IN THE MATTER OF AN ARBITRATION HELD IN LONDON

UNIVERSITY OF VERSAILLES
FRANCE

RESPONDENT'S MEMORANDUM

CLAIMANT/ CHARTERER VS RESPONDENT/ OWNER

Cerulean Beans and Aromas Ltd Dynamic Shipping LLC

TEAM NO.3
Melissa Aourane
Constance Benoist
Alexandre Bergouli
Ophélie Lacaille
Faustine Lalle
Simon Wagner
I. The arbitral procedure is governed by English law

II. The Claimant’s request is not admissible pursuant to Clause 27 of the Charterparty

PART III - MERITS OF THE CLAIM -

I. The Hague Visby Rules applies to the merits by means of the clause paramount

II. The Respondent did not breach the Charterparty

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   1. The Goods were no longer under the Respondent’s custody when damaged
   2. The Claimant provided insufficient packing of the Goods
   3. The damages are the result of the Claimant’s failure to take delivery of the Goods
   4. Alternatively, the Respondent would be entitled to mitigate its liability under the HVR

B. The Respondent provided a seaworthy Vessel

   1. The Respondent diligently provided a seaworthy Vessel
   2. In any events, the seaworthy obligation was no longer due by the Respondent
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C. The Vessel was forced to follow an alternative route
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A. The solar flares are constitutive of an act of God and forced the Respondent to deviate

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      b. *Alternatively, the Respondent is entitled to mitigate its liability under the Limitation of Liability for Maritime Claims Act*
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<td><em>Dakin v. Oxley</em> [1864] 15 CBNS 647, 660 Court of Common Pleas.</td>
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<td><em>Diwon v. Safler</em> [1839] 5 M&amp;W 405.</td>
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<td><em>Elena Shipping Ltd v. Aidenfeld Ltd (The Elena)</em> [1986] 1 Lloyd’s Rep. 425.</td>
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<td><em>Gilroy, Sons &amp; Co v. W R Price &amp; Co</em> [1893] AC 56, 64.</td>
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<td><em>Hamilton v. Mackie</em> [1889] 5 T.L.R. 677.</td>
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<td><em>Hewison v. Meridian Shipping Services Pte Ltd</em> [2003] ICR 766.</td>
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<td><em>Hick v. Raymond &amp; Reid</em> [1893] AC 22 HL.</td>
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<td><strong>Pannel v. Us Lines</strong></td>
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<td>Postletwaite v. Freeland [1880] 5. App. Cas. 599 at 608.</td>
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<td>President of India v. West Coast Steamship Co (The Portland Trader) [1963] 2 Lloyd’s Rep 278, 280  281 (Dist Ct, Oregon).</td>
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<td>Randall v. Lynch [1810] 2 com. 352.</td>
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<td>Rey Banano del Pacífico C.A. v. Transportes Nav Ecuatorianos (The Isla Fernandina) [2000] 2 Lloyd’s Rep.15.</td>
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<td>Serena Navigation Ltd v. Dera Commercial Establishment (The Limnos) [2008] EWHC 1036 Comm.</td>
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<td>Shipping Corporation of India Limited v. Gamlen Chemical Co. Australasia Pty. Ltd [1980] HCA 51; 147 CLR 142; 32 ALR 609.</td>
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<td>D. Chakravarti, “Australia: Handling Potentially Complex Disputes: Multi-Tiered Dispute Resolution Clauses”, in <em>Australian Construction Law Newsletter</em>, 2006.</td>
<td>4</td>
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<td>W. Tetley, “Assignment and Transfer of Maritime Liens: Is There Subrogation of the Privilege”, in <em>Journal of Maritime Law and Commerce</em>, vol.15, n°3, 393, 1984.</td>
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<td>T. L. Tisdale of Tisdale &amp; Lennon, “Hurricane and natural disaster – Carrier liability for damage to cargo in the U.S.”, in <em>Steamship Mutual’s website</em>, 2005.</td>
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PART I - STATEMENT OF FACTS -

1. This memorandum is submitted on behalf of Dynamic Shipping\(^1\) (hereinafter the “Respondent”) a Cerulean company incorporated under the Laws of the United Kingdom.\(^2\)

2. The Respondent entered into a voyage charterparty\(^3\) (hereinafter the “Charterparty”) with Cerulean Beans and Aromas Ltd (hereinafter the “Claimant”), a Cerulean company incorporated under the Laws of the United Kingdom.\(^4\) The Respondent agreed to handle the carriage of coffee beans (hereinafter the “Cargo” or the “Goods”) on the Madam Dragonfly (hereinafter the “Vessel”) registered under the Cerulean flag,\(^5\) from Cerulean to Dillamond (hereinafter the “Voyage”).

3. Pursuant to the Charterparty, delivery of the Goods was to be done by 28 July at 7:00 p.m., in exchange for a freight payment.\(^6\) Due to the short timeframe, the Respondent and the Claimant (hereinafter the “Parties”) settled on the payment of the crew’s wages prior to the shipment by means of a separate bank account.

4. On 24 July 2017, the Vessel departed Cerulean heading to Dillamond.\(^7\) After a day in regular navigational condition, the Vessel faced adversities pertaining in a solar flare crisis, which started on 25 July 2017.\(^8\) The Vessel lost its radio and satellite communication and had to deviate to Spectre.\(^9\)

5. Whilst heading toward Dillamond on 28 July 2017, the Vessel faced a sudden massive storm, only noticed 30 minutes prior to its occurrence.\(^10\) The Vessel’s anchor was dropped for the sake of limiting this event’s income.\(^11\) Once the storm overcame, the Vessel started back its course.

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\(^{1}\) IMLAM Problem, Points of defence and counterclaim delivered on behalf of the Respondent, p.40.
\(^{2}\) IMLAM Problem, background information and assumptions, p.45, para.1.
\(^{3}\) IMLAM Problem, Charterparty, pp.3-4.
\(^{4}\) IMLAM Problem, background information and assumptions, p.45, para.1.
\(^{5}\) IMLAM Problem, final inspection report, p.44.
\(^{6}\) IMLAM Problem, Charterparty, box 11, freight payment of USD 500,000, p.3.
\(^{7}\) IMLAM Problem, letter sent on 24 July 2017 from Marc Simpson to Jay Mizzone, p.15.
\(^{8}\) IMLAM Problem, letter sent on 26 July 2017 from Marc Simpson to Jay Mizzone, p.17.
\(^{9}\) IMLAM Problem, email sent on 27 July 2017 at 7:17 a.m. from Marc Simpson to Jay Mizzone, p.18.
\(^{10}\) IMLAM Problem, email sent on 28 July 2017 at 4:58 p.m. from Marc Simpson to Jay Mizzone, p.19.
\(^{11}\) IMLAM Problem, email sent on 29 July 2017 at 8:58 a.m. from Marc Simpson to Jay Mizzone, p.20.
6. When arriving at its final destination on 29 July 2017 at 8:58 a.m., the Vessel was ordered by the port to stay 100 nm out from Dillamond. Delivery could only be completed by 6:28 p.m. The Respondent notified the Claimant that the Cargo was available for collection and advised the latter to rapidly take delivery. The Respondent further reminded that demurrage would accrue starting from the Vessel’s arrival. An access authority pass was transmitted to take later delivery of the Cargo. The Goods were left in Dillamond’s port for two rainy days and only collected on 31 July 2017 despite the Respondent’s recommendation.

7. On 1 August 2017, the Claimant informed the Respondent that three of the four containers were water damaged despite having been shipped in accordance with the agreed specifications, and sent a letter requesting that USD30,200,000 be paid. The Respondent denied its liability to the Claimant and sent an invoice concurring the payment of the Voyage, which had not been fulfilled yet. This invoice gathered initially agreed costs relative to the chartered voyage. Although the Goods have been shipped accordingly, the Claimant refused to pay.

8. The Parties agreed under the Charterparty that technical disputes had to be submitted to expert determination. However, the Claimant did not comply with this clause and began arbitration proceedings.

9. The Arbitral Tribunal (hereinafter the “Tribunal”) was constituted on 7 September 2017.

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12 IMLAM Problem, email sent on 29 July 2017 at 8:58 a.m. from Marc Simpson to Jay Mizzone, p.20.
13 IMLAM Problem, email sent on 29 July 2017 at 8:42 p.m. from Marc Simpson to Jay Mizzone, p.24.
14 IMLAM Problem, email sent on 31 July 2017 at 5:30 a.m. from Marc Simpson to Jay Mizzone, p.25.
15 IMLAM Problem email sent on 29 July 2017 at 4:28 p.m. from Marc Simpson to Jay Mizzone, p.22.
16 IMLAM Problem, email sent on 29 July 2017 at 4:28 p.m. from Marc Simpson to Jay Mizzone, p.22.
17 IMLAM Problem, email sent on 1 August 2017 at 9:17 a.m. from Jay Mizzone to Marc Simpson, p.25; IMLAM Problem, email sent on 1 August 2017 at 3:42 p.m. from Marc Simpson to Jay Mizzone, p.26.
PART II - JURISDICTION -

10. The Parties agreed on an arbitration agreement governed by English law (I). Though, the Respondent does not challenge the Tribunal’s competence to rule on its own competence over the claims and the lien, it argues that the request for arbitration is not admissible due to the breach of the expert determination clause (II).

I. The arbitral procedure is governed by English law

11. According to Clause 27(a) of the Charterparty the law governing the arbitral proceedings is the Arbitration Rules of the London Maritime Arbitrators Association which triggers the application of the English law. Indeed, the Parties did not expressly chose the applicable law. These Terms specify that submitting the dispute to its realm leads to the application of English law to the proceedings when the parties did not chose the applicable law. Thus, the Tribunal shall apply English law as the *lex arbitri*.

II. The Claimant’s request is not admissible pursuant to Clause 27 of the Charterparty

12. The Claimant failed to respect the procedure set up under Clause 27, which prevents the request for arbitration from being admissible.

13. Clause 27(d) sets out technical matters “shall be referred to expert determination”. Clause 27(e) provides that “a party may not commence legal proceedings (including arbitral proceedings under this clause) in respect of dispute” without first complying with the expert’s provisions. By imposing mandatory steps ahead of the arbitral procedure, this clause constitutes a multi-tiered dispute resolution one.

14. In *Aiton Australia Pty v. Transfield Pty Ltd,* the Court held that a multi-tiered dispute resolution clause could be set aside “if the procedures are not sufficiently detailed to be meaningfully

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18 LMAA Terms, Term 6.
19 *Aiton Australia Pty Ltd v. Transfield Pty Ltd* [2000] 153 FLR 236.
enforced”. Conversely, when the clause is “sufficiently detailed”, its enforcement must be respected.

15. In this case, the obligation to refer to expert determination cannot be questioned since the Clause defines clearly its terms and conditions. Firstly, what constitutes technical matters under Clause 27(g) are “matters surrounding the technical aspects of the performance of the charterparty, such as the vessel's route, loading and unloading of cargo, storage conditions”. Secondly, a specific order shall be followed, expert determination being the first step. Finally, the expert’s qualification is specified, the expert being an independent Master Mariner. Regardless, the multi-tiered dispute resolution clause shall prevail over the arbitration clause.

16. Besides, there is a general principle according to which a prerequisite to arbitration must be followed by the parties, otherwise the Tribunal’s jurisdiction can be challenged. When a matter is to be referred to expert determination according to the contract, “the request for arbitration would have to be dismissed as not admissible”.

17. In this case, the main issue at hand is to assess when the damages occurred. The Claimant’s position is that the damages happened due to inadequate storage conditions and issues surrounding the Vessel’s route. Both reasons constitute a technical matter according to the definition from Clause 27(d). Yet, by filing a request for arbitration and stating its claims without referring to any expert determination or providing the Respondent with an expert's written determination, the Claimant breached Clause 27.

18. Therefore, the Tribunal shall hold the Claimant’s request for arbitration inadmissible, and in the alternative, reject its claims on the merits.

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21 IMLAM Problem, Charterparty, Clause(d), p.12.
PART III - MERITS OF THE CLAIM -

19. The Parties agreed on the law applicable to the merits. Being the laws of New South Wales and the Hague Visby Rules (hereinafter the “HVR”) (I). The Tribunal shall reject any alleged breach of the Charterparty (II). The Tribunal shall also exempt the Respondent for any other supposed breaches, explained by Force Majeure events (III) and order the freight and demurrage payment (IV).

I. The Hague Visby Rules applies to the merits by means of the clause paramount

20. The laws of New South Wales and the HVR\(^{25}\) shall govern the Charterparty by means of Clause 28.\(^{26}\) Initially, the HVR do not apply to charterparties\(^{27}\) pursuant to its Article 5. However the scope of the HVR can be broaden to charterparties\(^{28}\) by means of a clause paramount.\(^{29}\) This latter emphasizes an agreement to apply the HVR to their contract\(^{30}\) and thus represents a contractual choice of law by the Parties.\(^{31}\) Despite the lack of bill of lading or similar documents, the parties’ will shall prevail and give force of law to the HVR. In the Agio Lazaros case, the judges gave effect to that intention and held that the expression “clause paramount” triggers the application of all the HVR.\(^{32}\)

21. In this case, Parties incorporated a clause paramount in Clause 28.\(^{33}\) In our contract, it may be fairly assumed that the Parties will have chosen their words with care. Thereupon, by referring to a “clause paramount” and to Article 4(5), they intended to follow all the provisions of the HVR.

22. Thus, by means of the Parties’ intention, the HVR shall govern the Charterparty.

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\(^{26}\) IMLAM Problem, Charterparty, Clause 28, p.12.
\(^{27}\) The Hague-Visby Rules - The Hague Rules as Amended by the Brussels Protocol 1968 multilateral, Article 5.
\(^{29}\) Ibid.
\(^{33}\) IMLAM Problem, Charterparty, Clause 28, p.12.
II. The Respondent did not breach the Charterparty

A. The Respondent did not deliver damaged Goods

1. The Goods were no longer under the Respondent’s custody when damaged

23. The Respondent argues that the Claimant was in possession of the Goods when the damages occurred.

24. On the one hand, Article 3(2) of the HVR provides that the carrier shall carefully carry and discharge the goods, i.e. deliver them. The term delivery involves the transfer of direct or indirect possession of the goods to the consignee by a mutual legal transaction. In the Sapfor case, delivery is defined as excluding the process of deciding where the goods shall be placed after the discharge. During the unloading phase, the goods are under the custody of the carrier, which limits its liability to this phase. The custody should not be imposed before being received and after delivery, although the goods have not physically been placed in the consignee’s possession.

25. On the other hand, the consignee is bound to take delivery of the goods pursuant to contractual conditions. Besides, Article 1(3)(b). of the Carriage of Goods by Sea Act 1991 (hereinafter the “COGSA”), which incorporates the HVR into Australia’s domestic legislation, states that the “carrier ceases to be in charge of the goods at the time the goods are delivered to, or placed at the disposal of the consignee”.

26. In this case, the Respondent offloaded the Goods on 29 July 2017. It also transmitted an access authority pass on which it is expressly written that “delivery of this access authority pass constitutes delivery of your cargo”. Therefore, the transmission of this document implied that the Goods were at the Claimant’s full disposal. The Respondent was no longer in custody of the Goods and therefore no longer liable. Consequently, the Respondent’s obligation under the Charterparty was already fulfilled when the damages to the Goods occurred.

37 Hick v. Raymond & Reid [1893] AC 22 HL.
38 IMLAM Problem, access authority pass, p.24.
27. Therefore, the Respondent cannot be held liable for the damages to the Goods.

2. **The Claimant provided insufficient packing of the Goods**

28. It is the Respondent’s position that the damages cannot be linked to the waterproof sealant provided. Indeed, in order to recover its loss, the owner must consider who packed the goods into the containers, what surveys and inspections took place, and where did the actual fault occur which caused the loss.\(^{39}\)

29. According to the expert opinion,\(^ {40}\) the damages were triggered by “prolonged use of the sealant” provided by the Respondent, which could only be efficient for up to five days as already clarified. The Respondent provided waterproof sealant complying with the agreed specification.

30. Moreover, the shipper is not required to pack the goods with the aim of keeping them safe from atypical risks.\(^ {41}\) The Claimant cannot organise claims revolving on the waterproof sealant it agreed upon. Besides, the Respondent provided sufficient information over their capacity.\(^ {42}\)

31. Additionally, Article 4(2)(n) of the HVR provides the goods should be sufficiently packed by the shipper.

32. The Claimant did not act accordingly to the rare nature of the Goods shipped. It only used simple fibre bags whilst pointing additional and specific care that such commodities needed to be shipped with.\(^ {43}\)

33. Therefore the Tribunal shall hold that the Claimant did not sufficiently pack the Goods.

3. **The damages are the result of the Claimant’s failure to take delivery of the Goods**

34. The Respondent argues that the damages took place after the delivery. In *The Polar*\(^ {44}\), the shipowner was not held liable for damages since the cargo’s owner failed to demonstrate that a consignment of potatoes had suffered condensation damage through improper carriage as opposed to weather conditions operation after discharge.

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\(^{40}\) IMLAM Problem, statement of expert opinion of Simon Webster, p.44.

\(^{41}\) The Lucky Wave [1985] 1 Lloyd’s Rep 80, QB.


\(^{43}\) IMLAM Problem, letter sent on 22 July 2017 from Jay Mizzone to Marc Simpson, p.2.

\(^{44}\) Forggensee Navigation Co Ltd (The Polar) [1993] 2 Lloyd’s rep, 478.
35. In our case, the Claimant fails to demonstrate that the Goods were damaged during the shipment or the delivery. According to the expert’s opinion, the Cargo was damaged “sometimes in the 24 hours from 4:30 a.m. on 30 July 2017”.45 It reveals that the Goods were damaged by the “unprecedented rainfall”, which started on 30 July 201746 after the delivery was completed.47 The Claimant negligently left the Goods for two days under pouring rain.

36. Therefore, the Tribunal shall hold the Claimant responsible for the damages to the Goods.

4. Alternatively, the Respondent would be entitled to mitigate its liability under the HVR

37. In any event, should the Tribunal find the Respondent liable for the delivery of damaged Goods, which is challenged hereby, its liability shall be limited pursuant to Article 4(5)(a) of the HVR for “loss or damage to or in connection with the goods”. The Liminos case48 included economic loss as well as physical loss.

38. In our case, the Claimant holds that the delivery of damaged Goods led to an economic loss and is therefore subject to limitation. Besides, it alleges that damages were done recklessly and knowingly their probable income, which would prevent the Respondent to mitigate its liability. Yet, according to Article 4(5)(e) the burden of proof is on the Claimant, but such a proof is not brought.

39. As a result, the Respondent’s liability shall be limited to an amount of USD2 per kilogramme of gross weight of the Goods damaged as provided under Article 4(5)(a) of the HVR.

40. Thereby, the Respondent cannot be requested to pay more than USD105,000 49 to the Claimant.

B. The Respondent provided a seaworthy Vessel

1. The Respondent diligently provided a seaworthy Vessel

41. Pursuant to Article 3(1) of the HVR the carrier must provide with due diligence a vessel properly equipped, before and at the beginning of the voyage. The application of the HVR converts the absolute undertaking of the seaworthy obligation by the shipowner into a mere due diligence one.50

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45 IMLAM Problem, statement of expert opinion of Simon Webster, p.44.
46 IMLAM Problem, Dillamond Times article dated on 1 August 2017, p.36.
47 IMLAM Problem, access authority pass, p.23.
49 USD2 x 3 damaged containers containing 17,500 kilogrammes each = USD105,000.
42. The obligation to act with due diligence, relies on the accomplishment by the shipowner of all reasonable skill and care to ensure that the vessel is seaworthy.\(^{51}\) There is no absolute standard regarding an “accident free ship”,\(^{52}\) which might withstand “all conceivable hazards”.\(^{53}\) The due diligence obligation then relies on the circumstances.\(^{54}\)

43. In this case, the Respondent provided the Vessel, which was safely able to carry the Cargo. Should the unforeseeable and overwhelming result of the solar flares not occurred, the Respondent did provide a Vessel with reasonable care.

44. Therefore, the Respondent diligently provided a seaworthy Vessel.

2. In any events, the seaworthy obligation was no longer due by the Respondent

45. The obligation to provide a seaworthy vessel shall be examined at the beginning of the voyage and no longer applies after the vessel’s departure, since such obligation does not extend through the voyage.\(^{55}\)

46. In this case, the Vessel had been sailing for nearly one day and a half out of the four expected voyage days when the solar flare crises occurred.\(^{56}\) The impact of this crisis on the Vessel’s equipment started well after the beginning of the Voyage. The seaworthy obligation relying on the Respondent was consequently no longer due.

47. In addition, fortuitous events may occur during the voyage and cause damage to a vessel.\(^{57}\) If the unseaworthiness of the Vessel is the result of latent defects of the equipment, this will only lead to

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\(^{52}\) President of India v. West Coast Steamship Co (The Portland Trader) [1963] 2 Lloyd’s Rep 278, 280–281 (Dist Ct, Oregon).

\(^{53}\) Ibid.


\(^{56}\) IMLAM Problem, letter sent on 24 July 2017 from Marc Simpson to Jay Mizzone, p.15; IMLAM Problem, email sent on 26 July 2017 at 2:32 p.m. from Marc Simpson to Jay Mizzone, p.17.

the shipowner’s liability, if aware of these defects prior to the voyage.\textsuperscript{58} An inaccessible and invisible defect will not ordinarily render the vessel unseaworthy.\textsuperscript{59}

48. In the case at hand, the defects of the equipment were not apparent and were only noticed after the Vessel departed. The Respondent was not aware of these defects prior to the voyage. The solar flares triggered these damages on 25 July 2017.

49. Therefore, the Tribunal shall hold that the Respondent provided a seaworthy Vessel at the beginning of the Voyage.

3. The condition of the Vessel did not cause any damage to the Claimant

50. Article 4(1) of the HVR provides that liability of the shipowner will only be held if a causal link between the absence of due diligence, and the damages the cargo owner complains of is demonstrated. Thusly, the onus of proof to demonstrate a correspondence with losses relies on the person who alleges them\textsuperscript{60}. In order to rely on this exception, the shipowner must demonstrate that the act of default complained of is a proximate cause of the alleged damage.\textsuperscript{61} For instance, without any demonstration of a causal link between the loss and the use of inadequate charts on board, a shipowner was not held liable.\textsuperscript{62}

51. In that respect, the Claimant failed to demonstrate the presence of a causal link between the loss and the seaworthiness of the Vessel. The Claimant cannot prove such an allegation since its negligence constitutes the expected causal link as previously demonstrated.\textsuperscript{63} There is no link between the justifiable deviation\textsuperscript{64} and the damages to the containers.

52. Therefore, the Tribunal shall hold the Respondent not liable for a breach of the seaworthy condition provided by the Charterparty.

\textsuperscript{58} Whybrow & Company Pty Ltd v. Howard Smith Co Ltd [1913] 17 CLR 1.
\textsuperscript{60} Shipping Corporation of India Limited v. Gamlen Chemical Co. Australasia Pty. Ltd [1980] HCA 51; 147 CLR 142; 32 ALR 609.
\textsuperscript{61} Kamilla Han Peter Eckhoff KG v. AC Oerssleff's EFTF A/B (The Kamilla) [2006] EWHC 509 (Comm) 2 Lloyd’s Rep 238 [15].
\textsuperscript{62} Rey Banano del Pacifico C.A. v. Transportes Nav Ecuatorianos (The Isla Fernandina) [2000] 2 Lloyd’s Rep 15.
\textsuperscript{63} See Memoranda, Part III, II, A, 2 and 3, pp.7-8, paras. 28-36.
\textsuperscript{64} See Memoranda, Part III, II, C, pp.11-12, paras.53-56.
C. The Vessel was forced to follow an alternative route

53. The Respondent had to take an alternative route in order to perform its obligations. A deviation is defined as “an intentional and unreasonable change in the geographic route of the voyage as contracted”. The act of deviating can be deemed necessary and justifiable as explained in the Davis v. Garrett case. It must be reasonable in regards to the “interests of all concerned”. The outlines of a justifiable deviation have since been clarified.

54. First, it must depend upon a comparison between the gravity of the danger and the inconvenience and expense of taking avoiding action. Second, there is no deviation when the vessel changes its course due to the “reliance on a defective compass” or for navigational reasons. When the vessel requires repairs, the deviation must, as well, be considered justified. Third, even if the deviation is deemed unnecessary, the carrier will not be held liable if the “the loss would also have happened on the proper route”.

55. In our case, by a letter on 22 July 2017, the Respondent accepted the condition to take the most direct route, which is not challenged. However, the Respondent had no other option than to follow a deviated route. First of all, the deviation must be considered necessary bearing in mind the gravity of sailing without navigational systems and the small impact it triggered. Both parties had no interest in randomly sailing at sea, which could have a major impact on the Goods. Second of all, the Vessel’s communication and satellite were highly damaged, which explains the deviation, as demonstrated. Besides, the Master feared the Vessel would need repairs, which could only be

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69 Rio Tinto Co v. Seed Shipping Co [1926].
71 J. Cooke and Al., Voyage Charters, Lloyd’s Shipping Law Library, 4th Edition, 2014, p.279, para.12.11; see also J. Wilson, Carriage of Goods by Sea, 7th Edition, Lloyd’s Shipping Law Library, 4th Edition, 2014, para.11.2.1 Voyage Charters: “one of the most frequently encountered examples of this type of justifiable deviation is the vessel which, for safety reasons, has to put into port for repairs to damage sustained on the voyage”.
72 Davis v. Garrett [1830] 6 Bing 716.
73 IMLAM Problem, letter sent on 22 July 2017 from Marc Simpson to Jay Mizzone, p.2.
74 IMLAM Problem, letter sent on 22 July 2017 from Marc Simpson to Jay Mizzone, p.14: “we appreciate the sensitiveness and information of the voyage and confirm that your instructions will be followed at all times”.
75 IMLAM Problem, p.40, para.3.
76 See hereunder para.62.
done by deviating to Spectre. Finally, the damages to the Goods would have occurred regardless since they took place at the discharge port after the Voyage.\textsuperscript{77} In any case, should the Tribunal accept the Claimant’s position, the deviation had no link with the anchor being dropped and harming the hull.\textsuperscript{78}

56. Thus, the Tribunal shall declare that the Respondent did not breach the Charterparty.

III. \textit{Force Majeure} events prevent the Respondent from performing its obligations

A. The solar flares are constitutive of an act of God and forced the Respondent to deviate

57. It is the Respondent’s position that the solar flares are constitutive of an act of God, which triggered the Respondent’s deviation. Both the HVR and Clause 17 provide that an act of God is an event of \textit{Force Majeure}. However, even if it is well established that “severe solar storms are a classic act of God”,\textsuperscript{79} the \textit{Rylands v. Fletcher}\textsuperscript{80} case required that three criteria shall apply in order to qualify an event as act of God: it must (i) be a natural cause without human intervention,\textsuperscript{81} (ii) be an event that could not have been decreased with human foresight,\textsuperscript{82} (iii) be the immediate and direct cause of the supposed breach of the Charterparty.\textsuperscript{83}

58. (i) First of all, the NASA described a solar flare as “an intense burst of radiation coming from the release of magnetic energy associated with sunspots”.\textsuperscript{84} This phenomenon directly comes from the sun and constitutes a natural event. Therefore, the solar flare being constitutive of a natural cause without human intervention, the first criterion to constitute an act of God is assessed.
59. (ii) Second of all, the solar flares should be foreseeable. In the Skandia\textsuperscript{85} case, the court held that the act of God defence could apply had the loss not been prevented even with reasonable foresight.\textsuperscript{86} Courts frequently apply the act of God doctrine when the event is described as “unprecedented”.\textsuperscript{87}

60. In this case, even though the crisis was first displayed to the public in the Cerulean Mail,\textsuperscript{88} its income could not have reasonably been predicted. Moreover, when the Vessel started its course, the latest development of the solar flares had not been observed yet, which led the Respondent not being able to foresee its impact. As mentioned in The Cerulean Mail, this phenomenon was an “unprecedented international emergency”, which was experienced “around the world” leaving vessels with neither navigation nor communication systems and “outdoor travellers fearing for their lives”.\textsuperscript{89} Therefore, the Respondent was not able to foresee the proportions of the solar flares.

61. (iii) Finally, the solar flares should be an immediate and direct cause of the deviation of the Vessel. This criterion refers to “circumstances where there is no concurrent causation”, \textit{i.e.} when the act of God is the sole cause of the damages,\textsuperscript{90} uncontrolled or uninfluenced by humans.\textsuperscript{91} In the Ransome \textit{v.} Wisconsin Electric Power Co.\textsuperscript{92} case, the court held that it is on the carrier to prove that he did not negligently behave. Indeed, “the carrier must not have been able to prevent the damage through the exercise of reasonable care”.\textsuperscript{93}

62. In this case, the solar flares are the direct cause of the deviation, which is therefore not a result of the Respondent’s behaviour. As previously mentioned, the Respondent could not rely on any navigational system and therefore had to deviate to Spectre in order to avoid the risks of hazardous


\textsuperscript{88} IMLAM Problem, The Cerulean Mail dated on 25 July 2017, p.35.

\textsuperscript{89} Ibid.


\textsuperscript{92} Ransome \textit{v.} Wisconsin Electric Power Co. [1979] 275 N.W.2d 641 (Wis. 1979).

\textsuperscript{93} T. L. Tisdale of Tisdale & Lennon, \textit{Hurricane and natural disaster – Carrier liability for damage to cargo in the U.S}, December 2005, https://www.steamshipmutual.com/publications/Articles/Articles/USCarrierLiability1205.asp
navigation. Such an act is demonstrative of a due diligent behaviour and reasonable care, since the Respondent balanced the result of a small detour to Spectre, with a high potential risk of getting lost at sea. All requirements constitutive of an act of God are met.

63. Therefore, the Tribunal shall hold that the Respondent not liable for breaching the Charterparty.

B. The storm is a peril of the sea preventing the Respondent from performing its obligations

1. The Respondent is exempted from its obligation to deliver the Goods on time

a. The storm prevents the Respondent to deliver the Goods on time

64. It is the Respondent’s position that it shall be exonerated from its obligation to deliver the Goods by 28 July 2017 at 7 p.m., the storm being constitutive of a peril of the sea. This exception can be performed for any damage caused by (i) risks peculiar to the sea (ii) that reasonable care would not have avoided. However, under Australian law, (iii) the unforeseeability of an event is not required in order to characterise perils of the sea.

65. (i) Firstly, in order to rely on this exception, the peril must be a characteristic of “maritime adventures”, meaning that it cannot happen on land. The event does not need to be of an extraordinary nature to be characterised as peril of the sea. For instance, in the Canada Rice Mills case, the peril of the sea defence was accepted for a storm, which magnitude was not exceptional.

66. In the present case, the storm was worse at sea than at land as related by the Captain. Even though the magnitude of the storm is not accurate, the storm was described as a “once in a lifetime storm”, which points out peril of the sea.

67. (ii) Secondly, to rely on the perils of the sea exemption, it must be proved that the damage could not have been avoided by the exercise of reasonable care. Thus, the Respondent can rely on this
exception if it did not act negligently,99 i.e. if it acted with due diligence, which only requires that the vessel and equipment be sufficient.100 Thereby, establishing the seaworthiness of the vessel101 is a necessary precondition to rely on the exception. In the Keystone102 case, it was stated that the negligence of the crew could not be characterised even if they did not take all the precautions that would inevitably prevent the accident and make its occurrence impossible.

68. In our case, the Respondent provided a seaworthy Vessel.103 Moreover, the crew acted carefully whilst trying to avoid the storm by stopping the progress of the Vessel. However, the storm’s income was so strong that despite further precautions by the crew the results could not have been avoided. In such a situation, the Respondent was not bound to provide other care in order to qualify its due diligence. Consequently, the crew exercised the care that a reasonably prudent man would have provided in similar circumstances.104

69. (iii) Finally, sea conditions, which may reasonably be foreseen, can constitute perils of the sea.105 For instance, in the Bunga Seroja106 case, where a storm caused cargo damage, even if it was foreseen, its intensity was such that its effects could not have been avoided.

70. The same situation was encountered in our case. As related previously, the storm, described as a “once in a lifetime”107 one, was so strong that it was impossible for the Respondent, however diligent, to guard against its repercussions.

71. The peril of the sea requirements are met, which exonerates the Respondent from its contractual obligations.

100 Diwon v. Safer [1839] 5 M&W 405.
102 Keystone Transports Ltd. v. Dominion Steel Coal Corp. [1942] SCR 495.
103 See Memoranda, Part II, II, B, pp.9-11, paras. 41-52.
105 Shipping Corporation of India Ltd v. Gamlen Chemical Co. A/Asia Pty Ltd [1980] 147 CLR 142.
107 IMLAM Problem, Dillamond Times article dated on 29 July 2017, p.36.
72. Therefore, the Tribunal shall acknowledge that the Respondent is not responsible for the delay in the delivery of the Goods.

b. Alternatively, the Respondent is entitled to mitigate its liability under the Limitation of Liability for Maritime Claims Act

73. The Tribunal shall rule that the Respondent's liability for the late delivery can be limited pursuant the Limitation of Liability for Maritime Claims Act (hereinafter “LLMC”). Indeed, Article 1(1) of the LLMC provides that shipowners are entitled to limit their liability. The Respondent, as the owner of the Vessel, is entitled to rely on this Convention. Moreover, Article 2(1)(b) provides that “claims in respect of loss resulting from delay” shall be subject to a limitation of liability.

74. Pursuant to Article 6 of the LLMC, the limitation of liability is based on the ship’s tonnage. The tonnage of the Vessel being 2,000 GRT, the Respondent’s liability shall be limited to USD1,510,000.

75. Should the Tribunal find that the storm cannot exempt the Respondent from performing its obligation to deliver the Goods on time, the Respondent is entitled to mitigate its liability under the LLMC.

2. The storm prevented the Respondent to deliver undamaged Goods

76. If the Tribunal considers that the broken hull led to the damages to the Goods, it shall hold this event as a mere consequence of the storm. Peril of the sea is also an exoneration from damages caused whilst trying to avoid the danger of an event. Even if the damages were not discovered immediately, it does not amount to negligence under prevailing weather conditions.

77. In this case, the crew made a decision to avoid the consequences of the storm, which resulted in damage to the hull. Should the Tribunal consider that the Goods were damaged due to the broken

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108 IMLAM Problem, Charterparty, p.3.
109 IMLAM Problem, Charterparty, p.3.
hull, the Respondent cannot be held liable since this decision was made by reason of a peril of the sea. The mere fact that the Claimant discovered the damage to the Goods does not characterise the Respondent’s negligence.

78. Thereby, in any event, the Respondent cannot be held liable for the delivery of damaged Goods.

IV. The Respondent is contractually entitled to freight and demurrage

A. Freight must be paid pursuant to Clause 22

79. The Respondent argues that the Claimant is liable for freight pursuant to Clause 22, which provides that “freight must be paid (...) within two banking days of delivery of the cargo”.

80. First of all, the charterer has an obligation to pay the freight, otherwise it would deprive the shipowner of any benefit from the charterparty. In our case, the Claimant did not pay any freight despite the former invoice sent by the Respondent, and consequently breached Clause 22. Furthermore, this situation has fateful consequences on the Respondent’s financial accounting regarding the amount of freight and may lead to its bankruptcy should the Claimant fail to pay. Thus, Claimant is liable for freight.

81. Second of all, lump sum freight charterparties are contracts for the use and hire of a ship for a given voyage in return for the payment of freight. It shall be distinguished from a contract that consists in paying for the carriage and delivery of a particular cargo. Consequently, shipowners are entitled to full freight if they delivered goods in a merchantable condition at the port of destination. In this case, the Respondent performed its obligations to properly carry and deliver the Goods to Dillamond as previously demonstrated. Moreover, the delay is only due to the storm, which is a Force Majeure event. Thus the Respondent is exempted for the delay.

115 IMLAM Problem, invoice sent on 7 August 2017 from Dynamic Shipping LLC to Cerealban Beans and Aroma Ltd, p.32.
120 See Memoranda, Part III, II, A, pp.6-8, paras.23-40.
121 See Memoranda, Part III, III, B, pp.14-17, paras. 64-78.
82. In addition, shipowners are entitled to full freight if they are ready to deliver in substance at the port of destination the goods loaded, even when in damaged conditions. In our case, the Respondent did deliver the Goods at the port of Dillamond.

83. Therefore, the Tribunal shall acknowledge that the Respondent is entitled to claim payment of the freight.

B. Demurrage must be paid pursuant to Clause 8

84. The Respondent holds that the Claimant is liable to demurrage since laytime has expired before it takes delivery of the Goods.

1. Demurrage is due since no interruption to laytime can be raised

85. The charter’s failure to load or discharge, within the agreed laytime, is a breach of contract. The mere fact that the laytime was exceeded is sufficient to hold the charterer liable. Shipowners are entitled to damages for the period during which the vessel was deprived of the use of the ship. The charterer has the obligation to load or unload during agreed laytime, and is liable for the non-performance of such commitment, regardless the nature of the impediments faced, unless covered under the Charterparty.

86. Clause 8(e) which provides that the laytime shall be interrupted in case of “inability or inefficiency of the ship to load or discharge”. In The Spalmatori case, Lord Reid held that when demurrage has begun to accrue, no cause of interruption of laytime can be raised, since if the carrier had taken reception of the Goods as planned, the interruptive cause would never have occurred. It has been held that the charterer will not be released from its contract due to delay resulting from the crowded state of the docks.

123 IMLAM Problem, email sent on 29 July 2017 at 8: 42 p.m. from Marc Simpson to Jay Mizzone, p.24.
125 N.V. Reederij Amsterdam v. President of India (The Amstelmolen) [1960] 2 Lloyd’s Rep. 82, p. 94 (Pearson J.).
129 IMLAM Problem, Charterparty, Clause 8(e), p.6.
87. In our case, the Claimant acted with want of due diligence. The Cargo was already available on Saturday and the Claimant had the opportunity to take delivery of the Goods on Sunday\(^{132}\) with a specific barcode.\(^ {133}\) The Respondent provided the Claimant with arrangements to facilitate the receipt of the Goods. Demurrage did not accrue as a consequence of delayed delivery but due to congestion, which occurred on Monday\(^ {134}\) and that could have been avoided. Furthermore, it was the *Force Majeure* events that triggered the delayed delivery,\(^ {135}\) which was beyond the Respondent’s control. Such events cannot either be imputed to the Respondent nor release the Claimant from its liability for demurrage.

88. Therefore, the Tribunal shall declare the Claimant liable for demurrage.

2. *The calculation of demurrage*

89. Demurrage becomes payable when the laydays allowed for unloading have expired. Laydays begin when the vessel arrives at the agreed place and run continuously.\(^ {136}\) The Respondent informed the Claimant of the Vessel’s arrival, although shipowners are not obliged to give notice.\(^ {137}\) Thus, the Claimant was in position of taking delivery of the Goods immediately. The Claimant knew that if the delivery did not go as planned and breached the time frame agreed to unload,\(^ {138}\) it would be held liable for demurrage.\(^ {139}\)

90. In our case, the Cargo was delivered at 8:42 p.m. on 29 July 2017\(^ {140}\) after approximately two hours of unloading.\(^ {141}\) However, the Claimant’s staff only took delivery of the Goods on Monday 31 July at 1:17 p.m.\(^ {142}\) Therefore, demurrage started from the offloading of the Cargo at 6:58 p.m., until

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\(^{132}\) IMLAM Problem, *email sent on 31 July 2017 at 5:30 p.m. from Marc Simpson to Jay Mizzone*, p.25.

\(^{133}\) IMLAM Problem, *access authority pass*, p.23.

\(^{134}\) IMLAM Problem, *email sent on 31 July 2017 at 4:21 p.m. from Jay Mizzone to Marc Simpson*, p.24.

\(^{135}\) See Memoranda, Part III, III, pp.12-17, paras.52-78.


\(^{137}\) *Houlde r. GSN* [1862] 3 F & F 170.

\(^{138}\) IMLAM Problem, *Charterparty, Clause 8(c)(ii)*, p.6.

\(^{139}\) IMLAM Problem, *Charterparty, Clause 9*, p.6.

\(^{140}\) IMLAM Problem *email sent on 29 July 2017 at 4:28 p.m. from Marc Simpson to Jay Mizzone*, p.22.

\(^{141}\) *Id.*

\(^{142}\) IMLAM Problem, *Points of claim n°5*, p.37; IMLAM Problem, *letter sent on 1 August 2017 from Robert Priestley to Marc Simpson*, p.27.
12:02 a.m., meaning that 5 hours of demurrage were accountable. Each hour representing USD20,000\textsuperscript{143}, the Claimant was accountable for a total amount of USD100,000.\textsuperscript{144}

91. In light of the above, the Tribunal shall hold the Claimant liable for USD100,000 for demurrage.

\textsuperscript{143} IMLAM Problem, Charterparty, box 24, p.3.
\textsuperscript{144} IMLAM Problem, email sent on 7 August 2017 at 3:40 p.m. from Marc Simpson to Jay Mizzone, p.32.
PART IV - THE CLAIMANT IS NOT ENTITLED TO A MARITIME LIEN -

92. The Respondent denies that the Claimant has a right to exercise a maritime equitable lien over the Vessel. The Claimant cannot be subrogated to the crew wages lien since it made the payment voluntarily (II). Besides, a claim for necessaries does not give rise to a maritime lien (III).

I. English law governs the existence of a maritime lien

93. The existence of a maritime lien is governed by English law. In The Halcyon Isle,\textsuperscript{145} it has been held that the existence of a maritime lien is subject to the law of the forum. Since the seat of arbitration in the case is London, the Tribunal shall rule over the lien claim in accordance with English law.

II. The Claimant is not entitled to be subrogated into the crew wages lien

A. The Claimant voluntarily paid the crew wages

94. The Respondent holds that the Claimant cannot acquire the crew wages lien by subrogation. According to English law, a person that voluntarily makes a payment cannot rely on subrogation to recover the amount paid.\textsuperscript{146} In The Petone\textsuperscript{147} case, it was held that a third party that voluntarily paid crew wages, and was “under no compulsion and under no necessity to protect his own property”, is not entitled to acquire any crew wages lien. The court confirmed that a third party who voluntarily pays crew wages has “no right in rem based upon a maritime lien”.\textsuperscript{148} Therefore, a third party who pays seamen’s wages is not subrogated by law to the maritime lien for wages of the crew.\textsuperscript{149}

95. In this case, the Claimant’s payment of crew wages was voluntary. Indeed, the Claimant was under no compulsion to do so. It was not bound either by legal duty, or by contractual obligations. The Claimant was under no necessity to protect its property. It chose to do the payment in order to

\textsuperscript{147} The Petone [1917] P.198, para.625.
\textsuperscript{148} Ibid.
protect the crew’s property. However, how honourable it may be, the payment of USD100,000 was made at the Claimant’s own initiative and without having been forced to do it.

96. Therefore, the Claimant has no right of recovery through the mechanism of subrogation. The Tribunal shall rule that subrogation cannot be awarded to a volunteer.

**B. The Claimant cannot rely on unjust enrichment defence**

97. The Respondent argues that the Tribunal shall deny Claimant’s subrogation to the crew wages lien because the transaction is tainted by illegality. It is a bar to claim unjust enrichment.\(^{150}\)

98. In *Holman v. Johnson*,\(^{151}\) Lord Mansfield said that the illegality defence “sounds at all times very ill in the mouth of the defendant”. However, it is accepted in order to avoid contracts tainted by illegality to produce their effects, and thus to protect public policies. Indeed, the rationale of the illegality defence is to prevent anyone “who founds his cause of action upon an immoral or illegal act” to be assisted. Ward LJ considered more recently, in *Hewison v. Meridian Shipping Services Pte Ltd*\(^{152}\) that Lord Mansfield judgment was the source of the illegality principle.\(^{153}\)

99. Illegality is a defence to a claim in unjust enrichment.\(^{154}\) In *Banque Financière*,\(^{155}\) Lord Hoffman expressly stated that a claimant would not be entitled to subrogation on the ground of unjust enrichment where “there are (...) reasons of policy for denying the remedy”. Hence, a party who enters into a contract whose purpose is fraudulent cannot seek to enforce it.\(^{156}\)

100. In our case, the agreement is unenforceable on grounds of illegality. Indeed, a “behind the scenes legal deal” relating to the payment of the crew wages was signed.\(^{157}\) The Claimant negotiated with the executives concurring the payment of the crew’s wages.\(^{158}\) Allowing the Claimant to recover the funds paid for crew wages would amount to enforce a fraudulent agreement and would give effect to an illegal transaction. Without further information regarding the deal which is “with the lawyers

\(^{151}\) *Holman v. Johnson* [1775] 1 Cowp 341, 343.
\(^{152}\) *Hewison v. Meridian Shipping Services Pte Ltd* [2003] ICR 766 [57].
\(^{155}\) *Banque Financière de la Cité v. Parc (Battersea)* Ltd [1999] 1 AC 221, 234.
\(^{156}\) 21\(^{st}\) Century Logistic Solutions Ltd v. Madsen Ltd [2004] EWHC 231 (QB), para.11.
\(^{157}\) IMLAM Problem, email sent on 8 August 2017 at 9:17 a.m. from Jay Mizzone to Marc Simpson, p.34.
\(^{158}\) IMLAM Problem, email sent on 19 July 2017 from Will Gardner to Jay Mizzone, p.1.
now”¹⁵⁹ the Claimant cannot recover the amount paid by subrogation to the crew wages lien on the ground of unjust enrichment.

101. Such defence does not hold if there is not a close connection between the claim of unjust enrichment and the illegality.¹⁶⁰ This defence shall be a proportionate response to deny the Claimant a remedy of unjust enrichment if a close connection is observed. In this situation, the claim of unjust enrichment is closely linked to the illegality since the Claimant’s alleged loss is due to the use for another purpose of the sums paid. Therefore, the Tribunal shall reject the claim for restitution.

III. A claim for necessaries does not give rise to a maritime lien

102. The Respondent submits that a claim under Section 20(2)(m) of the Senior Courts Act does not give rise to a maritime lien and confers a purely statutory lien. Only a right in rem is given, not a maritime lien.¹⁶¹ The right in rem can only come into existence at the time of the arrest of a vessel, whereas possession is not a requirement for maritime liens.

103. Under Common Law, ship suppliers have no right to exercise a maritime lien.¹⁶² As stated in The Heinrich Bjorn¹⁶³ case as well as in Lord Tenterden’ Treaties of Shipping,¹⁶⁴ anyone who provides personal services to a vessel has no maritime lien.

104. In our case, the Claimant provided personal services to the Vessel since he paid crew wages. However, maritime claims such as “claim in respect of goods or materials supplied to a ship for her operation or maintenance”¹⁶⁵ do not give rise to a maritime lien. Since the Vessel has not been arrested, the Claimant is not entitled to a right in rem and thus, has no statutory lien under Section 20(2)(m).

105. Therefore, the Tribunal shall rule that the Claimant does not hold a secured right on the Vessel.

¹⁵⁹ IMLAM Problem, email sent on 8 August 2017 at 9:17 a.m. from Jay Mizzone to Marc Simpson, p.34.
¹⁶³ The Heinrich Bjorn [1885] LR 10 P.D. 44 (CA); see also The Neptune case [1835] 3 Kn. 94, 12 ER 584 PC, para.97.
¹⁶⁴ The Neptune case, (1835) 3 Kn. 94, 12 ER 584 PC referring to Lord Tenterden Treatise on Shipping, para 97.
¹⁶⁵ S20(2)(m) of the Senior Courts Act
In light of the foregoing submissions, the Respondent respectfully requests this Tribunal to:

**DECLARE** the request for arbitration not admissible;

**FIND** in the alternative the Respondent not liable for the following Claimant’s allegations:

1. The damage to the Cargo
2. The unseaworthiness of the Vessel
3. The deviation to Spectre

**DECIDE** the Respondent is not liable for any delay that was caused by *Force Majeure*;

**FIND** in the further alternative the Respondent entitled to limit its liability;

**ORDER** the Claimant to pay freight and demurrage as well as all amounts due to the Respondent in respect of the Charterparty;

**REJECT** the Claimant’s request for a maritime lien over the Madam Dragonfly;

**FIND** the Claimant liable to the Respondent for damages;

**FIND** the Claimant liable to pay legal and other costs that may incur arising out of or in relation to the present arbitration.