MEMORANDUM FOR THE RESPONDENT


Against: Furnace Trading Pte Ltd., 2 Marina Boulevard, #19-05, Singapore 018990, Singapore.

RESPONDENT

TEAM
C. Yamuna Menon • Mukta Joshi • Srinivas Cummaragunta
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ISSUES RAISED

In light of the preliminary submissions made by the Claimant and the Respondent, the following issues arise for consideration before the Arbitral Tribunal:

I. WHICH CHARTER PARTY HAS BEEN INCORPORATED INTO THE BILL OF LADING?

II. WHETHER RESPONDENT IS LIABLE TO PAY FREIGHT TO CLAIMANT

III. WHETHER CLAIMANT CAN VALIDLY EXERCISE A LIEN ON THE CARGO

IV. WHETHER CLAIMANT CAN VALIDLY EXERCISE A LIEN ON SUB-FREIGHT

V. WHETHER CLAIMANT CAN CLAIM DAMAGES FOR DETENTION AND BREACH OF CHARTER PARTY

VI. WHETHER THE ARBITRAL TRIBUNAL HAS THE POWER AND JURISDICTION TO ORDER THE SALE OF THE CARGO PENDENTE LITE

VII. WHETHER IT IS JUST AND NECESSARY TO ORDER THE SALE OF CARGO
STATEMENT OF FACTS

THE PARTIES AND CHAIN OF CHARTER PARTIES

1. MV “Tardy Tessa” was time chartered by Furnace Trading Pte Ltd (“Furnace”/“Claimant”) from the vessel owner Imlam Consignorist GmbH (“Imlam”) by way of a time C/P dated 15th February 2016. Later, Furnace being the disponent owner, chartered the vessel to Inferno Resources Sdn Bhd (“Inferno”/“Respondent”) by way of a voyage C/P dated 1st September 2016 for the carriage of 80,000 mt 10% MOLOO Australian Steam Coal (“cargo”). The shipper of the cargo, Idoncare Berjaya Utama Pty. Ltd. (“Idoncare”) is also a respondent. The nature of the relationship and C/P between Inferno and Idoncare is not verified.

BILL OF LADING AND FREIGHT

2. A B/L dated 4th October 2016 was signed by the master and issued under the form of Imlam. The B/L incorporates all “terms and conditions, liberties and exceptions of the C/P, dated as overleaf” as per clause (1) of the conditions of carriage and also mentions “Freight payable as per C/P”, but no such C/P has been identified. As per the voyage C/P, the payment of freight has to be made within five banking days after completion of loading and signing/releasing B/L’s.

3. As the B/L was issued on 4th October 2016, the due date of the freight was 9th October 2016. Inferno was supposed to declare the discharge port as per the voyage C/P when the vessel passed Singapore for bunkering. The Claimant issued Invoice No. 1002/2016 to Inferno on 9th October 2016 for a sum of USD 771,120.48 being 100% freight due under the Voyage C/P on the basis of Shanghai being the discharge port.
NOTICE OF LIEN AND NOTICE OF TERMINATION

4. The vessel and the crew were kept adrift in open seas, as a legitimate discharge port was not nominated by Inferno on time. Moreover, Inferno failed to make the payment of the freight even after repeated demands from the Claimant. As a consequence, the Claimant issued a notice of lien on cargo to Inferno on 20th October 2016. On the same day, a notice of lien on sub-freight was issued to Idoncare. Inferno was informed about the same. Considering the conduct of Inferno to be wrongful and in repudiatory breach of the voyage C/P, the Claimant issued a notice of termination on 22nd October 2016.

ARBITRAL PROCEEDINGS AND THE CLAIMS

5. The Claimant sent a notice of arbitration to Inferno and Idoncare on 25th November 2016. The Claimant seeks the freight amount, damages for detention, damages for breach of C/P and other such damages, a declaration about the lien on cargo and sub-freight being lawful, costs for exercising the lien, preservation of cargo indemnity in respect of the expenses and interests on such amounts. Inferno and Idoncare denied all the claims and allegations made by the Claimant through their response dated 26th November 2016. Later, the Claimant made an urgent application to the Arbitral Tribunal for the sale of the cargo pendente lite on 1st December 2016. Inferno has objected to the Claimant’s application for sale.
ARGUMENTS ADVANCED

1. SUB-VOYAGE CHARTER PARTY BETWEEN INFERNO AND IDONCARE IS INCORPORATED INTO THE BILL OF LADING

1. It is submitted that the terms and provisions of the sub-voyage charter party between Inferno and Idoncare are incorporated into the B/L. This submission is made for two reasons, first, that the existence of a sub-voyage charter party between Inferno and Idoncare can be inferred from the language used by the representatives of Inferno and Furnace [1.1]. Second, between the voyage charter entered between Furnace and Inferno, and the voyage charter between Inferno and Idoncare, the latter is incorporated into the B/L [1.2].

[1.1] THE EXISTENCE OF A SUB-VOYAGE CHARTER PARTY CAN BE INFERRED FROM THE LANGUAGE USED BY FURNACE AND INFERNO

2. The existence of a sub-voyage charter between Inferno and Idoncare can be inferred based on the language and the terms used by representatives of Inferno at different points in the scenario. The language and terms used can ascertain facts and circumstances in a shipping contract. Courts have differentiated between terms such as “hire” and “freight” and held that depending on the term that is used, the type of C/P can be ascertained.1 Throughout the e-mail communication between Mr. Gordon Grill and Mr. Eric Yan, there are multiple references to “sub-charterers”,2 “sub-freight”3 etc. This, therefore, indicates that there has to be a sub-voyage charter party between Inferno and Idoncare under which these terms arise. Thus, it is submitted that this C/P between Inferno and Idoncare is a voyage charter and not a time charter.

2 Moot Scenario, Page 56, Email Transcript dated 15 October 2016; Moot Scenario, Page 68, Email Transcript dated 21 October 2016.
3 Moot Scenario, Page 62, Email Transcript dated 19 October 2016.
3. Additionally, the usage of the term freight instead of hire indicates that it is a voyage C/P. This distinction between hire and freight was made in *Federal Commerce & Navigation Co. Ltd. v. Molena Alpha Inc.* It was held that in modern times, payments due under a time charter are called hire and those due under a voyage charter are called freight. The observations of the Court in *Itex Itagrani Export S.A. v. Care Shipping Corporation and others*, reaffirm this stance. It held that in the shipping industry, the use of the term “freight” was restricted to sums owed under voyage charters.

**[1.2]** *THE INFERNO-IDONCARE SUB-VOYAGE CHARTER PARTY IS INCORPORATED INTO THE BILL OF LADING*

4. It is submitted that the incorporation clause on the B/L seeks to incorporate the sub-voyage charter party between Idoncare and Inferno and not the Inferno-Furnace voyage C/P as claimed by Claimant. Even though the head C/P was held to have been incorporated in the B/L in the case of *The San Nicholas*, this was because the shipowners were party to the B/L. Thus, they could have only sought to incorporate a C/P to which they were a party. This is significant when contrasted to the exception to this rule in several cases. However, the rationale behind these exceptions that the courts laid down was that in case the head charter was a time charter, it would contain clauses regarding hire, B/Ls etc., which would not be

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applicable to a contract for the voyage. Therefore, the terms of a voyage charter are more applicable in this situation.\textsuperscript{11}

5. In the present case, it can be ascertained that the parties to the B/L are Imlam and Idoncare. Additionally, the C/P to which Imlam is party to is a time charter.\textsuperscript{12} But, the C/P that Idoncare is party to is a voyage charter, as has been discussed above. It is therefore submitted that in accordance with the rationale in the \textit{San Nicholas},\textsuperscript{13} the voyage charter between Idoncare and Inferno must be incorporated. Here, Idoncare, a party to the B/L, is also party to this C/P. Idoncare could have only sought to incorporate this C/P as Idoncare was party to the sub-voyage charter party only.

6. In conclusion, the existence of a sub-voyage charter party between Inferno and Idoncare can be inferred from the terms used in the scenario. This C/P can only be a voyage C/P. Further, this Inferno-Idoncare sub-voyage charter party is incorporated over the Furnace-Inferno voyage C/P. This is because Idoncare is a party to the B/L as well as the sub-voyage charter party. Therefore, they could only seek to incorporate a C/P to which they are a party.

\textbf{2. RESPONDENT IS NOT LIABLE TO PAY FREIGHT TO CLAIMANT}

7. The voyage C/P between Furnace and Inferno sets out the details of the amount of freight to be paid under clause 19, which lists the freight amount to be paid pmt of coal for every possible choice of the discharge port.\textsuperscript{14} It is submitted that Respondent is not liable to pay freight to Claimant. \textit{First}, freight is not due to Claimant on the correct interpretation of the inconsistency between clauses 16 and 19 of the C/P [2.1] and \textit{second}, the freight cannot be

\begin{itemize}
\item \textsuperscript{11} Bangladesh Chemical Industries Corp v. Henry Stephens Shipping Co (The SLS Everest), [1981] 2 Lloyd’s Rep 389.
\item \textsuperscript{12} Moot Scenario, Page 1, Charterparty dated 15 February 2016.
\item \textsuperscript{13} Pacific Molasses v. Entre Rios (The San Nicholas), [1976] 1 Lloyd’s Rep. 8.
\item \textsuperscript{14} Moot Scenario, Page 22, Charterparty dated 1 September 2016.
\end{itemize}
paid due to the non-disclosure of the discharge port and the subsequent indeterminate nature of the freight amount [2.2].

[2.1] **Freight is not due to Claimant on the correct interpretation of the Charter Party**

8. It is submitted that on the correct interpretation of clauses 16 and 19 of the voyage C/P indicates that freight is not due to Claimant. Under clause 19 of the voyage C/P, freight is payable within five days of the issue of the B/Ls.\(^{15}\) However, under clause 16, the charterer to nominate a discharge port before passing Singapore.\(^{16}\) This is a period that in this case indeed is longer than the stipulated five days for payment of freight.

9. Courts have held that where there is a question of the part of a contract, which is to have effect, effect ought to be given to that part which is calculated to carry into force the *real intention*.\(^{17}\) The part that defeats this part of the contract is to be rejected.\(^{18}\) A perusal of the language that has been used in the contract, keeping in mind the surrounding circumstances as well, can determine the real intention of the parties.\(^{19}\) If a detailed and systematic analysis of terms in a contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.\(^{20}\) This principle was elaborated upon and came to signify that the stance of the courts has shifted towards commercial interpretation\(^{21}\)

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\(^{15}\) Moot Scenario, Page 22, Charterparty dated 1 September 2016.

\(^{16}\) Moot Scenario, Page 21, Charterparty dated 1 September 2016.

\(^{17}\) Walker v. Giles, (1848) 6 C.B. 662; Furnivall v. Coombes, (1843) 5 Man. & G. 736.


and further, that this principle extends to interpreting the contract’s commercial purpose keeping in mind the intention of reasonable businessmen.\textsuperscript{22}

\textbf{10.} On application of the aforesaid principles of contractual interpretation to the case at hand, it is observed that freight is indeed not payable to Claimant. On perusal of clause 16 of the \textit{C/P} which reads \textit{“CHRTRS to declare discharge port when the vessel passes Singapore”},\textsuperscript{23} it becomes apparent that the intention of the parties was to ensure that the charterers, Inferno would be provided a certain amount of time to nominate a port of discharge.

\textbf{11.} When the principle of business common sense is applied to this fact situation, the conclusion that is arrived at must be in the best interests of the commercial purpose of the \textit{C/P}. In \textit{Glynn v. Margetson & Co.},\textsuperscript{24} the purpose of the contract was ascertained to be the transport of oranges from Malaga to Liverpool.\textsuperscript{25} In this regard, the commercial purpose of this \textit{C/P} is the transportation of coal from Newcastle, Australia to an undetermined location. This is apparent from the type of \textit{C/P} i.e., a coal orevoy,\textsuperscript{26} and from clauses in the \textit{C/P} regarding the specifications, quality and quantity of the coal to be transported.

\textbf{12.} Therefore, in accordance with the principle of business common sense, clause 16 of the \textit{C/P} must be given preference over clause 19. \textit{First}, clause 16 displays the intention of the parties to allow Respondent a certain period of time to nominate the discharge port and \textit{second}, it deals directly with the commercial purpose of the contract i.e., the nomination of a discharge port which is an essential part of the purpose of the contract.

\textsuperscript{23} Moot Scenario, Page 21, Charterparty dated 1 September 2016.
\textsuperscript{26} Moot Scenario, Page 20, Charterparty dated 1 September 2016; Moot Scenario, Page 21, Charterparty dated 1 September 2016; Moot Scenario, Page 40, Certificate of Sampling and Analysis dated 4 October 2016.
13. It is submitted that Respondent cannot be held liable to pay freight to Claimant as the port of discharge has not been nominated. Respondent did not nominate a discharge port right until the termination of the C/P.27 This is significant while considering the fact that the freight rates differed from port to port28 and therefore, in order to finally ascertain the amount of freight to be paid, there had to be the nomination of a discharge port wherein the freight could be calculated and paid at the earliest.

14. It is further submitted that this non-disclosure of discharge port did not amount to a breach of the terms of the C/P but rather, were in full accordance with the provisions of the C/P. On perusal of clause 16 of the C/P, the exact wording of the relevant portion being “CHRTRS to declare discharge port while passing Singapore for bunkering”,29 it becomes apparent that Respondent was acting in accordance with the clause owing to the exact location of the MV Tardy Tessa. As mentioned in a few e-mails as well as the expert report on the status of the coal, the MV Tardy Tessa is currently floating outside the port limits of Singapore.30 This means that it has not passed Singapore after bunkering. Hence, as long as the vessel remains where it is, Respondent has the right to nominate the discharge port at any time, without breaching the C/P in any way.

15. Thus far, it has been established that as the situation unfolded, there was no nomination of discharge port, something that was permissible under clause 16 of the C/P,31 and that because no discharge port was nominated, it was impossible to ascertain the final freight amount and hence payment of the aforesaid amount was impossible as well. Additionally, Respondent tried to fulfill its obligations towards Claimant wherever and whenever possible, and one

27 Moot Scenario, Pages 50-66, Email Transcripts dated 10 October–21 October, 2016.
28 Moot Scenario, Page 22, Charterparty dated 1 September 2016.
29 Moot Scenario, Page 21, Charterparty dated 1 September 2016.
31 Moot Scenario, Page 21, Charterparty dated 1 September 2016.
attempt towards this end was the nomination of Ningbo as a possible discharge port. However, Claimant did not confirm that Ningbo would be acceptable to them but rather moved to terminate the C/P.

3. CLAIMANT IS NOT ENTITLED TO EXERCISE A LIEN ON THE CARGO

16. Claimant exercised a lien on cargo by issuing the notice of lien on 20th October 2016. It is submitted that Claimant cannot exercise lien on cargo for the following reasons: first, exercise of lien is not permitted by the local jurisdiction [3.1], second, the pre-conditions of ‘continuous possession’ and ‘due debt’ for exercise of lien are not satisfied [3.2], third, lien cannot be exercised over a third-party cargo [3.3], fourth, Claimant cannot exercise lien through the B/L contract [3.4], and fifth, the delay in payment of freight was with sufficient reason and there is no intentional breach of C/P [3.5].

[3.1] EXERCISE OF LIEN IS NOT PERMITTED BY THE LOCAL JURISDICTION

17. It is a general rule that the lien must be enforceable at the port of discharge. In addition to this, as a matter of the exercise of lien in its form and content, the same must comply with the local laws. In the case of incorporation of any of the charter parties (head time C/P, the voyage C/P or the sub-charter party) into the B/L, compliance with the local jurisdiction is necessary.

18. The suggestion of another disport due to congestion at Chinese ports by Respondent and the rejection of this suggestion by Claimant since the suggested port was not within the permitted range of the head time C/P and the voyage C/P. This shows that the permissible discharge

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32 Moot Scenario, Page 67, Email Transcript dated 21 October 2016.
33 Moot Scenario, Page 68, Email Transcript dated 22 October 2016.
34 Moot Scenario, Page 65, Email Transcript dated 20 October 2016.
35 J. Cooke et. al., VOYAGE CHARTERS, 343 (1993).
36 J. Cooke et. al., VOYAGE CHARTERS, 343 (1993).
37 Moot Scenario, Page 57, Email Transcript dated 16 October 2016.
ports are in China.\(^{38}\) Thus, in order to physically detain the possession of the cargo and exercise a lien, a port in China must be selected as per the terms of any of the charter parties. This would mean that the lien can only be exercised in compliance with the Chinese law.

19. There are some limitations in the exercise of lien as per the Chinese law. In China, the right to exercise a lien over the cargo is not recognized unless the cargo is owned by the debtor, i.e. the charterers.\(^{39}\) Respondent could be a debtor only under the voyage C/P as contended due to non-payment of freight as per the terms and conditions set out if any. As per the B/L, the consignee is yet to be determined and it will be a third party who is not a debtor to Claimant who would become the owner of the cargo.\(^{40}\)

20. Even if Idoncare is considered as the current owner of the cargo, no lien can be exercised in the absence of a contractual relation between Claimant and Idoncare. Therefore, Chinese jurisdiction does not permit the exercise of lien in this case within its boundaries, which mean that the exercise of lien by Claimant will be unsuccessful without any consequences. Thus, Claimant is not permitted to exercise the lien.

[3.2] **THE PRE-CONDITIONS OF ‘CONTINUOUS POSSESSION’ AND ‘DUE DEBT’ FOR EXERCISE OF LIEN ARE NOT SATISFIED**

21. The basic requirement for the exercise of lien is the retention of continuous possession by the lienor. Parting with possession of the cargo will lead to the ineffective exercise of lien.\(^{41}\) Lien is a right to detain the possession of the cargo until the due payment is satisfied. Thus, possession of the cargo has to be in the hands of Claimant, while exercising the lien. But, it is

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\(^{38}\) Moot Scenario, Page 21, Charterparty dated 1 September 2016.


\(^{40}\) Moot Scenario, Page 41, B/L no. IMOBL11223344X dated 4 October 2016.

\(^{41}\) Tamvaco v. Simpson, (1866) LR 1 CP 363; United States v. Freights of the Mt. Shasta, 274 U.S. 466, 1927 AMC 943 (1927); Marine Traders Inc. v. Compania de Navegacion Almirante S.A. Panama (The Searaven), 437 F.2d 301(9th Cir. 1971).
submitted that Claimant does not enjoy this possession of the cargo and hence cannot exercise the lien.

22. The holder of the B/Ls has the entitlement to possessory rights over the cargo.\textsuperscript{42} In this case, the three originals of the B/Ls are with Idoncare.\textsuperscript{43} The B/Ls were issued on 4\textsuperscript{th} October 2016\textsuperscript{44} and the lien on cargo was exercised on 20\textsuperscript{th} October 2016.\textsuperscript{45} Idoncare is the holder of the B/Ls from 4\textsuperscript{th} October 2016, resulting in Idoncare being the lawful party entitled to possess the cargo from the very same date.

23. Additionally, being the shipper of the cargo, even if Idoncare is considered as the owner of the cargo, Idoncare has possession of the same till the consignee is determined. Thus, when the lien was exercised on 20\textsuperscript{th} October 2016 by Claimant, Claimant did not enjoy the possession over the cargo, which means that there was no continuous retention of the possession over the cargo by the lienors (Furnace). The basic requirement of continued possession over the cargo has been violated due to parting with the possession.

24. The essential requirement for a valid exercise of lien on cargo for the sums payable is that the concerned sums must be due and pending at the time when the lien is exercised.\textsuperscript{46} As submitted above, the sub-charter party has been incorporated into the B/L.\textsuperscript{47} There is no ‘due debt’ to Claimant under this C/P as Claimant is not a party to the same. Since the debt has not accrued under the same C/P which is incorporated, the pre-condition of a ‘due-debt’ is not satisfied. Thus, Claimant is not entitled to exercise a lien over the cargo.

\textsuperscript{42} Barber v. Meyerstein, (1870) LR 4 HL 317.
\textsuperscript{43} Clause 2(1), Procedural Order No. 3 dated 17 February 2017.
\textsuperscript{44} Moot Scenario, Page 41, B/L no. IMOBL11223344X dated 4 October 2016.
\textsuperscript{45} Moot Scenario, Page 65, Email Transcript dated 20 October 2016.
\textsuperscript{46} T. Coghlin et. al., TIME CHARTERS, 579 (7\textsuperscript{th} edn., 2014).
\textsuperscript{47} Refer to Issue 1 in this Memorandum.
[3.3] A LIEN CANNOT BE EXERCISED OVER A THIRD-PARTY CARGO

25. As per the B/L, the consignee is yet to be determined and hence the cargo belongs to a third party and not to the charterers, Inferno. Even if Idoncare is considered as the party in possession of the cargo being the holder of the B/Ls, it is still a third party cargo. Lien can be exercised over third party cargo only if the lien exercised and the due debt is under the same C/P with a proper incorporation of the freight clause in the C/P to the B/Ls. The debt is contended to be due under the voyage C/P while the C/P incorporated into the B/L which provides the right of lien is the sub-charter party as submitted above. Therefore, the contention of debt accrued and the lien exercised are under different charter parties making the exercise of lien over the third party cargo invalid.

26. Thus, allowing a lien against a third party who was not a party to the contract with Claimant is against the principles of privity of contract and equity. Allowing a lien on the cargo owned by a third party will result in an unjust enrichment by Claimant at the cost of the cargo owner. Hence, such a lien is against the principles of justice. Thus, it is submitted that the lien should not be allowed over the cargo, which belongs to a third party.

[3.4] CLAIMANT CANNOT EXERCISE A LIEN THROUGH THE BILL OF LADING CONTRACT

27. The ship owner is generally the carrier when it has maintained control over the chartered ship. The identity of the carrier has to be determined based on the circumstances and the documents available. In the instant case, the crew was maintained by the owner of the ship, Imlam and the B/Ls were issued under the form of Imlam. Hence, it can be inferred that

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48 Moot Scenario, Page 41, B/L no. IMOBL11223344X dated 4 October 2016.
49 Barber v. Meyerstein, (1870) LR 4 HL 317.
51 Refer to Issue 1 in this Memorandum.
54 Samuel v. West Hartlepool SN Co, (1906) 11 Com Cas 115.
55 Moot Scenario, Page 2, Charterparty dated 15 February 2016.
56 Moot Scenario, Page 41, B/L no. IMOBL11223344X dated 4 October 2016.
Imlam has a control over the chartered ship. Due to the maintenance of this control over the ship, as per the general rule stated above, Imlam is the carrier of the cargo.

28. It is accepted that when “the charter parties were made between the disponent owners and the sub-charterers and the B/Ls were owners’ B/Ls, insofar as those B/Ls contained or evidence contracts, the contracts were not between disponent owners and sub-charterers but between head or registered owners and the holders of the B/Ls”. In the present case, the B/L has been issued by Imlam under its form. This creates a contractual relation between the contractual carrier, Imlam and the shipper, Idoncare. Here, the disponent owner (Furnace) is not a party to the B/L issued by Imlam. Since Furnace is not a party to the B/L, it cannot exercise a lien over the cargo for the freight owed under the B/L contract. Thus, Claimant cannot exercise a lien over the cargo based on the B/L.

3.5 **THE DELAY IN PAYMENT OF FREIGHT WAS WITH SUFFICIENT REASON AND THERE IS NO INTENTIONAL BREACH OF CHARTER PARTY**

29. Respondent was unable to make the payment of freight as the sub-freight was not received from its charterers. Moreover, Respondent never intended to breach the terms of the C/P with Claimant and was willing to perform the same at all stages. Respondent also suggested Busan as a disport due to congestion at the Chinese ports on 16th October 2016. Such a diversion was suggested by Respondent with a view to reducing the damages to both the parties that were accruing due to circumstances beyond its control.

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58 Moot Scenario, Page 41, B/L no. IMOBL11223344X dated 4 October 2016.
59 Moot Scenario, Page 69, Email Transcript dated 22 October 2016.
60 Moot Scenario, Page 57, Email Transcript dated 16 October 2016.
30. Moreover, such a suggestion was made well before the notice of exercise of lien on cargo and sub-freight on 20th October 2016.\textsuperscript{61} This shows that Respondent was willing to perform the C/P and fulfill its duties and obligations. Whereas, the Claimant, Furnace was not cooperative to allow such a diversion and they considered it as a breach of C/P that resulted in the notice of termination on 22nd October 2016.\textsuperscript{62} This has not only tarnished the reputation of Respondent in the shipping industry but also resulted in huge loss and costs. Thus, Respondent has acted in good faith and has abided by the C/P.

31. The costs associated with the exercise of the lien are not recoverable, provided there is no specific provision on the same in the contract between the parties.\textsuperscript{63} There is no B/L contract between Furnace and Inferno, as submitted above.\textsuperscript{64} Therefore, there is no contract of indemnity that arises between Furnace and Inferno through the B/L. Hence, indemnity for any of the costs, claims, damages, losses and expenses associated with the exercise of lien cannot be claimed from the Respondent.

4. EXERCISE OF A LIEN ON SUB-FREIGHT BY CLAIMANT IS INVALID AND UNLAWFUL

32. Claimant exercised a lien on sub-freight by issuing the notice of lien on sub-freight on 20th October 2016.\textsuperscript{65} It is submitted that exercise of lien on sub-freight by Claimant is invalid and unlawful for the following reasons: first, the voyage C/P does not recognize lien over sub-freight [4.1], and second, there is no contractual relationship between Furnace and Idoncare [4.2].

\textsuperscript{61} Moot Scenario, Page 65, Email Transcript dated 20 October 2016; Moot Scenario, Page 66, Email Transcript dated 20 October 2016.

\textsuperscript{62} Moot Scenario, Page 68, Email Transcript dated 22 October 2016.

\textsuperscript{63} J. Cooke \textit{et. al.}, \textit{VOYAGE CHARTERS}, 350 (1993); Soames v. British Empire Shipping Co., (1860) 8 H.L. Cas. 338.

\textsuperscript{64} Refer to Issue 3.4 in this Memorandum.

\textsuperscript{65} Moot Scenario, Page 66, Email Transcript dated 20 October 2016.
[4.1] The voyage charter party does not recognize a lien over sub-freight

33. The incorporation of the terms of the concerned C/P in the B/L is essential to enforce the contractual rights arising thereof. It helps in providing clarity to the contractual rights of each party.66

34. Claimant is seeking a lien on the sub-freight due under the voyage C/P.67 Thus the clause 19 on lien (“COAL-OREVOY” Standard Coal and Ore C/P)68 has to be analysed. Where a lien for certain charges is explicitly stated for, the agreement for a lien will be limited to that which is expressly provided for.69 Clause 19 of the voyage C/P (“COAL-OREVOY” Standard Coal and Ore Charter Party) explicitly allows a lien on cargo for freight, deadfreight, demurrage and general average contribution. Lien on sub-freight has not been mentioned in this clause, and hence it can be inferred that such a right of lien on sub-freight has been intentionally excluded.

35. The right of lien is limited only to the categories specified above. Thus the terms of the voyage C/P does not permit the exercise of lien on sub-freight. Hence, such an exercise by the lienor is outside of the contractual rights and therefore, invalid and unlawful. Thus, the voyage C/P under which the lien is claimed to be exercised does not permit the exercise of lien on sub-freight.

[4.2] There is no contractual relationship between claimant and doncare

36. Issuance of B/Ls in the head owner’s form creates a contractual relation between the head owner and the holders of B/Ls. The disponent owner does not have a contract with the

68 Moot Scenario, Page 31, Standard Coal and Ore Charter Party.
holders of B/Ls. Here, the disponent owner, Furnace does not have a contractual relation with Idoncare, holder of B/Ls, as the B/Ls are issued under the ship owner (Imlam)’s form. Therefore, no contractual rights of Claimant against Idoncare exist. This also means that Idoncare is not responsible to Claimant in any matter in the absence of a contract between them. Incorporation of the sub-charter party as submitted above does not create any rights of exercising a lien over the sub-freight for Claimant as they are not a party to that incorporated C/P. Hence, Claimant cannot exercise a lien on sub-freight.

5. CLAIMANT CANNOT CLAIM DAMAGES FOR DETENTION OR BREACH OF CHARTER PARTY

37. It is submitted that Claimant cannot claim damages for detention or claim damages for alleged breaches of the C/P by Respondent. In the present case, it is submitted that the non-nomination of the discharge port does not amount to a breach of the C/P and hence damages for detention cannot be claimed [5.1]. Further, the non-payment of freight is also not in violation of C/P terms and thus, no damages can be claimed on either of the grounds [5.2].

38. It is also submitted that the terms and provisions of the sub-voyage C/P between Inferno and Idoncare are incorporated into the B/L. This is due to the fact that the existence of a sub-voyage C/P between Inferno and Idoncare can be inferred from the language used by the representatives of Inferno and Furnace. Further, between the voyage charter entered between Furnace and Inferno, and the voyage charter between Inferno and Idoncare, the latter is incorporated into the B/L by virtue of Idoncare being a party to the B/L, as has been previously elucidated.

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71 Refer to Issue 1 in this Memorandum.
72 Refer to Issue 1 in this Memorandum.
[5.1] **Claimant cannot claim damages for detention**

39. It is submitted that Claimant cannot claim damages for detention on the grounds of non-nomination of the discharge port. This is because non-nomination of the discharge port does not constitute a violation of the C/P. This non-disclosure of discharge port was in full accordance with the provisions of the C/P. On perusal of clause 16 of the C/P, the exact wording of the relevant portion being “CHRTRS to declare discharge port while passing Singapore for bunkering”, it becomes apparent that Respondent was acting in accordance with the clause owing to the exact location of the MV Tardy Tessa. The MV Tardy Tessa is currently floating outside the port limits of Singapore, which therefore means that it has not passed Singapore and thus, the charterers have not breached the C/P, as has been elaborated upon previously. Therefore, Respondent is not liable to pay damages for detention because their actions did not breach the obligations conferred upon them by the C/P.

[5.2] **Claimant cannot claim damages for breaches in Charter party**

40. It is submitted that Respondent has not breached the C/P either by their non-nomination of discharge port or their non-payment of freight. As has been discussed in the previous heading, the non-nomination of discharge port does not constitute a breach in the C/P. Also, non-payment of freight cannot be held to be a breach in C/P terms. Respondent cannot be held liable to pay freight to Claimant as the port of discharge has not been nominated. Also, the freight rates differ from port to port and therefore, in order to finally ascertain the amount of freight to be paid, there had to be the nomination of a discharge port wherein the freight could be calculated and paid. As this did not happen, the payment of freight was subsequently impossible. This submission has been previously elucidated.

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73 Moot Scenario, Page 21, Charterparty dated 1 September, 2016.
75 Refer to Issue 2 in this Memorandum.
76 Moot Scenario, Page 22, Charterparty dated 1 September, 2016.
77 Refer to Issue 2 in this Memorandum.
41. Therefore, Respondent has not violated any of the legal obligations as under the C/P. In conclusion, due to the fact that the C/P has not been breached, Claimant cannot claim for damages.

6. **THE ARBITRAL TRIBUNAL DOES NOT HAVE THE JURISDICTION OR THE POWER TO ORDER THE SALE OF THE CARGO**

42. It is submitted that the Arbitral Tribunal has neither the jurisdiction to order the sale of the cargo [6.1] and nor does it have the power to do so, as the cargo is not the subject matter of the dispute [6.2].

6.1 **THE ARBITRAL TRIBUNAL DOES NOT HAVE THE JURISDICTION TO ORDER THE SALE**

43. It is submitted that the Arbitral Tribunal does not have the jurisdiction to order the sale of the cargo as *first*, jurisdiction of an Arbitral Tribunal is limited to a valid arbitration agreement between parties [6.1.1], *second*, because Respondent is not the owner of the cargo [6.1.2], and thus *third*, by ordering the sale of the cargo, the Tribunal will be affecting the rights of a non-signatory to the arbitration agreement [6.1.3].

6.1.1 **Jurisdiction of an arbitral tribunal is limited to the valid arbitration agreement between two parties**

44. ‘Jurisdiction’ defines and determines the power and authority of arbitrators to hear and decide a case.78 An arbitrator, unlike a judge, has no inherent power to make orders binding third parties.79 A valid arbitration agreement is the basis of commercial arbitration.80 The jurisdiction of an arbitral tribunal is limited to the valid arbitration agreement.

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between parties. The tribunal therefore has the jurisdiction to affect only the rights of the parties who have consented to the arbitration in question by virtue of a valid agreement.

[6.1.2] Respondent is not the owner of the cargo

45. As per the B/L, the consignee is yet to be determined and hence the cargo belongs to a third party and not to the charterers, Inferno. Even if Idoncare is considered as the party in possession of the cargo being the holder of the B/Ls, the owner of the cargo is not the Respondent.

[6.1.3] In ordering the sale of the coal, the tribunal will be affecting the rights of a non-signatory to the arbitration agreement

46. It is submitted that by ordering the sale of the cargo, the Tribunal will be acting outside the scope of its jurisdiction. Arbitration is a creature of a contract between two parties. A tribunal, which seeks to pass an order, which will affect the rights of a third party, who is a non-signatory to the arbitration agreement ought to take into account the contractual nature of the agreement that binds the signatories.

47. Moreover, it is submitted that first, if Idoncare is considered to be the owner of the cargo, it will remain a non-signatory to the arbitration agreement [6.1.3.1] and second, even if Idoncare is not the owner of the cargo, the owner will be a non-signatory to the arbitration agreement [6.1.3.2].

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81 J. Lew, Determination of Arbitrators’ Jurisdiction and the Public Policy Limitations on that Jurisdiction, CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION, 73 (1986).
82 Moot Scenario, Page 41, B/L no. IMOBL11223344X dated 4 October 2016.
83 Barber v. Meyerstein, (1870) LR 4 HL 317.
84 S. McClendon & R. Goodwin, INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK, 3 (1986).
[6.1.3.1] If Idoncare is considered to be the owner of the cargo, it will be a non-signatory to the arbitration agreement

48. The signatories to the C/P that contains the arbitration agreement, in the present case, are Furnace and Inferno. The present dispute is also one arising from the contract between Furnace and Inferno. Idoncare is not a party to the contract between Furnace and Inferno, out of which the present dispute has arisen. Idoncare is, therefore, a third party to the arbitration agreement, and a non-signatory. Thus, it is beyond the jurisdiction of the tribunal to pass an order that would affect the rights of Idoncare. A non-signatory, i.e. a third party to the arbitration agreement can be joined in arbitration only with the consent of all the stake-holding parties. However, Idoncare, by virtue of its letter dated 2nd December 2016, has stated that it has no interest in the remainder of the Claimant’s application, and has declined to make submissions at the hearing of the same. Declining to represent oneself at an arbitration proceeding cannot be considered consent to the arbitration agreement.

[6.1.3.2] Even if Idoncare is not the owner of the cargo, the owner is a non-signatory to the arbitration agreement

49. If the unknown buyer of the cargo is considered to be the owner, the question of it being a signatory to the contract between Furnace and Inferno does not arise. Therefore, the unknown buyer still remains a non-signatory to the arbitration agreement. The tribunal, thus, does not have the jurisdiction to affect its rights by virtue of ordering a sale of the cargo.

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86 Moot Scenario, Page 22, Charterparty dated 1 September 2016; Moot Scenario, Page 23, Charterparty dated 1 September 2016.
89 Moot Scenario, Page 93, Sale Application dated 2 December 2016.
90 Moot Scenario, Page 45, B/L no. IMOBL11223344X dated 4 October 2016.
50. Section 12(1)(d) empowers the arbitral tribunal to make orders or give directions to any party for the preservation, interim custody or sale of any property, which is or forms the subject matter of the dispute. The dispute, in the present case, is over the amount allegedly due to Claimant as freight. Therefore, the tribunal has the power to pass orders of any nature to preserve the amount due as freight. However, by passing an order of sale of the coal aboard the Tardy Tessa, the tribunal would be exceeding the power conferred upon it by the International Arbitration Act, as the coal is not property forming the subject matter of the present dispute.

7. **IT IS NEITHER JUST NOR NECESSARY FOR THE TRIBUNAL TO ORDER THE SALE OF THE CARGO**

51. It is not just for the tribunal to order the sale of the cargo *first*, because the right to exercise a lien does not confer upon Claimant the right of sale [7.1.1] and *second*, because an order for sale, by its very nature, is drastic and irreversible [7.1.2]. It is not necessary for the tribunal to order the sale of the cargo because *first*, there is an upward trend in the world market for coal [7.2.1], *second*, because coal is not a perishable commodity [7.2.2], and *third*, because reasonably available alternatives to the sale exist [7.2.3].

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[7.1.1] The right to exercise a lien does not confer upon the Claimant the right of sale

53. Lien, strictly, is neither a *jus in rem* nor a *jus ad rem*, but is simply a right to possess and retain property until some claim attaching to it is satisfied or discharged. Therefore, in case of a lien, there is not any right of bringing the property to sale unless it is expressly conferred by statute. Neither is there a statute conferring upon the Claimant the right to sell the cargo, nor does the contract between the Claimant and the Respondent allow for sale in furtherance of lien in case the freight is not paid. Thus, the Claimant has no right to bring the cargo on board the Tardy Tessa to sale.

[7.1.2] An order for sale, by its very nature, is drastic and irreversible

54. A vital characteristic of a “sale” is the irreversible nature of the transfer. There is no opportunity for the seller to recall the asset once the sale has taken place. Therefore, the tribunal ought not to grant an order for sale unless it is absolutely necessary that the sale take place. In the present case, the lien over cargo was exercised on 20th October 2016 and the notice of arbitration was sent to Inferno and Idoncare on 25th November 2016. It can be reasonably inferred from this that the period of time between the exercise of the lien and the notice of arbitration is not sufficient for the Claimant to be certain that the Respondents are unable to provide security in any form towards the amount allegedly due to them as freight. Thus, it would be unjust for the Tribunal to make such an order.

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92 Bank of India Ltd v. Rustom Fakirji Cowasjee, AIR 1955 BOM 419.
95 SKDP 1 Ltd., Cyprus v. Norsk Tillitsmann ASA, 22 June 2011 (Norway).
[7.2] IT IS NOT NECESSARY FOR THE TRIBUNAL TO ORDER THE SALE OF THE COAL

55. The term “necessary” implies the notion that without the order that is sought, the asset which is sought to be preserved would be lost.98 It is submitted that it is not necessary to order the sale of the cargo because the asset that Claimant seeks to preserve will not be lost in case sale is not ordered. The reasons for this are threefold: first, that there is an upward trend in the world market for coal [7.2.1], second, that coal is not a perishable commodity [7.2.2], and third, that reasonably available alternatives to the sale exist [7.2.3].

[7.2.1] There is an upward trend in the world market for coal

56. It is submitted that sale of the cargo for the purpose of preserving its value would be futile. In Five Ocean, where the sale of the coal aboard the ship was considered necessary, the downward trend of the world market for coal was a crucial factor in the sale of the coal being ordered.99 It can be seen from the expert report that in spite of there being a downward market trend till date, the fall will not necessarily continue further. In fact, given the political climate in the United States and its potential ramifications on global climate change policies, there is an upward trend in the coal market, as can be seen from the recent growth in share prices of coal giants.100 Therefore, there ought not to be sale of the cargo in order to “preserve its value,” as its value is most likely to rise.

98 Maldives Airports Co Ltd and another v. GMR Malé International Airport Pte Ltd, [2013] SGCA 16.
[7.2.2] Coal is not a perishable commodity

57. Coal is not perishable in nature, so much so that it is not even necessary to transport it quickly. This also implies that it is not necessary to dispose of it quickly. Moreover, the loss of calorific value of sub-bituminous coal kept in storage is only 3%-5.5% in about three years. This is a negligible loss, especially given that the coal aboard the Tardy Tessa has only been in storage for little over a month since the lien was exercised. Thus, there is no pressing need for the Tribunal to order the sale of the cargo.

[7.2.3] Reasonably available alternatives to the sale exist

58. An order for sale of assets cannot be considered necessary if other reasonably available alternatives for securing the evidence or asset exist. It is submitted that in the present case, reasonably available alternatives to the sale do exist. While the deteriorating conditions and the lack of supplies on board the Tardy Tessa and the low morale of the crew are acknowledged by the Respondents, it is submitted that sale of the cargo cannot be considered a solution to the abovementioned state of affairs. Lien over cargo may be exercised even after the cargo is offloaded. Offloading the cargo will not require sale, and the Claimant may continue to retain possession of it. This will serve as a remedy to the conditions on board the Tardy Tessa while also preserving the rights of the owner of the cargo over the coal. Thus, an order for the sale of the cargo cannot be considered necessary, by any means.

101 B. Solomon, CSX (MBI RAILROAD COLOR HISTORY), 134 (2005).
102 B. Solomon, CSX (MBI RAILROAD COLOR HISTORY), 134 (2005).
105 Maldives Airports Co Ltd and another v. GMR Malé International Airport Pte Ltd, [2013] SGCA 16.
PRAYER

In the light of the above submissions, the Respondent requests the tribunal to declare that:

1. Respondent is not liable to pay freight to Claimant.
2. Claimant cannot validly exercise a lien on the cargo.
3. Claimant cannot validly exercise a lien on sub-freight.
4. Respondent is not liable to pay damages to Claimant for detention and breach of charter party.
5. The tribunal does not have the jurisdiction to order sale of the cargo.
6. Sale of the cargo is neither just nor necessary.
7. Respondent is not liable to pay costs or furnish an indemnity.
8. Such further declaration as the tribunal sees fit.