TEAM CODE: DREADNAUGHTC

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

IN THE MATTER OF ARBITRATION SEATED IN LONDON

BEFORE THE HON'BLE ARBITRAL TRIBUNAL

CENTRAL KOREA FABRICATION CORPORATION ...CLAIMANT

v.

FLORIDA STEEL INCORPORATED ...RESPONDENT

WRITTEN SUBMISSIONS FOR CLAIMANT

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS

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

INDEX OF AUTHORITIES

STATUTES AND RULES

CASES

BOOKS

ARTICLES AND PUBLICATIONS

Aubrey L. Diamond, "*Clean Bills of Lading*", 21(3) THE MODERN LAW REVIEW 306 (May 1958). 13

Centre for Public Resources (CPR) International Committee on Arbitration*, "Guidelines on Early Disposition of Issues in Arbitration*". 4

Eric Robine, "*The Liability of Arbitrators and Arbitral Institutions in International Arbitrations under French Law*", 5(4) ARBITRATION INTERNATIONAL 323 (1989). 3

Kah Cheong Lye (Norton Rose LLP), "*Institutional Overreach? Institutional Arbitral Rules versus Parties' Express Agreement*", Kluwer Arbitration Blog (January 17, 2013). 6

Philip W. Thayer, "*C. I. F. Contracts in International Commerce*", 53(5) HARVARD LAW REVIEW (March 1940). 6

Philip W. Thayer, "*Marine Insurance Certificates*", 49(2) HARVARD LAW REVIEW 239 (December 1935). 9

Professor Robert Merkin KC and Dr Johanna Hjalmarsson, ISSN: 0024-5488. 12

West P&I Club, Claims Guides, *Bills of Lading 1 - Functions of a Bill of Lading*. 12

STATEMENT OF JURISDICTION

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

STATEMENT OF FACTS

I. THE PARTIES

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

II. THE CONTRACT OF SALE

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

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

III. THE DISPUTE BETWEEN THE PARTIES

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

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

IV. THE INSURANCE CERTIFICATE

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

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

V. THE BILL OF LADING

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

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

VI. ARBITRATION

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

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

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

ISSUES

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

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

III. WHETHER THE INSURANCE CERTIFICATE WITHOUT THE POLICY IS SUFFICIENT AND WHETHER THE INSURANCE CERTIFICATE ITSELF CAN ACT AS A POLICY?

IV. WHETHER CLAUSING NOT AFFECTING EVIDENTIARY FUNCTION OF BILL OF LADING RENDER IT AS CLEAN?

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

SUMMARY OF ARGUMENTS

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

The S15 English Arbitration Act is a non-mandatory provision. It is further submitted that the LMAA terms in Para 7 expressly provide that the English Arbitration Act if in conflict with the terms, then the terms shall prevail over the Arbitration act 1996.

The English Arbitration Act is a general law of the country with regard to conduct of arbitral proceedings. It is pertinent to note that the parties have expressly agreed over special provisions of LMAA terms. The LMAA terms are specific to maritime arbitration.

Since the LMAA terms are Maritime specific rules and the s15 being a non-mandatory provision, the LMAA terms should prevail over the Arbitration Act and therefore the Arbitral Tribunal should consist of 3 members.

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

The English Arbitration expressly confers the power to adopt its own procedure for conduct of arbitral proceedings and for recording of evidence.

In UK summary proceedings may be invoked when there is not merit in the case according to Civil Procedural Rules. It is further submitted that the UK courts have been conferred with power to summarily decide maritime disputes.

The Respondent has no merit in his case neither the Respondent is able to maintain his claim.

The Hon’ble Tribunal ought to decide the matter by adopting the summary procedures given under LMAA.

III. WHETHER THE INSURANCE CERTIFICATE WITHOUT THE POLICY IS SUFFICIENT AND WHETHER THE INSURANCE CERTIFICATE ITSELF CAN ACT AS A POLICY?

The term "insurance” used in a c.i.f. contract, did not mean necessarily mean a "policy of insurance", and in the absence of a specific agreement to supply an actual policy of insurance, the tender of a certificate was sufficient under a c.i.f. contract.

The question should not be whether the certificate of insurance is an actual policy, but whether it is a document of the intended nature, to be regarded as the equivalent of the policy within the meaning of the contract. The intention for commercial usage can be seen in our present insurance document and hence the certificate is equivalent to policy.

It is also submitted that the Incoterms 2020 provide for certificate as a valid document, while the terms of institute cargo clause 'C' are also in consonance with the terms of risk of the insurance. Hence, the argument that a certificate is not an actual policy becomes futile.

IV. WHETHER CLAUSING NOT AFFECTING EVIDENTIARY FUNCTION WILL RENDER A BILL OF LADING CLEAN?

It is most respectfully submitted that the actual test for determining whether a bill of lading is clean or not is whether the clause inserted on the bill of lading qualifies the term apparent order and condition and whether any other such notation or remark is made on the defective quality of goods.

RETLA clause excludes superficial rusting of cargo which an inherent defect in the goods. It is further contended that the RETLA clause does not therefore attempt to qualify the apparent good order and condition, but it functions as a reservation by the carrier of a right against estoppel.

The RETLA clause has been upheld by the courts of USA and UK and therefore such a clause will not render a bill of lading unclean and consequently a bad tender.

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

The transhipment and cesser clause typed on the bill of lading is in accordance with the implied terms of the CIF. The transhipment and cesser clause typed on a bill of lading does not affect the continuous documentary cover required by the CIF contract. The bill of lading and the insurance certificate mentions name of MV Korea Generator as the vessel for voyage. Even if the bill of lading mentions the name of one vessel, it is sufficient to give continuous cover for the entire duration of the voyage. It further mentions the port of discharge and port of loading.

Despite the transhipment cesser clause typed on the bill of lading, it is a good tender since it provides for continuous documentary cover.

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

1. The contract contained an English law and London arbitration clause. The Arbitration clause mentioned in the contract clearly states that the arbitration would be governed by the LMAA Rules.

2. Party autonomy is the guiding principle in determining the procedure to be followed in an international arbitration. The arbitral proceedings are seen as an expression of the will of the parties and, on the basis of party autonomy. Once parties have validly given their consent to arbitration, that consent cannot be unilaterally withdrawn. At its origin, the rule of party autonomy related to the freedom of the parties to choose the applicable law at the time of making their contract. It now extends to the right of the parties to choose the law as it is to be applied at the time of the dispute.[1]

3. The claimants therefore contest that the number of arbitrators that should be appointed should be as per the agreement and in pursuance of the LMAA terms that have been agreed upon by both parties. The Respondents' contention of the number of arbitrators being only one as per Section 15(3)[2] is in contrary of the agreed terms of the LMAA Rules, that both the parties have agreed on initially. The Claimants submit that the parties have already agreed upon the rules to govern the procedure of arbitration by the tribunal. The process of appointing the arbitrators is also a part of the procedure of the tribunal, and shall be according to the rules agreed upon.

4. Section 4(1) and Section 4(3) state out the mandatory and non-mandatory procedures that should be followed with regards to the English Arbitration Act, 1996. The non-mandatory provisions which allow the parties to make their own arrangements by agreement but provide rules which apply in the absence of such agreement**.** The parties may make such arrangements by agreeing to the application of institutional rules or providing any other means by which a matter may be decided**.** The non-mandatory provisions act as default provisions where matters are not covered by the parties' express agreement.[3]

---

[1] REDFERN & HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION (6th ed.). [hereinafter "**Redfern & Hunter**"]

[2] English Arbitration Act, 1996, Section 15.

[3] 2, HALSBURY'S LAWS OF ENGLAND, ARBITRATION (2017).

Section 4(1) says: -

> *(1) The mandatory provisions of this Part are listed in Schedule 1 and have effect notwithstanding any agreement to the contrary.*[4]

Section 4(3) says: -

> *(3) The parties may make such arrangements by agreeing to the application of institutional rules or providing any other means by which a matter may be decided.* [5]

5. If the arbitration does have its seat in England, the mandatory provisions of the 1996 Act will apply to it in all circumstances whereas the non-mandatory provisions will apply to it unless the parties have agreed to the contrary.[6] Therefore, as per the provisions of the English Arbitration Act, the number of arbitrators that have to be appointed can be according to the institutional rules, which in this case are the LMAA Terms. The parties have agreed upon to have England as the seat of Arbitration. Any choice of law will leave intact the mandatory provisions of the 1996 Act, and ousts only that which is non-mandatory and inconsistent with the rules in the law of the arbitrator's choice. Arbitration must have some connection with an accepted system of law in order to be recognized as valid in English law.[7]

6. Rule 2 of LMAA Intermediate Claims procedure states that: *"The parties are free to agree on the composition of the tribunal but, in the absence of agreement, the tribunal is to consist of three arbitrators."*

7. According to this rule, there was no express agreement between the parties on the number of arbitrators that were to be appointed, therefore in pursuance of Rule 2, a tribunal of three arbitrators was constituted. Honouring to the agreed procedure, there is no agreement in place between the parties to the contrary, and therefore shall the tribunal be formed according to the above mentioned rule of the LMAA rules.

8. The Rider Clause (essentially the clause of arbitration that is mentioned on the bill of lading + the agreement to follow LMAA Terms and Procedure) makes the English law as the substantive law and the LMAA Terms as the procedural law.[8]

---

[4] English Arbitration Act, 1996, Section 4(1).
[5] English Arbitration Act, 1996, Section 4(3).
[6] GEORGIOS I. ZEKOS, INTERNATIONAL COMMERCIAL AND MARINE ARBITRATION 238.
[7] Bank Mellat v. Helliniki Techniki, [1984] QB 291; Coppee-Lavalin v. Ken-ren Ltd, [1994] 2 All ER 449.
[8] Sifandros Carrier Ltd v. LMJ International Ltd, [2018] Indlaw CAL 418. [hereinafter "**Sifandros**"]

9. The arbitration proceedings would be done in consonance with the LMAA Rules that was the decided institutional rule that had to be followed, even though the seat of arbitration was to be in London in pursuance with English Law.[9]

10. Therefore, the claimants humbly submit that the parties have agreed upon the procedure of the arbitration to be according to the above mentioned rules, and request the tribunal to honour such agreement of the parties, and claim that the constitution of the tribunal be according to the same, i.e. with three arbitrators.

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

11. The Claimants most respectfully submit that the case of the respondents is based on unmeritorious and fraudulent claims, and hence is the tribunal empowered to dispose of the proceedings in a summary manner by having a limited two hours of oral hearing for each party. The claimants argue that the parties have agreed to submit the procedure according to the rules of the LMAA, and the rules provide for the procedure that is applied for by the claimants and when parties agree to enter into an institutional arbitration, they agree to be bound by the rules and procedures of that arbitral institution.[10]

12. It is further submitted that the Civil Procedural Rule 24.2[11] allow for summary disposal of any matter. It is further submitted that the admiralty courts in England have been conferred with power for disposing matters summarily under two grounds provided in Civil procedure Rules 24.3[12] which are –

> "The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –
>
> (a) it considers that –
>
> (i) that claimant has no real prospect of succeeding on the claim or issue; or
>
> (ii) that defendant has no real prospect of successfully defending the claim or issue; and

[9] Specialised Vessel Services Limited v. MOP Marine Nigeria Limited, [2021] 2 C.L.C. 72].
[10] Eric Robine, "*The Liability of Arbitrators and Arbitral Institutions in International Arbitrations under French Law*", 5(4) ARBITRATION INTERNATIONAL 323 (1989).
[11] Civil Procedural Rules, Part 24.
[12] Civil Procedural Rules, Part 24.

(b) there is no other compelling reason why the case or issue should be disposed of at a trial."

13. It is most respectfully submitted that the grounds for summary disposal of the case by a tribunal must be in accordance with Civil Procedural Rules.

14. It is further submitted that, the claimants submit that the Tribunal is empowered to adopt such procedure for summary disposal of the dispute before it, since the power to do the same has been conferred under the rules of LMAA that have been agreed by the parties. According to the LMAA Intermediate Claims Procedure 2021, Rule 11(a)[13] states that "*There is no automatic right to an oral hearing and only exceptionally will one be held….*"

15. The claimants state that the present case of the respondent does not hold any merit in the eyes of law and has been based on unmeritorious and vexatious claims. The claimants have completely followed and fulfilled their part of the transaction as per the contract between the parties based on a CIF basis, and there is no violation of any implied terms of a CIF contract from the claimant's side, which shall also be discussed further under those issues in detail. Therefore, forms a basis for the tribunal to consider summary disposal.[14]

16. Under these circumstances the claimants therefore submit that the case does not really have any legal merit and therefore should be disposed of as soon as possible under Rule 11:

> "…(c) If an oral hearing is permitted:
>
> (ii) except with the permission of the tribunal (sought and obtained no less than 14 days prior to the commencement of the hearing), the oral hearing shall be limited to one working day of five hours;
>
> (iii) each party shall be allocated a maximum of two hours in which to present its case either in the form of evidence or argument or both, as that party may see fit, and the remaining hour shall be allocated by the tribunal in such a way as it considers fair and appropriate in the circumstances of

[13] LMAA Intermediate Procedure Claims, 2021, Rule 11(a).
[14] Centre for Public Resources (CPR) International Committee on Arbitration, *"Guidelines on Early Disposition of Issues in Arbitration*".

> the particular case. Time for cross-examination of the other party's witnesses is included in each party's two-hour allocation."[15]

17. The English Arbitration Act clearly states the principles that the arbitration should be based on, and that the applicability of Part 1 of the act is to be construed on under S. 1 stating: "*the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense*."

18. The Claimants submit that when the respondents have based their arguments on such unmeritorious and illegal arguments, the claimants shall not be made to suffer with respect to the time that the tribunal shall take to dispose the proceedings in a regular matter. The tribunal shall be enlightened by the claimants on all the issues that the respondents have raised and also how the claimants have actually adhered to their part of the contract. In such a case, based on fraudulent and vexatious claims by the respondents the claimants request to this Hon'ble Tribunal that the same shall be disposed off in a summary manner.

19. The English Arbitration Act, 1996 under S.33 puts the duty on the tribunal to adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined. S.34 gives the autonomy to the tribunal to decide on the time period of the written and oral agreements and how strict the rules have to be in terms of the evidence produced. It emphasizes the autonomy of the tribunal. Section 34 of the English Arbitration Act which deals with and submitted that the said section (Procedural and evidential matters), gives complete autonomy to the tribunal to decide all procedural and evidentiary matters, subject to the right of the parties to agree any matter, which inter-alia in Section 34(2)(h) include whether and to what extent there should be oral or written evidence or submissions.[16]

20. Therefore, the claimants humbly submit that the tribunal, while disposing of the matter in the present case in a summary manner according to the procedure agreed by the parties, i.e. the LMAA Rules, shall not be acting ultra vires is power to do so, and neither shall it be inconsistent with the law of the seat, i.e. the Arbitration Act 1996.

---

[15] LMAA Intermediate Procedure Claims, 2021, Rule 11(c).
[16] Sifandros, *supra* note 8.

21. In *Travis Coal Restructured Holdings v. Essar Global Fund Limited,*[17] the English High Court considered the ICC Rules opted by the parties in its entirety. It can be inferred that the court validated the summary procedure adopted by the arbitrators, as the same was within the discretion exercised by them. This discretion exercised was held to be consented by the parties when they opted for ICC Rules. Blair J, held that the Tribunal had not exceeded its powers by adopting a summary procedure during arbitration.

22. The Claimant submits such procedure shall not override the agreed procedure of the parties, but is well within what was agreed upon by the parties,[18] and that a summary procedure need not prejudice the 'reasonable' opportunity to be heard. Moreover, approached with prudence, such procedures can, in the right circumstances, be entirely consistent with an arbitral tribunal's duty to adopt procedures that avoid unnecessary delay or expense.[19]

23. Therefore, the Claimants humbly submit before the court that the present matter before it be disposed of in a summary manner according to the provisions of the LMAA Rules.

III. WHETHER THE INSURANCE CERTIFICATE WITHOUT THE POLICY IS SUFFICIENT AND WHETHER THE INSURANCE CERTIFICATE ITSELF CAN ACT AS A POLICY?

24. It is most respectfully submitted that the present insurance document contains an insurance certificate instead of an insurance policy and that is not in violation of the implied terms of a c.i.f. contract as "the function of the marine insurance policy in the c.i.f transaction is to complete the protection afforded to the buyer against loss or damage of the goods by providing cover in situations where the carrier would be excused from liability",[20] and the present insurance certificate has the capacity to fulfil the required function.

25. It is most respectfully submitted that Art 28(d) of UCP 600 state that an insurance policy is acceptable in lieu of an insurance certificate or a declaration under an open cover. The requisite declaration in the present case has been provided in the insurance certificate.

---

[17] Travis Coal Restructured Holdings v. Essar Global Fund Limited, [2014] EWHC 2510 (Comm).
[18] Kah Cheong Lye (Norton Rose LLP), "*Institutional Overreach? Institutional Arbitral Rules versus Parties' Express Agreement*", Kluwer Arbitration Blog (January 17, 2013).
[19] Redfern & Hunter, *supra* note 1.
[20] Philip W. Thayer, "*C. I. F. Contracts in International Commerce*", 53(5) HARVARD LAW REVIEW (March 1940).

26. It is also most respectfully submitted that, the seller has issued an Insurance Certificate No. 09/444C2013 with reference to Insurance Policy No. JHGG7-09/444 on March 1, 2022, for the shipment in March 2022.The seller and the buyer entered into a CIF Miami Contract. Since neither make a mention to the year of previous incoterm rules, according to ICC guidelines and Incoterm 2020 rules which state "Incoterm Port Name year and of the contract is made after 01 January 2020 then incoterms 2020 apply. Thus, it is most respectfully submitted that Incoterm 2020 shall apply to this contract since the contract is made on 3rd January 2022.

27. The Incoterms 2020 specify in c.i.f. A5 that:

> "The seller must provide the buyer a separate contract or a certificate under an existing policy giving the details of the shipment to enable the buyer, or anyone else having an insurable interest in the goods, to claim from the insurer. This document usually shows the seller as the insured and is then endorsed by the seller on the back of the original/s in blank or with a specific endorsement."[21]

28. The seller must also provide the buyer, at the buyer's request, risk and expense, with information that the buyer needs to arrange any additional insurance.

29. Also Mere reading of the insurance certificate on page 3 of the fact sheet,[22] provides that the bona fide holder of the insurance certificate can claim against any/all risks mentioned in the insurance certificate even if the same are not provided in the insurance policy or if they are in conflict with the insurance policy. Thus, the insurance certificate provided herein amends the conditions of the open insurance policy and even though being a certificate, it acts as an insurance policy.

30. Further in *Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen*[23] there was a contract for the purpose of coal c.i.f Malmo, and a tender under the contract of a certificate containing some of the terms of policy. This certificate was accepted by the buyer's bank; the buyer, however, claimed that the tender was a breach of the promise to deliver insurance implied in a c.i.f. contract and declared that the contract called for the delivery of "insurance policies."

[21] ICC Incoterms Rules 2020, CIF | Cost, Insurance and Freight (named port of destination).
[22] Case Study, Insurance Certificate, page 3 of 12.
[23] Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen, 43 F.2d 705 (2d Cir. 1930).

31. The circuit court of appeals held that the tender was good, distinguishing *Scott & Co. v. Barclays Bank, Ltd.*[24] in that there an approved policy was expressly called for by the contract. As to the objection that such a usage compelled the buyer to take insurance without seeing the full terms, the court said: "the certificate at bar contains some of the terms of the policy actually underwritten, and for the balance refers to 'English law and customs.' Now it is quite true that such a reference leaves much uncertainty but can anyone say that it is less certain than the permissible latitude in the provisions of a policy which the seller might tender and the buyer must accept."

32. The opinion was expressed further that the term " insurance" used in a c.i.f. contract, did not mean necessarily mean a "policy of insurance," and that the alleged usage therefore did not contradict the language of the contract. This decision was follow *Johnson & Higgins v. Charles F. Garrigues Co.,*[25] where it was held that in the absence of a specific agreement to supply an actual policy of insurance, the tender of a certificate was sufficient under a c.i.f. contract.

33. Moreover in *Groom v. Barber*[26] the thought was expressed that what the contract contemplated was the delivery to the buyer of such documents as would enable him to obtain delivery of the goods or to recover their value in the event of loss. From such expressions it is not difficult to come to the conclusion that there is nothing about the requirement for insurance in a c.i.f. contract that should make an actual policy in the old recognized form mandatory. What the parties to a c.i.f. contract contemplate is the transfer to the buyer of some effective document of insurance affording adequate cover in case of loss, and it is doubtful indeed if they contemplate more than that. The question therefore should be, not whether the certificate of insurance is an actual policy, but whether it is a document of the intended nature, to be regarded as the equivalent of the policy within the meaning of the contract.

34. Further in *Malmberg v. H. J. Evans & Co.*,[27] **Lord Justice Scrutton** said "*in the absence of some evidence of usage or course of business, or waiver, or estoppel, this document (Fylgia Insurance Co. issued a certificate like document) is not a good tender as a policy*

[24] Scott & Co. v. Barclays Bank, Ltd., (1923) 14 Ll.L.Rep. 89.
[25] Johnson & Higgins v. Charles F. Garrigues Co., 22 F.(2d) 454 (S. D. N. Y. 1927).
[26] Groom v. Barber, [1915] K. B. 316.

[27] Malmberg v. H. J. Evans & Co., (1924) 20 Ll.L.Rep. 40.

under a c.i.f contract." The inference is clear that proof of usage might make it a good tender. In this connection it would appear to be immaterial whether the certificate is in the older form, referring to the policy for many of the terms and conditions, or whether it is of the present type, reproducing such terms and conditions more fully. If the certificate is the kind of document the parties had in mind in while entering into a c.i.f. contract, and if this intention is evidenced by commercial usage, the mere fact that some of the terms are obtainable only by reference to a definitely described and existing instrument does not evoke such uncertainty as to make the custom reasonable.

35. Also in *Phoenix Insurance Company of Hartford v. De Monchy,*[28] a certificate was issued under a floating policy against a shipment of tur*pentine from Jacksonville to Rotterdam in pursuance* of a c.i.f. sale. The certificate was transferred by the original insured to the consignee. The consignee claimed under the certificate for short delivery, and the insurer pleaded a one-year limitation clause contained in the policy but not mentioned in the certificate. Judgement for the plaintiff was affirmed in the Court of Appeal, and an appeal from the order of that court was dismissed by the House of Lords. It is in the first place significant to note that the right of the plaintiff to claim under the certificate as on the contract of insurance is accepted without question. If the parties, as evidenced by usage or otherwise, were contracting with such a document in mind, the certificate is a good tender under an ordinary c.i.f. contract. Although denied in earlier cases in England and in this country, this position was reinforced by this case by recognizing the transferability of the certificate and the right of the holder to claim under it; for if the certificate is effective to fulfil its intended purpose in the hands of a holder, there seems no adequate reason to deny the sufficiency of its tender.[29]

36. Further in *Hart v. Automobile Ins. Co*.,[30] where the issue was essentially similar to that in the De Monchy case. A certificate was issued on a shipment of merchandise from New York to Calcutta under a floating policy containing a one-year limitation clause. Part of the merchandise was stolen at sea, and after the expiration of more than a year the consignee brought an action as holder of the certificate. The insurer pleaded the limitation clause in the policy as a defence, and there was a directed verdict for the defendant. The certificate, said the court:

[28] Phoenix Insurance Company of Hartford v. De Monchy, [1929] Vol. 34, Ll.L.Rep. [hereinafter "**De Monchy**"]
[29] Philip W. Thayer, "*Marine Insurance Certificates*", 49(2) HARVARD LAW REVIEW 239 (December 1935).

[30] Hart v. Automobile Ins. Co, 246 N. Y. Supp. 586 (Sup. Ct. 1930*).*

> "does not constitute a separate and independent contract of insurance between the insurer and the holder of the certificate, but is rather in the nature of an assignment, pro tanto, by the holder of the policy of his rights thereunder impressed with whatever limitations may exist, except 'any liability for unpaid premiums.'"

37. In this case there is evident a tendency to confuse the certificate with a mere certifying letter. Also, there is a plain disposition to take no distinction between the original insured and a subsequent holder of the certificate. The real purpose behind the issue of the certificate therefore receives scant attention, which if would have been proper attention then the dispute over the validity of certificate would never have arose.

38. Moreover the marine insurance certificate affords a close parallel. Where the bill of lading facilitates the transfer from holder to holder of the contract of carriage, so the certificate is designed to aid the operations of commerce by making possible a corresponding transfer of the contract of insurance, and freedom of circulation without the attachment of extraneous obligations is fully as important in the one case as in the other. By an application of this analogy the marine insurance certificate issued under a floating policy may be made to fall within certain well defined rules, the answer may be found to a question that perplexed the court both in *Aetna Ins. Co. v. Willys-Overland, Inc*.,[31] and in *De Monchy:*[32] namely, to what extent is the contract of insurance to be found in the certificate and to what extent in the original policy? As between a subsequent holder and the insurer, the certificate is the contract, and the holder accordingly is not bound by the terms and conditions of the policy unless they appear in the certificate or are incorporated in it by reference; and in order to make such incorporation effective, the reference must be explicit. In the event of inconsistencies the certificate, as the actual contract, is the controlling instrument.

39. It is most respectfully submitted that the Incoterms 2020 specify in c.i.f. A5/B5 that "T*he seller must arrange a contract of insurance at its own cost to cover buyer's risk. This cover must be of the level provided in Institute cargo clauses 'C' by Lollyds Market Association or International Underwriting Association.*"

[31] Aetna Ins. Co. v. Willys-Overland, Inc, 58 288 Fed. 912 (N. D. Ohio 1922).
[32] De Monchy, *supra* note 28.

40. The conditions of the insurance on page 5[33] have been subjected to institute cargo clauses. Since there is no mention of any specific institute cargo clauses, the contract shall assume correspondence with Institute Cargo Clause (ICC) 'C' as stipulated by the implied terms of a CIF contract as mentioned in the ICC Incoterms 2020. The Institute Cargo clause 'C' as provided by the LMA/IUA[34] is similar. Thus, adherence to any one of them is sufficient. On comparing the risks covered by both i.e present insurance certificate and the Institute Cargo clause 'C' in terms of physical damage to the cargo/ goods, along with the exceptions, it can be clearly seen that insurance certificate contains all the provisions mentioned in ICC 'C'.

41. Hence insurance certificate is in form a document issued by the insurer certifying that the goods described therein have been insured under a certain policy and incorporating expressly or by reference the terms and conditions of that policy. The document contains in addition a statement that it represents and takes the place of policy, and an order clause relating to the payee in the event of loss or damage. In thus, aiming at negotiability it is noteworthy that the marine insurance certificate purports to be a more effective instrument than the policy itself. Courts nevertheless had difficulty in fitting the document into the c.i.f. picture, chief because it was not a policy. Such a view however ignores the real issue: as indicated above, the parties are interested in the effectiveness of the document rather than in its form, and it is now recognized on high authority that the certificate expresses a valid contract between the holder and the insurer. That being the case, the argument that a certificate is not an actual policy becomes futile.

IV. WHETHER CLAUSING NOT AFFECTING EVIDENTIARY FUNCTION WILL RENDER A BILL OF LADING CLEAN?

A. BILL OF LADING AS A RECEIPT OF GOODS AND CLEAN BILL OF LADING

42. It is most respectfully submitted that the bill of lading contains a RETLA clause which qualifies the term "apparent good order and condition." The carrier by making such a qualification makes a representation as to the inherent defect that is supposed to appear on steel cargo unless specifically treated. This qualification is the accurate representation of what ought to be considered as apparent order and condition of the steel cargo. In case of steel cargo rusting cannot be prevented. However the goods are still of merchantable

[33] Case Study, Insurance Certificate, page 3 of 12.
[34] Institute Cargo Clauses (C) 01/01/2009 CL384.

quality. In case of steel cargo, merchantable quality includes superficial rust. The bill of lading acknowledges that the goods have been "shipped in apparent good order and condition" if the "mate's receipt" is clean. Otherwise, comments are transferred to the bill of lading.[35]

43. It is most respectfully submitted that the reason behind treating a claused bill of lading as unclean is because it affects the evidential function of the bill of lading. A clause on a bill of lading may create ambiguity as to the function of bill of lading as a receipt of order and condition inter alia of goods.[36]

44. It is further submitted that a bill of lading must be regarded as a clean bill of lading if it is satisfying the essential functions of a bill of lading which are evidence of contract, receipt of goods by the carrier, as a document of title, relationship between charterparty and bills of lading.[37]

45. It is most respectfully submitted that a bill of lading functions as a prima facie evidence as to receipt of cargo by the carrier and as conclusive evidence as to the condition of the goods in the hands of buyer. [38]

46. The reason behind the need of such a clean bill of lading is for the merchant (consignee) to prove the so-called prima facie case leading to a presumed liability of the carrier under the current international cargo conventions. Thus, the receipt function of the bill of lading becomes a crucial instrument of the shipper and/or the consignee when claiming compensation in the context of maritime claims, because the information given in the transport document is presumed to evidence the true nature/quantity of the goods.

47. It is most respectfully submitted that In Saga Explorer,[39] the view taken in Tokio Marine[40] case that the RETLA clause will exclude all degree of rust which effectively robbed all meaning to the term 'apparent good order and condition' has been changed. In Saga Explorer, the view taken in Tokio marine case that the RETLA clause will exclude all

---

[35] DR. EVI PLOMARITOU AND ANTHONY PAPADOPOULOS, SHIPBROKING AND CHARTERING PRACTICE (8th ed. 2017).
[36] Professor Robert Merkin KC and Dr Johanna Hjalmarsson, ISSN: 0024-5488, para 42.
[37] West P&I Club, Claims Guides, *Bills of Lading 1 - Functions of a Bill of Lading*.

[38] David Agmashenebeli, [2003] Vol. 1 Q.B. (Adm. Ct.) 103.

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

degree of rust which effectively robbed all meaning to the term 'apparent good order and condition' has been changed. The Saga Explorer case states the RETLA clause will only exclude superficial rust which is inherent defect of steel cargo and hence the master qualifying or clausing the bill of lading in such manner is valid since in steel cargo visible rust of superficial nature will constitute to be good condition. Thus it is submitted that reading the bill of lading as a whole the RETLA clause does not act as a qualification clause.

48. Bailhache J[41] says, "*when a credit calls for bills of lading, in normal circumstances it means clean bills of lading*", he then tries to put down what is a clean bill of lading[42] which Salmon J also agrees to. Salmon J[43] views clean bills of Ladin as "*a clean bill of lading is one that does not contain any reservation as to the apparent good order or condition of the goods or the packing*." However all the three members expressed reservations as to this view of a clean bill of lading.[44]

49. Under Article 27 of the UCP, a clean bill of lading is defined as "one that bears no clause or notation which expressly declares a defective condition of the goods and/or the packaging". The above definition mandates that a bill of lading must expressly declare that the goods are in defective condition. In case of RETLA clause, it states that the goods may show visible rust which is strictly superficial. This is an inherent fault in the goods and hence the carrier is entitled to make a such a representation on the bill of lading. Such a representation on the face of it will not render it as a bad tender.

50. Carver in his book explains the expression "good order and condition" thus: "The general statement in the bill of lading that the goods have been shipped "in good order and condition" amounts (if it is unqualified) to an admission by the shipowner that, so far as he and his agents had the opportunity of judging, the goods were so shipped. If there is no clause or notation in the bill of lading modifying or qualifying the statement that the goods were "shipped in good order and condition" the bill is known as a clean bill of lading."[45] In the instant case the clause does not act in any manner so as to modify or qualify the apparent order and condition of the goods.

---

[41] National Bank of Egypt v. Hannevig's Bank Ltd., (1919) 1 Ll.L.Rep. 1.
[42] Aubrey L. Diamond, "*Clean Bills of Lading*", 21(3) THE MODERN LAW REVIEW 306 (May 1958). [hereinafter "**Aubrey L. Diamond**"]
[43] British Imex Industries, Ltd. v. Midland Bank, Ltd., [1958] 1 All E.R. 264.

[44] Aubrey L. Diamond, *supra* note 42.
[45] 2(1) STEVENS, BRITISH SHIPPING LAWS, para 82 (1982).

51. A bill of lading may be unclean if it is in a form unusual in the trade, requiring consent of the consignee before the ship releases goods to the holder[46] or the bill of lading has been claused in such a manner that it requires outside source to be consulted to ascertain its meaning.[47] A RETLA clause has been held to be a valid clause and hence it is not an unusual trade practise to render a bill of lading unclean as given by the above definition.

B. BILL OF LADING FUNCTIONS AS A RIGHT OF CARRIER AGAINST ESTOPPEL AND NOT AS QUALIFICATION OF APPARENT GOOD ORDER AND CONDITION.

52. It is most respectfully submitted that to safeguard carrier from estoppel, in *Ellerman and Bucknall Steamship Co., Ltd. v. S. M. Bherajee*[48] it is said that the omission of the adjective "new" qualifying the word "drums" or indeed the addition of the adjective "old" to qualify the same would not necessarily make the bill any the less a clean bill, if old drums were suitable vehicles for conveying the articles supplied therein. The newness or the oldness of the container, the argument proceeded, was not decisive of its suitability, for in the main it depended upon its condition and contents. This argument as a proposition of law appears to be sound. In The Tromp,[49] potatoes, to the knowledge of the defendants' Master who signed the bill of lading, were shipped in wet bags and in a damaged condition. Whereas at common law the rules of estoppel may in certain circumstances preclude the carrier as against the lawful holder of the bill from the opportunity to displace such conclusion.[50] It is therefore submitted that the bill of lading is a clean bill of lading and a good tender.

53. The Court held that as in the bill of lading, the potatoes were described as shipped in good order and condition which represented the external condition of the bags, the defendants were estopped from denying that the bags were dry when shipped. But it would be noticed that the packing in that case was defective and that was the main cause for the rotting of the potatoes and, therefore, the bill of lading was not a clean one. In *Silver v. Ocean Steamship Co., Ltd*,[51] damage was caused to frozen eggs as the can wherein they were packed were gashed, perforated or punctured and the eggs were insufficiently

[46] National Bank of South Africa v. Banca Italiana do Sconto, (1992) 10 LI LR 531, 536.
[47] Spillers Ltd. v. JW Mitchell Ltd, (1929) 33 LI LR 89T.

[48] Ellerman and Bucknall Steamship Co., Ltd. v. S. M. Bherajee, AIR 1966 SC 1892. [hereinafter "**S. M. Bherajee**"]
[49] The Tromp L.R., (1921) P. 337.
[50] C. N. Vasconzada v. Churchill, [1906] 1 K.B. 237.
[51] Silver v. Ocean Steamship Co., Ltd, (1889) 5 T.L.R. 641.

packed. So the Court held that having given a clean bill of lading the shipowner was estopped from proving that the cans were not in apparent good order and condition. In *Brown Jenkinson & Co. Ltd. v. Percy Dalton (London) Ltd*.,[52] orange juice was shipped in barrels. Some of the barrels were old and frail and some were leaking. Yet the shipowners gave a clean bill of lading. They were estopped from denying that the barrels were in apparent good order and condition.[53] It is therefore submitted that the RETLA clause fulfils its evidentiary function and acts as an enabling provision for the carrier for estoppel and hence the bill of lading is a clean bill of lading and a good tender.

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

54. It is most respectfully submitted that, the cesser clause along with transshipment clause does not end the continuous documentary cover. It is further submitted that the seller must ensure that the insurance is coterminous with all liberties accorded to the carrier under the bill of lading.[54] This view has been taken in *Belgian Grain & Produce Co Ltd v. Cox and Co (France) Ltd.*).[55]

55. In the present case the seller provides the insurance certificate for the entire duration of the voyage and also from the port of loading to port of discharge. Thus, the insurance will cover for all the risks mentioned therein. In case of an insurance policy even if name of only one vessel is mentioned the entire voyage is covered. In this scenario if the bill of lading is to provide for transshipment for the entire voyage and the bill of lading enables transshipment, then construing both the documents harmoniously and also the purpose of the insurance is to cover for the goods and not the vessel, the insurance document will provide cover for the transshipment. In case of transshipment of goods the voyage does not break but it is considered continuous. Thus even if the cover for one vessel is given, the insurance certificate will be deemed to cover the entire voyage. Thus even if the carrier excludes his liability by a cesser clause, the documentary cover will be provided by the insurance in case of transshipment and hence the bill of lading cannot be termed as a bad tender.

---

[52] Brown Jenkinson & Co. Ltd. v. Percy Dalton (London) Ltd., (1930) 1 K.B. 416.

[53] S. M. Bherajee, *supra* note 48.

[54] MICHAEL BRIDGE, THE INTERNATIONAL SALE OF GOODS, 198 (2nd ed.).

[55] Belgian Grain & Produce Co Ltd. v. Cox and Co (France) Ltd., (1919) 1 LI LR 256.

56. It is further submitted that Sir W. Scott held that it is a clear and settled principle that the mere transshipment of a cargo at an intermediate port will not break the continuity of the voyage, which can only be affected by a previous actual importation into the common stock of the country where the transshipment takes place. It therefore became absolutely necessary that the Court should require further evidence upon the subject, because if there was nothing more than a transshipment of the cargo from one vessel to another, that will not alter the transaction in any respect, and it must still be considered as the same continuous voyage to the port where the cargo was ultimately to be delivered.[56]

57. The conditions of carriage in the present bill of lading provide the best evidence of contract of carriage and Para 2(c) of the General Paramount clause[57] expressly mentions that The Carrier shall in no case be responsible for loss of or damage to the cargo while the cargo is in the charge of another Carrier therefore allowing transhipment and hence not rendering the bill of lading of as a bad tender. It is pertinent to note that, one of the key characteristics of a bill of lading is that it embodies or "evidences" a contract of carriage. In the words of Lord Selborne in *Glyn Mills Currie & Co. v. East and West India Dock Co*:[58] "*The primary office and purpose of a bill of lading, is to express the terms of the contract between the shipper and the ship-owner.*"[59]

58. In the case of *Marlborough Hill*[60] the bill of lading ran to the effect that the goods were received for shipment by the sailing vessel called the Marlborough Hill or by some other vessel owned or operated by the Common- wealth and Dominion Line, Ltd., Cunard Line, Australasian Service. It gave the shipowner power to substitute or tranship the whole or any part of the goods by any other prior or subsequent vessel. It was therefore not a contract for the carriage of the goods on a named ship, and it did not admit that the goods had been loaded on board ship. Lord Phillimore in delivering judgment, dealt with the question in this way. He said, "*The liberty to tranship is ancient and well established, and does not derogate from the nature of a bill of lading, and if the contract begins when the*

[56] "Thomyiss" (Russel), eds. Hay & Marriott; C. Robinson , 165 ENGLISH REPORTS FULL REPRINT 1017 (1752-1865).

[57] Case Study, Bill of Lading, page 8 of 12.
[58] Glyn Mills Currie & Co. v. East and West India Dock Co, (1882) 7 App. Cas. 591, 596.

[59] SIR RICHARD AIKENS ET. AL., BILLS OF LADING, Chapter 7 (3rd ed. 2020).

[60] Marlborough Hill, (1921) I A.C., at page 444.

goods are received on the wharf, substitution does not differ in principle from transhipment."

59. Moreover the governing principle is that the voyage must be completed in the same ship, and transhipment only becomes permissible (apart from express agreement) when the original carrying ship is prevented by damage or the like from completing the voyage. It is only in this restricted sense that transhipment, unless expressly sanctioned by the contract of carriage, is allowed.[61]

60. It is most respectfully submitted that since the conditions of carriage provide for transhipment and the continuous documentary cover is provided for the entire voyage, the cesser clause does not affect the documentary cover. Therefore it is submitted that the bill of lading is a good tender and does not violate the implied terms of CIF.

[61] CARVER: CARRIAGE BY SEA (6th ed).

PRAYER

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

1. A tribunal of 3 arbitrators be appointed according LMAA Intermediate Claims Procedure;
2. The application of the claimant for summary disposal of the proceedings be accepted;
3. The buyer shall be directed to accept the tender of Insurance Certificate, the bill of lading with the RETLA clause and transshipment and cesser clause typed on it;
4. The buyer be directed to deposit the consideration and accept the goods as stipulated under the CIF contract;
5. Any other or declaration or relief that the Hon'ble Tribunal deems fit in light of justice, equity and good conscience;

AND AWARD COSTS AND DAMAGES IN FAVOUR OF THE CLAIMANTS

Date:

Place:

Counsel(s) for Claimants.