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THE NINTH NATIONAL LAW UNIVERSITY ODISHA

BOSE & MITRA & CO. INTERNATIONAL MARITIME

ARBITRATION MOOT, 2022

IN THE MATTER OF ARBITRATION TO BE

ADJUDICATED BY THIS ARBITRAL TRIBUNAL BETWEEN

CASPIAN TRADERS LIMITED **...CLAIMANTS**

AND

1. TAWE LIMITED **...DEFENDANTS**

2. CRUZ SA

MEMORANDUM FOR CLAIMANTS

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-LIST OF ABBREVIATION-

ABBREVIATION	EXPANSION
&	And
¶	Paragraph
§	Section
AC	Appeal Cases (3rd Series)
All ER	All England Law Reports
AMC	American Maritime Cases
App. Cas.	Appeal Cases (2nd Series)
Anr.	Another
Art.	Article
Asp MLC	Aspinall's Maritime Law Cases
B/L	Bill of Lading
BomLR	Bombay Law Reporter
C	Containers
C.A.	Court of Appeal (English)
Cir.	Court of Appeals (federal)
Civ.	Civil division

cl.	Clause
CLC	Civil Law Cases
Co.	Company
COGSA	Carriage of Goods by Sea Act, 1992
Corp.	Corporation
CRGN	Companhia Riograndense de Navegação SA
Ct. App	Court of Appeal (state)
Doc.	Document
E & B	Ellis and Black burn's Reports
East	East's King's Bench Reports
ed.	Edition
Eng. Rep.	English Reports
EWCA	England and Wales Court of Appeal
EWHS	High Court of England and Wales
Exch	Exchequer Reports
FCR	Federal Court Reports
FDS	Ferreira da Silva SA
HL	House of Lords
HR	Hague Rules

HVR	Hague Visby Rules
i.e.	That is
IAA	International Arbitrational Act of Singapore
Inc.	Incorporated
Int.	International
KB	King's Bench
Lloyd's Rep.	Lloyd Law Reports
LMCQ	Lloyd's Maritime and Commercial Law Quarterly
LS	Lenova Shipping Ltd.
Prof.	Professor
QB	Queen's Bench
QBD	Queen's Bench Division
r.	Rule
SCC	Supreme Court Cases
SCMA	Singapore Chamber of Maritime Arbitration
SCR	Supreme Court Reporter
SGCA	Singapore Court of Appeal
SGHC	Singapore International Commercial Court
Sing.	Singapore

SLR	Singapore Law Reports
UKPC	United Kingdom Privy Council
UKHL	United Kingdom House of Lords
U.S.	United States Reports
USD	United States Dollar
v.	Versus
WLR	Weekly Law Reports

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10. Mohan R. Pillay, The Singapore Arbitration Regime and the UNCITRAL Model Law, 20(4) Arbitration International (2004) ---------- 1
11. Richard Aikens et al., Bills of Lading (Routledge,2nd ed. 2016) ---------- 4, 10
12. SD Girvin, Third Party Rights under Shipping Contracts in English and South African Law, 9 S. AFR. Mercantile L.J. (1997)----------12
13. Simon Baughen, Shipping Law 8 (Routledge, 6th ed. 2015)---------- 4, 6, 7

MISCELLANEOUS

1. Paul Aston & Suzanne Meiklejohn, International Arbitration Laws and Regulations 2020, ICLG (August 24, 2020) https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/singapore. ---------- 3
2. Siddharth Ratho & Tanisha Khanna, Supreme Court of India 'Rules Out' the Rulebook in Favor of Substantive Rights, Kluwer Arbitration Blog (September 21, 2018) http://arbitrationblog.kluwerarbitration.com/2018/09/21/supreme-court-of-india-rules-out-the-rulebook-in-favor-of-substantive-rights/---------- 3
3. United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006 (Vienna: United Nations, 2008), UN Doc ---------- 1

-STATEMENT OF JURISDICTION-

The Claimants have approached the tribunal under the arbitration cl. present in the addendum with the B/L, dated 25 November, 2020, read with the r. 2 of Singapore Chamber of Maritime Arbitration **["SCMA"]** Rules and § 2A of the International Arbitration Act of Singapore **["IAA"]**. The parties agree to accept the decision of the arbitral tribunal as final and binding.

-STATEMENT OF FACTS-

-THE PARTIES-

The Claimant, Caspian Traders Ltd. issued a claim for arbitration against Tawe Ltd. (first defendants) and against Cruz SA (second defendants). In both proceedings Caspian claimed $600,000 for the loss of the converters.

THE CONTRACT OF CARRIAGE

On 20th November 2020, Caspian Traders Limited (Caspian) entered into a contract of carriage with Tawe, the owners of MV Odyssefs, for the carriage of twenty hydrogen fuel cell converters, each weighing approximately one tonne, from Santos, Brazil to Chennai. Each converter cost $30,000.

-THE COMBICON BILL OF LADING-

On 25th November 2020, the cargo was shipped and a B/L was issued by Tawe, in Santos, in the form of Combicon Bill of Lading,2016. Additional clauses were incorporated through an addendum providing the carrier rights to trans ship on any terms whatsoever, relieving him from the liability after discharge & limiting hi liability to $500 per package unit. Hague Rules governed the contract. On 1 December 2020, Tawe discharged the goods from Odyssefs at Cartagena and transshipped the goods to Hidalgo, owned by Cruz. Another B/L was issued by Cruz in Cartagena, Colombia in the form of Combicon Bill of Lading,2016. Through the addendum, the carrier's liability was limited to a sum of 1,000 Sterling per package unit. Hague Rules were incorporated by virtue of Clause Paramount. The B/L, in both the cases, is governed by English Law and disputes are to be settled via SCMA Rules. The B/L made no mention of the value of goods.

-CHRONOLOGY OF EVENTS-

DATE	EVENTS
20 November 2020	Caspian Traders Ltd (Claimants) contracted with Tawe Ltd (first defendants), the owners of the MV Odyssefs, for the carriage of twenty hydrogen fuel cell converters from Santos, Brazil to Chennai.

25 November 2020	• The Cargo was shipped. • Bill of Lading was issued by Tawe in Santos.
1 December 2020	• The Odyssefs arrived at Cartagena, Colombia. • Tawe discharged the cargo and transshipped it on to the Hidalgo, owned by Armadores Cruz SA. • Tawe received a bill of Lading issued by Cruz.
25 August 2021	Caspian issued a claim for arbitration against Tawe.
3 September 2021	Caspian issued a claim for arbitration against Cruz.

-CLAIMS-

The Claimant claims that both Tawe and Cruz are liable to it for $600,000, the full market value of the twenty lost converters. *Alternatively*, it contends that Tawe and/or Cruz are liable to them in the figure of the dollar equivalent of 2,000 SDRs per tonne, approximately $2,800 per converter, or $56,000 in total.

-APPROACHING THE TRIBUNAL-

The Claimants invoked the arbitration cl. in the addendum and claim that the tribunal shall consist of three arbitrators as per Rule 8.2 of SCMA Rules.

-ISSUES RAISED-

ISSUE -I

WHETHER THE ARBITRAL PANEL SHALL CONSIST OF THREE ARBITRATORS?

ISSUE - II

WHETHER THE HAGUE/HAGUE VISBY RULES ARE APPLICABLE TO THE CONTRACT?

ISSUE - III

WHETHER THERE HAS BEEN A BREACH OF CONTRACTUAL DUTY BY TAWE?

ISSUE - IV

WHETHER THE SECOND DEFENDANTS ARE LIABLE FOR FAILURE TO SHOW DUE DILIGENCE IN PROVIDING A SEAWORTHY VESSEL?

ISSUE - V

WHETHER THE CLAIMANTS ARE ENTITLED TO THE AMOUNT OF COMPENSATION CLAIMED FROM THE DEFENDANTS?

-SUMMARY OF ARGUMENTS-

I. THAT THE ARBITRAL PANEL SHALL CONSIST OF THREE ARBITRATORS

It is humbly submitted that the parties have adopted the SCMA Rules in the arbitration agreement, which they are free to do as per the Model Law and the IAA, the latter being the lex arbitri in this case. According to § 15(A) of the IAA, such rules of arbitration prevail in case of inconsistency with any non-mandatory provisions of the IAA. The IAA does not specifically lay down any mandatory provisions. Further, § 9 allows the parties to agree upon the number of arbitrators and only applies in the absence of any agreement. Hence, it is not a mandatory provision. § 15A expressly clarifies that a provision of the rules is not inconsistent with a provision of the IAA when the latter allows the parties to make their own arrangement, which may be by adopting rules of arbitration which provide for that matter. Thus, adoption of Rule 8.2, providing for three arbitrators, acts as the arrangement and is not inconsistent with § 9. Rule 8.2 prevails over § 9 and, accordingly, the tribunal should consist of three arbitrators.

II. THAT THE HAGUE RULES/HAGUE VISBY RULES ARE APPLICABLE TO THE CONTRACT

The Claimants submit that the parties have agreed in the addendum to the B/L that the contract evidenced by this B/L will be governed by Hague Rules. Furthermore, the governing law of the contract is English Law which has incorporated Hague & Hague Visby into its legislation by adopting them in COGSA,1971. In addition to that, by a clause in the second B/L the parties have incorporated by the virtue of 'clause paramount'. Therefore, Hague and Hague/Visby Rules are applicable to the contract of carriage in the instant dispute.

III. THAT TAWE ARE LIABLE FOR BREACH OF CONTRACTUAL DUTY

The claimants submit that the loss of cargo was caused due to unseaworthiness of the ship. As per Art. III R. 1, of HR & HVR, the carrier is liable to maintain due diligence and ensure the provision of a sea worthy vessel. Art. III R. 2, of HR & HVR, provides that any clause incorporated in the contracts by which the carrier avoids its basic liabilities and responsibility shall be rendered null and void. By this rule, the Cl. In the addendum which relives the carrier of liabilities after discharge, is rendered null and void. Furthermore, the terms of the B/L lay down the responsibilities of the carrier and precede over the additional clauses. The carrier has

also failed to fulfil the terms of the contract of carriage by not taking due care of them, and non-delivery. Therefore, Tawe, the first defendant, is liable for breach of contractual duty in the instant dispute.

IV. THAT THE SECOND DEFENDANTS ARE LIABLE FOR FAILURE TO SHOW DUE DILIGENCE IN PROVIDING A SEAWORTHY VESSEL

The Claimants submit that the second Defendants, Cruz SA, on account of having the custody of the goods, owed the duty of care. The second Defendants become the sub-bailee, upon the delegation of obligation by the first Defendants, Tawe Ltd. Therefore, it is their duty to provide a seaworthy vessel. Moreover, Article III Rule 1 of Hague Visby rules puts an obligation upon the carrier and bounds the carrier to exercise due care to make the vessel seaworthy The Defendants were negligent in showing due diligence to provide a seaworthy vessel and are to be held liable for the same.

V. THAT THE CLAIMANTS ARE ENTITLED TO THE COMPENSATION CLAIMED FROM THE DEFENDANTS

The Claimants submit that they are entitled to compensation as the losses aren't remote. In the instant matter, it was reasonably known to the first defendants that sea routes are always vulnerable to calamities and therefore ensuring the seaworthiness of Hidalgo before the beginning of voyage becomes most pertinent. Therefore, it is humbly submitted that the first Defendant's Recklessness makes them lose their right to limit his liability to any lower figure because of the application of Article 4(5)(E) of Hague Visby Rules. Both the Defendants have inserted clauses in the contract by the way of addendums to limit their liability which is to be regarded null and void as per Article III Rule 8 of Hague Visby Rules and the reference to £100 in Hague Rules is to be construed as a gold value figure and in the alternative, the relevant limit of liability is the limit of 2 SDRs per kg contained in article 4 Rule 5 of HVR appended to the carriage of Goods by Sea Act, 1971. On that basis, it contends that First Defendants and/or Second Defendants are liable to them in the figure of the dollar equivalent of 2,000 SDRs per tonne, approximately $2800 per converter, or $56000, in total.

-ARGUMENTS ADVANCED-

I. THAT THE ARBITRAL PANEL SHALL CONSIST OF THREE ARBITRATORS

1. It is humbly submitted that the arbitral panel should consist of three arbitrators as per Rule 8.2 of the SCMA Rules, since the parties have agreed that the disputes arising out of the B/L shall be governed by the SCMA Rules **[A],** the SCMA Rules prevail over the non-mandatory provisions of the IAA**[B]** and the Section 9 of the IAA is a non-mandatory provision. **[C].**

A. THAT THE SETTLEMENT OF DISPUTES BY THE SCMA RULES HAS BEEN AGREE UPON BY THE PARTIES

2. It is submitted that parties in the Cl. 1 to B/L have agreed that any dispute arising out of the B/L, shall be settled by SCMA. According to Art. 19(1) of the UNCITRAL Model Law[1], following the principle of party autonomy[2], the parties are free to agree on the procedure to be followed by the arbitral tribunal. Moreover, Section 15A (1) of the IAA[3] (the *lex arbitri* in this case)[4] provides parties the freedom to adopt rules of arbitration for deciding the procedure, which can be done by specifying them in the arbitration agreement itself, or by agreeing to adopt the rules of an arbitral institution.[5] Singapore's Ministry of Law has also issued a public statement that parties have full liberty to decide their arbitration rules and this choice would be fully respected.

3. The validity and scope of an arbitration clause shall be interpreted in accordance with the general principles of the interpretation of contracts, seeking the intention of the parties[6].In the present case, the parties have specifically intended in the addendum, which construes a valid arbitration agreement.[7]As per rule 8.2, Where the parties have not agreed on the number of arbitrators but have agreed to these Rules, 3 arbitrators shall be appointed.[8] In the instant dispute, the parties have incorporated the SCMA Arbitration Clause in their

[1] United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration* 1985, with amendments as adopted in 2006 (Vienna: United Nations, 2008), UN Doc.
[2] Alastair Henderson, *Lex Arbitri, Procedural Law and the Seat of Arb*, 26 Singapore Academy of Law Journal 886, 896 (2014); NCC International AB v. Alliance Concrete Pte Ltd. [2008] 2 SLR (R) 565.
[3] International Arbitration Act, § 15A(1), 2002 (Sing.).
[4] SCMA Rules, 2022.
[5] Mohan R. Pillay, *The Singapore Arbitration Regime and the UNCITRAL Model Law,* 20(4) Arbitration International (2004) 355, 384.
[6]*Ram Lal Jagan Nath* v. *Punjab State through Collector*, (1996) 2 SCC 216
[7] DR. P.C. Markanda et al, *Law Relating to Arbitration And Conciliation* (Lexis Nexis 2016) 207.
[8] SCMA Rules, 2022.

agreement, thereby adopting and agreeing to the application of the SCMA Rules in the arbitral proceedings.

B. THAT THE SCMA RULES PREVAIL OVER THE NON-MANDATORY PROVISIONS OF THE IAA

4. As per Section 15 (A) of IAA[9], adopting rules of arbitration has the effect of displacing the default provisions in the *lex arbitri* to the extent the law and rules are inconsistent and insofar as the law is not of mandatory application[10]. This was observed in *C v. D*[11], where it was held that the parties may choose another procedural law in relation to matters covered by the non-mandatory provisions of the law of the seat, in which case the former will prevail. In the case of *Daimler South Asia* [12],the court held that valid exclusion of the right to appeal, provided by the Arbitration Act [13] but allowed to be waived by agreement, had taken place by adopting the ICC rules, which under Art. 28(6)[14] deemed the parties to have waived the right by agreeing to the rules. This shows how the adopted rules of arbitration can prevail over non-mandatory provisions of the *lex arbitri*. In the instant dispute, the adopted arbitration rules are SCMA and hence, those will prevail over the non-mandatory provisions of IAA.

C. THAT SECTION 9 OF THE IAA IS A NON-MANDATORY PROVISION

5. It is submitted that the IAA does not explicitly set out mandatory provisions.[15]In any case, a provision that includes the express qualification *unless agreed by the parties* or words to similar effect is clearly non-mandatory. Section 9[16] allows the parties to determine the number of arbitrators by agreement. The UK Arbitration Act 1996 contains a similar provision by way of § 15(3),[17] allowing the parties to determine the number of arbitrators, and the same is not considered as a mandatory provision under Schedule 1 of the Act.

[9] International Arbitration Act, 1996.
[10] Alastair Henderson, *Lex Arbitri, Procedural Law and the Seat of Arb*, 26 Singapore Academy of Law Journal (2014) 886, 896; *NCC International AB* v. *Alliance Concrete Pte Ltd*. [2008] 2 SLR (R) 565.
[11] *C* v. *D* [2007] EWHC 1541 (Comm.).
[12] *Daimler South East Asia Pte Ltd.* v. *Front Row Investment Holdings Pte Ltd*. [2012] SGHC 157.
[13] Arbitration Act, 2002 (Sing.).
[14] Arbitration Act, Art. 28(6), 2002 (Sing.).
[15] Alastair Henderson et al., *Arbitration procedures and practice in Singapore: overview*, Practical Law, https://uk.practicallaw.thomsonreuters.com/.
[16] International Arbitration Act, § 9, 2002 (Sing.).
[17] Arbitration Act, § 15(3), 1996 (UK).

6. Courts have also gone so far as to consider whether any consequences are provided for violation of a provision, to decide whether it is mandatory or not.[18] § 9[19] seeks to provide a default rule that parties can benefit from in the absence of any agreement between them, rather than to impose any obligation carrying a penalty for contravention. Therefore, § 9[20] should be considered as a non-mandatory provision.

7. Further, § 15A(5) [21] provides that a provision of the rules of arbitration is not inconsistent with a provision of the IAA, merely because they deal with the same matter, when the provision of the IAA allows parties to make their own arrangements by agreement and only applies in the absence of agreement. § 9[22] is one such provision. Therefore, an arrangement for the number of arbitrators under § 9[23] can be made by the parties by adopting the SCMA Rules which provide for a number under Rule 8.2.[24] Hence, Rule 8.2 of the SCMA Rules is not inconsistent with § 9 of IAA.

8. In the instant dispute, Rule 8.1 of the SCMA Rules should prevail over § 9 of the IAA, the latter being a non-mandatory provision. Hence, it is submitted that the tribunal should consist of three arbitrators

II. THAT THE HAGUE/ HAGUE VISBY RULES ARE APPLICABLE TO THE CONTRACT

9. The claimants submit that Hague Rules/Hague Visby Rules are applicable to the contract, as the parties in the addendum have agreed that the contract governed by this B/L is subject to Hague Rules**[A]** and any dispute arising out of it shall be governed by the English Law**[B]**, and the parties have agreed upon the applicability of HR by virtue of Cl. Paramount in the second B/L **[C].**

[18] *State of Bihar* v. *Bihar Rajya Bhumi Vijas Bank Samiti*, (2018) 9 SCC 472 (India); Siddharth Ratho & Tanisha Khanna, *Supreme Court of India 'Rules Out' the Rulebook in Favor of Substantive Rights*, Kluwer Arbitration Blog (September 21, 2018) http://arbitrationblog.kluwerarbitration.com/2018/09/21/supreme-court-of-india-rules-out-the-rulebook-in-favor-of-substantive-rights/.
[19] International Arbitration Act, 1996.
[20] Id.
[21] Id.
[22] Id.
[23] *Daimler South East Asia Pte Ltd.* v. *Front Row Investment Holdings Pte Ltd*. [2012] SGHC 157.
[24] Paul Aston & Suzanne Meiklejohn, *International Arbitration Laws and Regulations 2020*, ICLG (August 24, 2020) https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/singapore.

A. THAT THE PARTIES HAVE AGREED THAT THE CONTRACT EVIDENCED BY THE B/L WILL BE GOVERNED BY THE HAGUE RULES.

10. It is submitted that the parties have impliedly agreed in the Cl. 4 of addendum to the Odyssefs B/L[25] that the contract contained in or evidenced by this B/L is subject to the HR. The HR can be applied via contractual application.[26]

11. The most common way of incorporating the HR into a contract of carriage is by way of cl. paramount.[27] Hague Rules can be applied under English law by virtue of contractual obligation, notwithstanding the mandatory applicability in the state of loading.[28] The port of loading in the present case is Brazil and Colombia[29] and none of the state legislations make Hague Rules applicable mandatorily, however they will be applicable by the virtue of contract.

12. In the *Superior Pescadores*[30], the intention of the parties was upheld to incorporate the Hague Rules. The wordings of the clause makes it clear that the parties did intend the relevant rules to apply, in this case effect shall be given to the intention of the parties.[31] Thus, giving effect to the clause, Hague Rules shall be applicable. Therefore, it is submitted that the contract of carriage evidenced by this B/L will be governed by the Hague Rules.

B. THAT THE PARTIES HAVE AGREED THAT THE BILL OF LADING WILL BE GOVERNED BY THE ENGLISH LAW

13. The parties, in Cl.1 of the addendum to Odyssefs B/L and Hidalgo B/L[32], have impliedly agreed that this B/L will be governed by the English Law. The Hague Rules were incorporated into the English Law by the COGSA, 1924 (repealed by COGSA,1971). The English law gives effect to the Hague and Hague Visby Rules by incorporating them into their legislation.

[25] IMAM Case Study 3.
[26] Richard Aikens et al., Bills of Lading (Routledge,2nd ed. 2016)
[27] Anthony Rogers et.al., Cases & Materials on the Carriage of Goods by Sea,259 (Routledge 5th ed. 2019).
[28] Simon Baughen, Shipping Law 8 (Routledge, 6th ed. 2015).
[29] IMAM Case Study 2;3.
[30] *Yemgas FZCO & Ors* v. *Superior Pescadores SA* [2016] EWCA Civ 101
[31] Aikens et al,Supra 25.
[32] IMAM Case Study 3.

14. The governing law here, is the English Law[33] and as per the principle[34], if the bill of lading has incorporated Hague Rules[35], then, as a matter of contractual construction, they will precede over other conflicting terms. In the instant case, as already mentioned in issue **II [A]**, there is contractual implication of Hague Rules.

15. As per Article X (c)[36], the HVR rule would be applicable if the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract. The B/L, in the instant case, is subject to English Law; the English gives effect to the HVR by incorporating them into the COGSA,1971.[37] Thus, HVR would be applicable.

16. An express choice of law must be given effect,[38] Therefore, since English Law has been expressly chosen by the parties to the contract, it will be of effect. Section 2(1) of the COGSA, 1971[39] provides that rules shall have the force of law. This was set out in *Hollandia*[40], that if a case is entitled to English law, then, section 1 will give the rules the force of law. Therefore, HVR '*shall have force of law'* in the instant case.

C. THAT THE PARTIES HAVE AGREED UPON THE APPLICABILITY OF HAGUE RULES BY THE VIRTUE OF CLAUSE PARAMOUNT IN THE ADDENDUM TO THE SECOND B/L.

17. It is submitted that in the Cl. 2 of the addendum to the Odyssefs B/L[41], the parties agreed on the transhipment on any terms whatsoever. The cargo was transhipped & Tawe contracted with Cruz and a B/L was issued. The Cl. 3 of the addendum to the B/L stated that the Hague Rules will be applicable by the virtue of a Clause Paramount. As set out in *Morris' case*, the consent was implied and Clause Paramount was applicable.

18. It was observed in *The Agio Lazarus*[42], "When a paramount clause is incorporated into a contract, the purpose is to give the Hague Rules contractual force: so that, although the bill of lading may contain very wide exceptions, the rules are paramount and make the shipowners liable for want of due diligence to make the ship seaworthy and so forth."

[33] IMAM Case Study, (Addendum Cl.1) 3
[34] *Ocean SS Co v Queensland State Wheat Board* [1941] 1 KB 402, CA. See, also, *Finagra UK (Ltd) v OT Africa Line Ltd* [1998] 2 Lloyd's Rep QB, 622.
[35] IMAM Case Study 3.
[36] Article X (c), The Hague Visby Rules,1968.
[37] John F Wilson, Carriage of Goods by Sea 174 (Cambridge Law Journal, Seventh Edition)
[38] *Vita Food Products Inc* v *Unus Shipping Co Ltd* [1939] UKPC 7.
[39] Carriage of Goods by Sea Act, 1971, Section 2(1).
[40] *Roya Netherlands Steamship Co.* v. *the Hollandia*, [1983] 1 AC 565.
[41] IMAM Case Study, (Addendum Cl.2) 3.
[42] The Agios Lazarus [1976] Q.B. 933

19. Hague Rules can be applied by contractual incorporation by the virtue of a Paramount clause[43], and the intention is said to be that the Rules are as incorporated by it were to be "paramount" and take precedence over any inconsistent clauses to the contrary. In the present case, following the principle in *Pioneer*[44] case, the consent for clause paramount is implied and therefore, Hague Rules would apply.

20. It is, therefore, submitted by the claimant that the Hague and/or Hague/Visby rules would apply to the contract and shall also have the force of law.

III. THAT THERE HAS BEEN A BREACH OF CONTRACTUAL DUTY BY TAWE

21. It is submitted that there has been a breach of contractual duty by Tawe, as under Article III Rule 1,[45] the carrier is liable to ensure the provisions of a seaworthy vessel **[A],** Article III Rule 8[46] renders Cl. 2 of addendum[47] null and void **[B],** that the terms of B/L will prevail over terms of the addendum **[C],**and the terms of contract of carriage were not fulfilled.**[D]**

A. THAT THE CARRIER IS LIABLE TO ENSURE THE PROVISION OF A SEAWORTHY UNDER ARTICLE III RULE 1 OF HAGUE/HAGUE VISBY RULES

22. It is submitted that due to a fault in the radar, the ship was unseaworthy for the voyage and this led to the cargo being lost.[48] As per the contract signed between Caspian and Tawe, Tawe was the carrier. Under Art. III r. 1[49] , the carrier is liable to ensure that the vessel is seaworthy, properly equipped and fit and safe for the carriage and voyage.[50]The obligation to maintain seaworthiness is an innominate obligation.[51]

23. The contract of carriage, in the instant dispute, is governed by English law and Hague Rules have been incorporated. The carrier, as per Article II,[52] shall be subject to rights and liabilities under every contract of carriage. The carrier is only bound to exercise 'due diligence'[53] in making the ship seaworthy. Secondly the onus of proving unseaworthiness is generally accepted to be on the cargo owner, as is the case at common law. The carrier's

[43] Baughen, supra note 28.
[44] *The Pioneer Container KH Enterprise* v. *Pioneer Container* [1994] 1 Lloyd's Rep 593.
[45] The Hague Rules, 1924 & Hague Visby Rules, 1968.
[46] *id*
[47] IMAM Case Study 3.
[48] IMAM Case Study 4.
[49] Hague Rules, 1924, Article III Rule 1 & Hague Visby Rules, 1968.
[50] Article III Rule 1 Hague Rules, 1924,
[51] *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd,* [1962] 2 QB 29.
[52] Hague Rules, 1924.
[53] *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd*, [1961] A.C. 807.

core obligation under contract of carriage is the absolute liability of a common carrier.[54] In the instant dispute, it has already been admitted that the loss of cargo was due to unseaworthiness which resulted from lack of due diligence.[55]

24. The wording of Art III Rule (1)[56] does not impose an absolute obligation on the carrier to make the vessel seaworthy, as is the case at common law, but only an obligation to exercise due diligence to achieve this end.[57] In the instant dispute, no due care was taken by the carrier to maintain or check whether the ship was fit for the voyage.

25. It is submitted that If the contract of carriage provides for either English or Singapore law, then S 3(3) of both the UK COGSA[58] 1924/ Singapore Bill of Lading Act 1925, provides that the original parties to the contract (i.e., the Shipper) remain liable irrespective of the transfer of title of cargo.59In the instant dispute, the Contract of Carriage is governed by English Law & Tawe is the original carrier to the contract.[60] Therefore, it is the liability of Tawe to ensure due diligence.

26. If the servant of the independent contractor was negligent, then the owners were still in breach of their duty. The duty was 'non-delegable', so, contrary to the general position in tort, it would not be satisfied merely by appointing a reasonably competent contractor.[61] In the instant dispute, Tawe had entered into a contract with Cruz[62], and the loss of cargo was due to lack of negligence on part of Cruz. Thus, the duty to maintain seaworthiness was non-delegable and the carrier would still be liable.

27. In *Pyrene Co Ltd* v *Scindia Navigation Co Ltd*.[63] it was held that 'the carrier's period of responsibility begins under the Hague Rules when the contract of carriage of the goods by sea is expressed to begin, usually from when and including the loading of the goods onto the vessel.' The same reasoning was reiterated in the case of *KMA Abdul Rahim & Anor v Owners of 'Lexa Maersk' & Ors.*[64]

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[54] *The Glendarroch*, [1894] UKLawRpPro 9.
[55] IMAM Case Study 4.
[56] Hague Rules, 1924 & Hague Visby Rules, 1968.
[57] Simon Baughen, *Shipping Law,* (Routledge, 6th ed. 2015) 109.
[58] Section 3, Carriage of Goods by Sea Act,1924.
[59] Hariesh Manadiar, *Liability of a shipper on the Bill of Lading*,
[60] IMAM Case Study
[61] Reliance on the judgments of Classification Society surveyors will also be insufficient to discharge the burden of proving due diligence. *The Toledo* [1995] 1 Lloyd's Rep 40.
[62] IMAM Case Study
[63] *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 402.
[64] *KMA Abdul Rahim & Anor* v. *Owners of 'Lexa Maersk' & Ors* [1973] 2 MLJ 121.

28. Article III Rule 1[65], is an overriding obligation and if it is not fulfilled, the carrier cannot rely on the immunities provided[66] under Article IV.[67] Furthermore, common law *'doctrine of stages'* principle makes it the duty of the shipowners to ensure that due diligence is maintained in different stages of voyage[68].

29. In the instant case, it was Tawe's duty to ensure if the other ship is seaworthy for another stage of the voyage as per the contract of carriage. The Court of Appeal had to reconcile an initial seaworthiness clause and the scheme of the Hague Rules[69]. The duty of due-diligence arises at each port in case of one or more ports.[70] It was held that the owner's obligation as to seaworthiness at each stage was the same, i.e., to exercise due diligence.[71] In the instant case, it was Tawe's duty to ensure if the other ship is seaworthy for another stage of the voyage as per the contract of carriage. The courts have held that if the carrier's negligence is a cause for damage, it holds the carrier liable.[72]

30. It is hereby, submitted that Tawe is liable for breach of contractual obligation by not ensuring the provision of a seaworthy vessel under Article III Rule 1.[73]

B. THAT CL. 2 IS RENDERED NULL AND VOID BY THE HAGUE AND HAGUE /VISBY RULES

31. As per Article III Rule 8[74], "*Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connexion with, goods arising from negligence, fault, or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in this Convention, shall be null and void and of no effect."* The carrier has inserted a cl. in the addendum to the B/L, that *'any and all liability in the Carrier, whether in contract, tort, bailment or otherwise, shall cease once goods are discharged from the Odyssefs'*.[75] The ability of contracting parties to exclude their liability for negligence has been substantially restricted by

[65] Hague Rules, 1924.
[66] *Alize 1954 & Anr.* v. *Allianz Elementar Versicherungs Ag & Ors.* [2021] UKSC 51 2 Llyod's Rep.625
[67] Id.
[68] The Makedonia, [1962] 1 Lloyd's Rep. 316.
[69] Hague Rules,1924.
[70] *One go Shipping & Chartering BV v JSC Arcadia Shipping*, [2010] 2 Lloyd's Rep. 221.
[71] *Eridania S.P.A and ors* v. *Rudolf A. Oetker and ors*., [2000] 2 Lloyd's Rep 191.
[72] [1940] AC 997, 1003.
[73] Hague Rules, 1924 & Hague Visby Rules, 1968.
[74] Id.
[75] IMAM Case Study

legislation.[76] The clause[77] prevents the carrier from contracting out of its responsibilities and liabilities.

32. The carrier is entitled to subcontract but cannot exclude his own liability during the sea leg while the carriage is covered by a bill of lading.[78] Thus, even though the contract expressly provides him with an option to tranship, he will remain fully responsible under Art III for the safety of the goods during the transhipment period.[79] In the landmark case of the Lexington,[80] despite an 'exculpatory clause' that made the carrier not liable for the loss of goods, being a 'common carrier', the shipowner was made liable for such loss to the cargo owner.

33. Furthermore, in the *Propeller Niagara*[81] it was held that the "common carriers by water, like common carriers by land, in the absence of any legislative provisions describing a different rule, are also, in general, insurers, and liable in all events." In the case of *Sociedade Brasileira de Intercampio Commercial e Industrial, Ltd. v. Punte del Este*,[82] the wheat that was shipped from New Orleans to Santos, Brazil, reached its destination in a spoilt condition. The carrier was held liable.

34. When a paramount cl. is incorporated into a contract, the purpose is to give the HR contractual force, so that, although the B/L may contain very wide exceptions, the rules are paramount and make the carriers liable for want of proper care.[83] Art. III r. 8[84], when incorporated into a contract, has a certain edge over the other clauses in the contract.[85] In the present case, Hague Rules have been incorporated via inserting Cl. Paramount in the second B/L as established in **II[C].** This clause would override any express exemption which is inconsistent to it. By virtue of this, Art. III r. 8 of the HR[86] have been incorporated into the contract. This declares any clause, covenant, or agreement in a contract of carriage which relieves or reduces the liability of the carrier for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided

[76] Unfair Contract Terms Act 1977, s 2 ; J.Beatson et. Al, Anson Law of Contract, Terms of Contract and Exemption Clauses,190.
[77] IMAM Case Study
[78] Hague Rules, 1924, Article III, Rule 8.
[79] *Mayhew Foods v OCL* [1984] 1 Lloyd's Rep 317.
[80] *New Jersey Steam Navigation Company v. Merchants' Bank of Boston* (The Lexington) (1848) 47 U.S. 344.
[81] *Propeller Niagara v. Cordes*, (21 How.) (1858) U.S. 62.
[82] *Sociedade Brasileira de Intercampio Commercial e Industrial, Ltd. v. Punte del Este* (1955), 135 F. Supp. 394 (D.C.N.J.)
[83] *Anglo-Saxon Petroleum Co.* v. *Adamastos Shipping Co*. [1957] 1 Lloyd's Rep. 271.
[84] Hague Rules, 1924, Article III Rule 8.
[85] *Sabah Flour* v. *Comfez* [1988] 2 Lloyd's Rep. 18, 19.
[86] Article III Rule 8, Hague & Hague Visby Rules.

in Art. III as null and void and of no effect.[87] Thus, in the instant case, the defendants cannot take the defence of Cl.2 since the clause is rendered null and void by Art. III, r.1.

C. THAT THE TERMS OF THE B/L PREVAIL OVER TERMS OF TERMS OF ADDENDUM

35. The B/L constitutes the contract of carriage[88] and its terms are binding on the shipper, shipper's agent and the carrier.[89] Cl. 9 (1)[90] of the B/L provides that the carrier shall be liable for the loss of goods occurring between the time it receives & the time of delivery. Cl.9(2)[91] provides that the carrier shall be liable for the acts and omissions of any person whose services it may take for the performance of contract. In this case, through incorporation of the cl.2[92], the parties had agreed on transhipment on any terms. For the purpose of performance of the contract, Tawe entered into contract with Cruz, whose recklessness resulted in the loss of cargo. Thus, the carrier (Tawe) shall be liable for the loss of cargo & for the omission of Cruz.

36. "*One distinctive feature of the contract law is that it is at the same time a power-conferring and a duty-imposing rule*."[93]As the Defendants assumed the responsibility for delivery of goods by issuing a bill of lading, which served not merely as a receipt but also as an evidence of contractual obligation [94], they impliedly undertook a legal responsibility, which inevitably gives rise to legal duties.

37. The terms of the B/L are binding over the carrier since it was issued by him.[95] The Bill of Lading was issued after the contract was drafted and thus served as an amendment to the contract.[96] The B/L is an evidence to the contract of carriage [97], and thus contains the terms of the contract. The B/L reflects the exact terms of the contract of carriage.[98] Thus, the carrier is bound by the terms of the contract of carriage. In the instant dispute, B/L provides

[87] Hague Rules 1924, Article III Rule 1.
[88] *Grace Line, Inc. v. Todd Shipyards Corp*., 500 F.2d (9th Cir. 1974) 361.
[89] *Albany Ins. Co. v. M/V "Sealand Uruguay*," 2002 WL (S.D.N.Y. 2002) 1870289.
[90] Combicon Bill, 2016 Clause 9 (1).
[91] Combicon Bill, 2016 Clause 9(2).
[92] IMAM CASE STUDY.
[93] Gregory Klass, *Three Pictures of Contract: Duty, Power, and Compound Rule*, 83 N.Y.U.L. Rev. 1726 (2008).
[94] Richard Aikens, Richard Lord and Michael Bools, *Bill of Lading* (Routledge, 2nd Ed.).
[95] *Burnell v. Butler Moving & Storage*, F.Supp. 65 (N.D.N.Y. 1993) 826.
[96] *Calchem Corp. v. Activsea* USA LLC, 2007 WL 2127188.
[97] *Crooks* v. *Allan* (1879) 5 Q.B.D. 38.
[98] *Heskell v Continental Express* (1950) 83 Ll. L. Rep. 438.

for the carrier to be liable under the breach of contractual obligation and the terms of the B/L will prevail over the terms of addendum.

38. Therefore, it is submitted that Tawe, the first defendants, are liable for breach of contractual duty since they did not take due diligence to ensure if the ship was sea worthy, they cannot take defence under cl.2 of the addendum[99], the B/L terms prevail over the addendum & the bill of lading is also a contract.

IV. THAT THE SECOND DEFENDANTS ARE LIABLE FOR FAILURE TO SHOW DUE DILIGENCE IN PROVIDING A SEAWORTHY VESSEL

39. It is submitted before this tribunal that the second Defendants, on account of having the possession of the cargo, owe the duty of care towards the goods. The Claimants argue that the second Defendants being a sub-bailee, are a party to the contract **[A]**. Moreover, Cruz is liable for negligence in providing a seaworthy vessel **[B]**.

A. THAT CRUZ SA BEING THE SUB-BAILEE IS A PARTY TO THE CONTRACT

40. It is humbly submitted that the second defendants, being the sub-bailee is a party to the contract of carriage evidenced by the bill of lading signed by Caspian and Tawe since it contained a clause for transhipment of cargo *on any terms whatsoever*,[100] implying the contract with a sub-bailee. Moreover, the contract of carriage entered by Cruz is also covered by a bill of lading where Cruz agreed to carry the cargo on the terms of the Bill of Lading subject to Hague and/or Hague Visby Rules.

41. On the transhipment and receipt of the cargo, Caspian delegated their obligations and Cruz assumed the carrier's responsibilities who is contracted to perform a particular task and thus, becomes a party to the contract as a sub-carrier. The term agent is meant to cover a group of employees of independent contractors, who are not themselves employees of the carrier nor independent contractors. A sub-carrier is thus considered an independent contractor who is to be held liable for its actions or omissions independently. **[101]**

42. The Court of Appeal of the Supreme Court of New South Wales in *Gilchrist Watt and Sanderson Pty. Ltd. v. York Products Pty. Ltd* [102] held that when there is a bailment of goods by the plaintiff and subsequently a sub-bailment to the Defendants, the Defendants took

[99] IMAM Case Study 3.
[100] Id.
[101] Carver, *Bills of Lading*, paragraph (Sweet & Maxwell, 4th Ed.) 9-294.
[102] *Gilchrist Watt and Sanderson Pty. Ltd. v. York Products Pty. Ltd* [1970] 1 WLR.1262.

upon themselves an obligation to the plaintiffs to exercise due care for the safety of the goods, although there was no contractual relation or attornment between the Defendants and the plaintiffs.

43. Moreover, the court of appeal also held that a sub-bailee had only voluntarily taken into his possession the goods of another if he has sufficient notice that a person other than the bailee is interested in the goods so that it can properly be said that in addition to his duties to the bailee he has, by taking the goods into his custody, assumed towards that other person the responsibility for the goods which is characteristic of a bailee.[103]Therefore, Cruz, being the sub-bailee, are liable for failure to take due care of the goods which were in their possession and failed to show due diligence in providing a seaworthy vessel.

B. THAT CRUZ IS LIABLE FOR NEGLIGENCE IN PROVIDING A SEAWORTHY VESSEL

44. It is submitted that Article III r. 1[104], rules puts an obligation upon the carrier and bounds the carrier to exercise due care to make the vessel seaworthy. Moreover, in the absence of same, the cargo owners can also sue parties other than contracting parties in shipment as well as tort since tort is not based on the existence of contractual rights and relationships; rather it is based on the existence of a duty owed by one party to another.[105]

45. The United States Court of Appeals in *Horn* v. *Compania de Navigacion Fruco, S.A.*[106] held that, under COGSA, after a vessel is found unseaworthy, it is the ship's burden to prove either the absence of causation between the unseaworthiness and the loss or it exercised due diligence.

46. Moreover, in the case of *Cooper* v. *Pinedo,*[107] after the cargo owner had proved a prima facie case and that certain equipment did not function as warranted in the charter agreement (which incorporated COGSA), the court held that the owners of the vessel had the burden of going forward with evidence showing either that the damage was not causally related to the unseaworthy condition or that it had used due diligence to make the vessel seaworthy.

47. In the instant case, it has already been admitted that the loss was due to the failure of Cruz to show due diligence to render the Hidalgo seaworthy where the unseaworthiness was due to Cruz's failure to correct the fault in the vessel's weather radar due to which the stow

[103] Id.
[104] Article III Rule 1, Hague Rules & Hague Visby Rules
[105] SD Girvin, Third Party Rights under Shipping Contracts in English and South African Law, 9 S. AFR. Mercantile L.J. (1997) 97.
[106] *Horn* v. *Compania de Navigacion Fruco, S.A* [1970] 1 Lloyd's Rep. 191.
[107] *Cooper* v. *Pinedo,* 212 F.2d (5th Cir. 1954)137.

collapsed when it encountered a hurricane and resulted in goods being lost.[108]Moreover, there was a proximate cause between the unseaworthiness of the vessel and the loss of the goods. Therefore, Cruz is liable for negligence for failure in providing a seaworthy vessel and taking due care of the goods.

V. THAT THE CLAIMANTS ARE ENTITLED TO THE COMPENSATION CLAIMED FROM THE DEFENDANTS

48. It is humbly submitted that the Defendants are liable for the full value of the 20 lost converters, i.e., $600,000, in total **[A]** and *alternatively*, Defendants are liable for liability contained in Article IV Rule 5 of Hague Visby Rules **[B]**.

A. THAT THE DEFENDANTS ARE LIABLE FOR THE FULL VALUE OF 20 CONVERTERS, I.E., $600,000 IN TOTAL.

49. It is humbly submitted that the damages must be given on the basis of principle *restitutio in integrum.*[109] The Claimants are entitled to be monetarily placed in the same situation as if the contract had been performed and the injury had not been done. Therefore, the Claimants are entitled to the full value, as Tawe acted Recklessly by not ensuring the seaworthiness of Hidalgo before departure from Cartagena **[i]**, thereby losing his right to limit his Liability, and any attempt by either of the Defendants to limit liability to a lower figure is prohibited by Article III Rule 8 of Hague Visby Rules **[ii].**

i. Tawe acted recklessly by not ensuring the seaworthiness of Hidalgo before departure from Cartagena, thereby losing his right to limit his Liability

50. The Hague-Visby standard reads as follows: Article IV, 4., (e) *"Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result."*[110] Clause 14 of the COMBICONBILL 2016 stipulates the same.

51. The recklessness is considered to be an ultimate breach of due diligence (the objective criteria to be determined by the court) with an actor's awareness that the damage will

[108] IMAM Case Study 5.
[109] The Woodrop Sims (1815) 2 Dods. 83, 85 (Lord Stowell) (Eng.).
[110] The HagueVisby Rules - The Hague Rules as Amended by the Brussels Protocol 1968.

probably occur. Thus, the reckless behaviour is generally perceived as an intentional conduct of a lesser magnitude (dolus eventualis).

52. It is humbly submitted that the Hague-Visby Rules confer an obligation upon the owners to make the ship seaworthy.[111] This imposes on the Respondent, an obligation to ensure that the ship is seaworthy at the time of delivery. This principle has also been reiterated by the Court of Appeal in the Madeleine[112] ,The Hongkong Fir[113], and the Derby[114]. In its most fundamental sense, providing a seaworthy vessel requires the vessel being structurally fit for the intended voyage, 'fit to meet and undergo the perils of sea and other incidental risks to which of necessity she must be exposed in the course of a voyage.'[115]

53. It is humbly submitted that in the present case, the First Defendants, who were under an absolute obligation to check the seaworthiness of Hidalgo before departure from Cartagena, failed to fulfil this by acting recklessly and consequently became liable for the loss incurred to the Claimant. The Claimant is entitled to compensation as the losses aren't remote.[116] In the instant matter, it was reasonably known to the first Defendants that sea routes are always vulnerable to calamities and therefore ensuring the seaworthiness of Hidalgo before the beginning of voyage becomes most pertinent. This is because the duty to ensure a seaworthy vessel is a personal one and non-delegable.[117] Therefore, the claimants find it necessary to highlight the defendant's lack of proper conduct that constituted an ultimate breach of due diligence and disregard of the expected professional behaviour standard.

54. The duty to exercise due diligence is a personal one.[118] In other words, it must be exercised by the carrier, though it can also be exercised by one of his agents, servants or independent contractors. The carrier must exercise an absolute duty to make the vessel seaworthy and ready to receive and carry the agreed cargo safely.[119]

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[111]The Hague-Visby Rules, 1968 art. III r. 1.
[112] Cheikh Boutros Selim El-Khoury v. Ceylon Shipping Lines Ltd. [1967] 2 Lloyd's Rep. 224.
[113] Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd. [1961] 2 Lloyd's Rep. 478.
[114] Alfred C. Toepfer Schiffahrtsgesellschaft v. Tossa Marine Co. Ltd. [1985] 2 Lloyd's Rep. 325
[115] *Kopitoff v. Wilson* [1876] 1 QBD (Eng.) 377; *Steel v. State Line Steamship* (1877) 3 App. Cas. (Eng.)72; *Gilroy, Sons & Co v. W R Price & Co*. [1893] AC (Eng.)56; *Virginia Carolina Chemical Co. v. Norfolk and North American Steam Shipping Co.* [1912] 1 KB (Eng.) 229.
[116] *Monarch Steamship Co. Ltd. v. Karlshamns Oljefabriker* [1948] 82 Lloyd's Rep. 137.
[117] *Union of India v. N.V. Reederij Amsterdam*, (The Amstelslot), [1963] 2 Lloyd's Rep 223. *Riverstone Meat Company, Pty., Ltd. v. Lancashire Shipping Company, Ltd., (The Muncaster Castle) [1961] 1 Lloyd's Rep 57. W. Angliss and Company (Australia) Proprietary, Limited v. Peninsular and Oriental Steam Navigation Company*. [1927] 2 K.B. 456.
[118] *Heskell v. Continental Express Ltd*. [1950] 83 Lloyd's Rep 438; *Wayne Tank & Pump Co. Ltd. v. Employers Liability Assurance Corp Ltd*. [1973] 2 Lloyd's Rep. 237.
[119] *Cheikh Boutros Selim El-Khoury v. Ceylon Shipping Lines Ltd.* [1967] 2 Lloyd's Rep. 224.

55. In the case Pž-2187/96[120], held before the High Commercial Court in Zagreb in 1997, the Court held the members of the crew guilty for stealing the goods onboard (case of theft on-board), and additionally held the owner liable for the poor choice of crew (*culpa in eligendo*), determining such conduct to be gross negligent, and not allowing the owner to avail the right to limit the liability.Therefore, it is humbly submitted that the first Defendant's Recklessness makes them lose their right to limit his liability to any lower figure because of the application of Article 4(5)(E) of Hague Visby Rules.

ii) Any attempt by either of the Defendants to limit liability to a lower figure is prohibited by Article III Rule 8 of Hague Visby Rules

56. Article III Rule 8[121] of the Hague/ Hague Visby Rules stipulates: *"Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect."*

57. It is humbly submitted that in the present case, both the Defendants have inserted clauses in the contract by the way of addendums to limit their liability which is to be regarded null and void as per Article III Rule 8[122] of Hague Visby Rules. The insertion of the additional typed clauses for limiting the monetary liability, stands annulled by the virtue of above-mentioned article.

58. Clause 3 of Addendums to the B/L issued by first Defendants to Claimants stipulates- "*In the case of loss or damage neither the Carrier nor the ship shall be liable in any circumstances for any sum in excess of $500 per package or unit*"[123] and Clause 3 of Addendums to the B/L issued by First Defendants to Second Defendants stipulates- "*The Carrier's liability for any loss or damage whatsoever is limited to a sum of £1,000 Sterling per package or unit.*"[124] It is humbly submitted that both the clauses stand null and void and are of no effect due to the above mentioned article.

[120] Pž-2187/96, *High Commercial Court*, 1997.
[121] Article III Rule 8, Hague & Hague Visby Rules.
[122] Id.
[123] IMAM Case Study
[124] IMAM Case Study

59. The English High Court in The Rosa S[125] and the New South Wales Court of Appeal in The Nadezhda Krupskaya[126] upheld the approach of linking Article IV rule 5 and Article IX of the Hague Rules and construing the reference to £100 in the Hague Rules as a gold value figure. Therefore, it is humbly submitted that the deletion of clause IX of Hague Rules which states that the monetary units are to be taken to be fold value of 100-pound sterlings, by Second Defendants by way of Clause Paramount to limit their liability also stands null and void due to the application of Article III Rule 8 of Hague/ Hague Visby Rules.

B. THAT IN THE ALTERNATIVE, DEFENDANTS ARE LIABLE FOR LIABILITY CONTAINED IN ARTICLE IV RULE 5 OF HAGUE VISBY RULES

60. Article IV Rule 5 (a) of HVR Stipulates – *"Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent of 666.67 units of account per package or unit or units of account per kilo of gross weight of the goods lost or damaged, whichever is the higher."*[127]

61. It is humbly submitted that in the present case, though it has been already established by the claimants that the Defendants cannot avail the benefit of limitation of liability given in Article 4 Rule 5 of HVR because the Defendants have acted recklessly and negligently, but even if limitation of liability is to be given to them, then the limitation inserted in addendums to the BOL by Defendants are rendered null and void by the article iii rule 8 of HVR and limitation in this regard is to be governed by Article 4 Rule 5 of HVR appended to the carriage of Goods by Sea Act, 1971.

62. Therefore, it is submitted that in the alternative, Claimants claim that the relevant limit of liability is the limit of 2 SDRs per kg contained in article 4 Rule 5 of HVR appended to the carriage of Goods by Sea Act, 1971. On that basis, it contends that First Defendants and/or

[125] *The Rosa S* [1988] 2 Lloyd's Rep 574.
[126] *Brown Boveri (Australia) Pty Ltd v Baltic Shipping Co* (The Nadezhda Krupskaya) [1989] 1 Lloyd's Rep 518.
[127] Hague Visby Rules art. IV r. 5.

Second Defendants are liable to them in the figure of the dollar equivalent of 2,000 SDRs per tonne, approximately $2800 per converter, or $56000, in total.[128]

[128] IMAM Case Study 6.

-PRAYER-

In light of the above submissions, the Claimants request the tribunal to declare:

(1) That the tribunal should consist of three arbitrators.
(2) That the Defendants are liable for breach of their contractual duty and negligence.
(3) The Claimants are liable for the amount of compensation claimed.
(4) The amount has to be paid for the full value of the lost converters.
(5) Alternatively, the amount can be in the figure of the dollar equivalent of 2,000 SDRs per tonne

And therefore, the following reliefs are prayed for:

(1) $600,000 as damages.
(2) *Alternatively*, $56,000, in total.
(3) Further or other reliefs.

AWARD interest and costs in favour of the Claimants.

COUNSEL *for* CLAIMANTS