FIFTEENTH ANNUAL INTERNATIONAL MARITIME LAW ARBITRATION MOOT COMPETITION 2014

MURDOCH UNIVERSITY
PERTH, WESTERN AUSTRALIA

IN THE MATTER OF AN ARBITRATION HELD IN HONG KONG

Claimant/Owners	**Respondent/Charterers**
Reliable Tankers Inc	Super Charters Inc
AND	
Claimant/Charterers	**Respondent/Owners**
Super Charters Inc	Reliable Holdings Inc

MEMORANDUM FOR THE OWNERS

TEAM NO. 8

Hannah Bailey
Lachlan Conroy
Michael Olds
Collin Ong

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LIST OF ABBREVIATIONS

Arbitration Agreement	:	Clause 24, Part II, ASBATANKVOY Charter Party
Asbatankvoy	:	ASBATANKVOY Charter Party
Bunkerport	:	Redland Bunker Port
Charterers	:	Super Charters Inc
Charterers' Standard Terms	:	Super Charters Inc's Standard Terms
Charterparty	:	The Charterparty
first reference	:	Reliable Holdings Inc's notice of arbitration
Owners	:	Reliable Holdings Inc
Owners' Standard Terms	:	Reliable Tankers Inc's Standard Terms
Rider Clauses	:	Super Charters Single Voyage Charter Party Rider Clauses
second reference	:	Super Charters Inc's notice of arbitration
Tankers	:	Reliable Tankers Inc
Vessel	:	The Reliable Butterfly

STATEMENT OF FACTS

THE CHARTERPARTY

1. On 19 November 2011 Reliable Tankers Inc (***Tankers***) entered into a charterparty (***Charterparty***) with Super Charters Inc (***Charterers***) to transport 260,000 mt of crude oil from Blueland to Indigoland on the Reliable Butterfly (***Vessel***).
2. The Charterparty was attached to the Fixture Recap and comprised of an ASBATANKVOY Charter Party (***Asbatankvoy***), the Charterers' Rider clauses (***Rider Clauses***), Intertanko's Standard Tanker Chartering Questionnaire 88, Tankers' Standard Terms (***Owners' Standard Terms***) and the Charterers' Standard Terms (***Charterers' Standard Terms***).

THE ARREST

3. Between 19 and 22 November 2011 the Vessel arrived at the Redland Bunker Port (***Bunkerport***) to acquire bunkers for the voyage.
4. The Vessel was arrested at the Bunkerport. Local lawyers demanded an unreasonably high figure for the amount Tankers owed to the bunker suppliers and for security.
5. Tankers had limited funds and it had not received the advance freight the Charterers owed. Tankers undertook negotiations to reduce the figure.

CANCELLATION

6. On 25 November 2011 Tankers notified the Charterers that the Vessel had not been released from arrest and the laycan could not be met. Tankers could not provide a specific revised laycan date until the arrest was lifted.

7. The Charterers cancelled the Charterparty. Tankers confirmed this cancellation without recourse and advised that it owned another ship that may be suitable for the voyage.

UNIVERSAL SUCCESSION

8. On 3 January 2012 it was reported in a newspaper that Tankers had merged with Reliable Holdings Inc (***Owners***). The Owners were the surviving entity.

ARBITRAL PROCEEDINGS

9. On 28 January 2012 the Owners notified the Charterers that they were referring the dispute to arbitration (***first reference***) pursuant to Clause 24 of the Asbatankvoy (***Arbitration Agreement***). This reference used the Tankers letterhead.
10. On 12 February 2012 the Charterers responded that the first reference was invalid, but they appointed their own arbitrator as per the Arbitration Agreement. The Charterers then issued their own notice of arbitration to the Owners (***second reference***). The Owners disputed the validity of this reference but appointed their own arbitrator regardless.

PART ONE: JURISDICTION

1. The Owners argue that this Tribunal has jurisdiction to hear the merits of this dispute because: (A) this Tribunal has the power to rule on its own jurisdiction; and (B) the Charterparty is subject to English law. Further the Owners argue that the first reference is valid because: (C) the Owners inherited Tankers' rights and obligations including the right to arbitrate; (D) it contained a misnomer that should be corrected to read 'Reliable Holdings Inc'; and (E) it is not time-barred.

A. This Tribunal has the power to rule on its own jurisdiction

2. An arbitral tribunal has the power to decide on its own jurisdiction.[1] The Owners argue that this Tribunal has the power to rule on its own jurisdiction.

B. The Charterparty is subject to English law

3. Parties to an arbitration agreement may choose which law governs the validity of that agreement.[2] When the parties fail to do so either the law of the seat or the law applicable to the underlying contract will apply.[3]

4. The parties have expressly chosen English law to apply to the contract, and specified London as the seat of arbitration.[4] Therefore both arbitral procedure and the merits of the dispute are governed by English law.

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[1] *Arbitration Act 1996* (UK) c 23, s 30; *Christopher Brown Ltd v Genossenschaft Oesterreichischer Waldbesitzer Holzwirtschaftsbetriebe Registrierte GmbH* [1954] 1 QB 8, 12-3 (Devlin J); *Interim Award in ICC Case No 7929*, XXV YB Comm Arb 312 (2000); *Texaco Overseas Petroleum Co v Libyan Arab Republic, Preliminary Ad Hoc Award on Jurisdiction (27 November 1975)* IV YB Comm Arb 177, 179 (1979); Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2009) vol I, 856.

[2] *Arbitration Act 1996* (UK) c 23, s 3; *Peterson Farms Inc v C&M Farming Ltd* [2004] 1 Lloyd's Rep 603, 609 (Langley J); *XL Insurance v Owens Corning* [2000] 2 Lloyd's Rep 500, 506 (Toulson J). See also *Arbitration Act 1996* (UK) c 23, s 103(2); Born, above n 1, 436.

[3] *Compagnie Tuniesienne de Navigation SA v Compagnie d'Armement Maritime SA* [1970] 2 Lloyd's Rep 99, 116 (Lord Diplock); *Tzortzis and Sykias v Monark Line A/B* [1968] 1 Lloyd's Rep 337, 340 (Lord Denning MR); *Kiwk Hoo Tong Handel Maatsohappij v James Finley & Co* [1927] AC 604, 608 (Viscount Dunedin); *Spurrier v La Cloche* [1902] AC 446, 450 (Lord Lindley); Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2009) vol II, 2123.

[4] Moot Problem, 6, 13, 49, 56, 101, 103.

C. The Owners inherited Tankers' rights and obligations including the right to arbitrate

5. The Owners argue that they inherited Tankers' rights and obligations because: (I) the transfer of rights validly occurred under the Fruitland law of universal succession. Alternatively if this Tribunal finds that the transfer is governed by English law: (II) the Owners gave the Charterers valid notice of the transfer.

I. The transfer of rights validly occurred under the Fruitland law of universal succession

6. The transfer of a merging company's rights and obligations are governed by the law of the place of incorporation.[5] Both the Owners and Tankers are incorporated in Fruitland.[6] Therefore Fruitland law governs the transfer of rights between them.

7. Under Fruitland law two entities can choose to merge by way of universal succession.[7] The surviving entity automatically becomes the owner of all the rights and property; and subject to all the liabilities, obligations and penalties of the previously existing entity.[8] This includes the right to arbitrate under an existing

[5] *SEB Trygg Holding AB v Manches* [2006] 1 CLC 849, 872-3 (Buxton, Tuckey and Kay LJJ); *Kuwait Airways Corporation v Iraq Airways Co* [2001] 1 Lloyd's Rep 161, 218 (Brooke LJ); *Concept Oil Services Ltd v En-Gin Group LLP* [2013] EWHC 1897 (Comm), [70]-[74] (Flaux J); *Global Container Lines Ltd v Bonyad Shipping Co* [1999] 1 Lloyd's Rep 287, 293 (Rix J); Lawrence Collins (ed), *Dicey, Morris and Collins on The Conflict of Laws* (Sweet & Maxwell, 15th ed, 2012) [30-011]; *Daebo Shipping Co Ltd v The "Go Star"* [2012] FCAFC 156, [111] (Keane CJ, Rares and Besanko JJ).

[6] Moot Problem, 113.

[7] Ibid.

[8] Moot Problem, 133. See also *Republic of Kazakhstan v Istil Group Inc (No 2)* [2007] EWHC 2729 (Comm); *Siemens Schweiz AG v Thorn Security Ltd* [2009] Bus LR D67, [75]-[76] (Mummery LJ); *Hans Brochier Holdings Ltd v Exner* [2006] EWHC 2594 (Ch), [5] (Warren J); *Harper Versicherungs AG v Indemnity Marine Assurance Co Ltd* [2006] EWHC 1500 (QB), [40]-[42] (Tomlinson J); *Eurosteel Ltd v Stinnes AG* [2000] CLC 470, 472-5 (Longmore J).

contract.[9] Universal succession occurs automatically with no requirement for notice to be given.[10]

8. The Owners and Tankers merged in December 2011.[11] The Owners were the surviving entity.[12] The Owners argue that this was by way of universal succession in accordance with Fruitland law. Therefore the Owners automatically became the owner of all Tankers' rights, property, liabilities, obligations and penalties on that date.

II. Alternatively, if this Tribunal finds that the transfer is governed by English law, the Owners gave the Charterers valid notice of the transfer

9. If this Tribunal finds that the transfer of rights and obligations from Tankers to the Owners is governed by English law and is therefore subject to a notice requirement, the Owners argue that they gave the Charterers valid notice of the transfer.

10. The courts do not strictly enforce a procedural notice requirement when the companies merged in a country where no notice requirement exists.[13] In *Eurosteel Ltd v Stinnes AG*[14] universal succession occurred in Germany where there is no requirement to give notice.[15] The parties then commenced arbitration in London.[16] Despite no notice being given Justice Longmore held that the arbitration does not die immediately, and that the surviving entity has time to give notice of transfer.[17]

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[9] *SEB Trygg Holding AB v Manches* [2006] 1 CLC 849, 872-3 (Buxton, Tuckey and Kay LJJ); *Republic of Kazakhstan v Istil Group Inc* [2006] EWHC 448 (Comm), 378 (Steel J); *Harper Versicherungs AG v Indemnity Marine Assurance Co Ltd* [2006] EWHC 1500 (QB), [40]-[44] (Tomlinson J); *Eurosteel Ltd v Stinnes AG* [2000] CLC 470, 474-7 (Longmore J).
[10] Moot Problem, 113.
[11] Ibid, 100.
[12] Ibid.
[13] *Eurosteel Ltd v Stinnes AG* [2000] CLC 470, 474-7 (Longmore J). See also *Toprak Enerji Sanayi AS v Sale Tilney Technology Plc* [1994] 1 WLR 840, 847 (Diamond J); *Industrie Chimiche Italia Centrale v Alexander G Tsavliris & Sons Maritime Co* ('*The Choko Star*') [1995] CLC 1461, 1469[E] (Mance J).
[14] [2000] CLC 470.
[15] *Eurosteel Ltd v Stinnes AG* [2000] CLC 470.
[16] Ibid.
[17] Ibid, 474-7 (Longmore J).

11. In this case the companies merged in Fruitland where no notice requirement exists.[18] Therefore, the Owners were not required to give notice prior to commencing arbitration. The Owners gave the Charterers notice of universal succession on 24 February 2012 in a message that said 'Reliable Holdings Inc and Reliable Tankers Inc are now, for all purposes, the same entity'.[19] As such, the Owners have validly succeeded to Tankers' right to arbitrate and the first reference was valid.

D. The first reference contained a misnomer that should be corrected to read 'Reliable Holdings Inc'

12. The Owners argue that the first reference is valid despite the use of the incorrect letterhead. The Owners argue that the use of the 'Reliable Tankers Inc' letterhead on the first reference was a misnomer and should be amended to read 'Reliable Holdings Inc'.

13. A misnomer is a 'mistake in name; the giving of an incorrect name to a person in a pleading, deed, or other instrument'.[20] A court has the power to correct a misnomer as a matter of construction, rather than enforce the error.[21]

14. To determine if the mistaken name is a misnomer the court will assess what a reasonable person receiving the document would have understood to be the intended name.[22]

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[18] Moot Problem, 100, 113.
[19] Ibid, 104.
[20] Bryan A Garner, *Black's Law Dictionary* (Thomson Reuters, 9th ed, 2009) 1090. See also *Davies v Elsby Brothers Ltd* [1961] 1 WLR 170, 176 (Devlin LJ); *Whittam v W J Daniel & Co Ltd* [1962] 1 QB 271, 275-82 (Donovan LJ).
[21] *Harper Versicherungs AG v Indemnity Marine Assurance Co Ltd* [2006] EWHC 1500 (QB), [40]-[44] (Tomlinson J); *SEB Trygg Holding AB v Manches* [2006] 1 CLC 849, 872-3 (Buxton, Tuckey and Kay LJJ); *Nittan (UK) Ltd v Solent Steel Fabrication Ltd trading as Sargrove Automation and Cornhill Insurance Company Ltd* [1981] 1 Lloyd's Rep 633, 639 (Brightman LJ); *Derek Hodd Ltd v Climate Change Capital Ltd* [2013] EWHC 1665 (Ch), [42]-[52] (Henderson J).
[22] *SEB Trygg Holding AB v Manches* [2006] 1 CLC 849, 872-3 (Buxton, Tuckey and Kay LJJ); *Harper Versicherungs AG v Indemnity Marine Assurance Co Ltd* [2006] EWHC 1500 (QB), [40]-[44] (Tomlinson J); *Derek Hodd Ltd v Climate Change Capital Ltd* [2013] EWHC 1665 (Ch) [47]-[50] (Henderson J); *Nittan (UK) Ltd v Solent Steel Fabrication Ltd trading as Sargrove Automation and Cornhill Insurance Company Ltd* [1981]

15. In the case of *Nittan v Solent Steel Fabrications Ltd*[23] Sargrove Electronics Ltd merged with Sargrove Automation Ltd but subsequently used the name 'Sargrove Electronics Limited' in an insurance policy. To determine whether a misnomer had occurred the Court considered what a reasonable person receiving the insurance policy would have concluded. Lord Denning held that the other party 'would have said to themselves, 'Sargrove Electronics Limited are out of business. They are dormant altogether. They cannot mean that company. They must mean Sargrove Automation'.[24]

16. Applying the common sense test, the Owners argue that the Charterers would have known that the letterhead should have read 'Reliable Holdings Inc' because Tankers did not exist. This is evidenced by the Charterers' message on 12 February 2012 in which they wrote '[w]e note that Reliable Tankers no longer exists as an entity'.[25] The Charterers immediately issued the second reference upon the Owners, indicating that the Charterers knew what party was intended in the letterhead.[26]

17. As such, the Owners argue that the incorrect letterhead is a mere misnomer and this Tribunal should read the letterhead as corrected to 'Reliable Holdings Inc'. Therefore the first reference was valid.

E. The first reference is not time-barred

18. The Owners argue that the first reference is not time-barred by Clause 4 of the Charterers' Standard Terms because the doctrine of separability applies to the Arbitration Agreement.

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1 Lloyd's Rep 633, 637 (Lord Denning MR); *Whittam v W J Daniel & Co Ltd* [1962] 1 QB 271, 275 (Donovan LJ).

[23] *Nittan (UK) Ltd v Solent Steel Fabrication Ltd trading as Sargrove Automation and Cornhill Insurance Company Ltd* [1981] 1 Lloyd's Rep 633.

[24] Ibid, 637 (Lord Denning MR).

[25] Moot Problem, 102.

[26] Ibid, 103.

19. Clause 4 of the Charterers' Standard Terms provides that the Charterers must be notified of all claims against them within ten days of discharge/redelivery and/or when discharge/redelivery would have occurred.[27] The cargo was scheduled to be discharged by 10 January 2012.[28] The Charterers claim that under Clause 4 the Charterers must have been notified of any claims against them by 20 January 2012.[29] The Charterers may argue that the first reference is invalid because the first reference was brought on 28 January 2012.[30] The Owners argue that the first reference is not time-barred by Clause 4 of the Charterers' Standard Terms because the Arbitration Agreement is separate from the Charterparty under the doctrine of separability.

20. An arbitration agreement is a legal obligation that is separate and distinct to the main agreement between the parties, providing a dispute resolution mechanism for disputes arising under the main agreement.[31]

21. This separation between the arbitration agreement and the main agreement known as the 'separability doctrine' has been applied by both courts and arbitral tribunals[32] and is a recognised principle under English arbitral law.[33]

22. The time-bar is contained in Clause 4 of the Charterers' Standard Terms.[34] The Arbitration Agreement does not make any reference to a time-bar or the Charterers' Standard Terms.[35] Therefore the Owners argue that the Arbitration Agreement is

[27] Moot Problem, 45, 88.
[28] Ibid, 89.
[29] Ibid, 45, 88-9.
[30] Ibid, 101.
[31] *Arbitration Act 1996* (UK) c 23, s 7; *Fiona Trust Holding Corporation v Privalov* [2008] 1 Lloyd's Rep 254, 257 (Lord Hoffman); UNCITRAL Arbitration Rules, Article 23(1); Born, above n 1, 311-2, 336-7.
[32] *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* ('*The Hannah Blumenthal*') [1983] 1 Lloyd's Rep 103, 117 (Lord Diplock); *Harbour Assurance Co (UK) Ltd v Kansa General Insurance Co Ltd* [1992] 1 Lloyd's Rep 81, 88 (Steyn J); *Elf Aquitaine Iran v Nat'l Iranian Oil Co, Preliminary Ad Hoc Award, (14 January 1982)*, XI YB Comm Arb 97, 102-3 (1986); *Libyan Am Oil Co v Government of the Libyan ARAB Republic (LIAMCO), Ad Hoc Award (12 April 1977)*, VI YB Comm Arb 89, 96 (1981); Georgios I Zekos, *International Commercial and Marine Arbitration* (Routledge-Cavendish, 2008) 207.
[33] *Arbitration Act 1996* (UK) c 23, s 7.
[34] Moot Problem, 45, 88.
[35] Ibid, 13, 56.

separate to the time-bar and the time-bar does not apply to the first reference. Accordingly the first reference is valid.

PART TWO: ENTITLEMENT TO FREIGHT

23. The Owners argue that the Charterers are liable to pay freight because: (A) the Owners are contractually entitled to freight in the amount of US$4,935,368.75; (B) the Charterers have no right to equitable set-off; and (C) the Charterers cannot rely on the principle of unjust enrichment. Alternatively the Owners argue that they are entitled to damages because: (D) the Charterers have breached the Charterparty by failing to pay freight. Further the Owners argue for: (E) compound or simple interest on the amount owed.

A. The Owners are contractually entitled to freight in the amount of US$4,935,368.75

24. Freight is the consideration payable for the carriage of the goods to and their delivery at their destination.[36] However parties can agree that freight will be paid prior to the delivery of goods.[37] This is called advance freight.[38]

25. When a charterparty provides that freight is 'deemed earned' it renders advance freight irrecoverable and enables a shipowner to recover the balance of freight even if the voyage is not completed.[39]

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[36] *Compania Naviera General SA v Kerametal Ltd* ('*The Lorna I*') [1983] 1 Lloyd's Rep 373, 374 (Sir Donaldson MR); *Kirchner v Venus* (1859) 12 Moo PC 361, 390 (Lord Kingsdown); Sir Bernard Eder et al, *Scrutton on Charterparties and Bills of Lading* (Sweet & Maxwell, 22nd ed, 2011) 323 [15-001].

[37] *Compania Naviera General SA v Kerametal Ltd* ('*The Lorna I*') [1983] 1 Lloyd's Rep 373, 374 (Sir Donaldson MR); *Karin Vatis Vagres Compania Maritime SA v Nissho-Iwai America Corp* ('*The Karin Vatis*') [1988] 2 Lloyd's Rep 330, 332 (Lloyd J); *Colonial Bank v European Grain & Shipping Ltd* ('*The Dominique*') [1989] 1 Lloyd's Rep 431, 436 (Lord Brandon).

[38] *Allison v Bristol Marine Insurance Co* (1876) 1 App Cas 209, 217 (Brett J); *Colonial Bank v European Grain & Shipping Ltd* ('*The Dominique*') [1989] 1 Lloyd's Rep 431, 436 (Lord Brandon).

[39] *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1942] 73 Ll L Rep 45, 59 (Lord Wright); *Karin Vatis Vagres Compania Maritime SA v Nissho-Iwai America Corp* ('*The Karin Vatis*') [1988] 2 Lloyd's Rep 330, 332 (Lloyd J); *Colonial Bank v European Grain & Shipping Ltd* ('*The Dominique*') [1989] 1 Lloyd's

26. Clause 4 of the Owners' Standard Terms provides that freight is 'deemed earned in full, discountless and non-refundable upon lifting of subjects'.[40] 95% of freight became payable upon lifting of subjects.[41] Subjects were lifted on 19 November 2011 at 1700 hours (London time).[42] The Charterers have not paid the freight.[43]

27. The Owners argue that the 95% of freight payable upon lifting of subjects is advance freight under Clause 4. As it is 'deemed earned'[44] it is irrecoverable by the Charterers despite the non-completion of the voyage. Therefore the Owners are entitled to freight in the amount of US$4,935,368.75.

B. The Charterers have no right to equitable set-off

28. The Owners argue that the Charterers cannot retain the freight owed by way of equitable set-off for the Owners' failure to deliver the cargo.

29. Set-off is the deduction from the amount of freight owed for damage to cargo, or for short delivery.[45] There is no right to equitable set-off under voyage charters.[46]

30. The Charterparty is a voyage charterparty as evidenced by its use of the Asbatankvoy.[47]

31. The Owners argue that because the Charterparty is for a voyage charter, the Charterers have no right to retain the freight owed by way of equitable set-off.

Rep 431, 441 (Lord Branson); *Compania Naviera General SA v Kerametal Ltd* ('*The Lorna I*') [1983] 1 Lloyd's Rep 373, 374 (Sir Donaldson MR); Eder et al, above n 36, 326 [15-005].

[40] Moot Problem, 44, 87.

[41] Ibid.

[42] Ibid, 46.

[43] Ibid, 107.

[44] Ibid, 44, 87.

[45] *Aries v Total Transport* [1977] 1 Lloyd's Rep 334, 339 (Lord Simon).

[46] *Aries v Total Transport* [1977] 1 Lloyd's Rep 334, 337-8 (Lord Wilberforce); *Colonial Bank v European Grain & Shipping Ltd* ('*The Dominique*') [1989] 1 Lloyd's Rep 431, 440 (Lord Branson); Eder et al, above n 36, 331 [15-019]. See, eg, *Dakin v Oxley* [1864] 15 CB(NS) 646; *Henriksens Rederi AS v THZ Rolimpex* ('*The Brede*') [1973] 2 Lloyd's Rep 333; *The Tarva* [1973] 2 Lloyd's Rep 385.

[47] Moot Problem, 9, 52.

C. The Charterers cannot rely on the principle of unjust enrichment

32. The Owners argue that the Charterers' contractual obligation to pay freight had arisen because freight was 'deemed earned' prior to the cancellation of the Charterparty. Therefore the Owners argue that the payment of freight would not result in unjust enrichment because the Charterers would only be fulfilling their contractual obligations.

33. The payment of advance freight, when specified by the terms of the contract, is a contractual obligation that is due and irrecoverable, even when the voyage is not completed.[48]

34. A party cannot seek equitable relief from liability that the contract requires them to bear simply because they consider it unjust in the circumstances that the obligation be enforced.[49]

35. Therefore because the Owners' right to freight accrued prior to the cancellation of the Charterparty, the Charterers are contractually obliged to pay and cannot claim unjust enrichment.

D. Alternatively, the Owners argue that they are entitled to damages because the Charterers have breached the Charterparty by failing to pay freight

36. Alternatively if this Tribunal finds that the Charterers are not contractually obliged to pay freight, the Owners argue that they are entitled to the amount of freight claimed

[48] *Karin Vatis Vagres Compania Maritime SA v Nissho-Iwai America Corp* ('*The Karin Vatis*') [1988] 2 Lloyd's Rep 330, 332 (Lloyd J); *Colonial Bank v European Grain & Shipping Ltd* ('*The Dominique*') [1989] 1 Lloyd's Rep 431, 435 (Lord Brandon); *Compania Naviera General SA v Kerametal Ltd* ('*The Lorna I*') [1983] 1 Lloyd's Rep 373, 374-5 (Sir Donaldson MR); *Allison v Bristol Marine Insurance Co* (1876) 1 App Cas 209, 226 (Brett J), 253 (Lord Selbourne); Eder et al, above n 36, 326 [15-005].

[49] *Hyundai Shipbuilding & Heavy Industries Co Ltd v Pournaras* [1978] 2 Lloyd's Rep 502, 508-9 (Roskill LJ); *Hyandai Heavy Industries Co Ltd v Papadopoulos* [1980] 2 Lloyd's Rep 1, 7 (Viscount Dilhorne); Robert Stevens, 'Chapter 1: Is there a Law of Unjust Enrichment?' in Simone Degeling and James Edelman (eds), *Unjust Enrichment in Commercial Law* (Thomson Reuters, 2008) 11, 17, 24-6.

by way of damages because the Charterers breached Clause 4 of the Owners' Standard Terms.

37. Freight became payable on 19 November 2011.[50] The Charterers did not pay the freight at that time.[51] The Owners argue that this breached Clause 4 of the Owners' Standard Terms, and entitles the Owners to damages. The loss suffered by the Owners is equal to the amount of the freight. Therefore the Owners claim the payment of US$4,935,368.75 by way of damages.

E. The Owners are entitled to compound or simple interest on the amount owed

38. The Owners argue that if they are entitled to the sum of US$4,935,368.75 either as freight or damages, then the Owners are also entitled to interest on that amount.

39. An arbitral tribunal has a discretionary power to award compound or simple interest.[52] The award of interest may be on the whole or part of any amount awarded by the tribunal, in respect of any period up to the award.[53]

40. In *Man Nutzfahrzeuge AG v Freightliner Ltd*[54] Lord Justice Moore-Bick said that simple interest does not adequately compensate the injured party or reflect the benefits obtained by the wrongdoer.[55] Therefore arbitrators commonly award compound interest.[56]

41. The amount claimed as freight or damages became payable on 19 November 2011.[57] The Owners argue that compound interest should be paid on the full amount owed

[50] Moot Problem, 44, 46, 87.
[51] Ibid, 107.
[52] *Arbitration Act 1996* (UK) c 23, s 49.
[53] Ibid, s 49(3)(a).
[54] [2005] EWHC 2347 (Comm).
[55] *Man Nutzfahrzeuge AG v Freightliner Ltd* [2005] EWHC 2347 (Comm), [321] (Moore-Bick LJ).
[56] Nigel Blackaby et al, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th ed, 2009) 543 [9.80]; *Man Nutzfahrzeuge AG v Freightliner Ltd* [2005] EWHC 2347 (Comm), [321] (Moore-Bick LJ); *LG&E Energy Corp, LG&E Capital Corp, and LG&E International Inc v The Argentine Republic* (Award, ICSID Case No ARB/02/1; IIC 295, 25 July 2007), 29; *Seimens AG v The Argentine Republic* (Award, ICSID Case No ARB/02/8; IIC 227, 6 February 2007), 127.
[57] Moot Problem, 44, 46, 87.

from that date, in order to fully compensate the Owner. Alternatively the Owners argue that they are entitled to simple interest on the amount.

PART THREE: CONTRACTUAL LIABILITY

42. The Owners argue that they are not liable to the Charterers for a breach of the Charterparty because: (A) the Owners did not breach the duty to proceed with all convenient dispatch; (B) the Owners did not breach the duty to notify of changes to the Vessel's ETA; and (C) in any event, Clause 2 exempts the Owners from all liability.

A. The Owners did not breach the duty to proceed with all convenient dispatch

43. Clause 1 of the Asbatankvoy contains the duty to proceed with all convenient dispatch.[58] This is equivalent to the common law duty to proceed with reasonable dispatch.[59] The Owners argue that they did not breach the duty to proceed with all convenient dispatch because: (I) the Owners commenced the approach voyage at an appropriate time to meet the laycan; (II) the Owners did all that was reasonable and convenient; and (III) the delay caused by the arrest and detention of the Vessel did not frustrate the main purpose of the Charterparty.

I. The Owners commenced the approach voyage at an appropriate time to meet the laycan

44. The duty to proceed with all convenient dispatch combined with an expected readiness to load clause imposes an obligation on the shipowner to ensure that the

[58] Ibid, 11, 54.

[59] *Fyffes Group Ltd and Caribbean Gold Ltd v Reefer Express Lines Pty Ltd and Reefkrit Shipping Inc* ('*The Kriti Rex*') [1996] 2 Lloyd's Rep 171, 191 (Moore Bick J); *Monroe Brothers Ltd v Ryan* [1935] 51 Ll L Rep 179, 182 (Greer LJ); *Evera SA Commercial v North Shipping Co Ltd* ('*The North Anglia*') [1956] 2 Lloyd's Rep 367, 373 (Devlin J); *President of India v Hariana Overseas Corporation* ('*The Takafa*') [1990] 1 Lloyd's Rep 536, 537 (Hirst J).

vessel begins its approach voyage by the day when, if it proceeds with all reasonable dispatch, it would arrive at the loading port by the expected date.[60]

45. An expected readiness to load clause is analogous to an ETA provision specifying the date the vessel is expected to arrive at the loadport.[61] The approach voyage commences on the date of the charter from wherever the vessel happens to be to the loading port.[62]

46. The Fixture Recap contains an ETA clause specifying 3 December 2011 as the estimated date of arrival at the loadport.[63] The Owners argue that the approach voyage commenced on 19 November 2011 when subjects were lifted. In order to arrive at the loadport by 3 December 2011 the Vessel needed to leave the Bunkerport by 23 November 2011.[64] At the time the approach voyage commenced the Vessel was expected to arrive at the loadport by the ETA date.[65] However the Vessel was arrested at the Bunkerport between 19 and 22 November 2011.[66] This was the only cause of delay. The Owners argue that had the Vessel not been arrested, the Vessel would have met the ETA.

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[60] *Geogas SA v Trammo Gas Ltd* ('*The Baleares*') [1993] 1 Lloyd's Rep 215, 225 (Neill LJ); *Mitsui OSK Lines Ltd v Garnac Grain Co Inc* ('*The Myrtos*') [1984] 2 Lloyd's Rep 449, 452-3 (Leggatt J); *Evera SA Commercial v North Shipping Co Ltd* ('*The North Anglia*') [1956] 2 Lloyd's Rep 367, 372 (Devlin J); *Louis Dreyfus & Co v Lauro* (1938) 60 Ll L Rep 94, 97 (Branson J); *Monroe Brothers Ltd v Ryan* [1935] 51 Ll L Rep 179, 182 (Greer LJ).

[61] *Geogas SA v Trammo Gas Ltd* ('*The Baleares*') [1993] 1 Lloyd's Rep 215, 225 (Neill LJ); *Mitsui OSK Lines Ltd v Garnac Grain Co Inc* ('*The Myrtos*') [1984] 2 Lloyd's Rep 449, 452-3 (Leggatt J); Julian Cooke et al, *Voyage Charters* (Informa Law, 3rd ed, 2007) 95-96 [4.11]-[4.12].

[62] *Geogas SA v Trammo Gas Ltd* ('*The Baleares*') [1993] 1 Lloyd's Rep 215, 225 (Neill LJ); *Fyffes Group Ltd and Caribbean Gold Ltd v Reefer Express Lines Pty Ltd and Reefkrit Shipping Inc* ('*The Kriti Rex*') [1996] 2 Lloyd's Rep 171, 188 (Moore-Bick J); *Evera SA Commercial v North Shipping Co Ltd* ('*The North Anglia*') [1956] 2 Lloyd's Rep 367, 372 (Devlin J); *Louis Dreyfus & Co v Lauro* (1938) 60 Ll L Rep 94, 97 (Branson J).

[63] Moot Problem, 4, 47.

[64] Ibid, 5, 48, 90, 92, 94.

[65] Ibid, 89, 90.

[66] Ibid, 92.

II. The Owners did all that was reasonable and convenient

47. The duty to proceed with all convenient dispatch requires a shipowner to make reasonable speed to arrive at its destination by the designated date.[67] Reasonableness is determined by reference to the circumstances of the particular case[68] including the impact on the business interests of the party bound by the obligation.[69]

48. The Owners argue that they did all that was reasonable to ensure the Vessel met the laycan. The Vessel was arrested after arriving at the Bunkerport.[70] Local lawyers at the Bunkerport demanded a 'preposterously high' figure for the amount that the Owners owed to the bunker suppliers and were required to put up as security.[71] The Owners had not been paid the advance freight they were owed by the Charterers and had limited funds available.[72] The Owners entered into negotiations to have the figure reduced.[73] This was ordinary practice at the Bunkerport.[74] At that time the Owners still expected that the Vessel would meet the laycan.[75] However despite the Owners' 'strenuous efforts' during the following two days, they were not successful in securing the Vessel's release.[76]

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[67] *Geogas SA v Trammo Gas Ltd* ('*The Baleares*') [1993] 1 Lloyd's Rep 215, 225 (Neill LJ); *Ease Faith Ltd v Leonis Marine Management Ltd* [2006] EWHC 232 (Comm), 697 (Smith J); *President of India v Hariana Overseas Corporation* ('*The Takafa*') [1990] 1 Lloyd's Rep 536; 538 (Hirst J); Eder et al, above n 36, 124 [7-033].

[68] *S Sanday & Co v Keighley, Maxsted & Co S Sanday & Co v Hillerns & Fowler* [1922] 10 Ll L Rep 738, 740 (Lord Pickford MR); *Bamford Bros Ltd v Great Western Railway Company* [1922] 13 Ll L Rep 489, 492 (Rowlatt J); *Mitsui & Co v Olympia Oil & Cake Company Ltd* [1921] 9 Ll L Rep 368, 369 (Horridge J).

[69] *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7, [41] (French CJ, Hayne, Crennan and Kiefel JJ); *Transfield Pty Ltd v Arlo International Ltd* (1980) 144 CLR 83, 101 (Mason J); *B Davis Ltd v Tooth & Co Ltd* [1937] 4 All ER 118, 128 (Lord Roche).

[70] Moot Problem, 92.

[71] Ibid, 93.

[72] Ibid.

[73] Ibid.

[74] Ibid.

[75] Ibid, 94.

[76] Ibid, 95.

III. The delay caused by the arrest and detention of the Vessel did not frustrate the main purpose of the Charterparty

49. The duty to proceed with all convenient dispatch is breached when the shipowner causes a delay and that delay frustrates the main purpose of the charterparty.[77] In order for a breach to be so fundamental that it frustrates the main purpose of the charterparty, that breach must render performance totally different to that intended by the parties and deprive the parties of substantially the whole benefit of the agreement.[78] The main purpose of a voyage charterparty is to transport the cargo in exchange for the payment of freight.[79]

50. The Vessel was arrested at the Bunkerport en route to the loadport.[80] The Owners were unsuccessful in having the Vessel released by 25 November 2011 and the Vessel was therefore unable to meet the laycan.[81] The Owners argue that although this arrest did cause a delay it did not prevent them from fulfilling the main purpose of the Charterparty which was to transport the cargo from Blueland to Indigoland. Therefore performance was not rendered completely different to that intended by the parties and the main purpose of the Charterparty was not frustrated.

B. The Owners did not breach the duty to notify of changes to the Vessel's ETA

51. The Owners argue that they did not breach the duty to notify of changes to the Vessel's ETA because: (I) they complied with the notice requirements under Clause 3

[77] *EL Oldendorff & Co GmbH v Tradax Export SA* [1974] AC 479, 555-7 (Lord Diplock); *WP & R M'Andrew v Adams* (1834) 131 English Rep 1028; *MacAndrew v Chapple* (1866) LR 1 CP 643; *Universal Cargo Carriers v Citati* [1957] 2 QB 401.
[78] *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1961] 2 Lloyd's Rep 478, 487-8 (Sellers LJ); *BS & N Ltd (BVI) v Micado Shipping Ltd (Malta)* ('*The Seaflower*') [2000] 2 Lloyd's Rep 37, 41 (Walker J); *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* ('*The Hannah Blumenthal*') [1983] 1 Lloyd's Rep 103, 117 (Lord Diplock).
[79] *MacAndrew v Chapple* (1866) LR 1 CP 643, 648 (Willes J); *Metall Market OOO v Vitorio Shipping Co Ltd* [2013] 2 Lloyd's Rep 541, 571 (Sir Rix LJ); Cooke et al, above n 61, 3 [1.1].
[80] Moot Problem, 92.
[81] Ibid, 95.

of the Charterers' Standard Terms. Alternatively the Owners argue that: (II) Charterers are entitled only to nominal damages.

I. The Owners complied with the notice requirements under Clause 3 of the Charterers' Standard Terms

52. The Charterparty contains three different ETA provisions: Clause 27 of the Rider Clauses;[82] Clause 1 of the Owners' Standard Terms;[83] and Clause 3 of the Charterers' Standard Terms.[84]

53. Clause 1 of the Charterers' Standard Terms provides that the Charterers' Standard Terms take precedence over any other terms.[85] The Owners argue that the effect of Clause 1 is to make Clause 3 of the Charterers' Standard Terms the applicable ETA provision under the Charterparty. Therefore, the Owners argue that Clause 3 is the relevant ETA provision in determining the obligations of the duty to notify.

54. Clause 3 requires the Owners to give notice of arrival 'immediately and where applicable, every 5 days and then every 96, 72, 48, 24 and 12 hours notice'.[86]

55. The Owners gave immediate notice of the Vessel's ETA on the day the Charterparty was circulated for signatures.[87] No further notice was required for five days,[88] which would have been 24 November 2011. The Vessel was arrested prior to the expiry of the five day period.[89] On 23 November 2011, prior to the expiry of the five days, the Owners notified the Charterers that the Vessel was still expected to meet its original laycan despite the arrest and that they would update the Charterers when

[82] Ibid, 24, 67.
[83] Ibid, 44, 87.
[84] Ibid, 45, 88.
[85] Ibid.
[86] Ibid.
[87] Ibid, 89.
[88] Ibid, 45, 88.
[89] Ibid, 92.

circumstances changed.[90] Circumstances did not change however by 25 November 2011 it was clear that the Vessel would miss its laycan.[91] On 25 November 2011 the Owners notified the Charterers that the Vessel would not meet its laycan and that they were unable to provide a revised laycan date at that time.[92] Therefore the Owners argue that they did provide sufficient notice to satisfy Clause 3 of the Charterers' Standard Terms which was the applicable notice clause.

II. Alternatively the Charterers are only entitled to nominal damages for a breach of the duty to notify

56. Alternatively if this Tribunal finds that the Owners did breach the duty to notify, the Owners argue that the Charterers are only entitled to nominal damages.

57. A warranty is a term of the contract, a breach of which will only entitle the innocent party to damages, not repudiation.[93] Repudiation is only available for conditions that go to the root of the contract.[94] If no loss or damage is proven, then the innocent party is only entitled to nominal damages.[95]

58. The Owners argue that the duty to notify of changes to the Vessel's ETA is a warranty not a condition because it does not affect the main purpose of the Charterparty (the carriage of the cargo) nor does it affect the actual date of the Vessel's arrival. Therefore it does not go to the root of the Charterparty.[96]

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[90] Ibid, 94.
[91] Ibid, 95.
[92] Ibid.
[93] *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1961] 2 Lloyd's Rep 478, 493 (Diplock LJ); *R G Grain Trade LLP v Feed Factors International Ltd* [2011] 2 Lloyd's Rep 432, 440 (Hamblen J); H G Beale, *Chitty on Contracts* (Sweet & Maxwell, 30th ed, 2011) vol 1, 831 [12-031].
[94] *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 WLR 361, 380 (Buckley LJ); *Kuwait Rocks Co v Amn Bulkcarriers Inc* ('*The Astra*') [2013] EWHC 865 (Comm) 69, 74 (Flaux J); *R G Grain Trade LLP v Feed Factors International Ltd* [2011] 2 Lloyd's Rep 432, 440 (Hamblen J).
[95] Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 17th ed, 2003) 4 [1-002].
[96] Paragraphs [49]-[50] above.

59. The Owners did not immediately notify the Charterers when the Vessel was arrested at the Bunkerport.[97] The Charterers learnt of the delay through other avenues.[98] However the Owners argue that their failure to give immediate notice did not result in any additional loss or damage to the Charterers. Therefore the Charterers would only be entitled to nominal damages.

C. In any event, Clause 2 exempts the Owners from all liability

60. Clause 2 of the Owners' Standard Terms provides that the Charterparty may be cancelled without recourse when it becomes evident that the Vessel will miss the laycan.[99] The Owners argue that the Charterers are prevented from claiming damages because: (I) the Charterparty was cancelled under Clause 2; (II) Clause 2 stipulates that cancellation is 'without recourse to either party whatsoever'; and (III) in any event Clause 2 is unambiguous and, when read in its natural and ordinary meaning, exempts the Owners from all liability.

I. The Charterparty was cancelled under Clause 2

61. The Owners argue that the Charterparty was cancelled under Clause 2 because: (a) the Charterers' right to cancel was validly exercised; or (b) alternatively, the Charterparty was cancelled by agreement under Clause 2.

a. The Charterers' right to cancel the Charterparty was validly exercised

62. A cancellation clause gives the charterer an absolute right to terminate the charterparty regardless of whether the owner has breached the charterparty.[100] This right accrues in accordance with the requirements laid out in the clause.[101]

[97] Moot Problem, 92.
[98] Ibid.
[99] Ibid, 87.
[100] *Marbienes Compania Naviera SA v Ferrostaal AG* ('*The Democritos*') [1976] 2 Lloyd's Rep 149, 152 (Lord Denning MR); *Smith v Dart & Son* (1884) 14 QBD 105, 108 (Smith J); Eder et al, above n 36, 149 [9-006].

63. Clause 2 provides that when it becomes evident that the Vessel will miss the laycan, the Owners must provide a revised ETA and laycan.[102] The Charterers may decline the revised laycan and cancel the Charterparty.[103]

64. Laycan is the time between the earliest date that the vessel is expected to begin loading and the date after which the charterers have the right to cancel the charterparty.[104] A vessel's ETA is the time at which it is reasonably certain that the vessel will arrive at port.[105] The laycan and ETA must be provided honestly and on reasonable grounds based on the facts known to the owner.[106]

65. On 25 November 2011 the Owners notified the Charterers that the Vessel could not meet the laycan.[107] The Owners were unable to provide a revised ETA and laycan because the Vessel remained under arrest.[108] The Owners argue that this was honest and reasonable because it was unclear when the Vessel would be released. On 27 November 2011 the Charterers cancelled the Charterparty and stated that they considered the Owners' notification to be a revised ETA and laycan for undetermined dates.[109] The Charterers also stated that they would have cancelled the Charterparty

[101] *Newland Shipping and Forwarding Ltd v Toba Trading FZC* [2014] EWHC 661 (Comm), [49] (Longmore J); *Cheikh Boutros Selim El-Khoury and Others v Ceylon Shipping Lines Ltd* ('*The Madeleine*') [1967] 2 Lloyd's Rep 224, 237-8 (Roskill J); *Christie & Vesey Ltd v Maatschappij Tot Exploitatie van Scheepen en Andere Zaken, Helvetia NV* ('*The Helvetia-S*') [1960] 1 Lloyd's Rep 540, 552 (Pearson J).
[102] Moot Problem, 44, 87.
[103] Ibid.
[104] *ERG Raffinerie Mediterranee SpA v Chevron USA Inc* ('*The Luxmar*') [2007] 2 Lloyd's Rep 542, 546 (Longmore J); *Tidebrook Maritime Corporation v Vitol SA of Geneva* ('*The Front Commander*') [2006] 2 Lloyd's Rep 251, 257 (Rix LJ).
[105] See, eg, *Mitsui OSK Lines Ltd v Garnac Grain Co Inc* ('*The Myrtos*') [1984] 2 Lloyd's Rep 449, 451-2 (Leggatt J); *SHV Gas Supply and Trading SAS v Naftomar Shipping & Trading Co Ltd Inc* [2006] 1 Lloyd's Rep 163, 173 (Clarke J); *Tidebrook Maritime Corporation v Vitol SA of Geneva* ('*The Front Commander*') [2006] 2 Lloyd's Rep 251, 257 (Rix LJ).
[106] *S Sanday & Co v Keighley, Maxsted & Co S Sanday & Co v Hillerns & Fowler* [1922] 10 Ll L Rep 738, 742 (Lord Pickford MR); *SHV Gas Supply and Trading SAS v Naftomar Shipping & Trading Co Ltd Inc* [2006] 1 Lloyd's Rep 163, 172 (Clarke J); *Mitsui OSK Lines Ltd v Garnac Grain Co Inc* ('*The Myrtos*') [1984] 2 Lloyd's Rep 449, 453 (Leggatt J).
[107] Moot Problem, 95.
[108] Ibid.
[109] Ibid, 96.

regardless of any revised ETA and laycan provided.[110] The Owners argue that the Charterers' treatment of the notification as a revised ETA and laycan of undetermined dates, and subsequent rejection, is a valid cancellation under Clause 2.

b. Alternatively the Charterparty was cancelled by agreement under Clause 2

66. Alternatively, if the Owners did not provide a revised laycan, the Owners argue that the Charterparty was cancelled by agreement under Clause 2 because the Owners accepted the Charterers' premature cancellation.

67. A right to cancel cannot be exercised before the right accrues under the cancellation clause.[111] The owner may refuse a premature cancellation and continue with the charter.[112] However if the owner accepts a premature cancellation without objection the charterparty is cancelled by agreement.[113]

68. The right to cancel the Charterparty would accrue after the Owners provided a revised laycan.[114] The Charterers cancelled the Charterparty on 27 November 2011 before a revised laycan was provided.[115] The Owners confirmed the Charterers' notice of cancellation on 28 November 2011.[116] The Owners relied specifically on the wording of Clause 2 confirming that the Charterparty was cancelled without recourse.[117]

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[110] Ibid, 96.
[111] *Noemijulia Steamship Co Ltd v Minister of Food* ('*The San George*') [1950] 83 Ll L Rep 500, 507 (Devlin J); *Cheikh Boutros Selim El-Khoury and Others v Ceylon Shipping Lines Ltd* ('*The Madeleine*') [1967] 2 Lloyd's Rep 224, 244 (Roskill J); *Christie & Vesey Ltd v Maatschappij Tot Exploitatie van Scheepen en Andere Zaken, Helvetia NV* ('*The Helvetia-S*') [1960] 1 Lloyd's Rep 540, 551-2 (Pearson J); Cooke et al, above n 61, 545 [19.27].
[112] *Fercometal SARL v Mediterranean Shipping Co SA* ('*The Simona*') [1988] 2 Lloyd's Rep 199, 203 (Lord Ackner); *Heyman v Darwins Ltd* [1942] 72 Ll L Rep 65, 68 (Viscount Simon LC); *Golding v London & Edinburgh Insurance Company Ltd* [1932] 43 Ll L Rep 487, 488 (Scrutton LJ); Cooke et al, above n 61, 546 [19.30].
[113] *Fercometal SARL v Mediterranean Shipping Co SA* ('*The Simona*') [1988] 2 Lloyd's Rep 199, 203 (Lord Ackner); *Christie & Vesey Ltd v Maatschappij Tot Exploitatie van Scheepen en Andere Zaken Helvetia NV* ('*The Helvetia-S*') [1960] 1 Lloyd's Rep 540, 551-2 (Pearson J); *Golding v London & Edinburgh Insurance Company Ltd* [1932] 43 Ll L Rep 487, 488 (Scrutton LJ); Eder et al, above n 36, 149 [9-007].
[114] Moot Problem, 44, 87.
[115] Ibid, 96.
[116] Ibid, 97.
[117] Ibid.

Therefore the Charterparty was cancelled under Clause 2 and this exempts the Owners from liability.

II. Clause 2 stipulates that cancellation is 'without recourse to either party whatsoever'

69. The Owners argues that cancellation under Clause 2 was without recourse to either party whatsoever because: (a) the words 'to either party whatsoever' were included in Clause 2; and (b) the inclusion of these words clearly exempts the Charterers from claiming damages.

a. The words 'to either party whatsoever' were included in Clause 2

70. When a contract is signed the parties are presumed to have knowledge of its terms.[118] Parties are bound by the terms of the contract even if one party fails to read the contract.[119] Commercial entities in particular are considered capable of protecting their own interests.[120]

71. During negotiations the Charterers sought to have Clause 2 amended to remove the words 'to either party whatsoever'.[121] On 19 November 2011 the Charterparty was circulated for signature.[122] The Charterers did not object to the continued inclusion of the words 'to either party whatsoever'. The Owners argue that the Charterers are therefore bound by the final version of the Charterparty, including these words.

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[118] *Parker v South Eastern Railway Company* [1877] 2 CPD 416, 421 (Mellish LJ); *L'Estrange v F Graucob Ltd* [1934] 2 KB 394, 404 (Scrutton LJ); *Ariadne Steam Ship Company v James McKelvie & Co* [1921] 9 Ll L Rep 388, 389-90 (Bankes LJ).

[119] *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, 186-93, (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ); *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 79 ALR 9, 31 (Brennan J); *L'Estrange v F Graucob Ltd* [1934] 2 KB 394, 404 (Scrutton LJ); *Parker v South Eastern Railway Company* [1877] 2 CPD 416, 421 (Mellish LJ).

[120] *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 Lloyd's Rep 545, 554 (Lord Diplock); *Brown v InnovatorOne Plc* [2012] EWHC 1321 (Comm), [1304] (Hamblen J).

[121] Moot Problem, 3.

[122] Ibid, 47.

b. The inclusion of these words clearly exempts the Charterers from claiming damages

72. An exemption clause limits parties' contractual liability.[123] Parties to a commercial contract can apportion their risk as preferred.[124] Exemption clauses must be interpreted with the general principles of contractual interpretation.[125] Words must be construed in accordance with their ordinary and natural meaning.[126] When the exemption clause is clear and capable of only one meaning the courts must enforce it.[127] Courts cannot strain the construction of the words if the exemption clause is unambiguous.[128]

73. An exemption clause is clear and capable of only one meaning when a reasonable person with all the relevant background knowledge of the parties would have understood what the parties intended.[129] The subjective intention of the parties and the fact that a clause is unfavourable to a party is irrelevant.[130] 'Recourse' is a legal right to demand payment or compensation.[131] The ordinary and natural meaning of 'whatsoever' is 'no matter what'.[132]

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[123] *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 Lloyd's Rep 545, 553 (Lord Diplock); *Fujitsu Services Ltd v IBM United Kingdom Ltd* [2014] EWHC 752 (TCC), [25] (Carr J).
[124] *Fujitsu Services Ltd v IBM United Kingdom Ltd* [2014] EWHC 752 (TCC), [26] (Carr J); Beale, above n 93, 909 [14-001].
[125] *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd and Securicor (Scotland) Ltd* ('*The Strathallan*') [1983] 1 Lloyd's Rep 183, 186 (Lord Fraser); Beale, above n 93, 912 [14-005].
[126] *Prenn v Simmonds* [1971] 1 WLR 1381, 1385 (Lord Wilberforce); Beale, above n 93, 911-2 [14-005].
[127] *Rainy Sky v Kookmin Bank* [2011] 1 WLR 2900, 2908 (Lord Clarke); *Fujitsu Services Ltd v IBM United Kingdom Ltd* [2014] EWHC 752 (TCC), [24] (Carr J); *L Schuler AG v Wickman Machine Tool Sales Ltd* [1973] 2 Lloyd's Rep 53, 57 (Lord Reid); Beale, above n 93, 914 [14-007].
[128] *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 Lloyd's Rep 545, 553-4 (Lord Diplock); *Fujitsu Services Ltd v IBM United Kingdom Ltd* [2014] EWHC 752 (TCC), [49] (Carr J); Beale, above n 93, 912 [14-005].
[129] *Rainy Sky v Kookmin Bank* [2011] 1 WLR 2900, 2908 (Lord Clarke); *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101, 1112 (Lord Hoffmann); *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989, 995-7 (Lord Wilberforce).
[130] *Rainy Sky v Kookmin Bank* [2011] 1 WLR 2900, 2908 (Lord Clarke); *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101, 1115 (Lord Hoffmann); *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896, 913 (Lord Hoffman).
[131] J A Simpson and E S C Weiner (eds), *Oxford English Dictionary* (Oxford University Press, 2nd ed, 1989) 366; Susan Butler (ed), *Macquarie Dictionary* (Macquarie Dictionary Publishers, 5th ed, 2009) 1385.
[132] Butler (ed), above n 131, 1877.

74. The Charterparty is a detailed contract between two commercial entities with experience in the maritime industry.[133] Clause 2 covers cancellation resulting from the Vessel missing the laycan.[134] The Owners argue that a reasonable person with the relevant background knowledge of both parties would have understood the words 'without recourse to either party whatsoever' to exempt both parties from all liability connected with the cancellation, including losses that result from missing the laycan, which gave rise to the right to cancel.

III. In any event Clause 2 is unambiguous and, when read in its natural and ordinary meaning, exempts the Owners from all liability

75. In any event the Owners argue that if Clause 2 does not include the words 'to either party whatsoever' it still exempts the Owners from all liability connected to the cancellation because the words 'without recourse' are sufficient. The Owners argue that a reasonable person with all the relevant background knowledge of the parties would have understood the words 'without recourse' as including both parties and all losses arising in connection to the cancellation because this is what Clause 2 encompassed.

[133] Moot Problem, 1, 47-88.
[134] Ibid, 44, 87.

PART FOUR: LIABILITY IN TORT

76. Tortious damages are not recoverable for economic losses that do not directly result from personal injury or property damage.[135]

77. The Owners argue that economic loss cannot be claimed in tort because there was no personal injury or property damage sustained in this case. Therefore the Charterers cannot bring a claim in tort.

PRAYER FOR RELIEF

For the reasons set out above, the Owners request this Tribunal to:

(I) **DECLARE** that this Tribunal has jurisdiction to hear the merits of this dispute;

(II) **FIND** that the Charterers are liable to the Owners for freight;

(III) **FIND** that the Owners are not liable to the Charterers for breaches of the Charterparty; and therefore

(IV) **AWARD** freight or damages to the Owners and interest on the amounts claimed.

[135] *Neitrigrin Eirann Teoranta v Inco Alloys Ltd* [1992] 1 WLR 498; *Murphy v Brentwood District Council* [1991] 1 AC 398; *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] 1 QB 27, 36 (Lord Roskill); *Weller & Co v Foot and Mouth Research Institute* [1966] 1 QB 569; *Donoghue v Stevenson* [1932] AC 562; Judge Walton, Roger Cooper & Simon E Wood, *Charlesworth & Percy on Negligence* (Sweet & Maxwell, 10th ed, 2001) 67-72.