TEAM CODE: DREADNAUGHTR

THE 10TH NATIONAL LAW UNIVERSITY ODISHA BOSE & MITRA & CO. INTERNATIONAL MARITIME ARBITRATION MOOT, 2023

IN THE MATTER OF ARBITRATION SEATED IN LONDON

BEFORE THE HON'BLE ARBITRAL TRIBUNAL

CENTRAL KOREA FABRICATION CORPORATION …CLAIMANT

v.

FLORIDA STEEL INCORPORATED …RESPONDENT

WRITTEN SUBMISSIONS FOR RESPONDENT

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TABLE OF ABBREVIATIONS

ART.	ARTICLE
BOL	BILL OF LADING
CIF / C.I.F.	COST INSURANCE FREIGHT
CL.	CLAUSE
COGSA	CARRIAGE OF GOODS BY SEA ACT, 1971
ED.	EDITION
HON'BLE	HONORABLE
ICP	INTERMEDIATE CLAIMS PROCEDURE
LTD.	LIMITED
NO./ NO.	NUMBER
REP	REPORT
LMAA	LONDON MARITIME ARBITRATION ASSOCIATION
SECT/SEC./ SEC./ §/S./S.	SECTION
UCP	UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS
USD/$	UNITED STATES DOLLAR
V/V	VERSUS

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STATEMENT OF JURISDICTION

The Respondent has approached this Hon'ble Tribunal in pursuance of the London Arbitration Clause in the CIF contract and in pursuance of Rule 4 of the LMAA Terms 2021 and Section 2 of the English Arbitration Act, 1996. The parties agree to accept the decision of the Arbitral Tribunal as final and binding.

STATEMENT OF FACTS

I. THE PARTIES

1. The Claimant/Seller (Central Korea Fabrication Corp.) has issued an arbitration claim against the Respondent/Buyer (Florida Steel Incorporated) for allegedly rejecting the delivery of the documents tendered by them, claiming a breach of contract.

II. THE CONTRACT OF SALE

2. The parties had entered into a contract of sale on CIF terms, for the sale of steel coils, where the Claimant was to sell about 225 metric tons of steel coils to the Respondent in the USA.

3. Pursuant to the contract, documents were then tendered to the Respondent which included the Bill of Lading, and the Certificate of Insurance.

III. THE DISPUTE BETWEEN THE PARTIES

4. The delivery of the said documents was rejected by the Respondent on various grounds relating to non-conformity with terms, of which majority of the grounds were abandoned via negotiations between the parties leaving behind some unsatisfied issues between the parties.

5. The issues that were left unresolved revolved majorly around the Bill of Lading, and the Certificate of Insurance.

IV. THE INSURANCE CERTIFICATE

6. The Insurance Certificate dated March 1, 2022 was tendered by the Claimant for the goods to be shipped from Korea to the USA. The Respondent claimed that the tender of insurance certificate was not in accordance with the implied terms of a CIF Contract and hence rejected the delivery of the same.

7. The certificate mentioned the port of loading i.e. Bussan, Korea and the port of discharge i.e Miami, USA. The certificate also mentioned other details about the carriage, and had mentioned certain conditions on it.

V. THE BILL OF LADING

8. The goods were shipped and the Bill of Lading was issued by Korea Pacific Liner Co on March 12, 2022, in the form of CONGENBILL 1994. The Bill of Lading was challenged

by the Respondent on grounds of the added clauses, namely, the RETLA clause which turned the bill of lading unclean, and the Transhipment and Cesser Clause, the presence of which denied the buyer of protection of continuous documentary cover.

VI. ARBITRATION

9. The Contract contained a clause stating for English Law and London Arbitration, while stating that the procedure of arbitration to be covered by LMAA Rules.

10. The parties do not share the same ground with respect to the appointment of arbitrators and the method of the proceedings.

11. The Claimant invoked the arbitration clause and claimed for breach of contract.

Issues

I. Whether the arbitral tribunal be constituted according to LMAA terms or the English Arbitration Act, 1996?

II. Whether the summary disposal is beyond the powers of the tribunal?

III. Whether tendering of insurance certificate instead of or without the insurance policy violates the implied terms of CIF?

IV. Whether the qualifying / clausing renders a bill of lading not 'clean'? And consequently RETLA clause typed on a bill of lading makes it a bad tender?

V. Whether the transshipment and cesser clause typed on a bill of lading make it a bad tender?

I. WHETHER THE ARBITRAL TRIBUNAL BE CONSTITUTED ACCORDING TO LMAA TERMS OR THE ENGLISH ARBITRATION ACT, 1996?

It is most respectfully submitted that the English Arbitration Act, 1996 provides for a sole arbitrator. It is pertinent to note that the English Arbitration Act aims at speedy disposal of matters and hence has laid down certain intrinsic provision. Even though S. 15 is not a mandatory provision, both the parties have disagreed over application of the LMAA terms 2021 regarding the Arbitral tribunal. Since the parties have expressly disagreed over a certain term, it cannot be said to be included in light of the party autonomy principle that pervades through the entire arbitration regime. Hence since the Arbitral Tribunal relating provisions has been expressly disagreed by the parties, but no such disagreement is over the English Arbitration Act, the Arbitration Act shall apply to the arbitration proceedings.

II. WHETHER THE SUMMARY DISPOSAL IS BEYOND THE POWERS OF THE TRIBUNAL?

It is most respectfully submitted that the arbitral tribunal cannot invoke summary procedure to dispose of the case. The Respondent has sufficiently shown merit in his case. It is further submitted that the Claimant has filed a frivolous application to misguide the Tribunal. The Tribunal must apply standard procedure to ensure that the Respondent is properly heard.

III. WHETHER TENDERING OF INSURANCE CERTIFICATE INSTEAD OF OR WITHOUT THE INSURANCE POLICY VIOLATES THE IMPLIED TERMS OF CIF?

It is most respectfully submitted that the respondent contends that in case of tender of documents under CIF, it is imperative to tender the insurance policy. Tendering only the certificate will thus violate the implied terms of CIF.

It is further submitted that the certificate only mentions the assured but no assignee. Since the assignee is not mentioned, endorsement of the insurance certificate can be made to anyone.

It is further submitted that the certificate and the open cover must be read together. The certificate supersedes the open policy. Since the open cover is not provided, which is imperative to determine what terms of the open cover will apply the buyer is left hanging as to what are the exact terms of the insurance.

IV. WHETHER THE QUALIFYING / CLAUSING RENDERS A BILL OF LADING NOT 'CLEAN'? AND CONSEQUENTLY RETLA CLAUSE TYPED ON A BILL OF LADING MAKES IT A BAD TENDER?

It is most respectfully submitted that, in this instant case, the bill of lading states on Page 2 of the Bol that the goods are shipped at the port of loading in apparent good order and condition on board the vessel. It is pertinent to note that on the next page RETLA clause is typed which defines the term "apparent good order and condition." This definition acts as a qualification in the bill of lading. A clean bill of lading does not have any qualification/clausing on it especially w.r.t apparent order and condition. Therefore tendering a bill of lading having the RETLA clause typed on it is not a clean BoL.

It is further submitted that this definition hampers the evidentiary function of BoL. A bill of lading acts as the conclusive evidence of the receipt of goods. Under a CIF contract, the buyer or subsequent purchaser who is entitled to receive the goods as its owner/agent of the owner must be represented reasonably as to the condition of the goods that are being supplied to him. Under a CIF contract, the liability of the seller ceases once the goods are loaded on board the ship. The contract casts a duty on the seller to produce a clean BoL which must contain representation as to order and condition of the goods.

V. WHETHER THE TRANSSHIPMENT AND CESSER CLAUSE TYPED ON A BILL OF LADING MAKE IT A BAD TENDER?

It is most respectfully submitted that the bill of lading contains a transshipment and cesser clause. It is pertinent to note that the wording of such a clause is in line with the clause 2 'c' of the conditions of the carriage. Here the clause merely provides a liberty to tranship. It is further submitted that the under a CIF contract the liability of the seller ceases once the goods are loaded on board the ship. Hence the goods are then at the risk of the buyer. A bill of lading which takes away the liability of the carrier in case of transhipment takes away the continuous documentary cover despite payment of entire freight is prejudiced to the buyer, disallowing carrier to entertain any claim which render the rights of the buyer under CIF without limbs.

It is most respectfully submitted that the insurance certificate provided by the buyer does not make any mention of documentary cover in case of transhipment. Such an insurance is detrimental to the buyer since the goods are at the risk of the buyer, the transhipment cesser clause safeguards the carrier and the seller is not liable due to transfer of risk.

I. WHETHER THE ARBITRAL TRIBUNAL BE CONSTITUTED ACCORDING TO LMAA TERMS OR THE ENGLISH ARBITRATION ACT, 1996?

1. It is most respectfully submitted that the English Arbitration Act is divided into two parts - mandatory and non-mandatory.[1] The LMAA terms are terms of procedure. The English Arbitration Act provides for in s15 liberty to parties to agree on number of arbitrators. Reading the language of s15 of English Arbitration Act, it provides for express agreement of number of arbitrators. In the present case there is no express agreement over number of arbitrators. The parties have expressly agreed to apply English laws, to have London as Seat of Arbitration and to include LMAA terms.[2] S.15 of English Arbitration act and the Para 2 of ICP and Para 8 of the LMAA Terms, both these provisions are directory in nature.

2. It is further submitted that 'constitution of arbitral tribunal is not according to express agreement of the parties' is one of the ground for refusal to enforce foreign award or to challenge the arbitral award. Therefore, even though s15 is not a mandatory provision, it will take the character of a mandatory provision when there is no agreement as to number of arbitrators. Therefore, it is submitted that the English Arbitration Act should prevail over the LMAA terms.

3. It is further submitted that the para 7 of the LMAA terms only aims at varying non-mandatory provisions even though no such express mention is made in para 7(a). Reading para 7(b) and s(4) of the English Arbitration Act together, it can be gathered that the LMAA terms can only vary provisions which are non-mandatory in nature. It is also pertinent to note that institutional rules cannot overreach or override[3] what is expressly agreed by the parties. The question to be considered is whether mere subscription to institutional rules overriding the agreed terms of arbitration clause violate party autonomy or will subscription to terms be the basis of overriding by applying party autonomy party.[4] Here since there is no agreement over the number arbitrators, the provision in English

[1] English Arbitration Act, 1996, Section 4.
[2] Case Study, Factsheet, para 1.
[3] D. L. T. Chong, "*Institutional Leadership or Institutional Overreach?: Overriding the Parties' Agreement for the Number of Arbitrators in Expedited Proceedings*", 7(1) AMERICAN JOURNAL OF TRADE AND POLICY 22 (2020).
[4] Kah Cheong Lye (Norton Rose LLP), "*Institutional Overreach? Institutional Arbitral Rules versus Parties' Express Agreement*", KLUWER ARBITRATION BLOG (January 17, 2013).

Arbitration Act will function as a mandatory provision. Therefore, the LMAA terms para 7 will not vary English Arbitration Act.

4. It is most respectfully submitted that, the challenge to arbitral award based on constitution of tribunal as to number of arbitrators is a matter of construction of arbitration clause and the mandate of the applicable arbitration act. Therefore the question is a matter of substantive law and not rules of institutions. It is further submitted that Generally, the arbitral institution's role in an institutional arbitration includes (but is not limited to):receiving the request for arbitration and distributing it to the respondent, appointing the tribunal where the arbitration agreement provides for them to do so or in default of the parties' ability to do so, setting and administering the financial arrangements for the arbitration (eg setting a deposit or an advance on fees, and paying the tribunal's fees) assisting the tribunal to deal with any issues that arise relating to the conduct of the arbitration (eg a challenge to a tribunal member).[5] The institutional rules cannot in any manner vary the provisions of the arbitration act to determine what is the number of arbitrators unless the parties have shown such express intention apart from mere agreement to institution rules. Therefore, it is submitted that the English Arbitration Act should prevail over the LMAA terms.

II. WHETHER THE SUMMARY DISPOSAL IS BEYOND THE POWERS OF THE TRIBUNAL?

5. The respondents humbly submit that the present case as has been brought up by the respondents, holds merit in every issue raised before this Hon'ble tribunal, and in every submission made thereafter. The merit of all the arguments that have been submitted before this tribunal below, shall be proven to the highest possibility.

6. The claimants have applied to the Hon'ble tribunal to dispose of the proceedings in a summary manner by limiting the arguments to two hours for each side. The claimants have made such a request stating that the respondents submissions are completely absent of merit. The respondents shall herein prove that not only do the arguments hold merit but also that allowing any such procedure for the present case is beyond the powers of the tribunal.

[5] "*Institutional arbitration—an introduction to the key features of institutional arbitration*", LEXISNEXIS.

7. Firstly, the LMAA Intermediate Claims Procedure under rule 11 holds that oral hearings shall not be a natural right, but only in exceptional cases shall such right be offered.[6] The Respondent claims and requests the tribunal here that there is no prima facie case of 'exceptional circumstance' that can be observed before the tribunal. The instant case is a case of a breach of contract which has been challenged by the respondents based on technical, legal and meritorious arguments, giving reasonings for the objections raised by the respondents during the course of business. There does not lie any exceptional circumstance in the instant case for such procedure to be allowed by the tribunal. While making such a claim, the claimant holds the burden to prove such an exceptional situation, which they have essentially failed to do so. The respondent states that this claim by the claimant is nothing but a runway so as to avoid a detailed procedure and finish off the matter to evade greater liability.

8. Further, the respondents humbly request the tribunal that it is the statutory responsibility, to act in a fair manner while conducting the proceedings. This duty of the tribunal can be seen under section 31 of the English Arbitration Act, 1996 which states that-

> ***"33 General duty of the tribunal.***
>
> *(1) The tribunal shall—*
>
> *(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and…"*

9. Now in the due process of the arbitration proceedings, if the tribunal allows such disposal as requested by the claimants, the respondents shall be denied their right of natural justice to be given a fair opportunity of being heard and to be able to respond to what the claimants have claimed. Such an instance would do nothing but to declare this entire procedure merely purposeless and ineffectual.

10. The High Court considered whether summary disposal of a claim during an arbitration amounts to serious irregularity under section 68[7] in *BTC Bulk Transport Corporation v. Glencore International AG*.[8] During the arbitration, the claimant (BTC) applied for a strike out of the defendant's (Glencore) counterclaim. The tribunal made a final award in

[6] LMAA Intermediate Claims Procedure, 2021, Rule 11(a).
[7] English Arbitration Act, 1996, Section 68.
[8] BTC Bulk Transport Corporation v. Glencore International AG, [2006] EWHC 1957 (Comm).

Glencore's favour, allowing the counterclaim. It was held that this amounts to a serious irregularity as the tribunal terminated an issue that was not properly put before it, owing to the adoption of the summary procedure. Since, BTC were deprived of the opportunity, Cooke J found that there had been a serious irregularity in the procedure of the arbitration as the tribunal were in breach of section 33.

11. The Respondent also claims that if such a procedure is adopted, that shall be gravely inconsistent with the Arbitration Act, since the Act does not provide for the summary disposal of procedure, especially on the ground of unmeritorious claims.[9] And hence, the respondents most humbly request that such Procedure shall be ineffectual and unjust to the parties, also is beyond the powers of this tribunal.

III. WHETHER TENDERING OF INSURANCE CERTIFICATE INSTEAD OF OR WITHOUT THE INSURANCE POLICY VIOLATES THE IMPLIED TERMS OF CIF?

A. WHETHER AN INSURANCE CERTIFICATE CAN BE ISSUED IN PLACE OF AN INSURANCE POLICY?

12. It is most respectfully submitted that the present insurance document contains an insurance certificate instead of an insurance policy which isn't according to the implied terms of insurance policy. Whenever the documents are tendered for the purpose of claiming marine insurance then there is always a mention of an original policy with the required elements to be showed.

13. It is further submitted that in any discussion of insurance documents, it is always remembered that the CIF buyer has two principal needs. **First**, the buyer needs information about the terms of cover, in order to know whether the seller has complied with his responsibility to enter into a contract of insurance on the terms usual in the trade. Secondly, the buyer needs direct recourse against the insurer.[10] Both points emerge from *Diamond Alkali Export Corporation v. Fl. Bourgeois,*[11] in this case under a contract for the sale of goods to be shipped from American seaboard C.I.F. Gothenburg, the sellers tendered, with an invoice for the goods a certificate of insurance issued by an American insurance corporation, which, as the certificate declared, *"represents and takes the place of the policy and conveys all the rights of the signed policy holder.*"

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[9] UK Law Commission, "*Review of the Arbitration Act 1996 - A Consultation Paper*" (September 2022), at page 257.
[10] M G BRIDGE, PART I INTERNATIONAL SALES GOVERNED BY ENGLISH LAW, 1 INTRODUCTION TO INTERNATIONAL SALES (OUP). [hereinafter "**M G Bridge**"]
[11] Diamond Alkali Export Corporation v. Fl. Bourgeois, [1921] 3 K.B. 443.

14. It is further submitted that the counsel in the above case argued that he couldn't see how the buyer here could know whether the document he got was of a proper character (one he was bound to accept) unless he saw the original policy, and examined its conditions, whether usual or otherwise. In the next place, a certificate of insurance falls within a legal classification, if any, different to that of a policy of insurance. The latter is a well-known document with clearly defined features. It comes within definite, established and statutory legal rights. A certificate, however, is an ambiguous thing; it is unclassified and undefined by law.

15. McCardie J was also unable to see how the buyer could sue the insurance company under an assigned certificate. There was nothing to indicate the terms of cover and it was assumed that the certificate was issued under a floating policy.

16. It is further submitted that it is also vital to see the provisions of the Marine Insurance Act, 1906. Now the relevant statutory provision is **Sect. 50**,[12] sub-s. 3, which says: "*A marine policy may be assigned by endorsement thereon or in other customary manner.*" This sub-section, however, only applies, to that which is an actual marine policy. **Sect. 90,**[13] the interpretation clause, says: "*In this Act unless the context or subject matter otherwise requires, - 'policy' means a marine policy.*" The Act contains no reference, express or implied, to a certificate of insurance. **Sect. 22**[14] says: "*Subject to the provisions of any statute, a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy in accordance with this Act*." If, as is admitted, this document be a certificate only and not a policy.

17. It is further submitted that the King's Bench Division concurred and held that a document of insurance is not good tender in England under an ordinary c.i.f. contract unless it be an actual policy, and unless it falls within the provisions of the Marine Insurance Act, 1906.

18. It is further submitted that In the case of *Manbre Saccharine Company Limited v. Corn Products Company Limited,*[15] it was held that under a c.i.f. contract the vendor is bound to tender to the purchaser a proper policy of insurance together with the other shipping documents, and that obligation is not performed by the vendor guaranteeing to hold the purchaser covered by insurance in accordance with the terms of a policy of insurance in

[12] Marine Insurance Act, 1906, Section 50(3).
[13] Marine Insurance Act, 1906, Section 90.
[14] Marine Insurance Act, 1906, Section 22.
[15] Manbre Saccharine Company Limited v. Corn Products Company Limited, [1919] 1 K.B. 198.

the vendor's possession. The purchaser under a c.i.f. contract is entitled to demand a policy of insurance which covers, and covers only, the goods mentioned in the bills of lading and invoices.

19. It is further submitted that In *Wilson, Holgate & Co. v. Belgian Grain & Produce Co*.,[16] The question which the learned Judge had to decide in that case was whether the tender of a broker' cover note was compliance with the condition in a c.i.f. contract which required the tender of a policy of insurance. In holding that it was a non-compliance with the condition, Mr. Justice Bailhache held that:

> "It is, of course, clear that the buyer, it he chooses to do so, may waive his right to require a policy of insurance and may agree to take some other document. If he chooses to adopt that course, a document other than a policy can only be forced upon him if it is a document of the kind which he has agreed to take. He cannot be compelled to take a document which is something like that which he has agreed to take. He is entitled to have a document of the very kind which he has agreed to take, or at least one which does not differ from it in any material respect."

20. It is further submitted that the function of the marine insurance policy in the c.i.f transaction is to complete the protection afforded to the buyer against loss or damage of the goods by providing cover in situations where the carrier would be excused from liability. In very similar considerations apply as in the case of bill of lading. In the absence of any special stipulation in the contract of sale, the seller must take out an effective policy[17] on the terms usual in the trade.

21. It is further submitted that between buyer and seller, the former is entitled to the benefit of any excess insurance effected by the latter and covered by the policy tendered; but the parties may provide otherwise. In dealing with substitutes that may be tendered in place of an actual policy, the considerations involved are similar to those noticed in the case of the bill of lading: the buyer is entitled to certain protection by way of security, and the question is whether the particular document gives it to him. A mere letter from the seller

[16] Wilson, Holgate & Co. v. Belgian Grain and Produce Co., [9191] W. N. 3.
[17] A. C. Harper & Co. v. Mackechnie & Co., [1925] 2 K. B. 423; Theodor Schneider & Co. v. Burgett & Newsam, [1915] 2 K. B. 379; Cantiere Meccanico Brindisino v. Constant, I7 Comm. Cas. i88 (K. B. 1912).

stating that he is holding the buyer covered is insufficient and is so a broker's cover note.[18] This clearly highlights the importance of an original policy being issued.

22. Lord Justice Bankes in *D & J Koskas v. Standard Marine Insurance Company Limited*[19] questioned the elements of both certificate and policy. He was not content with the fact that in spite of the language of the certificate you are driven back to the policy to find what the risk was; and it follows from that that you have got to read the two documents together, and you have to make sense of them if you can; and, when you are considering whether a particular clause in the one document or the other document is a condition precedent, you must be really certain that the parties by the language they have used intended that it should be. According to him the policy, after all said and done, is the governing document, because that contains the risk. Sankey J distinguished Diamond Alkali saying it had no application to the discussion and did not assist where the question at issue was the relationship vis-à-vis the insurance company and the assured, the reason being that the certificate was "*a document issued by the defendants themselves*". In short, insurers cannot effectively deny the contract of insurance evidenced by the certificate and would, in practice, be bound to issue a policy in accordance with the undertaking to do so provided in most certificates.[20]

23. It is also mentioned in Halsbury's laws of England:[21]

> "unless there is an express stipulation to the contrary, nothing short of an actual policy of insurance properly stamped is a good tender under a c. i. f. contract. For instance, no broker's cover note, or certificate of insurance, or other document which does not include all the terms of the usual contract of insurance is good tender under the ordinary c. i. f. contract."

24. Further, in the cases of *Underwriters' Agency v. Sutherlin*,[22] and *Imperial Shale Brick Co. v. Jewett*,[23] in both of which the so-called certificates were merely certifying letters which did not purport to take the place of the policies, but on the contrary stated expressly that

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[18] Philip W. Thayer, "*C. I. F. Contracts in International Commerce*", 53(5) HARVARD LAW REVIEW (March 1940).
[19] D & J Koskas v. Standard Marine Insurance Company Limited, (1927) 27 Ll.L.Rep. 59. [hereinafter "**D & J Koskas**"]

[20] JOHN DUNT, MARINE CARGO INSURANCE, Para 3.51 (2nd ed. 2015).
[21] XXIX, HALSBURY'S LAWS OF ENGLAND, 217 (Hailsham ed.).
[22] Underwriters' Agency v. Sutherlin, 55 Ga. 266 (1875).
[23] Imperial Shale Brick Co. v. Jewett, 169 N. Y. 143, 62 N. E. 167 (1901).

they were issued subject to the terms and conditions of the policies. The peculiar features of the actual certificate in the case accordingly were disregarded and not discussed.

25. Further the same position was reiterated in the case of Scott & Co. v. Barclays Bank Ltd.,[24] Lord Justice Bankes, held that the certificate is not a policy, the certificate does not show whether that policy was in a recognised or usual form or not. The certificate does not, therefore, contain all the terms of the insurance. Those terms have to be sought for in two documents-namely, the original policy and the certificate. Here a letter of credit required the seller to tender an "*approved insurance policy."* The tender of a certificate did not meet the requirements of the letter of credit. For one thing how it could be known whether the certificate was issued under an approved policy? No firm ruling was made on the compliance requirement for sales contract but the case is generally supportive of Diamond alkali case on this point.[25]

B. WHETHER THE PRESENT INSURANCE CERTIFICATE COMPLIES WITH THE REQUIRED FORMALITIES?

26. Although certificates do generally identify the subject-matter with reasonable clarity they may fail to comply with the other formalities. A certificate will name the original assured, whether it be issued on a facultative one-off basis, or, as is more commonly the case, under an open cover. However, it would be rare for a certificate to name the assignee, as certificates are not generally endorsed and even where they are endorsed they may be endorsed "in blank" opening them to the benefit of whoever may hold the certificate down a chain of c.i.f. buyers[26] as can be seen in the certificate of insurance.[27]

27. In Aetna Ins. Co. v. Willys-Overland, Inc.,[28] the independent rights of the holder found strong support. In that case the insured, a shipper of motor cars an open policy, issued certificates against particular shipments by authority of the insurer. These certificates apparently referred in part to the terms conditions of the policy, and in part contained clauses independent of the policy. In issuing certificates, the insured was required by the terms of original policy as well as by custom to insert the name of the carrying vessel, but

[24] Scott & Co. v. Barclays Bank Ltd., (1923) 14 Ll.L.Rep. 89.

[25] M G Bridge, *supra* note 10, at page 197, para 4.124.
[26] Marine Cargo Insurance, Chapter 3 Open Covers, Policies and Insurance, 3.49.

[27] Case Study, Insurance Certificate, page 3 of 12.
[28] Aetna Ins. Co. v. Willys-Overland, Inc, 288 Fed. 912 (N. D. Ohio 1922).

neglected to do so in the case of a shipment from pacific coast to Asia. The ship was lost, and the consignee, into whose hands the certificate in this form had come, was paid in full by the insurer. The present action was brought by the insured against the insurer to recover the amount. The Court held that:

> "A certificate issued and countersigned pursuant to the authority conferred…becomes a new and independent contract between the insurance company and the certificate holder, and a new contract is thereby engendered which controls the rights as between them. The certificate holder does not become an assignee of the original policy of insurance nor a mere appointee under that policy to collect the insurance in case of loss. He is not a person claiming title through the defendant as the original insured under the original policy. His contract is none the less an independent one with the insurance company, although it may be necessary to examine both the certificate and the original policy in order to ascertain the terms of that independent contract."[29]

C. WHETHER THE TERMS OF OPEN COVER NEED TO BE READ WITH THE INSURANCE CERTIFICATE?

28. Also, in determining which terms of the open cover apply to the certificate,[30] the certificate and the open cover are to be read together.[31] There will usually be much in the open cover that is clearly personal to the original assured such as the agreement and payment of premiums and options to have different levels of cover. Other terms personal to the original assured will include the right to give notice of cancellation and the right to issue certificates, and finally, and most importantly, limitations upon the total amounts to be insured under the open cover for any one shipment or location.[32] Whilst it is the practice for certificates to state shipment limits, certificates may not include the location limits in an open cover. Where location limits and, similarly, deductibles, are not stated on

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[29] Philip W. Thayer, "*Marine Insurance Certificates*", 49(2) HARVARD LAW REVIEW 239 (December 1935).

[30] De Monchy v. Phoenix Insurance Company of Hartford and Anr., (1929) 34 Ll.L.Rep. 201 (HL) [hereinafter "**De Monchy**"]; MacLeod Ross & Co Limited v. Compagnie d'Assurances Generales l'Helvetia, [1952] 1 Lloyd's Rep. 12; Evialis SA v. SIAT & Others, [2003] 2 Lloyd's Rep. 377, at para 32.

[31] D & J Koskas, *supra* note 19; De Monchy, *supra* note 30.

[32] ROY GOODE AND EWAN MCKENDRICK, GOODE AND MCKENDRICK ON COMMERCIAL LAW (6th ed. 2021).

the certificate they are likely to be treated as personal to the original assured and not binding on an assignee. Hence the importance of certificate to be read with the terms of an open cover can be clearly seen and in the present insurance certificate the terms of open cover hasn't been provided.[33]

IV. WHETHER THE QUALIFYING / CLAUSING RENDERS A BILL OF LADING NOT 'CLEAN'? AND CONSEQUENTLY RETLA CLAUSE TYPED ON A BILL OF LADING MAKES IT A BAD TENDER?

A. THE QUALIFYING / CLAUSING RENDERS A BILL OF LADING NOT 'CLEAN' AND CONSEQUENTLY RETLA CLAUSE TYPED ON A BILL OF LADING MAKE IT A BAD TENDER.

29. It is most respectfully submitted that the bill of lading contains a RETLA clause which qualifies the term "apparent good order and condition". Such a qualification will necessarily lead to unclean / foul BoL.

30. Bailhache J[34] "*when a credit calls for bills of lading, in normal circumstances it means clean bills of lading*" he then tries to put down what is a clean bill of lading[35] which Salmon J also agrees to. Salmon J[36] views clean Bills of Lading as "*a clean bill of lading is one that does not contain any reservation as to the apparent good order or condition of the goods or the packing*." The bills in the instant case described the goods as "*in apparent good order and condition*," and were not "claused" by any statement endorsed on the bill qualifying that description; they were, therefore, clean bills of lading.

31. Under Article 27 of the UCP, a clean bill of lading is defined as "*one that bears no clause or notation which expressly declares a defective condition of the goods and/or the packaging.*" Banks must refuse bills of lading that contain such clauses or notations unless the letter of credit expressly stipulates the clauses or notations that may be accepted. The word 'clean' need not appear on a bill of lading, even if a credit has a requirement that the bill of lading be 'clean on board', unless this is expressly required by the applicant.

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[33] Case Study, Insurance Certificate, pages 3-5 of 12.
[34] National Bank of Egypt v. Hannevig's Bank Ltd., (1919) 1 Ll.L.Rep. 1.
[35] Aubrey L. Diamond, "*Clean Bills of Lading*", 21(3) THE MODERN LAW REVIEW 306 (May 1958).

[36] British Imex Industries, Ltd. v. Midland Bank, Ltd., [1958] 1 All E.R. 264.

32. It is further submitted any notation superimposed on a bill of lading renders it "foul" is valid. The bill of lading must not indicate any fault in the goods.[37] Here superimposed means something more is meant than the filling in of blanks on the printed form of the bill.[38] Whenever merely a blank is filled with certain words which do not refer to the condition of the goods or any representation w.r.t to the same, then such a bill of lading will be a clean bill of lading.[39]

33. It is submitted that, the present BoL does not expressly mention anything about the goods, however if reliance is placed on the Saga Explorer[40], the court held that the term visible moisture/rust in RETLA clause refers only to superficial rust. And hence the carrier will be held liable if he falsely represents deeply rusted cargo as in apparent good order and condition. As opposed to the same, the Tokyo Marine[41] case in which the RETLA clause came to life, a diametrically opposite view was taken to hold that RETLA clause does not make any representation as to the condition of the goods. The Saga Explorer considered and overruled the above position held in Tokyo marine case. Hence, adhering to the latest view taken in SAGA explorer, the RETLA clause will exclude representation as to visible rust and moisture, and hence if a master of the ship has issued a clean BoL, despite there being deep rusting, the carrier's liability will continue. It will be assumed that the carrier was a party to the misrepresentation. Thus, under English law, RETLA clause is not recognized disabling the ship owners from hiding behind such a deceitful clause.[42]

34. It is most respectfully submitted that if the description of the goods was such that the master could sign a bill of lading that said that those goods, as described, were in "*apparent good order and condition,*" then the cargo would not be "*subject to clausing of the bill of lading*".[43] But if the master would have to make a notation on the bill of lading to reconcile the description of the goods with a statement that they were in "*apparent good order and condition,*" then the cargo was "*subject to clausing of the bill of lading*."[44]

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[37] Daniel C. Draper, "*What is a Clean Bill of Lading A Problem in Financing International Trade*", 37 CORNELL L. REV. 56 (1951).
[38] The Idefjord, 114 F.2d 262 (2d Cir. 1940).
[39] Norske Amerikalinje v. Blumenthal Import Co., 311 U.S. 707 (1940).

[40] Breffka & Hehnke GmbH & Co KG and Others v. Navire Shipping Co Ltd and Others (The "Saga Explorer"), [2012] EWHC 3124 (Comm).
[41] Tokio Marine & Fire Ins. v. Retla Steamship Co., [1970] Vol. 2 U.S. CT Lloyd's Rep.

[42] Assuranceforeningen Skuld, "*Rusted Steel Cargo: How to avoid Receivers' Claims*", P&I Bulletin.
[43] SIR RICHARD AIKENS ET. AL., BILLS OF LADING (3rd ed. 2020).
[44] Sea Success Maritime Inc v. African Maritime Carriers Ltd, [2005] EWHC 1542 (Comm).

35. It is further submitted that Donaldson J. held that buyers were not entitled to reject it, as the bill was clean. He rejected a suggested "practical test" by reference to what would normally be acceptable to banks as clean. He analysed the legal position, citing textbooks and authorities that adopted the test of cleanliness as being a bill "*in which there is nothing to qualify the admission that the goods were in apparent good order and condition.*" He also held that the relevant time was not the time of issue of the bill but the time of shipment.[45]

36. It is most respectfully submitted that in the present case the RETLA clause defines "*apparent good order and condition*" in such a manner that the original term is rendered ambiguous and is deprived of its reasonable meaning. The definition further makes it ambiguous to understand the real condition of the goods being shipped. This inherently contradicts with the principle that the buyer must know the condition of the goods. Further under a CIF contract, the obligation of the seller ceases once the goods are shipped on board a vessel.[46] Hence it becomes imperative for the buyer under CIF contract to have reasonable understanding as to quality of goods at the time of loading. The Last line of the RETLA clause states that if the shipper so requests a substitute BoL shall be issued according to the mate's / tally clerk's receipts. Thus, in this case since the seller had the opportunity to demand clean bill of lading, the seller ignored to exercise his obligation to request for a clean bill of lading. Therefore, the bill of lading is a bad tender.

B. WHETHER THE RETLA CLAUSE AFFECTS THE EVIDENTIARY FUNCTION OF A BILL OF LADING RENDERING IT A BAD TENDER?

37. The bill of lading in the present case contained a statement on its face that the cargo was shipped "*in apparent good order and condition.*" If there had been no Retla clause, this would amount to a representation of fact which could be relied on as reflecting the reasonable judgment of a reasonably competent and observant master.[47] If clean bills of lading are issued in respect of goods received by the vessel otherwise than in apparent good order and condition, the ship owners will be estopped as against an endorsee for

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[45] Golodetz & Co. Inc. v. Czarnikow-Rionda Co. Inc. (The "Galatia"), [1980] Vol. 1 Lloyd's Rep. 453.

[46] Incoterms 2020, "*ICC Rules for the Use of Domestic and International Trade Terms"*, INTERNATIONAL CHAMBERS OF COMMERCE.

[47] GUENTER H. TREITEL AND FRANCIS M.B. REYNOLDS, CARVER ON BILLS OF LADING, para 2-006 (3rd ed.).

value or against a person taking delivery against the bills from asserting that, at the time of loading, the goods were not in apparent good order and condition. Law did not cast on the master the role of an expert surveyor and he need not possess any greater knowledge or experience of the cargo in question than any other reasonably careful master; what he was required to do was to exercise his own judgment on the appearance of the cargo loaded; and if he took the view that the cargo was not or not all in apparent good order and condition he was entitled to qualify the bill of lading.[48]

38. The statements in the bill of lading as to the goods are only representations of fact,[49] not contractual promises.[50] They can amount to prima facie evidence as to the state of the goods at the time of their shipment.[51] Provided that the elements of common law estoppel are established, these representations may become conclusive evidence as against the carrier.[52]

39. It is most respectfully submitted that, the recording of apparent order and condition of the goods at the time of goods at the time of loading amounts to prima facie evidence which may be considered as conclusive evidence at a later stage. Therefore qualifying the term by RETLA clause affects the evidentiary value of the bill of lading in the hands of the transferee. As a result of this if the goods are further damaged due to any negligence by the carrier, the carrier will be able to dodge his liability. This in turn affects the buyer and he may be liable for loss without him being not responsible for the same. A claused bill of lading is not fit to pass through the hands of traders and is thus not ordinarily accepted as good tender for payment in international trade.[53] Therefore it is most respectfully submitted that the bill of lading is a bad tender.

V. WHETHER THE TRANSSHIPMENT AND CESSER CLAUSE TYPED ON A BILL OF LADING MAKE IT A BAD TENDER?

[48] The "David Agmashenebeli", [2002] EWHC 104 (Admlty).

[49] Compania Naviera Vasconzada v. Churchill & Sim, [1906] 1 KB 237.

[50] The Mata K, [1998] 2 Lloyd's Rep 614.
[51] Smith v. Bedouin Navigation Co., [1896] AC 70 (HL).
[52] Dr. Melis Özdel, "*The Receipt Function of the Bill Of Lading: New Challenges*", INTERNATIONAL COMPANY AND COMMERCIAL LAW REVIEW (2017).

[53] BENJAMIN'S SALE OF GOODS, para 19–126 (Sweet & Maxwell, 11th ed. 2022).

40. It is most respectfully submitted that the BoL provides for voyage only by vessel 'Korea Generator'.[54] It is further submitted that the CIF contract concluded between the parties is not given. It is settled position of law that where the contract of sale is silent as to whether transhipment is allowed, the tender of a bill of lading stating that the goods will be transhipped constitutes a good tender where the carrier does not seek to exclude his responsibility after the goods are transhipped.[55]

41. It is further submitted that a bill of lading with a transshipment clause is not necessarily a bad tender under a C.I.F contract but it must in some way give continuous documentary cover in respect of the goods.[56] The CIF clause indicates a definite transit and the bill of lading must provide cover for the whole of that transit.[57] A bill of lading issued by a shipowner who by the transhipment terms in it disclaims all liability in respect of the goods in the event and as from the time of transhipment, gives no such "continuous" cover.[58] However, where the bill of lading simply gives a liberty to tranship to a carrier who does not disclaim responsibility for the goods after transhipment, it would seem that this constitutes bad tender.[59]

42. It is further submitted that, In the absence of contrary agreement in the contract of sale, it would appear that tender of a bill of lading stating that the goods will or may be transhipped is also valid where the carrier excludes his liability after transhipment, at any rate where the carrier has not exercised his liberty at the time of tender.[60]

43. It is most respectfully submitted that the seller is duty bound to tender an insurance which is coterminous with all the liberties accorded to the carrier under the bill of lading. In the present case, the seller has only provided the insurance certificate without a policy. The insurance certificate does not mention about cover in case of transshipment even though the bill of lading issued gives liberty to transship. The carrier has further claused the bill of lading in such a manner that his liability in any claim arising after transshipment will

[54] Case Study, Factsheet BoL, page 2.
[55] 7 HALSBURYS LAWS OF ENGLAND, CARRIAGE AND CARRIERS (2020).

[56] Landauer & Co. v. Craven & Speeding Bros., [1912] 2 K.B. 94.

[57] Sutro & Co. v. Heilbut, Symsons & Co., [1917] 2 K.B. 348 (C.A.); Pacific Rice Mills v. Westfeldt Bros., 3I F.(2d) 979 (C. C. A. 5th, 1929).
[58] Hansson v. Hamel & Horley, Ltd., [1922] 2 A.C. 36; (1922) 10 Ll.L.Rep. 507.

[59] L. M. Fischel & Co. v. R. Knowles Spencer, I2 L1. L. R. 36 (K. B. 1922).

[60] Soproma S.P.A. v. Marine & Animal By-Products Corporation, [1966] 1 Lloyd's Rep. 367.

be waived. The seller has to ensure that the insurance is coterminous with all liberties accorded to the carrier under the bill of lading.[61] This view has been taken in *Belgian Grain & Produce Co Ltd v. Cox and Co (France) Ltd.*[62] Since the seller has failed to provide insurance cover for the transshipment liberty and the carrier is also absolved of his liability by the same clause, the bill of lading therefore becomes a bad tender.

[61] MICHAEL BRIDGE, THE INTERNATIONAL SALE OF GOODS, 198 (2nd ed.).
[62] Belgian Grain & Produce Co Ltd v. Cox and Co (France) Ltd., (1919) 1 LI LR 256.

PRAYER

Wherefore, in light of the above submissions, the Respondent humbly prays before the Hon'ble Tribunal to declare that:

1. A sole arbitrator be appointed according to the English Arbitration Act 1996;
2. The application of the claimant for summary disposal of the proceedings be rejected;
3. The seller shall tender an insurance policy or the open policy along with the insurance certificate;
4. A clean bill of lading be tendered which does not contain RETLA clause and any qualifications or any clause of such nature;
5. The liability of the carrier be fixed in light of the transshipment clause and buyer be protected under insurance and be given continuous documentary cover for the entire duration of the voyage;
6. Any other or declaration or relief that the Hon'ble Tribunal deems fit in light of justice, equity and good conscience;

AND AWARD COSTS AND DAMAGES IN FAVOUR OF THE DEFENDENTS

Date:

Place:

Counsel(s) for Defendants.