NATIONAL LAW UNIVERSITY, JODHPUR

TEAM NO 8

MEMORANDUM FOR THE CLAIMANT

ON BEHALF OF

CERULEAN BEANS AND AROMAS
CLAIMANT

AGAINST

DYNAMIC SHIPPING LLC
RESPONDENT

TEAM

DIVYAKSHI JAIN
SAHER FATIMA
SHAGUN TAPARIA
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PRAYER FOR RELIEF
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STATEMENT OF FACTS

The Claimant is engaged in the trade of coffee. The Respondent is a shipping company. On 22 July 2017, the Claimant entered into the Voyage Charterparty with the Respondent to ship 70,000 Kg of Coffee from Cerulean to Dillamond. Arbitration Agreement provided that in case of any disputes the contract shall be referred to arbitration in accordance with the Arbitration Rules of the London Maritime arbitrators Association. On 24 July 2017, the Vessel departed Cerulean and was en route to Dillamond. On 26 July, the Claimant was informed about the solar flares and the subsequent deviation of the Vessel to the port of Spectre. A notice of force majeure event as required under Clause 17 of the Charterparty had not been served to the Claimant.

On 29 July, Dillamond began to endure extreme weather conditions. The port was hit by a major storm. As a consequence the port closed down for 12 hours. The Vessel was outside the port waiting to berth. While lifting the anchor, it got stuck in the coral bed. The anchor was cut and there was some damage to the hull. On the same day, the Respondent intimated about the Vessel’s readiness. Due to the congestion on the port the delivery was delayed at the warehouse. On 31 July, 2017 the delivery was done to the Claimant. The Claimant observed variations in the weight of the containers. On 1 August 2017, Claimant informed about the damaged cargo, which lead to frustration of the contract with the COTW. On the same day the Claimant informed Respondent about the clear breach of the Charterparty. Claimant denied the payments to the Respondent with respect to the use of electronic access systems, demurrage and other added costs due to Respondent’s own breach. As a result arbitration got proceeded in furtherance of the Arbitration Agreement.
ARGUMENTS ADVANCED

1. THIS TRIBUNAL HAS THE JURISDICTION TO HEAR THE MATTER

The Claimant submits that this Tribunal, has the requisite jurisdiction to hear the present matter as [A.], it has the power to decide its own jurisdiction, [B.] the Charterparty provides for London as the seat of arbitration. Additionally, [C.] the Claimant has not failed to comply with the pre-arbitral procedures. [D.] And in any case, such failure does not bar the jurisdiction of the Tribunal.

A. THE TRIBUNAL HAS THE POWER TO DECIDE ITS OWN JURISDICTION

The Claimant submits that this Tribunal has the competence to rule on its own jurisdiction. This is because it is a well-established principle of Kompetenz-Kompetenz. The principle encapsulates that the Tribunal has an inherent power to rule on its own jurisdiction, including questions as to the validity of the Arbitration Agreement. Hence, this Tribunal is entitled to rule on its jurisdiction to hear the merits of these claims.

B. THE CHARTERPARTY CONTAINS A VALID ARBITRATION AGREEMENT, WHICH SPECIFIES LONDON AS THE SEAT

The law applicable to the arbitration is the law of the Tribunal which is, English law, as [i.] the arbitration clause is valid, and [ii.] the parties have expressly agreed to arbitrate in London for all disputes.

i. The arbitration clause is valid

1 Nigel Blackaby et al, Redfern And Hunter on International Arbitration, p 346.


An Arbitration Agreement is valid when it has the requisite degree of certainty. Charterparties often contain abbreviated arbitration clauses. The English courts have held that an abbreviated arbitration clause will contain the requisite degree of certainty where it can give effect to the parties’ presumed intentions. The words ‘Arbitration in London’ are sufficiently certain to give effect to the parties’ intention and such clause, is therefore valid.

ii. The parties have agreed to arbitrate in London for all disputes

Parties to an Arbitration Agreement may choose which law governs the validity of that agreement. In the present case, there is no evidence to suggest that the parties have impliedly chosen the substantive law of the Charterparty (the law of New South Wales, Australia) to govern the Arbitration Agreement. Hence, the words ‘Arbitration in London’ signify that the parties intend to refer disputes to arbitration applying English rules.

C. The Claimant has not failed to comply with the pre-arbitration procedures

An expert determination is not a necessary pre-condition for commencing arbitral proceedings. The use of the word ‘may’ in sub-clause (e) of the arbitration clause indicates

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5 Id.
6 Supra note 4.
7 Charterparty Clause 27.
9 Charterparty Clause 28.
12 Charterparty Clause 27.
that expert determination is not a condition precedent to arbitration. It is well-established that when the word ‘may’ is used to provide for a condition precedent in arbitration clauses, then such condition is not mandatory, only aspirational.\textsuperscript{13} Therefore, in the present case, an Expert Determination was not a necessary pre-condition for commencing arbitral proceedings\textsuperscript{14}.

The parties in sub-clause (c)(ii) of the arbitration clause\textsuperscript{15} have laid down their requirements from an arbitrator, which includes decisions regarding material questions of law and fact, which is out of the scope of a Master Mariner. Therefore, the parties have clearly agreed to a specified function for an arbitrator and thus, never meant to bar the jurisdiction of an arbitrator to decide upon any dispute. Further, any person appointed under sub-clause (f) of the Arbitration Agreement\textsuperscript{16} must act as an expert and not as an arbitrator, and the expert's written determination will be conclusive and binding on the parties. It is submitted that the Master Mariner is in not an alternative to the arbitrator\textsuperscript{17}. The expert's written determination is simply to assist the arbitrator in his decision.

The present matter arises out of the breach of the Charterparty and cannot be stated merely to be a technical matter. Thus even under sub-clause (g) of the Arbitration Agreement\textsuperscript{18}, it is not necessary for the parties to first submit to an expert determination by a Master Mariner.

Commercial contracts often contain provisions for the resolution of certain types of disputes

\begin{itemize}
\item \textsuperscript{13} Anzen Ltd &\textit{ors} v. Hermes One Ltd, [2016] UKPC 1.
\item \textsuperscript{15} Charterparty Clause 27.
\item \textsuperscript{16} Charterparty Clause 27.
\item \textsuperscript{17} Section 34(1), Arbitration Act, 1996 (England).
\item \textsuperscript{18} Charterparty Clause 27.
\end{itemize}
by an expert\textsuperscript{19}. However, the present matter is not a purely technical issue\textsuperscript{20}, but also involves a question of law, which is out of the scope of a Master Mariner.\textsuperscript{21}

D. IN ANY CASE, THE FAILURE TO COMPLY WITH PRE-ARBITRATION PROCEDURE DOES NOT AFFECT THE JURISDICTION OF THE TRIBUNAL

Compliance with procedural mechanisms in an Arbitration Agreement is not ordinarily a jurisdictional pre-requisite.\textsuperscript{22}

The access to adjudicative proceedings and relief on potentially meritorious claims should not be denied, particularly on the basis of non-compliance with procedures that are very unlikely finally to resolve the parties’ dispute.\textsuperscript{23}

The Expert Determination was done subsequently and the report was submitted on December 1, 2017, and its report is accepted by the Tribunal. Therefore, the Claimant’s failure to comply with such procedures before the commencement of the arbitration proceeding causes no material damage to the Respondent.

II. DEVIATION TO PORT OF SPECTRE VIOLATED THE CHARTERPARTY

The deviation by the Vessel was in violation of the Charterparty as [A.] Respondent had no valid reason under the same for such deviation and [B.] the Charterparty limits the application of the exclusion of liability in absence of proper due-diligence.

\textsuperscript{19} Gary B. Born, \textit{International Commercial Arbitration}, vol. 1, p 223.

\textsuperscript{20} Judgment of 14 December 1994, 7 Ob 604/94 (Austrian Oberster Gerichtshof).

\textsuperscript{21} Charterparty Clause 27.


\textsuperscript{23} \textit{X} v. \textit{Y}, Judgment (22 June 2011) 2116 Hanrei Jiho 64 (Tokyo Koto Saibansho).
A. **RESPONDENT HAD NO VALID REASON TO DEViate TO THE PORT OF SPECTRE UNDER THE CHARTERPARTY**

Respondent has solely relied on the force majeure events to exclude its liability for deviation. The same should be rejected as [i.] No dependence can be placed where the force majeure event is foreseeable, surmountable and there is lack in following the proper procedure and [ii.] the absence of paper charts on board is unjustifiable.

i. **No reliance can be placed on the events of force majeure**

The scope of the force majeure clause requires to be assessed where the party relies on it.\(^{24}\) Clause 17 of the Charterparty, when engaged, evades the Respondent of its liability for deviation. The application of the clause is limited to specified circumstances.\(^{25}\) The clause requires to be understood as a whole \(^{26}\) and the party claiming force majeure exception under it is required to follow the prescribed procedure in such events.\(^{27}\)

The events of solar flare subsequent flooding do not qualify as force majeure events as they were foreseeable, surmountable and the Respondent failed to adhere to the procedural requirements.

   a. **The peril was foreseeable**

A party cannot rely on a force majeure event for its failure to perform where such an event is not a direct cause for the said failure.\(^{28}\) The exceptions of unforeseen weather events and acts

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\(^{24}\) Treitel, *Frustration and Force Majeure*, para. 12–18.

\(^{25}\) Charterparty Clause 17.


\(^{27}\) Charterparty Clause 17, J W Carter, Kate Cahill and Kate Draper, *Force majeure clauses – a timely topic*, (2011) 26 Australian Environment Review 74, 74.

of god becomes valid where the events of force majeure are unavoidable and the party could not have been expected to know of such an event in advance.\footnote{William Tetley, \textit{Marine Cargo Claims}, Volume I (4th Edition, Thomson Carswell, 2008), p. 1077.} Damages from perils that could have been avoided such as bad weather are ascribed to error in the care of the cargo, rather than to the event.\footnote{The \textit{Washington}, [1976] 2 Loyd’s Rep. 453 at 459-460 (Fed. C. Can.); \textit{Kruger Inc v Baltic Shipping C}, [1988] 1 FC 262 at pp. 227 and 278.} Events such bad weather can be taken into account and be protected against in the contract by the parties. \footnote{\textit{Matsoukis v. Priestman & Co}, (1915) 1 K. B. 681.}

The knowledge of solar flares was available with the parties before the conclusion of the contract.\footnote{Moot Problem p. 35.} Therefore, the Respondent cannot exempt itself from liability by means of the protection of force majeure clause enumerated in Clause 17 of the Charterparty.

b. \textbf{The peril was surmountable}

The carrier must be reasonably diligent in taking precautions to avoid foreseeable occurrences.\footnote{Charterparty Clause 17.} Where a peril could not have been anticipated but the negligence of a party subjected the goods to a loss or damage, the negligent party would remain responsible for such a loss irrespective of the fact that the damage was caused by an unanticipated event.\footnote{\textit{Green-Wheeler Shoe. Co. v Chicago, R. I. & Pac. R. Co.}, 130 Ia. 123, 106 N. W. 498 (1906).}

Moreover, it is not sufficient for the event to have made the voyage more onerous or difficult.\footnote{\textit{Hyundai Merchant Marine Co Ltd v Darthrook Coal (Sales) Pty Ltd}, (2006) 236 ALR 115, 130.} Thus there is required to be a direct chain of causation of such events under a force majeure clause and the event causing the damage suffered.\footnote{\textit{Hyundai Merchant Marine Co Ltd v Darthrook Coal (Sales) Pty Ltd}, (2006) 236 ALR 115, 130.}
The disruption in radio communications was known to the parties due to the events in the present case.\textsuperscript{37} Thus Respondent had to ensure the presence of printed maps, as the event was not an unforeseen one. The lack of such maps resulted in the additional voyage to Spectre and the presence of such maps for Spectre shows that these maps were available on board. The information regarding the storm was made available two hours before the delivery time\textsuperscript{38}, and the same could have been circumvented if the Respondent had not negligently delayed the goods. Therefore, Respondent is liable for negligence.

\textit{c. The procedure prescribed in force majeure events was not followed}

Clause 17 of the Charterparty states the procedure prescribed in force majeure events.\textsuperscript{39} The clause places a duty to provide notice in case of delays on the Respondent. However no such notice had been forwarded to the Claimant and was notified to them only on such query being made to the Respondent. The failure to adhere to same does not allow reliance on the clause as an exception.

Herein, the Respondents were informed about the further obligations of the Claimant and thus are liable for damages arising from the frustrated contract.

\textit{ii. The deviation was unjustified due to the absence of printed maps on board}

Each Vessel that is taken into the sea is required to carry nautical charts and publications.\textsuperscript{40} The presence of electronic access system does not relieve the Respondents

\textsuperscript{36} Raiffeisen Hauptgenossenschaft v. Louis Dreyfus & Co. Ltd, 1 Lloyd’s Rep 345.

\textsuperscript{37} Moot Problem p. 35.

\textsuperscript{38} Moot Problem p. 19.

\textsuperscript{39} Charterparty Clause 17.

\textsuperscript{40} Section 224, Section 225, Navigation Act, 2012 (Australia).
from this duty, being mandatory in nature. Apart from an ECDIS no other electronic chart system is accepted as an exception to carry paper charts. Even if such system is assumed to be present the system must have adequate back-up arrangements.

Solar flares can cause unintentional interference which can lead to partial or total loss of the received signal, slower signal acquisition or other adverse effects. Additionally a Shipowner is obliged to follow the lawful voyage instructions under a Charterparty agreement. Moreover, the Charterparty specifies only protection of life or property as justifiable reasons for a deviation.

In the present scenario, the vessel deviated from its route due to the failure of the electronic systems. Claimants had clearly instructed Respondent to take the most direct route to the Port of Dillamond due to their further obligations and to intimate any information in case of change in routes. However, absence of hard copy maps on the Vessel caused it to deviate adding 2000 nautical miles to the journey where time was of an essence. An unjustified deviation would result in the carriage contract being suspended.

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41 The Merchant Shipping (Safety of Navigation) Regulations 2002, SOLAS chapter V (1/7/02, 2.1.4).
42 Ibid.
43 Supra Note 41, Regulations 19 and 27.
44 Australian Maritime Safety Authority, Marine Notice 06/2013.
46 Charterparty Clause 17.
47 Moot Problem p. 18.
48 Moot Problem p. 2.
49 Moot Problem p. 2.
50 Section 15, Sale of Goods Act, 1923(Australia).
deviation was unjustified under Clause 17 of the Charterparty. The deviation, as shown above, was due to Respondent’s own negligence causing a direct loss to the consignment. Therefore, in the present case Respondent has breached the Charterparty.

**B. THE ABSENCE IN EXERCISING DUE DILIGENCE TO MAKE THE VESSEL SEAWORTHY**

The exceptions under Clause 17 are subject to exercising due diligence to make the vessel seaworthy and properly manned to sail. An unseaworthy vessel, improperly equipped to undergo its journey, is deemed unfit for the care of its cargo. The failure to check the temperatures where the goods were to be temperature controlled renders the ship unseaworthy. Additionally, the carrier is strictly liable where express guarantee is given to deliver the goods at the specified time.

The Respondents had guaranteed waterproofing and a delivery before 7 p.m. on 29th July. The events of force majeure cannot be taken as an exemption as there was enough foreseeability regarding the event’s occurrence and its supposed effect. As the events were foreseeable, due diligence required the carrier to arrange for the hard copy maps, which

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52 Moot Problem p. 9.
53 Charterparty Clause 17.
58 Moot Problem p. 15.
59 Moot Problem p. 35.
further added to delay.\textsuperscript{60} Thus, the ship was not ready for the present voyage amounting to unseaworthiness.

III. THE RESPONDENT IS LIABLE FOR THE DAMAGES ACCRUING AS A RESULT OF THE WATER DAMAGE

The Respondent is liable for the damages caused to the Claimant as the result of their negligence because the liability of the goods rested with the Respondent until they had been safely delivered to the buyer. The default position under the Sale of Goods Act is that property will pass at such time as the parties to the contract intended it to be transferred.\textsuperscript{61} Such intention is to be ascertained having regard to the terms of the contract, the conduct of the parties and the circumstances of the case.\textsuperscript{62} Where a contract is wholly in writing, the intention depends on the true construction, having regard to the nature of the contract and the surrounding circumstances, of the document or documents in which the contract is contained.\textsuperscript{63} Thus where the contract talks about the ceasing of liability of the Charterer on the shipment of cargo, it is clear that it was intended that the risk would stay with the carriers until the goods were passed on to the buyer.\textsuperscript{64}

The intention of the parties is to be ascertained exclusively from the words of the contract itself as used in their context and external evidence of that intention, including the actual negotiations\textsuperscript{65} Also, in a commercial contract the court should take cognizance of the

\textsuperscript{60} Moot Problem p. 27.

\textsuperscript{61} Section 25, Sale of Goods Act, 1923(Australia).


\textsuperscript{63} The Swan,\textsuperscript{[1968]} 1 Lloyd’s Rep. 5; Brandt v. Morris, \textsuperscript{[1917]} 2 K.B. 784.

\textsuperscript{64} Charterparty Clause 22.

\textsuperscript{65} Ocean Bulk Shipping and Trading v. TMT Asia,\textsuperscript{[2011]} 1 A.C.662.
surrounding facts and this implies understanding of the genesis of the contract, context, etc.\textsuperscript{66} The general approach is an objective one by which the parties ascertain the intention of the parties.\textsuperscript{67} Furthermore, the master on the arrival of the ship must allow the consignee a reasonable time to receive the goods, and cannot discharge his liability by landing them immediately on the ship’s arrival.\textsuperscript{68}

Apart from this, from the construction of the contract, it is clear that the Claimant envisaged the delivery only when the goods were handed over to the agents of the Claimant waiting at the loading port, which they had done at the decided time.\textsuperscript{69} The Claimants were not able to take the delivery of goods on the port as was earlier decided because of congestion on port.\textsuperscript{70} Considering this, the Respondents placed the goods in the warehouse on 30\textsuperscript{th} July with the belief that it constituted delivery. As the agents were not present till 31\textsuperscript{st} July to take the delivery of the goods which was partially the fault of the Respondent, the delivery could not have said to have been completed till such time. Thus, as the damage took place on before the risk had passed to the Claimant, the liability for the damage lies on the Respondent.

**IV. THE CLAIMANT HAD TO INCUR ADDITIONAL LOSSES FOR SETTLING LEGAL LIABILITY TO COFFEES OF THE WORLD**

The Respondent is liable to reimburse the Claimant for the replacement coffee and the settlement amount as [A.] the cause of the payment was the damage which occurred as a


\textsuperscript{67} Investors Compensation Scheme Ltd. v. West Bromwich Building Society, [1998] 1 W.L.R. 896.

\textsuperscript{68} Bourne v. Gatcliffe, (1844) 11 Cl. & Fin. 45; Proctor, Garratt, Marston v. Oakwin S.S. Co, [1926] 1 K.B. 244.

\textsuperscript{69} Charterparty Clause 12(a).

\textsuperscript{70} Moot Problem p. 24.
result of the negligence of the Claimant and [B.] the circumstances in which the event occurred was foreseeable.

A. **THE CAUSE OF THE PAYMENT WAS THE DAMAGE WHICH OCCURRED AS A RESULT OF THE NEGLIGENCE OF THE CLAIMANT**

The carrier was in breach of the condition of quality as laid down in the Charterparty.\(^{71}\) Shipping certain goods having good order and condition, binds the defendant to deliver them in like good order and condition.\(^{72}\) Strict liability is imposed in cases of seaworthiness, making the carrier liable even in the absence of negligence.\(^{73}\) However, the Respondent was negligent in his dealings. Thus, in order to avoid legal liability which arose as a result of the negligence of the Respondent, the Claimant had to purchase replacement coffee and deliver to COTW. This led to an unforeseeable pecuniary loss for Claimants. Therefore, the Respondent is liable to compensate the Claimant to the amount of the cost of the replacement coffee.

B. **THE WATER DAMAGE WAS FORESEEABLE ACCORDING TO THE EVENTS**

The water damage was foreseeable in the ordinary circumstances. [i.] Alternatively, even if the water damage was not foreseeable the water sealant was the responsibility of the Respondent.[ii.]

i. **The water damage was foreseeable in ordinary circumstances**

The test for foreseeability in contract is, whether the loss should be fairly and reasonably be considered either arising naturally. Arising naturally means according to the usual course of

\(^{71}\) Charterparty Clause 34.

\(^{72}\) *Kay v. Wheeler*, (1867) LR 2 CP 302.

\(^{73}\) *Liver Alkali v. Johnson*, (1872) LR 7 Exch 267.
things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. 74 What has to be considered whether the party in breach should reasonably have contemplated that, at the time the contract was made, the damage suffered75 was liable to be the result of the breach or was a serious possibility or real danger.76

The replacement coffee cost the Claimant USD 9,450,000. Furthermore, the buyer and the Claimant entered into a settlement agreement whereby the third party released the Claimant from all claims it may have against it in relation to the Claimant's breach of contract in return for the Claimant paying the amount of USD 5,000,000.77 The Claimant is entitled to receive the amount paid in form of damages, as the costs were incurred only because of the negligence of the Respondent and the water damage caused to the cargo.

ii. The Respondent had the responsibility to ensure the water sealant was applied to the containers

The duty of care when an advice is given by one party to another is to be assessed on the precise relationship between the person giving the advice and recipient, the precise circumstances in which the advice or statement, or other information came into existence and the precise circumstances in which the advice or information or other information was

74 Hadley v. Baxendale, (1854) 9 Ex. 341.
77 Id.
communicated to the recipient. Furthermore, the carrier has the duty to ascertain the nature of the goods placed in their custody and take due care in their handling.

The letter sent by Mr. Jay (MD of Claimant) to Mr. Marc (Director of Respondent) on the date of July 22, 2017 makes it clear that the voyage was to be conducted in control of the Claimant and also that it had been emphasised by the Claimant that the coffee was of such a quality that it required completely waterproof containers. Furthermore, the letter sent in reply to the above mentioned letter shows that the Respondent had taken the responsibility for providing the waterproof material.

The waterproof sealant was required to preserve the coffee and it had been clearly stated by the Claimant to the Respondent that an appropriate water sealant was essential for the carriage of the same. Furthermore, the water sealant was supposed to last the entire journey as per the terms decided among them.

Thus, arranging waterproof sealant was the responsibility of the Respondent. As the Claimant was dependent on the Respondent to suggest a suitable water sealant, the Respondent had a duty of care while selecting the sealant. The failure of the adequacy of the water sealant was identified as the cause of the final water damage caused. Therefore, as the Respondent failed to provide a water sealant with and did not exercise due care, it is liable for the damage arising because of the failure.

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80 Moot Problem p. 2.


82 Supra 81.
Also in *Victoria Laundry v Newham Industries* the defendant’s delay caused the defendant loss of profit, including the loss of an unusually lucrative contract. The defendant was liable for normal loss of profit under the first limb of the Hadley test, but had been liable for the loss from that particular contract had he known about it.

Herein, the Respondents were informed about the further obligations of the Claimant and thus are liable for damages arising from the frustrated contract.

**V. THE WATER DAMAGE RESULTED IN THE BREACH OF THE CONDITIONS LAID DOWN IN THE CONTRACT**

The purpose of the contract was the safe and proper delivery of goods to the Claimant. The goods were to reach in the condition in which they had been shipped. 75% of the cargo was damaged beyond repair, which inherently points towards the breach of essential conditions which had been implied in the contract. The contract and its terms depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct.

A condition of the contract is a promise or undertaking by one party which is fundamental to the contract, with the result that any breach of it will entitle the innocent party to terminate the contract, even if the breach is minor in degree or in effect. Time clauses in mercantile contracts usually have the force of conditions.

If the parties have neither expressly stated that an obligation is a condition nor spelled out the consequences of breach, the legal authority may find that the term was of such importance in

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the contract that it is a condition. It was held in *Hong Kong Fir Shipping* case that the charterer may repudiate his/her obligations under the charter-party where the breach deprives him/her “of substantially the whole benefit which it was the intention of the parties they should obtain from further use of the vessel.”

Clause 34 of the Charterparty talks about the ship and the facilities conforming with the standards required to maintain the cargo of coffee in the expected condition. This implies that the quality of goods at the time of delivery was the condition of the contract. Furthermore, it was made clear by the Claimant that it was necessary that the goods reach to Dillamond by July 28 as it was for a festival being organized from July 29-July 31. Thus, it can be inferred that the essence of the contract was the safe delivery of goods on time and in the expected condition to the Claimant in Dillamond. This shows that the dual conditions of time as well as quality were breached by the actions of the Respondent.

**VI. THE RESPONDENT IS NOT ENTITLED TO LIMIT THEIR LIABILITY**

The Respondent is not liable to limit its liability as [A.] The Claimants are supposed to get the benefit of Article IV Rule 5. [B.] The Respondent is not entitled to limit their liability under the International Convention.

**A. THE CLAIMANTS ARE SUPPOSED TO GET THE BENEFIT OF ARTICLE IV RULE 5 OF HAGUE-VISBY RULES**

Clause 28 of the Charterparty provides that the Claimants are entitled to get the benefit of Article IV Rule 5 of the Hague-Visby Rules. The purpose of Article IV Rule 5 is the

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86 *Id.*


88 Charterparty Clause 34.
limitation of liability of parties in case of non-disclosure of information. The test for when and whether goods are damaged is at the time of discharge/delivery of the goods and that the words “lost or damaged goods” refer to two categories of goods: those that are lost in the sense of gone or destroyed, and those that are damaged in the sense of not being lost but surviving in damaged form.89

When the loss of the goods is due to the gross negligence of the carrier the limit of liability provided by the Hague-Visby Rules is null and void, since it is contrary to order public.90 The Claimants had clarified the quantity and quality of the goods being shipped. This entitles them to get the benefit of Article IV Rule 5 which would imply that they are liable to get the entire amount claimed by them and not only equivalent to 666.67 units. Furthermore, the damage was a result of the negligence of the Respondent has been established. This is also consistent with the terms of the Charterparty.91

B. THE RESPONDENT IS NOT ENTITLED TO LIMIT ITS LIABILITY UNDER THE CONVENTION ON LIMITATION OF LIABILITY FOR MARITIME CLAIMS, 1976

A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.92 Thus, a Shipowner does not have a right to limit in every case. Where a company claims to be entitled to limit this makes it necessary to decide whose acts or omissions are to be treated as those of the


91 Charterparty Clause 28.

company. Therefore, the claim of the Respondent to limit their liability is not sustainable in law.

VII. THE RESPONDENT IS NOT LIABLE TO GET THE AMOUNTS AS ASKED FOR IN THE INVOICE

The Respondent is not liable to [A.] get the freight they are claiming in the invoice, [B.] The Respondent is not liable to get the amount under the General Average claims made by them.

A. THE CLAIMANT IS NOT LIABLE FOR THE PAYMENT OF FREIGHT

The Charterparty establishes that the freight was to be paid after the delivery and was to be calculated based on the bill of lading tonnage. When freight is payable on delivery of the cargo, payment and delivery are concurrent conditions. The freight is payable on the delivery of the cargo in a contract of carriage. The test of the right of freight is the question whether the service in respect of which the freight was contracted to be paid has been substantially performed. Thus, under the simple contract to pay freight, no freight is payable if the goods are lost on the voyage or for any other reason except the fault of the merchant alone, are not presented at the port of destination. A set-off against the freight for the loss of cargo is available if the breach of the contract is repudiatory in nature and is caused as a result of delay. In the present matter, the cargo was damaged and there was no

94 Charterparty Clause 22.
95 Vogemann v. Bisle, (1897) 2 Comm. Cas. 81; Black v. Rose, (1864) 2 Moore PC(NS) 277.
96 London Transport Co. v. Trenchmann, (1904) 1 K.B. 635; Grant v. Coverdale, (1884) 9 App Cas 470.
delivery of the goods thus there is no entitlement on part of the Respondent for the freight to be paid to them as this non-delivery amounted to the breach of the contract. 101

B. THE CLAIMANT IS NOT LIABLE FOR THE GENERAL AVERAGE CLAIMS OF THE RESPONDENT

The Claimant is not liable to pay the agency fees at Spectre, the Repairs to hull, agency fees at Dillamond and Use of electronic access systems at Port of Dillamond. The Respondent by the operation of Rule C of the York-Antwerp Rules 1994, is unable to claim a contribution for the Vessel’s and the Claimant’s loss as the expenses incurred by deviation shall not be admitted as General Average. 102

The Charterparty provides that the owners shall pay any dues or charges levied on the ship by reason of cargo being on board and all other dues or charges whatsoever. 103 The deviation to Spectre was a unilateral decision taken without the permission of the Claimant as has been discussed in above arguments. Thus, the agency fees at Spectre cannot be expected to be paid by the Claimant. Furthermore, the Claimant had provided in the Charterparty that the agents at any port of docking were to be selected after consultation with the Claimant.104

The Charterparty provides that the ship will not be answerable for losses through explosion, bursting of boilers, breakage of shafts, or any latent defect in the machinery or Hull not resulting from want of due diligence by the Owners of the ship.105 The crew of the ship in order to avoid the storm dropped anchor 1000nm out of Dillamond. This was also a unilateral

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102 York-Antwerp Rules 1994, Rule C.

103 Charterparty Clause 23.

104 Charterparty Clause 12(b).

105 Charterparty Clause 17.
decision. This willful ignorance of the Respondent as well as the crew of Vessel was the reason for the damage to the hull. Thus, there is no way that the Claimant can be held liable for the same. As iterated above, the agency fees would not be valid because the agents were to be selected with the consultation of the Claimants.\textsuperscript{106}

Also, in the present matter, the Claimant had already sent their agents on time to the port.\textsuperscript{107} After the storm blew over, the agents could not get the goods because of congestion in port.\textsuperscript{108} However, as the Respondent has avoided these instructions, thus the onus of such ignorance cannot be placed on the Claimant.

As is evident from the email written from Mr. Jay to the Respondents, it is clear that the electronic access used at Dillamond was unplanned and done without the knowledge of the Claimant.\textsuperscript{109} This cannot be used to extract money from the Claimant.

\textbf{VIII. CRELUEAN BEANS AND AROMAS CAN EXERCISE MARITIME LIEN OVER MADAM DRAGONFLY ON ACCOUNT OF UNPAID CREW WAGES}

The Claimant submits that \textbf{[A.]} the present dispute is a maritime claim, which gives rise to a \textbf{[B.]} maritime lien over the Vessel.

\textbf{A. THE PRESENT MATTER IS A MARITIME CLAIM}

A maritime lien is a way of securing rights which are peculiar to maritime law.\textsuperscript{110} The subject matter of an agreement is the test for determining whether a claim can be considered a


\textsuperscript{107} Moot Problem p. 19.

\textsuperscript{108} Moot Problem p. 24.

\textsuperscript{109} Moot Problem p. 33.

\textsuperscript{110} William Tetley, \textit{Stevedores and maritime liens}, the maritime lawyer,\textit{Vol.8}, 1983, P270.
maritime claim.\textsuperscript{111} The Arrest Convention, 1952 provides that “agreement relating to the carriage of goods in any ship whether by Charterparty or otherwise”\textsuperscript{112} is a maritime claim. The mere fact that certain stipulations contained in an agreement are not strictly maritime, does not bar a claim from being considered as a maritime claim.\textsuperscript{113} The disbursements paid by the Claimant for the wages of crew before the commencement of the voyage was in its essence, a maritime contract.

\textbf{B. THE CLAIMANT CAN EXERCISE MARITIME LIEN OVER THE VESSEL}

The Claimant can initiate proceeding against the Respondent as the [i.] the Seafarer’s Lien can be transferred to the Claimant, [ii.] it is not opposed to public policy, and [iii.] there is no statutory bar on the same.

\textbf{i. The Seafarer’s Lien can be transferred to the Claimant}

A maritime lien automatically gives the Claimant a right to proceed \textit{in rem} against the ship.\textsuperscript{114} The charterer is entitled to retain the ship until the unearned payments are repaid.\textsuperscript{115} Further, it has been held that the crew of a ship has a right of lien in case of unpaid wages.\textsuperscript{116}

It has been held in The Tagus\textsuperscript{117} that when the entire disbursement is made for the payment of the crew wages,\textsuperscript{118} then the claim of the crew will stand assigned to the person making the

\textsuperscript{111} Menetone v. Gibbons, 3 T. R. 269.
\textsuperscript{112} Article 1(e), The International Convention Relating to the Arrest of Sea-Going Ships, 1952.
\textsuperscript{113} The Pacific, 1 Blatch CCR 470.
\textsuperscript{114} Harmer v. Bell, (1851) 7 Moo PC 267.
\textsuperscript{115} Vaughan And Co v. Smith And Weatherill, (1897) 2 Com Cas 2; The Lancaster, (1980) 2 Lloyd’s Rep 497.
\textsuperscript{116} The Ship Gran Turk, 1 Paine 73; Section 20(2)(o) and (p), Senior Courts Act, 1981 (England).
\textsuperscript{117} The Tagus, [1903] P. 44.
\textsuperscript{118} The Andalina, (1886) 12 P. D. 1; The Cornelia Henrietta, L. R. 1 A. & E. 51.
Therefore, the person has a right to exercise a lien for such disbursement made even if he was not master, in payment of the wages of the crew.\textsuperscript{120}

\textbf{ii. Such transfer is not opposed to public policy}

Where there is no fraud or overreaching in the assignment of such wages, the said assignment is valid.\textsuperscript{121} The assignment of wages to the assignee in this case was not an inequitable agreement and could not be characterized as renouncement of the lien or the remedy of recovery of wages.\textsuperscript{122} The owner’s obligation to pay wages was not in any way abandoned by the crew granting an assignment.

\textbf{iii. There is no statutory bar on assignment}

As provided in Section 39, Merchant Shipping Act, 1995, a seaman’s lien and his remedies for the recovery of his wages are not capable of being renounced by any agreement.\textsuperscript{123} The rationale behind this statutory provision or its predecessor was to protect seafarer from inequitable agreement.\textsuperscript{124} \textit{The Sparti}\textsuperscript{125}, dealt with a provision which was equivalent to Section 39, Merchant Shipping Act. The Judge held that the impugned section presented no bar to the transfer of the Crew’s wages lien by assignment to the assignee. An assignment of the wages to the assignee could not be characterized as renouncement of the lien or the remedy for recovery of wages. However, there is no injustice done to the Seafarer’s in the assignment and the same is valid.


\textsuperscript{120} \textit{The St. Lawrence}, 1(1880) 5 P.D. 250.

\textsuperscript{121} \textit{The Bethlehem}, (1923) 286 F.400; \textit{The President Arthur}, (1928) 25 F. (2d) 999.

\textsuperscript{122} \textit{The Sparti}, (2000) 2 Lloyd’s Rep 618.

\textsuperscript{123} Section 39, Merchant Shipping Act, 1995 (England).


\textsuperscript{125} Supra Note 122.
PRAYER FOR RELIEF

For all the reasons submitted above, the Claimant respectfully requests this arbitral panel to:

DECLARE that this arbitral panel does have jurisdiction to hear these proceedings and admit the statement of claim; and further

ADJUDGE that the Respondent is liable to the Claimant for the following amounts claimed:

a) Pass an award for USD15,750,000 for cost of the damaged cargo

b) Pass an award for USD9,450,000 for cost of the Replacement Coffee Payment

c) Pass an award for USD5,000,000 on account of the Settlement Payment; and

further ADJUDGE that the Claimant holds a maritime lien over Vessel

further ADJUDGE that the Claimant is not liable to the Respondent for any claims made by the Respondent in its Statement of Defence against the Claimant.