TEAM CODE: 723R

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* **RESPONDENT**

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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

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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 RESPONDENT 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 18 July, 2016 for carriage of goods in respect of the vessel J Momoa.

OBLIGATIONS UNDER THE CHARTERPARTY

The charterparty enlisted various obligation and requirements concerning both the charterers and the owners for taking care of the goods and containers. The owners only 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 charterers' on the other hand were under an obligation to provide the cargo as well as the containers in good order and condition.

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-degree C.

MONITORING AND REPAIRING OF THE MALFUNCTIONS

The mal-reef reports and the event logs clearly indicate the fulfilment of the obligation of the monitoring and recording of data. The unit trip which occurred in 4th day of July 2018 was noticed during the morning round on 5th day of July 2018 and the corrective action for the same was taken.

Subsequently, the AL15 activity in the event log which started on 12th July 2018 was monitored during the morning round of 13th July 2018 for which an endeavour to repair was carried by addition of refrigerant. Another AL15 activity which started on 27th July 2018 was not rectified immediately as the vessel was unable to receive data. The endeavour to repair the cooling loss was affected on 29th July 2018.

The survey report stated that there were pre-shipment issues including anthracnose, cigar, etc. The same added with the temperature fluctuations due to the absence of the maintenance of the reefer containers by TCL lead to the damage of cargo.

COMMENCEMENT OF ARBITRATION

The arbitration proceedings have been initiated by the charterers/carrier against the owners for recovery of compensation under clause 20 of the charterparty. The settled claim of USD 89, 918.42 exceeds the amount of USD 3,000 and was not informed to the owners in a timely manner. Due to the absence of any protest during discharge of the cargo, the owners rejected the claim made by the charterers.

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

Clause 17(a) (ii) of the c.p imposes a duty on the owner to properly and carefully keep, take care and carry the cargo. The owners had performed their part of the agreement by taking due care of the reefer containers. "Proper and careful" care of the cargo under the c.p requires the vessel's crew to establish a sound system which excludes "special" weaknesses of the cargo. Such sound system adopted by the crew included provision of uninterrupted supply of power, regular and timely monitoring of reefer containers and endeavouring to repair the malfunctioning unit.

The obligation under the c.p was only limited to provision of uninterrupted electric power to the unit. There is nothing on record to show that there was a failure on the part of the owners in providing electric power. The only power failure in the unit was caused due to the malfunctioning of the condenser motor and not because of failure to supply power.

For the purpose of monitoring, both the parties had consented to adoption of reefer monitoring system. The system worked on automated procedures that checked the air temperature of the reefers based on data collected by data loggers fitted in the vessel. Based on this data collected by the reefer monitoring system, the vessel's crew monitored the performance of each unit once daily. Hence, while the claimants had expressly agreed to adoption of reefer monitoring system, they cannot at this stage deny the admissibility of reefer monitoring logs. Moreover, the vessel's reefer monitoring logs are clear and evident that all units have been monitored once daily.

The owners are not liable for the damage caused as it is due to the pre-shipment deterioration of bananas that they couldn't survive the ordinary incidents of voyage. Moreover, the containers were not properly maintained by TCL which actually lead to multiple malfunctions and temperature fluctuations causing damage to cargo.

THAT IT SHOULD NOT BE EXPECTED OF THE OWNER TO ADVISE CHARTERERS IF THE REEFER WAS MALFUNCTIONING

Expectations have an empirical base, in what the parties to a contract believe to be their understanding, promises, and obligations. Expectations arise from either express

representations or promises or they are implicit in words, conduct, or setting. In the instant case, there is no reasonable and legitimate expectation of the vessel's crew to advice and consult the charterers as there is no express promise in this regard also no such promise is implicit in owner's responsibilities in the c.p.

Owners' responsibilities and liabilities are explicit in the c.p and are limited to crew assistance for monitoring and recording performances and for supplying labor and standard tools. The only responsibility for consultation with Charterers' arises in the case when resources on-board are insufficient for carrying out repair facilities, which was not the case herein.

In absence of any standard industrial practice for consultation with charterers, there cannot be any implication of obligation in the contract. In absence of any evidence showing intention of the parties to include the obligation to consult, the tribunal must not imply terms or make presumptions about the intention of the parties.

THAT THE CHARTERERS DID NOT PERFORM THEIR PART OF THE AGREEMENT WITH REGARD TO KEEPING THE OWNERS INFORMED OF THE CLAIM

There was no notice of loss or damage at the time of discharge of goods. No joint survey was conducted. Payment was made in excess of amount stipulated in box 32. The claim was unreasonably settled by the charters.

ARGUMENTS ADVANCED

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

¶1.) It is humbly submitted that the Owners must not be held liable for the damage to the cargo as *firstly,* owners performed their part of the agreement by taking due care of the reefer container as well as refrigerated cargo **[1.1]**; *secondly,* there exists no causative link between the damage to goods and owner's responsibilities **[1.2];** and *lastly,* arguing but not conceding, owners are not liable to the full extent **[1.3].**

1.1 OWNERS PERFORMED THEIR PART OF THE AGREEMENT BY TAKING DUE CARE OF THE REEFER CONTAINER AS WELL AS REFRIGERATED CARGO

¶2.) It is humbly submitted that Cl. 17(a) (ii) imposes a duty on the owner to properly and carefully keep, take care and carry the cargo.[1] This duty under the c.p. corresponds to the duty of the carrier under Article III Rule 2 of the Hague-Visby Rules.[2] It is well settled that if the carrier can show that the loss or damage to the cargo occurred without any breach of his duty of care inherent under the above provision, he is not required to rely on any exception.[3]

¶3.) The Owners have fulfilled their responsibility to perform their part of the agreement with regards to taking due care[4] of the reefer containers by *firstly* supplying uninterrupted power to the container, *secondly* by monitoring and recording the performance of such unit and *lastly* by endeavouring to timely repair and rectify the malfunction.

1.1.1 THE OWNERS PROVIDED FOR UN-INTERRUPTED ELECTRIC POWER

¶4.) The first obligation of the Owners under Cl. 17(b) is of continuous power supply for maintaining the cargo. Such obligation is only limited to provision of un-interrupted electric

[1] Cl. 17(a)(ii), Page 19, 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] Volcafe Ltd. v. Compania Sud Americana De Vapores S.A. [2018] UKSC 61(U.K.).
[4] JULIAN COOKE ET AL., VOYAGE CHARTERS 647 (Andrew W. Baker et al. eds., 4th ed. 2014).

power[5] and therefore, if there is any deterioration of the goods, traceable to a failure in the Vessel's power supply, only then the owners are responsible.[6]

¶5.) It is alleged by the Claimants that there was an interrupted power supply to the container and consequently it was kept off from 04/07/2018 20:34 till 05/07/2018 16:35.[7] However, the Charterers fail to observe that the trip found during the morning rounds by the crew[8] was not because of the interrupted power supply but because of a malfunction within the container's refrigeration machinery i.e. compressor's internal protector being open as was highlighted by Alarm Code – 24.[9]

¶6.) Moreover, responsibility lies with the Charterers for the plugging/unplugging of the containers in accordance with Cl. 5(a) (ix) of the agreement[10] and hence the Owners are not responsible for any consequence of such plugging/unplugging.[11]

1.1.2 THE OWNERS MONITORED AND RECORDED THE PERFORMANCE OF SUCH UNIT

¶7.) It is submitted that provision of Cl. 5(b) (viii) along with Cl. 17(b) requires the Owners to monitor and record the performance of all such units whilst on board.[12] This duty of the Owner is restricted to monitoring and recording only once daily.[13]

1.1.2.1 Reefer Monitoring System was a 'sound system' for the purpose of 'due care'

¶8.) "Properly" in Cl. 17(a) (ii) did not impose an obligation to achieve a particular outcome, but to carry, keep and care "*in accordance with a sound system.*"[14] This sound system does not require to take into account all weaknesses and idiosyncrasies pertaining to a particular cargo, but to reflect general practices of the voyage.[15] In accordance with the general practice in the

[5] BARIS SOYER & ANDREW TETTENBORN, NEW TECHNOLOGIES, ARTIFICIAL INTELLIGENCE AND SHIPPING LAW IN THE 21ST CENTURY 156 (2019).
[6] JOHN RICHARDSON, COMBINED TRANSPORT DOCUMENTS: A HANDBOOK OF CONTRACTS FOR THE COMBINED TRANSPORT INDUSTRY 85 (1st ed. 2000).
[7] Page 7, EMAIL COMMUNICATION – 16/04/2019, 7th International Maritime Arbitration Moot, 2020.
[8] Page 126, MALFUNCTION REPORT – 05/07/2018, 7th International Maritime Arbitration Moot, 2020.
[9] Carrier Transicold, *Container Refrigeration, Operations and Services Manual for Container Refrigeration Units* https://www.utcccs-cdn.com/hvac/docs/2000/Public/09/T-363.pdf (last visited Feb. 10, 2020).
[10] Cl. 5(b)(ix), Page 14, CHARTER PARTY, 7th International Maritime Arbitration Moot, 2020.
[11] Page 4, EMAIL COMMUNICATION – 19/11/2019, 7th International Maritime Arbitration Moot, 2020.
[12] Cl. 17(a)(ii), Page 19, CHARTER PARTY, 7th International Maritime Arbitration Moot, 2020; *see also* Cl. 5(b)(viii), Page 14, CHARTER PARTY, 7th International Maritime Arbitration Moot, 2020.
[13] Cl. 5, Page 14, CHARTER PARTY, 7th International Maritime Arbitration Moot, 2020.
[14] Pyrene Co. Ltd. v. Scindia Navigation Co. Ltd. [1954] 2 QB 402 (U.K.); *see also* G.H. Renton & Co. Ltd. v. Palmyra Trading Corporation of Panama [1956] 2 Lloyd's Rep. 379 (U.K.).
[15] Albacora S.R.L. v. Westcott & Laurance Line Ltd. [1966] 2 Lloyd's Rep. 53 (U.K.).

industry, the parties to the c.p adopted a reefer monitoring system for the purpose of recording and monitoring the performance of the units.[16]

¶9.) Under this reefer monitoring system, there were automated procedures[17] to check the air temperature of the reefers and based on data collected by such reefer monitoring system. During morning rounds, the Vessel's crew were supposed to take corrective action. Therefore, under this mechanism the Vessel's crew was supposed to act on the basis of reefer monitoring logs and not temperature logs.[18] Moreover, this system of monitoring was known and agreed to by the Charterers in Part – III of the c.p.[19]

¶10.) The word "carefully" does not mean merely taking care and is considered to be equivalent to the standard of reasonable care.[20] The exercise of reasonable care is assessed and gauged by way of a comparison with what an ordinarily prudent and rational person would have done in the same circumstances.[21] The vessel' crew not only monitored all the units daily but also undertook repair facilities in a timely manner, thereby discharging their obligation of due care under the c.p, particularly Cl. 17(b).[22]

¶11.) In light of reefer monitoring system being a 'sound system' for the purpose of monitoring and recording the performance of the units, it is the reefer monitoring logs that must be relied upon by this Tribunal and not the temperature data.[23]

1.1.2.2 Malfunctions on 04/05/2018 and 05/05/2018 were duly monitored and repaired

¶12.) Reefer Monitoring Logs/ Event Log on 04/07/2018 depicts that the unit got tripped at 20:34.[24] It is worth noting herein is that the routine monitoring round of 04/07/2018 had already taken place in the morning and subsequently the crew during the monitoring round of 05/07/2018 found the unit trip, it immediately took corrective actions and the logs clearly depict that the unit had started working well from 05/07/2018 onwards.[25]

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[16] JP Klausen & Co AIS, Kitzinger & Co (GMBH & Co KG) v. Mediterranean Shipping Co SA [2013] EWHC 3254 (Comm) (U.K.); *see also* YVONNE BAATZ ET AL., MARITIME LAW 229 (Andrew W. Baker & Harry Sumption eds., 3rd ed. 2014).
[17] 2 ALEKA MANDARAKA – SHEPPARD, MODERN MARITIME LAW 153 (3rd ed. 2013).
[18] Page 5, EMAIL COMMUNICATION – 10/05/2019, 7th International Maritime Arbitration Moot, 2020.
[19] Part – III, Page 50, CHARTER PARTY, 7th International Maritime Arbitration Moot, 2020.
[20] JOHN WILSON, CARRIAGE OF GOODS BY SEA 345 (7th ed. 2010).
[21] Blyth v. Birmingham Waterworks Company (1856) 11 Ex Ch 781 (U.K.).
[22] JOHN A.C. CARTNER, THE INTERNATIONAL LAW OF SHIPMASTER 191 (2009).
[23] Claudio Perella, *Blowing Hot and Cold in Courts,* MARITIME RISK INTERNATIONAL, Sept. 2013, at 25.
[24] Page 121, EVENT LOG, 7th International Maritime Arbitration Moot, 2020.
[25] Page 126, MALFUNCTION REPORT – 05/07/2018, 7th International Maritime Arbitration Moot, 2020.

¶13.) Similarly, the event logs of 13/07/2018 read along with the Malreef report[26] show that the crew during the morning rounds found the unit not maintaining set temperature. Subsequently, the same was attended and repaired. Post-repairs the unit was maintaining temperature.[27]

¶14.) Therefore, the Vessel's reefer logs are clear and evident. All units have been monitored at-least once daily and such monitoring was in accordance with the system adopted by the parties in the c.p.[28]

1.1.2.3 Delay in repair of malfunction which took place on 27/07/2018 was on account of unavailability of Temperature data.

¶15.) It is clear that the crew's monitoring of reefer containers was based on it receiving temperature data. It was only through the study of this temperature data that the crew undertook corrective actions, if required.[29] However, in absence of any temperature data, it wasn't possible for the crew to identify any malfunction. In the malfunction which took place on 27/07/2018 came to the crew's notice on 29/07/2018. Soon after it came into crew's notice, it undertook repair facilities and the reefer was working well.[30] However, for the period of 27-29/07/2018, the temperature data was not available to the master because of which the crew couldn't detect malfunction.

1.1.3 THAT THERE WAS AN ENDEAVOUR BY THE VESSEL'S CREW TO REPAIR AND RECTIFY THE MALFUNCTION

¶16.) It is humbly submitted that on all three instances of malfunction, the vessel's crew took cognizance and attended the unit. The crew according to their best judgement undertook repair facilities and they cannot be held liable for any error in their judgement because *firstly,* the obligation of the crew here is "to endeavour" and *secondly,* the vessel's crew are considered the charterer's servants during such repairs.

[26] Page 119, EVENT LOG, 7th International Maritime Arbitration Moot, 2020; *see also* Page 127, MALFUNCTION REPORT – 13/07/2018, 7th International Maritime Arbitration Moot, 2020.
[27] Page 108, TEMPERATURE LOG, 7th International Maritime Arbitration Moot, 2020.
[28] *Seafood Imports Pty Ltd. v ANL Singapore Pte Ltd.* [2010] FCA 702 (Austl.).
[29] P. Barriero et al., *Review Monitoring the Intermodal, Refrigerated Transport of Fruit using Sensor Networks*, 5(2) SPAN. J. AGRIC. RES. 142, 144-145 (2007).
[30] Page 128, MALFUNCTION REPORT – 29/07/2018, 7th International Maritime Arbitration Moot, 2020.

1.1.3.1 The responsibility of the owners is to only endeavour

¶17.) If the machinery malfunctions, the responsibility of the Owners is to endeavour and there is no penalty for justifiable failure.[31] By inserting an endeavour qualification parties are in effect only agreeing to "try" to achieve the particular contractual obligation.[32]

¶18.) In the instant case, the object of the endeavours qualification is sufficiently clear.[33] Repair works are a matter of judgment and there could be multiple alternatives to repair a malfunction and therefore if in the judgement of the crew a method is better than the other, subsequently the crew cannot be held liable for not adopting the other method as it at-least undertook reasonable endeavours for repairing the malfunction.[34]

1.1.3.2 Vessel's crew are considered the charterers' servants during such repairs

¶19.) It is humbly submitted that in case of any inadequacy in the repair facilities undertaken by the Vessel's crew, the Owners must not be held liable for the same. This is because Cl. 17(b) read with Cl. 5 (b)(viii) provides for repair of the Charterers' containers to be an extraordinary task which is evidenced by the fact that the Charterers are responsible for all additional expenses incurred by the Owner.[35]

¶20.) Furthermore, the vessel's crew are considered the charterers' servants during such repairs, so the charterers' have no recourse to the owners if they feel that repairs were not done properly or that something which could have been repaired wasn't repaired.[36] Therefore, even if the charterers' feel that the repairs undertaken were not adequate, the owners cannot be held liable for the same.

¶21.) The master was under the orders of the Charterers as regards employment, agency or other arrangements.[37] In *Kawasaki Kisen Kaisha Ltd v. Whistler International Ltd. - The 'Hill Harmony'*,[38] it was held that the master (although appointed by the owners) shall be under the orders and directions of the Charterers. Also, as per Cl. 6(b)[39] which states that *"The Master*

[31] RICHARDSON, *supra* note 6.
[32] KS Energy Services Ltd v. BR Energy (M) Sdn Bhd., [2014] SGCA 16 (Sing.).
[33] SHEPPARD, *supra* note 17; s*ee also* Rhodia International Holdings Ltd v. Huntsman International LLC [2007] EWHC 292 (Comm) (U.K.); *see also* Yewbelle Ltd v. London Green Developments Ltd [2000] EWHC 3166 (U.K.); *see also* Jet2.com v. Blackpool Airport Ltd. [2012] EWCA Civ 417 (U.K.).
[34] EDI Central Ltd v. National Car Parks Ltd. [2012] CSIH 6 (U.K.).
[35] RICHARDSON, *supra* note 6, at 86.
[36] RICHARDSON, *supra* note 6, at 87.
[37] STEPHEN D. GIRVIN, CARRIAGE OF GOODS BY SEA 556 (2nd ed. 2011).
[38] Kawasaki Kisen Kaisha Ltd v. Whistler International Ltd. [2001] 1 Lloyd's Rep. 147 (U.K.).
[39] Cl. 6(b), Page 14, CHARTER PARTY, 7th International Maritime Arbitration Moot, 2020.

although appointed by Owners shall be under the orders and directions of the Charterers and the Respondent had an implicit duty[40] to ensure that, during the course of the Charter Party, not only do they give orders but they give only 'legitimate' orders.[41] In *Batis Maritime Corporation v. Petroleos Del Mediterraneo S. A.*,[42] it was held that in a 'Charter' which makes express provision for the charterers to give orders to the master, there is little difficulty in construing the contract as including an obligation not to give improper orders to the master.

1.2 THAT THERE EXISTS TO CAUSATIVE LINK BETWEEN THE DAMAGE TO GOODS AND OWNER'S OBLIGATIONS

¶22.) It has been alleged on behalf of the charterers that the improper monitoring/ taking due care of refrigerated cargo by the vessel's crew along with inadequacy of repair facilities has caused real damage to the shipper's goods. However, it is submitted that the owners have fulfilled their obligation of taking due care and therefore the damage caused to the goods is not because of any breach in owner's obligations but because of *firstly,* proximate cause of the damage was poor quality of the cargo and *secondly,* containers carried on board the vessels were not properly maintained by TCL resulting in damage to the cargo.

1.2.1 THAT THE CARGO WAS NOT IN GOOD ORDER AND CONDITION ON STUFFING IN THE CONTAINERS

¶23.) It is submitted that the bill of lading is a *prima-facie* evidence of certain facts stated in it,[43] such as the quantity of cargo shipped and its good order and condition on shipment.[44] In the instant case, the bill of lading was issued under the provisions of this c.p.[45] and was drawn by the charterer on behalf of the owners.[46] Under the bill of lading, there was an express warranty on behalf of the shipper that the goods being shipped are in good order and condition.[47]

¶24.) On perusal of the Survey Reports conducted by an expert it becomes clear that cargo suffered from pre-shipment issues of anthracnose, cigar end rot and crown rot.[48] In the

[40] THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 238 (5th ed. 2012).
[41] TERENCE COGHLIN, TIME CHARTERS 342 (Andrew W. Baker & Hatty Sumption eds., 7th ed. 2014).
[42] Batis Maritime Corporation v. Petroleos Del Mediterraneo S.A. [1990] 1 Lloyd's Rep. 345 (U.K.); *see also* Hyundai Merchant Marine Co Ltd. v. Gesuri Chartering Co Ltd. [1991] 1 Lloyd's Rep. 100 (U.K.).
[43] J. Aron v. Comptoir Wegimont [1921] 3 KB 435, 437 (U.K.).
[44] G. TREITEL & FRANCIS M B REYNOLDS, CARVER ON BILLS OF LADING 558 (4th ed. 2017).
[45] Page 60, BILL OF LADING, 7th International Maritime Arbitration Moot, 2020.
[46] Cl. 13(o), PAGE 17, CHARTER PARTY, 7th International Maritime Arbitration Moot, 2020.
[47] Page 60, BILL OF LADING, 7th International Maritime Arbitration Moot, 2020.
[48] Page 73, SURVEY REPORT, 7th International Maritime Arbitration Moot, 2020.

conclusion drawn by the surveyor too, he explicitly observes that the damage has been caused due to the poor-quality of cargo.[49] This therefore clearly proves that the cargo was not in good order and condition upon shipment as to enable it to withstand the ordinary incidents of refrigerated container carriage.[50]

¶25.) Moreover, as was held by the court in the case of *Exportadora*[51] that the carrier could shift the burden on to the claimant by proving that one or more of those excluded matters relied upon could plausibly have caused the damage, not that on a balance of probabilities the excluded matter did cause the damage. Therefore, drawing analogy from the case, the findings of the survey report in the instant case are a sufficient hypothesis to prove the plausibility of inherent vice.[52]

1.2.2 CONTAINERS CARRIED ON BOARD OF THE VESSEL WERE NOT PROPERLY MAINTAINED BY TCL RESULTING IN DAMAGE TO THE CARGO

¶26.) It is humbly submitted that as per the provisions of the c.p the Charterers had warranted that all containers carried pursuant to this c.p have been constructed to a design approved by a Classification Society and are properly maintained.[53] This is an absolute warranty on behalf of the charterers which the charterers have breached in the instant case.[54]

¶27.) On perusal of the temperature logs it is evident that reefer container was not maintaining the set supply and return temperature from the day data logger had started recording the temperature i.e. 29th June, 2018.[55] Furthermore, it took 72 hours for the reefer container to bring the return temperature within the permissible limits of set-point.[56]

¶28.) During the voyage too, the reefer had malfunctioned thrice, with approximately taking 40 hours during each malfunction to bring down the return temperature to the set-point.[57] Subsequent to voyage a work order details that the evaporator coil was replaced due to a leak.[58]

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[49] Page 81, SURVEY REPORT, 7th International Maritime Arbitration Moot, 2020.
[50] Exportadora Valle De Colina S.A. v. Maersk Line [2010] EWHC 3224 (Comm) (U.K.).
[51] Exportadora Valle De Colina S.A. v. Maersk Line [2010] EWHC 3224 (Comm) (U.K.).
[52] David A Glass, *Sour Grapes in the Reefer Trade? – The Exportadora case*, 8 SHIPPING AND TRANSPORT INTERNATIONAL, Sept. 2011, at 35.
[53] Cl. 6(e), PAGE 14, CHARTER PARTY, 7th International Maritime Arbitration Moot, 2020.
[54] Rey Banano Del Pacifico v. Transportes Navieros [2000] 2 Lloyd's Rep. 15 (U.K.).
[55] Page 105, TEMPERATURE LOG, 7th International Maritime Arbitration Moot, 2020.
[56] Page 106, TEMPERATURE LOG, 7th International Maritime Arbitration Moot, 2020.
[57] Page 106, TEMPERATURE LOG, 7th International Maritime Arbitration Moot, 2020; *see also* Page 108, TEMPERATURE LOG, 7th International Maritime Arbitration Moot, 2020; *see also* Page 111, TEMPERATURE LOG, 7th International Maritime Arbitration Moot, 2020.
[58] Page 73, SURVEY REPORT, 7th International Maritime Arbitration Moot, 2020.

Moreover, according to the survey report in respect of the container, the temperature fluctuations could have been caused by the problems with the container condenser fan motor and the container temperature sensor issues respectively.[59] Therefore, in light of these circumstances it is clear that the container provided by the Charterers was not properly maintained[60] and inspected before loading on to the vessel. Also, this is the actual reason for the high level of malfunction giving rise to regular temperature fluctuations[61] resulting in damage to the cargo.[62]

1.3 ARGUING BUT NOT CONCEDING, OWNERS ARE NOT LIABLE TO THE FULL EXTENT

¶29.) It is humbly submitted, arguing but not conceding that the owner's (vessel's crew) negligence cannot make them liable for damages, to the full extent, because, *firstly,* such negligence was not the proximate cause of the damage and *secondly,* the Charterers also contributed to the damage so caused.

1.3.1 OWNER'S NEGLIGENCE WAS NOT THE PROXIMATE CAUSE OF THE DAMAGE

¶30.) The cause, truly proximate, is that which causes the damage even in the absence of other causes, but may not be true vice versa.[63] In the instant case, the inherent vice of the cargo i.e. pre-shipment issues of anthracnose, cigar end rot and crown rot exacerbated as a result due to temperature fluctuations for a short period of time. The same ought to happen, even after taking due care due to poor quality of cargo.

¶31.) The question of causation should be approached with a broad common sensical view of the whole position.[64] In the present case, the common sense approach lean towards the inherent vice of shipper's poor quality bananas to not withstand the ordinary incidents of the voyage. The argument is supported by the fact that the shipper witnessed such rotting of cargo in the previous shipment too,[65] even when the carriage involved proper cooling compliance.

¶32.) Moreover when the duty to provide cargo in good order and condition was that of shipper under the B/L, the Charterers' should have raised this defence before the shipper before

[59] Page 1, BACKGROUND OF THE CLAIM, 7th International Maritime Arbitration Moot, 2020.
[60] Peregrine Storrs-Fox, *The carriage of cargo in non-operating reefers,* MARITIME RISK INTERNATIONAL, Apr.2017, at 227.
[61] R.C. Springall, *The Transport of Goods in Refrigerated Containers: The Australian Perspective* LLOYD'S MARITIME AND COMMERCIAL LAW QUARTERLY 222 (Jul. 1987).
[62] Riverstone Meat Co. v. Lancashire Shipping Co. [1961] AC 807 (U.K.).
[63] Leland Shipping Co. v. Norwich Union Fire Insurance Society [1918] AC 350 (U.K.).
[64] Leyland v. Norwich Union [1918] AC 350 (U.K.).
[65] Page 78, SURVEY REPORT, 7th International Maritime Arbitration Moot, 2020.

settling the claim. Due to improper knowledge of the Charterer's, the owners mustn't be made liable to bear the amount paid by the charterer to the shipper.

1.3.2 THE CHARTERERS ALSO CONTRIBUTED TO THE DAMAGE SO CAUSED

¶33.) Contributory negligence means that there has been some act or omission on the part of the aggrieved, which has materially contributed to the damage caused.[66] For these purposes "negligence" is used in the sense of carelessness in looking after its own safety rather than in its sense of breach of duty.[67] In instant case, the Charterer's negligence in properly maintaining the reefer container signifies their careless conduct in looking after their own cargo's safety.[68]

¶34.) In *Precis*,[69] failure to instruct an independent actuary, who would have been likely to have discovered the error, amounted to contributory negligence. Drawing parallel from this case, even though it was crew's responsibility to monitor and repair the malfunctions, Charterers' failure to maintain container prior to loading, must amount to contributory negligence.

¶35.) Applying the principles of *Ryland v Fletcher*,[70] bananas would not have rotten but for the Charterers' negligence in maintaining the container. Thus, the Charterers are barred from claiming of the damages.

[66] C.T. WALTON, CHARLESWORTH & PERCY ON NEGLIGIENCE 242 (13th ed. 2014).
[67] Lewis v. Denye [1939] 1 KB 540 (U.K.).
[68] SOYER & TETTENBORN, *supra* note 5.
[69] Precis PLC v. William M. Mercer Ltd. [2004] EWHC 838 (U.K.).
[70] Ryland v. Fletcher [1868] UKHL 1 (U.K.).

2. IT CANNOT BE EXPECTED FROM THE OWNERS (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.[71] 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.[72]

¶37.) Expectations have an empirical base, in what the parties to a contract believe to be their understandings, promises, and obligations.[73] Sometimes expectations arise from express representations or promises; other times they are implicit in words, conduct, or setting.[74] In the instant case, there is no reasonable and legitimate expectation of the vessel's crew to advise and consult the charterers in case of reefer malfunction as *firstly,* there is no express promise in this regard **[2.1];** *secondly,* no such promise is implicit in owner's responsibilities in the c.p. **[2.2].**

2.1 THERE IS NO EXPRESS PROMISE IN THIS REGARD

2.1.1 DUTY UNDER CLAUSE 17(B) AND CLAUSE 5(B) IS LIMITED TO MAINTAINING LOGS

¶38.) It is humbly submitted that Cl. 5 of the c.p. lays down the various obligations of the owner with respect to goods and containers. Under this, sub-clause (b) sets out those tasks for which the charterers are entitled to look to the owners for crew-assistance.[75] Owner's crew assistance is thereby limited to only two tasks, *firstly*, monitoring and recording performances; *secondly,* supplying labor and standard tools for the repairing of the Charterers' refrigeration machinery; and *lastly,* the owner's obligation of notifying charterers arose only in case the resources on-board were insufficient.

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[71] *Expectation,* OXFORD ENGLISH DICTIONARY (3rd ed. 2010).
[72] Catherine Mitchell, *Leading a Life of Its Own? The Roles of Reasonable Expectation in Contract Law*, 23(4) OJLS 649, 665 (2003).
[73] STEVEN J. BURTON & ERIC G. ANDERSEN, CONTRACTUAL GOOD FAITH: FORMATION, PERFORMANCE, BREACH, ENFORCEMENT 54 (1995).
[74] *Id.*
[75] Cl. 5(b)(viii), Page 14, CHARTER PARTY, 7th International Maritime Arbitration Moot, 2020.

2.1.1.1 Monitoring and recording performances do not require any consultation with the charterers.

¶39.) 'Monitoring' is defined as to watch and check a situation carefully for a period of time in order to discover something about it.[76] 'Recording' means to keep information for by the future, by writing it down or storing it on a computer.[77] It is the overriding principle of interpretation of contracts that the intention of the parties must be ascertained objectively.[78] Moreover, the intention of the parties is to be ascertained exclusively from the words of the contract itself as used in their context.[79] Therefore, use of the words 'monitoring' and 'recording' makes it prominent that the intention of the parties herein is clear and limited to only maintaining logs and taking up repair activities in case of any deviation found.

2.1.1.2 Obligation is only limited to supplying labor and standard tools

¶40.) The liability under Cl. 5(b) only provides for the supplying of labor "when available"[80] and Cl. 17(b),[81] to which cross-reference must be made here, provides for "reasonable endeavors without responsibility" approach to repairing refrigeration machinery. Post supplying of labor by the owners, such workmen become the servants of the charterers for all the subsequent repair work undertaken according to the provision of the c.p. In the clear terms the obligation of the owner under the c.p. comes to an end on supplying of experienced crew and standard tools and therefore it cannot be expected of the owners to advise charterers on reefer malfunction.

2.1.1.3 The owner's obligation of notifying charterers arose only in case the resources on-board were insufficient

¶41.) Clause 17(b) of the c.p. provides for repair of the charterers' containers to be an extraordinary task, so that the charterers are responsible for all additional expenses incurred by the owners. Furthermore, the vessel's crew is considered the charterer's servants during such repairs, and therefore the charterers have no recourse to the owners if they feel that repairs were not done properly or that something which could have been repaired wasn't repaired.

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[76] *Monitoring,* OXFORD ENGLISH DICTIONARY (3rd ed. 2010).
[77] *Recording,* OXFORD ENGLISH DICTIONARY (3rd ed. 2010).
[78] BCCI v. Ali [2002] 1 AC 251 (U.K.); *see also* Reardon Smith v. Hansen Tangen [1976] 2 Lloyd's Rep. 621 (U.K.); *see also* Multi-Link Leisure Developments Ltd v. North Lanarkshire Council [2011] 1 All ER 174 (U.K.).
[79] Ocean Bulk Shipping and Trading v. TMT Asia [2011] 1 AC 662 (U.K.).
[80] Cl. 5(b)(viii), Page 14, CHARTER PARTY, 7th International Maritime Arbitration Moot, 2020.
[81] Cl. 17(b), Page 19, CHARTER PARTY, 7th International Maritime Arbitration Moot, 2020.

¶42.) The clause also addresses the problem if the repair is beyond the resources of the vessel. It is in this case that it becomes the duty of the owners to immediately to notify the charterers, so they may take appropriate steps. However, this duty kicks in only when the demand of 'insufficiency' is raised by the vessel's crew who are working as servants of the charterers. In the instant case, there was no such demand of 'insufficiency of resources' raised by the vessel's crew and therefore the owners were never called in to fulfill this duty.

2.1.2 DUTY TO CARE UNDER CLAUSE 17(A) IS LIMITED TO ADOPTING A 'SOUND SYSTEM'

¶43.) It is well established that the obligation to care for and carry the goods 'properly' means 'in accordance with a sound system.'[82] Such 'sound system' needn't be underpinned by any theoretical calculation or empirical study and must be in accordance with the general industry practice.[83] In the instant case too, absence of any consultation with the charterers doesn't vitiate the 'sound system' adopted by the vessel's crew in discharging its obligation of 'due care'. This is because, *firstly,* 'sound system' comprises of the obligations under specific sub-clause 17 (b) and *secondly,* 'sound system' in accordance with the general industry practice doesn't call for any consultation/advise.

2.1.2.1 'Sound System' comprises of the obligations under specific sub-clause 17(b)

¶44.) Clause 17 (a) of the c.p. calls for adopting a 'sound system' for properly and carefully keeping care of goods and containers, subsequently sub-clause 17(b) defines the extent of such system with respect to refrigerated goods and containers. It was held in the case of *Albacora Srl*[84] that a sound system does not mean a system suited to all the weaknesses and idiosyncrasies of a particular cargo, but a sound system under all the circumstances in relation to the general practice of carriage of goods by sea.

¶45.) It is well settled rule of interpreting contracts that a specific provision prevails over a general provision.[85] In the instant case too, while sub-clause 17(a) provides for a general duty of care, sub-clause 17(b) is a specific provision defining the scope of such duty of care. The intention of the parties to include a specific provision like that of Clause 17(b) was to well define the liabilities and responsibilities of the owners (vessel's crew) with respect to taking care of refrigerated cargo and containers. As discussed above, there is nothing in this specific

[82] G.H. Renton & Co. Ltd. v. Palmyra Trading Corporation of Panama [1956] 2 Lloyd's Rep. 379 (U.K.).
[83] Volcafe Ltd. v. Compania Sud Americana De Vapores SA [2016] EWCA Civ 1103 (U.K.).
[84] Albacora Srl v. Westcott & Laurence Line [1966] 2 Lloyd's Rep. 53 (U.K.).
[85] Marifortuna v. Government of Ceylon [1970] 1 Lloyd's Rep. 247 (U.K.); *see also* Petroleum Oil and Gas Corporation of South Africa (Pty) v. FR8 Singapore Pte Ltd. [2009] 1 Lloyd's Rep. 107 (U.K.).

provision which calls upon the owners to advise/consult charterers that the reefer was malfunctioning and therefore absence of any consultation with the charterers doesn't vitiate the 'sound system' adopted by the vessel's crew in discharging its obligation of 'due care'.

2.1.2.2 'Sound system' in accordance with the general industry practice doesn't call for any consultation/advice

¶46.) It is well-established that one of the indicia of a sound system is that it must be in accordance with general industrial practice.[86] In *The Rio Sun*[87] upon discharge of a cargo of crude oil, a high percentage of the cargo was found to have formed a hard, waxy, unpumpable residue in the bottom of the vessel's tanks. The cargo claimants contended that the carrier was in breach of its obligations under article III rule 2 in failing to heat the cargo. The judge rejected that contention, on the basis that there was no general industry practice to heat crude oil cargoes of that particular blend.

¶47.) In the instant case too, various surveys and statistical data[88] highlights that difficult operating conditions of refrigerated containers, cause the risk of disruption or even damage leading to malfunction to be very high.[89] Amongst such damage the most common recorded malfunctions are associated with refrigerant and refrigerant related components,[90] as was the case with the charterer's container also.[91] This shows that malfunctioning of a reefer-container in the container industry is a common event to occur and there is nothing extra-ordinary about such malfunction which requires the crew to advise/consult the charterers about the same.

¶48.) Owing to the fact that malfunction occurs frequently, the parties had devised a system of undertaking repairs as and when necessary,[92] which expressly doesn't include advising the charterers before undertaking the repairs. Therefore, in absence of any general industrial practice, advising/consulting charterers doesn't form a part of sound system.

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[86] Volcafe Ltd. v. Compania Sud Americana De Vapores Sa [2016] EWCA Civ 1103 (U.K.).
[87] Gatoil International Inc v Tradax Petroleum Ltd. [1985] 1 Lloyd's Rep 350 (U.K.).
[88] Christina Francis et al., *An investigation of refrigerant leakage in commercial refrigeration,* 74 INT. J. REFRIG. 12, 12-21 (2016).
[89] Ewelina Zloczowska, *Maritime Containers Refrigeration Plant Faults Survey,* NEW TRENDS IN PRODUCTION ENGINEERING 589 (2018) at 589-595.
[90] W. Kostrzewa, K. Gawdzińska, C. Behrendt and S. Berczyński*, Determination of the frequency and number of occurrences of damage to the cooling systems of fishing vessels*, NOTEBOOK RESEARCH OF THE GDYNIA MARITIME UNIVERSITY, at 24-36.
[91] Page 127, MALFUNCTION REPORT – 13/07/2018, 7th International Maritime Arbitration Moot, 2020; s*ee also* Page 128, MALFUNCTION REPORT – 29/07/2018, 7th International Maritime Arbitration Moot, 2020.
[92] Cl. 17(b), Page 19, CHARTER PARTY, 7th International Maritime Arbitration Moot, 2020.

2.1.2.3 Arguendo, charterers have been kept duly informed through malfunction reports

¶49.) It is submitted that the crew has fulfilled her liabilities under the c.p., particularly clause 17 (b), and maintained due care for all reefer and other units on board. Charterers, being the true owners of the containers and the carrier of goods under B/L, were kept duly informed on the observations and actions taken by the crew on the subject unit by means of the different mal-reef reports. It must also be noted that when taking into account of the time zone of the vessel the different reports were issued and sent in time.

¶50.) Furthermore, the claim of the charterers that no mal-reef report has been issued on 5th July, 2019[93] cannot be sustained as the reefer monitoring system on board automatically generated such report[94] on receiving the comments entered in by the vessel crew conducting the monitoring and automatically sends it to the charterers.[95] Therefore due to the absence of any human involvement in the process, it cannot be the case that the same monitoring system could send out reports automatically on two other occasions but not on 5th July 2019.

2.2 NO SUCH PROMISE IS IMPLICIT IN OWNER'S RESPONSIBILITIES IN THE C.P.

¶51.) The process whereby a term will be implied into a contract is an exercise in the construction of the contract as a whole.[96] It has been well established by the courts and arbitrators that the courts will not be over-ready to imply terms or to make presumptions about the intention of the parties.[97] A term will be implied into a c.p. only if it is necessary to do so in order to give business efficacy to the transaction, that is to say where the contract will not work, or leads to manifestly absurd consequences, unless the term is implied, but not otherwise.[98]

¶52.) Lord Clarke had held in the case of *The Reborn*,[99] that, the question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs.

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[93] ¶2, Page 7, EMAIL COMMUNICATION – 16/04/2018, 7th International Maritime Arbitration Moot, 2020.
[94] Page 126, MALFUNCTION REPORT – 05/07/2018, 7th International Maritime Arbitration Moot, 2020; *see also* 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).
[95] 19, Page 2, CLARIFICATIONS, 7th International Maritime Arbitration Moot, 2020.
[96] 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.).
[97] North West Metropolitan Regional Hospital Board v. Trollope & Colls [1973] 1 WLR 601 (U.K.).
[98] The 'Moorcock' (1889) 14 P.D. 64, 68; *see also* Shirlaw v. Southern Foundries [1939] 2 KB 206, 227 (U.K.).
[99] Mediterranean Salvage & Towage v. Seamar Trading & Commerce [2009] 2 Lloyd's Rep. 639 (U.K.); *see also* North Sea Ventures v. Anstead Holdings [2010] 2 Lloyd's Rep. 265 (U.K.).

However, in the instant case, the c.p. explicitly provides that in case of any malfunction of the container, the vessel's crew must endeavor to repair and rectify such malfunction. The most usual inference from the express terms is that the only duty to be undertaken by the crew post-knowledge of malfunction is that of repair and not of consultation/advise. The parties had intended something to happen and the same was expressed in the instrument. Therefore, this c.p. works perfectly well in the sense that both the parties can perform their express obligations, however, implicating any un-intended obligations would violate the fundamental principle of freedom to contract of the parties.[100]

¶53.) Furthermore, implication of 'duty to advise' in the c.p. fails the criteria for testing whether a term should be implied,[101] because, *firstly,* it is unreasonable and inequitable as it frustrates the intention of the parties to lay down an express mechanism in case of reefer malfunction. *Secondly,* such implication is not necessary to give business efficacy to the contract as the repair mechanism is effective even without such implication. *Lastly*, it contradicts the terms of the c.p. as the c.p. provides for notification to the charterers only in form of reefer-malfunction reports. Therefore, there exists no implied duty to advise charterers in case of reefer-malfunction.

[100] Attorney-General of Belize v. Belize Telecom Ltd [2009] 1 WLR 1988 (U.K.).
[101] *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1978) 52 A.L.J.R. 20 (P.C.) (Austl.).

3. THE CHARTERERS DID NOT INFORM/NOTIFY THE OWNERS OF THE CLAIM ACCORDING TO THE CHARTERPARTY

¶54.) Clause 16 h of the Charterparty[102] 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 the innocent party a loss which is the Charterer's customer, innocent party may recover that amount with costs.[103]But it does not preclude the Owner from disproving such liability.[104]The Charterer in the present case has failed to notify the Owner of the Cargo damage claim according to the Charterparty as there was no notice or protest at time of discharge of goods **[3.1];** No joint survey was conducted by the Owners and Charterers **[3.2];** There is a breach of Clause 16h of the Charterparty **[3.3];** and the Cargo claim was not reasonably settled **[3.4].**

3.1 THERE WAS NO NOTICE AT TIME OF DISCHARGE OF GOODS

¶55.) 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 parties.[105]

¶56.) A carrier may be precluded from attacking a lack of precision in the measure of damages where the carrier has failed to give plaintiff advance notice of damage to the cargo, so that the plaintiff was unprepared to inspect, and where the plaintiff's surveyor was prevented from conducting a joint survey of the damage, it was held that no damages could be claimed without an advance notice of the damage.[106]

¶57.) It is pertinent to note here that the Charterers had various opportunities to inform the Owners of the alleged loss on various occasions. No advance notice whatsoever was given by the Charterers while discharging the cargo from the Vessel, unpacking of boxes, notice of consignee to the Charterers, joint survey between Charterers and the third party.[107] The

[102] Cl. 16(h), Page 14, CHARTER PARTY, 7th International Maritime Arbitration Moot, 2020.
[103] COOKE ET AL., *supra* note 4.
[104] Sacor v. Repsol [1998] 1 Lloyd's Rep. 518 (U.K.).
[105] Rep. of Secretariat of United Nations Conference on Trade and Development on Bills of Lading (1971) https://unctad.org/en/PublicationsLibrary/c4isl6rev1_en.pdf (last visited Feb. 10, 2020).
[106] *Amstar Corp. v. M/V Alexandros T.*, 472 F. Supp. 1289, 1298-1299 (D. Md. 1979) (4th Cir. 1981) (U.S.).
[107] Page 4, EMAIL COMMUNICATION – 19/11/2019, 7th International Maritime Arbitration Moot, 2020.

Charterers waited more than 6 months to bring the claim[108] into the notice of the Owners and have started the arbitration process after a year from the period of the alleged wrong.[109]

3.2 NO JOINT SURVEY WAS CONDUCTED

¶58.) A carrier may be precluded from attacking a lack of precision in the measure of damages where the carrier has failed to give plaintiff advance notice of damage to the cargo and the plaintiff was unprepared to inspect, and where the plaintiff's surveyor was prevented from conducting a joint survey of the damage.[110] In *Cass Mixte n°11-18710,* it was further ruled that in such circumstances a unilateral report could not be the exclusive source of evidence.[111] Further, the Cour de Cassation overruled a judgment of the Court of Appeal which had condemned the defendant based upon a unilateral survey report where the defendant contested the findings of the surveyor.[112]

¶59.) The condition for such surveys to be valid and admissible as evidence is that both parties to the dispute are afforded an opportunity to comment on the contents of the survey report as held by the Cour de Cassation in one of its decisions where it was laid down that the findings of a unilateral survey report may be taken into consideration provided that the parties' lawyers had been able to comment upon its content.[113]

3.3 THERE IS A BREACH OF CLAUSE 16 H OF THE CHARTERPARTY

¶60.) In order to have a right of indemnity, the owner or charterer must have a liability to a third party. Where a court or arbitrators have determined that a party has such a liability, it ordinarily satisfies this requirement. Problems may arise, however, where a party faced with a claim decides to settle it without any determination of its actual liability, and then seeks indemnity.[114] In this situation, the burden is on the settling party to show that it had an actual liability to the third party.[115]

[108] Page 9, EMAIL COMMUNICATION – 16/01/2019, 7th International Maritime Arbitration Moot, 2020.
[109] Page 1, NOTIFICATION, 7th International Maritime Arbitration Moot, 2020.
[110] COOKE ET AL., *supra* note 4.
[111] Cass Civ 1 n°15-16643 (Fr.).
[112] COOKE ET AL., *supra* note 4, at 648.
[113] (Cass Civ 2 n°10-19919) (Fr.).
[114] COOKE ET AL., *supra* note 4, at 648.
[115] BERNARD EDER ET AL., SCRUTTON ON CHARTERPARTIES AND BILLS OF LADING 557 (24th ed. 2019).

3.3.1 PAYMENT WAS MADE IN EXCESS OF THE AMOUNT STATED IN BOX 32

¶61.) The Charterers were afforded the opportunity to settle losses with third parties arising out of the c.p., without prejudice to their right to recover such losses from the Owners.[116] However, the Claim Settlement Authority of the Charterers was limited to 3000 US$.[117] In the present case, the Charterers have settled an amount far exceeding the stipulated amount without any notice to the Owners.[118] The primary intention behind stipulating a maximum amount of settlement without the consultation of Owners was given so that big amount of claims are not settled without proper consultation between the Owners and the Charterers.[119]

3.3.2 THERE WAS NO CONSULTATION BETWEEN THE CLAIMANT AND RESPONDENT

¶62.) Cl. 16(h) of the Charter Party stipulates a certain mechanism for settlement of claims with third parties.[120] Any settlement above US 3000 $ has to be made after consultation with the Owners. The Charterers have not consulted the Owners before settling the Claim. It is pertinent to note here that the first email communication notifying the Owners of the Claim was sent on 16/01/2019, pursuant to which the Charterers settled the claim with the third party within the time period of 15/01/2019-30/01/2019.[121] A prudent man cannot undertake consultation of a claim of this amount within 15 days without any communication from the Owners.

¶63.) In *The Atlantic Power,* [122]the panel denied the charterer's claim for indemnity from the owner for a cargo damage claim that the charterer had settled. The charterer had not notified the owner of the claim, and had instead proceeded to secure a survey and settle with the claimant on its own. In *The Atlantic Current,*[123] the owner and charterer were both carriers under the bill of lading. Suit on a cargo claim was brought against the owner and it tendered defense to the charterer, who merely rejected the tender. The owner later settled the cargo claim and commenced an arbitration with the charterer to press its claim for indemnity. The panel was critical of the owner's failure to give the charterer advance notice of the settlement with cargo. Thus, the Charterers have failed to consult the Owners before settling the claim.

[116] Cl. 16, Page 14, CHARTER PARTY, 7th International Maritime Arbitration Moot, 2020.
[117] Cl. 16(h), Page 14, CHARTER PARTY, 7th International Maritime Arbitration Moot, 2020.
[118] Page 73, SURVEY REPORT, 7th International Maritime Arbitration Moot, 2020.
[119] Atlantic Power, SMA 3886 (Arb. at N.Y. 2005) (U.S.).
[120] Cl. 16(h), Page 14, CHARTER PARTY, 7th International Maritime Arbitration Moot, 2020.
[121] 23, Page 3, CLARIFICATIONS, 7th International Maritime Arbitration Moot, 2020.
[122] Atlantic Power, SMA 3886 (Arb. at N.Y. 2005) (U.S.).
[123] The Atlantic Current, SMA 2567 (1989) (Williams van Gelder) (U.S.).

3.4 THE CLAIM OF THE CARGO OWNER WAS NOT REASONABLY SETTLED

¶64.) 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.[124] According to *Fisher v. Val de Travers Asphalte*,[125] 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.[126]

¶65.) The amount settled with a third party is generally recoverable as damages if it is reasonably settled.[127]If the settlement is not reasonable, it is irrelevant in law.[128]According to *Supershield v. Seimens Building Technology*,[129] the settlement can be subjective in the minds of both parties but should be reasonable enough to indicate that all the variables have been taken care of.

¶66.) Megarry J once described the law reports as charts of the wrecks of unsinkable cases.[130] Because of its uncertainty and expense, prudent parties usually try to avoid litigation where possible. It has to be borne in mind that the "settlement value" of a claim is not an objective fact or something which can be assessed by reference to an available market but a matter of subjective opinion, taking account of all relevant variables.

¶67.) The settlement in the present case has been done by the Charterers without taking into consideration all relevant documents, facts, and circumstances and is based on a unilateral scientific survey without considering the contentions of the Owners. The settlement was done in a mechanical manner by unilaterally deciding on the behalf of the Owners without affording them an opportunity to participate in the process.

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[124] Wayne Courtney, *Settlement following Breach of Contract,* MARITIME RISK INTERNATIONAL, Sept. 2013, at 47.
[125] Fisher v. Val de Travers Asphalte Co [1876] 1 CPD 511 (U.K.).
[126] Supershield v. Siemens Building Technology [2010] 1 Lloyd's Rep. 349 (U.K.).
[127] Courtney, *supra* note 124, at 157.
[128] John F Hunt v. Asma Engineering Ltd. [2008] 1 All ER 180 (U.K.).
[129] Supershield Ltd. v. Siemens Building Technologies Fe Ltd. [2010] EWCA Civ 7 (U.K.).
[130] Supershield Ltd. v. Siemens Building Technologies Fe Ltd. [2010] EWCA Civ 7 (U.K.).

PRAYER

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

ADJUDGE

a. That the Owners did 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 not be expected of the vessel's crew to advise Charterers if the reefer was malfunctioning.
c. That the Charterers did not perform their part of the Agreement with regard to keeping the Owners informed of the claim.

AWARD

a. Interest and costs in favor of the Respondents.
b. Further or other reliefs.

COUNSEL FOR RESPONDENT