UNIVERSITAS GADJAH MADA

TEAM 9

MEMORANDUM FOR RESPONDENT

ON BEHALF OF
Dynamic Shipping LLC
RESPONDENT/SHIPOWNER

AGAINST
Cerulean Beans and Aromas Ltd
CLAIMANT/CHARTERER

COUNSEL

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<td>Act</td>
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<td>B/L</td>
<td>Bill of Lading</td>
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<td>Cargo</td>
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<td>nm</td>
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STATEMENT OF FACTS

A. THE PARTIES

1. The Claimant is Cerulean Beans and Aroma Ltd ("Claimant"), a coffee bean company. The Respondent is Dynamic Shipping Ltd ("Respondent"), a shipping company. Madam Dragonfly ("Vessel") is flagged in Cerulean. Both Cerulean and Dillamond are European Settlements who has adopted all United Kingdom (UK) laws.

B. THE PERFORMANCE OF THE CHARTERPARTY

2. The Claimant and Respondent entered into the Voyage Charter party ("VCP") dated on 22 July 2017. Under the VCP, 4 containers of coffee beans cargoes ("Cargo") was loaded at the loading port of Cerulean and should arrive at Dillamond by 7pm 28 July 2017. On the same day, Respondent had confirmed that the Cargo would be protected by the waterproof sealant, guaranteed waterproofing of containers for up to 5 days.

3. On 24 July 2017, Respondent sent an email that gave notice that the Vessel departed and is en route to Dillamond and the cargo receipt is attached to the email, with the expectation that the delivery of the cargo is to be completed by 5pm on Friday, 28 July 2017.

4. On 26 July, Solar flares disrupt communication and satellite system, left the Vessel with no satellite and contact for 17 hours, thus, the Vessel had to deviated to Spectre. Respondent had no choice but to deviate to Spectre because the Vessel required repair in order to reach her destination in safety after facing Solar flares.

5. On 28 July 2017, Respondent was informed at 4:28 pm that the massive storm about to hit Dillamond in 30 minutes through the radar. Consequently, the port was also
closed for 12 hours, resulting in congestion. However, Respondent decided to continue the voyage to meet Claimant’s time expectation to receive the cargo.

6. The Vessel eventually managed to arrive at the port on 29 July 2017 at 7:00 pm even after getting stuck 100nm out from Dillamond since 8:58am due to the storm. Further, the Vessel had also nowhere safe to berth and there were also complications with the worsening hull condition because of the storm.

7. At 4:28pm on the same day, Respondent informed Claimant that the Vessel is due to berth in 30 minutes and informed that if Claimant’s agents are not at the port, Respondent will attach barcode for entry. When Respondent gave notice to Claimant that the Vessel has docked and cargo is available for collection at 8:42 pm, Claimants’ agents were nowhere to be found and Respondent was waiting until midnight at the port, resulting in accruing demurrage in the amount of US20,000/hour from the Vessel’s arrival.

8. After such notice, Respondent was waiting for 5 hours at the discharge ports until 12:00 am on 30 July 2017, leaving behind an access barcode for Claimant to conveniently access the cargo without having the Respondent to be present. Claimant gave no response until 4:21 pm on 31 July 2017, where Claimant informed that they took the cargo at approximately 1:17pm and contended that delivery was delayed and was unable to access the cargo left at Dillamond due to congestion at the port. When Claimant’s agents collected the cargo, they were complaining that 3 out of 4 containers were water damaged and could not be sent to the Claimant’s client, Coffee of the World. However, Respondent had carried the Cargo in accordance with industry standard conditions and that the sealant was still exceptionally strong as the Respondent managed to arrive within 5 days. The Claimant was the one who went against the Respondent’s advice to collect the cargo sooner.
9. On 1 August 2017, Claimant demanded USD30,200,000 from Respondent. Such amount derives from the calculation of USD15,750,000 for the damaged coffee, USD9,450,000 for replacement coffee and USD5,000,000 for settlement payment between Claimant and its client, Coffee of the World. The Respondent however denies such liabilities as the unfortunate events were due to the delay, which was caused by two events of force majeure. Respondent also denies the assertion that Claimant holds a maritime lien over the Vessel.

10. Following the completion of the voyage, Respondent has attached an invoice, holding the Claimant liable for freight (USD500,000), agency fee at Spectre (USD75,000), fee for repairing the hull (USD875,000), agency fee at Dillamond (USD50,000), demurrage (USD100,000), and the use of electronic access systems at Dillamond (USD10,000), which the Claimant deems completely unacceptable.
ARGUMENT ADVANCED

I. THE CLAIMANT CANNOT COMMENCE ARBITRATION PROCEEDING BASED ON ARTICLE 27(E) OF THE VCP

1. Following the Claimant’s assertion of determining claim on damages,¹ the Respondent contends that the Claimant has failed to comply with Clause 27E which states that “a party may not commence legal proceedings (including arbitral proceedings under this clause) in respect of dispute unless clause (d) has been complied with first.”²

2. This is due to the fact that the arbitral proceeding is contingent on the compliance of Clause 27 (D) of the VCP³ that “any dispute as to technical matters arising out of or in connection with this contract shall be referred to expert determination by an independent Master Mariner.”

3. However, the expert determination that has already been submitted to the Tribunal by Simone Webster [A] does not include causation and valuations. As a result, [B] the expert determination is insufficient to determine damages.

A. CLAUSE 27(G) SHALL INCLUDE VALUATION

4. This dispute involves the conflict on whether or not determination of damages arises out of technical matters that has been regulated in Article 27(G) of the VCP.⁴ In Clause 27(G) of the VCP, it is stated that “technical matters” constitute as:

“matters surrounding the technical aspects of the performance of the charter party, such as the vessel’s route, loading and unloading of cargo, storage conditions and

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¹ Case file P.38
² Voyage Charter Party -Clause 27 (E) on Arbitration
³ Voyage Charter Party -Clause 27 (D) on Arbitration
⁴ Case File – Page 40
other matters which can reasonably be considered to be within the expert technical knowledge of a Master Mariner.  

5. The open interpretation of “other matters” contained in Article 27 (G) of the VCP gives rise to a dispute on whether or not specifications should be included in its definition. The dispute is based on the nature of the words “arising out” which is wider than “in relations with” in a sense where an arbitration clause within an international commercial contract shall be “liberally construed”.

6. Based on the practice within the VCP Governing law, the interpretation of determination of damages should seen as the extension of technical dispute, due to the fact that the question of valuations are included within the process of investigating the technical performance of the charter party, and the value of the goods shall be calculated to the amount of commodity exchange price.

7. Here, the Respondent contends that the issue of damages arises out of matters that have been addressed within Clause 27(E) of the VCP, concerning technical matters being referred to expert determination by an independent Master Mariner. The expert determination admitted however, does not contain the causation and valuation needed to fulfill the definition of technical matters.

8. The extension of the definition of “technical matters” contained within Clause 27 (G) leads to the problem of insufficiency within the admitted expert opinion since in that document, the addressed problems only include the cause and the timing for

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5 Voyage Charter Party -Clause 27 (G) on Arbitration
6 Premium Nafta Products Limited (20th defendant) and others (Respondent) v Fili Shipping Company Limited (14th Claimant) UKHL 40 (2007) (Para 12)
7 Clause 28 (Law) of the Voyage Charter Party
8 Carriage of Goods By Sea Act 1991 (Article 5 B)
9 Case File. P.40
10 Procedural Order 2 – Point 22
damages, and none about valuations. Furthermore, the expert determinations are also not supported by the facts to support their opinion.

9. The fact that expert determination shall comply with Clause 27 (A) of the VCP results in the legal effect of the Act, Civil Practice Rules for Experts CPR 35 as well as the practice direction of CPR 35.

10. Within the latter rule, it is stated that the expert evidence is to be given on the issue of liability, causation or quantum. This also reflects LMAA’s Arbitration Terms where parties should adapt guidelines contained within the documents, one that also urges the experts to answer a question of quantum of the claim in order to consider the issue that have been raised.

11. Thus, the requirements above shall lead into the extension of clause 27(G) of the VCP in relations to other matters within the expert’s field. They shall determine damages based on not law, and instead the facts of damaged Cargo.

B. **CONSEQUENTLY, THE EXPERT DETERMINATION IS INSUFFICIENT TO DETERMINE DAMAGES**

12. If the expert determination is insufficient, it results to the determination not binding.

In relation to Clause 27(F) of the VCP, which states that a party appointed as an independent master mariner should not act as an arbitrator and the determination shall be binding, expert determination will not be valid as it lacks the specifications needed.

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11 Refer to Expert Opinion by Simon Webster & DSM Surveyors
12 “Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity, or termination, shall be referred to arbitration in London by a sole arbitrator/a tribunal of 3 arbitrators (strike out whichever is inapplicable) in accordance with the Arbitration Rules of the London Maritime Arbitrators Association (LMAA).” Voyage Charter Party -Clause 27 (A) on Arbitration
13 Civil Justice Council - Guidance for the instruction of experts in civil claims in United Kingdom
14 LMAA Arbitration Terms; Third Schedule & Questionnaire
15 Voyage Charter Party -Clause 27 (F) on Arbitration
13. According to the Clause 27 (C) (II) of the VCP, these facts are needed in order to include in the arbitration award their findings on the material questions of law. The notion of “references to the matters on which the findings of fact were based” includes references to the matters on which the findings of fact were based. Within the present dispute, respondent contends the tribunal that the expert opinion are lacking the valuations evidence it needed in order to resolve the issue at hand.  

14. The importance of inserting valuations evidence can be found within the case of British Airways Plc where valuations evidence that could help to resolve the pleaded issue should clearly be admitted. In the present dispute, both experts have given out their opinions regarding the condition of the Cargo, but they did not provide any information regarding the causation nor the quantum of the damages itself.

15. The fact that in this dispute determination shall be conclusive and binding and the present determination are proven to be insufficient implies that the expert has acted outside his remit. As reflected in the case of Premier Telecom Communications, an expert who misunderstood the exercise that they should undertake shall lead into their expert determination to be non binding because it is not a determination of the kind that the parties have contractually agreed should be binding.

16. Thus, the technical matters that should be included in the expert determination is not limited to the only the liabilities but also the causation and quantum of the damaged Cargo. The expert determination is thus insufficient to be admitted to the Tribunal, as it would not become binding for the parties.

\[\text{British Airways Plc v Spencer & Ors (Trustees of the Airways Pension Scheme) [2015] EWHC 2477 (Ch) (21 August 2015) (Warren Justice) (Paragraph 103)}\]  
\[\text{ibid}\]  
II. THE RESPONDENT HAS NOT BREACHED THE VCP

17. When the effect of solar flares left the vessel with no satellite and navigation, the Vessel had to deviate to the port of Spectre. Consequently, the Vessel encountered a storm that led to the delay to the port of Dillamond. As result of the delay, the Respondent had to resort using the access barcode at the port of Dillamond to deliver the cargo to the Claimant.

18. Thus, the Respondent would not be liable due to [A] the deviation to the port of Spectre is justified [B] and the event that caused delay falls within force majeure clause. Lastly, due to Claimant’s failure to receive the cargo, [C] the use of access barcode shall be justified.

A. THE DEVIATION TO SPECTRE IS JUSTIFIED BECAUSE OF FORCE MAJEURE

19. Respondent is not liable for any delay as it was caused by force majeure events. As sets forth in Clause 17 of VCP, the event that is constitutes as force majeure, including act of God, unforeseen weather events and hindrance in mining, loading and discharging, will exempted carrier from liability of any delay in performing contractual obligation.

20. Referring to characteristics by Ewan McKendrick, which have been recognized by the courts, force majeure events shall be irresistible, unforeseeable, external to the person claiming discharge and has made performance impossible and not merely

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19 Case File p. 18  
20 Case File p. 19  
21 Case File p. 23  
22 Clause 17 VCP
difficult.  

23 Here, Respondent submits that the deviation for Spectre was for safety measures due to [i] withstand sea perils that they may encounter [ii] and the intended repair of the navigational system to reach Dillamond.

   i. **The deviation to withstand sea perils that may be encountered by the Vessel**

21. Although deviation would constitute a breach in the VCP, the Respondent pleads that his deviation was an exception of the clause since it was delayed, interrupted and prevented by force majeure event.  

22. The news that published the occurrence of solar flares, along with the notice to bring back-up arrangement, was unforeseeable to Respondent due to Respondent’s large presence in Dillamond, and keep up with Dillamond news only.  

23. The event was so extreme, communication and satellite systems were knocked out, that Respondent could not reasonably expected to encounter it. However, accident that was due to natural causes, directly and exclusively without human intervention, constitutes as an act of God, because it was not realistically possible for human to guard against. 

24. Moreover, Respondents pleads that a Master, whose ship is in a perilous position, does right in making such deviation from his voyage, as it is necessary to save his ship and lives of the crew. 

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23 GARDINER v AGRICULTURAL AND RURAL FINANCE PTY LTD [2007] NSWCA 235 para. 223 Kiefel J; Hyundai Merchant Marine Co Ltd v Dartbrook Coal (Sales) Pty Ltd [2006] FCA 1324; 236 ALR 115 para. 61
24 Clause 17 VCP
25 Clarification for Procedural Order No. 1 art. 1
28 Ibid
29 J. & E. Kish v Charles Taylor, Sons & Co [1912] 2 QB 26
25. Here, the knocked out navigation system can not serve to guide the Vessel further on in the previous course and the Vessel had no choice but to deviate to Spectre for its own safety and the crew, and additionally in order to fulfill the Respondent’s implied duty to take reasonable care of the Cargo.\(^\text{30}\) Therefore, the delay is justified for the sake of saving lives and property.

ii. The intention to repair the satellite system in order to reach Dillamond safely

26. The deviation is justified because the Respondent had the intention to repair the satellite system to reach Dillamond safely.\(^\text{31}\) When the ship requires repair in order to reach her destination in safety, the deviation for repair is justifiable unless it arises out of initial unseaworthiness for which the carrier is liable.\(^\text{32}\) The Respondent is not liable because the repair was initially needed for the Vessel to reach Dillamond safely and the Vessel is not unseaworthy to begin with.

27. In Spectre, the system did not require repair and came back on when the effect of solar flares died down.\(^\text{33}\) Referring to the case of *Teekay Shipping v AMSA*, a defect will only render a ship unseaworthy if it cannot be readily fixed on the voyage in ordinary course management.\(^\text{34}\) Here, the effect of solar flares was readily curable by the time solar flares died down, proving the Vessel is fit enough to not only to withstand the effect of solar flares but to fix itself automatically. Because the system came back on by the time the defect subsided, the Vessel is restored to being safe carrying of the goods and crew.\(^\text{35}\) Further, the Vessel’s initial inspection and

\(^{31}\) Case File p. 19
\(^{32}\) Voyage Charterers 12.11
\(^{33}\) Case File p. 19
\(^{34}\) *Teekay Shipping (Aust) Pty Ltd and Australian Maritime Safety Authority* [2012] AATA 519
\(^{35}\) Case File, p. 19
certification for safety\textsuperscript{36} renders the Vessel seaworthy to be able to sail in the first place.\textsuperscript{37}

28. Referring to the case of Davis v Garrett, there is no natural connection between the wrong of the master in taking the proper course and the loss itself, if that the same loss might have been occasioned by the very same tempest if the vessel proceeded in her direct course. Further, the case mentioned that the loss occurs while the ship is actually upon a devious course, will be treated as having been caused by deviation, unless the carrier can prove the loss would have been occurred if there had been no deviation.\textsuperscript{38}

29. Notwithstanding the deviation to the port of Spectre, even if the vessel proceeded to her direct route, the Vessel will still encounter the storm since the storm hit Dillamond at approximately 4:28 pm on 28 July, while the estimated time arrival of the Vessel in her direct route was 5 pm on the same day.

**B. THE EVENT THAT CAUSED DELAY FALLS WITHIN FORCE MAJEURE**

30. By the time the effect of solar flares died down, a massive storm hit Dillamond, and was not picked up on radars until 45 minutes before the storm battered Dillamond. A freak storm described as ‘once in a lifetime’ that brought with rain, hail and severe winds.\textsuperscript{39}

31. The event was so extreme that Respondent could not reasonably expect to encounter it.\textsuperscript{40} Thus, the storm was due to natural causes and directly and exclusively without

\textsuperscript{36} The Vortigern [1899] P 140 per Henn Collins LJ; The Hague-Visby Rules Art.III(1)

\textsuperscript{37} Navigation Act 2012 Cl. 96(2)(A)

\textsuperscript{38} Davis v Garrett (1830) 6 Bing. 716; Morrison v Shaw Savill [1916] 2 K.B. 783

\textsuperscript{39} Case File p.21

\textsuperscript{40} Lebeupin v Richard Crispin and Co [1920] 2 K.B. 714; Ewan McKendrick, Force Majeure and Frustration of Contract (Lloyd’s of London Press Ltd, 2 ed 1991) p. 142
human intervention, constitutes as an act of God. 41 [i] The storm caused delay shall constitute as hindrance. Moreover, [ii] the Respondent has tried reasonable steps to minimize any delay.

**i. Delay was due to hindrance**

32. As a result of the event, the port was closed for 12 hours 42 and causes delays once it open. The Vessel had to wait for a berth even though she has been in that location since 7 am on 29 July 2017. Clause 17 (C) of VCP stated that:

“hindrances of whatsoever nature in mining, processing, loading or shipping or discharging of products occurring without the negligence of the Charterer”

33. Pursuant to the aforementioned, the case of The Radauti 43, due to congestion in the port, vessel did not obtain a berth. It is held that when a port suffers from congestion it is almost invariably the responsibility of the Port Authorities to deal with the situation by taking appropriate measures in respect of allocation of berths. It is either the owners not the charterers of the congestion bound vessels who exercise any control relating to the matter of allocation of berths. Nobody has suggested that the charterers of the Radauti could have done anything about the delay. Therefore, Staughton J. is in the opinion that hindrance covers congestion at port.

34. Moreover, hindrance should be limited to hindrances which were unpredictable as well as unavoidable. In the present case, the Vessel is stuck 100nm out from Dillamond due to delay causes by storm.

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42 Case File p. 21
35. Further, time occupied in shifting ports or berth not to count as lay time. In the clause 8(e), interruption to laytime includes event of any delay on hindrance in discharging by reason of act of God. Due to this, laytime shall count because the event of hindrance was due to force majeure. Under act of God, Respondent is not liable under the COGSA which were incorporated in the VCP.

ii. **Respondent has taken all reasonable steps to minimize any delay**

36. Moreover, it is stated that in the event of force majeure event arising,

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“(a) shall take all reasonable steps to minimize any delay so caused
(b) the performance of those obligation shall be resumed as soon as practicable after such disability is removed”
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37. Respondent contends that Respondent has taken all reasonable steps to minimize any delay and resumed the performance of obligation right away:

a. Solar flares occurred at 9.30 pm on 24 July, whereas the effect of solar flares caused the Vessel to lost with no satellite for 17 hours.  

b. By the time the effect died down, Respondent has given the prompt notice right away on 2.32 pm to Claimant, along with the notice that the Vessel is safe and en route to Dillamond.

c. However, a “once in a lifetime storm” hit Dillamond so sudden that the crew did not see it on the radar until approximately 4:28 on 28 July, when the agreed time arrival was 7 pm on the same day.

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44 Case File, p. 35  
45 Case File, p. 17  
46 Ibid  
47 Case File, p. 19
d. Notwithstanding the Vessel’s arrival on 7 pm, the Vessel has stuck 100nm out from Dillamond, due to the delays caused by the storm, that also closes airport for 12 hours.

e. After waiting for her turn to berth, Respondent has given notice to Respondent two hours before the arrival, along with the notice of demurrage.

38. As stipulated on Carriage of Goods by Sea Act, a carrier is liable for loss unless the carrier establishes that the delay was excusable and the carrier took all measures that were reasonably required to avoid the delay and its consequences.  

39. By the above explanation, it is clear that Respondent has taken all reasonable steps to minimise the delay caused by force majeure. In addition, the VCP provides that the charterer shall not be liable on any basis in failure or delay in delivery caused by any force majeure event.

40. Respondent asserts that even though this two events constitutes as force majeure, Respondent still managed discharge the cargo within five days, as the sealant can properly be used. However, Claimant has failed to assign its agent to receive the cargo, consequently, Respondent had to use an access barcode which constitutes as a delivery.

C. THE USE OF ACCESS BARCODE AS SUBSTITUTE OF DELIVERY IS JUSTIFIED

41. While not regulated in the VCP, the use of access barcode shall be justified. Under Clause 12 of VCP, the Vessel shall be consigned to the Charterer’s agent at the discharging port for attending to matters concerning the Cargo and the Vessel. Here,
based on Clause 12 of VCP, the Respondent submits that because [i] it was the
Claimant’s failure to take the Cargo as part of his obligation, and [ii] the
Respondent’s use of access barcode shall be justifiable.

i. The Claimant Failed to Collect the Cargo

42. It was Claimant’s obligation to collect the cargo when it was available at the
discharging port. In the case of *The Beltana*,\(^{51}\) it was held that delivery occurs once
the consignee has been notified and had an opportunity to collect the goods, where
actual collection is deemed unnecessary. It shall be noted that it was both parties
obligation under Clause 12 of VCP to be present at the discharging port concerning
the delivery of the Cargo.

In the present case, the Respondent has fulfilled his obligation in giving notification
of readiness of the Cargo two times prior and after the arrival.\(^{52}\) However, none of
Claimant’s agents were present at the discharging port to take the delivery of the
Cargo. Therefore, there cannot be delivery of the Cargo under Clause 12 of VCP
when the Claimant failed to take the Cargo.

ii. The Respondent’s use of access barcode is justified

43. Because the Claimant failed to take the Cargo in the first place, the Respondent’s use
of access barcode shall be deemed justifiable. Since there is no fixed time agreed for
the delivery, the Respondent has to wait for a reasonable time for the consignee to
take the cargo.\(^{53}\) After the expiry of reasonable time, the shipowner is entitled to
take reasonable steps to prevent the delay of his ship.\(^{54}\)

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\(^{51}\) Automatic Tube Co. v. Adelaide SS. (*The Beltana*) [1967] 1 Lloyds’s Rep. 531 P. 8
\(^{52}\) Case File. P. 22 & 24
\(^{54}\) Ibid.
44. The question on reasonable time must necessarily depend on the circumstances, and is therefore a question of fact.\textsuperscript{55} In the case at hand, the Respondent was pressured to prevent extra costs from accruing and increasing risks for to the safety of the Cargo.\textsuperscript{56} Further, due to the Claimant’s unresponsiveness to the emails, it would be unreasonable for the Respondent to wait further considering the risks he bore. The Respondent’s time waiting from the Vessel’s arrival until midnight is considered reasonable, including the use of access barcode as an alternative measure.

45. The use of access barcode is justified in the circumstance that the Respondent was in. Under the Carriage of Goods by Sea Act 1991 (COGSA), if there is no consignee to receive the goods from the carrier, the carrier has the obligation to place the cargo at the disposal of the consignee accordingly to that particular trade, applicable at the port of discharge.\textsuperscript{57}

46. Similarly, the use of access barcode was in accordance with COGSA, therefore justified in the circumstance that the Respondent was in. The access barcode was produced by the Respondent using a system created by the port of authority of Dillamond, and the Cargo was left at the port.\textsuperscript{58}

47. Here, it shall be noted that the fact this delivery was allowed by the port of authority, and Claimant had no issue with collection at the port, implying that the use of access barcode is applicable. Therefore, the use of access barcode shall be deemed justified as the Respondent had waited for a reasonable time, and took reasonable steps under the law for delivery of the cargo.

\textsuperscript{55} Jessup v Fremder [2001] VSC 100 Par. 25;  
\textsuperscript{56} Zou, Y. “Delivery of Goods by the Carrier Under the Contract of Carriage by Sea; a Focus on China”. Erasmus University Rotterdam, 2005. Web. Cpt 10 P. 245  
\textsuperscript{58} Case File, Procedural Order No. 2, P.
III. **THE RESPONDENT IS NOT LIABLE FOR DAMAGES IN THE AMOUNT OF $30,200,000**

48. Having submitted that Respondent’s alleged breaches are justified, the Respondent further submits that he would not be liable from any damage after the delivery of the Cargo. The Respondent denies allegation made by the Claimant for damaged cargo, alternative coffee bought, and settlement payment. 59

49. Respondent submits that [A] the Respondent has successfully delivered the Cargo, and will not be liable for damages occurred after delivery. Further, [B] the Claimant is not entitled for alternative coffee and settlement payment expenses as they are too remote to recover. Lastly, [C] the Claimant cannot claim for damages as it is his own failure to take reasonable steps in mitigating losses.

A. **THE RESPONDENT IS NOT LIABLE FOR WATER DAMAGED CARGO**

50. Since the use of access barcode shall constitute as delivery of the Cargo, the Respondent further rejects the liability for Claimant’s loss. Delivery of the Cargo is the final obligation of the ship owner under the VCP, it marks the point of time at which the carrier’s responsibility for safe custody of the goods to come to an end. 60

51. In the present case, it is clear that the Claimant’s failure to collect the Cargo caused the damage of the Cargo. According to expert opinion of Simon Webster, the Cargo was damaged from 04.30am 30 July 2017. 61 Here it shows that the damage occurred after the delivery of the Cargo. Therefore, Respondent would not be liable for the damage

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59 Case File, p. 27  
61 Case File P. 43
B. CONSEQUENTIAL DAMAGES ARE TOO REMOTE TO RECOVER

52. Assuming alleged breach of damaged coffee cargo contended by the Claimant is true, he can only recover damages if the loss suffered arose naturally, making the loss within the contemplation of the parties when they made the contract\(^{62}\) and thus foreseeable. To the extent that these conditions are satisfied, the loss by reason of a breach of contract is to be placed in the same situation, financially, with respect to damages as if the contract had been performed.\(^{63}\)

53. The test of remoteness of damages is the foreseeability of the damages. If the parties have contemplated the kind of damages, the damages is not remote.\(^{64}\) The contemplation of the parties marks the boundary of the liability for loss or damage caused by a breach of contract.\(^{65}\) At the time of entering the contract, it was acknowledged by the Respondent the existence of the Claimant and his client’s contractual obligation.\(^{66}\)

54. However, the details of said contractual obligation, like the kinds of damages for the alternative coffee and settlement payment expenses for the failure to deliver the Cargo, was not within the contemplation of the Respondent as it was not informed to him explicitly by the Claimant. This would mean that the alternative coffee and settlement payment were unforeseeable to the Respondent. Therefore, Respondent cannot not be held responsible for Claimant’s consequential damages as it was beyond the contemplation of Respondent of the parties of such damages.

\(^{62}\) North East Solution Pty Ltd v Masters Home Improvement Australia Pty Ltd [2016] VSC 1; Hadley v Baxendale (1854) 9 Exch 341, 355;
\(^{63}\) Ibid; Commonwealth v Amann Aviation Pty Ltd [1991] HCA 54, 174 CLR 64 (Deane J) Par. 2; Robinson v Harman (1848) 1 Ex 850, 855, 154 ER 363, 365.
\(^{64}\) Ibid par 249(4); Alexander v Cambridge Credit Corporation Ltd (1987) 9 NSWR 310 at 365-6; Mount Isa Mines Ltd v Pusey [1970] HCA 60; 125 CLR 383 Par. 11
\(^{65}\) Commonwealth v Amann Aviation Pty Ltd [1991] HCA 54, 174 CLR 64 (Deane J) Par. 36;
\(^{66}\) Case File P. 2
C. THE CLAIMANT FAILED TO MITIGATE HIS LOSSES

55. The Respondent further submits that the Claimant is not entitled for Settlement Payment for he failed to mitigate his damages. The Claimant is under duty to take all reasonable steps to mitigate his losses and cannot recover those which are avoidable.67

56. In the present case, it was unreasonable for the Claimant to pay the settlement payment because it only increased his losses even more, defeating the purpose of mitigation. In mitigation, the injured party is required to take steps that are reasonable only, and need not resort to measure that are costly.68 Here, the Claimant’s settlement payment in the amount of $5,000,000 shall be considered as costly and avoidable.

57. It was unreasonable for the Claimant to pay $5,000,000 for the settlement without knowing the actual risk of legal threats by the third party. Moreover, the settlement payment was avoidable as it was Claimant so it was not a contractual obligation but a device chosen by the Claimant.69 Thus, Claimant cannot recover for consequential damages because they would not have arisen if he did not make the choice to take it without further consideration that the settlement payment may have been more costly than the legal action itself.

67 Castle Constructions Pty Limited v Fekala Pty Limited & Ors [2004] NSWSC 672 Par. 39
68 Werner Motoring Group Pty Ltd v NMX Pty Ltd, [2012] VSC Par. 41
IV. THE CLAIMANT IS NOT ENTITLED TO EXERCISE A
MARITIME EQUITABLE LIEN AGAINST THE VESSEL

58. While the Respondent admits the allegations made by the Claimant,\(^{70}\) the Respondent
denies the assertion that the Claimant is entitled to exercise a maritime lien. The
Claimant themselves can not exercise a maritime lien over the Vessel because the
Respondent has not paid the crew of the Vessel wages for the voyage, and has not
repaid the sum of $100,000 that the Claimant paid to the crew in the Respondent’s
stead.\(^{71}\)

59. Maritime lien consists in the substantive right of the Tribunal’s executive function of
arresting and selling the Vessel, in that order.\(^{72}\) By enforcing a maritime lien against
the Vessel based on the crew wages, the Claimant would be able to secure their
$100,000 through distributing the proceeds of the sale of the Vessel amongst the
Claimant and the crew.\(^{73}\)

60. However, the Claimant’s argument is inadmissible because [A] the Claimant does not
hold the title of seaman and [B] maritime lien, particularly on the payment of crew
wages is incapable of being transferred in law by subrogation to the Claimant.

A. THE CLAIMANT DOES NOT HOLD THE TITLE OF SEAMAN

61. The Claimant should not be the one to exercise the maritime lien because they are not
seafarers. According to the Senior Courts Act 1981, any claim by the master or crew

\(^{70}\) Case File p. 1
\(^{71}\) Case File p. 38
\(^{72}\) United Africa Company v. Owners of The Tolten [1946] W.N. 7 (1945)
\(^{73}\) The Two Ellens (1872) LR 4 PC 16 (Sir Robert Phillimore); Daniel Harmer v. William Errington Bell and Others (‘The Bold Buccleugh’) [1850-1851] VII Moore, P.C. 267 13 E.R. 884
for wages is within the admiralty jurisdiction of the High Court and in respect of which a vessel may be arrested.74

62. The claim for crew wages must only be made by a crew member or a ‘seaman’, which is defined in the Merchant Shipping Act75 to include ‘every person (except masters and pilots) employed or engaged in any capacity on board any ship.’76

63. In the current case, because the Claimant did not have the capacity engage on board the Vessel, then the Claimant can not be categorized as a seaman or a crew member. Thus, the claim asserted by the Claimant does not fall within the list of maritime claims found in section 20 of the Act77 and is considered inadmissible if the Claimant themselves argue to exercise a maritime lien.

B. THE RIGHT TO EXERCISE A MARITIME LIEN CANNOT BE TRANSFERRED TO THE CLAIMANT

64. It is true that liens are able to be transferred by the principles of subrogation.78 However in this case, even if lien were to be transferred by the crew to the Claimant, the claim would still remain inadmissible because [i] maritime liens, in particular, can not be transferred by subrogation79 for the exception of [ii] maritime liens subrogated with judicial consent.

i. Maritime liens cannot be legally subrogated

65. In general, maritime liens are not transferable rights under English maritime law, whether through legal subrogation.80 Subrogation, under the common law, is

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74 Art. 20(2) of the Senior Courts Act 1981
75 Merchant Shipping Act 1995 p.343; Section 24(3) of the Attachment of Earnings Act 1971
76 Maritime Lien For Seafarers’ Wages in England and Wales, PDF p.3
77 Art. 20 of the Senior Courts Act of 1981
78 Trendtex Trading Corporation and Another Appellants v. Credit Suisse Respondents [1981] 3 W.L.R. 766 (Lord Wilberforce, Lord Edmund-Davies, Lord Fraser of Tullybelton, Lord Keith of Kinkel and Lord Roskill)
79 Jackson, DC, Enforcement of Maritime Claims, 3nd edn, 2000, LLP
80 The Petone [1917] P. 198 (Hill J.)
essentially a remedy to ensure "a transfer of rights from one person to another, without assignment or assent of the person from whom the rights are transferred, and which takes place by operation of law in a whole variety of widely different circumstances." 

66. In *The Sparti*, Waung J dealt with this issue as understood by the British courts. He held that the weight of English authorities was strongly against the doctrine that under which a person, who pays off the crew wages in a port, is put into the shoes of the seaman whose wages he had paid because it is personal in nature and should be reserved for the crew.

67. Thus, in this case, where the Claimant pays off outstanding crew wages which arose before the arrest, the Claimant does not then become entitled to the maritime lien which the crew wages normally attract. The leading ground upon which their claim is contested is that a lien for wages is a privilege personal to the master and crew, or to the master in respect of payment, and cannot be assigned.

**ii. There is no judicial consent to subrogate a maritime lien to the claimant**

68. The legal subrogation that is generally recognized is in the form of a court order granting transfer of the lien. Voluntary payment by the Claimant will not transfer the maritime lien to the Claimant unless the payment is made with judicial consent or is ordered by the Court before payment were made for the wages in order for the seamen to strip the expense of keeping them if the Claimant were to be subrogated.

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82 The Sparti (2000) 2 Lloyd's Rep 618; The Petone (1917) P. 198 (Hill J)
83 The Petone (1917) P. 198 (Hill, J); The Leoborg (1963) 2 Lloyd's Rep. 269, 441.
their right to a maritime lien.\textsuperscript{85} For instance, in the Leoborg No. 2, it was held that the volunteer who paid without authority of the court was not granted the maritime lien for wages but only given the status of a necessaries man.\textsuperscript{86}

69. Whereas here, because there has not been written subrogation from any court giving permission to the Claimant to pay the crew wages before the commencement of this proceeding, maritime lien shall not be subrogated to the Claimant.

V. THE CLAIMANT IS RESPONSIBLE TO PAY FREIGHT AND DEMURRAGE

70. Since Respondent has fulfilled the obligations under the VCP with delay for delivery justified, Respondent submits that Claimant is liable for the freight, and demurrages.

71. On the first account, Claimant has the obligation to pay freight in the amount of $500,000 under VCP.\textsuperscript{87} The true test of the right to Freight is whether the service in respect to freight under the contract has been performed.\textsuperscript{88} Here, Under Clause 22 of VCP, Freight is to be paid after the delivery of the cargo. However, despite such obligation under the VCP, Claimant has not pay the freight. Therefore, Claimant is liable for the unpaid freight in the amount of $500,000.

72. On 29 July 2017, upon Vessel’s arrival, Respondent has given notice of the demurrage that accrues at USD20,000 per hour from the Vessel’s arrival. The Claimant has yet to pay USD100,000 to the Respondent for demurrage, contending that since the Respondent was late delivering the cargo, the time for demurrage will not count.

\textsuperscript{85} Clark v Hine, (1908) 15 S.L.T. 914 (1908) (Lord Salvesen); The Petone [1917] p. 198
\textsuperscript{87} Case File p. 3
\textsuperscript{88} Dakin v Oxley (1864) 15 CBNS 646, 664-665
73. The mere fact that the shipowner by some act of his prevents the discharge of the vessel is not enough to interrupt the running of the laydays, as the delay was justified for the protection of the cargo and the Vessel.\textsuperscript{89} It is necessary for there to be fault on the part of the shipowner.\textsuperscript{90}

74. The shipowner fulfilled the obligation to have the Vessel ready and available to discharge.\textsuperscript{91} However, it was the Claimant’s failure to collect the cargo at the large span of time provided by the Respondent,\textsuperscript{92} made it difficult for the Respondent to complete their obligations relating or discharging within the agreed lay days.

**PRAYER FOR RELIEF**

For the aforementioned submission, the Respondent respectfully requests that this Tribunal declare that

a) The Tribunal does not have jurisdiction to determine damages

b) The Respondent has not breached the VCP

c) The Claimant is not entitled all damages submitted in the amount of $30,200,000.

d) The Claimant is not entitled to exercise a maritime equitable lien due to the matters pleaded therein

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\textsuperscript{89} Houlder v. Weir (1905) 10 CC 228 p. 236

\textsuperscript{90} Gem Shipping Co of Monrovia v. Babanaft (Lebanon) SARL (The Fontevivo) [1975] 1 Lloyd’s Rep 339, at p. 342.

\textsuperscript{91} Ibid., at p. 789.

\textsuperscript{92} Case File p. 24