TEAM 333 A

2ND NATIONAL LAW UNIVERSITY ODISHA MARITIME LAW MOOT COURT COMPETITION, 2015

IN THE MATTER OF AN ARBITRATION HELD IN LONDON

CLAIMANT/ OWNER — RESPONDENT/CHARTERER

AND

AMDSC — HAPPY TURDS GROUP

MEMORIAL FOR THE CLAIMANT

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

1. All ER	All England Law Reports
2. Art	Article
3. BIMCO	Baltic and International Maritime Council
4. C/P	Charter Party
5. Cl.	Clause
6. CLJ	Cambridge Law Journal
7. Ed	Edition
8. ETA	Estimated Time of Arrival
9. EWCA (Civ)	Court of Appeal (Civil Division)
10. EWHC	England and Wales High Court
11. HTG	Happy Turds Group
12. Inc	Incorporated
13. KB	Law Reports King's Bench
14. Lloyd's Rep	Lloyd's Law Reports
15. LMAA	London Maritime Arbitrators Association
16. LRPC	Privy Council Appeals
17. Ltd.	Limited
18. NYPE	New York Produce Exchange Form-93
19. Para	Paragraph
20. QBD	Law Reports Queen's Bench Division
21. S	Section
22. TLR	Times Law Reports
23. UKHL	United Kingdom House of Lords
24. USD	United States Dollar
25. Vessel	m.v. ANKU

INDEX OF AUTHORITIES

CASES

BOOKS AND ARTICLES

STATUTES AND CONVENTIONS

STATEMENT OF JURISDICTION

The Arbitral Tribunal has jurisdiction over the present matter pursuant to Section 30 read with Section 6 of the Arbitration Act, 1996:

30. Competence of tribunal to rule on its own jurisdiction.

(1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to—

(a) Whether there is a valid arbitration agreement,

(b) Whether the tribunal is properly constituted, and

(c) What matters have been submitted to arbitration in accordance with the arbitration agreement.

(2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part.

***6. Definition of arbitration agreement**.*

(1) In this Part an "arbitration agreement" means an agreement to submit to arbitration present or future disputes (whether they are contractual or not).

(2) The reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement.

STATEMENT OF FACTS

DATE	EVENT
January 04, 2008	HTG approached AMDSC to time charter their vessel m.v. ANKU for a monthly advance hire of USD 75,000 per day for a period of 18 months i.e. till August 01, 2009.
January 14, 2008	The proposed Charter Party was enclosed by AMDSC post negotiation.
January 20, 2008	The proposed terms were accepted by HTG and subjects lifted at 1500 hours. It was requested that information regarding vessel position be communicated by AMDSC for urgent business.
February 01,2008	Date of delivery of vessel at specified loading port which was also made an essential condition as per HTG communication dated January 20, 2008. Contents of Charter Party: The Charter Party was based on a standard form NYPE 93 signed between AMDSC and HTG. It contained an Anti-Technicality Clause which was a rider clause prescribing a 48 hour notice period to be given by the Claimant before invoking withdrawal clause. The speed of the vessel was described as 20 knots per hour.
April 15, 2008	An internal report was released by HTG to its Chartering Department informing them regarding a breakdown of engine & subsequent grounding which lasted for 5 days, from April 3, 2008 till April 7, 2008. The Claimant who denied liability and stated the same to be a latent defect in the engine. The commercial team was in the process of calculating losses suffered.
May 02, 2008	The Claimant communicated a default in payment of May hire by Respondent and gave notice of 42 hours to make payment of due amount, failing which they shall withdraw the vessel.
May 04, 2008	A notice on non-payment of hire and resulting notice of withdrawal on the 43rd hour, which is 0000 hours on May 04, 2008 was communicated to HTG. A letter of protest was subsequently issued by the Respondent vide email stating that the payment had been made in the 44th hour in compliance with the Anti-Technicality Clause withholding USD 475,000 (i.e. approximately 6.33 days of hire attributed towards period of off hire and resultant grounding),thereby making the withdrawal unfounded. A negotiation with the Head of Department of AMDSC was called for.
May 05, 2008	AMDSC informed HTG that the withholding of payment was erroneous in law since they could not be held responsible for the engine breakdown and maintainability of off-hire must be entertained through legitimate recourse as per the Charter Party.

May 07, 2008	An internal report was issued by the Respondent to their Chartering Department stating that the Charter Party dated January 20, 2008 was terminated by AMDSC on insufficient grounds and it was concluded post negotiations that entering into a second Charter Party was feasible. The previous Charter Party was thereby adopted with logical amendments wherein all other terms and conditions of the previous Charter Party were adopted without prejudice to respective rights & remedies of the parties. The subjects for the same were lifted at 1600 hours and the altered specifications included the delivery date being May 10, 2008, the hire per day being USD 150,000 and the duration of the contract being 24 months.
September 10, 2008	Vessel speed mis-description of 10 knots per hour. Charterers terminate and seek to redeliver. Market rate of T/C is USD 25,000 per day.
September 11, 2008	Owners refuse termination and redelivery and state that Charterers are intending to take advantage of market fluctuations.
January 1, 2009	Vessel has been waiting for 4 months now and as a result the Owners terminate the C/P – delivered to SNP on 15th January 2009. Market rate is USD 50,000 per day.
January 12, 2009	Invocation of arbitration and appointment of Mr. Born by the Owners.
January 15, 2009	Charterers appoint Mr. Matt as their arbitrator.

STATEMENT OF ISSUES

I. Jurisdictional Issue

(i) Whether the arbitral tribunal has jurisdiction to hear the present dispute.

(ii) Whether the arbitration clause was validly incorporated from the first Charter Party into the second Charter Party in the absence of specific incorporation.

II. Whether the Charterers were entitled to make an adjustment hire following a period of off -hire?

III. Whether the Owners committed a repudiatory breach by withdrawing the vessel without giving a valid notice pursuant to the Anti-technicality Clause.

IV. Whether non-payment of hire amounted to breach of the Charter Party by the charterers, and the effect of subsequent payment.

V. Whether mis-description of speed in the second Charter Party amounted to breach and entitled the charterers to terminate the charter party.

VI. Whether by continuing with the Charter Party for 4 months, the charterers had waived their right to terminate/claim damages.

VII. If the Charterers had repudiated the Charter Party, whether the Owners were entitled to exercise their right to elect and keep the vessel waiting at the anchorage.

VIII. Quantification of damages.

SUMMARY OF ARGUMENTS

I) THE HON'BLE TRIBUNAL HAS JURISDICTION TO HEAR THE PRESENT DISPUTE AND NO SPECIFIC INCORPORATION IS REQUIRED FOR THE ARBITRATION CLAUSE

The Arbitral Tribunal has jurisdiction to hear the present dispute under Clause 45 (b) of the NYPE Form 1993. English law and English Arbitration Act, 1996 shall be the governing law and the procedural law respectively. It has further been considered that due to the transaction being the same, only one tribunal must be set up to hear disputes arising out of both the charter parties. Further, it has been stated that no specific incorporation was required for the arbitration agreement to be considered.

II) THE CHARTERERS ARE NOT ENTITLED TO MAKE AN ADJUSTMENT HIRE FOLLOWING A PERIOD OF OFF HIRE.

The loss of time caused to the charterers due to a latent defect cannot be adjusted and that all necessary design and maintenance standards were maintained exonerating the owners from unseaworthiness of the vessel. The amount deducted by the Respondents is substantially in excess. Further the Respondents have failed to itemize the deductions made or provide details for the deductions.

III) THE OWNERS DID NOT COMMIT A REPUDIATORY BREACH BY WITHDRAWING THE VESSEL.

The sufficiency of notice in accordance with the anti-technicality clause does not hold merit since the initial non-payment or subsequent part-payment was wilful, which in itself would constitute a default that the Charterer cannot be absolved of. It is submitted that the Charterers may not treat the contract as repudiated, the right to withdraw is an express right provided under Clause 11(a) of the NYPE Form, The notice of default was valid since the Anti-Technicality Clause was inapplicable. Arguendo, the payment disbursed was lesser than the hire payable thereby validating the termination.

IV) THE NON-PAYMENT OF HIRE AMOUNTED TO BREACH OF THE CHARTER PARTY BY THE CHARTERERS AND THE SUBSEQUENT PAYMENT SHALL HAVE NO EFFECT ON THE NATURE OF DEFAULT

It is submitted that the non-payment of hire amount constituted a breach of the Charter Party and that the subsequent payment cannot amend such breach since the Charterers would not be

absolved of the resultant default. It is submitted that the payment of hire is a condition. The payment of less than the amount due does not fulfil the requirement for full and timely payment of hire. The underpayment after serving of notice amounted to renunciation. The withholding of payment of hire is erroneous in law and hence a repudiatory breach of the charter party.

V) MISDESCRIPTION OF SPEED IN THE SECOND CHARTER PARTY DID NOT AMOUNT TO A BREACH NOR ENTITLED THE CHARTERERS TO TERMINATE THE CHARTER PARTY.

It is submitted that there was no misrepresentation of the speed of the vessel as of the date of delivery of vessel. In any event, such misdescription amounted to breach of a warranty and did not entitle the Charterers to terminate the charter party. Arguendo, misdescription of speed was breach of an intermediate term and did not amount to a repudiatory breach of the second charter party.

VI) ARGUENDO, BY CONTINUING WITH THE CHARTER PARTY FOR 4 MONTHS, THE CHARTERERS HAD WAIVED THEIR RIGHT TO TERMINATE/CLAIM DAMAGES.

Assuming but not conceding that there was a misdescription of the speed of the vessel that would vest a right of termination in the Charterers, it is submitted that the Charterers had waived their right to do so, in full awareness of the relinquishment of such a right and in light of communication between the parties. Acceptance of the vessel and failure to inspect the same amounted to a waiver on the part of the Charterers.

VII) IF THE CHARTERERS HAD REPUDIATED THE CHARTER PARTY, OWNERS WERE NOT ENTITLED TO EXERCISE THEIR RIGHT TO ELECT AND KEEP THE VESSEL WAITING AT THE ANCHORAGE.

It is submitted that the Owners were not bound to accept the repudiation of the charter party by premature redelivery of the vessel and instead, had the right to refuse to accept such repudiation by exercising their right of election in keeping the contract alive and claiming hire for the period as there is a legitimate interest in insisting upon the performance of the second charter-party.

VIII) THE CLAIMANTS ARE ENTITLED TO DAMAGES

The charterers failed to give any orders as a result the vessel simply waited at anchorage where it was, awaiting orders but earning hire. The Respondents are entitled to a sum of USD 45,00,092 hire being calculated at 150,000 per day. The breakdown of the vessel was caused due to a latent defect in the engine and hence cannot be made payable.

ARGUMENTS ADVANCED

ISSUE I: JURISDICTIONAL ISSUE

[A.] THE ARBITRAL TRIBUNAL HAS JURISDICTION TO HEAR THE PRESENT DISPUTE.

It is submitted that English law has long unequivocally affirmed the parties' autonomy to select the law governing the arbitration agreement.[1] One leading decision goes on to state that, "the parties may make an express choice of the law to govern their commercial bargain and that choice may also be made of the law to govern their agreement to arbitrate."[2] The Arbitration Act, 1996 gives statutory force to this well recognized right of the parties to choose which law governs the validity of an arbitration agreement.[3] Since the parties have chosen English law to apply to the contract and specified London as the seat of arbitration[4], therefore, both arbitral procedure and the merits of this dispute are governed by English law.

Having specified this in the agreement, the competence-competence doctrine applies to this international arbitral tribunal, which provides, in general terms, that international arbitral tribunals have the power to consider and to decide disputes concerning their own jurisdiction.[5] Under §§30, 31 of the Arbitration Act, 1996, the competence-competence doctrine which has been incorporated states that unless otherwise agreed, an arbitral tribunal may consider and make a decision on its own jurisdiction, subject to subsequent judicial review. The scope of the tribunal's power to decide upon its own jurisdiction under §30(1) includes: (a) whether there is a valid arbitration agreement, (b) whether the tribunal is properly constituted, and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement.[6] Thus, it is manifest that even the question of validity of an arbitration agreement is to be answered by the arbitral tribunal itself. A challenge by the Respondents on the ground of non-incorporation of arbitration agreement from the first charter party to the second too, would be

[1]ROBERT MERKIN, ARBITRATION LAW, ¶7.8 (Lloyd's Commercial ***Law*** Library 2007).
[2]Union of India v. McDonnell Douglas Corp., [1993] 2 Lloyd's Rep. 48, 50 (Q.B.).
[3] U.K. Arbitration Act, §46(1)(a) (1996).
[4]Refer to Annexure 1: NYPE 93 charterparty, Clause 45(b).
[5]GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 853 (Wolters Kluwer, 2009).
[6]Albon v. Naza Motor Trading Sdn Bhd, [2007] EWHC 1879 (Ch.); ROBERT MERKIN, ARBITRATION LAW, ¶9.6-97 (Lloyd's Commercial ***Law*** Library 2007).

covered by this clause, and hence, it is submitted that this Tribunal has jurisdiction to hear the present case.

[B.] THE ARBITRATION CLAUSE WAS VALIDLY INCORPORATED FROM THE FIRST CHARTER PARTY INTO THE SECOND CHARTER PARTY.

Arbitration is the natural and preferred means for resolving international business disputes.[7] The status of international arbitration as a neutral, efficient and expert means of international dispute resolution precludes arguments that special clarity should be required in an arbitration agreement. The parties' reference to an instrument that contains an arbitration clause should be interpreted to include that provision, just as it includes choice-of-law and similar provisions that have been developed to support the underlying commercial provisions in question.[8] If this Hon'ble Tribunal does not accept this submission of the Claimant, a situation of great uncertainty will be created; wherein under the very nature of the applicability of English law to this arbitral dispute will be called into question. Thus, the reference in the second charter party to 'all other terms and conditions as per previous c/p' should go on to include a reference to the arbitration agreement as per first c/p.

The rationale behind imposing heightened proof requirements of the existence of an agreement to arbitrate has been largely discredited, at least in the context of international arbitration.[9]In furtherance of this, it is submitted that authorities have found a valid arbitration agreement based only on a general reference to another document containing an arbitration clause.[10] In *Sea Truck Maritime* case it was held that English law accepts incorporate of standard terms by the use of general words.[11]Moreover, this is within the terms of §6(2) of the Arbitration Act, 1996 dealing with incorporation of arbitration agreements by reference, which stipulates that reference in an agreement to a document containing an arbitration clause constitutes an arbitration agreement. Also, in context of standard form contracts, it has been observed that "in principle an arbitration clause may be incorporated by a reference to a standard form of contract

[7]GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 646 (Wolters Kluwer, 2009).
[8]*Ibid,* p. 701.
[9]*Ibid,* p. 646.
[10]Sea Truck Maritime v. Hellenic Mut. War Risks Ass'n (Bermuda) Ltd., [2007] 1 Lloyd's Rep. 280 (Q.B.).
[11]*Ibid. See also*, Secretary of State for Foreign and Commonwealth Affairs v. Percy International and Kier International, (1998) unreported ***as cited in*** Andrew Tweeddale, *Cases - Incorporation of Arbitration Clauses*,(2002) 68 Arbitration 1, p. 55.

or the particular terms of another contract in which the clause is set out even without express reference to the clause.[12]

International contracts frequent seek to incorporate arbitration agreements or rules from other instruments, and in some cases, an agreement will incorporate an arbitration clause from another contract.[13] In cases involving a general reference to another instrument, one of whose provisions is an arbitration clause, courts will typically examine the nature of the two contracts, the extent to which both parties were or should have been aware of the arbitration clause, the sophistication of both parties, custom and trade usage, the clarity of the reference and the extent to which incorporation of the arbitration clause would produce a workable dispute resolution mechanism.[14] All of these conditions are met with in the present case so as to suggest that the arbitration agreement was validly incorporated into the second c/p.

It is further submitted that whether an arbitration clause in one agreement extends to disputes under other agreements is a question of the parties' intent, but courts have endeavoured to construe the parties' contracts in a commercially-sensible manner than, insofar as possible, permits a single, centralized dispute resolution mechanism. So long as the parties to the relevant contracts are the same, and the contracts all relate to a single project or course of dealing, English courts have generally been willing to hold that an arbitration clause in one agreement extends to related agreements.[15] Also, in dealing with the question of whether an arbitration clause contained in one, but not all, of the successive contracts between the same parties extends to disputes under subsequent (or earlier) contracts, courts have looked to the language and relationship of the parties' agreements in order to determine their intent, while generally presuming that the parties desired a single, sensible and efficient dispute resolution mechanism.[16]Some courts have also held that the pre-existing arbitration clause presumptively applies to disputes under subsequent agreements that attempt to resolve disagreements under the earlier contracts.[17]

[12]Mustill & Boyd, *International Commercial Arbitration* 106 (2nd ed. Butterworths Law 1989).
[13]GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 695 (Wolters Kluwer, 2009).
[14]*Ibid*,p. 702.
[15]Al-Naimi v. Islamic Press Agency Inc., [2000] 2 Lloyd's Rep. 522, 524 (English Court of Appeal); Fletamentaos Maritimos SA v. Effjohn Int'l BV, [1996] 2 Lloyd's Rep. 304 (Q.B.).
[16]GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 74-76 (Wolters Kluwer, 2009).
[17]Niro v. Fearn Int'l Inc., 827 F.2d 173, 175 (7th Cir. 1987); Coody Custom Homes, LLC v. Howe, 2007 Tex. App. LEXIS 3603 (Tex. App. 2007).

Lastly, it is submitted that the mere fact that a dispute does not arise, and a party does not assert claims, until after the parties' underlying contract has terminated does not necessarily prevent the dispute from being arbitrated pursuant to a separate arbitration clause in the underlying (and expired) contract. Born notes that it is settled law in most developed jurisdictions that termination of the parties' underlying contract does not necessarily or ordinarily terminate the parties' arbitration agreement.[18] This is a consequence of the separability presumption embodied within §7 of the Arbitration Act, 1996 which permits the arbitration agreement to survive the underlying contract.[19]

Arguendo, it is submitted that the first c/p be considered to be a 'umbrella agreement' as the bulk of the rights, duties, liabilities and remedies *inter se* the parties continue to be incorporated therein. If construed otherwise, gross uncertainty (as stated above) would result. Where the parties have entered into a number of different agreements, either simultaneously or consecutively, each with or sometimes without a separate dispute resolution mechanism, if a single, unitary dispute resolution mechanism governs all of the parties' various relations as a clause in a single 'umbrella agreement', then application of the clause to disputes arising under several contracts is not controversial: there is no reason that an arbitration clause in one contract cannot encompass disputes under another contract, or coordinate dispute resolution mechanisms, provided that this in what the parties intended.[20]

[18]Gar GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1118 (Wolters Kluwer, 2009).
[19]U.K. Arbitration Act, §46(1)(a) (1996).
[20]GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1110 (Wolters Kluwer, 2009).

ISSUE II: THE CHARTERERS ARE NOT ENTITLED TO MAKE AN ADJUSTMENT HIRE FOLLOWING A PERIOD OF OFF HIRE

The owners are relived from the liability for the losses caused due to unseaworthiness of the vessel.[21] The Claimant is exonerated when he proves that, despite the exercise of due diligence to make the ship seaworthy, the loss or damage resulted from the unseaworthy condition of the vessel.[22] Such a condition may result from latent defects, that is, defects not discoverable by the exercise of due diligence or from transitory unseaworthiness, that is a condition that arose once the ship broke ground.[23]The loss of time caused to the charterers due to a latent defect cannot be adjusted and that all necessary design and maintenance standards were maintained exonerating the owners from unseaworthiness of the vessel. [24]

Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from latent defects not discoverable by due diligence.[25]It covers defects which would not have been discoverable by due diligence, even if the claimant could not show that he had in fact exercised due diligence.[26]

[A.] FAILURE TO MAKE PAYMENT OF HIRE IN FULL IS A BREACH OF CONDITION

The Charterers have made unauthorized deductions, or deductions exceeding the proper amount, which can be treated the same as non-payment[27] the off-hire clause being in the nature of an exception is to be construed narrowly against the charterer because it is included for his sole benefit'[28]. The obligation in to make punctual payment of hire *was* a condition.[29] The wording of the clause makes it clear that there was a right to withdraw whenever there was a failure to make punctual payment.[30]

[21] Article IV(2)(p) Hague Visby Rules.
[22]The Tecomar SA 765,.1150, 1991 AMC 2432 (S.D.N.Y 1991)
[23] ibid
[24]Tata, Inc. v. Farrell Lines Inc 1987 AMC 1764 (S.D.N.Y) 1987
[25] Article IV (2) (p) Hague Visby Rules
[26]Scrutton, Charterparties, 20thedn, London: Sweet & Maxwell, p 450., Corp Argentina de Productores de Carnes v Royal Mail Lines Ltd. (1939) 64 LIL 188, p 192 , The Antigoni [1991] 1 Lloyds Rep 209, CA.
[27] John D Kimball '*Termination of rights under time charters'* in Rhidian Thomas 221.
[28] John Weale 'The NYPE Off-hire Clause and Third Party Intervention: Can an Efficient Vessel be Placed Off-hire' available at http://www.simsl.com/Weale_Off-hirepaper9.pdf, accessed on 29 July 2012 ('John Weale'). See also Burton & Co v English [1877] 6 Ch D 265
[29] Kuwait Rocks Co v AMN Bulk Carriers Inc (The "Astra") – QBD (Comm Ct) (Flaux J) [2013] EWHC 865 (Comm)
[30] *Ibid*

The amount withheld is stated to be 4,75,000. Assuming but not conceding that the off hire clause is triggered the amount deducted would be estimated to be 3,75000 for a period of 5 days. The amount deducted by the Respondents is substantially in excess. Further the Respondents have failed to itemize the deductions or provide details for the deductions.[31]Clause 17 Line 225 states that 'or any other similar cause preventing the full working of the vessel' the cause must be one that is in essence similar to those mentioned in Clause 17. It is further stated that although the NYPE 1993 is a net loss of time charter payment of hire resumes once the Vessel becomes fully efficient. The owners denied that the ship was off hire after she refloated and was again in full working order.[32] It was further accepted that Clause 17 should not construed so as to allow the deduction of time lost after the ship again becomes fully efficient.[33]

[B.] BONAFIDE BELIEF TO DEDUCT IS NOT ENOUGH

As there is no right to deduct either under the terms of the charter or on the basis of equitable set off the fact that the charterers believed they have a right of deduction will not prevent the claimants from exercising their right of withdrawal for non-payment or under payment of hire.[34] The claimant has in no way mislead the charterers to believe that there is no objection to the charterers deduction.

The charterers' deductions showed a lower balance due than the ship owners expected.[35] The charterers failed to itemize their deductions.[36]Details were not provided resulting in the withdrawal of the vessel. The charterer's deductions were not made reasonably.

The underpayment was not a valid set off, the ship owners were entitled to withdraw as a result of such unreasonable deductions.[37]It was further stated that the first question was whether, in making the deduction from hire, the charterers had acted in good faith and assessed the sum on a reasonable basis. The charterers had not done so and solely relying on the assessments made have acted purely on the basis of their calculations.[38]

[31] The MihaliosXilas [1979]1 WLR 1018,HL
[32] The Marika M [1981] 2 Lloyd's Rep. 622
[33] Vogeman v. Zanzibar (1901) 6 Com. Cas 253 and (1902) 7 Com Cas (C.A
[34] The Lutetian, [1982] 2 Lloyds Rep. 140, at page 154.
[35]The MihaliosXilas [1979]1 WLR 1018,HL
[36] Ibid
[37]The Chrysovolandou Dyo [1981] 1 Lloyd's Rep. 159, QB
[38](2006) 687 LMLN 3

ISSUE III: THE OWNERS DID NOT COMMIT A REPUDIATORY BREACH BY WITHDRAWING THE VESSEL SINCE A VALID NOTICE WAS GIVEN DUE TO THE INAPPLICABILITY OF THE ANTI TECHNICALITY CLAUSE

The remedy of withdrawal is available to the Owners in the event of non-payment of hire under a time charter. It must be noted that the sufficiency of notice in accordance with the anti technicality clause does not hold merit since the initial non-payment or subsequent part-payment was willful, which in itself would constitute a default that the Charterer cannot be absolved of. It is submitted that **[A.]** the Charterers may not treat the contract as repudiated, **[B.]** the right to withdraw is an express right provided under Clause 11(a) of the NYPE Form, **[C.]** The notice of default was valid since the Anti Technicality Clause was inapplicable and **[D.]** Arguendo, the payment disbursed was lesser than the hire payable thereby validating the termination.

[A.] THE CHARTERERS MAY NOT TREAT THE CONTRACT AS REPUDIATED

A repudiation of a contract may be said to have occurred only when a party evinces a complete inability to perform the intended contract, i.e., there is a total failure of performance,[39] and it may not be lightly inferred.[40] The test for repudiation is that the act or conduct of the promisor must be such as to amount to an intimation of the intention to abandon the contract,[41] i.e., that a reasonable person assessing the breach would conclude that the promisor would be absolutely unable to perform the contract.[42] This may occur when there is either a breach of a contractual condition, or a breach of a warranty amounting to a fundamental breach of the contract.[43]

The alleged breaches of the obligations under the charter with respect to withdrawal of the vessel due to insufficient notice does not frustrate the very purpose of the contract. It is noteworthy that the alleged violation in terms of giving an invalid notice cannot be construed as an intimation of intent to abandon. In case no notice was served and the withdrawal was

[39] ANDREW GRUBB, THE LAW OF CONTRACT 1493 (3rd edn, Lexis Nexis Butterworths 2007); Heyman v Darwins Ltd [1942] AC 356, 397; Universal Cargo Carriers Corp v. Citati [1957] 2 QB 401, 436; Koompahtoo Local Aboriginal Land Council v. Sanpine Pty Ltd [2007] HCA 61.
[40] Ross T Smyth & Co Ltd v. TD Bailey Son & *Co* [1940] 3 All ER 60
[41] Freeth v Burr (1873-74) LR 9 CP 208, 213.
[42] ANDREW GRUBB, THE LAW OF CONTRACT 1497 (3rd edn, Lexis Nexis Butterworths 2007).
[43] Davidson v Gwynne 12 East 380, 389; Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd [1962] 2 QB 26; Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale, [1966] 2 WLR 944; Photo Production Ltd v Securior Transport Ltd, [1980] AC 827, 849; SIR JACK BEATSON, ANDREW BURROWS AND JOHN CARTWRIGHT, ANSON'S LAW OF CONTRACT (29th edn, Oxford University Press 2010).

invoked, such intention could have been inferred. Infact, a breach of condition of non-payment of hire was committed on behalf of the Charterers. It may further be stated that the period of notice was made adequately clear as 42 hours, which was not substantially shorter than the contractually determined 48 hours, thereby making it plausible for the Charterers to fulfill, which opportunity was not taken by the defaulting party.

Therefore, in the absence of any further hindrance to the performance of the contract,[44] the Owners' notice cannot be termed as a fundamental breach going to the root of the contact, and thus, cannot be held to be repudiation.[45]

[B.] THE RIGHT TO WITHDRAW IS AN EXPRESS RIGHT PROVIDED UNDER CLAUSE 11(A) OF THE NYPE FORM

If the Charterers fail to make punctual payment of an installment of hire, that is to say payment on or before the due date, the Owners are entitled by the withdrawal clause to withdraw the ship from their service and thus bring the charter to an end. [46] The same has been echoed by Lord Wright in the case of Tankexpress v. Compagnie Financiere Belge des Petroles[47]. It must further be noted that the expression 'without prejudice to the liberty to withdraw' has been expressly stated in the hire payment clause.[48]

[C.] THE NOTICE OF DEFAULT WAS VALID SINCE THE ANTI TECHNICALITY CLAUSE WAS INAPPLICABLE

The inapplicability of the clause can be deduced on the basis of terms of the standard form NYPE wherein an express right has been provided to the Owners under Clause 11(a) to withhold the performance of any and all of their obligations under the charter party wherein they shall have no responsibility whatsoever for any consequences has been provided for. The Explanatory notes issued by BIMCO maybe relevant for the purpose of understanding the usage of this clause even though it may not be directly applied. In a situation wherein the Charterer goes bankrupt immediately before the start of a new voyage and the hire is due, the

[44] Jackson v. The Union Marine Insurance Company Ltd, (1874-75) LR 10 CP 125.
[45] Davidson v. Gwynne 12 East 380, 389; Hongkong Fir Shipping Co Ltd v. Kawasaki Kisen Kaisha Ltd, [1962] 2 QB 26; Suisse Atlantique Société d'Armement Maritime SA v. NV Rotterdamsche Kolen Centrale, [1966] 2 WLR 944; Photo Production Ltd v. Securior Transport Ltd [1980] AC 827, 849.
[46] Michael Wilford, Time Charters, (5th ed. et al LLP, 2003).
[47] (1948) 82 LI.L. Rep. 43
[48] Line 150 & Line 151 of NYPE Form

Owner may resort to the recourse under the said clause.[49] It must be noted that providing a notice under the rider clause is also an obligation, the performance of which can be withheld as long as a notice with a clear.

Insofar as Clause 11(b) providing for a grace period is concerned, the same operates where the failure to make punctual and regular payment is "due to oversight, negligence, errors and omissions on part of the Charterers or their bankers". It must be however noted that in the present dispute the payment has not been made willfully at the behest of the Charterer thereby disentitling them of the benefit of this clause.

The notice in the present case was dispatched on Friday, however the payment could still have been made, and was in fact successfully made on Sunday. Thereby, the Charterers may not seek the defence of the same. Even if the said contention was taken, the law is settled on the matter in The Zographia M case[50] with regard to making punctual payments.

[D.] *ARGUENDO*, THE PAYMENT DISBURSED WAS LESSER THAN THE HIRE PAYABLE THEREBY VALIDATING THE TERMINATION

It must also be noted that the amount paid as part of the hire at the 44th hour succeeding the notice was in contravention of the requirement of the notice. Thereby deprivation of the benefit of the anti technicality clause requiring a 48 hour notice period before invocation of the withdrawal clause does not hold merit. It must be considered that the Charterers acted in bad faith from the starting of the default period wherein, firstly, no payment was made for the month of May, followed by part payment being made while withholding certain sum as deduction for alleged off-hire without negotiating the quantification of the same with the Owners and finally, contestation of the same on the basis of insufficiency of notice period.

Therefore, the charter was only terminated upon the Owner's contractual right to withdraw and there was no repudiatory breach committed by the Owner preceding such termination. It must also be stated that the anti technicality clause is inapplicable in the present case, thereby making the form and period of notice to be valid.

[49] Explanatory notes issued by Baltic and International Maritime Council on NYPE Form
[50] [1976] 2 Lloyd's Rep. 382

ISSUE IV: THE NON-PAYMENT OF HIRE AMOUNTED TO BREACH OF THE CHARTER PARTY BY THE CHARTERERS AND THE SUBSEQUENT PAYMENT SHALL HAVE NO EFFECT ON THE NATURE OF DEFAULT

It is submitted that the non-payment of hire amount constituted a breach of the Charter Party and that the subsequent payment cannot amend such breach since the Charterers would not be absolved of the resultant default. It is submitted that **[A.]** the payment of hire is a condition, **[B.]** The payment of less than the amount due does not fulfill the requirement for full and timely payment of hire **[C.]** The underpayment after serving of notice amounted to renunciation **[D.]** the withholding of payment of hire is erroneous in law and hence a repudiatory breach of the charter party and **[E.]** as a result of the repudiation or renunciation, the Owners elected to terminate the contract, while reserving their right to claim damages

[A.] THE PAYMENT OF HIRE IS A CONDITION

It has been held)[51] that in considering that a time charter-party is essentially a contract for the provision of services, the Commercial Court has held that a particular clause with regard to the payment of hire is a condition. A condition as opposed to a warranty is an essential stipulation of the contract which one party guarantees is or promises will be fulfilled. Any breach of such a stipulation entitles the innocent party, if he so chooses, to treat himself as discharges from further performance of the contract, and notwithstanding that he has suffered no prejudice by the breach. [52] Thereby, it can be concluded that the non-payment of hire was a default with amounted to an actual breach wherein the Owner exercised his right to withdraw without waiving the same under the second paragraph of Clause 11 (a) of the NYPE. Failure to pay hire thereby amounts to repudiation of the contractual obligation on part of the Charterers.

[B.] THE PAYMENT OF LESS THAN THE AMOUNT DUE DOES NOT FULFILL THE REQUIREMENT FOR FULL AND TIMELY PAYMENT OF HIRE

It is submitted that it has been previously held in a number of authorities, including but not limited to, *The Agios Giorgis case*[53] and *The Mihalios Xilas case*[54] that the right of the owners to withdraw arises not only when no hire is paid or when hire is paid late but it also arises when

[51] Kuwait Rocks Company v. AMN Bulkcarriers Inc (The MV "Astra") [2013] EWHC 865 (Comm).
[52] Chitty, GENERAL PRINCIPLES, THE LAW OF CONTRACTS, (Sweet & Maxwell, 2008 ed.).
[53] [1976] 2 Lloyd's Rep. 192.
[54] [1976] 2 Lloyd's Rep. 697.

a timely payment has been made, but for less than the amount due, and the outstanding balance is not paid by or on the due date. In both cases it was conceded by the charterers that a timely but insufficient payment gave rise to the right to withdraw.

It may further be taken cognizance of that, considering but not admitting to, the ship being off-hire, the same was not on the due date of payment of hire and was much before the due date. Even in the said situation the Owner was entitled to receive timely and full payment.

[C.] THE UNDERPAYMENT AFTER SERVING OF NOTICE AMOUNTED TO RENUNCIATION

As per the notice dated May 4, 2008, it is noteworthy that even after the serving of notice of default in payment of May hire, USD 475,000 was withheld without any intention of deduction being communicated. A renunciation of contract occurs when a party to the contract absolutely or unequivocally expresses their total inability or refusal to perform. [55] Such an expression need not be expressly made. [56] Admittedly, the Charterers letter was not an express renunciation but it was an indication that they would not be discharging their obligations under the Charter. Further, their indication that of deduction of amount despite the Owner's insistence that a latent defect in the engine cannot be attributed to them was an expression of doubt as to their will or ability to perform. Moreover, it must be noted that no intention to make deductions were communicated to the Owner which makes the conduct of the Charterers even more suspicious. This may be reasonably inferred to be an indication of their absolute inability to perform their obligations under the charter party. [57]

[D.] THE WITHHOLDING OF PAYMENT OF HIRE IS ERRONEOUS IN LAW AND HENCE A REPUDIATORY BREACH OF THE CHARTER PARTY

It is submitted that as per the letter dated May 5, 2008, the Owners have taken the contention withholding of payment is erroneous in law. Assuming but not conceding to the fact that charterers have the right to make a deduction, those deductions have to be made in a bona fide manner and the sum claimed has to be reasonable.[58]

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[55] ARTHUR ROSETT, PARTIAL, QUALIFIED, AND EQUIVOCAL REPUDIATION OF CONTRACT 93, 107 (Columbia Law Review 1981); Jaks (UK) Ltd v Cera Investment Bank, SA [1988] 2 Llyod's Rep 89, 93

[56] GH Treitel, The Law of Contract ¶ 17-074 (12th ed. Sweet & Maxwell 2007) para 17-074

[57] [57]Arthur Rosett, *'Partial, Qualified, and Equivocal Repudiation of Contract'* (1981) 81 Columbia Law Review 93, 95; SK Shipping (S) Pte Ltd v. Petroexport Ltd [2009] EWHC 2974 (Comm).

[58]The Nanfri [1978] 1 Lloyd's Rep. 581.

[E.] AS A RESULT OF THE REPUDIATION OR RENUNCIATION, THE OWNERS ELECTED TO TERMINATE THE CONTRACT, WHILE RESERVING THEIR RIGHT TO CLAIM DAMAGES

At the outset, it must be stated that subsequent payment of hire would not absolve the Charterers of their liability arising out of the default under Clause 11 (a). The right to withdraw is not lost merely because the charterers tender the overdue hire before the owners have given notice. If the charterers fail to pay in time, they are in default and their tender of hire thereafter cannot alter that position.[59]

The decision of Court of Appeal to the contrary on a charter in *The Georgios C.*[60] was expressly overruled by the House of Lords in *The Laconia*[61], where the charter under consideration was the NYPE Form. Lord Wilberforce there emphasised that the words "in default of payment" had to be related to the obligation in the Baltime form to pay hire installments "in advance", saying: "The Court of Appeal have in effect construed the words 'in default of payment' not as meaning 'in default of payment in advance or later, so long as the vessel has not been withdrawn.' This is a reconstruction and not a construction of the clause."

In the absence of a requirement of a particular format or manner of accepting a repudiation or renunciation,[62] the Charterer's willingness to negotiation as well as internal communication to its Chartering Department amounted to a valid acceptance of the Owners' repudiation or renunciation, while clearly and unequivocally bringing the contract to an end.[63] Such a termination, brought about by the innocent party, discharged both the parties from performance of further obligations under the contract, but not from accrued liabilities.[64] Hence, it is contended that the Owners legally reserved their right to claim damages for the breach.

[59] Michael Wilford, Time Charters 16 (5th ed. et al LLP, 2003).
[60] [1971] 1 Lloyd's Rep. 7
[61] [1977] 1 Lloyd's Rep. 315
[62] Stocznia Gdanska SA v. Latvian Shipping Co [2001] 1 Lloyd's Rep 537; Vitol SA v Norelf Ltd (The Santa Clara) [1996] 2 Lloyd's Rep 225.
[63] Vitol SA v Norelf Ltd (The Santa Clara) [1996] 2 Lloyd's Rep 225; Force India Formula One Team Ltd v. 1 Malaysia Racing Team Sdn Bhd [2013] EWCA Civ 780; Photo Production Ltd v Securicor Transport Ltd [1980] 1 Lloyd's Rep 545.
[64] Heyman v. Darwins Ltd, [1942] AC 356; Photo Production Ltd v. Securicor Transport Ltd, [1980] 1 Lloyd's Rep 545; Hyundai Shipbuilding & Heavy Industries Co v. Pournaras, [1978] 2 Lloyd's Rep 502; Moschi v. Lep Air Services Ltd, [1972] 2 All ER 393.

ISSUE V: MISDESCRIPTION OF SPEED IN THE SECOND CHARTER PARTY DID NOT AMOUNT TO A BREACH NOR ENTITLED THE CHARTERERS TO TERMINATE THE CHARTER PARTY.

It is humbly contended that there was no misrepresentation of the speed of the vessel nor termination of the charter-party in the instant matter.

A promise that the ship is capable of a certain performance at the start of the charter does not contain any kind of implied promise that she will remain capable of that level of performance after the date of delivery[65] i.e. the ship must accord with her description of speed at the date of the charter-party.[66]Hence, variation in the speed of the ship after delivery is justified.

Furthermore, law regards a contract as satisfied if the performance given is sufficiently close to what the contract called for as to be within the margin of error which it is not commercially practicable to avoid.[67]The extent of the margin will depend on what is regarded as reasonable in the particular trade or according to any recognized commercial practice.[68]

The margin imported in the word 'about' cannot be fixed as a matter of law and must be tailored to the ship's configuration, size, draft and trim etc.[69]The description of speed in the charter party is qualified by the word 'about' and 'in good weather conditions' [70]and therefore, the owner's description of the speed of the vessel as 20 knots/ hour is not an instance of misrepresentation.

Moreover, as the charterers carried out/ were expected to carry out their own inspections of the ship[71] and not merely rely on the owners' statements. They thus had the ability to check the speed but failed to do so and could no longer lawfully reject the vessel.[72]

In any event, assuming but not conceding that there was a mis-description of the ships' speed, it did not amount to a repudiatory breach, which goes to the whole root and consideration of it.[73]Repudiation is a drastic conclusion which would only be held to arise in clear cases of a

[65] The Al Bida, [1986] 1 Lloyd's Rep. 142, 150
[66] Didmyi Corp v. Atlantic Lines and Navigation Co Inc ('The Didymi') [1988] 2 Lloyd's Rep. 108, 110, Lorentzen v. White, (1942) 74 Lloyd's .Law Rep. 161,
[67] Margaronis Navigation v. Peabody, [1964] 2 Lloyd's Rep. 153, 159
[68] Cargo Ships El-Yam v. Invotra, [1958] 1 Lloyd's Rep. 39
[69] The Al Bida [1986], 1 Lloyd's Rep. 142, 148
[70] Line 18, NYPE-93
[71] Clause 3, NYPE-93
[72] The Aegean Dolphin [1992] 2 LR 179.
[73] Bunge v. Tradex [1981] 2 Llyod's Rep 1, Boone v. Eyre (1779), 1 H. Bl 273

refusal, in a matter going to the root of the contract, to perform contractual obligations or to refuse future performance of contract,[74]which is not established in the instant matter.

A promise as to the speed which the ship is capable of maintaining is a warranty.[75]Consequently, breach of such warranty merely entitles the right to claim damages and not to treat the contract as discharged. Additionally, a mis-description amounts to a breach of condition only if it is sufficient to make a fundamental difference to that which the party had contracted to take,[76]clearly lacking in the present case.

Arguendo, description of speed of the vessel is an intermediate term[77] i.e., a term that can be neither classified as warranty nor condition.[78] When a breach of such a term occurs, if the event resulting has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties, that he should obtain from the contract,[79] only then would it entitle the innocent party to treat the contract as discharged. The results of such a breach must be serious.[80]

Nothing from the facts suggests that the vessel is incapable of reaching its destination or that undue losses have been suffered by HTG on account of such alleged mis-description, thus not substantially depriving the charterers of the benefit of the charter party.

Therefore, it is submitted that the mis-description of the speed of the vessel would not entitle the respondents to repudiate the charter party.

[74] Eminence Property Developments Ltd. v. Heaney, [2010] EWCA Civ, Woodar Investment Development Ltd v. Wimpey Construction UK Ltd, [1980] 1 WLR 277, 283, Telford Homes (Creekside) Ltd v. Ampurius Nu Homes Holdings Ltd [2013] EWCA Civ 577.
[75] Lorentzen v. White, (1942) 74 Ll.L.Rep. 161.
[76] Cargo Ships El-Yam v. Invotra, [1958] 1 Lloyd's Rep. 39, 52.
[77] The Aegean Dolphin [1992] 2 Lloyd's Rep. 179, 184.
[78] Michael Wilford, Time Charters (5th ed. et al LLP, 2003).
[79] Photo Production v. Securicor, [1980] 1 Llyod's rep 545.
[80] Hong Kong Fir v. Kawasaki Kisen Kaisha, [1961] 2 Llyod's Rep 478.

ISSUE VI: *ARGUENDO,* BY CONTINUING WITH THE CHARTER PARTY FOR 4 MONTHS, THE CHARTERERS HAD WAIVED THEIR RIGHT TO TERMINATE/CLAIM DAMAGES.

Assuming but not conceding that there was a mis-description of the speed of the vessel that would vest a right of termination in the Charterers, it is humbly contended that the Charterers had waived their right to do so.

Waiver[81]is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted.[82] If the innocent party represents to the party in breach that he will not enforce his rights, court may prevent him from going back on this representation where it would be inequitable having regard to dealings which have thus taken place between parties.[83]Waiver requires[84] an examination of any act or conduct in its context in order to ascertain whether there is a clear and unequivocal relinquishment of rights[85] and full awareness of rights waived, which must be demonstrated by showing knowledge of the underlying facts relevant to the choice or indication of intention.[86]Unlike estoppel, it is not necessary to demonstrate that the aggrieved party placed reliance on innocent party's representation.[87]

In the instant matter, the second charter party was entered into in May 2008[88] and the ship was thus placed at the disposal of the charterers for at least 4 months, till the misdescription of speed was first alleged by HTG on 10th September, 2008. Consequently, the vessel was kept waiting at anchorage for another 4 months, prior to the final termination by the claimants.[89]

[81] Mardorf Peach & Co Ltd v. Attica Sea Carriers Corporation of Liberia (The Laconia), [1977] 1 All ER 545; Bentsen v. Taylor, [1893] 2 Q.B. 274. CA.
[82] Flacker Shipping Ltd v. Glencore Grain Ltd (The Happy Day), [2002] 2 All ER (Comm) 896; Banning v. Wright [1972] 1 W.L.R. 972.
[83] Hughes v. Metropliitan Railway (1877) 2 App. Cas 439; Birmingham & District Land v. LNWR (1888) 40 Ch. D. 268.
[84]Flacker Shipping Ltd v. Glencore Grain Ltd (The Happy Day) [2002] 2 All ER (Comm) 896.
[85] United States Shipping Board v J.J. Masters and Co., (1922) 10 Ll. L. Rep. 573, 578.
[86] Fuller's Theatre and Vaudeville Co. v Rofe [1923] A.C. 435.
[87] The Kanchenjunga, [1990] 1 Lloyd's Rep 391; Flacker Shipping Ltd v Glencore Grain Ltd (The Happy Day) [2002] 2 All ER (Comm) 896.
[88] Moot Proposition, HTG Internal report dated 7th May, 2008 r/w Letter from AMDSC to HTG dated 11th September, 2008
[89]Moot Proposition, AMDSC Internal report dated 1st January, 2009

Given the communications between the parties, it is evident that the charterers inaction constitutes a clear encouragement or inducement for the owners to continue to act [90] in the belief that the contract was still in existence.

Moreover, HTG had accepted the vessel having had an opportunity to inspect it[91]but failed to do so. By acceptance of the vessel, the charterer had waived the breach of speed.[92] Moreover, by virtue of the waiver, the charterers are precluded for claiming recovery of damages for any alleged breach of the contract.[93]

In any event, equitable estoppel occurs where a person having legal rights against another, unequivocally represents (by words or by conduct) that he does not intend to enforce those legal rights, if in such circumstances the other party acts or desists from acting in reliance from that representation, with the effect that it would be inequitable for the representator thereafter to enforce his legal rights inconsistently with his representation, he will to that extent be precluded from doing so. No question arises of any particular knowledge on the part of the representator and the estoppel may be suspensory only.[94]

It is therefore submitted that HTG has waived their right to bring an action for damages and/or termination of the contract on the basis of alleged misdescription of speed.

[90] Waltons Stores (Interstate) Ltd v. Maher, (1988) 164 CLR 387.
[91] Clause 3 of NYPE-93, Annex 1Moot Proposition
[92] The Aegean Dolphin [1992] 2 LR 179.
[93] Bottiglieri Di Navigazione Spa v. Cosco Qingdao Ocean Shipping Co, [2005] EWHC 244 (Comm) ; Chemical Venture [1993] Lloyd's Rep 508
[94] Hellas (Corinth) Refineries SA v Shipping Corp of India (*The Kanchenjunga*) (*1990) 1 Lloyd's Rep 391*; Vegetable Oih (Malaysia) Sdn Bhd (The Post Chaser), [1981] 2 Llyod's Rep 695.

ISSUE VII: IF THE CHARTERERS HAD REPUDIATED THE CHARTER PARTY, OWNERS WERE ENTITLED TO EXERCISE THEIR RIGHT TO ELECT AND KEEP THE VESSEL WAITING AT THE ANCHORAGE.

The second-charterparty was for a time period of 24 months[95] but the vessel was redelivered prematurely after expiry of only 4 months.[96] This re-delivery was rejected by AMDSC, keeping the vessel at anchorage, at the disposal of HTG.[97]It is humbly contended that in the event of a wrongful repudiation by the charterers, the owners were entitled to exercise their right to elect.

Redelivery of the vessel by the charterers before the earliest permissible date, as stipulated in the charter, constitutes a repudiatory breach of the time charter.[98]However, such wrongful repudiation of the contract by the charterer does not automatically bring the contract to an end.[99]The principle of *nullus commodum capere potest de injuria sua propria* prevents a party to a contract to take advantage of his own wrong. It follows that a party cannot liberate himself from a contract by reason of his own breach.[100]

As a general rule, in case of a breach of contract, apart from termination, the innocent party has an alternative to disregard or refuse to accept repudiation and instead, affirm the contract[101] and continue with its performance.[102]Although owners cannot fulfill the contract without the cooperation of the charterers, [103]time-charters do not require a high degree of co-operation.[104]

This right of refusal to accept repudiation will be denied in extreme situations wherein it is proven that the innocent party has no legitimate interest, financial or otherwise, in insisting on performing the contract rather than claiming damages.[105]The burden is on the contract breaker

[95]Moot Proposition, HTG Internal report dated 7th May 2008.
[96]Moot Proposition, Letter from HTG to AMDSC dated 10th September 2008.
[97]Moot Proposition, Letter from AMDSC to HTG dated 11th September 2008
[98] J. Cooke, et al, Voyage Charters (6th edn, Informa 2008) para 4.31.
[99] M. P. FURMSTON, CHESHIRE, FIFOOT AND FURMSTON'S LAW OF CONTRACT 689 (15th edn, Oxford University Press 2001).
[100] Boston Deep Sea Fishing and Ice Co. v. Ansell, (1888) 39 Ch.D. 339.
[101] White & Carter (Councils) Ltd v McGregor [1962] AC 413, Anglo-African Shipping Co v Mortner [1962] 1 Lloyd's Rep. 81.
[102] Hochster v. De La Tour, (1853) 2 E. & B. 678, Hain Steamship Company Ltd v Tate & Lyle Ltd [1936] 2 All ER 597 608.
[103] Clea Shipping Corp v. Bulk Oil (The Alaskan Trader), [1983] 2 Lloyd's Rep. 645 , 652.
[104]Gator Shipping Corporation v. Trans-Asiatic Oil Ltd. S.A. (The Odenfeld), [1978] 2 Lloyd's Rep. 357.
[105]White & Carter (Councils) Ltd v. McGregor, [1962] AC 413.

to prove so and this is not discharged merely by showing that the benefit to the innocent party is small in comparison to the loss to the contract breaker.[106]

For determination of the existence of a legitimate interest, it must be proven that damages would be an adequate remedy and election to keep the contract alive would be unreasonable.[107] However, it would be an oversimplification to consider that damages were an adequate remedy where the assessment of damages would be an extremely difficult and lengthy process.[108]Moreover, law does not impose an obligation to enforce rights under the contract in a reasonable manner[109]and thus it was not wholly unreasonable for the owners to keep the contract alive for further 9 months[110]after the redelivery of the vessel.

As the hire is payable in advance, the owner can perform under the contract by keeping the ship at the disposal of the charterer, without the need for the charterers to do anything i.e. the earning of hire after purported early redelivery is not dependent on any performance by the charterers of their obligations[111] and AMDSC can therefore rightfully claim hire from HTG.

It is therefore humbly submitted that AMDSC was entitled to exercise their right to elect.

[106]Ocean Marine Navigation Ltd v. Koch Carbon Inc (The Dynamic), [2003] EWHC 1936 (Comm).
[107]Isabella Shipowner SA v Shagang Shipping Co Ltd (the Aquafaith), [2012] EWHC 1077.
[108]Gator Shipping Corporation v. Trans-Asiatic Oil Ltd. S.A. (The Odenfeld), [1978] 2 Lloyd's Rep. 357.
[109]White & Carter (Councils) Ltd v. McGregor, [1962] AC 413, 430
[110]Gator Shipping Corporation v. Trans-Asiatic Oil Ltd. S.A. (The Odenfeld), [1978] 2 Lloyd's Rep. 357., 698
[111]Isabella Shipowner SA v. Shagang Shipping Co Ltd (the Aquafaith), [2012] EWHC 1077

ISSUE VIII: THE CLAIMANTS ARE ENTITLED TO DAMAGES RESULTING FROM EARLY AND WRONGFUL REDELIVERY OF THE VESSEL.

The Claimant has maintained the charter, and has kept the ship at the disposal of the charterers the charterer has wrongfully terminated the charter.[112]As a result the running of the vessel has incurred costs such as wages and other sums for which the owners is contractually responsible for.[113] However, the owner are entitled to continue to invoice the charterer at the agreed times and rate up to the earliest redelivery date. Upon non-payment of the hire, the owner will be entitled to bring a claim against the charterer in debt, for each hire invoice he issued.[114]

The charterers failed to give any orders as a result the vessel simply waited at anchorage where it was, awaiting orders but earning hire.*[115]* Hire continues to be earned. Although the charterers are obliged under the terms of the charter to provide and pay for fuel, should the bunkers run out whilst awaiting orders, the owners can claim to stem the vessel and to charge that to the Charterers' account.*[116]*

The alternative and most commonly adopted option for an owner, who is confronted with the early redelivery of his vessel by the charterer, is to terminate the contract and bring a suit for damages. Maritime law in this point does not deviate from the general principles for the recovery of contractual damages.[117] A fundamental principle for the recovery of damages provides that the scope of damages is to put the innocent party in the financial position where he would be in, if the contract had been performed.[118]

In a time charter trip, the underlap is calculated on the basis of a hypothetical permissible trip that would have caused the lowest payment of hire.[119] Had the contract been fulfilled for the corresponding 4 months while the vessel waited at anchorage. The Respondents are entitled to a sum of USD 45,00,092 hire being calculated at USD150,000 per day.

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[112] Simon Baughen, Shipping law, 265 (3rd ed. Cavendish Publishing Limited 2004)
[113] Clause Clause 7 NYPE 1993
[114]Brian Nash, Sophie Drake, '*Early Redelivery of Vessels: Repudiation and its Consequences in the Current Market' (Clyde & Co Shipping, Commodities and Trade* (June 2012).
[115]White and Carter (Councils) Ltd. v. McGregor [1961] 3 All ER 1178
[116] *Ibid* .
[117] Koufos v. C Czarnikow Ltd (The Heron II) [1969] 1 AC 350 David Foxton, *Damages for early redelivery under time charterparties,* [2008] L.M.C.L.Q. 461, 487.
[118]Robinson v. Harman (1848) 1 Ex 850, 855 (Parke B).
[119]Santa Martha BaayScheepvaart and Handelsmaatschappij NV v. Scanbulk A/S (The Rijn), [1981] 2 Lloyd's Rep. 314.

[A.] THE CLAIMANTS CANNOT BE HELD LIABLE AS THE LOSSES SUFFERED BY THE RESPONDENT ARE TOO REMOTE

The commercial losses suffered by the Respondent will be recoverable only if they satisfy the relevant tests of causation and remoteness. The Respondent must show that the breaches of the Claimant must have been the cause in fact and law and the "effective or dominant cause"[120] and not merely an occasion for the damage.[121] A loss will be too remote if at the time of contracting it was not within the reasonable contemplation of the parties that a breach would likely result in such a type of loss.[122] The breakdown of the vessel as a result of a latent defect cannot be considered to be in the ordinary course of events of the voyage.[123]

[B.] CLAIMANTS ARE ENTITLED TO THE PAYMENT OF HIRE IN FULL.

The breakdown of the vessel was caused due to a latent defect in the engine and hence cannot be made payable[124]. The deduction made from hire of USD 475,000 was not made with a reasonable assessment and the Claimants are hence entitled to receive the complete payment of hire.[125]There was plainly no loss of time and thus no off-hire case could be sustained.[126]

The Claimant is entitled to the full hire including the deductions made of USD 475,000. The damages claimed are in excess as even the off hire amounting to USD 375,000 is for a period of 5 days. The additional amount of USD 100,000 is not itemized correctly and has been unreasonably deducted.

[C.] CLAIMANTS ARE NOT ENTITLED FOR DAMAGES FOR REDUCTION IN SPEED OF THE VESSEL.

The Respondents cannot claim for damages in terms of speed reduction as there is no evidence supporting this assessment of reduction in speed. In order to assess consumption both at the most favourable ends of the range of normal conditions and moderate weather and at the most

[120] Humber Oil Terminal Trustee Ltd v. Owners of the Sivand (The Sivand), [1998] 2 Lloyd"s Rep 97, 101; Royal Greek Government v. Minister of Transport, [1949] 83 LI.L. Rep 228, 236
[121] Quinn v. Burch Bros Ltd, [1966] 2 All ER 283.
[122] Hadley v. Baxendale, [1854] 9 Exch 341, 354; Koufos v. C. Czamikow Ltd., (The Heron II) [1969] 1 A.C. 350, 384
[123] Victoria Laundry (Windsor) Ltd v. Newman Industries Ltd, [1949] 2 KB 528, 539
[124]Article IV, Carriage of Goods by Sea 1971.
[125] The Nanfri, [1978] 2 Lloyd's Rep 132
[126](2007) 733 LMLN 3

un-favourable ends and averaging the two it is necessary to have the required documentation.[127] It might be that actual performance in the early period of the charter would be good evidence as to whether, on delivery, the vessel had the required capability, but it was no more than that.[128] The Claimant is not entitled to the pay for any additional sum deducted in excess in terms of off hire.

[127]Luxor Trading Corporation v. Arab Maritime Petroleum Transport Co. (The Al Bida) - Court of Appeal (Fox, Parker & Nicholls L.JJ.), *(*1986) 185 LMLN 2
[128]*Ibid.*

PRAYER FOR RELIEF

In light of the above submissions, the Claimants request the Tribunal to:

1. **Declare** that the Tribunal has jurisdiction in the matter and the jurisdiction clause was validly incorporated into the second charter party.
2. **Find** that the Charterers were not entitled to make an adjustment following a period of off -hire.
3. **Find** that the Owners had not committed a repudiatory breach by withdrawing the vessel without giving a valid notice pursuant to the Anti-technicality Clause.
4. **Find** that the non-payment of hire amounted to breach of the charter party by the Charterers.
5. **Find** that the misdescription of speed in the second charter party did not amount to a breach and the Charterers were not entitled to terminate the charter party.
6. **Find** that by continuing with the charter party for 4 months, the Charterers had waived their right to terminate/claim damages.
7. **Find** that if the Charterers had repudiated the charter party, the Owners were entitled to exercise their right to elect and keep the vessel waiting at the anchorage.
8. **Award** the following reliefs prayed for:
    - **i.** USD 4,975,092 as hire due or alternatively, as damages.
    - **ii.** Compound or alternatively simple interest under S. 49 of the Arbitration Act, 1996 at such rests and at such rates at which the tribunal deems fit.
    - **iii.** Costs with compound or alternatively simple interest on costs under S. 61 (2) of the Arbitration Act, 1996.