

5<sup>TH</sup> NATIONAL LAW UNIVERSITY ODISHA

INTERNATIONAL MARITIME ARBITRATION MOOT COURT, 2018



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IN THE MATTER OF ARBITRATION TO BE

ADJUDICATED BY THIS ARBITRAL TRIBUNAL BETWEEN:

SHANGRILA SHIPPING CORPORATION.....CLAIMANT

AND

CONTINENTAL CHEMICALS LIMITED.....RESPONDENT

*(MV SULPHUR EXPRESS)*

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*MEMORIAL ON BEHALF OF THE RESPONDENT*

**TABLE OF CONTENTS**

**TABLE OF ABBREVIATIONS** ..... III

**INDEX OF AUTHORITIES** ..... IV

**STATEMENT OF JURISDICTION** ..... VI

**STATEMENT OF FACTS** ..... VII

**ISSUES RAISED** ..... IX

**SUMMARY OF ARGUMENTS** ..... IX

**ARGUMENTS ADVANCED** ..... 1

    A. THAT THE ARBITRAL TRIBUNAL DOES NOT HAVE THE ADEQUATE JURISDICTION TO ENTERTAIN THE DISPUTE..... 1

    B. THAT THE RESPONDENTS ARE NOT LIABLE TO INDEMNIFY ..... 2

        I. That the Letter of 10<sup>th</sup> October is a letter of Warranty and not a Letter of Indemnity 2

        II. That Implied Indemnity could not be read into the letter of 10<sup>th</sup> October..... 3

            a) The chain of causation was broken by the master’s negligence ..... 3

            b) There was no order by the charterer in the first place..... 4

            c) That reading of implied indemnity into the letter of warranty would be violative of the contractual freedom of the parties ..... 4

        III. Arguendo, supposing not conceding that the letter of 10th October was a letter of indemnity ..... 4

    C. THAT THE MASTER ERRED IN SIGNING A CLEAN BILL OF LADING ..... 5

        I. Unreasonable Actions of the Master ..... 5

            a) That the Bill of lading issued was inconsistent with the Charter Party ..... 6

            b) Breach of duty of care and negligence ..... 6

            c) No case of Implied Indemnity ..... 7

    D. THAT CLAIMANT AS THE SHIPOWNER WAS LIABLE FOR THE DAMAGE CAUSED ..... 7

        I. The Significance of incorporation of Clause 18 in the charter party agreement. .... 7

        II. Specific non-performance of Clause 18 led to the damage to the Charterers..... 8

III. There was a want of due diligence on the part of the ship owners. .... 9

IV. The vessel was uncargoworthy along with being unseaworthy ..... 10

V. The ship owner is not covered by the exceptions under Article 4 of Hague-Visby Rules 11

E. RESPONDENT’S LIABILITY DOES NOT ARISE..... 12

    I. The Charterers’ liability is limited ..... 12

    II. Claims set out in paragraph 1 shall be subject to limitation of liability even if brought by way of recourse or for indemnity under a contract or otherwise..... 13

    III. Claimant’s claim for indemnity against Heeru’s claim ..... 13

F. RESPONDENTS ARE NOT LIABLE FOR THE CLAIM BY HEERU SULPHUR PRODUCTS LIMITED ..... 14

G. THAT THE RATE OF DEMURRAGE SHOULD APPLY ..... 15

H. That The Respondents are Entitled to Set-off ..... 16

    I. First requirement ..... 16

    II. Second Requirement ..... 17

**PRAYER** ..... X

**TABLE OF ABBREVIATIONS**

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

**INDEX OF AUTHORITIES**

**Cases**

*A Meredith Jones v Vangemar Shipping Co (The Apostolis)* [1997] 2 Lloyd’s Rep 241 ..... 13

*AIG Europe (UK) Ltd v The Ethniki* [2000] 2 All ER 566..... 2

*Aughton Ltd (formerly Aughton Group Ltd) v MF Kent Services Ltd* 57 BLR 1 ..... 2

*Azov Shipping Co v Baltic Shipping Co* [1999] 1 Lloyd’s Rep 68 ..... 2

*Bankes v Jarvis* [1903] 1 KB 549, 552..... 18

*Bankruptcy Notice (No 171 of 1934) Re* [1934] Ch 431 ..... 18

*BimKemi AB v Blackburn Chemicals Ltd* [2001] 2 Lloyd's Rep 93 ..... 19

*Blyth v Birmingham Waterworks (1856)* 11 Ex R 781 ..... 10

*Breffka & Hehnke GmbH & Co KG v Navire Shipping Co Ltd (The Saga Explorer)* [2013] 1 Lloyd's Rep 401 ..... 8

*Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corpn Ltd* [1981] AC 909..... 1, 2

*British Imex v Midland Bank* [1958] 1 QB 542..... 7

*CompaniaNavieraVasconzada v Churchill & Sim* [1906] 1 KB 237 ..... 6

*Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 ..... 3

*Dole Dried Fruit & Nut Co v TrustinKerwood Ltd* [1990] 2 LI Rep 309 ..... 18

*EmpresaCubanaImportada de Alimentos v Iasmos Shipping Co (The Good Friend)* [1984] 2 Lloyd’s Rep 586..... 12

*Esso Petroleum Co v Harper's Garage (Stourport) Utd* [1967] 1 All ER 699 ..... 4

*Gilkison v Middleton* 140 ER 363..... 6

*Global Maritime Investments Cyprus Limited v OW Supply & Trading A/S* [2015] EWHC 2690 (Comm)..... 1

*Grant & Others v Norway (1851)* 138 ER 263..... 7

*Grant v Norway (1851)* 10 CB 655..... 6

*Habaş Sinai Ve Tibbi Gazlar Isthisal Endüstriyaş v Sometal SAL* [2010] EWHC 29 (Comm) . 2

*Hanak v Green* [1958] 2 WLR 755..... 18

*Hansen TangensRederi III A/S v Total Transport Corp (The Sagona)* [1984] 1 Lloyd's Rep 194..... 7

<i>Hansen v Harrold Brothers</i> [1894] 1 Q B 612 .....	6
<i>HenriksensRederi A/S v THZ Rollimpex (The Brede)</i> [1974] QB 233.....	19
<i>Heyman v Darwins Ltd</i> [1942] AC 356 .....	1
<i>Homburg Houtimport BV v Agrosin Private Ltd</i> [2004] 1 AC 715.....	14
<i>House of Lords in Canadian Transport Co Ltd v Court Line Ltd</i> [1940] AC 934 .....	16
<i>Inverkip Steamship Co Ltd v Bunge &amp; Co</i> [1917] 2 KB 193 .....	18
<i>Kondis v State Transport Authority</i> (1984) 154 CLR 672 .....	16
<i>Kopitoff v Wilson</i> [1876] 1 QB 377 .....	11
<i>Kruger &amp; Co Ltd v Moel Tryvan Ship Co Ltd</i> [1907] AC 272.....	7
<i>Lewis v British Columbia</i> [1997] 3 SCR 1145 .....	16
<i>LG Caltex Gas Co Ltd v China National Petroleum Corporation</i> [2001] BLR 235.....	2
<i>Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd (The Maurienne)</i> [1959] 2 L1 L Rep 105.....	13
<i>MJ Gleeson Group v Wyatt of Snetterton Limited</i> 1994 WL 1062742.....	1
<i>NavieraMogor S A v SocieteMetallurgique De Normandie (Nogar Marin)</i> [1988] 1 Lloyd's Rep 412.....	8
<i>Newfoundland Government v Newfoundland Railway Co</i> 13 App Cas 199 .....	19
<i>Owners of Cargo Lately Laden on Board the David Agmashenebeli v Owners of the David</i> <i>Agmashenebeli</i> [2003] 1 Lloyd's Rep 92.....	3
<i>Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd (The Eurasian Dream)</i> [2002] 1 L1 L Rep 719.....	11, 12
<i>Queen Villas Homeowners Association v TCB Property Management</i> 2007 Cal App Lexis 470.....	3
<i>Robinson v Mollett</i> (1875) LR 7 HL 802 .....	8
<i>Royal Greek Government v Minister of Transport</i> (1949) 83 L1 Rep 228.....	4
<i>Rylands v Fletcher</i> (1868) LR 3 HL 330.....	16
<i>Sanguinetti v Pacific Steam Navigation Co</i> [1877] 2 QB 238 .....	17
<i>Sea Success Maritime Inc v African Maritime Carriers Ltd</i> [2005] EWHC 1542 (Comm) .....	6
<i>Secunda Marine Services Ltd v Liberty Mutual Insurance Co</i> [2006] MSCA 82.....	10
<i>Short v J &amp; W Henderson Ltd</i> 1946 SC (HL) 24.....	5
<i>Smith Hogg &amp; Co Ltd v Black Sea &amp; Baltic General Insurance Co Ltd (The Librum)</i> [1940] 67 L1 L Rep 253 .....	10
<i>Strang Steel &amp; Co v A Scott &amp; Co</i> (1889) 14 App Cas 601 .....	6
<i>Stumore Weston &amp; Co v Michael Breen</i> (1886) 12 App Cas 698.....	7

<i>Tattersall v National Steamship Co</i> [1884] 12 QBD 297 DC .....	12
<i>The Amstelslot</i> [1963] 2 Lloyd’s Rep 223 .....	10
<i>The Brabant</i> [1965] 2 Lloyd’s Rep 546 .....	9
<i>The Brabant</i> [1965] 2 Lloyd’s Rep 546; <i>The Starsin</i> [2000] 1 Lloyd’s Rep 85.....	9
<i>The Eurasian Dream</i> [2002] 1 Lloyd's Rep 719.....	10
<i>The Garden City</i> [1982] 2 Lloyd’s Rep 382.....	10
<i>The Patria</i> (1871) LR 3 A & E 436 .....	6
<i>The Starsin</i> (2000) 1 Lloyd’s Rep 85 .....	6
<i>The Starsin</i> (2000) 1 Lloyd’s Rep. 85.;.....	6
<i>The Starsin</i> [2000] 1 Lloyd’s Rep 85 .....	9
<i>The Vortigern</i> (1899) P 140.....	14
<i>The White Rose</i> [1969] 2 Ll L Rep 52.....	4
<i>Triad Shipping Co v Stellar Chartering &amp; Brokerage Inc</i> [1994] CLC 734 .....	4
<i>Vale Do Rio DoceNavegacao SA Seamar Shipping Corp v Shanghai Bao Steel Ocean Shipping Co Ltd (Trading as Baosteel Ocean Shipping Co) v Sea Partners AS 2000 WL 544148 .....</i>	1
<i>W &amp; K Holdings (NSW) Pty Ltd v Mayo</i> [2013] NSWSC 1063 .....	9
<i>W Angliss &amp; Co (Australia) Pty v Peninsular &amp; Oriental Steam Navigation Co</i> [1927] 2 KB 456.....	13
<i>Western Steamship Co v Amaral Sutherland &amp; Co</i> [1913] 3 KB 366 .....	17
<b>Statutes</b>	
Arbitration Act 1996 .....	1
The Indian Contract Act 1872, s 124 .....	3
<b>Books</b>	
Joseph Chitty, <i>Chitty on Contracts</i> , vol 1 (28th edn, Sweet & Maxwell 1999) .....	5
Julian Cooke, <i>Voyage Charters</i> (2014).....	11, 13
Paul Todd, <i>Principles of Carriage of Goods by Sea</i> (Routledge 2015).....	8
TE Scrutton, <i>The Contract of Affreightment: As Expressed in Charterparties and Bills of Lading</i> (Forgotten Books) .....	12
<b>Other Authorities</b>	

‘Hazards of Carrying Sulphur Cargo in Bulk and Countermeasures’ (*Bulk Carrier Guide*)  
<[www.bulkcarrierguide.com/carriage-of-sulphur.html](http://www.bulkcarrierguide.com/carriage-of-sulphur.html)> accessed 13 February 2018..... 8

### **Treaties**

Convention on Limitation of Liability for Maritime Claims 1976 art 1 .....	14
Convention on Limitation of Liability for Maritime Claims 1976 art 2(1)(a) .....	14
Convention on Limitation of Liability for Maritime Claims 1976 art 2(1)(c) .....	15
Convention on Limitation of Liability for Maritime Claims 1976 art 5 .....	15
Convention on Limitation of Liability for Maritime Claims 1976, art 2(1)(b) .....	15



**STATEMENT OF JURISDICTION**

The Arbitration Tribunal does not have the jurisdiction to adjudicate and decide the present dispute because the Letter of warranty dated 10<sup>th</sup> October, 2016 which conferred an exclusive jurisdiction of Courts of Navigonia.

The Respondents, hence, disputes the jurisdiction. If the tribunal decides to rule on its substantive jurisdiction to hear the present dispute, the parties agree to accept the decision of this tribunal as final and binding.

## **STATEMENT OF FACTS**

### **I. The Parties**

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

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

### **II. The Charter Party Agreement**

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

### **III. Issuance of Clean Bill of Lading and the discovery of NWG**

Post the loading of the cargo; the independent surveyor appointed by the Respondents in an Inspection, reported that two pieces of Dunnage Wood, pieces of Torn Plastic and lumps of Solidified tar were found on the surface of the cargo. The Respondents subsequently, issued a letter warranting the cargo loaded on the Vessel on the port of Deeptara at Indisha to the claimants on 10/10/2016, the clean B/L was issued on 17/10/2016 and the voyage commenced. The Vessel was called into Quarantine at the port of Liuville, Helgaland on 14/11/2016 after the HQIS Quarantine Officers found foreign objects which were remnants of previous cargo. Further, traces of NWG were discovered, stuck to the torn plastic, which was a prohibited import in Helgaland. Thus, the ship was not allowed to discharge the cargo.

### **IV. The Addendum and Damages**

CCTL, the endorsee of the B/L, made an agreement with the shipowners to re-export the cargo after negotiating a re-sale to Heeru Sulphurs and thus provided the ship to transport the cargo to the port of Ariela in Anikaland. In furtherance of this, the parties to the dispute agreed to sign an Addendum to the C/P to deliver the cargo to the port of Ariela. CCTL claimed from the shipowners, loss of profits and transportation costs which the claimants accepted. The Shipowners claimed the same from Respondents which was denied as the Respondents reserved their rights against the claimants in lieu of the breach of the charter party which led to such addendum being signed.

### **V. The Embargo at Anikaland and Heeru Ltd’s Claim**

Upon arriving at Ariela and receiving port clearance on 10/12/2016, the government of Anikaland imposed an embargo on 12/12/2016 due to the presence of contaminated cargo and the vessel was stranded. Meanwhile, the master did not request the charterers to nominate

a safe port and the carrier claimed detention charges calculable at market rates, rather than at the demurrage rate agreed by the parties.

Further, the end buyer of the cargo claimed damages when the solidified lumps of tar in the cargo caused damage to production machinery of Heeru Ltd. The Respondents found by investigation that the lumps of tar had been picked up by the ship cranes which were under the control of the master of the ship while loading from the newly paved dock.

#### **VI. The Invocation of Arbitration**

The Claimants invoked the Arbitration clause contained in clause 17 of the Charter Party Agreement on 27/12/2017 and appointed Mr. Santos Basu as arbitrator. The respondents, in lieu of the breach of the charter party, and by reserving their rights to challenge the jurisdiction of the tribunal, appointed Ms.Minna Shao as arbitrator. The statements of claim and defence along with the counter-claim were filed before this tribunal. Now, this matter lies before this arbitral tribunal for adjudication.

**ISSUES RAISED**

- A. Whether the arbitral tribunal has the adequate jurisdiction to hear the dispute?
- B. Whether the letter of 10<sup>th</sup> October, 2016 is a letter of indemnity?
- C. Whether the master erred in issuing a clean bill of lading?
- D. Whether the ship owner was liable for the damage caused?
- E. Whether the Respondents hold any liability?
- F. Whether the Respondents are liable against the claim by Heeru Sulphur?
- G. Whether the rate of demurrage or rate of detention calculated at market rates would apply?
- H. Whether the Respondents are liable to be set-off?

## **SUMMARY OF ARGUMENTS**

### **I. THE ARBITRAL TRIBUNAL DOES NOT HAVE THE ADEQUATE JURISDICTION TO ENTERTAIN THE DISPUTE.**

The letter of 10<sup>th</sup> October, warranting the cargo conferred exclusive jurisdiction to the courts of Navigonia. Thus, the claimants do not have the locus to claim for the said relief from the tribunal as the claimant's claims are based on the letter. Further, the respondents had reserved the rights to challenge the tribunal's competency and jurisdiction.

### **II. THE RESPONDENTS ARE NOT LIABLE TO INDEMNIFY**

The letter of 10<sup>th</sup> October was a letter of warranty and not of indemnity for want of an express promise. The case of implied indemnity wouldn't stand as the chain of causation was broken by the master's negligence by not removing the foreign material present in the holds. Further, there was no request for action by the respondents to the claimants in the corresponding letter.

### **III. THE MASTER ERRED IN SIGNING A CLEAN BILL OF LADING**

The Hague Visby rules provides for the Master's duty to properly describe the apparent order and condition of the goods in the bill of lading, which, in the present case, he failed to do. Further, the duty of issuing a clean bill of lading, when the goods are in apparent good order and condition, was breached by the master. Also, the master was negligent in not clausing the bill of lading. The respondents did not give the warranty on the cargo in exchange for the clean bill of lading.

### **IV. CLAIMANT AS THE SHIP OWNER WAS LIABLE FOR THE DAMAGE CAUSED**

The ship owners failed to exercise due diligence and were negligent because they breached their obligation to clean the holds of the foreign objects and organic foreign matter under the absolute provision of hold cleanliness in the charter party agreement. Presence of foreign objects which were the remnants of previous cargo, which were subsequently infected with NWG, led to the vessel being called into quarantine and the damages that followed were due to the vessel being un-cargo worthy and the Claimants are liable to indemnify the respondents under Clause 18.

### **V. THAT THE RESPONDENT'S LIABILITY DOES NOT ARISE**

There was only one cause of action i.e. the want of due diligence on the part of the owners, to fulfill their contractual obligations of hold cleanliness and Seaworthiness under the charter party agreement. The progressive damage done in this case does not create new causes of

action in respect of the later stages of the same progressive damage. In consideration to this, all the consequent damage is an absolute liability of the Claimant. Claims for damage to the cargo goods were directly related to the want of due diligence by the Claimant to clean the holds which led to the damage to the goods and the consequential losses that followed.

**VI. RESPONDENTS ARE NOT LIABLE FOR THE CLAIM BY HEERU SULPHUR PRODUCTS LIMITED**

As the ship's cranes picked up the solidified lumps of tar, and the Cargo Handling gear was provided by the Ship owners to the crewmen according to the charter party agreement, the claimants must be held liable for the damage caused to Heeru Sulphur Products Ltd as the master is liable for the damage done by Stevedores/Crewmen. The master had the responsibility of taking due care so as to not allow the cargo being loaded to be damaged or contaminated.

**VII. THE RATE OF DEMURRAGE SHOULD CONTINUE TO APPLY**

The rate of demurrage has been stipulated in the Charter Party agreement signed between the parties. The demurrage rate covers the payment of the rate per day which is wide enough to cover the days for which detention may occur. As the claimants were signatory to the Charter party agreement, they must only be entitled to the demurrage calculated as stipulated in the contract.

**VIII. THE RESPONDENTS ARE ENTITLED TO SET-OFF**

All the pre-requisites to the principle of Equitable set-off have been established, namely, the counterclaim is at closely connected with the same transaction so as to give rise to the claim; and the relationship between the respective claims is such that it would be unjust to allow claimant's claim to be enforced without regard to the counter claims of the respondent and hence, the respondents are liable for set off.

**ARGUMENTS ADVANCED****A. THAT THE ARBITRAL TRIBUNAL DOES NOT HAVE THE ADEQUATE JURISDICTION TO ENTERTAIN THE DISPUTE.**

¶1. The letter of 10<sup>th</sup> October<sup>1</sup>, which can be construed as a Contract of warranty conferred exclusive jurisdiction on the Courts of Navigonia which governed the said letter<sup>2</sup> and hence, it is the only the courts of Navigonia which will have jurisdiction to determine all the disputes regarding the contract as the parties have submitted jurisdiction to the courts<sup>3</sup> and hence, the claimant do not have the locus to claim for the said relief from the tribunal as the letter expressly confers exclusive jurisdiction to the Courts of Navigonia.

¶2. In pursuance of the exclusive jurisdiction conferred on the letter of 10<sup>th</sup> October, the respondents had reserved their rights<sup>4</sup> regarding the Arbitral tribunal's competency and jurisdiction to the proceedings even if the appointment of Ms. Minna Shao as the arbitrator has taken place, and such an action doesn't imply that a party to arbitration is not precluded<sup>5</sup> from objecting to the jurisdiction of the arbitral tribunal even if they have appointed an arbitrator for the same<sup>6</sup>

¶3. The true rule is that arbitration clauses are not to be incorporated in any contract unless specifically referred to in the primary contractual documentation which in the present circumstance was the Letter of 10<sup>th</sup> October.<sup>7</sup>

¶4. Where there are two separate contracts, the English Courts require express words of incorporation before an arbitration provision in one contract will be binding on the parties to the other, this is a fortiori the case where the agreement encapsulated in the LOI is expressly subject to a different jurisdictional regime<sup>8</sup>

¶5. § 5 of the Arbitration Act requires the arbitration agreements to be in writing which shows the need for a conscious and deliberate relinquishment of a right to go to court<sup>9</sup> and the fact that arbitration clause is in itself a 'self-contained contract collateral or ancillary to' the

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<sup>1</sup> IMAM Proposition, 17.

<sup>2</sup> IMAM Proposition, 17 [4].

<sup>3</sup> *Global Maritime Investments Cyprus Limited v OW Supply & Trading A/S* [2015] EWHC 2690 (Comm).

<sup>4</sup> IMAM Proposition, 52.

<sup>5</sup> *MJ Gleeson Group v Wyatt of Snetterton Limited* 1994 WL 1062742.

<sup>6</sup> Arbitration Act 1996, s 31(2); *Vale Do Rio Doce Navegacao SA Seamar Shipping Corp v Shanghai Bao Steel Ocean Shipping Co Ltd (Trading as Baosteel Ocean Shipping Co) v Sea Partners AS* 2000 WL 544148.

<sup>7</sup> *TW Thomas & Co Ltd v Portsea Steamship Co Ltd* [1912] AC 1; *Federal Bulk Carriers Inc v C Itoh & Co Ltd* [1989] 1 Lloyd's Rep 103; *Heyman v Darwins Ltd* [1942] AC 356; *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd* [1981] AC 909.

<sup>8</sup> *Habaş Sinai Ve Tibbi Gazlar İsthisal Endüstriş v Sometal SAL* [2010] EWHC 29 (Comm).

<sup>9</sup> *Aughton Ltd (formerly Aughton Group Ltd) v MF Kent Services Ltd* 57 BLR 1.

substantive contract” and thus must be expressly referred to in the document relied on as incorporating it<sup>10</sup>

¶6. when the clause in question is a clause conferring jurisdiction not on arbitrators but on another court, it does not suffice to bring an arbitration clause from the other contract referred to into the contract where the clause never conferred jurisdiction to the arbitrators<sup>11</sup>

¶7. The Courts are also of the opinion that in cases involving substantial issues of fact, it might be preferable to go straight to court, either by agreement between the parties or upon application and with the tribunal’s consent, rather than have the tribunal determine its own jurisdiction<sup>12</sup>

¶8. Even if the tribunal decides to determine its own jurisdiction, an award under the said determination which subsequently decides and concludes that therefore the tribunal has no substantive jurisdiction, should not purport to make any determination as to liability or to dismiss the claim<sup>13</sup>.

¶9. That if the tribunal purports to determine its own jurisdiction, then an arbitral tribunal decision as to the existence of its own jurisdiction could not bind a party who had not submitted the question of arbitrability to that tribunal; that where an award had been made against such a person by reason of the arbitral tribunal’s determination, that party was entitled, in a purely domestic case, to a full determination on evidence of the issue of jurisdiction<sup>14</sup>.

## **B. THAT THE RESPONDENTS ARE NOT LIABLE TO INDEMNIFY**

The Counsel humbly submits that the Respondents are not liable to indemnify the Claimants as claimants are not entitled to indemnify and to substantiate, The Counsel shall establish that (I) the letter of 10<sup>th</sup> October is actually a letter of warranty and not a letter of Indemnity and (II) the principle of implied indemnity cannot be read into the letter of 10<sup>th</sup> October.

### **I. THAT THE LETTER OF 10<sup>TH</sup> OCTOBER IS A LETTER OF WARRANTY AND NOT A LETTER OF INDEMNITY**

¶10. The Counsel contends that the Letter of 10<sup>th</sup> October<sup>15</sup> is not a letter of indemnity but is a letter which warrants the condition of the cargo prior to loading and post the survey. The letter was sent to the claimants by the respondents warranting that the cargo which was

<sup>10</sup> *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corpn Ltd* [1981] AC 909.

<sup>11</sup> *AIG Europe (UK) Ltd v The Ethniki* [2000] 2 All ER 566.

<sup>12</sup> *Azov Shipping Co v Baltic Shipping Co* [1999] 1 Lloyd’s Rep 68.

<sup>13</sup> *LG Caltex Gas Co Ltd v China National Petroleum Corporation* [2001] BLR 235.

<sup>14</sup> *Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763.

<sup>15</sup> IMAM Proposition, 17.



surveyed and subsequently, was found to meet the product specification in relation to absence of foreign materials and moisture, neither of which would not affect the handling, usage or storage of the cargo<sup>16</sup>

¶11. It is submitted that the letter merely warranted the cargo prior to loading and hence, could be construed as a letter of warranty and not a letter of indemnity for want of an express promise<sup>17</sup> by the respondents that they will hold harmless<sup>18</sup> or protect from liability or indemnify the claimant in case of loss.

## II. THAT IMPLIED INDEMNITY COULD NOT BE READ INTO THE LETTER OF 10<sup>TH</sup> OCTOBER

¶12. The Counsel contends that assuming Arguendo, if implied indemnity were to be read into the present case owing to the established principle that the ship owners shall be entitled to implied indemnity for consequences of complying with the orders of the charterer<sup>19</sup>. The Counsel contends that the same cannot be held true for this case as –

### a) The chain of causation was broken by the master's negligence

¶13. The owners have the burden of establishing that the chain of causation between the charterer's act and the owner's loss is unbroken by an intervening event<sup>20</sup> but that is not the status quo as the alleged charterer's act of issuing the letter of warranty is not the primary cause of the owner's loss but the master's negligence in not removing the foreign objects from the hold when he was made aware of the same by our letter and hence, the implied indemnity in question is not wide enough to cover master's failure to perform his duty of checking the condition of the cargo and the accuracy of the bill of lading<sup>21</sup>

¶14. It is also contended that reliance on the causation principle is not very pertinently effective as if a particular event is a too foreseeable consequence of an order, the shipowner may be deemed to have assumed the risk of it; if a particular event is a too unforeseeable consequence of an order, the chain of causation may be broken<sup>22</sup>

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<sup>16</sup> IMAM proposition, 17 [3].

<sup>17</sup> The Indian Contract Act 1872, s 124.

<sup>18</sup> *Queen Villas Homeowners Association v TCB Property Management* 2007 Cal App Lexis 470.

<sup>19</sup> *Owners of Cargo Lately Laden on Board the David Agmashenebeli v Owners of the David Agmashenebeli* [2003] 1 Lloyd's Rep 92.

<sup>20</sup> *The White Rose* [1969] 2 Ll L Rep 52.

<sup>21</sup> *Triad Shipping Co v Stellar Chartering & Brokerage Inc* [1994] CLC 734.

<sup>22</sup> *ibid.*

b) There was no order by the charterer in the first place

¶15. The letter of 10<sup>th</sup> October as has been aforementioned only warrants the condition of the cargo and nowhere does the letter order or even request the master to comply with any order/request regarding the exchange of this letter for a clean bill of lading.

¶16. An implied right to an indemnity only exists in a case where a charter party entitled the charterer to act as he did and the shipowner was bound to obey<sup>23</sup> but in the present case, neither the charter party obliges the shipowner nor the charterers obliged/requested the same of the shipowner and hence, any claim regarding implied indemnity shall be unenforceable.

c) That reading of implied indemnity into the letter of warranty would be violative of the contractual freedom of the parties

¶17. Lord Morris in the House of Lords has held that the policy of the law is to uphold freedom to contract<sup>24</sup>. It is contended that English law takes a more restrictive approach regarding construction of contracts which consists of giving effect to the express wording of the contract and terms are implied only if they are necessary to make the contract work; to give it “business efficacy<sup>25</sup>”

¶18. It is contended that reading of implied indemnity into a letter of warranty would not be efficient for the business practices but rather be a detriment for the same as this would not only abridge the rights of the party to contract freely regarding tendering a warranty for the cargo but could also lead to blurring the distinct line between a warranty and an indemnity.

¶19. It is further contended that had the respondents wanted to give a letter of indemnity, They would have inserted provisions promising to indemnify the ship owners for the losses they would incur but in absence of the same, it is submitted that implied indemnity could not be read into the letter of warranty.

III. **ARGUENDO, SUPPOSING NOT CONCEDED THAT THE LETTER OF 10TH OCTOBER WAS A LETTER OF INDEMNITY**

¶20. It is argued that even if the letter of 10<sup>th</sup> October is to be construed as a letter of indemnity for the sake of argumentation, yet the letter expressly warrants or perhaps, indemnifies the ship owners only for the cargo.

<sup>23</sup> *Royal Greek Government v Minister of Transport* (1949) 83 Ll Rep 228.

<sup>24</sup> *Eso Petroleum Co v Harper's Garage (Stourport) Utd* [1967] 1 All ER 699.

<sup>25</sup> Joseph Chitty, *Chitty on Contracts*, vol 1 (28th edn, Sweet & Maxwell 1999).

¶21. The letter, which was issued post the owner's survey merely reported the findings of the survey regarding the presence of foreign objects and subsequently notwithstanding the foregoing foreign objects apparently discovered post the survey<sup>26</sup> warranted the cargo and hence, a simple construction of the letter would clearly show that the indemnity, if there was any, existed only to the liability for the cargo and not to the foreign objects and subsequently, not to NWG as well.

### **C. THAT THE MASTER ERRED IN SIGNING A CLEAN BILL OF LADING**

¶22. It is humbly submitted that, the master being the agent<sup>27</sup> of the ship owner had failed to clause the bill of lading which resulted in improper description of goods for which the claimant being the principal should be made liable for<sup>28</sup>. Even if the shipowner is unaware of, and thus gave no consent to, the issuance of such fraudulent Bill of Ladings, which leads to misrepresentation,<sup>29</sup> the ship-owner will be bound by the bill of lading<sup>30</sup> even though his agent had no authority to sign it, provided that such bill is on its face within the ordinary authority of the master<sup>31</sup>. The carrier may still be made liable for the consequences arising therefrom provided the agent had actual or ostensible authority to issue Bills of Ladings on his behalf.<sup>32</sup>

#### **I. UNREASONABLE ACTIONS OF THE MASTER**

¶23. The Hague-Visby Rules of 1968 are incorporated into the bill of lading terms<sup>33</sup>. The Rules in Article III (3) require a carrier to issue a bill of lading to a shipper after receipt of the goods on board, showing amongst other things 'the apparent order and condition of the goods'. It was held in *Sea Success Maritime Inc v African Maritime Carriers Limited*<sup>34</sup> that a Master or his representative who signs a bill of lading that inaccurately describes the cargo is making a misrepresentation of fact. It was also held that the word 'clausing' means a notation on the bill of lading by the Master or his agent, which qualifies existing statements in the bill of lading as to the description and apparent condition of the goods.

¶24. When a person who would otherwise have been entitled to claim contribution has, by his own fault, occasioned the peril which immediately gave rise to the claim, it would be

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<sup>26</sup> IMAM proposition, 17 [3].

<sup>27</sup> IMAM proposition, 18 43.

<sup>28</sup> *Short v J & W Henderson Ltd* 1946 SC (HL) 24.

<sup>29</sup> *Compania Naviera Vasconzada v Churchill & Sim* [1906] 1 KB 237.

<sup>30</sup> *The Patria* (1871) LR 3 A & E 436; *Gilkison v Middleton* 140 ER 363.

<sup>31</sup> *Grant v Norway* (1851) 10 CB 655.

<sup>32</sup> *The Starsin* (2000) 1 Lloyd's Rep 85; *Alimport v Soubert Shipping Co Ltd* (2000) 2 Lloyd's Rep 447.

<sup>33</sup> IMAM proposition, 8.

<sup>34</sup> *Sea Success Maritime Inc v African Maritime Carriers Ltd* [2005] EWHC 1542 (Comm).

manifestly unjust to permit him to recover from those damages which were imperilled by his own wrongful act<sup>35</sup>.

a) That the Bill of lading issued was inconsistent with the Charter Party

¶25. The master has a duty to take due care and caution in examining the bill of lading and must not sign a bill of lading which is inconsistent with the charter party. It is not incorrect to say that the master may exercise his discretion<sup>36</sup> in signing the bill of lading.

¶26. The charter party signed between the parties clearly defines the liability of the claimant's for hold cleanliness<sup>37</sup>. As per the letter of the Helgaland Quarantine Inspection Services<sup>38</sup> to the Master of the ship, the foreign materials present were the remnants of previous cargo. Thus, the claimants are clearly in breach of the charter party and the master negligently signed the clean bill of lading without exercising proper care in examining the bill of lading signed in view of the cargo loaded. It is the master's duty to refuse to sign the bill of lading,<sup>39</sup> if the bill of lading tendered is manifestly inconsistent with the contract signed between the parties.

b) Breach of duty of care and negligence

¶27. The independent surveyor in his survey stated the presence of the foreign objects present in the holds<sup>40</sup>. A 'clean' bill of lading can be defined as 'one that does not contain any reservations as to the apparent good order and condition of the goods or the packing<sup>41</sup>'. In this case the foreign objects were present and were clearly demarcated from the cargo. Thus, having full knowledge of the goods present, the master chose to omit the foreign objects present in the cargo, by not clausing the bill of lading. This is manifestly the tort of deceit and the claimant shouldn't be allowed to obtain indemnity against such an act<sup>42</sup>.

¶28. The master has large powers in respect of the bills of lading which he signs<sup>43</sup> he is bound to acquaint himself with all the facts and circumstances before he signs a bill of lading and to that effect, the master must use care and skill in examining bills of lading.<sup>44</sup>

<sup>35</sup> *Strang Steel & Co v A Scott & Co* (1889) 14 App Cas 601.

<sup>36</sup> *Hansen v Harrold Brothers* [1894] 1 Q B 612.

<sup>37</sup> IMAM Proposition, 14-16.

<sup>38</sup> IMAM Proposition, 23.

<sup>39</sup> *Kruger & Co Ltd v Moel Tryvan Ship Co Ltd* [1907] AC 272.

<sup>40</sup> IMAM Proposition, 17.

<sup>41</sup> *British Imex v Midland Bank* [1958] 1 QB 542.

<sup>42</sup> *Hansen Tangens Rederi III A/S v Total Transport Corp (The Sagona)* [1984] 1 Lloyd's Rep 194.

<sup>43</sup> *Grant & Others v Norway* (1851) 138 ER 263.

<sup>44</sup> *Stumore Weston & Co v Michael Breen* (1886) 12 App Cas 698.

c) No case of Implied Indemnity

¶29. The implied indemnity of the charterer would not arise if the master signed the bill of lading voluntarily and naturally, which was the case here. The letter of warranty<sup>45</sup> issued by the respondent did not ask the master for the issuance of a clean bill of lading. Further, any claims of customs of trade may control the mode of performance of a contract, but cannot change its intrinsic character. Thus if the express terms of the charter are inconsistent with the alleged usage, evidence of the usage of the custom will not be admissible<sup>46</sup>.

¶30. The master was liable to check the condition of the cargo<sup>47</sup>, and thus make an accurate description of the cargo with proper enquiry. Implied indemnity regarding any losses would not arise for the master had enough time<sup>48</sup> to check the goods and remove any material from the holds before issuing the bill of lading, and neither was the master coerced or bribed to sign a fraudulent bill of lading.<sup>49</sup>

¶31. Thus, there was no request of a clean bill of lading by the respondents and the clean bill of lading was issued by the master on his own volition and he chose not to clause the foreign material present in the cargo which caused the growth of the N.W.G. in the foreign material which led to the subsequent dispute due to the misrepresentation which was intended to be relied upon<sup>50</sup>.

**D. THAT CLAIMANT AS THE SHIPOWNER WAS LIABLE FOR THE DAMAGE CAUSED**

**I. THE SIGNIFICANCE OF INCORPORATION OF CLAUSE 18 IN THE CHARTER PARTY AGREEMENT.**

¶32. The charterer being both the manufacturer as well as the seller of the concerned specialized cargo, which requires cleanliness of the holds to a “grain clean” level<sup>51</sup>, holds a special interest in the carriage of the same, which in turn, justifies the importance of the whole clause.

¶33. The incorporation of Clause 18<sup>52</sup> holds a special purpose in the Charter Party Agreement highlighting the requirements with respect to cleanliness of the holds, non-compliance to which would hold the Owners liable to indemnify the Charterers. Hold

<sup>45</sup> IMAM Proposition, 17.

<sup>46</sup> *Robinson v Mollett* (1875) LR 7 HL 802.

<sup>47</sup> Paul Todd, *Principles of Carriage of Goods by Sea* (Routledge 2015).

<sup>48</sup> IMAM Proposition, 17, 19.

<sup>49</sup> *NavieraMogor SA v SocieteMetallurgique De Normandie (Nogar Marin)* [1988] 1 Lloyd’s Rep 412.

<sup>50</sup> *Breffka & Hehnke GmbH & Co KG v Navire Shipping Co Ltd (The Saga Explorer)* [2013] 1 Lloyd’s Rep 401.

<sup>51</sup> ‘Hazards of Carrying Sulphur Cargo in Bulk and Countermeasures’ (*Bulk Carrier Guide*)

<[www.bulkcarrierguide.com/carriage-of-sulphur.html](http://www.bulkcarrierguide.com/carriage-of-sulphur.html)> accessed 13 February 2018.

<sup>52</sup> IMAM Proposition, 14.

cleanliness clause is a written clause among the other printed clause of the Gencon standard charter party agreement, 1994 and hence, in case of any inconsistency in a contract between printed clauses and handwritten clauses, preference is to be given to the hand-written components as they require the particular attention of the drafter and the parties to the contract,<sup>53</sup> reason being the intention of the parties involved as it is negotiated prior to the agreement and thus, will prevail over the other.<sup>54</sup>

## II. SPECIFIC NON-PERFORMANCE OF CLAUSE 18 LED TO THE DAMAGE TO THE CHARTERERS.

¶34. Clause 18 of the Charter party stipulates the duty of the owner to keep the vessel's holds and hatches clean of any previous cargo remnants or residues. It also requires the Ship owners to ensure compliance with the HQIS zero tolerance policy, which prohibits the presence of any foreign organic matter. In case of any inconsistency in a contract between printed clauses and handwritten clauses, more weight is to be given to the hand-written components as these required the particular attention of the drafter and the parties to the contract<sup>55</sup> reason being the intention of the parties involved as it is negotiated prior to the agreement thus will prevail over the other.<sup>56</sup>

¶35. The vessel M.V. Sulphur Express was ordered into quarantine by Helgaland Inspection Services on 14<sup>th</sup> November, 2016 upon whose inspection, the officers discovered the presence of solidified lumps of tar, dunnage wood and torn plastic pieces in the hold, which were remnants of a previous cargo. In addition to these 'some residues stuck to the torn plastic', determined to be NAVIGONIA wheat germ (NWG), a prohibited import into Helgaland.<sup>57</sup> We submit that since cleaning the holds of any foreign matter and remnants of previous cargo was mandated by the Clause in express terms, which conferred a contractual obligation on the Ship owners to comply with the same.

¶36. Failure to fulfill the obligations and duties conferred upon the owners through violation of the express terms of the contract would be a clear violation of the charter party as is the case being submitted. The term "overriding" originates from common law, and it implies that even when the failure to provide a seaworthy vessel forms only a part of the cause for the damage, the breach of that overriding obligation will nevertheless be regarded

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<sup>53</sup> *W & K Holdings (NSW) Pty Ltd v Mayo* [2013] NSWSC 1063.

<sup>54</sup> *The Brabant* [1965] 2 Lloyd's Rep 546; *The Starsin* [2000] 1 Lloyd's Rep 85.

<sup>55</sup> *W & K Holdings (NSW) Pty Ltd v Mayo* [2013] NSWSC 1063.

<sup>56</sup> *The Brabant* [1965] 2 Lloyd's Rep 546; *The Starsin* [2000] 1 Lloyd's Rep 85.

<sup>57</sup> IMAM proposition, 23.

as the only cause for the damage, which eventually makes the carrier responsible for the entire damage.<sup>58</sup>

### III. THERE WAS A WANT OF DUE DILIGENCE ON THE PART OF THE SHIP OWNERS.

¶37. 'Due diligence' is a legal term which essentially means 'reasonable care in the circumstances' considering all the surrounding circumstances known or reasonably to be expected keeping in consideration the practice of others involved in the same industry in setting a standard of due diligence.<sup>59</sup> The exercise of due diligence by a shipowner is equivalent to the exercise of reasonable care and skill.<sup>60</sup>

¶38. Whereas negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.<sup>61</sup> Want of due diligence or the lack of due diligence is negligence<sup>62</sup> and in other words, the standard, again is what the reasonable prudent ship-owner would have done in the circumstances.<sup>63</sup>

¶39. The said clause necessitated the Owners to exercise due diligence while fulfilling their contractual duties. The owner was contractually obligated to clean the holds of the foreign objects and organic materials under the absolute provisions of clause 18 and exercise due diligence to keep a check on the Master/Agents, ostensibly acting on his behalf to fulfill their duties. The owners clearly failed to follow these obligations which included cleaning and drying the holds in accordance to the charter party<sup>64</sup>, which eventually caused damage to the cargo of the Charterers. Clause 18 holds a special purpose in the contract as stated and thus the Owners disregarded the interest of the Charterers by completely disrespecting it.

¶40. Nevertheless, the Owners acted negligently in fulfilling their obligations even when they had a considerable amount of time (additional period of seven days, i.e. from 10<sup>th</sup> October to 17<sup>th</sup> October) and ample opportunity after a letter mentioning those foreign objects was given to the Charterers. Failure to clean the vessel of the remnant of previous cargo mentioned in Respondent's letter<sup>65</sup> which led to the damage to the cargo clearly signifies the want of diligence from Owner's part.

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<sup>58</sup> *Smith Hogg & Co Ltd v Black Sea & Baltic General Insurance Co Ltd (The Librum)* [1940] 67 Ll L Rep 253.

<sup>59</sup> *Secunda Marine Services Ltd v Liberty Mutual Insurance Co* [2006] MSCA 82.

<sup>60</sup> *The Eurasian Dream* [2002] 1 Lloyd's Rep 719.

<sup>61</sup> *Blyth v Birmingham Waterworks* (1856) 11 Ex R 781.

<sup>62</sup> *The Amstelslot* [1963] 2 Lloyd's Rep 223.

<sup>63</sup> *The Garden City* [1982] 2 Lloyd's Rep 382.

<sup>64</sup> IMAM Proposition, 16 [2].

<sup>65</sup> IMAM Proposition, 17.

¶41. Clause 2 of the charter party agreement clearly states the liabilities and responsibilities of the owners for loss of or damage to the goods or for delay in delivery of the goods in case the loss, damage or delay been caused by personal want of due diligence on the part of the Owners<sup>66</sup>. This holds the owners liable for the damage caused to the Charterers. This implied undertaking arises not from the ship owner's position as a common carrier, but from his acting as a Ship owner.<sup>67</sup> The charter party through Clause 2 holds the Owner's responsible for the loss, damage or delay caused by personal want of due diligence on the part of the Owners.<sup>68</sup>

#### IV. THE VESSEL WAS UNCARGOWORTHY ALONG WITH BEING UNSEAWORTHY

¶42. The vessel must be cargo worthy in the sense that it is in a fit state to receive the specified cargo<sup>69</sup>. The charter party encompasses the Paramount Clause through Clause 10<sup>70</sup> along with the incorporation through express terms in ConGen Bill of Lading<sup>71</sup> which applies as between ship owners and charterers. Thus, Hague-Visby rules being set out *in extenso*<sup>72</sup> to the charter party, applying to the parties compulsorily.

¶43. Article III Rule 1 of the Hague-Visby rules states that

*The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—*

*(a) Make the ship seaworthy; (b) Properly man, equip and supply the ship; (c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.*

Article III rule 1 of the Hague-Visby Rules prescribes the first paramount duty of the carrier, which is to provide a seaworthy vessel, the elements of which includes that “the vessel must be cargo worthy in the sense that it is in a fit state to receive the specified cargo”.<sup>73</sup> Cargo worthiness is an aspect of seaworthiness.<sup>74</sup> Article III imposes a non-delegable duty on owners to exercise due diligence to make their vessel seaworthy and cargo worthy and to care for the cargo carried.<sup>75</sup>

<sup>66</sup> IMAM Proposition, 4.

<sup>67</sup> *Kopitoff v Wilson* [1876] 1 QB 377.

<sup>68</sup> IMAM proposition, 4 [2].

<sup>69</sup> *Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd (The Eurasian Dream)* [2002] 1 Ll L Rep 719.

<sup>70</sup> IMAM Proposition, 8.

<sup>71</sup> IMAM Proposition, 20.

<sup>72</sup> Julian Cooke, *Voyage Charters* (2014) para 85.9.

<sup>73</sup> *Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd (The Eurasian Dream)* [2002] 1 Ll L Rep 719.

<sup>74</sup> *Empresa Cubana Importada de Alimentos v Iasmos Shipping Co (The Good Friend)* [1984] 2 Lloyd's Rep 586.

<sup>75</sup> Julian Cooke, *Voyage Charters* (2014) para 11.4.



¶44. The owners of the ship chartered to carry cargo were under an obligation in pursuance of both the Hague rules and common law to make the vessel "cargo worthy"<sup>76</sup>. Presence of foreign objects as being remnants of previous cargo infected with NWG infected the cargo leading to the vessel called into quarantine and the damages that followed, due to the vessel being un-cargo worthy. A charter party, as regards the ship owner's obligations, is of such a nature that he must perform them personally<sup>77</sup> and non-performance of the duty to make the vessel un-cargo worthy shows the want of due diligence from Owner's part.

¶45. Both the parties agreed to the liability of the Owners to comply with Clause 18. Where there is a contract to carry goods in a ship there is, in the absence of any stipulation to the contrary, an implied engagement on the part of the person so undertaking to carry that the ship is reasonably fit for the purpose of such carriage.<sup>78</sup> For a ship to be unseaworthy, or more strictly un-cargo worthy, there must be some attribute of the ship itself which threatens the safety of the cargo and if a hold is dirty, that is properly considered as an attribute of the ship.<sup>79</sup> There was an initial absolute liability present on the Owners through Clause 18<sup>80</sup> -

¶46. *'In the event the inspection reveals that the Vessel does not meet the requirements of this Charter party, the parties agree that the Vessel is not ready in all respects to load.'* Thus, it is clear that the Owner failed to fulfill their absolute duty to make the vessel seaworthy before the commencement of the voyage, not exercising due diligence which makes him liable for the damage arising through the absolute warranty under Clause 18.<sup>81</sup>

#### V. THE SHIP OWNER IS NOT COVERED BY THE EXCEPTIONS UNDER ARTICLE 4 OF HAGUE-VISBY RULES

¶47. The duty of the carrier under Article III Rule 1 represents an "overriding" obligation, and thus a carrier that breached it by providing an unseaworthy ship cannot then avail itself of the defenses laid down in Article IV or of contractual exceptions that could otherwise meet the requirements of Article III.<sup>82</sup> The obligation to exercise due diligence to make the ship seaworthy is, as was recognized in the *Angliss*<sup>83</sup> case, placed on the ship owner in his capacity as carrier. The obligation includes that of maintaining his ship. If he fails to perform

<sup>76</sup> *Empresa Cubana Importada de Alimentos v Iasmos Shipping Co (The Good Friend)* [1984] 2 Lloyd's Rep 586.

<sup>77</sup> TE Scrutton, *The Contract of Affreightment: As Expressed in Charterparties and Bills of Lading* (Forgotten Books) 3, art 1.

<sup>78</sup> *Tattersall v National Steamship Co* [1884] 12 QBD 297 DC.

<sup>79</sup> *A Meredith Jones v Vangemar Shipping Co (The Apostolis)* [1997] 2 Lloyd's Rep 241.

<sup>80</sup> IMAM proposition, 16 [1].

<sup>81</sup> IMAM proposition. 14 [3].

<sup>82</sup> *Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd (The Maurienne)* [1959] 2 Ll L Rep 105.

<sup>83</sup> *W Angliss & Co (Australia) Pty v Peninsular & Oriental Steam Navigation Co* [1927] 2 KB 456.

this obligation, whether by himself or by those to whom he entrusts performance, he fails to exercise due diligence to make his ship seaworthy. Where loss or damage results from the unseaworthiness of a vessel before or at the beginning of the voyage due to a failure to exercise due diligence, the carrier is not entitled to rely upon the exceptions in Article IV rule 2 of the Hague Rules.<sup>84</sup> Relying on the same, it is submitted that the carrier does not hold the right to be exempted from the liabilities arising from the un-seaworthiness of the vessel and must be held liable for the same. In most cases if the vessel is unseaworthy due diligence cannot have been used by the owner, his servants, or agents; **if due diligence has been used the vessel in fact will be seaworthy**<sup>85</sup>.

#### **E. THE RESPONDENT'S LIABILITY DOES NOT ARISE**

¶48. There was a change in the nature of the role of the respondent in the carriage of the goods with due transfer of titles of the goods as to the role played in the process therein. The Respondent though was the Shipper and the Charterer throughout the carriage, along with being the manufacturer and the seller of goods to be sold to CCTL. But the point there was the transfer of the title of the cargo goods to CCTL, he became the owner of the goods and if sells off the goods to someone else, which he did in this case to Heeru, he will be the new seller and the liabilities related to the ownership of the goods related were transferred from the Respondent.

¶49. It is submitted that in reference to the Hamburg Houtiport<sup>86</sup> which puts forward the principle of case that there was only one cause of action i.e. the want of due diligence on the part of the owners to fulfill their contractual obligations under the charter party agreement. This cause of action was the responsible for the progressive damage that has happened, including but not limited to CCTL and Heeru's claim. The progressive damage done in this case does not create new causes of action in respect of the later stages of the same progressive damage In consideration to this the (albeit progressive) damage is an absolute liability of the Claimant.

#### **I. THE CHARTERERS' LIABILITY IS LIMITED**

¶50. It is submitted that Section 185 of Merchant Shipping Act, 1995 provides enforcement to the provisions of the Convention on Limitation of Liability for Maritime

<sup>84</sup> Julian Cooke, *Voyage Charters* (2014) para 85.255.

<sup>85</sup> *The Vortigern* (1899) P 140.

<sup>86</sup> *Homburg Houtimport BV v Agrosin Private Ltd* [2004] 1 AC 715.

Claims 1976 as set out in Part I of Schedule 7 in United Kingdom. The Respondent qualifies within the definition Article 1(2) to qualify as the Persons entitled to limit liability<sup>87</sup>.

¶51. Under Article 2 (Claims subject to limitation) the subjects required for the claim of limitation of liability are met. Claims with respect to the damage to the cargo goods(property)<sup>88</sup> were in direct connection with the due the want of due diligence by the Claimant to clean the holds which led to the damage to the goods and the consequential loses that followed; any of the claims related to freight prices because of the delay in the carriage<sup>89</sup>; arguendo though not conceding, the claims in respect of other loss resulting from infringement of rights other than contractual rights, occurring in direct connexion with the operation of the ship.<sup>90</sup>

**II. CLAIMS SET OUT IN PARAGRAPH 1 SHALL BE SUBJECT TO LIMITATION OF LIABILITY EVEN IF BROUGHT BY WAY OF RECOURSE OR FOR INDEMNITY UNDER A CONTRACT OR OTHERWISE.**

¶52. The Respondents signed the Addendum to the Charter party on a “without prejudice” basis, and to assist in the resolution of the matter in a good faith. Also, in the respect of the same letter dated 27 November, 2016, we reserved all rights to claim any amount of freight paid in respect of the voyage. Thus, it is contended that our claim to set-off Claimant’s claim of pending freight payment is justified. In addition to this, the convention gives us the right as a qualifies person to limit their liability to set-off against the respective claims made<sup>91</sup> against us through the Counterclaim<sup>92</sup>.

**III. CLAIMANT’S CLAIM FOR INDEMNITY AGAINST HEERU’S CLAIM**

¶53. It is submitted that we investigated the basis of the claim of Heeru Sulphur Products (Pvt) Ltd., which indicated that when the cargo was being loaded from the dock with the ship's cranes, the cranes picked up, together with the cargo, some remains of solidified tar in lumps situated on the newly paved dock. Since, the Cargo Handling gear was provided by the Ship owners according to the charter party agreement<sup>93</sup> and the crane men involved were employers of the Claimant, they are to be held responsible for any damage that occurred following that.

<sup>87</sup> Convention on Limitation of Liability for Maritime Claims 1976 art 1.

<sup>88</sup> Convention on Limitation of Liability for Maritime Claims 1976 art 2(1)(a).

<sup>89</sup> Convention on Limitation of Liability for Maritime Claims 1976, art 2(1)(b).

<sup>90</sup> Convention on Limitation of Liability for Maritime Claims 1976 art 2(1)(c).

<sup>91</sup> Convention on Limitation of Liability for Maritime Claims 1976 art 5.

<sup>92</sup> IMAM Proposition, 57 [13].

<sup>93</sup> IMAM Proposition, 5 [5].

**F. RESPONDENTS ARE NOT LIABLE FOR THE CLAIM BY HEERU SULPHUR PRODUCTS LIMITED**

¶54. According the investigation conducted by the Respondent, it was found that the damage claimed by Heeru was based on the damage caused during the procedure of loading. When the cargo was being loaded from the dock with the ship's cranes, the cranes picked up, together with the cargo, some remains of solidified tar in lumps situated on the newly paved dock.<sup>94</sup>

¶55. It is clearly stated in the charter party agreement that the cranemen/winchmen that are appointed by the Claimants free of charge and since, they the Master had an absolute supervision<sup>95</sup> over them, any damage/loss arising during loading, would hold the master liable.

¶56. The words 'under the supervision of the master' expressly give the master a right which he must in any case have, to supervise the operations of the charterers in loading and stowing.<sup>96</sup> The master is responsible for the seaworthiness of the ship and also for ensuring that the cargo will not be so loaded as to be subject to damage.<sup>97</sup> Liability is found where there is a special relationship of reliance because the person upon whom the duty is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or his property as to assume a particular responsibility for his or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised.<sup>98</sup> Even the argument of not being negligent in hiring<sup>99</sup> the cranemen, cannot not exclude the ship owners of their liabilities. The owner will be liable for loss flowing from negligence in hiring or supervising the contractor<sup>100</sup>, which in this case was the stevedore cranemen.

¶57. Hence, the whole process of loading being conducted under the supervision of the Master of the vessel and any act under supervision causing damage to the cargo would be the liability of the ship owner, owing to the reason that Master is agent of the Ship owner, working under him.

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<sup>94</sup> IMAM Proposition, 52 [4].

<sup>95</sup> IMAM proposition, 6.

<sup>96</sup> *House of Lords in Canadian Transport Co Ltd v Court Line Ltd* [1940] AC 934.

<sup>97</sup> *ibid.*

<sup>98</sup> *Kondis v State Transport Authority* (1984) 154 CLR 672.

<sup>99</sup> *Rylands v Fletcher* (1868) LR 3 HL 330.

<sup>100</sup> *Lewis v British Columbia* [1997] 3 SCR 1145.

**G. THAT THE RATE OF DEMURRAGE SHOULD APPLY**

¶58. The respondents submit that, the vessel The Sulphur Express was stranded at the port of Ariela due to the embargo imposed by the government of Anikaland<sup>101</sup> in lieu of the development of the NWG in the holds of the vessel.

¶59. The respondents dispute the rate of demurrage revised by the claimants on their own volition without the agreement of respondents. The rate of demurrage had been stipulated at 8,000<sup>102</sup> in the C/P agreement signed between the parties. The demurrage rate refers to the liquidated damages that the charterers are liable to pay to the ship owner for its delayed operations of loading/unloading.

¶60. The claimants have claimed that the rates of demurrage wouldn't apply as the same wouldn't cover the vessel's predicament. However, as the charterers agreed to the rate of demurrage applying on all days beyond the days of lay days, their claim of revised rates should be rejected. As was held in the case of *Sanguinetti v. Pacific Steam Navigation Co.*<sup>103</sup>, that even though arguendo, that the detention was for a period longer than was reasonable, but that, notwithstanding this fact, the clause of demurrage providing for the payment of the rate per day was wide enough to cover the detention which had occurred, and that even if the ship owners might properly have withdrawn the ship or cancelled the C/P agreement, as stipulated in the C/P agreement<sup>104</sup>, they did not do so and therefore must accept what the contract allows them. Justice Brett further said, "All the detention beyond the lay days seems to me to be demurrage, and quite within the demurrage clause."

¶61. Justice Bray while examining a demurrage clause in the case of *Western Steamship Co. v. Amaral Sutherland & Co.*<sup>105</sup> which dealt in similar circumstances as the on-going matter said this of the demurrage clause, "and when one has to construe a written document it is advisable to take the words as they stand and to add nothing to them and detract nothing from them unless one can see that it is absolutely necessary to do so." Further, he also added that, "In this case if he had thought that the demurrage rate would be insufficient to recoup him for the detention he could have landed the coals and taken his ships away. But he did not do that, and under those circumstances he is only entitled, by way of compensation for the detention, to the demurrage rate and no more. I am of opinion, therefore, that the contention in paragraph 4 of the defence is correct, and that, in the absence of an express provision in the

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<sup>101</sup> IMAM Proposition, 39.

<sup>102</sup> IMAM Proposition, 2.

<sup>103</sup> *Sanguinetti v Pacific Steam Navigation Co* [1877] 2 QB 238.

<sup>104</sup> IMAM Proposition, 11 cl 16.

<sup>105</sup> *Western Steamship Co v Amaral Sutherland & Co* [1913] 3 KB 366.

C/P that the demurrage rate should only apply to a reasonable number of days, it applies as long as the ship is in fact detained.”

¶62. As the delay is being provided for by the demurrage clause<sup>106</sup>, the respondents humbly request the tribunal to reject the revised rates of detention as claimed by the claimants and let the demurrage rate as agreed in the C/P agreement be the rate at which the claimant can claim the delayed unloading.

#### **H. THAT THE RESPONDENTS ARE ENTITLED TO SET-OFF**

¶63. The word 'set-off' is a word well known and established in its meaning; it is something which provides a defense because the nature and quality of the sum so relied upon are such that it is a sum which is proper to be dealt with as diminishing the claim which is made, and against which the sum so demanded can be set off<sup>107</sup>.

¶64. The Counsel contends that the Respondents be entitled to set off due freight on the basis of Counter Claim against the liability Alleged by the Claimants.

¶65. The Counsel submits that it is a well settled law that Counter Claim can be regarded as set-off<sup>108</sup>. If grounds exist which formerly would have entitled a defendant to file a suit in Chancery against the plaintiff, then a defendant is enabled to rely on these grounds as a defense to the action<sup>109</sup>

¶66. “For equitable set-off to apply it must therefore be established,  
*First* that the counterclaim is at least closely connected with the same transaction as that giving rise to the claim; and  
*Second* that the relationship between the respective claims is such that it would be manifestly unjust to allow one to be enforced without regard to the other.<sup>110</sup>”

#### **I. FIRST REQUIREMENT**

¶67. It has been held that Set off is available whenever the Counter-Claim arises out of the same transaction as the Claim; or out of a transaction that is closely related to the Claim<sup>111</sup>

¶68. The Counsel also submits that the basis for the Claims of the Claimants is the Letter of Warranty which was given on the Cargo and the basis for which the Respondent is entitled to set off is the violation of Clause 18 of the Charter Party as foreign objects were found in the Hold where the Cargo was placed and hence, not only that the Claims and Counter Claims arise from the same transaction but they are closely connected and inseparable.

<sup>106</sup> *Inverkip Steamship Co Ltd v Bunge & Co* [1917] 2 KB 193.

<sup>107</sup> *Bankruptcy Notice (No 171 of 1934) Re* [1934] Ch 431.

<sup>108</sup> *Dole Dried Fruit & Nut Co v TrustinKerwood Ltd* [1990] 2 Ll Rep 309.

<sup>109</sup> *Bankes v Jarvis* [1903] 1 KB 549, 552.

<sup>110</sup> *Hanak v Green* [1958] 2 WLR 755.

<sup>111</sup> *HenriksensRederi A/S v THZ Rollimpex (The Brede)* [1974] QB 233.

¶69. The case of Newfoundland allowed a Set off, on the basis that the debts ought to set off were debts that were due from him or flowing out of and inseparably connected with his dealings and transaction<sup>112</sup>

## II. SECOND REQUIREMENT

¶70. It would indeed be manifestly unjust if the Claimants were Allowed to be indemnified, even though there is no indemnity as the Letter of 10<sup>th</sup> October was a Letter of Warranty and not a Letter of Indemnity, meanwhile, the Respondents were not entitled to Set off the Freight in respect of the Indemnity owed by the Claimants to the Respondents under Clause 18

¶71. Equity will allow a set-off where it would be unconscionable to allow one party to insist on its legal right without first accommodating the other's countervailing legal right<sup>113</sup>.

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<sup>112</sup> *Newfoundland Government v Newfoundland Railway Co* 13 App Cas 199.

<sup>113</sup> *BimKemi AB v Blackburn Chemicals Ltd* [2001] 2 Lloyd's Rep 93.

**PRAYER**

Prayer for relief

For the reasons set out above, the respondent requests the tribunal to:

- a) Declare that the tribunal does not have the jurisdiction to hear the ship owner's claim.

Pending the Tribunal's Final Award:

- i) Declare that the Claimants are in breach of the obligations under the Charter Party Agreement.
- ii) Adjudicate that the Counter Claim is maintainable.
- iii) Adjudicate that the Respondent is entitled to set-off the freight against the Owner's claims.
- iv) Declare that the Respondents are not liable to indemnify the Claimant for Heeru's claim.
- v) Order that the Claimant is liable to indemnify the Respondents for losses including the consequential losses pursuant to the Charter Party agreement.

; AWARD interest and costs in favour of the Respondent.

Counsel for Respondents