LA

3RD NATIONAL LAW UNIVERSITY ODISHA

INTERNATIONAL MARITIME ARBITRATION MOOT, 2016

MEMORIAL FOR CLAIMANT

IN THE MATTER OF AN ARBITRATION

CONDUCTED BEFORE THE ARBITRAL TRIBUNAL

BETWEEN:

LAFAYETTE COMPANY LIMITED …CLAIMANT/OWNERS

AND

RADANI PRIVATE LIMITED …RESPONDENT/CHARTERERS

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS

Art.	Article
BoL	Bill of Lading
C/P	Charter Party
Cl	Clause
F/N	Fixture Note
Moot Scenario	IMAM Moot Proposition, 2016
MT	Metric Tonnes
PMT	Per Metric Tonnes
PDPR	Per day pro rata
§	Section
USD	United Stated Dollar
V/C	Voyage Correspondence in Moot Scenario
NYPE	New York Produce Exchange

INDEX OF AUTHORITIES

CASES

STATUTES

BOOKS

MISCELLANEOUS

STATEMENT OF JURISDICTION

The Claimant has approached this Honourable Tribunal under § 14(1) of the Arbitration Act, 1996.

STATEMENT OF FACTS

I. THE PARTIES

Lafayette Company Limited ["Owners"], a company located in Mumbai, Maharashtra, is the owner of a vessel named M.V. EJMOS.

Radani Pvt. Ltd. ["Charterers"], a company located in Ahmedabad, Gujarat, charter the aforementioned vessel as per a Charter Party and a Fixture Note.

II. THE FIXTURE NOTE AND THE CHARTER PARTY

Radani and Lafayette executed a Charter Party on 12th September, 2012. A Fixture Note or Recap was sent to the parties by their common broker, Atul. The Fixture Note contained standard clauses mentioning hire payment (USD 10,000 per day pro rata), bunker prices and concentration, applicable commission, and other relevant details. Clause 45 of the Charter Party, an Arbitration clause, was deleted. Seemingly in place of Clause 45, the Fixture Note contained a provision electing the Arbitration Act, 1996, of the United Kingdom as the law governing the arbitration agreement. The arbitration was to take place in London, and the Arbitral Tribunal was to consist of three members.

III. THE BREAKAGE OF CRANES

The 7th voyage was to be from Tawi Tawi, Philippines to Mumbai, India, as per Radani's instructions. On 1st March, 2013, the vessel's cranes malfunctioned while at Tawi Tawi, and were immediately examined by the local experts summoned by the master of the vessel. The experts rectified the problem and certified that the cranes could be used. The loading of cargo commenced, when the jib of crane 3 broke and landed on hatch 4, thereby rendering it inaccessible. Due to this, cargo could no longer be loaded in holds 3 and 4 of the vessel.

Subsequently, Charterers failed to pay full hire in advance as per the charter party, on account of the alleged loss of freight accruing to them due to the accident. Lafayette denied all responsibility and claimed the hire payment, as per the terms agreed upon.

IV. THE DAMAGE OF HOLDS

On 24th November, 2013, it was discovered that the holds of the vessel were damaged, rendering the vessel unfit for commercial usage. An independent examiner was of the opinion that the damage was caused by the cargo carried, and recommended sandblasting. Sandblasting was carried out at the cost of USD 1.13 million. Lafayette claimed that the cost for cleaning was to be borne by Radani, and that the vessel was to be treated as being off hire

for the duration of the cleaning. Radani denied all liability, and contended that the vessel was on hire during the sandblasting process.

V. WITHDRAWAL OF THE VESSEL FROM THE CHARTER PARTY

Meanwhile, Lafayette withdrew the vessel from the Charter Party on 17th January, 2014 and the vessel did not proceed to the West Coast of India as instructed by Radani. The delayed payment of hire by Radani was their reason for doing so. However, 5 days after withdrawing the vessel, they sought to settle their disputes either through arbitration or through discussion. M.V. EJMOS had arrived at the West Coast on 23rd January, 2014. Subsequent to this, Radani accepted Lafayette's withdrawal and requested a refund of advance hire, value of bunkers, and claimed damages for the loss of fixture.

Lafayette rejected Radani's acceptance of their withdrawal and wished to proceed with the voyage from the West Coast of India. No instructions were given to Lafayette regarding said voyage. Lafayette claimed that this amounted to repudiatory breach and terminated the Charter Party.

VI. INVOCATION OF ARBITRATION

Lafayette invoked the arbitration clause as per the Fixture Note and appointed Capt. Joel Fernandez as their arbitrator. Radani appointed Mr. Julian Dave as their arbitrator while reserving the right to challenge the jurisdiction of the arbitrator and the validity of the arbitration. They claimed that the invocation of arbitration was unlawful, being contrary to the public policy of India and hence unenforceable. Mr. Henry Albridge was appointed as the presiding arbitrator by the two chosen arbitrators. The disputes will now be heard by this Arbitral Tribunal.

ISSUES RAISED

I. Whether the award rendered from the arbitration will be enforceable?

II. Which substantive law is applicable?

III. Are Owners responsible for damage to the holds?

IV. Are Owners responsible claims by the sub-charterers?

V. Are Owners liable for the cost of sandblasting?

VI. Whether the vessel was off-hire during the course of sandblasting?

VII. Are Owners liable for losses due to dry-docking of the vessel?

VIII. Whether Charterers were permitted to deduct hire payment?

IX. Whether the vessel was withdrawn permanently?

X. Whether there was a repudiatory breach by Charterers?

XI. Are the Owners entitled to damages for breach of C/P?

SUMMARY OF ARGUMENTS

I. THE AWARD RENDERED FROM THE ARBITRATION WILL BE ENFORCEABLE, AS IT IS NOT CONTRARY TO THE PUBLIC POLICY OF INDIA

It is submitted that the ultimate award rendered from the arbitration proceedings will be enforceable, because: *first*, it is not contrary to the public policy of India, as two Indian parties can derogate from domestic law in the context of arbitration. *Second,* the arbitration clause in the fixture note is valid and binding.

II. INDIAN SUBSTANTIVE LAW WILL BE APPLICABLE

It is submitted that Indian substantive law will be applicable in the instant case. This is so in light of various judicial pronouncements. Further, Indian laws also give authoritative as well as persuasive value to the foreign jurisprudence in maritime law. Lastly, common law doctrines pertaining to maritime law are applicable in the Indian context.

III. OWNERS ARE NOT LIABLE FOR DAMAGE TO THE HOLDS WHILE LOADING CARGO FOR VOYAGE NO. 7.

The owners are not liable for damage to the holds, despite the clause stating that the master is liable for supervision of the stevedoring process. Further, provisions under C/P make Charterers liable for damage to the vessel while stevedoring.

IV. OWNERS ARE NOT LIABLE FOR THE CLAIMS OF THE SUB-CHARTERERS

Transactions with the sub-charterers are governed explicitly by the sublet clause of C/P. Further, the sublet is not under C/P, but under a separate contract with a third party alien to C/P. It is submitted that the doctrine of privity of contract applies in the current case. Finally, damages to sub-charterers were not reasonably foreseeable.

V. CHARTERERS ARE RESPONSIBLE FOR DAMAGE TO THE HOLDS AND HENCE, FOR THE COST OF SANDBLASTING

Owners are obligated only to undertake customary cleaning. Generally, Charterers are responsible for paying for the hold cleaning, and the same is apparent from the provision of C/P. Further, it was a necessity on the master's part to deviate the vessel for repair. Lastly, damages were a direct result of Charterers' instructions.

VI. VESSEL TO STAY ON-HIRE DURING THE COURSE OF SANDBLASTING

First, damage to the vessel was a direct result of Charterers' instructions, and *second*, sandblasting is an extraordinary measure. Finally, even during the dry-docking period the vessel is to be treated on-hire.

VII. OWNERS ARE NOT LIABLE FOR LOSSES DUE TO DRY DOCKING OF THE VESSEL

Provisions of C/P requiring Owners to inform Charterers in advance about the dry-docking process were frustrated on account of emergency. Further, Clause 19(b) of the C/P regulates dry-docking in case of emergencies. Even if there was no frustration of contract, no damages arise as a consequence of the breach.

VIII. CHARTERERS WERE NOT PERMITTED TO DEDUCT HIRE PAYMENT

It is submitted that the charterers were not permitted to deduct the hire, as the vessel was not off-hire and in any case, the deductions were not allowed under C/P.

IX. THE VESSEL WAS NOT WITHDRAWN PERMANENTLY

A right of withdrawal was present in the C/P signed between the owners and the charterers, and the same was exercised by the owners on non-payment of hire. It is submitted that this does not amount to a permanent withdrawal.

X. THERE WAS A REPUDIATORY BREACH BY CHARTERERS, ENTITLING OWNERS TO TERMINATE THE CONTRACT

After the vessel reached the West Coast as per the instructions of Charterers, they declined to give any further instructions. This amounts to a repudiatory breach, which was accepted by Owners, thus terminating the contract.

XI. THE OWNERS ARE ENTITLED TO DAMAGES AS A CONSEQUENCE OF BREACH OF C/P

It is submitted that Owners are entitled to damages due to non-performance of the contract by Charterers. Further, Owners fulfilled their duty to mitigate losses.

ARGUMENTS ADVANCED

I. THE AWARD RENDERED FROM THE ARBITRATION WILL BE ENFORCEABLE, AS IT IS NOT CONTRARY TO THE PUBLIC POLICY OF INDIA

1. Radani and Lafayette are both located in India.[1] They must, therefore, necessarily be registered in India as per the law, and that their assets are situated in India. Hence, enforcement of any award rendered from the arbitration proceedings will be sought under the Indian Arbitration and Conciliation Act.[2] In the present case, it is submitted that the ultimate award rendered from the arbitration proceedings will be enforceable, because: *first*, it is not contrary to the public policy of India, as two Indian parties can derogate from domestic law in the context of arbitration **[A]**. *Second*, the arbitration clause in the fixture note is valid and binding [**B]**.

[A]. TWO INDIAN PARTIES CAN DEROGATE FROM DOMESTIC LAW IN THE CONTEXT OF ARBITRATION

2. In *Sasan Power* v. *North American Coal Corporation*[3], the Madhya Pradesh High Court held that it is not against the public policy of India when two Indian parties contract to have a foreign seated arbitration. Reliance was placed by the court on *Atlas Exports* v. *Kotak Company*[4], wherein a Division Bench of the Supreme Court held that Exception 1 to S. 28 of the Indian Contract Act[5] allowed the parties to derogate from domestic law in the context of arbitration. Further, it was observed that such an arbitration agreement willingly entered into would not be against public policy. In the instant case, Charterers and Owners have willingly entered into an arbitration agreement as evidenced by the arbitration clause in the fixture note. Moreover, there exist multiple instances of implicit acceptance of deviation from domestic curial law.[6]

3. Furthermore, any reliance on *TDM Infrastructure*[7] to undermine this decision is misplaced for two reasons. *First,* the judgment was given only in light of S. 11 (Part I) of the Arbitration and Conciliation Act,[8] as clarified by a corrigendum released. Additionally, S.28,

[1] Moot Proposition, Page 1, F/N, P&C Cl.
[2] Arbitration and Conciliation Act, No. 26 of 1996, INDIA CODE (1996).
[3] Sasan Power v. North American Coal Corporation, First Appeal 310 of 2015.
[4] Atlas Exports v. Kotak Company, (1999) 7 S.C.C. 61.
[5] Indian Contract Act, No. 9 of 1872, INDIA CODE (1872).
[6] Reliance Industries v. Union of India, 2014 Indlaw SC 391.
[7] TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd., (2008) 14 S.C.C. 271.
[8] Arbitration and Conciliation Act, No. 26 of 1996, §11 INDIA CODE (1996).

Part I of the Act was significant to the case. Part I of the Act applies exclusively when the seat of arbitration is in India.[9] Here, the seat of arbitration is London, rendering all decisions under Part I inapplicable. *Secondly*, the decision in *Atlas Exports* is binding as it was given by a Division Bench of the Supreme Court, whereas *TDM Infrastructure* was decided by a single judge. It may be contended that the decision in *Atlas Exports* is untenable as it was under the Arbitration Act, 1940. However, the provisions of the 1940 Act and the 1996 Act are largely similar, with no difference in substance.[10] Thus, it is submitted that any award rendered from this arbitration will be enforceable in India, not being contrary to public policy by virtue of derogation from domestic law.

[B]. THE ARBITRATION CLAUSE IN THE FIXTURE NOTE IS VALID AND BINDING.

4. The agreement to arbitrate fulfills the conditions for a valid arbitration agreement in S. 5 of the Arbitration Act.[11] S. 5(4)[12] requires an agreement recorded by a third party to be authorized by the parties to the agreement. A shipbroker is vested with the authority to conclude fixture notes unless otherwise expressed by the parties.[13] Where one contract was intended to supersede an earlier one, the intention of the parties must be found in the later contract.[14]

5. In the present case, Atul, the common broker drafted the fixture note containing the arbitration clause. Indeed, he was vested with the apparent authority to conclude the fixture, in the absence of any communication to the contrary. Significantly, the fixture note was sent by Atul after the execution of the charter party,[15] thereby making it the later contract in which the intention of the parties is recorded. Further, Clause 45 in the pro forma charter party contained two options with respect to arbitration, neither of which was chosen by the parties.

6. Even if the common broker is deemed to have no authority, the parties' implied acceptance of the terms estops them from denying his authority.[16] The parties accepted the terms by acting in accordance with them, or with reference to them, for two years after the fixture was communicated to them. Moreover, when requested to confirm the provisions of the fixture note, neither of the parties objected to anything contained therein. This amounts to

[9] Bharat Aluminium Co. v. Kaiser Aluminium Technical Service Inc., (2012) 9 S.C.C. 552.
[10] Fuerst Day Lawson Ltd. v. Jindal Exports Ltd., (2011) 8 S.C.C. 333.
[11] Arbitration Act, 1996 § 5 (Eng.).
[12] Arbitration Act, 1996 § 5(4) (Eng.).
[13] Woodstock Shipping Co v. Kyma Compania Naviera SA ('The Wave'), [1981] 1 Lloyd's Rep. 521, 531.
[14] HIH v. New Hampshire, [2001] 2 Lloyd's Rep. 161.
[15] Moot Proposition, Page 2, F/N, CHARTER PARTY Cl.
[16] Spiro v. Lintern, [1973] 1 W.L.R. 1002.

implied acceptance. In light of the above, it is submitted that the arbitration clause in the fixture note is valid and binding.

II. INDIAN SUBSTANTIVE LAW WILL BE APPLICABLE

7. Substantive law defines rights and duties. In civil law it extends to civil rights and responsibilities. It is codified in legislated statutes, can be enacted through the initiative process, and in common law systems it may be created or modified through precedent.[17] It is submitted that the substantive law applicable in the instant case is Indian law **[A]**. Further it is also submitted that Indian law gives authoritative value to the foreign jurisprudence in maritime law, both in terms of admiralty and substantive aspects **[B]**. Lastly, maritime aspect of common law is fundamentally composed of doctrines applicable in all common law jurisdictions **[C]**.

[A]. INDIAN SUBSTANTIVE LAW WILL BE APPLICABLE.

8. Under Rome convention, parties to a contract might choose the law applicable to the contract.[18] Such willingness of the parties might be demonstrated by express clause[19] or by choice demonstrated by reasonable certainty.[20] In the case of *TDM Infrastructure Private Limited* v *UE Development India Private Limited (TDM Infrastructure)* [21]Supreme Court stated that the *intention of the legislature would be* clear that Indian nationals should not be permitted to derogate from Indian law. It was further held that this is a part of the public policy of the country. The same view was endorsed by the Bombay High Court in a recent judgment.[22] It is submitted that in the instant case both parties did not have either an express clause or any other clause demonstrating choice of jurisdiction. Further, both parties have their registered head offices in India.[23] Further both parties are registered entities in India. Hence, the substantive law applicable to both the parties should the Indian substantive law.

[B]. FOREIGN JURISPRUDENCE IS APPLICABLE IN INDIA.

[17] REED ET AL., THE LEGAL AND REGULATORY ENVIRONMENT OF BUSINESS 12-14 (1st ed. 1992).
[18] Rome Convention on the Law Applicable to Contractual Obligations, art. 3, Jun. 19, 1980, O.J. L. 266 of 9.10.198.
[19] Companie Tunisians de Navigation SA v. Companie d' Armament Maritime SA, [1971] AC 572.
[20] Marubeni Hong Kong and South China Ltd. v. Mangolian Government, [2002] All ER 873, 885.
[21] TDM Infrastructure Private Limited v. UE Development India Private Limited, (2008) 14 S.C.C. 271.
[22] Addhar Mercantile v. Shree Jagdamba Agrico Exports, Arbitration Application No. 197 of 2014 along with Arbitration Petition No. 910 of 2013.
[23] Moot Proposition, Page 1, F/N, P&C Cl; Moot Proposition, Page 1, F/N, ACCOUNT Cl.

9. Supreme Court ruled in the *M. V Elizabeth*[24] that developments in foreign jurisdiction with respect to 'Maritime Law' are incorporable in the Indian jurisdiction. This is true for both procedural as well as substantive law. Further, this view has been supported by subsequent judgments of the high courts.[25] In the instant case, it is submitted that in light of the rulings of different courts, developments in foreign jurisdiction have a pervasive value in India.

[C]. MARITIME LAW IS PRIMARILY COMPOSED OF COMMON LAW DOCTRINES

10. Maritime law is primarily composed of common law doctrines.[26] These common law doctrines are incorporated in different jurisdiction by the way of statutes and judicial pronouncements.[27] It is submitted that in the instant case such propositions apply. Further such propositions have been backed by relevant authorities.

III. OWNERS ARE NOT LIABLE FOR DAMAGE TO HOLDS WHILE LOADING CARGO FOR VOYAGE NO. 7.

11. In a demise time C/P, the charterers are to handle all cargo under the supervision of the master.[28] In such circumstances, Charterers are generally responsibly for damage during cargo stevedoring operations. This is true, despite the presence of a clause making master explicitly liable for supervision of the stevedoring process.[29] Here, absence of the words "*and responsibility*" after "*supervision of the master*" renders charterers liable for the damage to the holds **[A]**. Further, provisions under C/P make Charterers liable for damage to the vessel while stevedoring **[B].**

[A]. THE ABSENCE OF THE PHRASE "*AND RESPONSIBILITY*" IN THE PERFORMANCE CLAUSE OF C/P RENDERS CHARTERERS LIABLE.

12. All cargo handling functions are to be done by Charterers "*under the supervision*" of the master.[30] However, the phrase "*under the supervision*" in the performance clause does not

[24] M. V. Elisabeth v. Harwan Investment and Trading Pvt. Ltd., 1993 A.I.R. 1014.
[25] M.V. Free Neptune v. DLF Southern Towns Private Limited, 2011(1) KHC 628 (DB).
[26] ADMIRALTY AND MARITIME JURISDICTION IN THE FEDERAL COURTS, http://www.fjc.gov/history/home.nsf/page/jurisdiction_admiralty.html (last visited Mar 17, 2016).
[27] *Id.*
[28] Zerman, *Liability for Stevedore Damage Claims*, SKULD (Feb. 13, 2012), http://www.skuld.com/upload/News%20and%20Publications/Legal%20News/Skuld_Liability_for_stevedore_damage_claims.pdf
[29] C/P, Cl 8, Line 105.
[30] C/P, Cl 8, Line 105.

shift liability upon the master and thereby Owners.[31] In such circumstances, liability shifts to the charterers even if stowage renders the ship unseaworthy.[32] The addition of the phrase "*and responsibility*" after "*supervision of master*" in the performance clause will only render the master and Owners liable for damages while stevedoring. In the instant case, the Performance of Voyage clause[33] does not have the phrase "*and responsibility*" following the phrase "*supervision of the master.*" Hence, even though the master was supervising the stevedoring process at the TawiTawi port,[34] the master and Owners are absolved of all liability. Here, under the stated circumstances, the liability will shift to the charterers due to the absence of the stated clause.[35] Therefore, Charterers are liable for damage to the crane and the holds.

13. The presence of an exclusion clause in a contract determines the liability of one party while absolving another.[36] Thus, liability for the damage is determined by the terms of this clause.[37] This clause coupled with S. 73 of the Indian Contract Act,[38] prescribes the wrongdoer, and liability of the same. Here, Clause 8[39] is the exclusionary clause. It states that Charterers are to perform all cargo handling and thus, are responsible for all damages in the process. This clause read with S. 73 of the Indian Contract Act indicates that charterers are liable for damage to the crane and the holds.

[B]. THE STEVEDORE PROCESS IS GOVERNED BY CLAUSES 35 & 88 OF C/P.

14. Both parties to the C/P contract are bound by its terms.[40] The provisions of C/P which determine liability in case of damage during stevedoring are Clauses 35[41] and 88.[42] As per these provisions, charterers are responsible for any damage caused to the vessel by stevedores or during the loading process. The master is obligated to notify Charterers about the incident not later than 36 hours after the occurrence.[43] It is submitted that the stated provisions are

[31] CSAV v. MS ER Hamburg Schiffahrtsgesellschaft mbH & Co. KG ,[2006] EWHC 484; London Arbitration No. 2/89 LMLN 242**;** London Arbitration No. 5/05 LMLN 242.
[32] CSAV v. MS ER Hamburg Schiffahrtsgesellschaft mbH & Co. KG ,[2006] EWHC 484; London Arbitration No. 2/89 LMLN 242**;** London Arbitration No. 5/05 LMLN 242.
[33] C/P, Cl 8.
[34] Moot Proposition, Page 7, V/C dated 27 February 2013.
[35] CSAV v. MS ER Hamburg Schiffahrtsgesellschaft mbH & Co. KG ,[2006] EWHC 484; London Arbitration No. 2/89 LMLN 242**;** London Arbitration No. 5/05 LMLN 242.
[36] Nippon Yusen Kaisha v. Acme Shipping Corp ('The Charalambos N Pateras'), [1971] 2 Lloyd's Rep. 42.
[37] *Unfair (Procedural & Substantive) Terms in Contract*, 199TH REPORT, LAW COMMISSION OF INDIA 57-68 (AUGUST, 2006).
[38] Indian Contract Act, No. 9 of 1872, § 73 INDIA CODE (1872).
[39] C/P, Cl 8.
[40] Indian Contract Act, No. 9 of 1872, § 37 INDIA CODE (1872).
[41] C/P, Cl 35.
[42] C/P, Cl 88.
[43] C/P, Cl 88.

binding on the signatory parties in light of S. 37 of the Indian Contract Act.[44] Further, Charterers were informed of the incident not later than 36 hours after the occurrence. The incident in question occurred on March 1, 2013,[45] and was communicated to the charterers on the same day.[46] Hence, charterers are liable for damage to the cargo holds.

IV. OWNERS ARE NOT LIABLE FOR CLAIMS OF THE SUB-CHARTERERS

15. Under the non-demise C/P contract, charterers have liberty to sublet i.e. sub-charter the vessel.[47] Sublet does not necessarily have to be time-chartered and can be under any other form of contract. Nature of sublet is determined by nature of contract between the charterers and sub-charterers, and transactions under such contract are governed explicitly by the sublet clause of the C/P **[A]**. Further, sublet is not under C/P contract, but a separate contract with a third party alien to C/P. Perhaps, owners are alien to the contract between charterers and sub-charterers. In the light of the same, it is submitted, that, the doctrine of *privity of contract*[48] applies in the current case **[B]**. Lastly, the damages to sub-charterers were not reasonably contemplated **[C]**.

[A]. SUB-CHARTERING IS GOVERNED BY THE SUBLET CLAUSE OF C/P.

16. A contract is binding on the parties to the contract.[49] A party to a contract cannot claim immunity from clauses of the contract until provisions of such clauses are not violative of public policy.[50] In the instant case, charterers had a right to sublet vessel under Clause 18 of the C/P. The same clause states that "*Charterers remain responsible for fulfillment of this charterparty.*"[51] It is submitted that this clause imposes overall liability of sublet upon the charterers. Consequently, owners are absolved of any liability whatsoever. Hence, owners are not liable for claims of sub-charterers.

[B]. THE DOCTRINE OF PRIVITY IS APPLICABLE.

17. A third party is not bound by a contract between two parties. Obligations set up in a contract between two parties, consequences of its breach and other particulars only bind the

[44] Indian Contract Act, No. 9 of 1872, § 37 INDIA CODE (1872).
[45] Moot Proposition, Page 9, V/C dated 1 March 2013.
[46] Moot Proposition, Page 9, V/C dated 1 March 2013.
[47] TERENCE COGHLIN ET AL, TIME CHARTERS, ¶1.35 (7th ed. 2014);
[48] JACK BEATSON, ANSON'S LAW OF CONTRACT, 246 (27th ed. 1998).
[49] Indian Contract Act, No. 9 of 1872, § 37 INDIA CODE (1872).
[50] Indian Contract Act, No. 9 of 1872, § 23 INDIA CODE (1872).
[51] C/P, Cl 18, Lines 239-240.

contracting parties.[52] In non-demise time charter, sublet clause[53] does not normally gives the sub-charterers a right against the general owners of the vessel.[54] Owners are not accountable because of being alien to the contract between charterers and sub-charterers.[55] In the general sense, sub-charterers have rights only against the charterers[56] and not against the owners.[57] In the instant case, vessel was sub-chartered under a separate contract. Owners were not a party to this contract. Thus, owners are not bound by any provision of the sub-chartering contract. Hence, sub-charterers cannot direct any claims to the owners.

[C]. DAMAGES TO THE SUB-CHARTERERS WERE NOT REASONABLY FORESEEABLE.

18. For a damage to be foreseeable, it must be ordinarily perceivable as an outcome of the undertaken actions.[58] Otherwise, the party at fault must have some special knowledge because of which the consequences become foreseeable.[59] In the instant case, owners did not have knowledge of sub-chartering contract. Considering that consequences of deviation on sub-charterers were because of this contract, owners are not liable for the same. Even if they had the knowledge of the same, they were protected by the provision of Clause 18 of the C/P. Under the clause, owners were not required to know about any sublet arrangements. Since, consequences were neither ordinarily foreseeable nor did the owners have any special knowledge, owners are not liable for the claims of sub-charterers.

V. CHARTERERS ARE RESPONSIBLE FOR DAMAGE TO THE HOLDS AND HENCE, FOR THE COST OF SANDBLASTING

19. Customary cleaning of the holds of the vessel is limited to ordinary cleaning and does not include extraordinary sophisticated repair.[60] In the instant case, owners are only obligated to undertake such customary cleaning **[A]**. Generally, charterers have the responsibility of paying for all expenses associated with hold cleaning **[B]**, and same is apparent from the provision of the C/P **[C]**. Further, the master has a very broad authority with respect to any

[52] HUGH BEALE, CHITTY ON CONTRACTS, 453 (23rd ed. 1968).
[53] C/P, Cl 18.
[54] Saxis S.S. Co. v. Multifacs International Traders Inc., 375 F.2d 577, 582 n.7 (2d Cir. 1967).
[55] Flat-Top Fuel Co. Inc. v. Martin, 85 F.2d 39, 1936 AMC 1296 (2d Cir. 1936).
[56] Perez v. Cia Tropical Exportadora, 182 F.2d 874, 1950 AMC 1264 (5th Cir. 1950).
[57] Dampskibs Akt. Thor. v. Tropical Fruit Co., 281 F. 740 (2d Cir. 1922).
[58] Hadley v. Baxendale, [1859] EWHC J70.
[59] Hadley v. Baxendale, [1859] EWHC J70; Peevyhouse v. Garland Coal & Mining Co., 382 P.2d 109 (Okla. 1962).
[60] London Arbitration Award, (2007) 716 LMLN 1.

matters which affect the seaworthiness of the ship.[61] In addition, where circumstances dictate the necessity to deviate from voyage, the master may do so.[62] Here, due to damage to the vessel, it was necessary on part of master to deviate the vessel for repair **[D]**. Charterers are liable for the cost associated with this repair since damages were a direct result of their instructions **[E].**

[A]. OWNERS ARE OBLIGATED ONLY TO UNDERTAKE CUSTOMARY CLEANING.

20. Customary cleaning is defined as ordinary cleaning of the holds once the cargo has been offloaded.[63] If a customary cleaning does not work out, an extraordinary cleaning has to be done. Owners may not be held liable for the same.[64] This is true because practically while hold cleaning, vessel is still performing the charter service.[65] Even in case of extraordinary cleaning the vessel is performing the charter service.[66] Clause 36 of the C/P governs hold cleaning. Under the clause, charterers provide for "*sweeping and/or washing and/or cleaning of holds between voyages and/or between cargoes,*"[67] while owners are to undertake the cleaning. Further, it also states that "*Owners shall not be responsible if the vessel holds are not accepted or passed by the port or any other authority.*"[68] It is submitted that in the instant case, owners undertook customary cleaning of the holds and charterers paid for the same.[69] This was the maximum expected of owners under Clause 36 of the C/P. Consequently, they cannot be held liable for any extraordinary cleaning required or for a deficiency in customary cleaning. Therefore, owners are not responsible for the damage to the holds.

[B]. CHARTERERS ARE RESPONSIBLE FOR ALL EXPENSES PERTAINING TO HOLD CLEANING.

21. If the holds have to be cleaned because of residues of prior cargoes loaded by charterers, cost and time is for charterers' account.[70] Even if holds require cleaning of extraordinary nature, charterers are to be liable for the same.[71] If vessel is prevented from working by something which, under the charter, was the charterers' duty to supply, the vessel

[61] The Medita, SMA 1150 (N.Y. Arb. 1977).
[62] The Medita, SMA 1150 (N.Y. Arb. 1977).
[63] James Werely, *Time chartered vessel operator's perspective on Cleanliness of vessel cargo spaces*, 70.4 JOURNAL OF TRANSPORTATION LAW, LOGISTICS AND POLICY 307, 312 (2012).
[64] London Arbitration Award, (2007) 716 LMLN 1.
[65] SIG Bergesen DY and Co. v. Mobil Shipping, [1993] 2 Lloyd's Rep. 453 (C.A.), 460.
[66] The Milly Gregos, SMA 2190 (N.Y. Arb. 1986).
[67] C/P, Cl 36, Lines 434, 435.
[68] C/P, Cl 36, Lines 437, 438.
[69] Moot Proposition, Page 17, V/C dated 16 December 2013.
[70] The Long Hope, SMA 2664 (N.Y. Arb. 1990).
[71] The Milly Gregos, SMA 2190 (N.Y. Arb. 1986).

may not rely on an off-hire clause and charterers will be responsible for the same.[72] In the instant case, charterers are to provide all the expenses pertaining to the functioning of the vessel,[73] except for those provided by the owners.[74] Here, as per the independent expert, damage to the holds was a result of back to back cargoes of "*Iron Ore, Nickle Ore, Cement Clinker, Cement Clinker, Sulphur.*"[75] Such cargo was carried as instructed by the charterers. Thus, it is submitted that charterers are liable for damage caused by their instructions. Hence, charterers must be liable for cleaning of extraordinary nature.

[C]. CHARTERERS ARE LIABLE UNDER THE PROVISIONS OF C/P.

22. All cargo handling functions are to be done by charterers "*under the supervision*" of master.[76] However, the phrase "*under the supervision*" in the performance clause does not shift liability upon the master and thereby owners.[77] In such circumstances, liability shifts to the charterers even if stowage renders the ship unseaworthy.[78] Addition of phrase "*and responsibility*" after the phrase "*supervision of master*" in the performance clause will only render master and thereby owners liable for damages while stevedoring. In the instant case, *Performance of Voyage*[79] clause does not have the phrase "*and responsibility*" following the phrase "*supervision of the master.*" It is submitted that in the instant case, charterers were to perform all the cargo handling functions.[80] As per the independent expert's report,[81] damage to the holds was a direct result of back to back cargo of stated goods. Hence, charterers were liable for all the consequences arising out of cargo handling.

[D]. DEVIATION WAS NECESSARY DUE TO DAMAGE TO THE VESSEL.

23. A reasonable deviation is one in which interests of all parties are given equal priority.[82] In case priority is given to the interests of one party over the interest of other against the terms of the C/P, such a deviation is wrongful.[83] The master has very broad authority with respect to any matter affecting the seaworthiness of the vessel.[84] In addition,

[72] Andre & CIE S.A. v. Orient Shipping (Rotterdam) B.V. ('The Laconian Confidence'), [1997] 1 Lloyd's Rep. 139, 151; Board of Trade v. Temperley, (1927) 27 Ll.L.Rep. 230.
[73] C/P, Cl 7, Lines 88, 89.
[74] C/P, Cl 6.
[75] Moot Proposition, Page 17, V/C dated 16 December 2013.
[76] C/P, Cl 8, Line 105.
[77] CSAV v. MS ER Hamburg Schiffahrtsgesellschaft mbH & Co. KG ,[2006] EWHC 484; London Arbitration No. 2/89 LMLN 242**;** London Arbitration No. 5/05 LMLN 242.
[78] CSAV v. MS ER Hamburg Schiffahrtsgesellschaft mbH & Co. KG ,[2006] EWHC 484; London Arbitration No. 2/89 LMLN 242**;** London Arbitration No. 5/05 LMLN 242.
[79] C/P, Cl 8.
[80] C/P, Cl 8.
[81] Moot Proposition, Page 17, V/C dated 16 December 2013.
[82] Stag Line v. Foscolo, Mango & Co., (1931) 41 Ll.L.Rep. 165, 171.
[83] Stag Line v. Foscolo, Mango & Co., (1931) 41 Ll.L.Rep. 165, 171.
[84] COGHLIN ET AL., *supra* note 47, ¶ 18A.3; The Medita, SMA 1150 (N.Y. Arb. 1977).

where circumstances dictate the necessity to deviate from the voyage, the master may do so.[85] This is because the master has a duty to ensure the safety of the ship.[86] In fact, this is the primary duty[87] of the master and he has a right to deviate in order to ensure the seaworthiness of the vessel.[88] Further, as per the provisions of the C/P,[89] dry-docking and deviation because of same is allowed in state of emergency. It is submitted that in the instant case, deviation was on account of an emergency. The vessel was damaged and had structural defects which affected navigability and commercial, usability of the vessel. Considering his authority and interest of all parties involved, master of the vessel deviated from prescribed course under the C/P. Stated action was justified as per Clause 19(b) of the C/P. Thus, owners are neither responsible for deviation nor for damages because of the same.

[E]. DAMAGE TO THE VESSEL IS A DIRECT RESULT OF CHARTERERS' INSTRUCTIONS.

24. When damage to the vessel is natural, foreseeable and a direct consequence of vessel's complying with charterers' orders, charterers are responsible for the damage,[90] as well as for all the consequent repairs.[91] In this present case, charterers instructed the master to carry back to back cargo of "*Iron Ore, Nickle Ore, Cement Clinker, Cement Clinker, Sulphur.*"[92] As per Clause 4 and 49 of the C/P, carriage of goods in this stated order was detrimental to the seaworthiness of the vessel. The same was also determined by the report of independent expert employed in this regard. Therefore, it is submitted that charterers are liable for damage to the holds and subsequently must bear the cost of sandblasting.

VI. VESSEL TO STAY ON-HIRE FOR THE DURATION OF SANDBLASTING

25. The general principle is that the ship is to be treated on-hire when repair is direct consequence of the instructions of charterers.[93] Here, it is submitted that the vessel was on-hire during the course of sandblasting because of three reasons. First, damage to the vessel was a direct result of charterers' instructions **[A]**, and second, sandblasting is an extraordinary measure **[B]**. Finally, the vessel was on-hire even during the dry-docking. **[C]**.

[A]. DAMAGE TO THE VESSEL IS A DIRECT RESULT OF CHARTERERS' INSTRUCTIONS.

[85] The Medita, SMA 1150 (N.Y. Arb. 1977).
[86] Phelps v. Hill, [1891]1.Q.B.605.
[87] Phelps v. Hill, [1891]1.Q.B.605.
[88] Kish v. Taylor, [1912] A.C. 604.
[89] C/P, Cl 19(b), Lines 246, 247.
[90] The Mykali II, SMA 2240 (N.Y. Arb. 1986).
[91] Santa Martha Baay Scheepvaart and Handelsmaatschappij N.V. v. Scanbulk A/S, [1981] 2 Lloyd's Rep 267.
[92] Moot Proposition, Page 17, V/C dated 16 December 2013.
[93] The Mykali II, SMA 2240 (N.Y. Arb. 1986).

26. The vessel is to be treated on-hire during the repair period, when such repair is a consequence of damage due to instructions of the charterers.[94] It is submitted in the instant case, as per off-hire clause,[95] owners are not liable for damages to the vessel if the same is caused by events for which the charterers are responsible.[96] Hence, vessel is not to be treated off-hire when undergoing repair for the same

[B]. SANDBLASTING IS AN EXTRAORDINARY MEASURE.

27. It is a general principle that in a non-demise time charter, vessel is to be treated on-hire in case of extraordinary repairs.[97] Essentially, this is because the extraordinary repair is being done to facilitate charter service.[98] In *The Bela Krajina*,[99] sandblasting of the vessel was required. It was held that customary assistance under the C/P did not include "*cleaning operations requiring the use of sophisticated tools like chipping hammer, high pressure water-jets and sandblasting equipment*."[100] Further, when extraordinary cleaning is being done, ship shall stay on hire.[101] In the present case, sandblasting was an extraordinary step.[102] Due to this extraordinary step, which is in order to facilitate charter service, the vessel must be treated on hire.

[C]. THE VESSEL WAS ON-HIRE FOR THE DURATION OF DRY-DOCKING.

28. If repair is a direct consequence of charterers' instructions, vessel will not be treated as deviating from the purpose of the C/P agreement.[103] Further, when repairs are to facilitate charter service, the vessel does not deviate from the terms of C/P.[104] Extraordinary repairs are in turn to facilitate the purpose of C/P agreement.[105] In the current case, damage to the vessel was a result of instructions issued by the charterers.[106] Additionally, extraordinary repair was in order to restore seaworthiness of the vessel for the purpose of charter service. Hence, it should not be treated as deviation. Further, as per Clause 67 of the C/P, the "*payment of hire shall be suspended upon deviation from charter service.*"[107] In the instant case, there was no

[94] Santa Martha Baay Scheepvaart and Handelsmaatschappij N.V. v. Scanbulk A/S, [1981] 2 Lloyd's Rep 267.
[95] C/P, Cl 17.
[96] C/P, Cl 17, Lines 222, 223.
[97] SIG Bergesen DY and Co. v. Mobil Shipping, [1993] 2 Lloyd's Rep. 453 (C.A.), 460.
[98] SIG Bergesen DY and Co. v. Mobil Shipping, [1993] 2 Lloyd's Rep. 453 (C.A.), 460.
[99] The Bela Krajina, [1975] 1 Lloyd's Rep. 139.
[100] The Bela Krajina, [1975] 1 Lloyd's Rep. 139.
[101] London Arbitration Award, (2007) 716 LMLN 1; The Bela Krajina, [1975] 1 Lloyd's Rep. 139.
[102] Moot Proposition, Page 17, V/C dated 16 December 2013.
[103] The Mykali II, SMA 2240 (N.Y. Arb. 1986).
[104] S.I.G. Bergesen DY and Co. v. Mobil Shipping, [1993] 2 Lloyd's Rep. 453 (C.A.).
[105] The Bela Krajina, [1975] 1 Lloyd's Rep. 139.
[106] Moot Proposition, Page 15, V/C dated 24 November 2013.
[107] C/P, Cl 67.

deviation of the vessel from the charter service, during the process of dry-docking. Consequently, it is submitted that vessel will be treated on-hire.

VII. OWNERS ARE NOT LIABLE FOR LOSSES DUE TO DRY-DOCKING OF THE VESSEL

29. When external circumstances make it impossible for a contractual obligation to be performed, the contract is frustrated.[108] Frustration absolves the parties to a contract of any liabilities towards one another. In the instant case, provisions pertaining to informing charterers beforehand about the dry-docking process were frustrated on account of emergency **[A]**. Further, Clause 19(b) of the C/P regulates dry-docking in case of emergency **[B]**. Even if there was no frustration of contract, stated damages do not arise as a consequence of the breach **[C]**.

[A]. THE CONTRACT WAS FRUSTRATED DUE TO AN EMERGENCY

30. As per Indian Contract Act,[109] doctrine of frustration states that any act which was to be performed after the contract is made becomes unlawful or impossible to perform and which the promisor could not prevent, then such an act which becomes impossible or unlawful will be void. Thus, when a day before the concert, building of concert is burnt to ashes, organizers of concert are not liable for damages to the ticket buyers.[110] Similarly, when view of the king's procession from a rented house window is obstructed, purchasers of tickets cannot claim damages because of frustration of contract.[111] In fact, a contract may be frustrated due to change in the policies of the government,[112] destruction of subject matter,[113] death or incapacity of a party[114] and intervention due to war.[115] In the present case, damage to the vessel holds was not known before the report of the independent expert.[116] In light of the fact that such damage affected the navigability and usability of the vessel,[117] the vessel had to be compulsorily repaired. As per the recommendation of the independent expert, for the repair process, sandblasting (extraordinary cleaning) had to be carried out. It is submitted that nature of damage to the vessel and extraordinary cleaning required resulted in a situation of

[108] FREDERICK POLLOCK ET AL., THE INDIAN CONTRACT ACT WITH A COMMENTARY, CRITICAL AND EXPLANATORY, 252 (2nd ed. 1909).
[109] Indian Contract Act, No. 9 of 1872, § 56 INDIA CODE (1872).
[110] Taylor v. Caldwell, [1863] EWHC QB J1.
[111] Krell v. Henry, [1903] K.B. 740.
[112] Naihati Jute Mills v. Khyaliram Jagannath, A.I.R. 1968 S.C. 522; Maritime National Fish Ltd v. Ocean Trawlers Ltd, 1935 A.C. 525.
[113] Markfed Vanaspati & Allied Industries v. union of India, A.I.R. 2007 S.C. 679.
[114] N. Chandrasekhar v. T.N. Cricket Assn., A.I.R. 2006 3 MAD.
[115] A.F. Ferguson v. Lalit Mohan Ghose, A.I.R. 1954 PAT 596.
[116] Moot Proposition, Page 15, V/C dated 24 November 2013.
[117] Moot Proposition, Page 15, V/C dated 24 November 2013.

emergency. Due to emergency, the provisions requiring advance notice before dry-docking were frustrated.[118] Hence, due to frustration, owners are not liable for any damages to the charterers.

[B]. CLAUSE 19(B) OF THE C/P REGULATES DRY-DOCKING IN CASE OF EMERGENCY.

31. Provisions of the C/P govern the transaction between the owners and the charterers.[119] It is submitted that in the present case, dry-docking during emergency is covered under Clause 19(b) of the C/P. Under the mentioned clause,[120] dry-docking during the currency of C/P is allowed in case of emergency. Considering the fact that it was a case of emergency,[121] Clause 19(b)[122] shall be applicable and dry-docking will be allowed. Hence, there is no breach of the provisions of the C/P. Consequently, owners are not liable for damages to the charterers.

[C]. THE DAMAGES ARE NOT A CONSEQUENCE OF BREACH.

32. It is submitted that even if a situation of emergency did not arise in the instant case, the damages to the charterers because of dry-docking were not reasonably foreseeable. For a damage to be foreseeable, it must be ordinarily perceivable as an outcome of the undertaken actions.[123] Otherwise, the party at fault must have some special knowledge because of which the consequences become foreseeable.[124] In the present case, owners are only ordinarily liable for the damages to the charterers. Hence, at most, owners have to pay charterers a difference between charter rate under this contract and the then standard charter market rate.[125] Further principles of mitigation must also be considered.[126] Thus, considering the fact that market rate was less than charter rate, owners are not liable to the charterers for any damages.

VIII. CHARTERERS WERE NOT PERMITTED TO DEDUCT HIRE PAYMENT

29. The general principle states that the charterers are required to pay the full amount of each hire installment.[127] However, the right to deduct hire is only given to them in selective

[118] C/P Cl 67.
[119] Indian Contract Act, No. 9 of 1872, §37 INDIA CODE (1872).
[120] C/P Cl 19(b).
[121] Refer to Issue VII.A. in this Memorial.
[122] C/P, Cl 19(b).
[123] Hadley v. Baxendale, (1854) 9 Ex 341.
[124] Hadley v. Baxendale, (1854) 9 Ex 341; Peevyhouse v. Garland Coal & Mining Co., 382 P.2d 109 (Okla. 1962).
[125] Sylvia Shipping Co. Ltd. v. Progress Bulk Carriers Ltd., [2010] EWHC 542.
[126] **I**ndian Contract Act, No. 9 of 1872, § 73 INDIA CODE (1872); Tata Iron & Steel Co. Ltd v. Ramanlal Kandoi, (1971) 2 Cal. Rep. 493, 528; Union of India v. Jolly Steel Industries (Pvt.) Ltd., A.I.R. 1980 S.C. 1346.
[127] COGHLIN ET AL., *supra* note 47, ¶ 16.48.

cases which are governed by the C/P agreement.[128] It is submitted that the charterers were not permitted to deduct the hire, since, the vessel was not off-hire **[A]** and in any case, the deductions were not allowed under the C/P **[B]**.

[A]. THE VESSEL WAS ON-HIRE FOR THE DURATION OF SANDBLASTING.

30. Sometimes, in case of the vessel being off-hire, the charterers' are given a right to deduct the hire.[129] This right to deduct does not allow deductions for other losses and expenses which are not connected with the owners.[130] However, it is submitted that as the vessel did not go off-hire at any point in time, the charterers are not permitted to make deductions on this ground. There was no wrongful deprivation of use of the vessel from the owners' side. [131] Therefore, it is submitted that since the vessel was on-hire, the charterers had no claim to deduct hire.

[B]. IN ANY CASE, THE DEDUCTIONS WERE NOT ALLOWED UNDER THE C/P.

31. The terms of the C/P are binding on the parties.[132] Charterers are generally allowed only to deduct only when it is permitted by the terms of the C/P.[133] In the present case, the C/P specifically stated that no deductions from hire payment were possible unless they were agreed by the owners.[134] This exclusion clause[135] required the consent of owners before any kind of "*estimated expense*".[136] The necessary condition for the hire to be deducted were in cases of "*defect in, or breakdown of, any part of her hull, machinery or equipment*"[137] as mentioned explicitly in the C/P. The repair work of sandblasting cannot be covered in any of these cases. Therefore, it is contested that the deductions done by the charterers' on the ground of vessel being off-hire was not permissible anywhere as per the C/P without the consent of the owners.

IX. THE VESSEL WAS NOT WITHDRAWN PERMANENTLY

[128] Compania Sud Americano de Vapores v. Shipmair BV ('The Teno'), [1977] 2 Lloyd's Rep. 289.
[129] Century Textiles and Industry Ltd. v. Tomoe Shipping Co (Singapore) Pte Ltd. ('The Aditya Vaibhav'), [1991] 1 Lloyd's Rep. 573.
[130] Century Textiles and Industry Ltd. v. Tomoe Shipping Co (Singapore) Pte Ltd. ('The Aditya Vaibhav'), [1991] 1 Lloyd's Rep. 573.
[131] Federal Commerce & Navigation Co. Ltd. v. Molena Alpha Inc. ('The Nanfri'), [1979] A.C. 757.
[132] Indian Contract Act, No. 9 of 1872, §37 INDIA CODE (1872).
[133] Seven Seas Transportation v. Atlantic Shipping Co. SA, [1975] 2 Lloyd's Rep. 188.
[134] C/P, Cl 77.
[135] Nippon Yusen Kaisha v. Acme Shipping Corp ('The Charalambos N Pateras'), [1971] 2 Lloyd's Rep. 42.
[136] C/P, Cl 77.
[137] C/P, Cl 17, Line 234.

32. Sometimes, but not as a general practice in charterparties, owners are specially conferred with a right to *withhold the performance* of the vessel in case of delay in payment of hire.[138] This right is there with owners only if it mentioned clearly in the C/P.[139] In the presence of such clause, the owners can temporary withdraw the services of the vessel without terminating the C/P agreement. It is submitted that in this case, a right was present in the C/P signed between the owners and the charterers **[A]**, and the same was exercised by the owners on non-payment of hire **[B].**

[A]. C/P PROVIDED OWNERS WITH THE RIGHT TO TEMPORARILY WITHDRAW THE VESSEL.

33. Clause 11(b) of the C/P stated that in case of default of hire by charterers, "*charterers shall be given by the owners 3 (three) clear banking days written notice to rectify the failure*".[140] In pursuant of this anti-technicality clause,[141] on the non–payment of hire by the charterers, they were given a notice by the owners.[142] Since, the hire was not paid by the charterers within the stipulated time, the owners got the title to proceed with their rights under Clause 11.

34. Clause 11(a) mentioned explicitly the authority of owners in case expiry of grace period of 3 days and hire still outstanding to "*be entitled to withhold the performance of any and all of their obligations…*"[143] In *The Cape Palmas*,[144] owners were considered to be justified while exercising their right of temporary withdrawal specifically provided in the *NYPE 93* form of C/P. The "*clear and unambiguous*"[145] language of the clause gave the owners the right to exercise the same after giving the end of grace period.

[B]. THE RIGHT TO WITHHOLD THE PERFORMANCE OF THE VESSEL WAS EXERCISED BY THE OWNERS.

35. As per the current position of law, a withdrawal clause could be used to effect a temporary withdrawal of the vessel from the charter, if expressly stated in the C/P.[146] The notice of "*vessel is withdrawn from the CP*"[147] was given by the owners to the charterers on

[138] COGHLIN ET AL., *supra* note 47, ¶ 16.86.
[139] International Bulk Carriers v. Evlogia Shipping ('The Mihalios Xilas'), [1978] 2 Lloyd's Rep. 186, 191.
[140] C/P, Cl 11(b).
[141] COGHLIN ET AL., *supra* note 47, ¶ 16.91.
[142] Moot Proposition, Page 19, V/C dated 2 January 2014.
[143] C/P, Cl 11(a).
[144] The Cape Palmas, SMA 3865 (N.Y. Arb. 2004).
[145] Rainy Sky SA and others v. Kookmin Bank, [2011] UKSC 50.
[146] International Bulk Carriers v. Evlogia Shipping ('The Mihalios Xilas'), [1978] 2 Lloyd's Rep. 186; Greatship (India) Limited v. Oceanografia SA de CV, [2012] EWHC 3468.
[147] Moot Proposition, Page 23, V/C dated 12 January 2014.

January 12, 2014,[148] after 10 days of giving notice of grace period.[149] Subsequently, the services of the vessel were temporarily withdrawn from the C/P. However, on January 17, 2014, the temporary withdrawal was ended by the owners and performance of the vessel as per the C/P was restarted. The orders given by the charterers to proceed to West Coast prior to the withdrawal remained valid[150] and the voyage was made in accordance with that. The charterers' action of considering the temporary withdrawal of the vessel as a breach of C/P by owners and terminating the contract[151] accordingly is, therefore, not justified. Thus, it is submitted that the withdrawal done by the owners was a temporary withdrawal and there was no termination of C/P because of that.

X. THERE WAS A REPUDIATORY BREACH BY CHARTERERS, ENTITLING OWNERS TO TERMINATE THE CONTRACT

36. When the conduct of the party reflects its intention to deviate from the terms of the contract, it amounts to repudiatory breach. Consequently, the innocent party has a right to terminate the contract.[152] In the present case, after the vessel reached the West Coast as per the instructions of the charterers, they declined to give any further instructions which amounted to a repudiatory breach **[A]**. This repudiatory breach was accepted by Owners, thus terminating the contract **[B]**.

[A]. THE REFUSAL OF CHARTERERS TO GIVE INSTRUCTIONS AMOUNTED TO A REPUDIATORY BREACH.

37. The owners can prove a repudiatory breach by the charterers' communications and overall conduct. There has to be an unambiguous representation that the charterers would not or could not perform their obligations under the charter.[153] If their conduct is such that it shows an intention to no longer be bound by the contract, or an inability to perform such that the non-performance would have the effect of depriving the owners of the benefits of the charter,[154] repudiation is clear.[155] In the present case, the charterers who were in control of the

[148] Moot Proposition, Page 23, V/C dated 12 January 2014.
[149] Moot Proposition, Page 19, V/C dated 2 January 2014.
[150] The AES Express, (1990) 20 N.S.W.L.R. 57; ENE 1 Kos Ltd v. Petroleo Brasileiro SA Petrobras ('The Kos'), [2012] UKSC 17.
[151] Moot Proposition, Page 28, V/C dated 23 January 2014.
[152] SK Shipping PTE Ltd. v. Petroexport Ltd., [2010] 2 Lloyd's Rep. 158.
[153] COGHLIN ET AL., *supra* note 47, ¶ 16.128.
[154] Kuwait Rocks Co v. AMN Bulkcarriers Inc. ('The Astra'), [2013] 2 Lloyd's Rep. 69.
[155] Afovos Shipping Co. SA v. R Pagnan & Fratelli ('The Afovos'), [1983] 1 Lloyd's Rep. 335.

vessel as per Clause 8,[156] refused to give any further orders and claimed that the contract was terminated by them.[157] Even after persistent messages from the owners requesting the charterers instruct them, no satisfactory reply was received. Subsequently, the sudden drop in the market and the charterers' actions gave owners reasonable inference[158] of the charterers' "*ulterior motive.*"[159] Thus, it is submitted that the actions of Charterers amounted to a repudiatory breach.

[B]. THE OWNERS ACCEPTED THE REPUDIATORY BREACH AND TERMINATED THE CONTRACT.

38. In case of repudiatory breach, the innocent party can either accept the breach and terminate the C/P, or leave it as it as.[160] Clause 11 also gave the right to "*withdraw the vessel from the service of the charterers*"[161] in case of "*any fundamental breach.*"[162] In the present case, following the breach by the charterers, it was reasonable for the owners to terminate the contract.[163] The owners, thus, accepted the breach and terminated the contract as per Clause 11 of the C/P.[164] Due to the termination, all the obligations under the contract were terminated,[165] and the owners are entitled to sue the charterers for the damages.[166]

XI. THE OWNERS ARE ENTITLED TO DAMAGES AS A CONSEQUENCE OF BREACH OF C/P

39. The principle of damages in case of breach of contract is to restore the injured party to as good a financial position as it would have been in, if the contract had been performed.[167] The injured party is obligated to take reasonable steps to mitigate the loss.[168] Here, Charterers breached the contract when there was a sudden drop in the market.[169] Subsequently, the contract was terminated by Owners. Therefore, it is submitted that Owners were entitled to

[156] C/P, Cl 8.
[157] Moot Proposition, Page 28, V/C dated 23 January 2014.
[158] Leslie Shipping Company v. Welstead ('The Raithwaite'), [1921] 3 K.B. 420.
[159] Industriebeteiligungs & Handelsgesellschaft v. Malaysian International Shipping Corp Bhd ('The Bunga Melawis'), [1991] 2 Lloyd's Rep. 271.
[160] SK Shipping PTE Ltd. v. Petroexport Ltd., [2010] 2 Lloyd's Rep. 158.
[161] C/P, Cl 11(a), Line 151.
[162] C/P, Cl 11(a), Line 150.
[163] Overstone v. Shipway, [1962] 1 All E.R. 52.
[164] Moot Proposition, Page 32, V/C dated 24 January 2014.
[165] Vitol v. Norelf, [1996] A.C. 800.
[166] Tropwood AG v. Jade Enterprises Ltd ('The Tropwind'), [1977] 1 Lloyd's Rep. 397; Leslie Shipping Company v. Welstead ('The Raithwaite'), [1921] 3 K.B. 420; Overstone v. Shipway, [1962] 1 All E.R. 52.
[167] Sofia Shipping Co. v. Amoco Transp Co., 628 F Supp. 116, 1986 AMC 2163 (S.D.N.Y. 1986).
[168] Aaby v. States Marine Corp., 107 F. Supp. 484 (S.D.N.Y. 1951).
[169] Moot Proposition, Page 25.

damages due to breach of C/P **[A]**. Further, they fulfilled their duty to mitigate their losses **[B]**.

[A]. OWNERS ARE ENTITLED TO DAMAGES DUE TO BREACH OF C/P.

40. After accepting the repudiatory breach of a contract, the innocent party is entitled to claim damages for the losses arising from the breach.[170] The claim for damages includes damages for loss in fixture which arises as a natural and probable result of default by the charterers.[171] In case of breach of C/P, the measure of damages for the charterers' non-performance of a time charter is governed by comparing the amount of hire which would have been earned over the remaining term of the charter, with actual earnings from alternate voyages performed from the time of default to the expiration of the minimum term of the contract.[172] Fluctuation in market conditions are also taken into account while calculating the damages.[173] Thus, the principle of calculation is hire differential,[174] (anticipated profit–actual profit), which applies in the instant case.

41. Here, the contract was breached by Charterers on January 24, 2014.[175] However, charterers defaulted on the hire from the time of sandblasting. The hire rate applicable was USD 10,000 PDPR.[176] The vessel was re-chartered by Owners from February 10, 2015 onwards to mitigate their losses.[177] Due to the fall in the market, Owners re-chartered at a rate lower than the original charter rate. They are entitled to claim this difference in hire rate as damages for breach of contract.[178]

42. Had the charterers paid hire as per the provisions of C/P, it would have amounted to USD 10,000 * number of days (day from which the hire is due to February 9, 2015) plus USD (10,000-6,500) * (number of days (February 10, 2015 to prescribed date of lawful termination of the charter). It is submitted that Charterers are liable for the stated damages for breach of contract.

[B]. OWNERS FULFILLED THEIR DUTY TO MITIGATE.

43. In case C/P is breached, the injured party has an obligation to take reasonable steps to mitigate its losses.[179] The owner of a vessel can claim damages based on the difference

[170] Leslie Shipping Company v. Welstead ('The Raithwaite'), [1921] 3 K.B. 420.
[171] Leslie Shipping Company v. Welstead ('The Raithwaite'), [1921] 3 K.B. 420.
[172] The Moshill, SMA 2069 (N.Y. Arb. 1985).
[173] Nyquist v. Randall, 819 F.2d 1014 (11th Cir. 1987).
[174] Rheinoel GMBH v. Huron Liberian Co ('The Concordia C'), [1985] 2 Lloyds Rep 55.
[175] Moot Proposition, Page 31, V/C dated 24 January 2014.
[176] Moot Proposition, Page 2, F/N, HIRE / HIRE PAYMENT Cl.
[177] Moot Proposition, Page 32, V/C dated 24 January 2014.
[178] The Chia May, SMA 3546 (N.Y. Arb. 1999).
[179] Aaby v. States Marine Corp., 107 F. Supp. 484 (S.D.N.Y. 1951).

between the current charter rate and the substitute charter rate for the remaining period of the charter.[180] In the present case, the owners had to face the falling market.[181] However, in order to fulfill their duty to mitigate their loss, they re-chartered the vessel, though at lesser market rate.[182] Therefore, it is submitted that the owners are entitled to damages.

[180] The Chia May, SMA 3546 (N.Y. Arb. 1999).
[181] Moot Proposition, Page 25, INTERNAL NOTE OF RADANI PVT. LTD. dated 17 January 2014.
[182] Moot Proposition, Page 31, V/C dated 24 January 2014.

PRAYER

In the light of the above submissions, Charterers request the tribunal to:

DECLARE that

I. The tribunal has jurisdiction to hear the present dispute

II. The underlying C/P be governed by Indian law

ADJUDGE that

I. Owners are not liable for damage to the holds

II. Owners are not liable for the claims of the sub-charterers

III. Charterers are responsible for the cost of sandblasting

IV. Vessel to stay on-hire during the course of sandblasting

V. Owners are not liable for losses due to dry docking of the vessel

VI. Charterers cannot deduct hire payment

VII. The vessel was not withdrawn permanently from the C/P

VIII. There was a repudiatory breach by Charterers, entitling Owners to terminate the contract

IX. Owners are entitled to damages as a consequence of breach of C/P