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6TH NATIONAL LAW UNIVERSITY ODISHA – BOSE & MITRA & C0.

INTERNATIONAL MARITIME ARBITRATION MOOT, 2019

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

CITY SHIPPING COMPANY LIMITED…….CLAIMANT

AND

UNITED MARITIME LOGISTICS PTE LTD ……..RESPONDENT

(MT INDIA)

MEMORIAL FOR CLAIMANT

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TABLE OF ABBREVIATIONS

ABBREVIATION	FULL FORM
&	And
Arb	Arbitration
B/L	Bill of Lading
C/P	Charterparty
Cl	Clause
HVR	Hague Visby Rules
IMAM	International Maritime Arbitration Moot
KB	King's Bench
LOP	Letter of Protest
LR	Law Report
Ltd.	Limited
MT	Metric Tonne
NOP	Notice of Protest
NOR	Notice of Readiness
Ors	Others
QB	Queen's Bench
Rep	Report
w.r.t.	With respect to

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STATEMENT OF JURISDICTION

The parties, City Shipping Company Limited and United Maritime Logistics Pte Limited have agreed to submit the present dispute to the arbitral tribunal pursuant to clause 49 of the C/P dated 9 December 2018 read with Arbitration and Conciliation Act, 1996.

The parties agree to accept the decision of the arbitral tribunal as final and binding.

STATEMENT OF FACTS

[1] The Parties.

City Shipping Company Limited ["Owners"/ "Carrier"] is the owner of the vessel MT INDIA.

United Maritime Logistics Pvt Ltd. ["Charterers"/ "Shipper"] chartered the vessel as per the C/P contract.

[2] The Charter Party Agreement.

City Shipping Company Limited and United Maritime Logistics Pvt Ltd. signed a Voyage Charterparty Agreement on 9 December 2018, wherein it was decided that 45,000 MT of Bach Ho Oil would be transported on the vessel, *MT INDIA*.

[3] The Notice of Readiness tendered on 10 December 2018 and the laytime calculation.

The Master on behalf of the Owners tendered the NOR on 10 December 2018. Letter of Protest was also issued along with the same as free pratique could not have been procured. There lies a dispute as to the calculation of laytime, Charterers alleging that the NOR was tendered without free pratique and thus, laytime should be calculated from 11 December 2018 which was calculated from 10 December 2018 by the Owners.

[5] Voyage instructions regarding cargo heating.

Charterers, on 13 December 2018, conveyed to the masters that the cargo was loaded with the pour point of 34 degree Celsius. On 25 December 2018, Charterers requested the master to maintain the cargo temperature over and above 55 degree Celsius to avoid solidification of the cargo, due to change in weather conditions. Owners claimed that cargo heating was not undertaken because of Charterer's failure to provide the instructions within the given time frame. On 15 January 2019 the Charterers came to know about the shortage of 157.50 MT of cargo due to solidification. They claimed damages for the in-transit loss suffered by them.

[6] Laytime calculation dispute at the second port.

On 6 January 2019, the Master provided the Notice of Arrival and the vessel was ordered to wait at the anchorage. The Owners calculated the laytime from 6 January 2019 on the pretext that it was the Charterers' fault of not providing the berth timely. Charterers on the other hand claim that the laytime should be calculated from 13 January 2019 when the actual NOR was tendered.

[7] Presentation of claim and documentation.

The Owners presented their laytime and demurrage claim on 10 March 2019, to which the Charterers questioned their calculation on the above stated reasons. The Charterers also alleged that the Owners' inability to submit the pumping log within 60 days forfeit their entire claim.

[8] The invocation of arbitration.

The Claimants invoked the arbitration under clause 49 of the C/P. The Notice of Arbitration dated 19 March 2019 referred the dispute of non-payment of demurrage claim. The Respondents rejected all the claims and made their counter-claim regarding the cargo damage. Now, this matter lies before this arbitral tribunal for adjudication.

ISSUES RAISED

1. WHETHER THE ARBITRAL TRIBUNAL HAS JURISDICTION?
2. WHETHER UNITED MARITIME LOGISTICS PTE LTD ARE LIABLE TO CITY SHIPPING COMPANY LIMITED FOR DUES UNDER THE CHARTERPARTY?
3. WHETHER CITY SHIPPING COMPANY IS LIABLE TO UNITED MARITIME LOGISTICS PTE LTD FOR THEIR CLAIM? IF SO, TO WHAT EXTENT?
4. COSTS?

SUMMARY OF ARGUMENTS

[1] THAT THE TRIBUNAL LACKS JURISDICTION TO ADJUDICATE THE COUNTERCLAIMS.

(A) The parties intended to have a separate arbitration clause (cl 49.1) for specific issues like demurrage apart from a general arbitration clause (cl 49.2). Validity of both cl 49.1 and cl 49.2 to qualify as separate arbitration agreements along with the use of word like 'furthermore' substantiates the above argument. Specific reference of demurrage in the notice and a constitution of tribunal with 3 arbitrators signify that the present tribunal draws its power from cl 49.2 rather than cl 49.1. Cl 49.2 is limited in scope and does not confer the jurisdiction to adjudicate the counterclaim related to cargo damage. Section 23(2A) of the Arbitration Act 1996 specifically bars the power of tribunal to hear the counterclaim outside the scope of its arbitration agreement. Thus, the present tribunal lacks the jurisdiction to hear the counterclaim.

[2] THAT THE UNITED MARITIME LOGISTICS PTE LTD ARE LIABLE TO CITY SHIPPING COMPANY LIMITED FOR DUES UNDER THE CHARTERPARTY.

(A) The laytime calculation should initiate from the moment NOR was issued by the Master at Singapore Port. This is because of the fact that the accountability of the owners for not procuring the free pratique was done away by the issuance of Letter of Protest promptly. Moreover, the Charterers were estopped by accepting the NOR by their conduct. According to prudent practices in shipping business, the nuances in the notices provided should have been questioned instantly. Notwithstanding the above contention, the laytime computation commences as and when the vessel tenders NOR on its arrival at the specified port, they being port charterparties.

(B) At the second port, the vessel had to wait at the anchorage upon Charterers' orders. It was the Notice of Arrival, which should have been construed as a deemed NOR, through which the status of the vessel's arrival and readiness was communicated to the Charterers. Furthermore, the vessel was ready to be placed at the Charterers' disposal, but for their waiting orders. Additionally, the owners suffered losses as the vessel stood idle due to inability of the Charterers to provide the berth within time. Therefore, owners are entitled for the detention damages.

(C) Owners did not submit the pumping log because it only substantiates the additional time used by the vessel which was not claimed as demurrage in the instant case. Moreover,

the commercial intent of the demurrage time bar clause i.e. to have certainty in time bound period with regard to the claims was achieved without the pumping log only. The whole exercise was futile and law never forces such an act. Furthermore, the expressions used in the clause and general industry practices signify the common intention of the parties to not have such an outcome while writing down the clause.

Arguendo, the claim can be divided and calculated for separate constituents, therefore, the entire claim cannot be time barred in the present case.

[3] THAT THE CITY SHIPPING COMPANY LIMITED IS NOT LIABLE TO UNITED MARITIME LOGISTICS PTE LTD FOR THEIR CLAIMS.

(A) The Charterers ordered the Master to heat the cargo according to standard industrial practices. Large number of such incidents during that period and contradictory views of experts establish absence of any standard practice regarding heating. Master further fulfilled the obligation under cl 8 of the Additional Terms by consistently asking for the specific instructions. Charterers' ignorance to these queries gave master an implied authority to take reasonable actions.

(B) 'Proper and careful' care of the cargo under HVR requires the Master to establish a sound system which exclude 'special' weaknesses of the cargo. There lies no evidence to show that the Master should have greater knowledge of the cargo. He, therefore, fulfilled the criteria of reasonable care by keeping the cargo temperature above the point it ceases to flow.

(C) Furthermore, the Owners are saved by the exception under Article IV Rule 2(m) which provides for damage due to inherent vice. The same is to be determined in reference to the standard of care the charterers required for the cargo. In absence of any special instructions, the viscosity due to high paraffin content and tendency to solidify due to temperature sensitivity would qualify as inherent vice.

[4] *ARGUENDO*, THE OWNERS ARE NOT LIABLE TO THE FULL EXTENT.

(A) The oil solidification is incidental to normal voyage. Thus, the total loss, being only 0.35%, is covered by the in-transit loss clause of the Additional Terms. Furthermore, the common sense approach to causation does not lean toward the Master's negligence as the proximate cause. This is due to the inherent vice of Bach Ho oil in the form of temperature sensitivity and vague heating orders. The chain of causation also broke due to the Charterers' ignorance. The same resulted in the Claimant taking the defense of contributory negligence.

[5] COST OF ARBITRATION.

The rule, 'costs follow the event', should be applied. Also, the Respondents' conduct including a futile counterclaim increases the burden of costs on them.

ARGUMENTS ADVANCED

[1] THAT THE TRIBUNAL LACKS JURISDICTION TO ADJUDICATE THE COUNTERCLAIMS.

¶1. It is humbly submitted that the RESPONDENTS made their counterclaim, for alleged cargo damage due to master's inability to follow the voyage orders, to the arbitration tribunal. The Owners submit that the present tribunal lacks the jurisdiction to adjudicate on the above matter as the same is outside the scope of arbitration agreement under which the present arbitration is invoked. This is because parties intended to have separate arbitration agreement for different type of disputes**[A],** the present tribunal draws its powers from cl 49.2[1] of the C/P**[B]** and it lacks jurisdiction to adjudicate the counterclaim under cl 49.2[2]**[C]**.

[A] THE PARTIES INTENDED TO HAVE SEPARATE ARBITRATION AGREEMENT FOR DIFFERENT TYPE OF DISPUTES.

¶2. The arbitral tribunal should construe the validity and scope of an arbitration clause in accordance with the general principles of the interpretation of contracts, seeking the intention of the parties.[3] Cl 49.1[4] of the C/P portrays the specific intent of the parties to refer the disputes to arbitration and hence, does not require the specifications to be construed for being a valid arbitration agreement[5].

¶3. The use of the word 'arbitration' is sufficient to disclose the intention of the parties.[6] Section 7 of the Arbitration and Conciliation Act, 1996[7] (hereinafter 'the Arbitration Act') lays down the essentials of an arbitration agreement. It may not specify the number of arbitrators to be appointed in an arbitration agreement.[8] Moreover, there is no principle objection to the enforcement of an arbitration clause which operates to allow a party to nominate the seat of arbitration.[9] Such a clause makes it clear that the parties are to refer the

[1] IMAM PROPOSITION 17.
[2] IMAM PROPOSITION 17.
[3] Ram Lal Jagan Nath v. Punjab State through Collector, (1996) 2 SCC 216.
[4] IMAM PROPOSITION 17.
[5] DR. P. C. MARKANDA ET AL., LAW RELATING TO ARBITRATION AND CONCILIATION 207 (9th ed. LexisNexis 2016).
[6] Hobbs Padgett & Co. v. J.C. Kirkland Ltd., [1969] 2 Lloyd's Rep. 547; Mangistaumunaigaz Oil Production v. United World Trade Inc., [1995] 1 Lloyd's Rep. 617.
[7] Arbitration and Conciliation Act 1996 §7.
[8] M.M.T.C. v. Sterlite Industries (India) Ltd., (1996) 6 SCC 716.
[9] Star Shipping A.S. v. China National Foreign Trade Corporation, [1993] 2 Lloyd's Rep. 445.

dispute to arbitration and thus, the same clause qualifies as an arbitration clause even though the specifications have not been decided at the time of agreement itself.[10]

¶4. Literal interpretation of a contract unfolds the intention of the parties.[11] Oxford English Dictionary prescribes the word 'furthermore' as to bring a fresh consideration.[12] The use of the same in the C/P, to begin cl 49.2, itself indicates the intention of the parties to have a 'separate' arbitration agreement for specific disputes relating to freight, deadfrieght, demurrage, detention and delay.[13]

¶5. In *Petroleum Corporation (BVI) v. Ferrell International Ltd*,[14] an agreement for different jurisdictions for different issues was held valid. Moreover, considering both the clauses as part of the same arbitration agreement will render the former portion inoperative, which is against the cannons of construction of contracts.[15]

¶6. Therefore, it can be well established that the parties always intended to have different arbitration clauses for different kinds of disputes.

[B] THE PRESENT TRIBUNAL DRAWS ITS POWERS FROM CL 49.2.

¶7. The Notice of Arbitration dated 19 March 2019 submits the dispute related to the non-payment of demurrage to the arbitration. Cl 49.2[16] deals with the disputes related to demurrage. Applying the principle of *Generalia Specials Non Derogant*, in case of any conflict between general and specific clauses, the latter operates.[17]

¶8. The present tribunal comprises of three arbitrators as prescribed by cl 49.2 of the C/P. Furthermore, cl 49.1 does not specify the number of arbitrators for the tribunal. Section 10 of the Arbitration Act[18], dealing with the number of arbitrators, mandates for the tribunal to consist of a sole arbitrator when no prior agreement regarding the same subsists between the parties.[19] Had the arbitration clause been invoked under cl 49.1 of the C/P, the tribunal would have consisted of a sole arbitrator. Therefore, the present tribunal has its jurisdiction under cl 49.2 of the C/P primarily.

[C] THE PRESENT TRIBUNAL CANNOT ADJUDICATE THE COUNTER-CLAIM.

[10] ROBERT MARTIN, ARBITRATION LAW 120 (Lloyd's Commercial Law Library 2004).
[11] P. Madhusudhan Rao v. Ravi Manan, (2015) SCC OnLine Hyd 87.
[12] OXFORD ENGLISH DICTIONARY 711 (Angus Stevenson, 3d ed. Oxford University Press 2010).
[13] IMAM PROPOSITION 17.
[14] Petroleum Corporation (B.V.I.) v. Ferrell International Ltd., (2002) 1 All ER (Comm) 627.
[15] Newall v. Lewis, [2008] 4 Costs L.R. 626.
[16] IMAM PROPOSITION 17.
[17] Yarm Road Ltd. v. Hewden Towwer Cranes Ltd., (2003) 90 Con. L.R. 1.
[18] Arbitration and Conciliation Act 1996 § 10.
[19] M.M.T.C. v. Sterlite Industries (India) Ltd., (1996) 6 SCC 716.

¶9. An arbitral tribunal derives its authority from the arbitration agreement and will thereby, not undertake any action which the parties have not authorized it to do.[20] This is in consonance with s 23(2A) of the Arbitration Act, which mandates only those counter-claims which are to be adjudicated by the tribunal and fall within the scope of the arbitration agreement.[21] For deciding the jurisdiction of the arbitration tribunal, the question is whether the dispute has been enumerated in the dispute resolution agreement of the parties or not.[22]

¶10. Cl 49.2 of the C/P specifically provides for the dispute resolution through arbitration for matters relating to freight, dead freight, demurrage, detention and delay. The pro-arbitration interpretative presumption does not apply where an arbitration clause is limited in scope.[23] Thus, the subjects being enumerated specifically, the scope of the clause is limited and does not include counter-claim per se.

¶11. The underlying test to determine the scope of an arbitration agreement is to check if the counter-claim could have been raised under the said agreement.[24] The counter-claim, in the present case, raised by the RESPONDENTS alleges the breach of City/United Additional Terms and does not fall under cl 49.2 of the C/P. Therefore, the same cannot be raised as a claim under the said clause.

¶12. A decision on the counter-claim by the tribunal will be in excess of jurisdiction which has been conferred by the arbitration agreement.[25] Thus, the arbitrator should not entertain the counter-claim as it does not provide a true defense, and should therefore, be pursued in a separate proceeding.[26]

¶13. In a similar case, the claimant was successful in setting aside the award for lack of jurisdiction and the tribunal entertained the counterclaim under different arbitration agreement with a different seat.[27]

¶14. If something is without jurisdiction, it cannot acquire the sanctity merely because of the parties' inability to raise the objection of jurisdiction.[28] Even efficiency cannot supersede

[20] D.S.A. Engineers (Bombay) v. H.U.D.C.O., (2009) 1 RAJ 276; Saraswat Trading Agency v. Union of India, (2007) 4 RAJ 429.
[21] Arbitration and Conciliation Act 1996 § 23 cl. 2A.
[22] Booz Allen & Hamilton Inc. v. S.B.I. Home Finance Ltd., (2011) 5 SCC 532.
[23] Barclays Bank plc. v. Nylon Capital L.L.P., [2011] EWCA (Civ) 826.
[24] D.D. Sharma v. Union of India, (2004) 5 SCC 325.
[25] Himachal Pradesh State Electricity Board v. R.J. Shah & Co., (1999) 2 Arb. LR 316.
[26] MUSTIL & BOYD, COMMERCIAL ARBITRATION 234 (2d ed. Lexis Nexis 2001).
[27] Societe Empresa de Telecomunicaciones de Cuba S.A. (E.T.E.C.S.A.) v. Telefonica Antillana S.A., (Nov.16, 2006).
[28] Ajit Singh v. Fateh Singh, AIR 1962 (Punj) 412.

party autonomy.[29] It is no misconduct on the part of the arbitrator, if he denies to deal with counter-claims, which, as per terms of the contract, are outside the purview of arbitration.[30]

¶15. Therefore, the extent to which agreements in question have different jurisdiction clauses, the parties should be referred to different proceedings under each such agreement.[31]

[2] THAT THE UNITED MARITIME LOGISTICS PTE LTD ARE LIABLE TO CITY SHIPPING COMPANY LIMITED FOR DUES UNDER THE CHARTERPARTY.

¶16. It is humbly submitted that the Charterers are liable to the demurrage claims made by the Owners because the laytime should commence from 10 December 2018 at 0601**[A]**. The entire time from 6 January 2019 at 0600 to 13 January 2019 at 1005 is on Charterers' account**[B]**. Moreover, Owners' entire claim for demurrage should not be time barred due to the failure to provide pumping log**[C]**.

[A] THE LAYTIME SHOULD COMMENCE FROM 10 DECEMBER 2018 AT 0601.

The counsel on behalf of the CLAIMANTS argue that the laytime should commence from 10 December 2018 at 0601 because the notice of protest was issued within the stipulated time**(a)**, the Charterers waived their right to question the validity of the NOR by their conduct**(b)** and issuance of free pratique remains a mere formality in the present commercial scenario**(c)**.

(a) The NOP was issued on time.

¶17. Readiness of a vessel is a preliminary existing fact which must exist before NOR can be given.[32] The vessel should be both physically and legally ready at the time of tendering the NOR. In the present case, legal readiness can be construed by the very fact that the NOP was issued by the master within the stipulated time, owing to clause 6.3.3[33] of the C/P, which was an essential requirement if the free pratique was not available.

¶18. The very language of Clause 6.3.3[34] of the C/P suggests the intention of the parties clearly. The words used such as "failing which" itself imply that the laytime would commence after tendering the NOR, as the master did not "fail" in issuing the NOP. Furthermore, the counsel refrains from establishing the physical readiness as it is not challenged by the RESPONDENTS primarily.

[29] Duro Felguera S.A. v. Gangavaram Port Limited, (2017) 9 SCC 729.
[30] R.K. Aneja v. Delhi Development Authority, (1998) 2 Arb. LR 341.
[31] Trust Risk Group v. AmTrust Europe Ltd., [2015] EWCA (Civ) 437.
[32] Donald Davies, *Voyage Charterparties - Notice of Readiness* (Feb. 15, 2019, 10:05 AM), https://www.ukpandi.com/fileadmin/uploads/uk-pi/legal/31%20Davies_D.pdf.
[33] IMAM PROPOSITION 29.
[34] IMAM PROPOSITION 29.

(b) The waiver of their right to question invalidity of the NOR by the Charterers' acceptance by conduct.

¶19. The counsel submits that the RESPONDENTS have waived their right to object upon the validity of the NOR by their subsequent e-mail conversations, regarding the berthing of the vessel, which suggests their inherent acceptance of the same. In *The Happy Day*[35], it was held that waiver of the defect in the notice by the party depends on the subsequent communication or conduct of the parties.

¶20. As persons with experience in the shipping business, Charterers should have complained immediately of the notice's invalidity.[36] The reason for this might be that the Owners act relying on that acceptance and cannot be expected to behave differently whenever the charterers change their mind.[37] Thus, no immediate question raised about the invalidity of NOR due to the absence of free pratique, gives an impression to the Owners that the Charterers have accepted the same.

¶21. The Charterers, in *London Arbitration 6/90 LMLN 274,*[38] were estopped from contending that the original notice of readiness was invalid, as they did not reject it and their agents accepted it. A similar decision was taken in *The Northgate*[39], where acceptance of the defective NOR was considered as a waiver of that defect.

¶22. Laytime commences if there exists a waiver or estoppel regarding its validity.[40]. Thus, in the instant case, the laytime should commence from 10 December 2018 at 0601 itself.

¶23. Similarly, in *The Shackleford,*[41] an invalid NOR was deemed accepted by charterers when charterers endorsed it with the word "accepted" having full knowledge of the defect and were thereby, estopped from relying on the invalidity.[42] In the present case, the acceptance was by conduct, rather than in expressed terms.

¶24. In *The Helle Skou*[43], it was held that as the charterers had accepted the NOR, they could not later claim to reject it, "*unless*" on ground of fraud.[44] In our case, fraud was not alleged by the RESPONDENTS, and thus, cannot reject the earlier accepted NOR.

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[35] Glencore Grain Ltd. v. Flacker Shipping Ltd., [2002] 2 Lloyd's Rep. 487.
[36] Despoina Aspragkathou, *The Happy Day and Issues of the Invalidity of a Notice of Readiness under English Law*, 38 J. Mar. L. & Com. 191, 200 (2007).
[37] Donald Davies, *Voyage Charterparties - Notice of Readiness* (Feb. 15, 2019, 10:05 AM), https://www.ukpandi.com/fileadmin/uploads/uk-pi/legal/31%20Davies_D.pdf.
[38] London Arbitration 6/90 LMLN 274.
[39] Ocean Pride Maritime L.P. v. Qingdao Ocean Shipping Co., [2007] EWHC 2796.
[40] London Arbitration 6/04 LMLN 636.
[41] Surrey Shipping Co. Ltd. v. Compagnie Continentale (France) S.A., [1978] 1 Lloyd's Rep. 191.
[42] Nikolai Ivanov, *A Brief History of Laytime*, (Feb. 20, 2019, 12:30 PM), https://www.skuld.com/topics/legal/pi-and-defence/a-brief-history-of-laytime/.
[43] Sofial S.A. v. Ove Skou Rederi, [1976] 2 Lloyd's Rep. 205.

(c) Free pratique remains to be a mere formality in present scenario when other conditions are fulfilled.

¶25. In the *Delian Spirit*[45], Lord Denning held that in some cases obtaining a free pratique license is a formality process to tender NOR.[46] The court rejected the charterers' argument of non-acceptance of vessel's readiness without obtaining free pratique. Thus, non procurement of Free pratique cannot be the sole argument to question the validity of the NOR, giving no reason to suspend the laytime calculation.

¶26. Cl 6.1[47] of the C/P provides arrival of the vessel at the respective loading or discharging port as the pre-condition for tendering NOR. The counsel submits that the NOR was tendered by the master, only after the arrival of the vessel at the Singapore port, owing to the subsisting port C/P contract between the parties.

¶27. The test for validity of the NOR did not concern the geographical position of the vessel.[48] With all these conditions fulfilled by the master before tendering the NOR, the validity of the NOR cannot be questioned merely on the ground of unavailability of free pratique, which is earlier stated to be a mere formality in today's scenario.

¶28. In *Glencore Grain Ltd v. Flacker Shipping Ltd*,[49] being a berth C/P, the NOR tendered outside the berth was considered invalid for the commencement of the laytime.[50] However, in the present case, the parties entered into a port C/P and thus, the NOR tendered on the vessel's arrival in the specified port, is sufficient to make it valid for the commencement of laytime.

¶29. Since, all the significant conditions were fulfilled on behalf of the CLAIMANTS including the issuance of NOP within time in place of free pratigue, validity of the NOR sustains, therefore, it is prudent to commence the laytime from 10 December 2019 at 0601.

[B] THE ENTIRE TIME FROM 6 JANUARY 2019 AT 0600 TO 13 JANUARY 2019 AT 1005 IS ON CHARTERERS ACCOUNT.

The owners are entitled to claim damages for the time lost because the vessel acquired the status of an arrived ship at the anchorage**(a)**, the charterers failed to provide the berth timely**(b)**, and the notice of arrival was the deemed NOR**(c)**.

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[44] DONALD DAVIES, COMMENCEMENT OF LAYTIME 268 (4th ed. Taylor and Francis 2006).
[45] Delian Spirit v. Carras Shipping Co. Ltd., [1983] 2 Lloyd's Rep. 496.
[46] YASHAR NASIRIAN, REVISION IN THE CONCEPT OF COMMENCEMENT OF LAYTIME AND DEMURRAGE 37 (Spring 2013).
[47] IMAM PROPOSITION 29.
[48] T.A. Shipping Ltd. v. Comet Shipping Ltd., [1998] 1 Lloyd's Rep. 675.
[49] Glencore Grain Ltd. v. Flacker Shipping Ltd., [2001] 1 Lloyd's Rep. 754.
[50] Despoina Aspragkathou, *The Happy Day and Issues of the Invalidity of a Notice of Readiness under English Law*, 38 J. Mar. L. & Com. 191, 212 (2007).

(a) The vessel acquired the status of an arrived ship on 6 January 2019 at 0600.

¶30. Under a port C/P, a vessel is considered arrived when it can proceed directly to a berth or when it cannot do so, on reaching that part of the port where vessels waiting usually lie before moving to the berth and there it must be in a position to be effectively placed at the charterers' disposal.[51] In the instant case, it is submitted that the vessel was ordered to wait at the anchorage by the Charterers. Moreover, the vessel was ready to be given at the Charterers' disposal, but could not, due to the waiting orders of the Charterers.[52]

¶31. It must be necessarily implied that the vessel becomes an arrived ship when she arrives at the usual waiting place, even though it is outside the port.[53] The status of an arrived ship acquired by the vessels in these different circumstances suggests that there exists no thumb rule to that effect and depends upon the circumstances of each and every case.

¶32. The arrival of the ship is therefore, established as the NOR tendered prior to the vessel becoming an arrived ship, cannot be perfected afterwards.[54] Thus, the vessel being an arrived ship implied that the readiness was not established before arrival.

(b) Charterers are liable for damages because of their own fault.

¶33. The Owners seek special provisions to compensate them for the time their money-making chattel laid idle at the anchorage because of the Charterers' fault of not providing the berth timely.[55] In the present case, the notice of arrival was given at the anchorage on 6 January 2019 and the vessel laid idle at that place, waiting for the Charterers' further instructions, till 13 January 2019. Thus, the owners are entitled for the compensation.

¶34. Delay caused by any of the parties gives the right to the other party to sue for the damages.[56] In this case, the delay was caused due to the Charterers' fault, entitling the Owners to claim damages regarding the same.

¶35. In *The Aello,*[57] even though the owners were denied the commencement of laytime at the intersection anchorage, the House of Lords allowed them damages for the delay caused due to unavailability of a berth. Similarly, in the present case, the owners should be allowed

[51] Despoina Aspragkathou, *The Happy Day and Issues of the Invalidity of a Notice of Readiness under English Law*, 38 J. Mar. L. & Com. 191, 210 (2007).
[52] IMAM PROPOSITION 7.
[53] New York Arbitration The ''Polyfreedom'' 1974.
[54] Navalmar U.K. Ltd. v. Kale Made Hammadeeler Sanayi Ve Ticart A.S., [2017] 1 Lloyd's Rep. 370.
[55] Despoina Aspragkathou, *The Happy Day and Issues of the Invalidity of a Notice of Readiness under English Law*, 38 J. Mar. L. & Com. 191, 207 (2007).
[56] Despoina Aspragkathou, *The Happy Day and Issues of the Invalidity of a Notice of Readiness under English Law*, 38 J. Mar. L. & Com. 191, 205 (2007).
[57] Agrimpex Hungarian Trading Company for Agricultural Products v. Sociedad Financiera De Bienes Raices S.A., [1961] Lloyd's Rep. 623.

the damages for delay. Furthermore, in *The Vastric*,[58] it was decided that the time lost should be calculated as laytime and thus, entitled the owners to claim damages in this form.

¶36. Following the principles laid down in these cases, the owners in the present case, submit their claim for the damages through the laytime calculation commencing from 6 January 2019 itself.

¶37. "*In addition to the words of the instrument, and the particular facts proved by the evidence admitted in aid of construction, the court may also be assisted by a consideration of the commercial purpose of the contract, and in considering that purpose may rely upon its own experience of contracts of a similar character to that under examination.*"[59] Therefore, considering the above principle, similar provisions of different C/P contracts suggests common commercial practices in the business.

¶38. Cl 6(c) of the GENCON 94 form included that if the berth is not available on the vessel's arrival at or off the port, the vessel shall be entitled to give NOR, within ordinary office hours, and laytime shall then count as if she were in berth. Therefore, considering it to be the common commercial practice, the waiting period should come under the laytime calculation.

¶39. In interpreting the language of a commercial contract, the law generally favours a commercially sensible construction because it is more likely to give effect to the intention of the parties.[60]

¶40. In *LMLN 230*,[61] cl 17b of the C/P laid that the time spent waiting outside the port's commercial limits was also be considered against laytime. The vessel though did not wait outside the port limits in the ongoing case, it is through the commercial practices and the intention of parties, which advocates the protection of both the parties to the contract, the idle time spent while waiting for the berth should be calculated as laytime.

¶41. *Arguendo*, the Court of Appeal, in *The Radnor*[62],held that the laytime can commence even before tendering of the NOR, while waiting for the berth. Similarly, in the present case, in order to protect owners' interest, the laytime should commence from 6th January 2019.

(c) Notice of Arrival was deemed to be the Notice of Readiness.

¶42. In *Adolf Leonhardt Case*[63], the court held that it was not necessary that the notice is emanated in a written from, merely informing the charterers in written form is necessary to

[58] Metals & Ropes Co. Ltd. v. Filia Compania Ltd., [1966] 2 Lloyd's Rep. 219.
[59] KIM LEWISON, THE INTERPRETATION OF CONTRACTS 36 (4th ed. Sweet & Maxwell 2007).
[60] Mannai Investment Co. Ltd. v. Eagle Star Life Assurance Co. Ltd., [2010] EWCA (Civ) 713.
[61] London Arbitration LMLN 230.
[62] North River Freighters Ltd. v. President of India, [1955] 2 Lloyd's Rep. 668.

fulfil the clause.[64] By the above decision of the court, the counsel reasonably deduce that the major stress is upon the fact of communicating the status of the vessel to the Charterers, putting minimal emphasis upon the nature or the name of the notice so given.

¶43. Therefore, the notice of arrival given by the master on 6 January 2019 was a deemed NOR, hereby communicating the vessel's state of readiness, but for the Charterers' orders.

¶44. If the charterers are aware of the state of arrival and readiness of the vessel from other sources, then there is no requirement to give the notice and the time will start to run.[65] Thus, it was the Charterers' orders which made the ship to wait at the anchorage and not the vessel's unreadiness, thereby, calculating the laytime therefrom.

¶45. If there is any doubt as to the validity of the notice, it is always advisable for the master to tender a further notice.[66] This suggests that the master can give multiple NORs for the formality, though the intention of the mere communication of the vessel's readiness stands by, which was fulfilled by the master in the instant case through the deemed NOR earlier. Even after that, a further NOR was tendered by the Owners on 13 January 2019, as a mere formality, to give the Charterers the information of vessel's readiness *again* when the berth was available finally.

¶46. In *Noemijulia Steamship Co Ltd v. Minister of Food*[67], it was held that if the unreadiness alleged by the charterers was not such that would hamper the operations, then the owners cannot be held liable thereby, restricting the Charterers from transferring their own liabilities upon the owners.[68] In the present case, though the delay in loading is merely because of the Charterers' failure to provide for a berth, it implies that the laytime will be calculated in the manner presented by the Owners, as they had no fault in the delay.

¶47. *Justice Roskill* emphasise that the ship need not be absolutely ready at the time when the charterers are not in a position to do any of their part of the work, so long as the ship can be absolutely ready as soon as they are.[69] Similarly, the orders of the Charterers to wait, itself suggests that they were not ready to carry on their operations due to unavailability of the berth, and thus, cannot question upon the vessel's readiness primarily.

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[63] R. Pagnan v. Finagrain Compagnie Commerciale Agricole et Financiere S.A., [1986] 2 Lloyd's Rep. 395.
[64] YASHAR NASIRIAN, REVISION IN THE CONCEPT OF COMMENCEMENT OF LAYTIME AND DEMURRAGE 35 (Spring 2013).
[65] Franco-British Steamship Co. v. Watson & Youell, [1921] 11 WLUK 138.
[66] Transgrain Shipping v. Global Transporte Oceanico, [1990] 1 Lloyd's Rep. 507.
[67] Antaios Compania Naviera S.A. v. Salen Rederierna A.B., [1984] 2 Lloyd's Rep. 235.
[68] YASHAR NASIRIAN, REVISION IN THE CONCEPT OF COMMENCEMENT OF LAYTIME AND DEMURRAGE 30 (Spring 2013).
[69] KIM LEWISON, THE INTERPRETATION OF CONTRACTS 294 (4th ed. Sweet & Maxwell 2007).

¶48. Therefore, the laytime calculated by the Owners from 6 January 2019 was a prudent act in the commercial interest, to protect their position and to penalise the Charterers for their fault of not providing the berth within time.

[C] OWNERS' CLAIM FOR DEMURRAGE SHOULD NOT BE TIME BARRED DUE TO FAILURE TO PROVIDE PUMPING LOG.

¶49. It is presented on behalf of the CLAIMANTS' counsel that the RESPONDENTS wrongly alleged the demurrage claim as time barred, citing failure of CLAIMANTS to submit pumping log for discharge port 2 within the limitation period of 60 days under cl 20 of the C/P. The CLAIMANTS are entitled to recover their claim as the pumping log for discharge port 2 does not substantiate any constituent part of the demurrage claim**(a),** the commercial intent of the clause is fulfilled**(b)**, Cl 20.2 does not require pumping for the pumping log in the present claim**(c)** and failure to submit a document for constituent part of the claim cannot time bar the entire demurrage claim**(d)**.

(a) Pumping log for discharge port 2 does not substantiate any constituent part of the demurrage claim.

¶50. Pumping log is an official document which contains the hourly record of the pressure maintained by the vessel during loading or discharging. As evident from cl 19.7 of the C/P, it is used to justify any additional time used by the Owners.[70]

¶51. Cl 19.4 of the C/P provides vessel with either 24 hours or pro rata time to maintain a minimum discharge pressure of seven (7) bars.[71] MT India had to discharge only half of the cargo, at the discharge port 2 and thus, qualify as 'part cargo' under the definition provided under cl 19.1 of the C/P.[72] Thus, the vessel had 12 hours to discharge the cargo before any additional time could accumulate. The net time used by MT India in discharging the cargo at discharge port 2 was 11 hours 5 mins.[73] Hence, no additional time was consumed by the vessel in discharging the part cargo so, none was claimed by the CLAIMANTS against demurrage. Therefore, the pumping log for discharge port 2 does not substantiate any constituent part of the demurrage claim presented by the Owners.

(b) The commercial intent of the clause is fulfilled.

¶52. A clause of a commercial contract must be interpreted keeping the commercial common sense in mind.[74] The commercial intention behind cl 20 of the C/P is to put the

[70] IMAM PROPOSITION 34.
[71] IMAM PROPOSITION 34.
[72] IMAM PROPOSITION 33.
[73] IMAM PROPOSITION 49.
[74] Rainy Sky S.A. v. Kookmin, [2011] UKSC 50.

Charterers in possession of the factual material which they require in order to satisfy themselves whether the demurrage claim is correctly calculated or not.[75] This is exclusively for Charterers' benefit.[76] As already established above, the pumping log for discharging port 2 does not substantiate any part of the claim presented and the Charterers were in possession of all the factual matrix required to satisfy themselves regarding demurrage on 10 March 2019[77].

(c) Cl 20.2 does not require pumping for the pumping log in the present claim.

¶53. Cl 20.2 relied upon by the RESPONDENTS for barring the demurrage claim due to exhaustion of time limit provided, uses the phrase '*substantiating each and every part of the demurrage claim'* just before mentioning the essential documents.[78] While interpreting the contract, whole context should be kept in mind before focusing on specific words.[79] Moreover, strict interpretation of the clause would make the above phrase inoperative which is against the cannons of construction of commercial contracts[80]. Thus, the mandatory requirement of presenting documents is qualified by the phrase '*substantiating each and every part of the demurrage claim'.* This signifies that some documents are only required if they substantiate the demurrage claim.

In the instant case, as the pumping log was not substantiating the demurrage claim, the same was not required.

¶54. Breach of the pumping warranty amounted to an exception to laytime under cl 19 of the C/P, and accordingly, the burden of proof was on Charterers to prove an exception to laytime.[81] This creates no onus on the Owners to provide pumping log.

¶55. Furthermore, the law never compels a person to do something which is useless or unnecessary.[82] Providing pumping log for the discharge port 2 would have added nothing of value to either party, nor was it necessary in the interest of commercial practices. Thus, the requirement was futile making the claim of the Owners just and reasonable.

[75] Banabaft International Co. S.A. v. Avant Petroleum Inc., [1982] 1 Lloyd's Rep. 448.
[77] Mira Oil Resources of Tortola v. Bocimar N.V., [1999] 2 Lloyd's Rep. 101.
[77] IMAM PROPOSITION 9.
[78] IMAM PROPOSITION 17.
[79] Patrick Stewart Hodge, *Judicial Development of the Law of Contract in the United Kingdom*, 85 Geo. Wash. L. Rev. 1587 (2017).
[80] Newall v. Lewis, [2008] 4 Costs L.R. 626.
[81] SIMON BAUGHEN, SUMMERSKILL ON LAYTIME 132 (6th ed. Sweet & Maxwell 2017).
[82] Arrett Bros (Taxis) Ltd. v. Davies Lickiss, [1966] 1 WLR 1334; Mansel Oil v. Troon Storage Tankers S.A., [2008] EWHC 1269 (Comm).

¶56. In *The Abqaiq*, it was held that the substance of the documents had to be focused upon, rather than presentation of documents, while construing demurrage time bar clauses.[83] It is better to give effect to the clarity and certainty, which is the purpose to be achieved by such clauses.[84] In the instant case, the claim was unambiguous, even without the pumping log.

¶57. Therefore, the current claim did not require the pumping log as a supporting document and therefore the Owners' claim should not be time barred.

(d) *Arguendo*, non-submission of pumping log cannot time bar the entire demurrage claim.

¶58. The non-submission of pumping log for discharge port 2 cannot time bar the demurrage claim in entirety. As it was held in *The Minerva,*[85] if the claim can be identified and quantified in constituent parts, failure to provide document substantiating one of the parts would not time bar the claim in totality.

¶59. Similarly, in the instant case, the demurrage claim can be divided into three constituent parts w.r.t one loading and two discharging ports.[86] CLAIMANTS failed to provide documents only for discharge port 2. The touchstone is that the claims should be unrelated.[87] Demurrage claim for discharge port 2, in the present case, is totally unrelated to the claims at the other two ports. Moreover, it can even be quantified separately.

¶60. Use of phrase, 'all and any', by the parties in the clause, shows the intention of the parties to submit the claims in multiple parts. Thus, it is absurd to differentiate between the two situations. Even if a composite claim was required, failure to provide '*supporting documents for one constituent part cannot discharge the liability for the entire demurrage claim'*.[88]

¶61. In case of conflicting interpretations, the tribunal should reject the one which seems unreasonable in commercial common sense.[89] A balance has to be struck between the two.[90] The ambiguity in the demurrage time bar clause, if any, should never be resolved in such a

[83] National Shipping Company of Saudi Arabia v. B.P. Oil Supply Company (The Abqaiq), [2011] EWCA (Civ) 1127.
[84] Lukoil Asia Pacific Pte. Ltd. v. Ocean Tankers Pte. Ltd., [2018] EWHC 163.
[85] Transoceanic Co. Ltd. v. Newton Shipping Limited, 203 (Jan. 17, 2001).
[86] IMAM PROPOSITION 17.
[87] Kassiopi Maritime Co. Ltd. v. Fal Shipping Co. Ltd., [2015] EWHC 318 (Comm).
[88] The Petroleum Oil and Gas Corporation of South Africa (Pty.) Ltd. v. F.R.8 Singapore Pte. Ltd., [2009] 1 Lloyd's Rep. 107.
[89] Operative Wholesale Society Ltd. v. National Westminster Bank plc., [1995] 1 EGLR 97; Wickman Machine Tools Sales Limited v. Schuler A.G., [1974] AC 235.
[90] H.G. BEALE, CHITTY ON CONTRACTS 342 (28th ed. Sweet & Maxwell 1999).

manner so as to prevent an otherwise legitimate claim.[91] Thus, even if the demurrage claim for discharge port 2 stands in ambiguity to be decided by the tribunal, the residuary claim for the other ports should be considered as a legitimate entitlement of the Owners. The commercial common sense also favours the partial time bar of such claims,[92] thereby establishing that, it will be against the commercial practice to bar the Owners from claiming the residuary, if not entire, demurrage claim.

[3] THAT THE CITY SHIPPING COMPANY LIMITED IS NOT LIABLE TO UNITED MARITIME LOGISTICS PTE LTD FOR THEIR CLAIMS.

¶62. It is humbly submitted that the Owners are not liable for the alleged cargo damages occurred on the vessel because there was no violation of the voyage orders by the master**[A],** the Owners also did not violate Article III Rule 2 of HVR**[B]** and the Owners are covered by the exceptions provided under Article IV Rule 2 of the HVR**[C]**.

[A] THE VOYAGE ORDERS WERE NOT VIOLATED BY THE MASTER.

¶63. It is humbly submitted that the Charterers failed to give any clear instructions regarding heating of the cargo. Cl 3.1 of the voyage order instructs cargo heating to be in accordance to standard industrial practices.[93] The same is immediately followed with an assurance to specify the details in short period of time. Charterers failed to supply any specific voyage order regarding the heating of the cargo, in spite of two general and one specific query regarding additional voyage instructions and cargo heating on 11 December, 13 December and 18 December 2018 respectively, was made by the master.

¶64. 'Standard' means a model conduct or custom[94] whereas 'practice' can be defined as a habitual action.[95] Thus, standard industrial practice in commercial sense is a habitual model or conduct followed by a large segment of the industry. Assuming the cause of solidification to be non-heating of Bach Ho oil, several such incidents of cargo solidification, including 15 between the months of December and January,[96] indicates absence of any specific heating practice in the industry.

¶65. Furthermore, in *Volcafe Ltd*,[97] Supreme Court upheld the decision of not assuming any practice as a standard practice, if it is contradictory in view of the experts. In the instant

[91] Pera Shipping Corporation v. Petroship S.A., [1985] 2 Lloyd's Rep. 103 CA.
[92] The Petroleum Oil and Gas Corporation of South Africa (Pty.) Ltd. v. F.R.8 Singapore Pte. Ltd., [2009] 1 Lloyd's Rep. 107.
[93] IMAM PROPOSITION 27.
[94] BLACK'S LAW DICTIONARY 1441 (Bryan A. Garner, 8th ed. Thomson Reuters 2004).
[95] OXFORD ENGLISH DICTIONARY 1394 (Angus Stevenson, 3d ed. Oxford University Press 2010).
[96] IMAM PROPOSITION 51.
[97] Volcafe Ltd. v. Compania Sud Americana De Vapores S.A., [2018] UKSC 61.

case, advice by Fulham Laboratories and statement by Dr. Ibrahimovio, point towards different conclusions regarding the nature of the cargo. Therefore, it is submitted that, in this scenario, no standard industrial practice can be established.

¶66. Moreover, cl 8 of the City/Unity Additional Terms (hereinafter 'Additional Terms') related to voyage orders, confers a right upon master to contact charterers for instruction in case of non-compliance. In the instant case, master's communication on 11 December, 13 December and 18 December 2018, asking for instructions absolves him, on behalf of the CLAIMANTS, of any liability under this clause.

¶67. The Charterers' negligence to reply to the communication[98] or refusal to give instructions,[99] gave an implied authority to the master to take such steps as may appear to him as reasonably necessary.[100] The master fulfilled this authority by maintaining an adequate temperature throughout the voyage.[101]

¶68. Therefore, CLAIMANTS are not liable for any violation of the voyage orders, as alleged by the RESPONDENTS.

[B] THE OWNERS DID NOT BREACH THE ARTICLE III RULE 2 OF HAGUE-VISBY RULES.

¶69. Article III Rule 2 of HVR imposes a duty on the carrier to properly and carefully keep, take care and carry the cargo.[102] If the carrier can show that the loss or damage to the cargo occurred without any breach of his duty of care inherent under the above provision, he is not required to rely on any exception.[103]

¶70. "Properly" in Article III Rule 2 did not impose an obligation to achieve a particular outcome, but to load, carry and discharge "*in accordance with a sound system*".[104] This sound system does not require to take into account all weaknesses and idiosyncrasies pertaining to a particular cargo, but to reflect general practices of the voyage.[105] Therefore, in the instant case, to establish a sound system, the carrier need not take care of the particular heat sensitivity of the Bach Ho oil. Master fulfilled the obligation under 'proper' care, by maintaining the adequate temperature.[106]

[98] Droege v. Stuart, (1869) L.R. 2 PC 505.
[99] Garriock v. Walker, (1873) L.R. 100.
[100] HAILSHAM ET AL., HALSBURY LAW OF ENGLAND 453 (4th ed. Butterworths Law 1994).
[101] IMAM PROPOSITION 9.
[102] The Hague Visby rules 1968, art. III rule 2.
[103] Volcafe Ltd. v. Compania Sud Americana De Vapores S.A., [2018] UKSC 61.
[104] Pyrene Co. Ltd. v. Scindia Navigation Co. Ltd., [1954] 2 QB 402; G.H. Renton & Co. Ltd. v. Palmyra Trading Corporation of Panama, [1956] 2 Lloyd's Rep. 379.
[105] Albacora S.R.L. v. Westcott & Laurance Line Ltd., [1966] 2 Lloyd's Rep. 53.
[106] IMAM PROPOSITION 9.

¶71. The word "carefully" means merely taking care and is considered by authors to be equivalent to the standard of reasonable care.[107] The exercise of reasonable care is assessed and gauged by way of a comparison with what an ordinarily prudent and rational person would have done in the same circumstances.[108] The master not only maintained the adequate temperature above pour point to protect the cargo from solidifying, but also constantly queried regarding the specific heating requirements of the oil. It cannot be expected of a master to be an expert surveyor and to posses any greater knowledge or experience of the cargo in question.[109] This suggests that in absence of any special knowledge, an ordinary prudent master would also have opted for a similar measure. Therefore, the above care qualifies as reasonable care and signifies absence of negligence on master's behalf.

¶72. In *The Maltasian,*[110] the court held that the carrier did not breach its duty to carry the cargo properly and carefully, as the consignment was marked "keep away from engines and boilers", which was complied by the carrier and no further instructions were given by the consignors. Similarly, in the instant case, where the instructions only provide to heat the cargo "*as per standard industrial practice*s," the carrier cannot be held liable to heat it upto 55 degree Celsius. The master fulfilled his obligations by keeping the cargo above pour point as provided by the Charterers.[111]

¶73. Moreover, in *Rio Sun*,[112] the court did not find the carrier to have breached its duty, when there was no evidence to prove master's past experience in a similar cargo. In the instant case, mentioning of the last three cargoes, indicate that the master does not carry before such an oil, which required special heating like this. He, thus, followed the general practice and maintained the adequate temperature.

¶74. Therefore, the carrier cannot be held liable to have failed in taking proper and careful care of the cargo under Article III Rule 2 of HVR.

[C] THE OWNERS ARE COVERED UNDER THE EXCEPTIONS PROVIDED BY ARTICLE IV RULE 2 OF THE HAGUE-VISBY RULES.

¶75. Article III Rule 2 of HVR begins with "*Subject to the exceptions laid down in Article IV*".[113] This signifies that even if the carrier has breached the duty therein, it is entitled to a

[107] PROF. JOHN WILSON, CARRIAGE OF GOODS BY SEA 345 (7th ed. Longman 2010).
[108] Blyth v. Birmingham, (1856) 11 Ex Ch 781.
[109] JULIAN COOKE ET AL., VOYAGE CHARTERS 245 (4th ed. Informa Law 2014).
[110] Albacora S.R.L. v. Westcott & Laurance Line Ltd., [1966] 2 Lloyd's. Rep. 53.
[111] IMAM CLARIFICATION 3.
[112] Gatoil International Inc. v. Panatlantic Carriers Corporation (The "Rio Sun"), [1985] 1 Lloyd's Rep. 350.
[113] The Hague Visby rules 1968, art. III rule 2.

defense against its breach in Art IV. Moreover by virtue of Cl 38[114] of the C/P and Article IV Rule 1,[115] the Owners are entitled to the protection of the exceptions therein, against the claims made under the C/P.

¶76. Article IV Rule 2(m), provides for wastage in bulk of weight or any other loss or damage arising from inherent defect, quality or vice of the goods.[116] 'Inherent vice' means the unfitness of the goods to withstand the ordinary incidents of the voyage, given, the degree of care which the shipowner is required by the contract to exercise, in relation to the goods.[117] In the instant case, the contract did not require any special heating of the cargo. The voyage order also did not involve specific instructions regarding heating. The queries regarding the same were also ignored. Therefore, the voyage, here, did not involve any special standard of care. The solidification of the oil, thus, was due to its inability to withstand the normal voyage circumstances and henceforth, constituted inherent vice.

¶77. In *The Albacora*,[118] the court upheld the exception of inherent vice, where the voyage did not provide for refrigeration, though the cargo could have been saved through it. It is therefore submitted, that even though the oil could have been saved through special heating, absence of any such requirement enable the loss to be covered under the exception of inherent vice.

¶78. Furthermore, the Owners are bestowed with no duty to carry out more than superficial inspection of the goods,[119] or being prevented from relying on the exception, where the inherent defect in the goods is "*perfectly apparent*".[120] The principle applies to oil cargoes that are allegedly "*vicious*" due to their propensity to solidify.[121] Bach Ho oil has high paraffin content (about 20-25%), which makes it a "*vicious oil*".[122]

¶79. The phrase "*inherent vice*" is applied figuratively as "*anything which by reason of its own inherent qualities is lost without any negligence by any one*".[123] The fact that 15

[114] IMAM PROPOSITION 41.
[115] The Hague Visby rules 1968, art. IV rule 1.
[116] The Hague Visby rules 1968, art. IV rule 2(m).
[117] SIR THOMAS EDWARD SCRUTTON & F. D. MACKINNON, CHARTERPARTIES AND BILLS OF LADING 125 (8th ed. Sweet & Maxwell 1917).
[118] Albacora S.R.L. v. Westcott & Laurance Line Ltd., [1966] 2 Lloyd's Rep. 53.
[119] Westcoast Food Brokers Ltd. v. The Ship "Hoyanger" And Westfallarsen & Co., [1979] 2 Lloyd's Rep. 79.
[120] Gould v. South Eastern and Chatham Railway Co., [1920] 2 KB 186.
[121] Gatoil International Inc. v. Panatlantic Carriers Corporation (The "Rio Sun"), [1985] 1 Lloyd's Rep. 350.
[122] RANDOLPH ET AL., PIPELINE FLOW ASSURANCE: A CASE STUDY OF OIL WITH HIGH PARAFFIN CONCENTRATION IN VIETNAM: ENERGY AND GEOTECHNICS 234 (Springer 2018).
[123] Greenshields v. Stephens, (1908) App. Cas. 431.

shipments in a short period of two months have faced the issue of wax formation, indicates inherent deteriorating quality of the oil and not negligence as a cause.[124]

¶80. Furthermore, a cargo may have inherent characteristics that make its deterioration inevitable, irrespective of the care taken. In that scenario, negligence is irrelevant and inherent vice is proved without further contentions.[125] The instances of solidification even after being adequately heated during the voyage,[126] represents such characteristics of the Bach Ho oil. Therefore, solidification of oil occurred due to its inherent vice and thus, the Owners cannot be held liable for the same.

[4] *ARGUENDO*, THE OWNERS ARE NOT LIABLE TO THE FULL EXTENT.

It is humbly submitted, arguing but not conceding, that the Owners' negligence cannot make them liable for the damages, to the full extent, because the loss is covered by the in-transit clause of the Additional Terms**[A]**, the negligence was not the proximate cause of the damage**[B]** and the Charterers also contributed to the damage so caused**[C]**.

[A] LOSS IS COVERED BY IN-TRANSIT LOSS CLAUSE OF THE ADDITIONAL TERMS.

Cl 4 of the Additional Terms makes the Owner liable for any cargo loss only when such loss exceeds 0.5% of the total cargo. In the instant case, the total cargo loss is of 157.50 MT which amounts to only 0.35% of the total cargo.

The "in transit loss" clause is interpreted as applying to a loss, incidental to such cargo, occurring during the course of a normal voyage.[127] In *The Kriti Rex*, the court concluded that the cargo damage sustained to be in the nature of an in-transit loss, caused due to its fragile nature. In the instant case, Bach Ho oil, being a high paraffin content oil, is difficult to transport.[128] Wax formation, in spite of adequately heating the cargo, further substantiates this argument.[129] Thus, the loss sustained in the course of voyage, is incidental to the cargo and should therefore, be covered by in-transit loss clause.

[B] MASTER'S NEGLIGENCE WAS NOT THE PROXIMATE CAUSE OF THE LOSS.

The cause, truly proximate, is that which causes the damage even in the absence of other causes, but may not be true vice versa.[130] In the instant case, the inherent vice of the cargo

[124] IMAM PROPOSITION 51.
[125] Volcafe Ltd. v. Compania Sud Americana De Vapores S.A., [2018] UKSC 61.
[126] IMAM PROPOSITION 51.
[127] Trafigure Beheer B.V. v. Navigazione Montanari S.p.A., [2015] EWCA (Civ) 91.
[128] RANDOLPH ET AL., PIPELINE FLOW ASSURANCE: A CASE STUDY OF OIL WITH HIGH PARAFFIN CONCENTRATION IN VIETNAM: ENERGY AND GEOTECHNICS (Springer 2018).
[129] IMAM PROPOSITION 51.
[130] Leland Shipping Co. v. Norwich Union Fire Insurance Society, [1918] AC 350.

caused the solidification, even after taking due care, but the same would not have occurred without it, as the cargo temperature was maintained above the pour point.[131]

The question of causation should be approached with a broad common sensical view of the whole position.[132] In the present case, the common sense approach lean towards the inherent vice of a vicious oil to solidify. The argument is supported by the fact that the port witnessed 15 such incidents in the period of two months, even when the carriage involved proper heating compliance.

In *Harding*,[133] the court attributed the cause of damage to inherent vice while analyzing the weather conditions and refused to acknowledge the fact that the moisture travelled via roof of the container. Drawing analogy, here, the temperature sensitivity of the cargo, as acknowledged by Fulham Laboratories, along with absence of specific heating instructions, should be attributed as the cause of damage.

In *Kapitan Sakharov*,[134] the court did not hold the Owners liable, where the chain of causation was attributed to unseaworthiness and damage due to presence of dangers, which could not be known by the owners. In the instant case, the chain of causation broke by the presence of inherent vice in the form of temperature sensitivity of Bach Ho oil. Due to the ignorance of the Charterers, the master had no means to know about the nature of oil and thus, could not make out the special care requirements demanded by the same.

Moreover, where the burden of proof is upon the CLAIMANT to prove the damage caused by breach of contract, he must also quantify the same.[135] If it is not possible to draw inference about the quantum of the damage, the carrier should not be held liable for more than just the nominal damages.[136] Therefore, even if the damage is assumed to be caused by negligence, in absence of any evidence to infer the quantum attributable, the CLAIMANTS are only responsible for nominal damages.

[C] THE RESPONDENTS ALSO CONTRIBUTED TO THE DAMAGE.

Contributory negligence means that there has been some act or omission on the part of the aggrieved, which has materially contributed to the damage caused.[137] For these purposes 'negligence' is used in the sense of carelessness in looking after its own safety rather than in

[131] IMAM CLARIFICATION 3.
[132] Leyland v. Norwich Union, [1918] AC 350.
[133] T.M. Noten B.V. v. Harding, [1990] 2 Lloyd's Rep. 283.
[134] Northern Shipping Co. v. Deutsche Seereederei G.m.b.H., [2000] 2 Lloyd's Rep. 255.
[135] Oxford Shipping v. Nippon Yusen Kaisha, [1984] 2 Lloyd's Rep. 373.
[136] Govt. of Ceylon v. Chandris, [1965] 2 Lloyd's Rep. 204.
[137] C.T. WALTON, CHARLESWORTH & PERCY ON NEGLIGIENCE 242 (13th ed. Sweet & Maxwell 2014).

its sense of breach of duty.[138] In the instant case, the Charterers' vague voyage order and ignorance to the Owner's query on 18 December 2018, regarding specific cargo heating instructions, signify their careless conduct in looking after their own cargo's safety.[139]

In *Precis*,[140] failure to instruct an independent actuary, who would have been likely to have discovered the error, amounted to contributory negligence. Taking cue from this case, even though it was master's responsibility to discover the specific industrial practices, Charterers' failure to clarify, must amount to contributory negligence.

Applying the principles of *Ryland v Fletcher*,[141] oil would not have solidified but for the Charterers' negligence to answer the queries of the master. Thus, the Charterers are barred from claiming of the damages.

[5] <u>COST OF ARBITRATION.</u>

Section 31 of the Arbitration Act gives the discretion to the arbitral tribunal to award on the cost of arbitration, including the amount and time of payment of such costs.[142] The tribunal is expected to exercise its discretion judiciously.[143] The general rule of the unsuccessful party being ordered to pay the cost,[144] should be followed in the instant case. Refusal to mediate the disputes amicably is not a special circumstance to deviate from this general rule.[145] Moreover, actual costs must be awarded rather than just nominal costs.[146]

It is submitted that the circumstances and conduct of the parties must be taken into account while deciding the costs.[147] Moreover, the counter-claim brought by the RESPONDENTS, w.r.t. cargo damage, suffer from lack of jurisdiction. The RESPONDENTS decided to claim the sum only after the CLAIMANTS decided to go for arbitration. It was only pursued to delay the proceedings of the tribunal, and force the CLAIMANTS to arrive at an unjust settlement. Misconceived claims against a party are not only to be rejected but the party initiating such claims has to be burdened with the costs.[148] Thus, according to Section 31A(3)(c) of the Arbitration Act,[149] the liability of the RESPONDENTS to bear the costs is enhanced.

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[138] Lewis v. Denye, [1939] 1 KB 540.
[139] IMAM PROPOSITION 5.
[140] Precis plc. v. William M. Mercer Ltd., [2004] EWHC 838.
[141] Ryland v. Fletcher, [1868] UKHL 1.
[142] Arbitration and Conciliation Act 1996 § 31A(1).
[143] Lewis v. Haverfordwest Rural District Council, [1953] 1 WLR 1486.
[144] Arbitration and Conciliation Act 1996 § 31A(2)(a).
[145] Glaister v. Amalgamated Dairies Ltd., [2004] 2 NZLR 606 CA.
[146] Oriental Insurance Co. Ltd. v. Amira Foods Ltd., 2010 (4) RAJ 499 (Del).
[147] Andrew v. Grove, [1902] 1 KB 625.
[148] All India Radio v. Unibros, (2010) 6 RAJ 217.
[149] Arbitration and Conciliation Act 1996 § 31A(3)(c).

PRAYER

In light of the above submissions, the Claimants request the tribunal to declare:

(1) That the counter-claim is not maintainable.

(2) That the Claimants provided valid NOR along with NOP.

(3) That the Claimants are entitled to detention damages for the time lost.

(4) That the pumping log is not an essential document to claim damages.

(5) That Claimants are not liable for the damage caused.

(6) That the Claimants are fully entitled to the laytime and demurrage claims.

And, therefore, the following reliefs are prayed for:

(1) USD 227,400 as the laytime and demurrage claim including detention damages.

(2) Further or other reliefs.

AWARD interest and costs in favour of the Claimants.

Counsel for Claimants