15TH ANNUAL INTERNATIONAL MARITIME LAW ARBITRATION MOOT, 2014

NATIONAL LAW SCHOOL OF INDIA UNIVERSITY

TEAM NO. 18

MEMORANDUM FOR RELIABLE HOLDINGS INC.

ON BEHALF OF	**AGAINST**
RELIABLE HOLDINGS INC.	SUPER CHARTERS INC.
CLAIMANTS	**RESPONDENTS**

IN THE FIRST REFERENCE.....

AND

ON BEHALF OF	**AGAINST**
RELIABLE HOLDINGS INC.	SUPER CHARTERS INC.
RESPONDENTS	**CLAIMANTS**

IN THE SECOND REFERENCE.....

TEAM

ABHISHEK CHOUDHARY • DIVIJ JOSHI • PRAKSHAL JAIN • SHUBHAM JAIN

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ABBREVIATIONS

AB QB	Alberta Court of Queen's Bench (Canada)
All ER	All England Law Reports
Art	Article
ASBATANKVOY	Association of Ship Brokers & Agents Tanker Voyage Charter Party
Bing NC	Bingham New Cases
Bundle	IMLAM Moot Scenario 2014
Ch.	Law Reports Chancery
Charter	Charter Party
Charterers	Super Charters
Cl.	Clause
CLJ	Cambridge Law Journal
Com Cas	Company Cases (England)
C/P	Charter Party
EWCA (Civ)	Court of Appeal (Civil Division)
EWHC	England and Wales High Court
i.e.	That is
KB	Law Reports King's Bench
LR Ex	Exchequer
LRPC	Privy Council Appeals
Lloyd's Rep	Lloyd's Law Reports
Owners	Reliable Holdings Inc./ Reliable Tankers Inc.

Para	Paragraph
P & I	Protection and Indemnity insurance
QBD	Law Reports Queen's Bench Division
RHI	Reliable Holdings Incorporated
RTI	Reliable Tankers Incorporated
S	Section
SC	Super Charters
SDNY	United States District Court for the Southern District of New York
TLR	Times Law Reports
UKHL	United Kingdom House of Lords

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STATEMENT OF FACTS

THE PARTIES AND THE CONTRACT OF AFFREIGHTMENT

Super Charters ("The Charterers"), agreed to charter the Vessel "Reliable Butterfly" ("The Vessel") from Reliable Holdings Inc./ then Reliable Tankers Inc.("The Owners") by way of an amended ASBATANKVOY standard form charterparty. The charterparty included the Charterers' single voyage charterparty rider clauses and incorporated Standard terms of business of both parties. The charterparty provided that the Vessel was to arrive at BlueLand ("The Loadport") via RedLand ("The Bunker port") on the 3rd of December; from where it would carry a cargo of 260,000 Metric Tons of crude oil to IndigoLand ("The Disport"). The laycan for the Vessel was agreed from the 5th to the 6th of December, 2011, which was later narrowed down to the 5th of December, 2011.

THE ADVANCE FREIGHT CLAUSE

The Owners' Standard terms provided for full freight to be earned, and further, for 95% of the freight to be payable upon the lifting of subjects of the charter. The subjects were lifted on the 19th of November, 2011 when the charterparty was finally formalized; yet, the Charterers did not pay the freight.

THE ARREST AT THE BUNKER PORT

On the way to the loading port, the Vessel was unexpectedly detained by the way of an *in-rem* action against the ship by third-party bunker suppliers seeking to enforce their maritime lien with respect to unpaid bunker dues. The Owners were not given a notice regarding the same. Hence, the Owners were unable to provide security due to a lack of liquidity, caused in measure due to the expectation that timely payment of the advance freight would be made as per the charterparty.

THE NOTICE OF CANCELLATION

Due to the arrest and the resultant delay, the Owners indicated to the Charterers that the Vessel would be unable to meet its laycan of 5th of December, and agreed to provide a new laycan. The Charterers elected to decline this proposal, and hence validly terminated the contract under the cancellation clause (Clause 2) of the Owners' Standard terms, which operated *without further recourse to either party whatsoever*. In the interim, the Charterers were able to negotiate a substitute charter for the same voyage with exactly similar laycan dates from a third party.

THE NOTICE OF CLAIMS AND THE ARBITRATION PROCEEDINGS

On the 28th of January, the Owners commenced arbitration proceedings against the Charterers as per the arbitration clause in the charter, for settlement of disputes arising out of the Charter (The "first reference"). The Charterers appointed an arbitrator under the first reference on the 12th of February; while concurrently initiating separate proceedings against the Owners.

THE CLAIMS

The Owners contend that the Charterers are in breach of the charter due to their failure and refusal to pay the advance freight and claim the same as freight or alternatively as damages.

The Charterers contend that the Owners are in breach of the charter due to non-performance of the obligations under the ETA clause and the obligation of proceeding with reasonable dispatch, and are liable for the consequential damages.

These proceedings have been conjoined, and are being brought together for the tribunal's reference.

ARGUMENTS ADVANCED

I. THE ARBITRATION IN THE FIRST REFERENCE HAS BEEN VALIDLY COMMENCED

1. The Owners commenced arbitration proceedings for settlement of disputes arising out of the charter on the 28th of January.[1] The Charterers contend the validity of the proceedings on account of the incorrect title of the notice of arbitration. It is submitted that the proceedings were validly commenced because there was a clear misnomer in the notice of appointment [A]; and alternatively, because an appointment in the name of RTI was necessarily on behalf of RHI [B].

[A] THERE WAS A CLEAR MISNOMER IN THE NOTICE OF APPOINTMENT

2. It is firmly established that if the error in the naming of the party can be attributed to a misnomer, the position can be corrected by simply amending the name of the party to the proceedings; which are nonetheless validly constituted.[2]

3. In order to establish that the error in naming is due to a misnomer, it is crucial to consider the identity of the entity that was intended to be the claimant in the proceedings.[3] The identity is determined objectively in accordance with the ordinary principles for the construction of a contract, by taking into account the notice of arbitration and the surrounding circumstances.[4] An essential condition for the validity of notice is that it should leave the respondent in no doubt as to the identity of the person intending to sue.[5] The purpose of the

[1] Notice of Appointment, Page 101 of Bundle.
[2] *Unisys International Services Ltd v Eastern Counties Newspapers Ltd* [1991] 1 Lloyd's Rep 538; *Owners of the Sardinia Sulcis v Owners of the Al Tawab* [1991] 1 Lloyd's Rep 201; *SEB Trygg Holding AB v Manches* [2005] 2 Lloyd's Rep 129; *Harper Versicherungs AG v Indemnity Marine Assurance Company Ltd* [2006] EWHC 1500 (QB); David St John Sutton, Judith Gill and Matthew Gearing, *Russell on Arbitration* (23rd edn, Sweet & Maxwell 2007) 192.
[3] *Evans Construction Co Ltd v Charrington & Co Ltd* [1983] 1 QB 81; *Owners of the Sardinia Sulcis v Owners of the Al Tawab* [1991] 1 Lloyd's Rep 201; *SEB Trygg Holding AB v Manches* [2005] 2 Lloyd's Rep 129.
[4] *Unisys International Services Ltd v Eastern Counties Newspapers Ltd* [1991] 1 Lloyd's Rep 538; *SEB Trygg Holding AB v Manches* [2005] 2 Lloyd's Rep 129.
[5] *Lay v Ackerman* [2004] EWCA Civ 184; *AMB Generali Holding v SEB Trygg Liv Holding* [2005] EWCA Civ 1237.

construction of the notice and surrounding circumstances is thus to ascertain the objective intention of the claimant, as understood by the respondent.[6]

4. In the present case, the arbitration agreement between the parties requires that the parties to any arbitration must be the Charterers and the Owners.[7] In pursuance of that, the notice of arbitration that was sent to the Charterers *clearly identified the claimants as the owners of the Vessel under the charterparty.*[8] It is submitted that in Fruitland law, the merger between RTI and RHI was a transfer, by way of universal succession, of all assets and liabilities of RTI to RHI.[9] Thus RHI was the new owner of the Vessel and the same was commonly and publicly known.[10] That the same fact was well known to the Charterers is apparent because their reply to the Owners' notice of arbitration was addressed to RHI and not to RTI.[11]

5. Since there could be *no reasonable doubt as to the identity of the person intending to sue,*[12] it is submitted that the error was simply in respect of an attribute of the contracting party, i.e., its name, and not as to any *more of a fundamental characteristic of identity*. Hence, it must be treated as a mere misnomer, which cannot be held to vitiate the valid commencement of the arbitration proceedings.

[B] ALTERNATIVELY, AN APPOINTMENT IN THE NAME OF RTI WAS ON BEHALF OF RHI

6. In the present case, the reference was commenced using an out of date headed note paper. However, it is submitted that this does not affect the validity of the reference since at the time the notice was sent, RTI had already merged with RHI by way of universal succession.[13] The result of this is that the successor is to be treated as the same person as the person whom it

[6] Simon Crookenden, 'Correction of the Name of the Party to an Arbitration' (2009) 25 Arbitration International 217.
[7] Cl 24 of part II, ASBATANKVOY.
[8] Notice of Appointment, Page 101 of Bundle.
[9] Expert Report of Tim Bowman, Page 113 of Bundle.
[10] Newspaper Report, Page 100 of Bundle.
[11] Reply to notice of appointment, Page 102 of Bundle.
[12] *Owners of the Sardinia Sulcis v Owners of the Al Tawab* [1991] 1 Lloyd's Rep 201; *SEB Trygg Holding AB v Manches* [2005] 2 Lloyd's Rep 129.
[13] Newspaper Report, Page 100 of Bundle.

succeeds.[14] Therefore, the Owners' submit that the proceedings were validly commenced in the first reference as an appointment in the name of RTI was necessarily made on behalf of RHI.

II. IN ANY CASE, THE OWNERS ARE NOT TIME BARRED FROM COUNTER-CLAIMING IN THE SECOND REFERENCE

7. The Charterers contend that the time bar of 20 days in Cl. 4 of their Standard terms precludes the owners from bringing a counter claim in the second reference. It is submitted that the Charterers may not rely on the contractual time bar in Cl.4 of their Standard terms because the time bar of 90 days in Cl. 46(B) of the Charterers' rider clauses prevails over the former.

8. In the instant case, the charter contains two time bar clauses that are under contention: namely, Cl.4 of the Charterers' Standard terms[15] and Cl. 46(B) of the Charterers' rider clauses,[16] the latter providing for a time bar of a longer duration. It is submitted that because the requirement constituting the time bar is different in both clauses, and because both the clauses are generally applicable to all claims, the two are in conflict with each other.[17] Moreover, even though Cl. 46(B) bars only the claims and not the commencement of proceedings, it still provides for a time bar and is therefore in conflict with Cl. 4.[18]

9. It is well settled that in the case of a conflict or inconsistency between negotiated terms and incorporated or Standard terms, the former will prevail.[19] This is because usually, *at the time of inclusion* into the contract, the parties will have given express consideration to the negotiated terms and much less, if any, consideration to the application of the incorporated

[14] *Eurosteel Ltd v Stinnes AG* [2000] 1 All ER 964 (Longmore J).
[15] SC Standard Terms, Page 45, 88 of Bundle.
[16] SC Rider Clauses, Page 32, 75 of Bundle.
[17] *MH Progress Lines SA v Orient Shipping Rotterdam BV (The Genius Star 1)* [2012] 1 Lloyd's Rep 222; *Kuoni Travel Ltd v John Boyle* [2013] EWHC 877 (QB).
[18] *Metalfer Corp v Pan Ocean Shipping Co Ltd* [1997] CLC 1574; *MH Progress Lines SA v Orient Shipping Rotterdam BV (The Genius Star 1)* [2012] 1 Lloyd's Rep 222.
[19] *Cobelfret Bulk Carriers NV v Swissmarine Services SA* [2009] EWHC 2883 (Comm). See also *Modern Building Wales Ltd v Limmer & Trinidad Co Ltd* [1975] 1 WLR 128; *Bayoil SA v Seawind Tankers Corp (The Leonidas)* [2001] 1 Lloyd's Rep 533; *The Petroleum Oil and Gas Corp of South Africa v FR8 Singapore Pte Ltd (The Eternity)* [2009] 1 Lloyd's Rep 107.

terms.[20] In the present case, the rider clauses are expressly agreed to and negotiated upon, while the Standard terms have been fully incorporated in their standard format.[21] Hence, it is submitted that the rider Cl. 46(B) prevails over Standard term Cl. 4, and that, consequently, the Owners are not time barred from counterclaiming in the second reference.

10. The Charterers may seek to rely on decisions such as *The Genius Star I,* [22] or *Kuoni Travel,*[23] to contend that Cl. 1 of the SC Standard terms resolves the conflict in favour of the time bar in Cl. 4 of the Standard terms. However, these decisions can be distinguished from the instant case on facts as in the aforementioned cases, both the conflicting terms were negotiated terms, while in the current case, the Standard terms are not negotiated terms;[24] and hence Cl. 1 of Standard terms does not resolve the conflict because Cl. 1 itself has not been negotiated upon.

III. THE OWNERS WERE NOT IN BREACH OF THEIR OBLIGATIONS UNDER THE CHARTER

11. The Charterers have contended that the delay in the prosecution of the voyage was due to the Owners' breach of the obligations under the charter, caused by the delay due to the arrest at the Bunker port. It is submitted that at the time of the Vessel's arrest, the Owners had not breached any obligation under the ETA clause [A]; and secondly, that they prosecuted the voyage with reasonable dispatch [B]. With their obligations being so discharged, the Owners could not be said to be in breach of their obligations under the charterparty.

[A] THE OWNERS DID NOT BREACH THEIR OBLIGATIONS UNDER THE ETA CLAUSE

12. The ETA clause in the charterparty only imposes an obligation on the Owner to provide an estimate of arrival on *reasonable grounds, at the time the contract is entered into.*[25] It is submitted that the Owners fulfilled their duty to nominate a reasonable estimated time of arrival:

[20] *Metalfer Corp v Pan Ocean Shipping Co Ltd* [1997] CLC 1574.
[21] Fixture Recap, Page 51; SC Claim Submissions, Page 109 of Bundle.
[22] *MH Progress Lines SA v Orient Shipping Rotterdam BV (The Genius Star I)* [2012] 1 Lloyd's Rep 222.
[23] *Kuoni Travel Ltd v John Boyle* [2013] EWHC 877 (QB).
[24] Fixture Recap, Page 51; SC Claim Submissions, 109 of Bundle.
[25] *Finnish Government (Ministry of Food) v H Ford & Co* (1921) 6 Ll L Rep 188; *Maredelanto Compania Naviera SA v Bergbau-Handel GMBH (The Mihalis Angelos)* [1971] 1 QB 164; *Bunge Corp v Tradax Export SA* [1981] 1 WLR 711; Yvonne Baatz, *Maritime Law* (2nd edn, Sweet & Maxwell 2011) 158.

the 3rd of December,[26] notwithstanding the delay that occurred in the voyage, since they had no reason to apprehend the potential arrest of the ship by the third-party bunker suppliers at the time of fixing of the charter.[27]

13. In determining at what point the chartered voyage commences, the intention of the parties must be given effect to.[28] Thus, where the vessel breaks ground, and accomplishes some part of the journey with the *bona fide intention of prosecuting the chartered voyage*, the approach voyage may be said to have begun.[29] Therefore, the approach voyage to the Loadport may be said to have commenced on the 19th of November, 2011, when the charter was fixed, as the Owners intended for the Vessel to immediately prosecute the chartered voyage.

14. Further, an intermediate voyage may not be a part of the chartered voyage *only* if it is made solely for the Owners' own benefit: for example, in the course of fulfilling another charter.[30] It is submitted that the voyage to the Bunker port does not fall under this head, and was for the *sole purpose of preparing the Vessel for the prospective voyage,* i.e., for the benefit of the Charterers. Where a delay is incurred for the purpose of fulfilment of the chartered voyage, such delay cannot come within the meaning of a deviation from the chartered voyage.[31]

15. The obligation to commence on the approach voyage is fulfilled when the vessel first breaks ground for the purpose of the chartered voyage; hence, the obligation to start on time for the loading port is not dishonoured where the vessel stops for bunkering or dry-docking on its course to fulfil the charter.[32] A charter may be made subject to an intermediate engagement, and

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[26] Page 47 of Bundle.
[27] Fixture Recap, Page 93 of Bundle.
[28] *Valente v Gibbs* [1859] 28 LJCP 229. See also *Pedersen v Pagenstecher* 32 F 841, 842 (SDNY 1887); *Atlantic Maritime Carriers SA v Hellenic Mutual War Risks Association Ltd (The Mitera)* [1969] 1 Lloyd's Rep 359.
[29] *Barker v Mcandrew* (1868) 18 CBNS 759; *Adamastos Shipping Co Ltd v Anglo Saxon Petroleum Co Ltd* [1958] 1 Lloyd's Rep 73.
[30] Chan Leng Sun, 'What you can expect from the expected ready to load clause' (1993) 14 Singapore Law Review 382, 395.
[31] *Palmer v Marshall* (1832) 8 Bing 317; Sir Joseph Arnould, *Arnould's Law of Marine Insurance and Average,* vol 1(16th edn, Stevens & Sons 1981) para 492; William Tetley and Bruce Cleven, 'Prosecuting the voyage' (1971) 45 Tulane Law Review 815.
[32] *Forest Oak Steam Shipping Co Ltd v Richard & Co* (1899) 5 Com Cas 100; cf *Wigton v Ratke* 1984 1284 (AB QB); TE Scrutton, *Scrutton on Charterparties and Bills of Lading* (Stewart C Boyd and others, 21st edn, Sweet and Maxwell 2008) art 67; Julian Cooke and others, *Voyage Charters* (1st edn, Lloyd's of London Press Ltd 1993) 65;

the risk of delay in the intermediate engagement may fall on the Charterers, if it is so consented by them.[33] It is submitted that the voyage to the bunkering port was consented to by the Charterers through its express inclusion in the charter,[34] and was further indicated to the Charterers in the communication between the Owners and Charterers.[35] Further, bunkering voyages prior to the port of loading are a customary and usual part of the business, and Cl. 4 of the ASBATANKVOY charter also expressly contemplates such a voyage for the Vessel, prior to its direct voyage to the loading port.[36] Since the intermediate voyage forms a part of the chartered voyage, the risk of delay in the commencement of the voyage to the loading port falls on the Charterers, and not on the Owners.[37]

16. It is submitted that even if the Owners are held to be in breach of the 'start in time' obligation, they are exempted from liability for consequential damages under Cl. 5 of the Owners' Standard terms. It is a matter of ordinary construction to determine whether exclusion clauses apply beyond the ordinary chartered voyage.[38] Parties in a contract are free to expressly modify their liabilities under the contract, and such clauses must be strictly interpreted, with the presumption that the party against whom it operates was aware of its effect and consented to it.[39] The exclusion clause clearly provides that the Owners are *in no event* to be liable for consequential damages unless by proven gross negligence; and this must be construed strictly to apply to all actions of the Owners relating to the charter.[40] Therefore, the Owners may rely on the exclusion clause to cover any delay occurred in the commencement and prosecution of the approach voyage as well.

Frederick Stroud, *Stroud's Judicial Dictionary*, vol 4 (4th edn, Sweet & Maxwell 1974) 2124; Chan Leng Sun, 'What you can expect from the expected ready to load clause' (1993) 14 Singapore Law Review 382, 395.
[33] *Corkling v Massey* (1872-73) LR 8 CP 395, *Halsbury's Laws* (4th edn, 1983) vol 43, para 427.
[34] Page 47 of Bundle.
[35] Page 89 of Bundle.
[36] Cl 4, ASBATANKVOY.
[37] *Hudson v Hill* [1874] 43 LJ CP 273.
[38] *Barker v McAndrews* (1868) 18 CBNS 759, *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep 1, 6.
[39] *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 Lloyd's Rep 545.
[40] *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 Lloyd's Rep 545.

[B] THE OWNERS WERE NOT IN BREACH OF THE OBLIGATION TO PROCEED WITH REASONABLE DISPATCH

17. The obligation of reasonable dispatch requires that the vessel proceed on the approach voyage without unreasonable delay, and perform the chartered voyage within a reasonable time.[41] In determining what is reasonable, regard must be had to the actual circumstances which exist at the time for performance,[42] as well as the customary mode of performance.[43] Further, circumstances such as whether the party for whose benefit the relevant obligation was to be performed needed to participate in the performance need also to be taken into consideration.[44]

18. The obligation to proceed within reasonable time is fulfilled so long as the delay was caused by intervening circumstances beyond the control of either party and *neither party acted negligently or unreasonably in the circumstances*.[45] For the action to be unreasonable, the delay must have been caused by the arbitrary action of the Owners, and this does not include such delays as are reasonably within the contemplation of the parties.[46] Supervening events which do not occur due to the fault of either party must be taken into account in determining whether the delay was reasonable or not.[47] Therefore, a delay in the voyage caused due to reasonable apprehension of its capture,[48] or delays incurred due to negotiations with labourers demanding an increase in wages at the port of discharge,[49] have been held to have been reasonable and justifiable delays.

19. It is submitted that at the time of cancellation of the charterparty, the delay was not sufficient for it to be termed unreasonable. It is further submitted that, in the present case, the

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[41] *Hick v Raymond and Reid* [1893] AC 22. See also *Astea (UK) Ltd v Time Group Ltd* [2003] EWHC 725 (TCC); TE Scrutton, *Scrutton on Charterparties and Bills of Lading* (Stewart C Boyd and others, 21st edn, Sweet and Maxwell 2008) art 158; David Sian, 'Reasonable Dispatch in Voyage Charterparties' (1993) Singapore Journal of Legal Studies 401, 406.
[42] *Hick v Raymond and Reid* [1893] AC 22.
[43] *Mc'Andrew v Adams* (1834) 1 Bing (NC) 29.
[44] *Astea (UK) Ltd v Time Group Ltd* [2003] EWHC 725 (TCC).
[45] *Hick v Raymond and Reid* [1893] AC 22; TE Scrutton, *Scrutton on Charterparties and Bills of Lading* (Stewart C Boyd and others, 21st edn, Sweet and Maxwell 2008) art 158; *Halsbury's Laws* (5th edn, 2008) vol 7, para 286.
[46] *Barque Quilpue Ltd v Brown* [1904] 2 KB 264.
[47] *London and Overseas Freighters v Timber Shipping Co SA* [1971] 2 WLR 1360.
[48] *The San Roman* (1869-72) LR 3A & E 583.
[49] *Stewart & Co v Joseph Rank Ltd* 36 TLR 728; cf *Thomas Heiton Ltd v LMS Rly Co* [1926] vol 24 Ll L Rep 479.

risk of the Vessel being detained by the bunker suppliers was not reasonably foreseeable, since, as is customary, credit ought to have been extended to the Owners.[50] Further, the Owners had expected the Charterers to make the payment of advance freight upon fixing of the charter, and, it was due to the unforeseen failure of this payment by the Charterer, that the Owners were unable to make the necessary payment of security.[51] In light of the unforeseen claims by the bunker suppliers, it was reasonable for the Owners to negotiate for more reasonable figures for dues, and the delay incurred in the course of such negotiations was not unreasonable, and the Owners cannot be said to be in breach.

20. Further, it is submitted that there was no anticipatory breach of the obligation to proceed with reasonable dispatch. An anticipatory breach of a contractual term may be said to have occurred when it is apparent from the conduct of the party that they intend to, or would necessarily be unable to, fulfil that obligation.[52] Since the Owners were willing to provide an alternative laycan date for the performance of the chartered voyage,[53] no reasonable person could have concluded that they did not intend to fulfil their promise under the contract.[54] At the time of the disputed notice, therefore, there could be no apprehension that the Owners would have breached the reasonable dispatch obligation. Hence, the Owners' actions were not sufficient to constitute an anticipatory breach of the charter.[55]

IV. *ARGUENDO*, THE OWNERS ARE EXEMPTED FROM THE LIABILITY FOR THE BREACHES, DUE TO THE OPERATION OF THE EXCEPTION CLAUSES UNDER THE CHARTER

21. It is submitted that, in the event that the tribunal finds the Owners to be in breach of their contractual obligations, they are exempted from liability by the operation of exception clauses

[50] Shrikant Hathi, *Ship Arrest and Admiralty Laws of India* (8th edn, 2014) < http://admiraltypractice.com/chapters/77.htm> accessed on 1 May 2014.
[51] Page 93 of Bundle.
[52] *Universal Cargo Carriers Corp v Citati* [1957] 2 QB 401.
[53] Page 95 of Bundle.
[54] *Forslind v Bechely-Crundall* 1922 SLT 496; *Universal Cargo Carriers Corp v Citati* [1957] 2 QB 401; *Proctor & Gamble Ltd v Carrier Holdings Ltd* [2003] EWHC 83 (TCC).
[55] Hugh Beale, *Chitty on Contracts* (31st edn, Sweet & Maxwell 2012) para 24-021.

under the charterparty. Specifically, they are entitled to the exception of "seizure under legal process" under the general exceptions clause in the charterparty [A], as also to the exception provided under Cl. 5 of the Owners' Standard Terms [B].

[A] THE GENERAL EXCEPTIONS CLAUSE PROTECTS THE OWNERS FROM LIABILITY IN RESPECT OF LEGAL SEIZURES

22. The General Exceptions Clause clearly states that the Owners shall not, unless otherwise expressly provided, be responsible for any liability arising out of seizure under legal process, provided bond is promptly furnished for the release of the vessel or cargo.[56] This immunity also applies to instances when the vessel is prevented from arriving at the given port of loading.[57]

23. It is submitted that the arrest falls under the category of a *legal seizure,*[58] as the arrest of a ship by a non-governmental third-party for the violation of some regulation under the ordinary legal proceedings of the said country is deemed to be a legal seizure.[59] Bunker suppliers have an independent legal claim to extend a maritime lien over a disputed vessel, which entitles them to arrest the vessel under the International Convention on the Arrest of Ships.[60]

24. Further, it is submitted that the exception under Cl. 19 of the ASBATANKVOY with respect to legal seizures is substantially modelled on the basis of Article IV, Rule 2 of the Hague Rules, must be read as "clarification" or "refinement", and not as a "departure" from the Hague Rules;[61] in other words, the proviso to the exception must be viewed as a subsidiary obligation. Therefore, the requirement of a bond being promptly furnished must be examined in light of the circumstances.[62] On such subjective examination, it is submitted that the requirement of *prompt*

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[56] Cl 19, ASBATANKVOY.
[57] TE Scrutton, *Scrutton on Charterparties and Bills of Lading* (Stewart C Boyd and others, 21st edn, Sweet and Maxwell 2008) art 110; *Smith v Rosario Nitrate Co* [1894] 1 QB 174.
[58]TE Scrutton, *Scrutton on Charterparties and Bills of Lading* (Stewart C Boyd and others, 21st edn, Sweet and Maxwell 2008) art 110.
[59] *Black v Marine Insurance Co* 11 John (NY) 287; *Spence v Chodwick* 116 ER 197*; Johnston v Hogg* (1883) 10 QBD 432; TE Scrutton, *Scrutton on Charterparties and Bills of Lading* (Stewart C Boyd and others, 21st edn, Sweet and Maxwell 2008) art 110.
[60] International Convention on the Arrest of Ships 1999 art 2(3).
[61] Julian Cooke and others, *Voyage Charters* (1st edn, Lloyd's of London Press Ltd 1993) 654.
[62] TE Scrutton, *Scrutton on Charterparties and Bills of Lading* (Stewart C Boyd and others, 21st edn, Sweet and Maxwell 2008) art 110.

furnishing could not be said to have been breached at the time at which the alleged breaches arose, and therefore, the Owners must be given the benefit of the clause.

[B] THE OWNERS ARE EXEMPTED FROM CONSEQUENTIAL DAMAGES BY CL. 5 OF THE OWNERS' STANDARD TERMS

25. In interpreting clauses that provide for the limitation of a party's liability under a contract '*unless gross negligence has been proven'*, effect must be had to the intention of the parties in providing for an additional burden.[63] It has been held that the usage of the phrase implies that the parties did not intend it to connote mere negligence,[64] and intended conduct negligently undertaken not only with actual appreciation of the risks involved, but also *serious regard of or indifference to an obvious risk*.[65] It is submitted that *even if* the Owners were negligent in their conduct, they cannot be qualified as *grossly negligent*; and as provided under Cl. 5, the Owners may not be held liable for consequential damages.[66]

26. It is submitted that any action of the Owners must be viewed in the light of prevalent trade practices.[67] It is a common feature of bunker supply contracts that payment to bunker suppliers is allowed to fall due sometime after the delivery of the contract.[68] Given that such contracts usually have a provision for payment on credit, and that the Owners did not have the slightest apprehension, or any notice, from the bunker suppliers that their dues were payable immediately, the non-payment of dues to the bunker suppliers cannot be said to have crossed the threshold of the *significant degree of negligence* required to constitute gross negligence.[69]

27. Further, the non-payment of the bond for release of the Vessel was also reasonable in the circumstances, as the Owners were attempting to negotiate the unreasonable and unforeseeable demands of the bunker suppliers before claiming a Letter of Undertaking from their P&I club,

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[63] *Red Sea Tankers Ltd v Papachristidis (The Ardent)* [1997] 2 Lloyd's Rep 547.
[64] *Camarata Property Inc v Credit Suisse Securities (Europe) Ltd* [2011] EWHC 479 (Andrew Smith J).
[65] *Red Sea Tankers Ltd v Papachristidis (The Ardent)* [1997] 2 Lloyd's Rep 547, 586 (Mance J).
[66] Cl 5, RT Standard Terms, Page 87 of Bundle.
[67] *ICDL GCC Foundation FZ-LLC v European Computer Driving Licence Foundation Ltd* [2012] IESC 55.
[68] Shrikant Hathi, *Ship Arrest and Admiralty Laws of India* (8th edn, 2014) < http://admiraltypractice.com/chapters/77.htm> accessed on 1 May 2014.
[69] *Springwell Navigation Corp v JPMorgan Chase Bank* [2010] EWCA 1221.

which would have been onerous for the Owners. Therefore, in light of the circumstances of the arrest, and applying the principles established above, failing to procure a bond for release cannot be termed as *grossly negligent* conduct.

V. THE CHARTERERS WERE NOT ENTITLED TO TREAT THE CHARTER AT AN END DUE TO REPUDIATION OR RENUNCIATION

28. Upon the arrest of the Vessel, the Owners duly informed the Charterers that a delay may be incurred in the voyage, and were open to providing a new laycan for later dates. The Charterers, on the 27th of November, validly exercised their right to cancel the charter as per the cancellation clause provided in the charter, which was duly accepted by the Owners.[70] The termination did not arise out of a breach, as *even if* the Owners were in breach of the contract, such breaches cannot be said to be repudiatory in nature [A]; the notice informing the Charterers of the delay did not constitute a renunciation [B]; and further, that there was no *unequivocal* acceptance by the Charterers of a repudiation or renunciation [C]. Therefore, the charter was only terminated upon the exercise of the Charterers' contractual right to cancel.

[A] THE CHARTERERS MAY NOT TREAT THE CONTRACT AS REPUDIATED

29. A repudiation of a contract may be said to have occurred *only* when a party evinces a complete inability to perform the intended contract, i.e., there is a total failure of performance,[71] and it may not be *lightly inferred*.[72] The test for repudiation, as laid down in *Freeth v Burr* is that the act or conduct of the promisor must be such as to amount to an intimation of the *intention to abandon the contract,*[73] i.e., that a reasonable person assessing the breach would conclude that the promisor would be *absolutely unable to perform* the contract.[74] This may occur when there is either a breach of a contractual condition, or a breach of a warranty

[70] Notice of Cancellation, Page 96 of Bundle.
[71] Andrew Grubb, *The Law of Contract* (3rd edn, Lexis Nexis Butterworths 2007) 1493; *Heyman v Darwins Ltd* [1942] AC 356, 397; *Universal Cargo Carriers Corp v Citati* [1957] 2 QB 401, 436; *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* [2007] HCA 61.
[72] *Ross T Smyth & Co Ltd v TD Bailey Son & Co* [1940] 3 All ER 60 (Lord Wright).
[73] *Freeth v Burr* (1873-74) LR 9 CP 208, 213 (Lord Coleridge).
[74] Andrew Grubb, *The Law of Contract* (3rd edn, Lexis Nexis Butterworths 2007) 1497.

amounting to a fundamental breach of the contract.[75] The alleged breaches of the obligations under the charter do not amount to breaches of condition, and breaches of a warranty may not be treated as a repudiatory breach if non-fulfilment of that term does not result in the denial of substantial benefit that the Charterers were supposed to derive.[76]

30. The primary purpose of the contract was the delivery of the cargo at the port of discharge, which needed to be completed within a *reasonable* period of time.[77] In *Bank Line v Arthur Capel*,[78] it was held that a delay *"even of considerable length and of wholly uncertain duration is an incident of maritime adventure"*, notwithstanding the fact that such delays may "*very seriously affect the commercial object of the adventure".*[79] Since such delays are ordinary in character, so much so that they are contemplated in most contracts of carriage, they do not amount to a fundamental breach of the contract.[80] Hence, notwithstanding the detention of the Vessel, the Owners would not have been denied the *substantial benefit* of the charter.[81]

31. In any case, it is evident from the fact that the Charterers accepted the delayed performance in the substitute voyage that time was *not of the essence* to this contract. Therefore, in the absence of any further hindrance to the performance of the contract, [82] the Owners' non-compliance cannot be termed as a fundamental breach going to the root of the contact, and thus, cannot be held to be repudiation.[83]

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[75] *Davidson v Gwynne* 12 East 380, 389; *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26; *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1966] 2 WLR 944; *Photo Production Ltd v Securior Transport Ltd* [1980] AC 827, 849; Sir Jack Beatson, Andrew Burrows and John Cartwright, *Anson's Law of Contract* (29th edn, Oxford University Press 2010).

[76] *Glaholm v Hays* (1841) 2 Man & G 257; *Bradford v Williams* (1872) LR 7 Ex 259 (Martin B); *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26.

[77] TE Scrutton, *Scrutton on Charterparties and Bills of Lading* (Stewart C Boyd and others, 21st edn, Sweet and Maxwell 2008) art 127.

[78] *Bank Line v Arthur Capel* [1919] AC 435; *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2006] EWHC 1713 (Comm).

[79] *Bank Line Ltd v Arthur Capel and Co* [1919] AC 435, 459 (Sumner J).

[80] *See* Hague-Visby Rules 1924 art IV (2)(g); Cl 27, Shell Time Charter Party; Cl 29, World Food Charter Party.

[81] *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2006] EWHC 1713 (Comm).

[82] *Jackson v The Union Marine Insurance Company Ltd* (1874-75) LR 10 CP 125.

[83] *Davidson v Gwynne* 12 East 380, 389; *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26; *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1966] 2 WLR 944; *Photo Production Ltd v Securior Transport Ltd* [1980] AC 827, 849.

[B] THE CHARTERERS MAY NOT TREAT THE OWNERS' NOTICE AS A RENUNCIATION

32. It is a well settled fact of law that a mere omission or refusal of performance does not amount to renunciation; it must be a *total, absolute or unequivocal inability or refusal* to perform the contact.[84] It is submitted that the Owners never disabled themselves absolutely from performance; rather, they were willing to give a revised laycan for slightly later dates which showed an intention to modify the charter and not to renounce it.[85] The contents of the letter informing the Charterers of the delay could not sufficiently have lead a reasonable person to believe that they still intended to fulfil their part of the contract.[86] Hence, the Charterers had no right to treat the notice as one of renunciation.

[C] *ARGUENDO*, THERE WAS NO UNEQUIVOCAL ACCEPTANCE OF THE REPUDIATION OR RENUNCIATION

33. In order for a repudiation or renunciation to amount to a valid termination of the charter, there must be a clear and unequivocal acceptance of the alleged repudiation or renunciation.[87] The Charterers' notice of cancellation does not expressly mention that the Charterers treated the alleged repudiation or renunciation as terminating the charterparty.[88] Therefore, it is submitted that the notice of cancellation was not valid to affect the repudiation or renunciation, and that the charter can only have been cancelled by the exercise of the contractual right to cancel under Cl.2 of the Owners' standard terms.

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[84] Arthur Rosett, 'Partial, Qualified, and Equivocal Repudiation of Contract' (1981) 81 Columbia Law Review 93; *Freeth v Burr* (1873-74) LR 9 CP 208; .*Jaks (UK) Ltd v Cera Investment Bank SA* [1988] 2 Llyod's Rep 89, 93.
[85] Page 95, 97 of Bundle.
[86] *SK Shipping (S) Pte Ltd v Petroexport Ltd* [2009] EWHC 2974 (Comm).
[87] *Vitol SA v Norelf Ltd (The Santa Clara)* [1996] 2 Lloyd's Rep 225; *Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd* [2013] EWCA Civ 780.
[88] Notice of Cancellation, Page 96 of Bundle.

VI. THE TERMINATION OF THE CHARTER UNDER CL.2 OF THE STANDARD TERMS RELIEVED BOTH PARTIES FROM ALL FURTHER LIABILITY

34. The charter was terminated when the Charterers elected to decline the alternative laycan and exercised their right of cancellation under Cl. 2 of the Owners' Standard terms.[89] The consequence of the cancellation was that the charter was cancelled *without recourse* such that both parties were released from any obligations to perform and *any further liability* thereunder [A]. Further, the Charterers are not entitled to plead rectification of the charterparty [B].

[A] BOTH PARTIES WERE RELEASED OF ALL FURTHER OBLIGATIONS AND LIABILITIES AS PER THE TERMS OF THE CANCELLATION CLAUSE

35. It is a firmly established rule that the meaning of a provision is derived from the natural and ordinary usage of the written words.[90] The aim of construction must be to ascertain the contextual meaning, i.e., the meaning a reasonable person in those circumstances would have interpreted the parties' intention to have been.[91] 'Recourse' has been defined as the legal right to approach courts to demand compensation.[92] Hence, any reasonable person would have construed the cancellation clause to mean that both parties were discharged of future obligations *and* liabilities. The express inclusion of the words '*to either party whatsoever*', in addition, can only have evinced a further intention that the Owners would not be liable in the case of contractual cancellation. In such a situation where the parties intended that their agreement be recorded in a single contract,[93] prior negotiations,[94] or declarations of subjective intent,[95] cannot be admitted

[89] Page 96, 97 of Bundle.
[90] *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896.
[91] *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 2 WLR 945; *Sirius International Insurance Co v FAI General Insurance Ltd* [2004] 1 WLR 3251.
[92] William P Statsky, *West's Legal Desk Reference* (West Publishing Company 1990).
[93] Boilerplate entire agreement, page 51 of Bundle; Cl 43, 57 SC Rider Clauses, Cl 1; 5 SC Standard Terms.
[94] *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 3 WLR 267.
[95] *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896.

to vary or contradict the terms of the charter;[96] as the non-presence of a contradictory term in the charter itself was a strong indication that such terms were not to be insinuated.[97]

36. In contracts of affreightment, where risks are normally borne by insurers, parties are free to appropriate the risks as they may wish to, and hence, exclusion clauses shifting insurable risks in a like manner are not against the commercial purpose of the contract.[98] Further, the clause neither leads to commercial absurdity,[99] nor is it unconscionable as it does not bar consequential damages in cases of *gross negligence*. Thus, it cannot be deemed to be a blanket exclusion from all secondary liabilities.[100]

37. It is further submitted that even if a clause appears to be unreasonable, it may not be struck down,[101] as a construction favouring performance will be preferred over an interpretation encouraging avoidance.[102] A person who signs a contract is bound by it even though he might have not read it or was ignorant of its legal effects.[103] As previously submitted, the clause has a limited application which does not render it repugnant to the main object of the contract and hence the doctrine of *contra proferentem* is inapplicable.[104]

38. Therefore, on a proper construction, the cancellation clause had the effect of releasing both the parties from further obligations and further liabilities thereunder.

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[96] The Law Commission, *The Parol evidence rule* (Law Com. No 154) para 2.7.
[97] Sir Jack Beatson, Andrew Burrows and John Cartwright, *Anson's Law of Contract* (29th edn, Oxford University Press 2010) 133-137.
[98] *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] 1 All ER (Comm) 696; *Mitsubishi Corp v Eastwind Transport Ltd* [2004] EWHC 2924 (Comm) para 31.
[99] *Abbott v Middleton* (1858) 7 HL Cas 68.
[100] *Mitsubishi Corp v Eastwind Transport Ltd* [2004] EWHC 2924 (Comm) para 31.
[101] *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827.
[102] *Cehave NV v Bremer Handelsgesellschaft mbH* [1975] 2 Lloyd's Rep 445.
[103] *Parker v The South Eastern Railway Co* (1877) 2 CPD 416; *L'Estrange v F Graucob Ltd* [1934] 2 KB 394; *Levison v Patent Steam Carpet Cleaning Co Ltd* [1977] 3 WLR 90.
[104] *Mitsubishi Corp v Eastwind Transport Ltd* [2004] EWHC 2924 (Comm) para 33.

[B] THE CHARTERERS ARE NOT ENTITLED TO SEEK A RECTIFICATION OF THE CANCELLATION CLAUSE

The Charterers were expected to seek confirmation in relation to facts believed to be significant by them,[105] as the Owners were under no duty to notify them regarding the same.[106] Hence, the charter may not be rectified on allegations of common mistake or unilateral mistake as doing so would allow the Charterers to reallocate the allocated risks, and consequently, undermine the sanctity of the contract.[107]

i. The charter may not be rectified due to a common mistake

39. A contract is rectifiable due to common mistake if the present document fails to reflect the common continuing intention which can be revealed by the rectified instrument.[108] The Owners contend that there was no *consensus ad idem*,[109] with regard to the meaning of the cancellation clause as both parties had different conceptions about its legal effects.[110] As already established, no reasonable man with this background knowledge would have understood the term so as to give it the Charterers' construction.[111] Even if it were to be believed that common intention was present, the Owners argue that the document in its changed terms was an indication of absence of continuing intention before execution.[112] Hence, the proposed rectification cannot be expected to resolve the dispute as it would have the effect of imposing terms which the parties had never agreed upon at the time of contract formation.

ii. The charter may not be rectified due to unilateral mistake.

[105] For instance, see *Bell v Lever Brothers Ltd* [1932] AC 161 (Lord Atkin).
[106] *Smith v Hughes* (1867) LR 6 QB 597.
[107] For instance, see *Associated Japanese Bank (International) Ltd v Credit Du Nord SA* [1989] 1 WLR 255; Sir Jack Beatson, Andrew Burrows and John Cartwright, *Anson's Law of Contract* (29th edn, Oxford University Press 2010) 250.
[108] *Agip SpA v Navigazione Alta Italia SpA* [1984] 1 Lloyd's Rep 353; *Swainland Builders Ltd v Freehold Properties Ltd* [2002] EWCA Civ 560.
[109] *Cambro Contractors Ltd v John Kennelly Sales Ltd* 1994 WL 1060888, The Times, 14 April 1994.
[110] Page 3 of Bundle.
[111] *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38.
[112] *Fowler v Fowler* 1859 4 De Gex & Jones 250; *Agip SpA v Navigazione Alta Italia SpA* [1984] 1 Lloyd's Rep 353.

40. Additionally, rectification by way of unilateral mistake is also not applicable to the instant case as it is a drastic remedy,[113] which should not be allowed in the absence of the fulfilment of the conditions required for granting the remedy. Parties to a contract are expected to read a document before signing it,[114] and hence, actual knowledge of the Charterers' mistake cannot be imputed to the Owners.[115] Therefore, no obligation could have been imposed on the Owners to bring any modification in the clause to the notice of the Charterers.[116] Further, the question of detriment to the mistaken party is a nullity as the Owners were altogether unaware of the Charterers' mistake.[117]

41. The Charterers failed to discharge their burden of proving convincingly that the document failed to represent the common intention of the parties,[118] and thus rectification cannot be permitted as the document was executed in the ignorance that the other party was under a mistake.[119]

VII. THE OWNERS ARE ENTITLED TO THE ADVANCE FREIGHT

42. Cl. 4 of the Owners Standard Terms provides for *full freight to be deemed earned and 95% payable upon the lifting of subjects.* It is submitted that, as per the charter, freight was deemed earned and payable upon the lifting of subjects on the 19th of November, on a proper construction of Cl. 4 of the Owners' Standard terms [A], and in consequence, may not be recovered by the Charterers [B].

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[113] *Agip SpA v Navigazione Alta Italia SpA* [1984] 1 Lloyd's Rep 353, 365; *George Wimpey UK Ltd v VI Construction Ltd* [2005] EWCA Civ 77.
[114] *Parker v The South Eastern Railway Co* (1877) 2 CPD 416; *L'Estrange v F Graucob Ltd* [1934] 2 KB 394; *Levison v Patent Steam Carpet Cleaning Co Ltd* [1977] 3 WLR 90.
[115] *A Roberts & Co Ltd v Leicestershire CC* [1961] 2 WLR 1000; *Riverlate Properties Ltd v Paul* [1974] 3 WLR 564; *Agip SpA v Navigazione Alta Italia SpA* [1984] 1 Lloyd's Rep 353, 365.
[116] Sir Jack Beatson, Andrew Burrows and John Cartwright, *Anson's Law of Contract* (29th edn, Oxford University Press 2010) 265.
[117] *Thomas Bates and Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505.
[118] *Joscelyne v Nissen* [1970] 2 QB 86, 98; *Thomas Bates and Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505;.*LUK Leamington Ltd v Whitnash plc* [2002] 1 Lloyd's Rep 6.
[119] *Riverlate Properties Ltd v Paul* [1974] 3 WLR 564; *Agip SpA v Navigazione Alta Italia SpA* [1984] 1 Lloyd's Rep 353.

[A] THE FREIGHT WAS DEEMED EARNED UPON LIFTING OF THE SUBJECTS

43. It is submitted that due to the operation of Cl. 4 of the Standard terms of the Owners, freight was deemed earned, and further that 95% of minimum freight was deemed payable upon the lifting of subjects. Incorporation of the terms *'deemed earned'* and *'non-returnable'* is sufficient for the clause to be construed as a clause for the payment of advance freight,[120] and not merely for ordinary disbursements of the ship-owners.[121] Contracts of affreightment must be construed having regard to the general rules of construction of contracts, i.e., that the intention of the parties must be ascertained from the language they have used.[122] The special meaning of certain words according to their commercial context must be given effect,[123] and the factual background of the contract must be applied.[124] Mere unpropitious drafting, in the absence of any other circumstances, does not allow for the departure from this rule.[125] The words 'lifting of subjects', construed in their ordinary commercial meaning, imply the date of the final fixture of the charterparty,[126] i.e., the 19th of November. Applying the test of reasonable construction,[127] Cl. 4 of the charterparty *can have no other meaning* than that the freight was deemed earned upon the fixing of the charterparty, i.e., on the 19th of November. As any other construction would render the first part of the clause meaningless, it is submitted that no other construction may be adopted.[128]

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[120] *Compagnie Commerciale Andre SA v Artibell Shipping Co Ltd* 2001 SC 653; Julian Cooke and others, *Voyage Charters* (1st edn, Lloyd's of London Press Ltd 1993) 240; Martin Dockray, *Cases and Materials on the Carriage of Goods by Sea* (3rd edn, Cavindish 2004) 281.
[121] Julian Cooke and others, *Voyage Charters* (1st edn, Lloyd's of London Press Ltd 1993) 240.
[122] *Smith v Cooke* [1891] AC 297; *Pagnam SPA v Tradax Ocean Transportation* [1987] 1 EGLR 124.
[123] *Glynn v Margetson & Co* [1893] AC 351.
[124] Hugh Beale, *Chitty on Contracts* (31st edn, Sweet & Maxwell 2012) para 12-050; Kim Lewison, *The Interpretation of Contracts* (2nd edn, Sweet & Maxwell 1997) 7.
[125] Hugh Beale, *Chitty on Contracts* (31st edn, Sweet & Maxwell 2012) para 12-056; *Mitsui Construction Co Ltd v AG of Hong* Kong [1987] HKLR 1079.
[126] The Baltic Exchange, The Baltic Code <*http://www.balticexchange.cn/Download/TheBaltic_CODE.pdf*> accessed 1 May 2014; '*The subject is subjects'* <*http://www.maritimeadvocate.com/subject/the_subject_is_subjects.htm*> accessed 1 May 2014.
[127] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; *ING Bank NV v Ros Roca SA* [2011] EWCA Civ 353.
[128] *Petroplus Marketing AG v Shell Trading International Ltd* [2009] 2 Lloyd's Rep 611; Hugh Beale, *Chitty on Contracts* (31st edn, Sweet & Maxwell 2012) para 12-081.

[B] THE ADVANCE FREIGHT IS NOT RECOVERABLE BY THE CHARTERERS.

44. It is submitted that advance freight, unlike other advance payments, is not recoverable upon the termination of the contract.[129] Further, even where advance freight is not paid, as long as it has been *earned* at a prior date, the freight that is due remains payable.[130] It has been held that even where the contract is frustrated owing to a repudiatory breach of the charter by the ship owners, for instance due to the vessel being arrested, after the advance freight was due, the charterers could not recover advance freight as long as the breach occurred after the freight had been earned.[131] Hence, notwithstanding how the charterparty was terminated, freight was unconditionally acquired, prior to the termination of the Charter, and remains due to the Owners.[132] It submitted that full freight was deemed earned upon the "lifting of subjects" on the 19th of November, 2011, and the Charterers are in breach of the charter due to their failure and refusal to pay the freight.

VIII. QUANTIFICATION OF DAMAGES

[A] THE CHARTERERS ARE NOT ENTITLED TO RECOVER THE COSTS OF THE SUBSTITUTE FIXTURES

45. The Charterers on the 26th of November entered into a substitute charter after cancellation.[133] It is submitted that the Charterers are not entitled to recover the costs of obtaining a substitute fixture, since such costs are only recoverable upon a *failure* of the ship owners to provide a vessel for the carriage of cargo. In the present instance, as submitted, the

[129] TE Scrutton, *Scrutton on Charterparties and Bills of Lading* (Stewart C Boyd and others, 21st edn, Sweet and Maxwell 2008) art 162; *Allison v Bristol Marine Insurance Co Ltd* (1876) 1 AC 209.
[130] Paul Todd, 'The peculiar position of freight' (1989) 8(4) Journal of International Banking Law 56; *Allison v Bristol Marine Insurance Co Ltd* (1876) 1 AC 209; *Bank of Boston Conneticut v European Grain and Shipping Ltd* [1989] 1 All ER 545.
[131] *Bank of Boston Conneticut v European Grain and Shipping Ltd* [1989] 1 All ER 545.
[132] *Hick v Shield* (1857) 7 E & B 633; *Byrne v Schiller* (1871) LR 6 Exch 319; *Johnson v Agnew* [1980] AC 367; *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457; *Astea (UK) Ltd v Time Group Ltd* [2003] EWHC 725 (TCC); *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 2 Lloyds Rep 1.
[133] Super Charters Internal Report, Page 98 of Bundle.

delay was not sufficient to amount to a repudiation or a failure of the contract, and therefore the Charterers may not claim damages for failure to provide a vessel for the carriage of cargo.[134]

46. It is further contended that the precipitous increase in Suezmax rates caused due to an uptick in WS freight rates, coupled with the shift in affreightment to the smaller Suezmax, when necessarily considered in the light of market expectations,[135] does not fall under either limb of the rule laid down in *Hadley v. Baxendale*.[136] Such a conclusion must rely on an examination of the commercial context,[137] and the unanticipated nature of the rise due to intensifying tonnage for Suezmax and unseasonal spike in TD15 rates cannot have said to be present in the contemplation of a *reasonable commercial actor*.[138]

47. Furthermore, given that the application of the general rule would clearly lead to unquantifiable, unpredictable and disproportionate liability;[139] while also being contrary to market understanding;[140] according to the principles laid down in *Mercator*, an *assumption of responsibility* on the Owners' part must be fulfilled.[141] Volatility in the freight market does not lead to such an assumption.[142] Therefore, the Owners cannot be held liable to pay the costs of the substitute charter.

[B] THE CHARTERERS ARE NOT ENTITLED TO RECOVER THE LOSSES SUFFERED AT THE DISPORT AND LOADPORT

48. The Owners have claimed damages for sums payable at Loadport and Disport for delayed arrival. Cl. 5 of the Owners' Standard terms clearly posit that the Owners' cannot be held liable for consequential damages unless *gross negligence* is proven. Consequential

[134] TE Scrutton, *Scrutton on Charterparties and Bills of Lading* (Stewart C Boyd and others, 21st edn, Sweet and Maxwell 2008) art 194.
[135] Ewan McKendrick, *Contract Law* (3rd edn, Palgrave Macmillan, 2006) 889.
[136] *Transfield Shipping Inc v Mercator Shipping Inc* [2008] 2 Lloyd's Rep 275 (Lord Rodger).
[137] Andrew Tettenborn, 'Hadley v Baxendale Foreseeability: A Principle Beyond its Sell-by Date' (2007) 23 Journal of Contract Law 120; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; *Re Sigma Finance Corp* [2009] UKSC 2.
[138] TD15 short term WS six week rate moves graph, Page 99 of Bundle.
[139] *Transfield Shipping Inc v Mercator Shipping Inc* [2008] 2 Lloyd's Rep 275 (Lord Hoffman).
[140] *Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd* [2010] EWHC 542 (Comm) (Hamblen).
[141] *South Australia Asset Management Corp v York Montague Ltd* [1996] UKHL 10.
[142] *Transfield Shipping Inc v Mercator Shipping Inc* [2008] 2 Lloyd's Rep 275 (Lord Hoffman); Edwin Peel, 'Remoteness re-visited' (2009) 125 Law Quarterly Review 6.

damages are defined as damages which, at the time of contract formation, could not have said to been in the reasonable contemplation of the parties.[143] Subsequent damage referable to the loss sustained by the Charterers in a particular contract of sale cannot be imputed to the Owners unless it is clear that the charter was made with *specific reference to and with the knowledge* of a *particular contract* of sale by the Charterers with their buyers.[144] Mere knowledge of the planned maintenance shutdown could never be regarded as fulfilling this obligation unless it was constructed to be a part of the contract. [145] In the absence of any such express,[146] or implied,[147] mention by the Charterers and the lack of an *assumption of responsibility*,[148] such a claim may not be determined in the Charterers' favour.[149]

49. It is submitted that the Owners complied with their duty to mitigate expeditiously,[150] by informing the Charterers about the prospective delay well in advance of the cancelling date; which enabled the Charterers to secure a timely replacement capable of complying with the same laycan dates.[151] It is a settled point of law that an intervening event will break the causal nexus between the alleged breach and the claimed loss, if the original event is not such that it would lead to an inexorable loss.[152] The Owners' breach must have been the *effective and*

[143] *Hadley v Baxendale* (1854) 9 Exch 341; *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 CA; Arthur G Murphey, 'Consequential damages in contracts for the international sale of goods and the legacy of Hadley' (1989) 23 George Washington Journal of International Law & Economics 415.
[144] *Geogas SA v Trammo Gas Ltd (The Baleares)* [1993] 1 Lloyd's Rep 215; *Koufos v Czarnikow Ltd (The Heron II)* [1967] 2 Lloyd's Rep 457.
[145] *Cory v Thames Ironworks Company* (1868) LR 3 QB 181; *British Columbia Saw-Mill Co Ltd v Nettleship* (1867-68) LR 3 CP 499.
[146] *Heimdal v Questier & Co* (1948-49) 82 Ll L Rep 452; *Ströms Bruks Aktie Bolag v John & Peter Hutchison* [1905] AC 515, 529 (Lord Davey).
[147] *Cory v Thames Ironworks Company* (1868) LR 3 QB 181.
[148] *Transfield Shipping Inc v Mercator Shipping Inc* [2008] 2 Lloyd's Rep 275; *Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd* [2010] EWHC 542 (Comm).
[149] *British Columbia Saw-Mill Co Ltd v Nettleship* (1867-68) LR 3 CP 499; Arthur G Murphey, 'Consequential damages in contracts for the international sale of goods and the legacy of Hadley' (1989) 23 George Washington Journal of International Law & Economics 415.
[150] *East Ham Corp v Bernard Sunley & Sons Ltd* [1966] AC 406.
[151] *Pacific Interlink Sdn Bhd v Owner of the Asia Star* [2009] 2 Lloyd's Rep 387; *British Westinghouse Electric Co Ltd v Underground Electric Rly* [1912] AC 673, 689.
[152] *Leyland Shipping Co v Norwich Union Fire Insurance Society* [1918] AC 350; *Koufos v Czarnikow Ltd (The Heron II)* [1967] 2 Lloyd's Rep 457; *Beoco Ltd v Alfa Laval Co Ltd* [1995] QB 137; Hugh Beale, *Chitty on Contracts* (31st edn, Sweet & Maxwell 2012) para 26-032.

dominant cause,[153] or the *real efficient cause*;[154] with the last causal event to occur in order to impute liability for the loss upon them.[155] Therefore, the Owners' may not be liable *merely* because their actions have provided the party with an opportunity to sustain losses.[156] They secured the substitute charter with the objective of reducing their losses and its timely performance would have protected them from any potential economic loss caused by the Owners' breach,[157] but the fact that the Charterers still suffered losses is evidence that it was due to the fault of the substitute ship.

50. The delay of the substitute ships broke the chain of causation, thus preventing the existing cause from operating further; thereby making the intervening act the effective and dominant cause of the ensuing damages.[158] The Owners' failure to reach the Loadport might have provided an occasion for the loss,[159] but cannot be deemed to have been the cause of the loss. The general principle governing the award of damages is compensation,[160] so as to place the parties in a position as if the contract was concluded.[161] In the absence of causation, awarding damages for special and peculiar losses for which the Owners are not directly liable,[162] would be against the interest of justice as they have a valid claim for delay against the substitute ship owners. [163]

[153] *Galoo v Bright Grahame Murray* [1994] 1 WLR 1360; *Mirant Asia-Pacific v Ove Arup and Partners* [2007] EWHC 918; *Monarch Steamship Co Ltd v Karlshamns Oljefabriker* (A/B) [1949] AC 196.
[154] *Leyland Shipping Co v Norwich Union Fire Insurance Society* [1918] AC 350.
[155] *Hams v CGU Insurance Ltd* [2002] NSWSC 273.
[156] *Quinn v Burch Bros (Builders) Ltd* [1966] 2 QB 370.
[157] Page 98 of Bundle.
[158] *In the Matter of An Arbitration between Etherington and the Lancashire and Yorkshire Accident Insurance Company* [1909] 1 KB 591; *Leyland Shipping Co v Norwich Union Fire Insurance Society* [1918] AC 350.
[159] *Quinn v Burch Bros (Builders) Ltd* [1966] 2 QB 370.
[160] *Johnson v Perez* (1988) 166 CLR 351, 355.
[161] *Nissho Co Ltd v NG Livanos* [1941] 69 Ll L Rep 125; *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272.
[162] *Monarch Steamship Co Ltd v Karlshamns Oljefabriker* (A/B) [1949] AC 196; *British Columbia Saw-Mill Co Ltd v Nettleship* (1867-68) LR 3 CP 499; *Hadley v Baxendale* (1854) 9 Exch 341.
[163] *Dunn and others v Bucknall Brothers* [1902] 2 KB 614; *Koufos v Czarnikow Ltd (The Heron II)* [1967] 2 Lloyd's Rep 457.

51. Lastly, it is contended that since there is an augmentation in the cost of acquisition as a result of the change in price of oil, it would also be logically accompanied by a commensurate rise in the sale price; and therefore only *nominal* damages in this respect can be claimed.[164]

PRAYER

In light of the above submissions, the Owners request the tribunal to declare:

1. That the first reference has been validly commenced; and
2. That the Owners can present counterclaims in the second reference; and
3. That the Owners are not in breach of the obligations under the charter; namely—
    a. The Owners are not in breach of the Estimated Time of Arrival Clause; and
    b. The Owners are not in breach of the obligation to proceed with reasonable dispatch.
4. That the Owners are in any case exempted from any liability for damages under the Charter;
5. That the Owners are entitled to the advance freight claimed, and the Charterers are in breach for non-payment of the same.

And therefore, the following reliefs are prayed for:

1. USD 4,935,368.75 as freight due and owing or alternatively as damages;
2. Compound or alternatively simple interest under S. 49 of the Arbitration Act at such rests and at such rates at which the tribunal deems fit;
3. Costs with compound or alternatively simple interest on costs under S. 61 (2) of the Arbitration Act;
4. Further or other reliefs.

[164] *The Notting Hill* (1844) 9 PD 105; *The Parana* (1877) 2 PD 118.