5TH NATIONAL LAW UNIVERSITY ODISHA

INTERNATIONAL MARITIME ARBITRATION MOOT COURT, 2018

IN THE MATTER OF ARBITRATION TO BE
ADJUDICATED BY THIS ARBITRAL TRIBUNAL BETWEEN:

SHANGRILA SHIPPING CORPORATION…….CLAIMANT

AND

CONTINENTAL CHEMICALS LIMITED……..RESPONDENT

(MV *SULPHUR EXPRESS*)

MEMORIAL ON BEHALF OF THE CLAIMANT

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS

ABBREVIATION	**FULL FORM**
&	And
B/L	Bill of Lading
C/P	Charter Party
CCL	Continental Chemicals Ltd.
CCTL	Constantine Commodity Traders Limited
cl	Clause
HQIS	Helgaland Quarantine Inspection Service
HVR	Hague Visby Rules
IMAM	International Maritime Arbitration Moot
KB	King's Bench
Ltd.	Limited
mt	Metric Tonne
NWG	Navigonia Wheat Germ
ors	Others
pg	Page no
QB	Queen's Bench
SSC	Shangrila Shipping Corporation
w.r.t.	With respect to

INDEX OF AUTHORITIES

Cases

Statutes

Books

Other Authorities

STATEMENT OF JURISDICTION

The Arbitration Tribunal has the jurisdiction to adjudicate and decide the present dispute pursuant to the Arbitration Clause of the Charter Party agreement and under the London Maritime Arbitration Association's Terms of 2017.

The Respondents have disputed the jurisdiction of the tribunal pursuant to which, if the tribunal decides to rule on its substantive jurisdiction to hear the present dispute, the parties agree to accept the decision of this tribunal as final and binding.

STATEMENT OF FACTS

I. The Parties

Shangrila Shipping Corporation ["Owners"/"Carrier"] a company located in Nirvana, Navigonia is the owner of the vessel MV *Sulphur Express*.

Continental Chemicals Limited ["Charterers"/"Shipper"] a company located in Liuville, Helgaland chartered the vessel as per the C/P contract.

II. The Charter Party

Shangrila Shipping Corporation and Continental Chemicals Limited signed a Voyage Charter Party Agreement on 11 August, 2016 wherein it was decided that 21,214mt of Sulphur would be transported on the *MV Sulphur Express*.

III. The Letter of Indemnity and the discovery of NWG

Post the loading of the cargo; the respondent's surveyor reported that dunnage wood, pieces of plastic and lumps of tar were found on the surface of the cargo. The Respondents then issued a Letter of Indemnity on the cargo as well as the foreign material found in the holds upon loading on the port of Deeptara at Indisha to the claimants on 10/10/2016, which satisfying the master, led to the clean B/L being issued on 17/10/2016 and the vessel commenced journey. The HQIS inspected the ship on its arrival at the port of Liuville in Helgaland on 10/11/2016 and found on the plastic, traces of NWG which was a banned import in Helgaland. Thus, the ship was not allowed to unload. The claimant notified the charterers and claimed indemnity against any arising dispute.

IV. The Addendum and Damages

Constantine Commodity Traders Limited, the buyers of the cargo and the endorsees of the B/L agreed with the claimants and thus provided the ship to be transported to the port of Ariela in Anikaland, where Heeru Sulphur Products Limited had agreed to buy the present cargo. The parties to the dispute agreed to sign an addendum to the C/P which would facilitate the vessel to sail to Ariela. The transportation and loss of profit to Constantine was demanded by the Claimants in lieu of the Letter of Indemnity provided by the charterers to the Owners.

V. The Embargo at Anikaland and Heeru Ltd's Claim

Upon arriving at Ariela and receiving port clearance on 9/12/2016, the government of Anikaland imposed an embargo on the discharging of the cargo from the vessel from 12/12/2016 which continued till 18/12/2017, when the clearance for unloading was given. During this whole time, the vessel was stranded at the port, and demurrage and detention

charges accrued according to the C/P, which the respondents were liable to pay to the Claimants.

Further, the end buyer of the cargo claimed damages when the solidified lumps of tar in the cargo caused damage to production machinery of Heeru Ltd. The claimants claimed indemnity against this action from the respondents as the lumps of tar were included in the Letter of indemnity dated 10/10/2016 of the respondents.

VI. The Invocation of Arbitration

Upon receiving no communication from the Respondents, the Claimants invoked the Arbitration clause contained in clause 17 of the Charter Party Agreement on 27/12/2017 as no freight, and no damages calculated at the detention rates were paid by the charterers. Thus, the claimants appointed Mr. Santos Basu as arbitrator. The respondents agreeing to the arbitration procedure appointed Ms.Minna Shao as arbitrator. The statements of claim and defence along with the counter-claim were filed before this tribunal. Now, this matter lies before this arbitral tribunal for adjudication.

ISSUES RAISED

A. Whether the tribunal is competent and has the jurisdiction to adjudicate this case?
B. Whether the letter of 10th October is a Letter of Indemnity?
C. Whether the ship owners are liable for the damage caused to the cargo?
D. Whether the Carrier is covered under the exception provided under Article IV of Hague Visby Rules?
E. Who is responsible for the damage caused by the presence of solidified lumps of tar found in the cargo?
F. Whether the rate of demurrage is liable for revision?
G. Whether the respondents are entitled to be set-off for freight?
H. Whether the counter claim filed by the respondents, time bared by the application of Article III Rule IV of Hague Visby Rules?

SUMMARY OF ARGUMENTS

- THE ARBITRAL TRIBUNAL IS COMPETENT AND HAS THE JURISDICTION TO ADJUDICATE

The parties agreed to refer all disputes arising from the charter party to arbitration under clause 17 and thus the claim of exclusive jurisdiction of the courts from the letter of indemnity holds no ground. The tribunal has been duly constituted under the LMAA Terms, and the Arbitration Act gives the tribunal the power to rule on its own jurisdiction and give the award on jurisdiction on merits and the parties do not have an agreement to stay the proceedings of the tribunal or refer the matter to the courts to decide the jurisdiction of the tibunal under section 32 of the Arbitration act.

- THE LETTER OF 10TH OCTOBER IS A LETTER OF INDEMNITY

Apart from stating their letter as a letter of indemnity, the respondents also expressly indemnified the claimants on the cargo loaded which contained the foreign material. Further, the case of implied indemnity against any liability of the claimants is made out against the respondents.

- THE SHIP OWNER OPERATED WITH DUE DILIGENCE

The issuance of the clean bill of lading was in exhange of the indemnity provided by the respondents. The master not being an expert surveyor, relied on the vouching of the cargo of the respondents, as they were both the manufacturers and sellers of the cargo and had the requisite expertise. The apparent good order and condition of goods satisfied the master, and further, the master exercising due diligence and good faith to not clause the bill of lading in order to avoid losses to the claimants, entitles the claimants to indemnity.

- THE CARRIER IS COVERED UNDER THE EXCEPTIONS PROVIDED BY ARTICLE IV OF THE HAGUE-VISBY RULES

The claimants are covered under the exception provided under The Hague Visby rules, the rules incorporated into the bill of lading. As the respondents are liable for loading and discharging the cargo under Clause 5 of the Charter Party, thus they are liable for any stevedore damages leading to the vessel's un-seaworthiness.

- RESPONSIBILITY ARISING DUE TO THE PRESENCE OF SOLIDIFIED LIMPS OF TAR

The claim by Heeru Sulphur Products Ltd. should be indemnified by the respondents as the solidified lumps of tar were indemnified by the respondents through the letter of indemnity and thus the damages arising there from should be borne by the defendants. Further, the cause

of action of Heeru is not maintainable on the ship owners as Heeru has no claim because they had neither a proprietary interest in, nor possession of, the goods at the time when the damage occurred which was the presence of solidifed lumps of tar for which the indemnification was provided. The progressive damage done in this case, Heeru's claim of solidified lumps of tar, does not create new causes of action in respect of the later stages of the same progressive damage because the damage was the result of negligence of the Respondents.

- THE RATE OF DEMURRAGE IS LIABLE FOR REVISION

As the vessel was stranded at the port of Ariela and was physically constrained and detained by the Anikaland authorities, and no stipulation of detention rates was given, the rate of demurrage is liable for revision as the rate of demurrage can only be applied for delay in cargo and embargo is clearly very different from loading/discharging and anyway, demurrage can only be applied up to a reasonable amount time.

- THE RESPONDENTS ARE NOT ENTITLED TO BE SET-OFF FOR FREIGHT

It has been established that equitable set off could not be raised against hire; that hire and freight should be treated in the same way. Freight, characterized as a contractual obligation on the charterer needs to be paid and cannot be a ground for set off and there is no close connection of the counter claim to be allowed to be set off.

- THE COUNTER CLAIM OF THE RESPONDENTS IS TIME BARRED BY THE APPLICATION OF ARTICLE III RULE VI, HAGUE-VISBY RULES

The time frame for the application of exception to Article III Rule VI is that the Suit has to be brought within one year of either Delivery or the Date when they should have been delivered. The cargo claimant's right is lost by the expiry of the one-year period, and therefore, loses the right to assert that right by way of set-off against a claim by the carrier. Delivery is a legal concept which is concerned with constructive possession and the time starts from the time when delivery of the relevant goods should have been completed assuming due performance of all contractual obligations.

ARGUMENTS ADVANCED

A. THE ARBITRAL TRIBUNAL IS COMPETENT AND HAS THE JURISDICTION TO ADJUDICATE

¶1. It is humbly submitted that any claims by the Respondents on the competency and jurisdiction, have no force and are not maintainable. The charter party agreement signed on 11th August, 2016 provided an arbitration clause[1] which provided that any dispute arising out of this Charter party shall be referred to arbitration in London, through the Arbitration Rules laid down by the London Maritime Arbitration Association's Terms of 2017, and in accordance with the Arbitration Act, 1996 of the United Kingdom.

¶2. The jurisdiction of the tribunal was challenged on the grounds that the LOI contained an exclusive jurisdiction clause that the courts of Navigonia would exclusively govern the Letter[2]. It is submitted that the claims arising from the present disputes are disputes that are arising out of the Charter Party and hence, are arbitrable under Clause 17[3]of the Charter Party.

¶3. In the case of Louis Dreyfus Negoce[4], It was held that claims brought under a letter of Indemnity which provided for claims to be submitted to the jurisdiction of the High Court in London arose pursuant to a collateral agreement to the Charterparty which contained an arbitration clause were nevertheless subject to arbitration because the Charterparty arbitration clause was a "broad clause" which gave rise to a presumption of arbitrability and because the claim under the LOI "implicated issues of contract construction or the parties' rights and obligations under it"

¶4. The present dispute relates to the indemnity owed by the Respondents to the Claimants for the presence of objects such as torn pieces of plastic, pieces of dunnage wood and solidified lumps of tar because of which the cargo was quarantined and had to be resold and subsequently, led to damage in the machinery of the buyer. The presence of aforementioned objects, which were warranted by the Letter of indemnity and the presence of Navigonia Wheat Germ on one of the warranted objects are the main causes of the claim that have been submitted for adjudication by this tribunal.

¶5. It is submitted that the presence of torn pieces of plastic, pieces of dunnage wood and solidified lumps of tar, which were allegedly claimed by the HQIS report to be remnants of previous cargo and the presence of NWG on the torn piece of plastic which were expressly

[1] IMAM Proposition, 14, cl 17.
[2] IMAM Proposition, 17.
[3] IMAM Proposition, 14, cl 17.
[4] Louis Dreyfus Negoce SA v Blystad Shipping & Trading Inc 252 F.3d 218 (2nd Cir. 2001)

warranted by the Respondents, there was a alleged violation of Clause 18[5] of the Charter party and hence, this dispute arises out of the Charter Party and subsequently should be adjudicated by the Tribunal.

¶6. Further, the applicable LMAA arbitration rules[6], the LMAA Terms would apply as the amount claimed in the dispute is out of the punitive jurisdiction of Small Claims; mentioned in the charter party agreement, or the Intermediate Claims, the only other two Arbitration Rules provided by the LMAA. Further, the rules were mutually agreed by the parties[7] and the arbitrators appointed by the parties which led to the constitution of this tribunal for the adjudication of the concerned dispute.

¶7. Section 30 of the Arbitration Act[8], mandates that the tribunal will have the power to adjudicate on its own jurisdiction, provided that there is a valid arbitration agreement, the tribunal is properly constituted, and the matters are in purview of the arbitration agreement.

¶8. As the parties have agreed to the arbitration procedure for adjudicating disputes, it can be said that the parties intended[9] that the substantive disputes between them to be referred to arbitration. Further, section 31[10] of the Arbitration Act provides that the tribunal when ruling on the matter of jurisdiction, can rule and award on the issue of jurisdiction on merits.

¶9. It was also held in the recent case of HC Trading[11], that it was a needless invocation of the court's powers where there is another body particularly suited to declaring the validity or otherwise of the arbitration agreement, namely, the arbitral tribunal itself. Arguendo, that at this early stage of proceedings, the determination that courts would be a cheaper/quicker way rather than the arbitrators is impossible to prove. It was also stated by the court that allowing the courts to decide the central issues would usurp the function of the arbitrators, as it would fail to give any weight to the legislative intent of the Act and section 30.

¶10. The Departmental Advisory Committee commented in their Report on the Draft Bill[12] on section 30 of the Act that, 'It is anticipated that the courts will take care to prevent this exceptional provision from becoming the normal route for challenging jurisdictions. Since

[5] IMAM Proposition, 14-16.
[6] *YM Mars Tankers Ltd v Shield Petroleum Co (Nigeria) Ltd* [2012] EWHC 2652 (Comm).
[7] IMAM Proposition, 50, 52.
[8] Arbitration Act 1996, s 30.
[9] *Shell International Petroleum Co Ltd v Coral Oil Co Ltd* [1999] 1 Lloyd's Law Rep 72.
[10] Arbitration Act 1996, s 31(4).
[11] *HC Trading Malta Ltd v Tradeland Commodities SL* [2016] EWHC 1279 (Comm).
[12] Departmental Advisory Committee, *Report on English Arbitration Bill 1996* Arbitration Int 1999, 15(4), 413-433.

this clause concerns a power exercisable by the court in relation to the jurisdiction of the tribunal, it is in our view important enough to be made mandatory.'[13]

¶11. The courts[14] have laid down that an arbitrator is entitled to take the view that it would be more efficient to rule on his own jurisdiction. If he has satisfied himself that such a course is time efficient, cost efficient and fair to all parties, an arbitrator should not be deterred from taking such a course simply because the issues on jurisdiction and liability are co-extensive.

¶12. The Arbitration Act[15] stipulates that the tribunal would only have the power to stay the proceedings if both the parties agree to the same but there is no such agreement between the parties for the same and hence, the proceedings cannot be stayed. Any application to the courts to determine the jurisdiction filed under section 32[16] of the Act would also not be maintainable as the essential requisite of both parties agreeing to such action is also not fulfilled as the Claimants want this dispute to be adjudicated by this arbitral tribunal, as provided by the charter party agreement signed.

B. THE LETTER OF 10TH OCTOBER IS A LETTER OF INDEMNITY

¶13. It is submitted that through the letter of 10th October, the Respondents indemnified the Claimants for losses which the Claimants incurred and damages which the claimant is liable for in relation to any claim on the cargo, as was in the hold, and that their act of warranting the presence of foreign objects in the cargo holds the Respondents liable to indemnify the Claimants.

¶14. Indemnity has been defined as a promise to save a person harmless from the consequences of an act. Such a promise can be express or implied from the circumstances of the case[17]. "A Contract whereby one party promises to save the other from loss caused to him by the conduct of the promisor himself or by the conduct of any other person is called a contract of indemnity."[18]

¶15. The essential conditions for indemnity are:

- Promise, whether it be express or implied, to protect a party from loss[19]
- To make good a person who has suffered due to the actions of the indemnifier or restitution of the indemnified[20].

[13] D Mark Cato, *Arbitration Practice and Procedure: Interlocutory and Hearing Problems* (3rd edn, LLP 1997).
[14] *AOOT Kalmneft v Glencore International* [2002] 1 Lloyd's Rep 128.
[15] Arbitration Act 1996, s 31(5).
[16] Arbitration Act 1996, s 32(2).
[17] *Adamson v Jarvis* (1827) 4 Bing 66.
[18] Contract of Indemnity (*University of Kashmir*) < http://law.uok.edu.in/Files/5ce6c765-c013-446c-b6ac-b9de496f8751/Custom/law%20of%20agency%20Continued.pdf > accessed on 12 February 2018.
[19] *Firma C Trade SA v Newcastle P & I Assn (The Fanti)* [1991] 2 AC 1.

¶16. In the present circumstance, the promise to indemnify was not an express promise but an implied promise which can be easily ascertained from the circumstances of the case.

¶17. The letter clearly states that the Respondents warrants the condition of the cargo with respect to absence of presence of foreign objects meanwhile, also acknowledging the presence of foreign objects such as torn plastic, pieces of dunnage wood and solidified lumps of tar. This inherent contradiction can only be explained by reconciling the two facts such that, the Respondents are warranting the presence of these foreign objects and the cargo and that they would not affect the usage, handling or storage of the cargo.

¶18. Hence, a breach of this warranting of cargo w.r.t. foreign objects would make the Respondents liable to indemnify the Claimants for the liability the Claimants incurred by relying on the said letter of indemnity and this intended reliance by issuing a letter warranting the goods signifies the implied "promise" as is required as the first essential condition of indemnity. The purpose of giving this letter which warranted the cargo was that in case of a breach of the same, the Claimants would be "restituted" for the liability they incurred because of the breach of the letter.

¶19. Pursuant to the aforementioned argument, in England and Wales an "indemnity" monetary award may be given during an action of restitutio in integrum (restoration of an injured party to the situation which would have prevailed had no injury been sustained; restoration to the original or pre-contractual position). Indemnity may be granted for costs necessarily incurred to the innocent party pursuant to the contract[21] which is why this letter is a letter of indemnity as it purports to restitute the claimant to the position they were, had they not relied on the letter of indemnity, thus fulfilling the second essential condition of an indemnity.

¶20. The construction of the letters of indemnity is to be determined by what a reasonable person in the position of the indemnified party would have understood them to mean. That requires consideration, not only of the text of the documents, but also the surrounding circumstances known to the parties and the purpose and object of the transaction[22]. The object of the transaction was to restitute the ship owners for the loss they would incur if they

---

[20] *Caledonia North Sea Limited v British Telecommunications Plc (The Piper Alpha)* [2002] 1 Lloyd's Rep 553.
[21] *Whittington v Seale-Hayne* (1900) 82 LT 49.
[22] *Pacific Carriers Limited v BNP Paribas* (2004) 208 ALR 213.

were to not rely on the warranty and the letter of indemnity was exchanged for a clean bill of lading as has been established as an accepted business practice[23].

¶21. When bills of lading are given they may give rise to rights in persons other than the charterers and on conditions other than those contained in the charter party; and therefore it is the duty of the charterers who have to present these bills, to provide that they shall not expose the ship owners to risks and the bills of lading shall be in accordance of the charter party, the liability of which they are to be exempt. It is not a case of warranty. Hence arises a duty to give adequate indemnity.[24]

¶22. As a matter of principle an indemnity which is to be implied from the terms of a contract or from the conduct of the potential indemnifier should be an indemnity against the *incurring* of liability. The implied indemnity to which the owners are entitled is an indemnity against the consequences of the master signing the bills of lading[25]. If the signing of the bill of lading exposes the ship-owner to greater liability than under the charter, the charterer must indemnify him[26].

¶23. When an act is done by one person at the request of another which act is not manifestly tortuous to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done[27].

¶24. Hence, according to the circumstances of the present case and the prevalent business practices, it can be easily ascertained that the parties understood this letter of indemnity was in exchange of clean bill of lading and hence, this letter was a clean bill of lading.

I. THE RESPONDENTS HAVE CONCEDED TO THE FACT THAT THE LETTER OF 10TH OCTOBER IS A LETTER OF INDEMNITY

¶25. It is submitted that the Respondents have conceded to the very fact that the letter of 10th October is a letter of indemnity, the very fact that they are negating and basing their major contention of denying liability to indemnify. To elaborate on the said contradiction, The Counsel for Claimants would like to submit that in their communications with the Claimants[28]; the Respondents have clearly said the following statements in their letter–

- "The LOI relevantly provides…"

[23] *Brown Jenkinson v Percy Dalton* [1957] 1 Lloyd's Rep 31.
[24] *Kruger & Co Ltd v Moel Tryvan Ship Co Ltd* [1907] AC 272.
[25] *Littlewood v George Wimpey & Co Ltd and British Overseas Airways Corporation* [1953] 2 QB 501.
[26] *Turner v Haji Goolam* [1904] AC 826; *Hansen v Harrold Brothers* [1894] 1 QB 612.
[27] *Naviera Mogor SA v Societe Metallurgique De Normandie (Nogar Marin)* [1988] 1 Lloyd's Rep 412.
[28] IMAM Proposition, 25, 26.

- "The LOI does not record…"

C. THE SHIP OWNERS ARE NOT LIABLE FOR THE DAMGE TO THE CARGO

¶26. The liability does not fall on the Claimants because: (I) issuance of clean bill of lading by the master was reasonable, (II) there was intention of the master to clause bill of lading and reasonable grounds for not doing so and (III) respondents are liable for the causation of the damage to the cargo.

¶27. 'Due diligence' is a legal term which essentially means "reasonable care in the circumstances" considering all the surrounding circumstances known or reasonably to be expected keeping in consideration the practice of others involved in the same industry in setting a standard of due diligence.[29] The exercise of due diligence by a ship-owner is equivalent to the exercise of reasonable care and skill.[30] The fulfillment of due diligence on owner's part would mean exercising functions of a carrier as reasonably expected of him depending upon the circumstances.

I. ISSUANCE OF CLEAN BILL OF LADING BY THE MASTER OF THE SHIP WAS REASONABLE.

a. Respondent's position as a charterer along with being the manufacturer and seller of the cargo.

¶28. The Respondents conducted an independent survey prior to the loading of the goods and was satisfied with the inspection and the findings of it which included the three objects found on the surface of the cargo[31]. Being the manufacturer as well as the seller, having the expertise in the specialized goods and having conducted an independent survey, it is fair to conclude that the Respondent was in the best position to know about the probability of those objects affecting the nature of the cargo. It is important to note that the Letter of indemnity was not a mere acknowledgment of the objects found on the surface of the cargo but a warranty on the same promising an indemnity.

b. Assurance presented through the inspection report conducted by Respondents through an independent surveyor.

¶29. It is well stated in the agreement[32] that the Charterer's designated surveyor had the authority to act to ensure Charterer's interests are protected and consequent to this, it was his

[29] *Secunda Marine Services Ltd v Liberty Mutual Insurance Co* [2006] MSCA 82.
[30] *Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd* [2002] 1 Lloyd's Rep 719.
[31] IMAM Proposition, 17.
[32] IMAM Proposition, 15, cl 18.

duty to perform his functions carefully and with full responsibility. Based on the inspection report of the survey, Respondents not only warranted the cargo along with objects present on the surface of the cargo through the letter, it can be logically deduced that they possess no objection to non-compliance with the requirements of the Hold Cleanliness Clause, if any, which wasn't the case. In accordance with the above, Master issued a clean bill of lading in good faith because he had reasonable grounds to believe the accuracy of the inspection report and the warranty attached to it which justifies his act as reasonable. Based on the above satisfaction, the master's act of issuance of clean bill of lading is in no way negligent and consequently cannot be considered want of diligence.

II. THE MASTER OF THE VESSEL INTENDED TO CLAUSE THE BILL OF LADING IN RESPECT OF THE CARGO.

a. Intention of the master based is a part of due diligence on his part

¶30. The Intention of the Master in clausing the Bill of Lading[33] signifies the exercise of due diligence by the master. The Master of the vessel intended to clause the bill of lading in respect of the cargo to indicate that it contained foreign objects and he did so in consideration of two factors.

First, being that the warranty provided by the Charterers, considering that they were in the best position to know the repercussions of not clausing the bill of lading as they had knowledge about the consequences of presence of foreign objects in the cargo as they had requisite expertise with the specialized cargo.

Secondly, the consequences and repercussions of not clausing the Bill of Lading on the Respondents in the capacity of Charterers and Sellers, is that, for though a bill of lading is a receipt of goods between the charterer and the shipper, the endorsee of the bill of lading relies on the document as a contract between himself and the ship-owner[34].

¶31. Consequently, as the Bill of Lading becomes a Binding Contract between the Charterer and Shipper and the fact that the Buyer who is relying on the contents of the Bill of Lading has the right to reject the Bill of lading[35], if they were claused, the Respondents would have suffered a loss of approximately 21 million USD, had the Bill of Lading been Claused, Pursuant to which the Buyer would have rejected the Goods.

¶32. Therefore, not clausing the Bill of lading justifies the action to be reasonable reliance on the actions of the Respondent.

---

[33] IMAM proposition, 53 [5].
[34] *Sewell v Burdick (The Zoe)* (1884) 10 App Cas 74.
[35] *Leigh & Sillivan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] AC 785.

b. Apparent good order and condition of the goods

¶33. The carrier is not bound to make any statements as to the actual order and condition of the goods received or shipped[36] nor as to their quality[37]. It is important to note that the master can't be held to be an expert surveyor[38] and being satisfied and acting in good faith, that the Respondents warranted the cargo loaded of which they were the manufacturers and sellers, issued a clean bill of lading. The duty of the master, as a reasonable ship's master, is to satisfy himself that the description of the order and condition stated in the bill of lading is fair and accurate which was present in our case. He is bound so to and equally bound not to authorize or make a statement which does not reflect such a judgment. He is to form his own view, and if he thinks fit after seeking expert assistance, and then to make a reasonable, honest and appropriate statement in the bill of lading as to the apparent order and condition of the goods.[39] It cannot be reasonably expected of the Master to detect infestation or the level of it considering the nature of NWG which is so small that it's presence cannot be detected easily. He issued a clean bill of lading[40] unaware of the presence of NWG as he was in a position only to ascertain the goods and not of the interaction of the NWG with the objects and goods present. Had he been able to ascertain that, which requires expert knowledge, he would have claused the bill of lading.

¶34. It is also submitted that the Respondents were aware of the presence of foreign organic matter in the cargo and thus the bills of lading ought to have been claused. Asking the Claimants to clause it or informing them about the same reflects lack of good faith from their part. The charterer's losses flowed from the issue of clean bills, which ought to have been claused, and for the purposes of the charter party[41] that was the responsibility of the charterers themselves.[42]

b. Causation of the cargo damage

¶35. According to Clause 18[43], Owner's acknowledgment to the Helgaland Quarantine Inspection Services (HQIS) requirements was with regard to zero tolerance for any foreign organic matter and both the parties agreed to the same. It is important to notice that, the

[36] *The Peter der Grosse* (1875) 1 PD 414.
[37] *Cox, Peterson & Co v Bruce* [1886] 18 QB 147.
[38] *Marbig Rexel Pty v ABC Container Line NV (The TNT Express)* [1992] 2 Lloyd's Rep 636.
[39] *The David Agmashenebeli* [2003] 1 Lloyd's Rep 92; *Oceanfocus Shipping v Hyundai Merchant Marine (The Hawk)* [1999] 1 Lloyd's Rep 176, 185; Carver on Bills of Lading, 3rd edn; Benjamin Parker, 'Liability for incorrectly Claused Bills of Lading [2003] LMCLQ 210.
[40] *Elders Grain Company Ltd v The Vessel "Ralph Misener"* [2005] 666 Ll Mar LN 2(1).
[41] IMAM Proposition, 14-15-16, cl 18.
[42] *Trade Star Lines Corp v Mitsui & Co Ltd* [1997] CLC 174.
[43] IMAM Proposition, 14.

foreign organic matter, i.e. NWG came aboard along with the cargo itself and since it was not present prior to loading, it can be concluded that it was the part of the cargo. In consideration with the act of warranting the cargo in the Letter of indemnity, promising the absence of any foreign objects which in this case affected the use of the cargo, they would hold the liability for the losses and damages arising from the same. The presence of NWG also affected the objects present on the surface of the cargo as the infestation of NWG in the cargo developed in the due course of voyage resulting in the spread to the these objects. In line with the warranty provided regarding the absence of foreign organic matter in relation of the cargo, the Respondent's liability would therefore extend to the foreign organic developed on the objects including the torn plastic, in due course of the voyage.

D. THE CARRIER IS COVERED UNDER THE EXCEPTIONS PROVIDED BY ARTIVE IV OF THE HAGUE-VISBY RULES

The exceptions provided under the Hague Visby Rule hold the carrier not liable for the damage to the cargo since there was no want of diligence.

I. THE CARRIER IS PROTECTED UNDER ARTICLE IV RULE 2 IN THIS CASE.

Article IV of Hague Visby rules provides,

Neither the carrier nor the ship shall not be responsible for loss or damage arising or resulting from:

(i). Act or omission of the shipper or owner of the goods, his agent or representative

(p). Latent defects not discoverable by due diligence

(q). Any other cause arising without the actual fault or by the law privity applicable to the carrier, or without the fault or neglect of the agents or servants of the carrier.

¶36. The "loss and damage" contemplated by this rule, as by rule 1, is not limited to physical loss or damage to the goods carried, but includes loss and damage connected with the carriage of goods, such as the pure financial loss arising from the loss of a number of voyages under a consecutive voyage charter.[44]

II. THE CONTRACTUAL DUTIES OF THE PARTIES

¶37. The carrier properly and carefully completed the duty under the HVR to load, handle, stow, carry, keep, care for and discharge the goods carried. What is more, where the apparent condition of the goods cannot be ascertained by the carrier by performing a reasonable and practical examination upon loading, a clean bill of lading could be considered to be

[44] *Adamastos Shipping Co v Anglo-Saxon Petroleum Co* [1959] AC 133.

insufficient to establish a prima facie case[45]. Notwithstanding the wording of Article II, the Hague Rules do not place a duty on the carrier to load and discharge.[46] Since cargo-handling functions fall within Article III rule 2 and since that rule is explicitly "subject to the provisions of Article IV", it would seem that if the carrier discharges the onus of proving that loss or damage was exclusively due to the act of a stevedore and that that stevedore was the shipper's or receiver's "agent or representative", then the exception ought to be applicable. The charterer holds the liability of the damage due to the presence of solidified limps of tar as under the charter party agreement- '*The Charterers are obliged to repair any stevedore damage prior to completion of the voyage, but must repair stevedore damage affecting the Vessel's seaworthiness or class before the Vessel sails from the port where such damage was caused or found.*'[47]The charterer failed to repair or inform that when the cargo was being loaded from the dock with the ship's cranes, the cranes picked up, together with the cargo, some remains of solidified tar in lumps situated on the newly paved dock.[48]

III. DENYING THE LIABILITY OF THE CARRIER UNDER ARTICLE III OF HAGUE VISBY RULES

¶38. It is submitted that the Claimant fulfilled the duty in accordance with Article III Rule 2[49] - the duty laid down which is not an obligation of result but an obligation of means, that is, it is aimed not at achieving the desired safe arrival of the goods but at carrying out the operations in question carefully and properly[50]. Since, the claimant exercised all their contractual duties with due care and due diligence, exceptions under article IV hold the ground. Arguendo, if the Respondents accuse vessel to be unseaworthy, where the loss or damage has resulted from un-seaworthiness at the beginning of the voyage and where there has been a want of due diligence on the part of the carrier, the carrier is nonetheless entitled to rely upon the exceptions in Article IV if that want of due diligence was not causative of the loss and damage.[51]

[45] *Elders Grain Company Ltd v The Vessel "Ralph Misener"* [2005] 666 Ll Mar LN 2(1).
[46] *Jindal Iron and Steel v Islamic Solidarity Shipping (The Jordan II)* [2005] 1 WLR 1363.
[47] IMAM Proposition, 6.
[48] IMAM Proposition, 52.
[49] The Hague-Visby Rules 1968, art III, rule 2.
[50] *Albacora SRL v Westcott & Laurence Line* 1966 SC (HL) 19.
[51] *Kuo International Oil v Daisy Shipping Co (The Yamatogawa)* [1990] 2 Lloyd's Rep 39; *Union of India v NV Reederij Amsterdam (The Amstelslot)* [1963] 2 Lloyd's Rep 223.

IV. THE FAILURE TO EXERCISE DUE DILIGENCE HAD NO CAUSATIVE EFFECT UPON THE CASUALTY

¶39. Arguendo, even if there was want of due diligence on Carrier's part, where the loss or damage has resulted from un-seaworthiness at the beginning of the voyage and where there has been a want of due diligence on the part of the carrier, the carrier is nonetheless entitled to rely upon the exceptions in Article IV if that want of due diligence was not causative of the loss and damage.[52]

E. RESPONSIBILITY ARISING DUE TO THE PRESENCE OF SOLIDIFIED LUMPS OF TAR

¶40. The Charterer holds the Carrier free from any risk, liability and expense whatsoever arising from loading of the cargo[53] and along with the responsibility for using and thereafter removing the dunnage available on board. Albeit, the stevedore cranemen/henchmen from the crew to operate the Vessel's cargo handling gear was the responsibility the Owners, the act which caused the damage was specifically concerned with the process of loading the cargo from the dock to the vessel. It is submitted that since the foreign organic matter, NWG was a part of the cargo that came along during cargo loading. Wherefore, the responsibility thus attached arising due the damage claim from the end user/ buyer of the cargo, Heeru Sulphur Products (Pvt) Ltd. that arose from its contention that its production system machinery suffered damage as a result of the presence of solidified lumps of tar in the cargo[54] will be the liability of the Respondents. Of course, the solidified lumps of tar were the subject of letter dated 10 October 2016. Ergo, the Respondent shall hold the liability to indemnify the claimant against any claim made by Heeru against the vessel.

I. CAUSE OF ACTION AND FOLLOWED PROGRESSIVE DAMAGE

¶41. Arguendo, even if the damage is a result of Claimant's act and that alleged wrongful act causes damage which occurs progressively throughout the voyage, the cause of action is complete when the first significant damage occurs, and persons who acquire title subsequently cannot claim, in respect of it, even for the damage which occurred after they acquired title[55]. Hence, in our case the damage to the cargo was deduced through the HQIS report at the port of Liuville and Heeru being the subsequent owner, after the transfer of title is not entitled to claim against the Ship owners. The reasoning[56] affirmed that the right to

[52] ibid.
[53] IMAM Proposition, 5.
[54] IMAM proposition, 50.
[55] *Homburg Houtiport BV v Agrosin Private Ltd* [2003] 1 Lloyd's Rep 571 (HL).
[56] ibid.

claim should be vested in the person who had title at the time when the cause of action became complete.

¶42. That the risk passed from their sellers (with respect to Heeru was CCTL) to them when they accepted the delivery orders, the fact that the Heeru had taken delivery of damaged goods gives them no remedy in tort against the Ship owners. The fundamental principle was stated in Simpson v. Thompson[57] in terms that makes it clear that negligent interference with a mere contractual right does not find a cause of action.

¶43. In addition to this, Heeru has no claim because they had neither a proprietary interest in, nor possession of, the goods at the time when the damage occurred. He had no legal title to the goods, since the property did not pass until appropriation at Ariela. They had no equitable title, since the law does not recognise an equitable interest in goods,[58] nor would damage to such an interest found an action[59]. Hence, the claim for negligence leading to damage to the cargo is not maintainable as it is well established that a claim in negligence for damage to property is only maintainable by a person who had either the legal ownership of or a possessory title to the property at the time when the damage occurred[60] .

¶44. *Homburg*[61] establishes the principle of cause of action and the progressive damage following that action which would help in deciding if the option of cargo owner to seek claims from the ship owner in pursuance of the cargo damage that took place prior to the transfer of ownership is available. "*There is only one cause of action, which arises when (more than negligible) damage is first caused. It is not open, therefore, to a new owner to say, that a new cause of action, in respect of further (albeit progressive) damage which has developed after the transfer of title*."[62]

¶45. The progressive damage done in the case of Heeru's claim of solidified lumps of tar, does not create new causes of action in respect of the later stages of the same progressive damage because the damage was the result of negligence of the Respondents in the process of loading the cargo. Heeru's claim would fail to succeed as he obtained the title both after the commencement of the voyage as well as the when the damage was discovered in the cargo which makes him not qualified to seek the damages from the Claimant.

[57] *Simpson & Co v Thompson* (1877) 3 App Cas 279 (HL).
[58] *In re Wait* [1927] 1 Ch 606.
[59] *Nippon Yusen Kaisha v Ramjiban Serowgee* [1938] AC 429.
[60] *Leigh & Sillivan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] AC 785.
[61] *Homburg Houtimport BV v Agrosin Private Ltd* [2001] 1 Lloyd's Rep 437, 459 [105].
[62] ibid.

F. THE RATE OF DEMURRAGE IS LIABLE FOR REVISION

¶46. The vessel Sulphur Express was stranded on the port of Ariela for more than a year[63] as the government of Anikaland imposed an embargo on the unloading of the cargo. The vessel wasn't allowed to sail away from the port even when in consideration of frustration of contract.

¶47. As stated in the case of *Hyundai Merchant Marine case*[64], it has been established that in the context of a charter-party, a vessel is detained when, as a result of some geographical or physical constraint upon her movement[65], she is prevented from proceeding as directed under the charter-party. If there is some physical constraint on a vessel's movement which prevents her from proceeding on the course directed by charterers, the fact that she is not prevented from proceeding elsewhere does not negate "detention". Thus, as the embargo was sanctioned and further, as the ship was not allowed to leave the port by the Anikaland authorities at any point of time before the embargo lifted, the ship was detained and the claimants had no chance to take the ship away in lieu of the reasonable time after laydays being expired. Also, the rate of demurrage only accrues on the loading and discharging of the vessel and is insufficient and wasn't premeditated for detention of the vessel.

¶48. The claimants also humbly submit that the rate of demurrage stipulated in the C/P[66] agreement when stipulated in the agreement couldn't foresee the scenario of delay being experienced at the Port of Ariela. It is a delay which the demurrage provisions of the Charter party were not designed to contemplate. Further, no stipulation of days has been provided in the C/P for the revision of the rate of demurrage or for the rate of detention would incur. In the case of *Lilly & Co,*[67] J. Trayner declared, "*Where the days on demurrage are not limited by contract, they will be limited by law to what is reasonable in the circumstances, as circumstances may happen to exist or emerge*." Thus, where the demurrage days are not limited by the contract they will be limited by law to what is reasonable in the circumstances.

¶49. Further, as previously claimed in our correspondence[68], the hire rates had moved up[69] significantly since the C/P had been signed and thus the claimants contend that the rate of demurrage must be revised as per the market rate as the ship should be kept on the rate of

[63] IMAM Proposition, 39
[64] *Hyundai Merchant Marine Co Ltd v Furness Withy (Australia) Pty* [2005] 2 Lloyd's Rep 470.
[65] *The Mareva A/S* [1977] 1 Lloyd's Rep 368.
[66] IMAM proposition, 2.
[67] *Lilly & Company v DM Stevenson & Company* (1895) 22 R 278.
[68] IMAM Proposition, 47-48.
[69] IMAM Proposition, 47.

demurrage for a reasonable amount of time.[70] Thus, the amount claimed by the Claimants is reasonable and any claims disputing the same should be rejected.

G. THE RESPONDENTS ARE NOT ENTITLED TO BE SET-OFF FOR FREIGHT

¶50. The Respondents are not entitled to set off the freight obligation which they owe to the claimants in lieu of the Counter Claim. Equitable set-off is available where the counterclaim arises out of the same contract.[71] However, in the present case, the indemnification for which the respondents are liable has arisen from the Charter Party Agreement and the freight that they are liable to pay is an obligation under the Addendum to the Charter Party which are clearly two separate Contracts.

¶51. It is established law that equitable set off could not be raised against hire and it along with freight should be treated in the same way.[72] Also, it is a settled principle where freight can be set-off is inapplicable to contracts of carriage and freight is payable according to the terms of the contract, no defence of recoupment being allowed[73] The rule of set-off is one confined to contracts for the sale of goods but does not extend to contracts generally. There is no case of its having been extended to contracts of any kind of carriage[74]

¶52. Freight unlike Hire, is special and must always be paid in full has been established as a well-settled law. That Freight is an exception to the law of Set off[75] and the fact that liability for "freight due is not to be postponed by the assertion of ... cross-claims[76]". "You cannot have an equitable set off for an unliquidated amount to a liquidated claim for freight[77]."

¶53. Hence, Freight, characterized as a contractual obligation on the charterer needs to be paid and cannot be a ground for set off and hence, cannot be a ground for claiming set-off as has been established by the preceding case laws.

¶54. To establish the entitlement for the application of the principle of Set off, the requirement is for a "close connection" between the claim and the counterclaim[78]. It is contended that there is no "Close Connection" between the claim of indemnity which the

[70] Thomas Gilbert Carver, *Carver's Carriage by Sea* (5th ed., Steven & Sons) 609.
[71] *Geldof Metaalconstructie NV v Simon Carves Limited* [2010] EWCA Civ 667.
[72] *Seven Seas Transportation Ltd v Atlantic Shipping Co SA* [1975] 2 Lloyd's Rep 188.
[73] *Henriksens Rederi A/S v Centrala Handlu Zagranicznego (CHZ) Rolimpex* [1973] 2 Lloyd's Rep 333.
[74] *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd* [1974] AC 689.
[75] *Mondel v Steel* (1841) 8 M & W 858.
[76] *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GMBH* [1977] 1 WLR 713.
[77] *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc [Nanfri]* [1978] 3 WLR 309.
[78] ibid.

respondent is liable to indemnify the claimants for, as the claim still has to adjudicated upon and the amount claimed even though is pretty accurate and has evidentiary proof behind it yet is an approximated estimate of the indemnity sought.

¶55. Meanwhile, the freight is a contractual obligation which is a liability of an absolute nature on the respondents and the freight was anyway prepaid and the exact amount can be easily ascertained because of the freight rate which is present both in the charter party and addendum.

¶56. Hence, the nature of the indemnification owed by the Respondents and the Freight that they are liable to pay as a Contractual term are substantively of two very different natures and hence, the test of "close connection" cannot be applied to the same.

¶57. "The mere fact that both claim and counterclaim arise out of a single trading relationship between the parties is …wholly insufficient to supply the close link necessary to support an equitable set-off."[79]

H. THE COUNTER CLAIM OF THE RESPONDENTS IS TIME BARRED BY THE APPLICATION OF ARTICLE III RULE VI, HAGUE-VISBY RULES

¶58. The Counsel for Claimant submits that Hague-Visby Rules (hereinafter, referred to as HVR) are applicable through the General Paramount Clause[80] and that Article III, Rule VI of the HVR stipulates that "the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered".

¶59. The Counsel Contends that because of Application of Article III Rule VI of the HVR, The Carrier i.e. The Claimants are discharged from all liability whatsoever in respect of goods which applies to all claims arising out of carriage "or miscarriage" of goods by sea under bills subject to the Hague-Visby Rules[81].

¶60. The Counsel contends that the time frame for the application of exception to Article III Rule VI is that the Suit has to be brought within one year of either Delivery or the Date when they should have been delivered. It is settled that delivery is a legal concept concerned with the passing of actual or constructive possession to a consignee, a lawful holder of the

[79] *Esso Petroleum Co Limited v Milton* [1997] 1 WLR 938.
[80] IMAM Proposition, 20 [2].
[81] *The Zhi Jiang Kou* [1989] 1 Lloyd's Rep 413; *PS Chellaram & Co Ltd v China Ocean Shipping Co (The "Zhi Jiang Kou")* [1991] 1 Lloyd's Rep 493 (Australia).

bill of lading or his agent[82] and it is delivery which is the concept by reference to which time starts to run under the Hague Rules[83].

¶61. The Counsel submits that the date of B/L for the carriage from CCTL to Heeru Sulphurs was of 28th November and the Ship arrived at Ariela on 9th of December, 2016, and was given the permission to Discharge on 10th December.

¶62. Hence, Delivery, as has been elaborated in the aforementioned context, has taken place and yet no suit has been instituted yet. The "suit" which is said to have been brought so as to protect the cargo claimant's position must be validly commenced and still in existence at the time when the defence is raised in the subsequent suit[84].

¶63. Arguendo assuming, that the notice to initiate Arbitration could be construed as a suit yet the notice was given on 27th December, 2017 which is clearly more than One year from the Delivery. It is submitted that the cargo claimant's right is lost by the expiry of the one-year period, and that he, therefore, loses the right to assert that right by way of set-off against a claim by the carrier[85] and the time starts from the time when delivery of the relevant goods should have been completed assuming due performance of all contractual obligations[86].

¶64. It is also contended that "All Liability" shows that the reference to delivery of the goods shows clearly that the clause is directed towards the carrier's obligations as bailee of the goods. It cannot be supposed that it admits of a distinction between obligations in contract and tort --- "all liability" means what it says[87].

¶65. It is also submitted that the word "whatsoever" in respect of the goods would be where there is an asserted liability which can properly be described as "in respect of the goods", then that liability is excluded if suit is not brought timeously[88].

¶66. That the words "loss or damage to or in connexion with goods" is not limited to actual loss of or physical damage to the goods and is wide enough to cover loss or damage which arises in relation to the loading, handling, stowage, custody, care for and discharge of the

[82] *Borealis AB v Stargas (The Berge Sisar)* [2002] 2 AC 205.
[83] *Denny Mott & Dickson v Lynn Shipping* [1963] 1 Lloyd's Rep 339.
[84] *Cia Portorafti Commerciale SA v Ultramar Panama Inc (The Captain Gregos)* [1990] 1 Lloyd's Rep 310.
[85] *The Nordglimt* [1988] 1 WLR 183; *Aries Tanker Corp v Total Transport (The Aries)* [1977] 1 WLR 185.
[86] *Trafigura Beheer BV v Golden Stavraetos Maritime (The Sonia)* [2003] 2 Lloyd's Rep 201.
[87] *Salmond & Spraggon v Port Jackson Stevedoring Pty (Australia) Pty (The New York Star)* [1981] 1 WLR 138.
[88] *Noranda v Barton (The Marinor)* [1996] 1 Lloyd's Rep 301.

goods[89]. It is also submitted that there is no necessary requirement that the claim should only relate to goods loaded[90].

¶67. Thus liability "in respect of goods" is a liability based on facts involving a particular cargo or intended cargo, and in the absence of physical loss or damage, sufficiently closely involving the cargo for it to be said that the financial loss sustained was preferable to what was done with that cargo or was directly associated with it[91]. Delivery of the goods, even in a damaged condition, is clearly delivery for the purpose of Article III Rule 6.[92]

¶68. Where there is an incorporation by general words into a time charter of legislation enacting the Hague Rules or Hague-Visby Rules, the ship-owners will be entitled to rely on the protection of the time bar against claims for breach of any of the terms of the charter[93]

¶69. It would also be wrong to restrict the application of art. III, r. 6 to goods being carried under a specific contract of carriage, as distinct from goods "exposed to risk by reason of the charterers' involvement in the contractual adventure"[94]

[89] *GH Renton v Palmyra Trading Corporation of Panama* [1957] AC 149; *Adamastos Shipping Co v Anglo-Saxon Petroleum Co* [1959] AC 133.
[90] *Cargill International v CPN Tankers (The Ot Sonja)* [1993] 2 Lloyd's Rep 435.
[91] *Noranda v Barton* [1996] 1 Lloyd's Rep 301.
[92] Francis Reynolds and Guenter Treitel, *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017) ¶ 9.188.
[93] *Noranda v Barton* [1996] 1 Lloyd's Rep 301.
[94] *Grimaldi Cia di NavigazioneSpA v Sekihyo Lines* [1998] 2 Lloyd's Rep 638.

PRAYER

Prayer for relief

For the reasons set our above, the claimant requests the tribunal to:

a) Find that the tribunal has jurisdiction to adjudicate the claims related to the Letter of indemnity issued on 10th October 2016.

Pending the Tribunal's Final Award :

i) Declare that the Claimants are not in breach of the Due Diligence obligation under the Charter Party Agreement.

ii) Adjudicate that the Counter Claim is time barred and hence, inapplicable.

iii) Adjudicate that the Respondent is liable to indemnify the Claimants for any liability that Heeru Sulphur has against the Claimant.

iv) Order that the Respondent is liable to indemnify the Claimants for the following –

- Loss of profits amounting to USD 3,182,216.25 and also declare that the payment made by the claimants was reasonable.
- Freight unpaid amounting to USD 650,270.00.
- Damages calculated at detention rates amounting to USD 9,722,500.00.

; AWARD interest and costs in favour of the Claimant amounting to USD 13,554,986.25

Counsel for Claimants