TEAM CODE: 723A

NATIONAL LAW UNIVERSITY ODISHA- BOSE & MITRA &CO.
INTERNATIONAL MARITIME ARBITRATION MOOT, 2020

BEFORE THE HON'BLE ARBITRAL TRIBUNAL AT LONDON

IN THE PROCEEDING BETWEEN

TIMAEUS CARGO LINES, DENMARK

(Claimant)

and

ATLANTIS EMPIRE, HONG KONG

(Respondent)

Arbitration No: __/2020

MEMORANDUM *for* CLAIMANT

TABLE OF CONTENT

TABLE OF ABBREVIATIONS

ABBREVIATIONS	: DEFINITION
&	: And
§	: Section
¶	: Paragraph
A/c	: Account
AC	: Appeal Cases
AJIL	: American Journal of International Law
All ER	: All England Reporter
Arb. L.R./ARBLR	: Arbitration Law Reporter
Art.	: Article
Austl.	: Australia
BHP	: Brake House Power
c.p.	: Charter Party
CA	: Court of Appeal
Cir.	: Circular
cl./Cl.	: Clause
CLR	: Commonwealth Law Report
Co.	: Company
Comm	: Commercial
Corp.	: Corporation
ed.	: Edition
eds.	: Editors
et. al.	: and others
EWCA Civ	: England and Wales Court of Appeal Civil Division
EWCA Comm	: England and Wales Court of Appeal Commercial Division
EWHC	: England and Wales High Court
Exch.	: Exchequer Reports

Hon'ble	: Honourable
Id.	: Ibid
Inc.	: Incorporation
Int. J. Refrig.	: International Journal of Refrigeration
KB	: King's Bench
Lloyd's Rep.	: Lloyd's Law Reports
LJ	: Lord Justice
LMAA	: London Maritime Arbitrators Association
LMLN	: Lloyd's Maritime Law Newsletter
Ltd.	: Limited
M/s.	: Messrs
No.	: Number
NSWLR	: New South Wales Law Report
Ors.	: Others
OJLS	: Oxford Journal of Legal Studies
PC	: Privy Council
Pvt.	: Private
QB	: Queen's Bench
SC	: Supreme Court
SCR	: Supreme Court Reporter
Span. J. Agric. Res.	: Spanish Journal of Agricultural Research
UK/U.K.	: United Kingdom
UKHL	: United Kingdom House of Lords
US/U.S.	: United States of America
USD	: United States Dollar
v.	: versus
vol.	: Volume
SC	: Supreme Court
SCR	: Supreme Court Reporter
UK/U.K.	: United Kingdom

UKHL	: United Kingdom House of Lords
US/U.S.	: United States of America
USD	: United States Dollar
v.	: versus
vol.	: Volume

INDEX OF AUTHORITIES

CASES

CONVENTIONS

BOOKS

INTERNATIONAL PUBLICATIONS

MAGAZINES

GUIDES

THESES

Ahmad Hussam Kassem, The legal aspects of Seaworthiness: Current Law and Development (2006) (unpublished Ph.D. dissertation, University of Wales) (on file with Swansea University).....7, 8

STATEMENT OF JURISDICTION

THE PARTIES, TIMAEUS CARGO LINES, DENMARK, & ATLANTIS EMPIRE, HONGKONG HAVE AGREED TO SUBMIT THE PRESENT DISPUTE TO THIS ARBITRAL TRIBUNAL PURSUANT TO CLAUSE 20 OF THE C.P DATED 18TH JULY 2016.

THE CLAIMANT SUBMITS TO THE JURISDICTION OF THIS HON'BLE TRIBUNAL UNDER SECTION 2(1), SECTION 3(A) AND SECTION 15 (1) OF THE ENGLISH ARBITRATION ACT, 1996 WHICH IS THE *LEX ARBITRI* IN THE PRESENT CASE.

THE HON'BLE ARBITRAL TRIBUNAL HAS THE POWER TO RULE ON ITS OWN JURISDICTION UNDER SECTION 30 OF THE ENGLISH ARBITRATION ACT, 1996 AND MAKE A DECISION ON ALL DISPUTES ARISING OUT OF THIS CONTRACT.

STATEMENT OF FACTS

THE PARTIES AND THE CHARTER PARTY AGREEMENT

Timaeus Cargo Lines, Denmark ["**Charterers**"/ "**Carrier**"] and Atlantis Empire, Hong Kong ["Owners"] entered into a BOXTIME Charterparty on 18th July, 2016 for carriage of goods in respect of the vessel J Momoa.

OBLIGATIONS UNDER THE CHARTER PARTY

The charterparty enlisted various obligation and requirements concerning both the charterers and the owners for taking care of the goods and containers. The owners had to fulfill the responsibility of monitoring the reefer containers carrying the cargo, at least once daily and record the results through temperature logs and event logs. The modern modem reefer system allowed the master and the crew to be alert about any occurrence of malfunction or temperature fluctuation in the reefer allowing them to undertake repair facilities for the same.

CARGO TEMPERATURE SET-POINT

The bill of lading signed between the shipper and the charterer had explicitly instructed the master that 17 containers with boxes of bananas had to be maintained at the set point temperature of 13.6 C.

MALFUNCTIONS

As per the event logs and temperature data there were three malfunctions in the reefer containers. Since 4th July 2018 the reefer unit was not working fine and there was no repair done from 4th July 20:34 till 5th July 16:35. Subsequently, two malfunctions were detected only on 13th July 2018 and 29th July 2018 through AL15 activity in the event log, however, the same had been occurring since 11th July and 27th July respectively as evidences by the temperature data.

The post-trip survey reports state that the three malfunctions, power shut downs and various instances of fluctuation in the supply and return temperature caused by the inadequate monitoring of the reefer containers lead to the over-ripening of the fruits (bananas) in the container - TWCU6830612, which caused damage to the cargo.

COMMENCEMENT OF ARBITRATION

The arbitration proceedings have been initiated against the owners by the charterers/carrier for recovery of compensation under clause 20 of the charterparty. The charterers' informed the owners about the settlement of claim amounting to loss of USD 89, 918.42 with the customers on 16th day of January 2019 via email communication holding the owners fully liable for the loss which is in well within the stipulated time under the charterparty.

The parties had agreed that all disputes arising under the charterparty shall be governed by English Law in accordance with the Arbitration Act, 1996 and that the same shall be arbitrated in London. In pursuance of the same the Charterers advised the owners of their nominated arbitrator on 23rd day of November 2019. Now, this matter lies before this arbitral tribunal for adjudication.

ISSUES RAISED

WHETHER OR NOT

I

THE OWNERS PERFORMED THEIR PART OF THE AGREEMENT WITH REGARD TO THE MONITORING/TAKING DUE CARE OF REEFER CONTAINERS/ REFRIGERATED CARGO

II

IT SHOULD BE EXPECTED OF THE OWNER (VESSEL'S CREW) TO ADVISE CHARTERERS IF THE REEFER WAS MALFUNCTIONING OR WAS IT ONLY THEIR DUTY TO MAINTAIN LOGS

III

THE CHARTERERS PERFORMED THEIR PART OF THE AGREEMENT WITH REGARD TO KEEPING THE OWNERS INFORMED/NOTIFYING THE OWNERS OF THE CLAIM

SUMMARY OF ARGUMENTS

THAT THE OWNERS FAILED TO PERFORM THEIR PART OF THE AGREEMENT WITH REGARD TO THE MONITORING /TAKING DUE CARE OF REEFER CONTAINERS AND REFRIGERATED CARGO

The owners under the provisions of the c.p were under an express obligation to properly and carefully keep, carry and care for the goods and containers while on board which included within itself the obligation of provision of electric power for the functioning of the containers, monitoring and recording the performance of all units and undertaking repairs for any fault/breakdown. However, the temperature logs as well as the event logs evidence the fact that the container had been kept off power several times during the period of voyage, there had been inordinate delay on behalf of the vessel's crew in identifying and undertaking repair facilities for the malfunctioning container and also that the crew had failed to take precautionary measures to prevent the damage to the cargo.

THAT IT SHOULD BE EXPECTED OF THE OWNER TO ADVISE CHARTERERS IF THE REEFER WAS MALFUNCTIONING

Expectations arise from express representations and promises, or they are implicit in words, conduct, or setting of the agreement. In the instant case, there was a reasonable and legitimate expectation of the vessel's crew to advice and consult the charterers as there was an express promise of 'due care' to this effect which imposed an obligation on the master to take all reasonable measures to preserve the goods from damage. This expectation also stems from an implied obligation as the standard industry practice calls for such consultation in cases of repeated instances of malfunction.

THAT THE CHARTERERS PERFORMED THEIR PART OF THE AGREEMENT WITH REGARD TO KEEPING THE OWNERS INFORMED OF THE CLAIM

Claim was notified to the owners according to the charpterparty. Due process required for a cargo damage claim and Cl. 16h was followed. Further, the claim was reasonably settled.

ARGUMENTS ADVANCED

1. THE OWNERS DID NOT PERFORM THEIR PART OF THE AGREEMENT WITH REGARD TO THE MONITORING/TAKING DUE CARE OF REEFER CONTAINERS/REFRIGERATED CARGO

¶1.) The Owners were under an obligation to keep the Reefer Vessel 'fitted for service in every way' according to the c.p.[1] The responsibility is a corollary to the responsibility of a carrier envisaged in Hague-Visby Rules to take due care of the cargo.[2]

¶2.) The Charterers relied on the Owners for provision of carriage of refrigerated goods[3] as well as monitoring and recording performance of the reefer and repairing it whenever required.[4] The c.p. sufficiently covers losses and damages occurring to the cargo as a consequence of failure of the Owners to keep and care for the goods and the containers.[5]

¶3.) In the present case, the Owners have not performed the part of the agreement with regard to the monitoring/ taking due care of the reefer as well as the cargo and have breached their obligation of monitoring **[1.1];** recording the performance of the reefer containers **[1.2];** and maintaining due diligence of the reefer and the goods **[1.3].**

1.1 OWNERS WERE IN BREACH OF THEIR OBLIGATION OF MONITORING

¶4.) The c.p. requires the Vessel's crew to monitor the vessel at least once daily and record the performance.[6] The master and the crew member on board had the important duty to periodically check the containers to ensure that carriage instructions are complied with.[7] The c.p. uses the word "at least" while prescribing the obligation of the crew.[8] However, the crew

[1] Cl. 5, Page 14, CHARTER PARTY, 7th International Maritime Arbitration Moot, 2020.
[2] International Convention for the Unification of Certain Rules of Law relating to Bills of Lading art III, Aug. 25, 1974 (hereinafter "Hague-Visby").
[3] JOHN RICHARDSON, COMBINED TRANSPORT DOCUMENTS: A HANDBOOK OF CONTRACTS FOR THE COMBINED TRANSPORT INDUSTRY 23 (1st ed. 2000).
[4] Cl. 5(b)(viii), Page 14, CHARTER PARTY, 7th International Maritime Arbitration Moot, 2020.
[5] Cl. 17, Page 19, CHARTER PARTY, 7th International Maritime Arbitration Moot, 2020.
[6] Cl. 5, Page 14, CHARTER PARTY, 7th International Maritime Arbitration Moot, 2020.
[7] Brett Hosking, *Focus: reefer container claims,* STANDARD BULLETIN, Jul. 2015, at 9.
[8] Cl. 17, Page 19, CHARTER PARTY, 7th International Maritime Arbitration Moot, 2020.

neglected its duty on multiple dates[9] where the return temperature of the reefer was more than instructed on the bill of lading.[10]

¶5.) This can be further supported through an analysis of the responsibility through understanding the meaning of monitoring and corrective actions **[1.1.1];** monitoring as an essential under the c.p. **[1.1.2];** and that minimum once daily does not mean only once daily **[1.1.3].**

1.1.1 THERE WAS A DUTY TO MONITOR AND TAKE CORRECTIVE MEASURES

¶6.) The Owner ought to have on board a properly qualified reefer engineer or electrician who can monitor and maintain the shipment throughout the voyage.[11] Monitoring of reefer units requires the engineer or the crew to ensure that regular inspections of each reefer container are carried out and temperature is recorded in a record book.[12]

¶7.) The performance of the task of making the vessel seaworthy and cargoworthy[13], and care for the cargo is delegable but the liability of negligence cannot be casted off[14] in that performance. The duty to exercise due diligence is thus non-delegable.[15] It is a duty of due diligence by whomsoever carries out the work of maintaining or repairing ship to a standard of seaworthiness, whether employees or independent contractors.[16]

¶8.) The duty to monitor and repair the reefers was delegated to the Vessel's crew and the liability for their negligence was casted upon the Owners under Cl. 17(b).[17]

1.1.2 MONITORING WAS AN ESSENTIAL/COMPULSORY OBLIGATION UNDER THE C.P.

¶9.) Cargo function of the Vessel's Crew remains to the extent of loading, discharging, and monitoring involving the crew.[18] The duty towards cargo includes cargo management such as

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[9] Page 6, EMAIL COMMUNICATION-16/04/2019, 7th International Maritime Arbitration Moot, 2020.
[10] Page 106, TEMPERATURE LOG, 7th International Maritime Arbitration Moot, 2020.
[11] R.C. Springall, *The Transport of Goods in Refrigerated Containers: The Australian Perspective,* LOYD'S MARIT AND COMMERCIAL LAW QUARTERLY, Jul. 1987, at 222.
[12] *Id*. at 223.
[13] JULIAN COOKE ET AL., VOYAGE CHARTERS 229 (Andrew W. Baker et al. eds., 4th ed. 2014).
[14] Paterson Steamships Ltd. v. Robin Hood Mills Ltd. [1937] 58 Lloyd's Rep. 33 (U.K.).
[15] COOKE ET AL., *supra* note 13, at 1026; *see also* WILLIAM TETLEY, MARINE CARGO CLAIMS TETLEY 556 (3rd ed.1988).
[16] COOKE ET AL., *supra* note 13, at 1028.
[17] Cl. 17, Page 19, CHARTER PARTY, 7th International Maritime Arbitration Moot, 2020.
[18] J. King, *Technology and the Seafarer*, 2 J. MAR. RES. 48, 58-59 (2000).

heating/ventilating, monitoring its conditions, and responding to problems and emergencies.[19] **¶10.)** Care of cargo includes continuous monitoring of temperature levels in reefer transport.[20] Once a company has collected data, it is the duty to use that data as and when necessary.[21]

¶11.) In *Klausen v. MSC,*[22] the Court held that although there is no best monitoring practice, the air temperatures should be monitored and acted upon when necessary. Further, in *Rey Banano Del Pacifico v. Transportes Navieros,*[23] the generators of the Vessel had failed and the monitoring was inoperative. There was no proper monitoring of the temperature at which air was delivered or returned in the reduction period. It was held that monitoring was a hit and miss affair and temperature not being recorded continuously, it was an important operation for the proper preservation of cargo. Thus, it was a direct cause of damage to cargo and the Owners were liable to pay damages to the cargo-interests.

¶12.) Monitoring is a compulsory obligation under the c.p. The Clause delineating the Owners' obligations places a duty on the Owners to monitor the cargo and the refrigerated containers.[24] Further, the Owners' liability clause in the c.p. places a general obligation on the Owners to take due care and places a specific obligation on the Owners to monitor the performance of the reefer.[25]

¶13.) It is pertinent to note here that the word 'only' after electrical power and the phrase 'endeavour to' before monitor in Cl. 17 (b) categorically indicate the intention of the parties to make monitoring a duty with obligation on the Owners and not a duty free responsibility.

1.1.3 "MINIMUM ONCE DAILY" GIVEN IN CL. 17(B) DOES NOT MEAN "ONLY ONCE DAILY"

¶14.) Where monitoring reefer temperatures requires a crew member to walk around the vessel and look at each container, there is also a duty to monitor the automatically generated

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[19] BARIS SOYER & ANDREW TETTENBORN, NEW TECHNOLOGIES, ARTIFICIAL INTELLIGENCE AND SHIPPING LAW IN THE 21ST CENTURY 156 (2019).
[20] *Id*. at 158.
[21] MARITIME LIABILITIES IN A GLOBAL AND REGIONAL CONTEXT 74 (Baris Soyer & Andrew Tettenborn eds., 2017).
[22] JP Klausen & Co AIS, Kitzinger & Co (GMBH & Co KG) v. Mediterranean Shipping Co SA [2013] EWHC 3254 (Comm) (U.K.).
[23] Rey Banano Del Pacifico v. Transportes Navieros [2000] 2 Lloyd's Rep. 15 (U.K.).
[24] Cl. 5, Page 14, CHARTER PARTY, 7th International Maritime Arbitration Moot, 2020.
[25] Cl. 17, Page 19, CHARTER PARTY, 7th International Maritime Arbitration Moot, 2020.

information.[26] If there is no appropriate response when the data indicates a problem, the carrier has failed to properly and carefully care for cargo because the vessel's crew had failed to detect and rectify problems with the reefer container.[27] In *Port Jackson Stevedoring Pty Ltd. v. Salmond & Spraggon (Australia) Pty Ltd.*,[28] it was held that the Owner's crew needs to monitor and record temperature regularly from the terminal log to guard against malfunction and breakdown.

¶15.) In the present case, the master and the crew member on board had the important duty to periodically check the containers to ensure that carriage instructions are complied with.[29] The c.p. demanded the reefer to be monitored once daily. However, the master neglected this duty on multiple dates[30] where the return temperature of the reefer was more than instructed on the bill of lading.[31] The three malfunctions ranging upto the period of 70 hours are an evidence to prove that the duty was neglected by the Vessel's crew.

1.1.3.1 There was negligence on part of Owners to deal with malfunction on 04/07/2018

¶16.) It is pertinent to note here that the temperature logs indicate the increase in temperature from 04/07/2018 16:00 and goes up to the return temperature as high as 21.50^0 C on 05/07/2018 16:00.[32] Even if the Owners argue that they were going to rely upon the monitoring logs, the monitoring logs show "Extended Alarm Activity" at 18:30 04/07/2018, which was not rectified by the Owners.[33]

¶17.) The Malreef Report for this malfunction indicates that the failure was observed on the morning of 05/07/2018.[34] However, it is pertinent to note here that the Malreef Report of the repair in the morning hours only shows one man working hours, whereas the reefer's temperature was not at optimum level till 05/07/2018 17:00 even after repairing.

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[26] MARITIME LIABILITIES IN A GLOBAL AND REGIONAL CONTEXT, *supra* note 21, at 75).
[27] *Seafood Imports Pty Ltd. v ANL Singapore Pte Ltd.* [2010] FCA 702 (Austl.).
[28] *Port Jackson Stevedoring Pty Ltd. v Salmond & Spraggon (Australia) Pty Ltd.* [1980] 2 Lloyd's Rep. 317 (Austl.).
[29] Hosking, *supra* note 7.
[30] Page 6, EMAIL COMMUNICATION-16/04/2019, 7th International Maritime Arbitration Moot, 2020.
[31] Page 106, TEMPERATURE LOG, 7th International Maritime Arbitration Moot, 2020.
[32] Page 106, TEMPERATURE LOG, 7th International Maritime Arbitration Moot, 2020.
[33] Page 121, EVENT LOG, 7th International Maritime Arbitration Moot, 2020.
[34] Page 126, MALREEF REPORT-05/07/2018, 7th International Maritime Arbitration Moot, 2020.

1.1.3.2 There was negligence on part of Owners to deal with malfunction on 11/07/2018

¶18.) During the second malfunction, it can be seen that the temperature logs were displaying an increase in the return and supply temperature from 09/07/2018 14:00 till 16/07/2018 14:00.[35] In addition to this, the reefer monitoring logs indicate "Extended Alarm Activity" from 12/07/2018 13:02. [36]

¶19.) There is negligence on the part of Owners in taking corrective action for this malfunction. The Malreef Report of the malfunction noticed in the morning hours shows three man working hours, whereas the reefer temperature remained at the increased level till 13/07/2018 19:00.[37]

1.1.3.3 There was exorbitant delay on part of Owners to deal with malfunction on 27/07/2018

¶20.) During the third malfunction, it can be seen that the temperature logs were displaying an increase in the return and supply temperature from 27/07/2018 08:00 till 30/07/2018.[38] Even the reefer monitoring logs indicate "Extended Alarm Activity" from 27/07/2018 13:02 19:57.[39] There is negligence on the part of Owners in taking corrective action for this malfunction. The Malreef Report of the malfunction noticed in the morning hours shows four man working hours, whereas the reefer temperature remained at the increased level till 30.07.2018.[40] The Reefer container was kept in a malfunctioning state by the Owners for a period exceeding three days.

¶21.) The Vessel's crew is expected to take care of the cargo properly. "Properly" means in "accordance with a sound system" and it relates to the method chosen and agreed for performing the contract of carriage.[41]

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[35] Page 107, TEMPERATURE LOG, 7th International Maritime Arbitration Moot, 2020.
[36] Page 120, EVENT LOG, 7th International Maritime Arbitration Moot, 2020.
[37] Page 127, MALREEF REPORT-13/07/2018, 7th International Maritime Arbitration Moot, 2020.
[38] Page 111, TEMPERATURE LOG, 7th International Maritime Arbitration Moot, 2020.
[39] Page 116, EVENT LOG, 7th International Maritime Arbitration Moot, 2020.
[40] Page 128, MALREEF REPORT-30/07/2018, 7th International Maritime Arbitration Moot, 2020.
[41] G.H. Renton Ltd. v. Palmyra Trading Corporation of Panama [1956] 2 Lloyd's Rep. 379 (U.K.).

¶22.) The difference between "properly" and "carefully" would be that there not only a duty to adopt a sound system for handling, carrying and caring for the goods as contracted, but must also be careful in application of that system.[42] Thus, it cannot be a defence that a sound system of monitoring was adopted if the crew were negligent in operating it.[43]

1.2 OWNERS WERE IN BREACH OF THEIR OBLIGATION OF RECORDING PERFORMANCE

1.2.1 THERE WAS A DUTY TO RECORD PERFORMANCE

¶23.) The ship's logbook is of course primarily known as a record of nautical and navigational information, but cargo information is also recorded. On any cargo ship, every serious incident relating to the cargo carried will be entered in it.[44]

¶24.) The reefers were equipped with multiple sensors that not only measure the temperature inside the container, but also relatively humidity, the percentage of ethylene gas present when fruits ripen emit ethylene which accelerates the ripening process[45] which can be detected through the higher return temperature.[46]

¶25.) It is obvious that monitoring the condition of the container and /or the goods inside, scheduling or performing maintenance is an obvious use. In the presence of such duty there is a requirement for the master or crew member to walk around the vessel and look at each container.[47]

¶26.) The slight variation should itself have alerted the crew members to the likelihood of a malfunction.[48] Reefer containers will automatically control refrigeration using the supply air sensor to detect and manage temperatures within a 0.5°C (0.9°F) range, or better, under most conditions.[49] Therefore, the increase in the return temperature beyond 14.5°C amounts to breach of the obligation.

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[42] *Seafood Imports Pty Ltd. v ANL Singapore Pte Ltd.* [2010] FCA 702 (Austl.).
[43] COOKE ET AL., *supra* note 13, at 1033.
[44] MARITIME LIABILITIES IN A GLOBAL AND REGIONAL CONTEXT, *supra* note 21, at 72).
[45] MARITIME LIABILITIES IN A GLOBAL AND REGIONAL CONTEXT, *supra* note 21, at 74).
[46] JP Klausen & Co AIS, Kitzinger & Co (GMBH & Co KG) v. Mediterranean Shipping Co SA [2013] EWHC 3254 (Comm) (U.K.).
[47] Springall, *supra* note 11, at 227.
[48] Page 116, EVENT LOG, 7th International Maritime Arbitration Moot, 2020.
[49] Springall, *supra* note 11.

1.2.2 THERE WAS A FAILURE TO OBTAIN TEMPERATURE DATA DUE TO BREACH OF DUTY TO SUPPLY POWER

¶27.) In relation to the carriage of such containers, the responsibility of the owners, in addition to those outlines in clause 5(b) (vi),[50] is to supply electrical power. Practice of keeping reefer unplugged can result in claims if containers are not kept at the right temperature.[51] If there is any deterioration of the goods, traceable to a failure in the vessel's power supply, then the owners are liable.[52] In *Exportadora Valle de Colina SA v. AP Moller-Maersk A/S,*[53] where there were certain periods of power off on the Vessel, more than what were necessary or permissible, as a result of which the grapes in the cargo were damaged, it was held that the Charterers were entitled to damages.

¶28.) There have been various instances of failure to the supply the power to the reefer which amounts to the breach of duty to maintain electrical power under the c.p.[54] Thus, the Owners have breached their obligation to provide uninterrupted power supply to the containers.

1.3 OWNERS WERE IN BREACH OF THEIR OBLIGATION TO MAINTAIN DUE DILIGENCE THROUGHOUT THE VOYAGE

¶29.) The obligation to make a vessel seaworthy or cargoworthy[55] applies at each distinct stage of the voyage.[56] The duty to deliver the cargo safely to its destination forms a part of the seaworthiness under common law.[57] An error in relation to the ship's refrigeration equipment is within the management of the ship.[58] When it comes to sensitive temperature products, it is imperative that the optimum temperature range is maintained during storage and transit.[59]

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[50] Cl. 5, Page 14, CHARTER PARTY, 7th International Maritime Arbitration Moot, 2020.
[51] Liz Booth, *Warning on Reefer Cargo Claims,* MARITIME RISK INTERNATIONAL, Sept. 2013, at 19.
[52] RICHARDON, *supra* note 3, at 27.
[53] Exportadora Valle de Colina SA v. AP Moller-Maersk A/S [2010] EWHC 3224 (Comm) (U.K.).
[54] Page 6, EMAIL COMMUNICATION-16/04/2019, 7th International Maritime Arbitration Moot, 2020.
[55] STEPHEN D. GIRVIN, CARRIAGE OF GOODS BY SEA 334 (2nd ed. 2011).
[56] COOKE ET AL., *supra* note 13, at 243.
[57] Mcfadden v. Blue Star Line [1905] 1 KB 697 (U.K.); *see also* Ahmad Hussam Kassem, The legal aspects of Seaworthiness: Current Law and Development (2006) (unpublished Ph.D. dissertation, University of Wales) (on file with Swansea University); *see also* COOKE ET AL., *supra* note 13, at 223.
[58] Rowson v. Atlantic Transport Co. [1903] 2 KB 666 (U.K.).
[59] Shubham Gupta, *Probing Temperature Abuse Claims,* Charles Taylor Adjusting http://www.charlestaylor.com/media/543140/Adjusters'-Insight-Probing-Temperature-Abuse-Claims.pdf (last visited Feb. 10, 2020).

¶30.) Performance of reefer containers is often related to three separate parameters, namely capacity, control and air movement. A claim arising for damage to cargo is often caused by a failure in at least one of these parameters due to a failure to care for the container or a breakdown of the machinery.[60] If there is no such monitoring, or no appropriate response when the data indicates a problem the vessel could be unseaworthy because the crew would fail to rectify the problems with reefer container.[61]

¶31.) Exercising due diligence in the transport of cargo using reefer containers includes having competent crew on board, monitoring of units, topping up of refrigeration levels, and defrosting as and when required so that the reefer remains efficient in its working.[62] In this case, the unseaworthiness of the vessel was due to a failure to exercise due diligence because of which the shipowner cannot limit their liability[63] even if there were other contributing causes as the cargo required attention because of its nature.[64]

¶32.) Had regular maintenance been carried out by the master "by necessary inspection, replacements and repairs" while the cargo was in his charge it would have satisfied the duty of due diligence.[65] The Owner in his capacity as a bailee must properly & carefully look after refrigerated cargo until delivery.[66] The Owners have breached their obligation of making the Vessel cargoworthy during the currency of the c.p.[67]

1.3.1 THE REEFER MONITORING SYSTEM FORMS A PART OF THE VESSEL

¶33.) A vessel's equipment as well as the vessel herself must be reasonably fit to meet and undergo the conditions which are likely to be encountered and to keep the cargo in sound condition.[68]Any machinery or equipment necessary for the preservation and handling of cargo must be in an adequate state of maintenance and repair, to undertake the voyage safely.[69] A

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[60] Hosking. *supra* note 7.
[61] *Seafood Imports Pty Ltd. v ANL Singapore Pte Ltd*. [2010] FCA 702 (Austl.).
[62] Springall, *supra* note 11, at 228.
[63] COOKE ET AL., *supra* note 13, at 1074.
[64] GIRVIN, *supra* note 55, at 336).
[65] Ahmad Hussam Kassem, The legal aspects of Seaworthiness: Current Law and Development (2006) (unpublished Ph.D. dissertation, University of Wales) (on file with Swansea University).
[66] *Port Jackson Stevedoring Pty Ltd. v Salmond & Spraggon (Australia) Pty Ltd*. [1980] 2 Lloyd's Rep. 317 (Austl.).
[67] Cl. 5, Page 14, CHARTER PARTY, 7th International Maritime Arbitration Moot, 2020.
[68] COOKE ET AL., *supra* note 13, at 242.
[69] Fyffes v. Reefer Express [1996] 2 Lloyd's Rep. 171(U.K.); *see also* Eridania v. Rudolf A. Oetker [2000] 2 Lloyd's Rep. 191 (U.K.).

reefer ship with refrigerated cargo is unseaworthy because of defects in her refrigeration machinery.[70] The duty to exercise due diligence to make vessel seaworthy includes the adequate system in monitoring, preventing any irregularity in the container.[71]

¶34.) It is very important to understand the functioning of a reefer monitoring system. The primary data set to be relied upon the Vessel's crew was the temperature log generated by the containers, which was the true account of hourly temperature of the cargo. An electronic remote monitoring system for recording the temperature in refrigerated containers is now a standard requirement.[72]

¶35.) Further, the Owners were supposed to rely on the temperature data and not the monitoring logs. Owner's Vessel was fitted with a reefer monitoring system which was not efficient enough to detect problems with the temperature data. Another evidence of the problem with the reefer monitoring system can be evidenced with the help of the three malfunctions which occurred with the reefer container and were rectified by the crew after long intervals of time.

[70] Maori King v. Hughes [1895] 2 QB 550 (U.K.).
[71] JP Klausen & Co AIS, Kitzinger & Co (GMBH & Co KG) v. Mediterranean Shipping Co SA [2013] EWHC 3254 (Comm) (U.K.).
[72] P. Barriero, *Review Monitoring the Intermodal, Refrigerated Transport of Fruit using Sensor Networks*, 5(2) SPAN. J. AGRIC. RES. 142, 144-145 (2007).

2. IT IS EXPECTED FROM THE OWNER (VESSEL'S CREW) TO ADVISE CHARTERERS IF THE REEFER WAS MALFUNCTIONING

¶36.) It is humbly submitted that 'expectation' is a forecast, belief or anticipation that something will happen or be the case.[73] Reasonable expectation particularly in the context of contractual relationships refers to the parties' shared understandings about the agreement based, for example, on previous dealings between them or the trade practices in the particular market with which they are familiar.[74]

¶37.) Expectations have an empirical base, in what the parties to a contract believe to be their understandings, promises, and obligations.[75] Sometimes expectations arise from express representations or promises; other times they are implicit in words, conduct, or setting.[76] In the instant case, there is a reasonable and legitimate expectation of the vessel's crew to advice and consult the charterers in case of reefer malfunction as *firstly,* there is an express promise of 'due care' to this effect **[2.1];** *secondly,* standard industrial practice calls for such consultation **[2.2]** and *lastly,* such promise is implicit in owner's responsibilities in the c.p. **[2.3]**

2.1 THERE EXISTS AN OBLIGATION OF TAKING 'DUE CARE' FOR THE GOODS WHILE ON BOARD

2.1.1 THIS OBLIGATION STEMS FROM COMMON LAW

¶37.) Under common law,[77] the master, as representing the ship-owner, has the duty of taking reasonable care of the goods entrusted to him, by doing what is necessary to preserve them on board the ship during the ordinary incidents of the voyage.[78] Such duty of care also extends to taking reasonable measures to prevent or check the loss or deterioration of the goods.[79]

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[73] *Expectation,* OXFORD ENGLISH DICTIONARY (3rd ed. 2010).
[74] Catherine Mitchell, *Leading a Life of Its Own? The Roles of Reasonable Expectation in Contract Law*, 23(4) OJLS 649, 665 (2003).
[75] STEVEN J. BURTON & ERIC G. ANDERSEN, CONTRACTUAL GOOD FAITH: FORMATION, PERFORMANCE, BREACH, ENFORCEMENT 54 (1995).
[76] *Id.*
[77] International Packers London Ltd. v. Ocean Steam Ship Company Ltd. [1955] 2 Lloyd's Rep. 218 (U.K.).
[78] Notara v. Henderson (1870) L.R. 7 Q.B. 225 (U.K.); *see also* Tronson v. Dent (1853) 8 Moore P.C. 419 (U.K.); *see also* Australasian S.N. Co v. Morse (1872) L.R. 4 P.C. 222 (U.K.); *see also* Adam v. Morris (1890) 18 Rettie 153 (U.K.); *see also* Phelps, James & Co v. Hill [1891] 1 Q.B. 605 (U.K.); *see also* Hansen v. Dunn (1906) 11 Com. Cas. 100 (U.K.); *see also* Gatoil International Inc v. Tradax Petroleum Ltd. [1985] 1 Lloyd's Rep. 350; *see also* Rose v. Bank of Australasia [1894] AC 687 (U.K.).
[79] Hanson v. Dunn (1906) 22 TLR 458 (U.K.).

¶38.) Such duty of care includes within itself the duty to communicate with cargo interests. The master, before dealing with cargo in a manner not contemplated in the contract must, if possible, must communicate with the cargo interests as to what should be done.[80] If the cargo-interests can be communicated with and they give directions in time, the necessity for the master's action doesn't arise.[81]

¶39.) In the instant case, it was certain that Charterers being the owners of the refrigerated containers had technical knowledge about the repairs of such containers. The cargo could have been prevented from spoilage in time, with material benefits to the parties.

¶40.) Such communication becomes more so necessary when an answer can be obtained only from the cargo-interests, or there is reasonable expectation that it can be obtained, before it becomes necessary to take action. If there are reasonable grounds for such an expectation, the master should use every means in his power to obtain such an answer.[82]

2.1.2 THIS OBLIGATION IS CATEGORICAL IN THE CHARTER PARTY

¶41.) Under Clause 17 (a) (ii) of the c.p, the owners were to be held liable for loss, damage or expense in respect of both goods and containers arising or resulting from failure on their part to properly and carefully to carry, keep and care for the goods and containers while on board.[83] This duty of the ship-owner under the c.p corresponds to the duty of a carrier under Article III rule 2 of the Hague-Visby rules.[84]

¶42.) The word 'properly' as used in Clause 17 (a) (ii) has been interpreted by the courts as a means to adopt a system which is sound in light of all the knowledge which the carrier has or ought to have about the nature of the goods[85] and circumstances during the voyage.[86] Ultimately, 'sound system' test mandates measures that a reasonably prudent carrier would have taken in light of the information he had (or should have had) about the carried goods.[87]

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[80] *In re* F (Mental Patient: Sterilisation) [1990] 2 AC 1, 75 (Lord Goff) (U.K.).
[81] The 'Hamburg' (1863) 2 Moore P.C. (N.S.) 289 (U.K.); *see also* The Bonaparte (1853) 8 Moore P.C. 459 (U.K.).
[82] *Australasian S.N. Co v Morse (NSW)* (1872) L.R. 4 P.C. 222 (Austl.).
[83] Cl. 17(a)(ii), Page 19, CHARTER PARTY, 7th International Maritime Arbitration Moot, 2020.
[84] Hague-Visby, art. III rule 2.
[85] G.H. Renton Ltd. v. Palmyra Trading Corporation of Panama [1956] 2 Lloyd's Rep. 379 (U.K.).
[86] Albacora S.R.L. v. Westcott & Laurance Line Ltd. [1966] 2 Lloyd's Rep. 53 (U.K.).
[87] *Seafood Imports Pty Ltd. v ANL Singapore Pte Ltd.* [2010] FCA 702 (Austl.).

2.1.2.1 The perishable nature of the goods being transported was well known to the vessel's crew

¶43.) In the instant case, as evidenced by the bills of lading,[88] the ship-master was aware of the perishable nature of the bananas being transported as there were clear instructions for the set temperature to be maintained at 13.6 C. Moreover, the transportation was being carried through special container vessel well-matched to carry reefer containers; therefore it could be reasonably expected that the master, being involved, in the same business ought to have knowledge as to the refrigerating requirements and requirement of taking immediate measures to preserve the good, in case of repeated reefer-malfunction.

2.1.2.2 Vessel's crew was aware about the multiple reefer malfunctions

¶44.) Under Clause 5 (b) (viii) of the c.p, the vessel crew had an obligation of monitoring and recording performances once daily.[89] By virtue of this, the vessel's crew had noticed that the reefer was not properly functioning on three occasions i.e. on 5th, 13th & 30th July.[90] Despite taking notice of repeated malfunction, the vessel's crew failed to adopt a 'sound' system to seek advice and consultation with the owners of such reefer container.

¶45.) The words 'carefully' and 'properly' must be read in consonance.[91] While 'carefully' meant merely taking care, 'properly' required, in addition, the element of skill and adopting sound system.[92] It is exactly this obligation over the vessel's crew which gives rise to an expectation to consult and advice charterers about the reefer malfunction in order to preserve the cargo.

2.1.3 'DUE CARE' INVOLVES TAKING PRECAUTIONARY STEPS FOR PRESERVATION OF CARGO

¶46.) In the case of *Foreman & Ellams* v. *Federal Steam Navigation Co*.[93] a refrigerated cargo of fresh-meat had an unsatisfactory out-turn. The Court therein had found that the chief

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[88] Page 60, BILL OF LADING, 7th International Maritime Arbitration Moot, 2020.
[89] Cl. 5(b)(viii), Page 14, CHARTER PARTY, 7th International Maritime Arbitration Moot, 2020.
[90] Page 126, MALFUNCTION REPORT – 05/07/2018, 7th International Maritime Arbitration Moot, 2020; *see also* Page 127, MALFUNCTION REPORT – 13/07/2018, 7th International Maritime Arbitration Moot, 2020; *see also* Page 128, MALFUNCTION REPORT – 29/07/2018, 7th International Maritime Arbitration Moot, 2020.
[91] JOHN WILSON, CARRIAGE OF GOODS BY SEA 345 (7th ed. 2010).
[92] Blyth v. Birmingham Waterworks Company (1856) 11 Ex Ch 781 (U.K.).
[93] Foreman & Ellams v. Federal Steam Navigation Co. [1928] 30 Lloyd's Rep.52 (U.K.).

engineer of the vessel concerned had made an error of judgment in not taking the precaution of putting on a second refrigerating machine, which would have prevented the damage. Therefore the judgment of the Court in this case makes it clear that there exists a duty of taking precautionary measures to prevent the damage. In the instant case too, consultation with the charterers would have evidently prevented the damage to the cargo as either the malfunctioning container would have been replaced at the next port or the charterers would have advised the correct set of repair measures to be undertaken.

2.2 STANDARD INDUSTRIAL PRACTICE CALLS FOR ADVISING AND CONSULTING CHARTERERS IN CASE OF REEFER MALFUNCTION

¶47.) "Standard" means a model conduct or custom[94] whereas "practice" can be defined as a habitual action.[95] Thus, standard industrial practice in commercial sense is a habitual model or conduct followed by a large segment of the industry. Principles of Contract Law require that in judging the reasonableness of an expectation 'the usages and practices of the trades or professions involved should be taken into account.'[96]Standard industrial practices give rise to reasonable expectations based on the fact that such practices are undertaken as a matter of customary duties of the contracting parties and therefore hold value in the eyes of law.

¶48.) As a matter of industry practice, many charter parties expressly provide that owners are to notify charterers of reefer unit malfunction/failure and thereafter take reasonable steps to affect repair.[97] Indeed, should the reefer system fail on voyage or the unit's insulation integrity become compromised, even if by wave damage, the ship-owner still has responsibility to take care of the goods, and accordingly has a duty to take reasonable measures to preserve the cargo, which in the instant case includes consulting charterers for immediate repair/replacement of the malfunctioning container.

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[94] *Standard*, BLACK'S LAW DICTIONARY (8th ed. 2004).
[95] *Practice,* OXFORD ENGLISH DICTIONARY (3rd ed. 2010).
[96] The Principles of European Contract Law, art. 1:302 https://cisgw3.law.pace.edu/cisg/text/textef.html#3302 (last visited Feb. 10, 2020).
[97] *Container types and problems* Gard News 151, Sept.-Nov. 1998 http://www.gard.no/web/updates/content/51-881/container-types-and-problems (last visited Feb. 10, 2020).

¶49.) Furthermore, standard industry practice as highlighted by various shipping guides of prominent reefer container providers[98] includes notification to the charterer in case the reefer unit has been malfunctioning or running 2° C out of range from Set Point, for more than 24 hours. In the current dispute, this situation had arisen multiple times for instance, on three occasions lasting between 21 and 38 hours on 4th/5th, 12th/13th & 28th/29th July supply as well as return air is higher than 2° C from the set point, going as high as 21.5° C.[99] However, the vessel's crew still didn't find it important for the charterers to know about such regular malfunction of their container, leave aside preserving cargo.

2.3 CONSULTATION/ADVISING CHARTERERS IN CASE OF REEFER MALFUNCTION IS IMPLICIT IN THE RESPONSIBILITIES OF THE OWNERS

¶50.) It is humbly submitted that although the parties' intention must be ascertained objectively, it must be ascertained by reference to the reasonable intentions of people in the situation of the parties at the time when the contact was concluded.[100] It therefore follows that evidence of the background and object of the transaction is always admissible. In light of this construction, it is submitted that *firstly,* owing to the nature of contract, duty to repair under clause 17(b) included within itself the duty to consult; *secondly,* mal-reef reports do not form a valid consultation.

2.3.1 OWING TO THE NATURE OF CONTRACT, DUTY TO REPAIR UNDER CLAUSE 17(B) OF THE C.P. INCLUDED WITHIN ITSELF THE DUTY TO CONSULT

¶51.) It is humbly submitted before this tribunal that in the case of *Reardon Smith v. Hansen Tangen,*[101] Lord Wilberforce held that no contracts are made in vacuum; there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as "the surrounding circumstances." Furthermore, the court held that in a commercial contract it is certainly right that the Court should know the commercial purpose of

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[98] Maersk, *Reefer Container, Vessel Support and Spare Parts – Guidelines and Instructions,* Jul. 2013 http://www.maersklineemr.com/wp-content/uploads/2014/03/Reefer-Guidelines-ver.2.0-July-2013.pdf (last visited Feb. 10, 2020).
[99] Page 73, SURVEY REPORT, 7th International Maritime Arbitration Moot, 2020.
[100] Lloyd's Bank Foundation for Scotland v. Lloyds Banking Group [2013] 1 WLR 366 (U.K.).
[101] Reardon Smith v. Hansen Tangen [1976] 2 Lloyd's Rep. 621 (U.K.); *see also* Lake v. Simmons [1927] AC 487 (U.K.).

the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

¶52.) The reefer container trade is a specialized commercial business which involves transportation of perishable and temperature-sensitive goods in standardized refrigerated containers.[102] Refrigerated containers are designed, manufactured and are fitted with integral refrigeration units in order to successfully preserve the cargo during the voyage.[103] The highlight of temperature-sensitive cargo trade is the reefer container itself, the shipper & the consignee pay a huge amount to the charterers for carrying their perishable goods in specialized reefer containers.

¶53.) In such a circumstance, wherein refrigerated container is the only way to preserve the cargo, it is reasonable to presume that the frequency of a reefer malfunctioning during voyage is very low.[104] This is also highlighted by the clauses of the c.p. wherein the threshold of the obligation to monitor and record the performance of the containers is as low as checking it once daily,[105] therefore, such a low threshold coupled with nature of trade clearly evidences the fact that reefer malfunctioning is not a common incident. However, whenever extraordinarily it happens, it requires immediate judgment on the part of the experienced reefer crew.

¶54.) The judgment of the reefer crew impliedly involves immediate notification to the charterers and then subsequently taking up repair works. This is because *firstly,* charterers are the ones who are responsible for cargo-damage and are also in communication with the cargo-interests. *Secondly,* charterers are the owners of the refrigerated containers and therefore presumably have better knowledge on the functioning of their containers. *Thirdly,* charterers are in better position to advice the vessel's crew on further action and cargo-preservation.

¶55.) Furthermore, such an implication of consultation must importantly be read into the terms of the contract as (i) it is reasonable and equitable; (ii) it is necessary to give business

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[102] Claudio Perella, *Blowing Hot and Cold in Courts,* MARITIME RISK INTERNATIONAL, Sept. 2013, at 25.
[103] Gac. A., *Refrigerated transport: what's new?*, 25 INT. J. REFRIG. 501, 503 (2002); s*ee also* STEPHEN J. JAMES & CHRISTIAN JAMES, CHILLING AND FREEZING OF FOODS IN FOOD PROCESSING: PRINCIPLES AND APPLICATIONS 224 (2nd ed. 2014).
[104] The Moorcock [1889] 14 PD 64 (U.K.).
[105] Cl. 5(b)(viii), Page 14, CHARTER PARTY, 7th International Maritime Arbitration Moot, 2020.

efficacy to the contract; (iii) it is so obvious that 'it goes without saying'; (iv) it is capable of clear expression and not in contradiction to any express term of the contract.[106]

¶56.) Though this requirement of 'consultation' is not stated in a narrow sense within the c.p., however, these extrinsic facts about the nature of the trade and the contract was well within the knowledge of the parties. The Court in the case of *Investors Compensation Scheme v. West Bromwich Building Society*[107] had summarized the importance of intention of parties in a contract.

¶57.) Therefore in light of the nature, object and commercial purpose of the contract, the very fact that the frequency of the reefer container malfunctioning is so low, whenever extraordinarily it happens, it requires the vessel's crew to immediately communicate and seek advice from the charterers as there are multiple commercial parties going to be subsequently effected by the same.

2.3.2 THE PURPOSE OF SENDING MALFUNCTION REPORTS IN THE PRESENT CASE DOES NOT FORM A VALID 'CONSULTATION'

¶58.) It is humbly submitted that Malfunction Reports are a combination of automated entries and comments which are entered in by the vessel crew after they have undertaken repairs.[108] The purpose of mal-reef reports sent herein was *firstly,* reporting of successful reefer repair, *secondly,* to ensure that used parts will be recorded properly to the charterer's system and *lastly,* to bill for the working hours of the crew on repairs of reefer-container. However, the purpose of consultation/advising charterers was assistance or guidelines required for the malfunctioning reefer container and steps required for mitigating the possible damage to the cargo because of reefer malfunction. Therefore, sending mal-reef reports in the nature of notification and not advising charterers thereby doesn't form a valid consultation for the purpose of the c.p.

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[106] BP Refinery (Westernport) v. Hastings [1977] UKPC 13 (U.K.); *see also* Reigate v. Union Manufacturing [1918] 1 KB 592 (U.K.); *see also* Mediterranean Salvage & Towage v. Seamar Trading & Commerce [2009] 2 Lloyd's Rep. 639 (U.K.); *see also* Attorney-General of Belize v. Belize Telecom Ltd. [2009] 1 WLR 1988 (U.K.); *see also* Equitable Assurance Society v. Hyman [2002] 1 AC 408 (U.K.).
[107] Investors Compensation Scheme v. West Bromwich Building Society [1998] 1 WLR 896 (U.K.).
[108] 19, Page 2, CLARIFICATIONS, 7th International Maritime Arbitration Moot, 2020

3. THE CLAIMANT INFORMED/NOTIFIED THE RESPONDENT OF THE CLAIM ACCORDING TO THE CHARTERPARTY

¶59.) Clause 16 h of the Charterparty[109] was included in the standard form to give the Charterers a certain amount of flexibility in handling third party claims. If a breach of contract causes loss to an innocent party which is the Charterer's customer, innocent party may recover that amount with costs.[110] The Charterer informed the Owner of the claim according to the Charterparty as the Claim was notified according to Clause 17 of the Charterparty **[1];** Due process required for a cargo damage claim was followed **[2];** Due procedure under Clause 16h was followed **[3];** and the claim was reasonably settled **[4].**

3.1 CLAIM WAS NOTIFIED ACCORDING TO CLAUSE 17 OF THE CHARTERPARTY

¶60.) Charterparties often include specific clauses which may operate as a contractual time bar.[111] The accepted interpretation of a clause requiring proceedings to be commenced within a certain number of days is that, if it is not commenced, the claim is barred.[112] By the express wording of Art. III (6) of Hague-Visby Rules, parties can extend this period by way of agreement. This provision permits a carrier who has been sued by a cargo owner whose goods are damaged to being an action of indemnity against the person who caused the damage even if the period of one year has expired.[113]

¶61.) Even if COGSA or Hague/Hague-Visby Rules had been incorporated to the charter, it wouldn't have resulted in the application of COGSA's one-year time for suit provision to the commencement of arbitration proceedings as arbitration does not fall within the term 'suit' used in the statutory provisions.[114]

¶62.) In the present case, the Charterparty expressly provides that the Owners shall be discharged from all liability in respect of all its obligations unless notice of arbitration is given

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[109] Cl. 16(h), Page 18, CHARTER PARTY, 7th International Maritime Arbitration Moot, 2020.
[110] COOKE ET AL., *supra* note 13, at 647.
[111] Waterfront Shipping Co. Ltd. v. Trafigura AG [2007] EWHC 2482 (Comm) (U.K.); *see also* Petroleum Oil and Gas Corporation of South Africa (Pty) Ltd. v. Fr8 Singapore Pte Ltd. [2009] 1 Lloyd's Rep. 107 (U.K.); *see also* X v. Y [2011] EWHC 152 (Comm) (U.K.).
[112] Smeaton Hanscomb v. Sasoon Setty Son & Co [1953] 1 WLR 1468 (U.K.); *see also* Metalimex Foreign Trade Corp v. Eugenie Maritime Co. Ltd. [1962] 1 Lloyd's Rep. 378 (U.K.).
[113] BRIAN HARRIS, RIDLEY'S LAW OF CARRIAGE OF GOODS BY LAND, SEA AND AIR 283 (8th ed. 2010).
[114] Son Shipping Co. v. DeFosse & Tanghe, 199 F.2d 687, 689 (2nd Cir. 1952) (U.S.).

within 24 months of delivery of goods.[115]The notice of arbitration, which is the agreed mode of dispute resolution between the parties, was given in accordance with Clause 20 of the Charterparty within 24 months of the Charterparty.[116]

3.2 DUE PROCESS REQUIRED FOR A CARGO DAMAGE CLAIM WAS FOLLOWED

¶63.) The general procedure in the cargo damage cases where the consignee receives damaged cargo is for the cargo owner to call for a survey of the apparently damaged goods to be conducted in the presence of representatives of the carrier.[117] Hague-Visby Rules which apply to the Bill of Lading and Carriage Contract provide a condition that a loss/damage has to be notified to the Carrier on the date of discharge or within three days if the damage is not apparent.[118]

¶64.) It is pertinent to note here that the Carrier, within the meaning of Hague-Visby Rules, in the present case, was the Charterer and not the Owner.[119] The goods were discharged at the port on July 30, 2019.[120] The Carrier was notified of the claim within a reasonable time and the survey report dated August 8, 2019[121] is an evidence of the fact that the damage was reported within a reasonable time. There is no rule of law whereby the adjudicating authority is compelled to accept a joint survey instead of a unilateral survey.[122]

3.3 DUE PROCEDURE UNDER CLAUSE 16 H WAS FOLLOWED

¶65.) It is pertinent to note here that the Charterers have followed the due procedure of Claims Settlement Authority as required under Clause 16h of the Charterparty. If a breach of contract causes an innocent party to incur a liability to a third party, which is the cargo-owner in this case, the innocent party may recover that amount with costs.[123]

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[115] Cl. 17(d), Page 19, CHARTER PARTY, 7th International Maritime Arbitration Moot, 2020.
[116] 23, Page 3, CLARIFICATIONS, 7th International Maritime Arbitration Moot, 2020.
[117] Rep. of Secretariat of United Nations Conference on Trade and Development on Bills of Landing https://unctad.org/en/PublicationsLibrary/c4isl6rev1_en.pdf (last visited Feb. 10, 2020).
[118] Hague-Visby, art. III.
[119] Page 63, TERMS OF CARRIAGE, 7th International Maritime Arbitration Moot, 2020.
[120] Page 124, BOOKING CONTAINER MOVEMENTS, 7th International Maritime Arbitration Moot, 2020.
[121] Page 73, SURVEY REPORT, 7th International Maritime Arbitration Moot, 2020.
[122] COOKE ET AL., *supra* note 13, at 650.
[123] Papera Traders Co. Ltd. v. Hyundai Merchant Marine Co. Ltd. [2002] 211 Lloyd's Rep. 692 (U.K.).

¶66.) Clause 16h of the Charterparty prohibits the Charterer from settling any claim above 3000 USD without consultation with the Owners. The logic behind this obligation rests on the premise that the Owner may later allege that some vital fact or document available with the Owner was overlooked while settling a claim.[124] The party settling the claim is required to know the "Available Facts" which are the facts that the party ought to discovered with reasonable diligence.[125]

¶67.) It is pertinent to mention here that the Owners were contacted by the Charterers with complete documents of evidence including the survey report and the temperature logs to consult about the claim.[126] If the party consults and is not given facts, it makes it more difficult to persuade that such facts were available.[127] Thus, the obligation to consult the Owners has been satisfied by the Charterers.

3.4 THE CLAIM WAS REASONABLY SETTLED

¶68.) Where breach of contract gives rise to a claim against contracting party by a third party and a claim is reasonably settled, the amount of settlement is generally recoverable as damages.[128] According to *Fisher v. Val de Travers Asphalte*,[129] two questions have to be answered – whether the settlement is reasonable at all and whether it is within a reasonable range. It is subjective to decide what is a reasonable settlement and is dependent upon the facts and circumstances of the case.[130]

¶69.) The settlement in the present case has been done by the Charterers after taking into consideration all relevant documents, facts, and circumstances and is based on a proper scientific survey.

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[124] Biggin v. Permanite [1951] 2 KB 314 (U.K.).
[125] General Feeds Inc. Panama v. Slobodna Plovidba Yugoslavia [1999] 1 Lloyd's Rep. 688 (U.K.).
[126] Page 9, EMAIL COMMUNICATION – 16/01/2019, 7th International Maritime Arbitration Moot, 2020.
[127] COOKE ET AL., *supra* note 13, at 652.
[128] Wayne Courtney, *Settlement following Breach of Contract,* MARITIME RISK INTERNATIONAL, Sept. 2013, at 47.
[129] Fisher v. Val de Travers Asphalte Co [1876] 1 CPD 511 (U.K.).
[130] Supershield v. Siemens Building Technology [2010] 1 Lloyd's Rep. 349 (U.K.).

PRAYER

In light of the above submissions, the Claimant requests this Arbitral Tribunal to:

ADJUDGE

a. That the Owners did not perform their part of the Agreement with regard to the monitoring and taking due care of reefer containers as well as refrigerated cargo.
b. That it must be expected of the vessel's crew to advise Charterers if the reefer was malfunctioning.
c. That the Charterers performed their part of the Agreement with regard to keeping the Owners informed of the claim.

AWARD

a. Reimbursement amount of USD 89,918.42 for the damage to cargo.
b. Interest and costs in favor of the Claimants.
c. Further or other reliefs.

COUNSEL FOR CLAIMANT