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3RD NATIONAL LAW UNIVERSITY ODISHA

INTERNATIONAL MARITIME ARBITRATION MOOT, 2016

MEMORIAL FOR RESPONDENT

IN THE MATTER OF AN ARBITRATION

CONDUCTED BEFORE THE ARBITRAL TRIBUNAL

BETWEEN:

LAFAYETTE COMPANY LIMITED …CLAIMANT/OWNERS

AND

RADANI PRIVATE LIMITED …RESPONDENT/CHARTERERS

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TABLE OF ABBREVIATIONS

Art.	Article
BoL	Bill of Lading
C/P	Charter Party
Cl	Clause
F/N	Fixture Note
Moot Scenario	IMAM Moot Proposition, 2016
MT	Metric Tonnes
PMT	Per Metric Tonnes
PDPR	Per day pro rata
§	Section
USD	United Stated Dollar
V/C	Voyage Correspondence in Moot Scenario
NYPE	New York Produce Exchange

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STATEMENT OF JURISDICTION

The Claimant has approached this Honourable Tribunal under § 14(1) of the Arbitration Act, 1996. The Respondent has also approached the Tribunal to decide on the principle of *Kompetenz-Kompetenz* under § 30(1) of the Act.

STATEMENT OF FACTS

I. THE PARTIES

Lafayette Company Limited ["Owners"], a company located in Mumbai, Maharashtra, is the owner of a vessel named M.V. EJMOS.

Radani Pvt. Ltd. ["Charterers"], a company located in Ahmedabad, Gujarat, charter the aforementioned vessel as per a Charter Party and a Fixture Note.

II. THE FIXTURE NOTE AND THE CHARTER PARTY

Radani and Lafayette executed a Charter Party on 12th September, 2012. A Fixture Note or Recap was sent to the parties by their common broker, Atul. The Fixture Note contained standard clauses mentioning hire payment (USD 10,000 per day pro rata), bunker prices and concentration, applicable commission, and other relevant details. Clause 45 of the Charter Party, an Arbitration clause, was deleted. Seemingly in place of Clause 45, the Fixture Note contained a provision electing the Arbitration Act, 1996, of the United Kingdom as the law governing the arbitration agreement. The arbitration was to take place in London, and the Arbitral Tribunal was to consist of three members.

III. THE BREAKAGE OF CRANES

The 7th voyage was to be from Tawi Tawi, Philippines to Mumbai, India, as per Radani's instructions. On 1st March, 2013, the vessel's cranes malfunctioned while at Tawi Tawi, and were examined by the local experts summoned by the master of the vessel. The experts rectified the problem and certified that the cranes could be used. The loading of cargo commenced, when the jib of crane 3 broke and landed on hatch 4, thereby rendering it inaccessible. Due to this, cargo could no longer be loaded in holds 3 and 4 of the vessel.

Subsequently, Radani did not pay full hire in advance as per the charter party, on account of the loss of freight accruing to them due to the accident. Further, they were exposed to claims from the sub-charterers as well. Lafayette denied all responsibility and claimed full hire.

IV. THE DAMAGE OF HOLDS

On 24th November, 2013, it was discovered that the holds of the vessel were damaged, rendering the vessel unfit for commercial usage. An independent examiner was of the opinion that the damage was caused by the cargo carried, and recommended sandblasting. Sandblasting was carried out at the cost of USD 1.13 million. General cleaning materials for the maintenance of the vessel were provided by Radani. Radani incurred additional losses due to the ship being off hire, and claimed the expense. Lafayette claimed that the cost for

cleaning was to be borne by Radani, and that the vessel was on hire for the duration of the sandblasting.

V. WITHDRAWAL OF THE VESSEL FROM THE CHARTER PARTY

Meanwhile, Lafayette withdrew the vessel from the Charter Party on 17th January, 2014 and the vessel did not proceed to the West Coast of India as instructed by Radani, stating the delayed payment of hire as their reason for doing so. However, 5 days after withdrawing the vessel, they sought to settle their disputes either through arbitration or through discussion. M.V. EJMOS had arrived at the West Coast on 23rd January, 2014. Subsequent to this, Radani accepted Lafayette's withdrawal and requested a refund of advance hire, value of bunkers, and claimed damages for the loss of fixture.

Lafayette rejected Radani's acceptance of their withdrawal and wished to proceed with the voyage from the West Coast of India. No instructions were given to Lafayette regarding said voyage. Lafayette claimed that this amounted to repudiatory breach and terminated the Charter Party.

VI. INVOCATION OF ARBITRATION

Lafayette invoked the arbitration clause as per the Fixture Note and appointed Capt. Joel Fernandez as their arbitrator. Radani appointed Mr. Julian Dave as their arbitrator while reserving the right to challenge the jurisdiction of the arbitrator and the validity of the arbitration. They claimed that the invocation of arbitration was unlawful, being contrary to the public policy of India and hence unenforceable. Mr. Henry Albridge was appointed as the presiding arbitrator by the two chosen arbitrators. The disputes will now be heard by this Arbitral Tribunal.

ISSUES RAISED

I. Whether the award rendered from the arbitration will be enforceable?

II. Which substantive law is applicable?

III. Are Owners responsible for damage to the holds?

IV. Are Owners responsible for losses in hire, and claims by the sub-charterers?

V. Are Owners liable for the cost of sandblasting?

VI. Whether the vessel was off-hire during the course of sandblasting?

VII. Are Owners liable for losses due to dry-docking of the vessel?

VIII. Whether Charterers had the option to set-off when the vessel was off hire?

IX. Whether the withdrawal of the vessel by Owners repudiated the contract?

X. Whether Charterers are entitled to advance hire paid, value of bunkers, loss of fixture, and damages?

SUMMARY OF ARGUMENTS

I. THE AWARD RENDERED FROM THE ARBITRATION WILL BE UNENFORCEABLE, BEING CONTRARY TO THE PUBLIC POLICY OF INDIA.

It is submitted that the ultimate award will be unenforceable in India, being contrary to public policy as two Indian parties cannot derogate from domestic law. In any case, the arbitration clause in the Fixture Note is invalid due to lack of consent. Even assuming that there is an intention to arbitrate, the seat of arbitration should be India.

II. INDIAN SUBSTANTIVE LAW WILL BE APPLICABLE

Indian substantive law will be applicable in the instant case. This is so in light of various judicial pronouncements. Further, Indian law also give authoritative as well as persuasive value to the foreign jurisprudence in maritime law. Lastly, common law doctrines pertaining to maritime law are applicable in the Indian context.

III. OWNERS ARE RESPONSIBLE FOR DAMAGE TO THE HOLDS, WHILE LOADING CARGO FOR VOYAGE NUMBER 7.

Owners are responsible for maintaining the seaworthiness of the vessel. Seaworthiness includes maintaining the machinery and equipment for the full working of the vessel. Further, the Hague Rules have been incorporated into C/P. Consequently, Owners are bound by Article IV read with Article VI of the Carriage of Goods by Sea Act, 1925. Lastly, even assuming that C/P has no express seaworthiness clause, maintaining seaworthiness is the implied responsibility of Owners.

IV. OWNERS ARE RESPONSIBLE FOR CONSEQUENT LOSSES IN HIRE AND CLAIMS BY SUB-CHARTERERS DUE TO DAMAGE TO THE HOLDS WHILE LOADING CARGO FOR VOYAGE 7

Damages to the sub-charterers were reasonably foreseeable by Owners and hence they are liable for all claims by the sub-charterers as per section 73 of the Indian Contract Act. Subsequently, damages payable by Owners include the lost hire and claims by the sub-charterers.

V. OWNERS ARE LIABLE FOR DAMAGE TO THE HOLDS AND HENCE, FOR THE COST OF SANDBLASTING

First, all cargo loaded was well within the limits prescribed under C/P. *Second*, sandblasting is to be treated as a deviation of the vessel. *Finally*, even if the stowing duties were transferred to the charterers, the master of the vessel is still liable.

VI. VESSEL TO STAY OFF-HIRE DURING THE COURSE OF SANDBLASTING

The vessel was off-hire as it was dry-docked. Dry-docking resulted in deviation of the vessel from its prescribed course. In any case, the vessel was in an unseaworthy condition and hence, off-hire.

VII. OWNERS ARE LIABLE FOR LOSSES DUE TO DRY-DOCKING OF THE VESSEL

Owners instated the dry-docking period without any advance notice to Charterers. Further, this uninformed withdrawal of the vessel from C/P amounts to deviation**.** Consequently Owners are liable to Charterers for damages arising out of breach of contract. Lastly, damages of this nature are foreseeable and hence, not remote.

VIII. CHARTERERS HAD THE OPTION TO SET-OFF WHEN THE VESSEL WAS OFF HIRE FOR THE DURATION OF SANDBLASTING

It is submitted that prerequisites for invoking the set off clause have been fulfilled in the present case, as it was explicitly permitted under C/P. Additionally, the advance hire paid was eligible to be deducted when the vessel was off hire.

IX. THE WITHDRAWAL OF THE VESSEL BY OWNERS REPUDIATED THE CONTRACT. THIS WAS ACCEPTED BY CHARTERERS.

C/P was terminated by Charterers following breach of contract by Owners, as the notice of withdrawal of the vessel by Owners was irrevocable. Such wrongful withdrawal was a breach of contract by Owners. Subsequently, Charterers accepted Owners' breach and terminated the contract.

X. CHARTERERS ARE ENTITLED TO ADVANCE HIRE PAID, VALUE OF BUNKERS, LOSS OF FIXTURE, AND DAMAGES, FOR WITHDRAWAL OF THE VESSEL FROM C/P.

Charterers are entitled to a refund of advance hire paid, value of bunkers, loss of fixture. Further, they are entitled to damages for the wrongful withdrawal of the vessel.

ARGUMENTS ADVANCED

I. THE AWARD RENDERED FROM THE ARBITRATION WILL BE UNENFORCEABLE, BEING CONTRARY TO THE PUBLIC POLICY OF INDIA.

1. Charterers and Owners are both located in India.[1] They must, therefore, be registered in India as per the law, and that their assets are situated in India. Hence, enforcement of any award rendered from the arbitration proceedings will be sought under the Indian Arbitration and Conciliation Act, 1996.[2] In the present case, it is submitted that the ultimate award will be unenforceable in India, being contrary to public policy as two Indian parties cannot derogate from domestic law **[A]**. In any case, the arbitration clause in the Fixture Note is invalid **[B]**. Even assuming that there is an intention to arbitrate, the seat of arbitration should be India **[C]**.

[A]. TWO INDIAN PARTIES CANNOT DEROGATE FROM DOMESTIC LAW.

2. Generally, the law of the place where the award will be recognized and enforced is taken into consideration by the arbitral tribunal.[3] In *Addhar Mercantile* v. *Shree Jagdamba Agrico Exports*,[4] it was held by the Bombay High Court that if two Indian parties derogate from domestic law, in the context of arbitration, it would be opposed to the public policy of India. The Bombay High Court relied on the Supreme Court's decision in *TDM Infrastructure* v. *UE Development India*[5] wherein it was stated that the intention of the legislature was clear in not allowing Indian parties to derogate from domestic law. The autonomy of the parties in international contracts extends only insofar as it is compatible with any overriding public policy.[6]

3. Here, Charterers and Owners can be reasonably inferred to be Indian parties as discussed above. Clause 45 of the pro forma charter party was deleted by the fixture note, which incorporated an arbitration clause.[7] This arbitration clause chose London as the seat of arbitration, and the Arbitration Act[8] of the United Kingdom as the *lex arbitri*. It is submitted

[1] Moot Proposition, Page 1, F/N, P&C Cl.
[2] Arbitration and Conciliation Act, No. 26 of 1996, INDIA CODE (1996).
[3] DAVID S.J. SUTTON ET AL., RUSSELL ON ARBITRATION 98 (24th ed. 2015).
[4] Addhar Mercantile v. Shree Jagdamba Agrico Exports, Arbitration Application No. 197 of 2014 along with Arbitration Petition No. 910 of 2013.
[5] TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd., (2008) 14 S.C.C 271.
[6] National Thermal Power Corporation v. Singer, 1993 A.I.R. 998.
[7] Moot Proposition, Page 2, F/N, ARBITRATION Cl.
[8] Arbitration Act, 1996 (Eng.).

that this amounts to derogating from domestic law, which would render the award unenforceable.

4. Admittedly, *TDM Infrastructure* was decided under Part I of the Arbitration and Conciliation Act,[9] which applies only when the seat of arbitration is in India. However, the position of law laid down in the aforementioned case is applicable to the instant case as "public policy" bears the same meaning under Part I and Part II of the Act.[10] It may be contended that the Bombay High Court's reliance on *TDM Infrastructure* is misplaced as the relevant observations made therein constitute *obiter dicta*. Nevertheless, the courts have, in a series of decisions, treated the *obiter* of the Supreme Court as binding on lower courts.[11]

[B]. IN ANY CASE, THE ARBITRATION CLAUSE IN THE FIXTURE NOTE IS INVALID.

5. A fixture note is not necessarily a binding contract.[12] The communication between parties must be examined to see if *consensus ad idem* existed with respect to the fixture note.[13] Further, it is common practice to use terms such as "*fully fixed*" and "*fixed clean*" to indicate that the negotiations have ceased and the parties have reached an agreement.[14] In the present case, the fixture note, in the form of an email/letter was drafted by the common broker Atul, and the parties were requested to respond with notes.[15] The parties were required to "*CONFIRM HAVE FIXED CLEAN AS FOLLOW*",[16] which shows that it was intended to have contractual force only when formalised, and confirmed.[17] Neither Charterers nor Owners has agreed to the terms set forth therein. Significantly, the charter party was executed before communication regarding the fixture recap.[18] The pro forma charter party contained two options with respect to arbitration, neither of which was chosen. No conclusion was reached regarding the fixture note, nor was any attempt made in furtherance of the same. There was no acceptance, direct or tacit, by either party. It is possible for a contract to be binding on the parties, with some sections still open to negotiations.[19] In light of this, it is

[9] Arbitration and Conciliation Act, No. 26 of 1996, INDIA CODE (1996).
[10] Phulchand Exports Ltd v. Ooo Patriot, [2011] 10 S.C.C. 300; Shri Lal Mahal Ltd v. Progetto Grano SPA, [2014] 2 SCC 433.
[11] Aswini Kumar Roy v. Kshitish Chandra Sen Gupta, A.I.R. 1971 Cal 252; Narbada Prasada v. Awadesh Narain, A.I.R. 1973 MP 179; State of Kerala v. Parameshwaran Pillai, 1974 Ker L.T. 617; Popcorn Entertainment Corporation v. The City Industrial Development Corporation, 2007(2) Bom C.R. 880.
[12] Electrosteel v. Scan- Trans, [2003] 1 Lloyd's Rep. 190.
[13] Naviera v. Hapag-Lloyd International SA ('The Blankenstein'), [1985] 1 Lloyd's Rep. 93.
[14] TERENCE COGHLIN ET AL, TIME CHARTERS, ¶1.35 (7th ed. 2014); U.S. Titan, Inc. v. Zhi Guangzhou Zhen Hua Shipping Co. Ltd., 241 F.3d 135, 147; NORMAN J. LOPEZ AND J. BES, BES' CHARTERING AND SHIPPING TERMS, 66 (11th ed., 1992).
[15] Moot Proposition, Page 3, F/N.
[16] Moot Proposition, Page 1, F/N.
[17] Okura v. Navara, [1982] 2 Lloyd's Rep. 537.
[18] Moot Proposition, Page 2, F/N, CHARTER PARTY Cl.
[19] Pagnan v. Feed Products, [1987] 2 Lloyd's Rep. 601.

submitted that the arbitration clause in the fixture note is invalid. § 5(4) of the Arbitration Act[20] requires that an arbitration agreement recorded by a third party be authorised by the parties to the agreement. While Atul might have been authorised as a broker, it is submitted that he did not have the authority to conclude the arbitration agreement, and commit the principals to the contract, without the express consent of the parties.[21] Therefore, the seat of arbitration cannot be London as arbitration must occur at a mutually agreed seat.[22]

[C]. EVEN IF THE PARTIES INTENDED TO ARBITRATE, THE SEAT OF ARBITRATION SHOULD BE IN INDIA

6. Since the arbitration clause in the fixture note is invalid, the "*close connection test*"[23] must be applied to decide the *lex arbitri* and the *lex fori*. Particularly, the system of law governing the arbitration agreement will be that which has the closest connection to the arbitration.[24] Admittedly, the law of the seat of the arbitration is considered to be the law governing the arbitration agreement. However, in light of the above submission that the arbitration clause is invalid, there is no evidence of the parties' agreement to a seat of arbitration. Therefore, it is submitted that the dispute is most closely connected to India. In the instant case, the law of the underlying contract is Indian and the parties are Indian. Therefore, the seat and place of arbitration should be in India, and the law governing the arbitration agreement should be the Indian Arbitration and Conciliation Act.[25]

7. It is submitted that the Tribunal should vacate its jurisdiction in favour of Singapore according to the doctrine of *forum non conveniens*. In the instant case both requirements of the doctrine are being fulfilled; that is, an adequate forum exists elsewhere and the balance of interests lies in favour of the dismissal of dispute from the present forum.[26] Further, it would be more convenient and less expensive to conduct the arbitration proceedings in India, another factor to be considered under the doctrine to determine balance of interests.[27] There are no special circumstances which *prima facie* indicate that the proceedings should

[20] Arbitration Act, 1996 (Eng.).
[21] Polish Steamship Co. v. Williams Fuels ('The Suwalki'), [1989] 1 Lloyd's Rep. 511.
[22] GARY BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING, 29 (4th ed. 2013).
[23] Sulamerica CIA de Seguros v. Enesa Engenharia, S.A. [2012] EWCA Civ 638.
[24] Sashoua v. Sharma, [2009] EWHC 957.
[25] Arbitration and Conciliation Act, No. 26 of 1996, INDIA CODE (1996).
[26] Spiliada Maritime Corp v. Cansulex Ltd., [1987] A.C. 460; Dole Food Co. v. Watts, 303 F.3d 1104 (9th Cir. 2002).
[27] Spiliada Maritime Corp v. Cansulex Ltd, [1987] A.C. 460; Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947); Mark D. Greenberg, *The Appropriate Source of Law for Forum Non Conveniens Decisions in International Cases: A Proposal for the Development of Federal Common Law Mark*, 4(1) BERKELEY JOURNAL OF INTERNATIONAL LAW 157 (1986).

nevertheless take place in London. Thus, the seat of arbitration should be in India, and the law governing the arbitration should be Indian law.

II. INDIAN SUBSTANTIVE LAW WILL BE APPLICABLE

8. Substantive law defines rights and duties. In civil law it extends to civil rights and responsibilities. It is codified in legislated statutes, can be enacted through the initiative process, and in common law systems it may be created or modified through precedent.[28] It's submitted that the substantive law applicable in the instant case is Indian law **[A]**. Further it is also submitted that Indian law gives authoritative value to the foreign jurisprudence in maritime law, both in terms of admiralty and substantive aspects **[B]**. Lastly, maritime aspect of common law is fundamentally composed of doctrines applicable in all common law jurisdictions **[C]**.

[A]. SUBSTANTIVE LAW APPLICABLE IS THE INDIAN LAW.

9. Under Rome convention, parties to a contract might choose the law applicable to the contract.[29] Such willingness of the parties might be demonstrated by express clause[30] or by choice demonstrated by reasonable certainty.[31] In the case of *TDM Infrastructure Private Limited* v *UE Development India Private Limited (TDM Infrastructure)* [32]Supreme Court stated that the *intention of the legislature would be* clear that Indian nationals should not be permitted to derogate from Indian law. It was further held that this is a part of the public policy of the country. The same view was endorsed by the Bombay High Court in a recent judgement.[33] It's submitted that in the instant case both parties did not have either an express clause or any other clause demonstrating choice of jurisdiction. Further, both parties have their registered head offices in India.[34] Further both parties are registered entities in India. Hence, the substantive law applicable to both the parties should the Indian substantive law.

[B]. FOREIGN JURISPRUDENCE APPLICABLE IN INDIA.

[28] REED ET AL., THE LEGAL AND REGULATORY ENVIRONMENT OF BUSINESS 12-14 (1st ed. 1992).
[29] Rome Convention on the Law Applicable to Contractual Obligations, art. 3, Jun. 19, 1980, O.J. L. 266 of 9.10.198.
[30] Companie Tunisians de Navigation SA v. Companie d' Armament Maritime SA, [1971] AC 572.
[31] Marubeni Hong Kong and South China Ltd. v. Mangolian Government, [2002] All ER 873, 885.
[32] TDM Infrastructure Private Limited v. UE Development India Private Limited, (2008) 14 S.C.C. 271.
[33] Addhar Mercantile v. Shree Jagdamba Agrico Exports, Arbitration Application No. 197 of 2014 along with Arbitration Petition No. 910 of 2013.
[34] Moot Proposition, Page 1, F/N, P&C Cl; Moot Proposition, Page 1, F/N, ACCOUNT Cl.

10. Supreme Court ruled in the *M. V Elizabeth*[35] that developments in foreign jurisdiction with respect to 'Maritime Law' are incorporable in the Indian jurisdiction. This is true for both procedural as well as substantive law. Further, this view has been supported by subsequent judgments of the high courts.[36] In the instant case, it is submitted that in light of the rulings of different courts, developments in foreign jurisdiction have a pervasive value in India.

[C]. MARITIME LAW PRIMARILY COMPOSED OF COMMON LAW DOCTRINES

11. Maritime law is primarily composed of common law doctrines.[37] These common law doctrines are incorporated in different jurisdiction by the way of statutes and judicial pronouncements.[38] It is submitted that in the instant case such propositions apply. Further such propositions have been backed by relevant authorities.

III. OWNERS ARE RESPONSIBLE FOR DAMAGE TO THE HOLDS, WHILE LOADING CARGO FOR VOYAGE NUMBER 7.

12. In a non-demise time charter, owners have a duty to maintain vessel in a seaworthy state.[39] Maintaining seaworthiness includes maintain the overall functionality of the vessel.[40] Such overall functionality includes maintaining all equipment and machinery on-board vessel.[41] In the present case, damage to the cargo hold number 3 and 4 was a direct result of the actions of Owners.[42] In the light of the same it's submitted that owners were responsible for maintaining the seaworthiness of the vessel **[A]**. Seaworthiness in turn includes maintaining the machinery and equipment for full working of the vessel **[B]**. Further, the Hague Rules have been incorporated into the C/P **[C]**. Consequently, Owners are bound by Article IV read with Article VI of the Carriage of Goods by Sea Act, 1925[43]**[D]**. Lastly, even assuming that C/P has no express seaworthiness clause, maintaining seaworthiness is implied responsibility of the Owners **[E]**.

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[35] M. V. Elisabeth v. Harwan Investment and Trading Pvt. Ltd., 1993 A.I.R. 1014.
[36] M.V. Free Neptune v. DLF Southern Towns Private Limited, 2011(1) KHC 628 (DB).
[37] ADMIRALTY AND MARITIME JURISDICTION IN THE FEDERAL COURTS, http://www.fjc.gov/history/home.nsf/page/jurisdiction_admiralty.html (last visited Mar 17, 2016).
[38] *Id.*
39 James Werely, *Time chartered vessel operator's perspective on Cleanliness of vessel cargo spaces*, 70.4 JOURNAL OF TRANSPORTATION LAW, LOGISTICS AND POLICY 307, 312 (2012).
[40] *Id.*
[41] COGHLIN ET AL., *supra* note 14, ¶ 2.13.
[42] Carriage of Goods by Sea Act, No. 26 of 1925, Art. IV, VI INDIA CODE (1925).
[43] Hong Kong Fir Shipping v. Kawasaki Kisen Kaisha, [1962] 2 Q.B. 26.

[A]. OWNERS ARE RESPONSIBLE FOR MAINTAINING THE SEAWORTHINESS OF THE VESSEL

13. The terms of the C/P are considered to be binding on the parties. Clause 6 of the C/P states that Owners shall keep vessel in "thoroughly efficient state in hull machinery and equipment state in hull, machinery and equipment for and during the service". Further, Clause 7 states that whenever vessel is put into a port, except for by stress of weather, Owners shall pay for all expenses. It's submitted that Clause 6 read along with clause 7 obliges Owners to maintain the vessel in a sea worthy condition. In fact, Owners ought to ensure that the vessel is seaworthy at the beginning of each voyage[44] and must also be seaworthy when loading in harbor.[45] In the instant case, vessel became unseaworthy because of breakdown of JCB of the crane, while loading at TawiTawi. It was owner's responsibility to ensure seaworthiness of the vessel at the beginning of the voyage, while loading. They failed to do the same. Hence, Owners are responsible for the stated accident which is indeed a reflection of unseaworthiness of the vessel.

[B]. SEAWORTHINESS INCLUDES MAINTAINING THE MACHINERY AND EQUIPMENT FOR FULL FUNCTIONING OF VESSEL

14. The vessel must also be seaworthy when loading in the harbor.[46] Seaworthiness includes appropriate functioning of cranes of a vessel.[47] As per the provisions of clause 28 of the C/P, are responsible to ensure proper functioning of the grabs. Further, as per clause 13 of the C/P, charterers shall have "whole reach of the vessel's holds". Here, seaworthiness would include proper functioning of vessel's grabs (Cranes) as well as complete access to vessel's holds. This is because while loading at the harbor, functioning of the cranes and access to the holds makes material part of seaworthiness. Clause 28 and 13 of the C/P also give charterers a right to access all areas of the hold and a functional grabs. These clauses make Owners liable in case the stated rights of charterers are breached. Further, as stated in *H. R. MacMillan*[48], breakdown of cranes renders vessel unseaworthy because of inability to load cargo in the holds. A similar position was taken by court in *The Happy Ranger case*[49], where Court ruled that Owners were responsible for malfunctioning crane and damage because of

[44] Hong Kong Fir Shipping v. Kawasaki Kisen Kaisha, [1962] 2 Q.B. 26.
[45] McFadden v. Blue Star Line [1905] 1 K.B. 697.
[46] McFadden v. Blue Star Line [1905] 1 K.B. 697.
[47] Canadian Pacific (Bermuda) Ltd. v. Canadian Transport Co. Ltd. ('The H. R. Macmillan'), [1974] 1 Lloyd's Rep. 311.
[48] Canadian Pacific (Bermuda) Ltd. v. Canadian Transport Co. Ltd. ('The H. R. Macmillan'), [1974] 1 Lloyd's Rep. 311.
[49] Parsons Corp. v Scheepvaartonderneming ('The Happy Ranger'), [2006] 1 Lloyd's Rep. 649.

the same. Thus, as per the provisions of C/P and stated legal authorities, functioning of the crane and access of holds forms a part of seaworthiness. Further, Owners are responsible for maintaining cranes and ensuring access to all the holds. Here they are liable for breach of the same.

[C]. HAGUE RULES INCORPORATED INTO C/P

15. It is submitted that Hague rules have been incorporated into C/P as evidenced by intention of the parties. In the present case, such intention is adequately expressed by the paramount clause[50] has been included in C/P, thereby seeking to govern Owners and Charterers (the parties to C/P) rather than just the parties to B/L (where owner is neither Shipper nor Carrier). Only such a construction would give true effect to the paramount clause. *The Saxon Star*[51] upheld such intention by reading the word "this bill of Lading" as "this Charter party" in the paramount clause. Thus, Hague rules apply to C/P and binds the parties.

16. Further, it is a settled principle that on such incorporation, all the provisions of Hague rules are given effect only to the extent that they can be harmoniously constructed with the C/P terms.[52] As a result of such incorporation, liability of Owners to ensure seaworthiness becomes even more severe, as mentioned below.

[D]. OWNERS BOUND BY ARTICLE IV READ WITH ARTICLE VI OF CARRIAGE OF GOODS BY SEA ACT, 1925

17. Hague rules are incorporated into the Indian jurisdiction by Carriage of Goods by Sea Act.[53] This is because under common law, for an international convention to be valid in a domestic jurisdiction, it has to be enacted as a law.[54] As per Article VI[55], owner is bound by the terms of contract with respect to seaworthiness of the vessel. Here contract determining parameters of seaworthiness is the C/P. As per the clauses 6 read with 7, 13 and 16, ensuring accessibility of holds and full working of the crane are relevant for seaworthiness while loading at the harbor.[56] Hence, Owners are liable as per statutory provisions for the accident because of their inability to maintain the vessel seaworthy.

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[50] C/P, Cl 31(a).
[51] Adamastos Shipping v. Anglo-Saxon Petroleum (The Saxon Star) [1958] 1 Lloyd's Rep. 73; Aliakmon Maritime Corp v. Trans Ocean Continental Shipping ('The Aliakmon Progress'), [1978] 2 Lloyd's Rep. 499.
[52] COGHLIN ET AL., *supra* note 14, ¶ 34.5(3), 34.17; Actis Co. v. Sanko Steamship Co. ('The Aquacharm'), [1982] 1 Lloyd's Rep 7.
[53] Carriage of Goods by Sea Act, No. 26 of 1925, Art. IV, VI INDIA CODE (1925).
[54] KUMAR SAHARAY, THE LAW OF CARRIAGE OF GOODS BY SEA AND AIR, 397-398 (2004).
[55] Carriage of Goods by Sea Act, No. 26 of 1925, Art. VI INDIA CODE (1925).
[56] C/P, Cl 6; C/P, Cl 7; C/P, Cl 13; C/P, Cl 16.

18. Article IV Clause (1)[57] of Carriage of Goods by Sea Act states that carrier is not liable for unseaworthiness, unless such unseaworthiness is created by want of diligence on part of owner. However, this defense can't be exercised by the carrier. This is primarily because Article VI states, "Notwithstanding the provisions of preceding articles…" Thus in case of express provision in the C/P, Article IV Clause (1) shall not undermine the liability of the owners. Hence, Owners are liable for the unseaworthiness of the vessel.

[E]. MAINTAINING SEAWORTHINESS IS IMPLIED

19. Owners may argue that C/P has no express seaworthiness clause and thus they can't be held liable for damages due to unseaworthiness of vessel. However, in *Kopitoffi* v *Wilson*[58], court held that even if there is no seaworthiness clause in the contract, seaworthiness is implied. Hence, even without a seaworthiness clause, Owners are liable for the above stated damages.

IV. OWNERS ARE RESPONSIBLE FOR CONSEQUENT LOSSES IN HIRE AND CLAIMS BY SUB-CHARTERERS DUE TO DAMAGE TO THE HOLDS WHILE LOADING CARGO FOR VOYAGE-7

20. In the instant case, Owners are liable for the stated accident, repair cost and all other foreseeable implications of the same. Consequently, all claims from sub-charterers are to be directed to the owners. It is submitted that the said claims by sub-charterers were reasonably foreseeable by the owners **[A]** and thus Owners are liable for all the claims by sub-charterers in light of section 73 of the Indian contract Act **[B]**. Subsequently, damages payable by owners include the lost hire and claims of the sub-charterers **[C]**.

[A]. DAMAGES TO THE SUB-CHARTERERS WAS REASONABLY FORESEEABLE

21. For a damage to be foreseeable, it must be ordinarily perceivable as an outcome of the undertaken actions.[59] Otherwise the party at fault must have some special knowledge because of which the consequences become foreseeable.[60] In order to determine foreseeability one has to look at the scope of protection offered by the contract.[61] Scope of protection is marked by reasonable contemplation of the parties at the time of entering into the contact.[62] In *the*

[57] Carriage of Goods by Sea Act, No. 26 of 1925, Art. IV INDIA CODE (1925).
[58] Kopitoff v. Wilson, (1876) 1 QBD 602.
[59] Hadley v. Baxendale, [1859] EWHC J70.
[60] Hadley v. Baxendale, [1859] EWHC J70.
[61] Monarch S.S. Co v. Karlshamns Oljefabriker, [1949] A.C. 196.
[62] Monarch S.S. Co v. Karlshamns Oljefabriker, [1949] A.C. 196.

Achilleas case[63] reasonable contemplation was determined by interpreting the whole contract against the commercial background. In the instant case, owners had a prior knowledge of the possibility of sub-chartering. Clause 18 of the C/P allows charterers to sublet the vessel. Further sub-chartering is also a general practice in the market.[64] Hence, Owners could reasonably foresee the implications of breach on sub-charterers and thus are liable to compensate them.

22. In *Scott v Foley,*[65] it was held that Owners were liable for all consequences of breach of contract. Court was of the opinion that there was a direct causational link between the breach and consequent damages to the third party. It was ruled that had there been no third party, Owners would have been still liable. Further in case of *Sylvia Shipping Co.*[66], sub-charterers cancelled their C/P with the charterers because Owners were unable to maintain the vessel. Consequently prime charterers suffered losses. Court allowed prime charterers to recover damages from Owners. Court ruled that there was a causational link and Owners were liable. Court also stated that Owners were entirely responsible for all damages arising because of unseaworthiness of the vessel. In the instant case, Owners were responsible for unseaworthy condition of the vessel. This resulted in damages to the sub-charterers. Hence, there is a direct causational link between unseaworthiness and damages to sub-charterers. Thus all claims from sub-charterers should be directed to the owners.

[B]. OWNERS ARE LIABLE UNDER SECTION 73 OF THE INDIAN CONTRACT ACT

23. Damages because of breach of contract can be claimed under Section 73 of the Indian Contract Act, 1872[67]. When such damages is pre-stipulated in the contract,[68] under Section 74[69] of the act, the stated sum is payable. Further, for invocation of section 73, a causational link has to be proved between the breach and the consequent damage.[70] Such a causational link is determined by considering knowledge of contracting parties at the time of getting into the contract. It's submitted that there is a direct link between the breach and the consequent damages. In fact Owners had a knowledge of the possibility of such breach because of the presence of clause 18 in the C/P. This special knowledge[71], makes Owners liable for even

[63] Transfield Shipping Inc. v. Mercator Shipping Inc ('The Achilleas'), [2008] UKHL 48.
[64] STEWART C. BOYD ET AL., SCRUTTON ON CHARTERPARTIES AND BILLS OF LADING 324-326 (21st ed. 2008).
[65] Scott v. Foley, Aikman & Co. (1899) 5 Com.Cas. 53.
[66] Sylvia Shipping Co. Ltd. v. Progress Bulk carriers Ltd., [2010] EWHC 542.
[67] Indian Contract Act, No. 9 of 1872, § 73 INDIA CODE (1872).
[68] FREDERICK POLLOCK ET AL., THE INDIAN CONTRACT ACT WITH A COMMENTARY, CRITICAL AND EXPLANATORY, 1523 (13th ed. 2009).
[69] Indian Contract Act, No. 9 of 1872, § 74 INDIA CODE (1872).
[70] Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd., A.I.R. 2003 S.C. 2629.
[71] POLLOCK ET AL., *supra* note 69, at 809.

generally unforeseeable damages. Thus, Owners are liable for damages to the sub-charterers and must compensate them for the same.

[C]. DAMAGES PAYABLE BY OWNERS INCLUDE LOST HIRE AND CLAIMS BY THE SUB CHARTERERS.

24. Damages are paid in order to restore the affected party to its original position, as though the breach never happened.[72] In cases of calculating damages because of provision of the C/P, ordinary rules of contractual damage have to be applied for assessing charterer's loss.[73] As a breach of the contract, charterers are entitled to: (a) expenses thrown away during the period in which charterers were deprived of the vessel's service;[74] (b) loss of profit that they may have incurred during the same period;[75] (c) any consequential loss of profits during the period following the vessel's return to the charterer's service.[76] Further, in the case of *H. R. MacMillan*[77]court held that hire was to be reduced pro rata in the event of breakdown of cranes. Hence, depending on the number of cranes in dysfunctional state, hire can be deducted accordingly on a pro rata basis. In the instant case, one of the cranes suffered breakdown. Consequently two holds, i.e. hold number 3 and 4 were inaccessible. Subsequently 15,000 MT lesser cargo was loaded on the vessel.[78] Considering that the vessel was sub-chartered for a freight rate of USD 7.50 PMT, total losses to the charterers on a pro rata basis amount to USD 112,500. Here charterers claim the entire amount because hire was paid in advance as per the provisions of clause 11 of the C/P. Further, in accordance with clause 77 of the C/P, charterers did not make any deductions for the losses from subsequent hire payments. Lastly, Owners are also liable for the claims of sub-charterers. Thus, the net total claims include claims of sub-charterers and loss of freight amounting to USD 112,500. Charterers may claim the entire

V. OWNERS ARE LIABLE FOR DAMAGE TO THE HOLDS AND HENCE FOR THE COST OF SANDBLASTING.

[72] HARVEY MCGREGOR, MCGREGOR ON DAMAGES 4, 5 (18th ed. 2009).
[73] TERENCE COGHLIN ET AL., TIME CHARTERS 111 (1st ed. 1978).
[74] Adamastos Shipping v. Anglo-Saxon Petroleum (The Saxon Star) [1958] 1 Lloyd's Rep. 73; Sylvia Shipping Co. Ltd. v. Progress Bulk Carriers Ltd., [2010] EWHC 542.
[75] Alfred C. Toepfer Schiffahrtsgesellschaft G.M.B.H v Tossa Marine Co. Ltd. ('The Derby'), [1984] 1 Lloyd's Rep 635.
[76] Alfred C. Toepfer Schiffahrtsgesellschaft G.M.B.H v Tossa Marine Co. Ltd. ('The Derby'), [1984] 1 Lloyd's Rep 635.
[77] Canadian Pacific (Bermuda) Ltd. v. Canadian Transport Co. Ltd. ('The H. R. Macmillan'), [1974] 1 Lloyd's Rep. 311.
[78] Moot Proposition, Page 10, V/C dated 3 March 2013.

25. As per C/P, certain mandatory guidelines were prescribed for loading cargo in the holds.[79] Further, Charter party also prescribed *modus operandi* of hold cleaning and other provisions pertaining to the same.[80] Under the clauses of C/P charterers hadn't violated the loading guidelines[81] and owners had the responsibility of maintaining the holds. Considering the two, it's submitted that Owners were liable for damage to the holds and consequently are liable to pay for the sandblasting. The same is submitted on three grounds. First, all cargo loaded was well within the limits prescribed under the C/P **[A]**. Second, Sandblasting is to be treated as a deviation of the vessel **[B]**. Third, Even if stowing duties were transferred to the charterers, master of the vessel is still liable **[C]**.

[A]. ALL CARGO LOADED WAS WELL WITHIN THE LIMITS PRESCRIBED BY C/P

26. Clause 4 and Clause 49 of the C/P prescribe guidelines for loading cargo in the holds.[82] It is submitted that all the cargo loaded in the holds was in accordance with the prescribed guidelines. Owners contend that back to back cargo of Iron ore, Nickle, Cement Clinker, Cement Clinker and Sulphur resulted in the damage.[83] However, the order of loading was in accordance with the provisions of clause 49. Charterers did not order the vessel to carry any cargo mentioned in first paragraph of clause 49. Further only one dirty cargo of 'Sulphur' was carried. This is less than the maximum limit of four dirty cargos per year prescribed under the C/P and also did not result in carriage of two consecutive dirty cargos. It's also submitted that a cargo of 'Cement Clinker' was allowed on all occasions. Further, while carrying 'Nickle Ore' all appropriate precautions were taken. Owners were also given an option to arrange for their surveyor at charterers' expenses to ensure safe loading of the 'Nickle ore' cargo. Lastly, C/P doesn't restrict loading of 'Iron Ore' in any manner. In light of these facts, charterers were well within the limits prescribed by C/P while carrying cargo. Hence, charterers are not liable for the damage to the cargo holds and consequently for the expenses of sandblasting.

27. When the C/P has no explicit or implied provisions to hold charterers accountable for doing a certain act, then charterers may not be held liable for the same.[84] In the instant case, clause 6 read along with clause 7 of the C/P renders Owners liable for maintaining the vessel. As per the provisions of these clauses, Owners are liable to maintain the vessel in thoroughly efficient state. Further when vessel is put into the port, except for by the stress of whether,

[79] C/P, Cl 4; C/P, Cl 9.
[80] C/P, Cl 36.
[81] C/P, Cl 4; C/P, Cl 49.
[82] C/P, Cl 4; C/P, Cl 49.
[83] Moot Proposition, Page 15, V/C dated24 November 2013.
[84] The Happy Empress, S.M.A. 2599 (N.Y. Arb. 1989) 89.

owners are liable for all charges incurred during the period. Here, no clause of the C/P, expressly or otherwise renders charterers liable for damage to the vessel's holds. In fact there are provisions that establish the liability of the owners in the instant case. Hence, Owners are liable for the damages as well as the expenses pertaining to the sandblasting process.

[B]. SANDBLASTING IS EQUIVALENT TO DEVIATION OF THE VESSEL

28. A reasonable deviation is one in which interests of all parties are given equal priority.[85] In case priority is given to the interests of one party over the interest of other against the terms of the C/P, such a deviation is wrongful.[86] In the instant case, the vessel deviated from prescribed voyage.[87] Owners claim that this was done because vessel suffered structural damages and required sandblasting.[88] Owners also state that charterers are liable for the expenses pertaining to the sandblasting process.[89] It's submitted that these claims of Owners are flawed on two grounds. Primarily, hold cleaning clause[90] of the charter party provides for hold cleaning provisions. These provisions include sufficient arrangements for maintenance of holds. Clause 36 provides for charterers to pay for hold cleaning and crew members of the vessel to undertake the same. In the instant case hold cleaning was done as prescribed in the C/P. Thus, because an appropriate and industrially accepted[91] method was prescribed for hold cleaning, undertaking any other method should be treated as wrongful deviation.[92] Secondly, sandblasting requires dry docking of the vessel. Dry docking attracts clause 67 of the C/P. As per the dry docking clause, firstly vessel is not to be dry docked without following the procedure prescribed under clause 67 and secondly vessel is supposed to be off-hire during the period. It is submitted that in the instant case dry docking of the vessel without following process prescribed U. Cl. 67, is equivalent to deviation.[93] Further, vessel must be treated off hire in the period. Hence, decision to undertake sandblasting is equivalent to deviation and Owners are liable for all expenses incurred during the period.

[C]. THE MASTER WAS RESPONSIBLE FOR THE VESSEL AT ALL TIMES

[85] Stag Line v. Foscolo, Mango & Co., (1931) 41 Ll.L.Rep. 165.
[86] Stag Line v. Foscolo, Mango & Co., (1931) 41 Ll.L.Rep. 165.
[87] Moot Proposition, Page 15, V/C dated24 November 2013.
[88] Moot Proposition, Page 15, V/C dated24 November 2013.
[89] Moot Proposition, Page 15, V/C dated24 November 2013.
[90] C/P, Cl. 26.
[91] COGHLIN ET AL., *supra* note 14.
[92] C/P, Cl 70.
[93] C/P, Cl 70.

Under C/P even if stowing duties are transferred to the charterers, master of the vessel is still obligated to intervene when stowage can affect the seaworthiness of the vessel.[94] In the instant case all the loading was done under the supervision of the master.[95] It is submitted that in the present case master never intervened in the loading of cargo. This indicates that all cargo was to the satisfaction of the master. Thus, a cargo detrimental to the seaworthiness of the ship was never loaded. Even if it was, master had all authority to stop charterers from doing the same. Hence, master being an agent of the owners, Owners are liable for the damage to the holds and are bound to pay for the sandblasting process.

VI. THE VESSEL WAS OFF-HIRE FOR THE DURATION OF SANDBLASTING

29. For a vessel to be off-hire there must be prevention of full functioning of the vessel.[96] A vessel is prevented from full functioning when she is unable to perform next service assigned by the charterers.[97] In the instant case, it is submitted that vessel was off-hire because of being dry-docked **[A]**. Further, the stated measure resulted in deviation of the vessel from its prescribed course **[B]**. In any case, vessel was in an unseaworthy condition and hence, off-hire **[C]**.

[A]. THE VESSEL WAS OFF-HIRE BECAUSE IT WAS DRY-DOCKED.

30. The vessel is deviated from its usual course of service when it is dry-docked.[98] In the instant case, dry-docking is governed by Clause 67 of the C/P. As per the Clause, vessel is to be treated off-hire because of deviation from charterers' service. Further, when the vessel is put into a port, Owners are to incur all expenses arising because of the same.[99] Here, vessel was dry-docked during the process of sandblasting.[100] Consequently, vessel is to be treated off-hire during the process of sandblasting and Owners are to bear all expenses during the process.

[B]. THE VESSEL DEVIATED FROM ITS PRESCRIBED COURSE.

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[94] Court Line v. Canadian Transport, (1940) 67 Ll. L. Rep. 161, 166; Transocean Liners Reederei G.m.b.H. v. Euxine Shipping Co. Ltd., ('The Imvros'), [1999] 1 Lloyd's Rep. 848, 851; C.H.Z. "Rolimpex" v. Eftavrysses Compania Naviera S.A. ('The Panaghia Tinnou'), [1986] 2 Lloyd's Rep. 586, 591.
[95] C/P, Cl 8.
[96] COGHLIN ET AL., *supra* note 14, at 441.
[97] Sig. Bergesen DY v. Mobil Shipping and Transportation Co. ('The Berge Sund'), [1993] 2 Lloyd's Rep. 453, 459.
[98] George Sarton, *Floating Docks in sixteenth century*, 36(3/4) ISIS 36 153, 154 (1946).
[99] C/P, Cl 6; C/P, Cl 7.
[100] Moot Proposition, Page 15, V/C dated 24 November 2013.

31. Deviation of a vessel results in initiation of the off-hire period.[101] This is because deviation from prescribed voyage results in deviation from the terms of the C/P.[102] In fact, when a breakdown in vessel's machinery becomes progressively worse to render it unseaworthy, the vessel is treated as deviated from C/P.[103] In the present case, unseaworthiness and thereafter dry-docking of the vessel resulted in deviation from the C/P.[104] Consequently, hire should be suspended and the vessel must be treated off-hire.

[C]. IN ANY CASE, THE VESSEL WAS UNSEAWORTHY.

32. For off-hire to begin, there be must be prevention of the full working of the vessel.[105] A vessel is prevented from full working when it is prevented from performing the next operation required U. C/P agreement.[106] Thus, if charterers require a vessel to sail to a port and it is unable to do the same, vessel is prevent from performing its obligations U. C/P.[107] Such inability may also be on account of unseaworthiness of the vessel.[108] In the instant case, vessel was unable to follow the charterers' instructions. This was on account of damaged holds. This inability of the vessel to follow charterers' instructions due to unseaworthiness results in initiation of off-hire period.[109] Hence, it is submitted that vessel is to be treated off-hire during the process of sandblasting.

VII. OWNERS ARE LIABLE FOR LOSSES DUE TO DRY-DOCKING OF THE VESSEL.

33. Damages are paid in order to restore the affected party to its original position.[110] For damages to arise, there must be a causational link between the breach of the contract and the damage thus incurred.[111] In the current case, Owners are liable to the charters for damages on account of breach of the C/P. Owners were at fault to instate the dry-docking period without any advance notice to the charterers **[A]** and charterers suffered damages on account of the same. Further, Owners' uninformed withdrawal of vessels from C/P amounts to deviation

[101] Stag Line v. Foscolo, Mango & Co., (1931) 41 Ll.L.Rep. 165,171.
[102] Stag Line v. Foscolo, Mango & Co., (1931) 41 Ll.L.Rep. 165,171.
[103] Giertsen v. Turnbull, 1908 S.C. 1101, 1110.
[104] C/P, Cl 70.
[105] André & Cie S.A. v. Orient Shipping (Rotterdam) B.V. ('The Laconian Confidence'), [1997] 1 Lloyd's Rep. 139.
[106] Sig. Bergesen DY v. Mobil Shipping and Transportation Co. ('The Berge Sund'), [1993] 2 Lloyd's Rep. 453, 459.
[107] TS Lines Ltd v. Delphis NV ('The TS Singapore'), [2009] 2 Lloyd's Rep. 54, 57.
[108] TS Lines Ltd v. Delphis NV ('The TS Singapore'), [2009] 2 Lloyd's Rep. 54, 57.
[109] C/P, Cl 17.
[110] MCGREGOR ET AL., *supra* note 73, 4-5.
[111] MCGREGOR ET AL., *supra* note 73, 14-19.

[B]. Consequently Owners are liable to the charterers for damages arising because of the breach. Lastly damages of this nature are foreseeable and not remote **[C]**.

[A]. DRY-DOCKING WAS INITIATED WITHOUT PRIOR NOTICE TO CHARTERERS.

34. C/P agreement prescribes for guidelines pertaining to dry-docking process.[112] As per the guidelines, "*Owners shall give the charterers approximate 3 (three) months' notice followed by forty five (45) day prior notice of intended dry-docking.*"[113] Further, Owners have responsibility to "*figure out the drydocking schedule/plan as soon as possible and to give Charterers at least four (4) months prior notice of intended drydocking for good cooperation."*[114] In the instant case, provisions of Clause 67 were not followed prior to dry-docking of the vessel.[115] As per the communiqué between the charterers and Owners dated November 24, 2013, the vessel was dry-docked for sandblasting without any prior communications to the charterers.[116] It is submitted that, charterers suffered damages as a result of breach of Clause 67 of the C/P. Consequently, Owners are liable to charterers under the § 73 of the Indian Contract Act[117] and § 40 of the Specific Relief Act[118] for all damages arising out of the breach. These damages comprise of charter lost and the hire paid to the owners as per Clause 11[119] read along with Clause 17.[120]

[B]. UNIFORMED WITHDRAWAL OF THE VESSEL FROM C/P AMOUNTS TO DEVIATION.

35. Off-hire period starts with the deviation of the vessel.[121] Moreover, deviation from prescribed voyage under the C/P, results in deviation from the terms of the C/P.[122] In turn, such deviation results in losses.[123] Such breach entitles the charterers to compensation for the loss of ship's service during the off-hire period.[124] Damages amount to difference between the charter rate and the market rate.[125] Here, as per the communiqué, dated November 24, 2013,[126] vessel was withdrawn from the services of the charterers. Such withdrawal attracts deviation clause and hire is to be suspended from the time of inefficiency in port.[127] It is

[112] C/P, Cl 19(a); C/P, Cl 67.
[113] C/P, Cl 67.
[114] C/P, Cl 67.
[115] C/P, Cl 67.
[116] Moot Proposition, Page 15, V/C dated 24 November 2013.
[117] Indian Contract Act, No. 9 of 1872, § 73 INDIA CODE (1872).
[118] Specific Relief Act, No. 47 of 1963, § 40 INDIA CODE (1963).
[119] C/P, Cl 11.
[120] C/P, Cl 17.
[121] Stag Line v. Foscolo, Mango & Co., (1931) 41 Ll.L.Rep. 165.
[122] Stag Line v. Foscolo, Mango & Co., (1931) 41 Ll.L.Rep. 165.
[123] Western Bulk Carriers K/S v. Li Hai Maritime Inc. ('The Li Hai'), [2005] EWHC 735.
[124] COGHLIN ET AL., *supra* note 14, ¶ 4.88.
[125] Sofia Shipping Co. v. Amoco Transp Co., 628 F Supp. 116, 1986 AMC 2163 (S.D.N.Y. 1986).
[126] Moot Proposition, Page 15, V/C dated 24 November 2013.
[127] C/P, Cl 70.

submitted, such withdrawal amounting to deviation is breach of C/P and entitles charterers to compensation. Thus, owners are liable for loss of charter and hire during the deviation period.

[C]. DAMAGES TO CHARTERERS WERE FORESEEABLE.

36. For a damage to be foreseeable, it must be ordinarily perceivable as an outcome of the undertaken actions.[128] Alternatively, the party at fault must have some special knowledge because of which the consequences become foreseeable.[129] In order to determine foreseeability one has to look at the scope of protection offered by the contract.[130] Scope of *protection* is marked by reasonable contemplation of the parties at the time of entering into the contact.[131] In the *The Achilleas*,[132] reasonable contemplation was determined by interpreting the whole contract against the commercial background. In *Sylvia Shipping Co.*,[133] compensation to the charterers was allowed because breach was foreseeable in the commercial background of the contract. In the instant case, Owners were bound under dry-docking clause to provide prior notice to the charterers.[134] Owners could reasonably foresee the implications of breach on charterers. Thus, Owners are liable to compensate charterers for all conceivable damages including lost charter and hire payment.

VIII. CHARTERERS HAD THE OPTION TO SET-OFF WHEN THE VESSEL WAS OFF-HIRE FOR THE DURATION OF SANDBLASTING

37. The principle of set off entitles the Charterers to make deductions from hire in certain circumstances.[135] Deductions can be made when there is an express right as per the terms of charter party,[136] when the vessel goes off-hire,[137] and when the charterers have a claim for damages for which they are permitted to set off against hire.[138] It is submitted that prerequisites for invoking the set off clause have been fulfilled in the present case, as *first*, the set off was explicitly permitted under the C/P **[A]**. *Second,* the advance hire paid was eligible to be deducted when the vessel was off-hire **[B]**.

[128] Hadley v. Baxendale, [1859] EWHC J70.
[129] Hadley v. Baxendale, [1859] EWHC J70.
[130] Monarch S.S. Co v. Karlshamns Oljefabriker, [1949] A.C. 196.
[131] Monarch S.S. Co v. Karlshamns Oljefabriker, [1949] A.C. 196.
[132] Transfield Shipping Inc. v. Mercator Shipping Inc. ('The Achilleas'), [2008] UKHL 48.
[133] Sylvia Shipping Co. Ltd. v. Progress Bulk Carriers Ltd., [2010] EWHC 542.
[134] C/P, Cl 67.
[135] COGHLIN ET AL., *supra* note 14, ¶ 16.48.
[136] Compania Sud Americano de Vapores v. Shipmair BV ('The Teno'), [1977] 2 Lloyd's Rep. 289.
[137] Century Textiles and Industry Ltd. v. Tomoe Shipping Co (Singapore) Pte Ltd. ('The Aditya Vaibhav'), [1991] 1 Lloyd's Rep. 573.
[138] Federal Commerce & Navigation Co. Ltd. v. Molena Alpha Inc. ('The Nanfri'), [1979] A.C. 757.

[A]. SET-OFF WAS PERMITTED UNDER THE C/P.

38. The terms of the C/P are binding on the parties.[139] Clause 23 gives Charterers the right to claim an adjustment of hire when it is not earned by Owners, or overpaid and excess hire.[140] Although it is '*less clearly*'[141] in NYPE,[142] the right still exists. In case the vessel is off hire,[143] the charterers are entitled to recover the hire which they have advanced '*at once*.'[144] Generally, the set-off is adjusted against the following term's hire.[145] Additionally, Clause 105[146] entitles the charterers to deduct from the hire in good faith and on *'reasonable grounds.'*[147] Thus, as per the explicit provisions in C/P, set-off was permitted.

[B]. ADVANCED HIRE PAID WAS ELIGIBLE TO BE DEDUCTED WHEN THE VESSEL WAS OFF-HIRE.

39. There exists a right to set-off against wrongful withdrawal for a certain time.[148] This is applicable even when the vessel is *'wholly or partially withheld.'*[149] The vessel was off-hire, and the charterers were deprived of its use[150] when it was directed[151] to the Chinese Yard for hold cleaning.[152] On this failure of consideration, the charterers had the right to recover the overpaid hire[153] as per Clause 23 and 105,[154] by deduction for the period of off-hire.[155] This deduction is permissible without the Owners' consent,[156] if assessed '*reasonably*'[157] by the charterers, on '*bona fide grounds*.'[158]

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[139] Indian Contract Act, No. 9 of 1872, § 37 INDIA CODE (1872).
[140] C/P, Cl 23.
[141] COGHLIN ET AL., *supra* note 14, at 280.
[142] New York Product Exchange Form (1993).
[143] Petroleum Shipping Ltd. v. Vatis (t/a Kronos Management) ('The Riza and the Sun'), [1997] 2 Lloyd's Rep. 314, 320.
[144] Stewart v. Van Ommeren, [1918] 2 K.B. 560, 564.
[145] Pan Ocean Shipping Co. Ltd. v. Creditcorp Ltd. ('The Trident Beauty'), [1994] 1 Lloyd's Rep. 365.
[146] C/P, Cl 105.
[147] Federal Commerce & Navigation Co. Ltd. v. Molena Alpha Inc. ('The Nanfri'), [1979] A.C. 757.
[148] COGHLIN ET AL., *supra* note 62, at 113**;** Sea and Land Securities v. William Dickinson, (1941) 71 LI.L. Re. 166; Halcyon Steamship v. Continental Grain, (1943) 75 LI.L. Rep. 80; Nippon Yusen Kaisha v. Acme Shipping Corp ('The Charalambos N Pateras'), [1971] 2 Lloyd's Rep. 42.
[149] Compania Sud Americano de Vapores v. Shipmair BV ('The Teno'), [1977] 2 Lloyd's Rep. 289.
[150] Federal Commerce & Navigation Co. Ltd. v. Molena Alpha Inc. ('The Nanfri'), [1979] A.C. 757.
[151] Moot Proposition, Page 15, V/C dated 23 November 2013.
[152] Leon Corp v. Atlantic Lines and Navigation Co. Inc., [1985] 2 Lloyd's Rep. 470.
[153] C. A. Stewart & Co. v. Phs. Van Ommeren (London), Limited, [1918] 2 K.B. 560.
[154] C/P, Cl 23; C/P, Cl 105.
[155] Century Textiles and Industry Ltd. v. Tomoe Shipping Co (Singapore) Pte Ltd. ('The Aditya Vaibhav'), [1991] 1 Lloyd's Rep. 573.
[156] Century Textiles and Industry Ltd. v. Tomoe Shipping Co (Singapore) Pte Ltd. ('The Aditya Vaibhav'), [1991] 1 Lloyd's Rep. 573.
[157] Century Textiles and Industry Ltd. v. Tomoe Shipping Co (Singapore) Pte Ltd. ('The Aditya Vaibhav'), [1991] 1 Lloyd's Rep. 573.
[158] SL Sethia Liners v. Naviagro Maritime Corp ('The Kostas Melas'), [1981] 1 Lloyd's Rep. 18.

40. In the present case, Charterers had already advanced the hire to Owners for the duration of off-hire and the deductions were made by them on a reasonable basis.[159] Such deductions reasonable because the set-off was as per the terms of C/P.[160] Even in the absence of any set-off clause in C/P, the right to adjustment was '*implied*'[161] and it manifested with the charterers. In conclusion, it is submitted that the charterers had the right to set-off. This was validly exercised by them when the vessel was off-hire.

IX. THE WITHDRAWAL OF THE VESSEL BY OWNERS REPUDIATED THE CONTRACT. THIS WAS ACCEPTED BY CHARTERERS.

41. Whene there is a repudiatory breach by a party in a contract, the innocent party may accept that breach, terminate the contract, and sue for damages.[162] In the present case, the C/P was terminated by Charterers following a breach of contract by Owners, as *first*, the notice of withdrawal of the vessel was irrevocable [**A**]. Second, the wrongful withdrawal of the vessel was a breach of contract by Owners [**B**]. Consequently, Charterers accepted Owners' breach and terminated the contract [**C**].

[A]. THE NOTICE OF WITHDRAWAL OF THE VESSEL WAS IRREVOCABLE.

42. The condition for a withdrawal notice is that it should not be '*unequivocal*.'[163] The owners sent a notice of withdrawal according to clause 11.[164] Owners, in this case, withdrew "*Charterers instructions are rejected and vessel is withdrawn from* CP."[165] Irrespective of the contentions of the owners regarding the withdrawal, the indication given is relevant. [166] It was done within a reasonable time[167] after an unambiguous notice[168] sent from Owners to Charterers under the anti-technicality clause[169] allowing them 3 days to pay the deducted hire. [170] Moreover, the instruction of Charterers to proceed to the West Coast was bypassed

[159] Moot Proposition, Page 17, V/C dated 16 December 2013.
[160] C/P, Cl 105.
[161] Pan Ocean Shipping Co. Ltd. v. Creditcorp Ltd. ('The Trident Beauty'), [1994] 1 Lloyd's Rep. 365.
[162] 1 H.G. Beale, CHITTY ON CONTRACTS: GENERAL PRINCIPLES 1710 (31st ed. 2012).
[163] Tropwood A.G. of Zug v. Jade Enterprises Ltd., [1981] 1 Lloyd's Rep. 45.
[164] C/P, Cl 11.
[165] Moot Proposition, Page 23, V/C dated 23 January 2014.
[166] Aegnoussiotis Shipping Corp of Monrovia v. Kristian Jebsens Rederi of Bergen AS ('The Aegnoussiotis'), [1977] 1 Lloyd's Rep. 268.
[167] Mardorf Peach & Co. Ltd. v. Attica Sea Carriers Corp of Liberia ('The Laconia'), [1977] 1 Lloyd's Rep. 315.
[168] Western Bulk Carriers K/S v. Li Hai Maritime Inc. (The Li Hai), [2005] EWHC 735.
[169] C/P, Cl 11(b).
[170] Moot Proposition, Page 3, F/N.

by Owners.[171] The actions of Owners clearly exhibit their intention to terminate the C/P permanently, and with immediate effect. Therefore, the notice of withdrawal of the vessel, al,though unjustified and unlawful, amounted to an irrevocable withdrawal.[172]

[B]. THE WRONGFUL WITHDRAWAL BY OWNERS AMOUNTED TO A BREACH OF CONTRACT

43. For a C/P to terminate a valid withdrawal is necessary, [173] else it becomes a repudiatory breach.[174] The decision in the *Nanfri* case,[175] inter alia, explained that the withdrawal of vessel by Owners on disputed set-off against hire by charterers,[176] repudiated the contract in case the set-off was done reasonably. The conduct of the owners, by not following the instructions of the charterers and withdrawing the vessel, amounted to a repudiatory breach.[177] The delay caused by the Owners in executing the instructions also amounted to a breach.[178] For a valid withdrawal by Owners,[179] it was necessary for the charterers to do a fundamental breach as per C/P,[180] which did not happen in this case. Thus, it is submitted that the actions of owners resulted in a repudiatory breach of the contract.

[C]. CHARTERERS' ACCEPTED OWNERS' BREACH AND TERMINATED THE CONTRACT.

44. The innocent party in a contract may elect to terminate it in case of breach by the other party.[181] Whenever there is withdrawal of a vessel, the innocent party has no right to '*relief against forfeiture*.'[182] The charterers cannot compel the owners to affirm to the terms of the C/P after the withdrawal since all the obligations from both the sides are terminated.[183] After the withdrawal notice, the charterers accepted the breach and terminated the contract on January 23, 2016. [184] The responsibility of Charterers towards any further voyage also ended

[171] Moot Proposition, Page 22, V/C dated 12 January 2014; Moot Proposition, Page 23, V/C dated 12 January 2014.
[172] Rainy Sky SA v. Kookmin Bank, [2011] UKSC 50.
[173] Steelwood Carriers of Monrovia v. Evimeria Compania Naviera of Panama ('The Agios Giorgis'), [1976] 2 Lloyd's Rep. 192.
[174] Federal Commerce & Navigation Co. Ltd. v. Molena Alpha Inc. ('The Nanfri'), [1979] A.C. 757.
[175] Federal Commerce & Navigation Co. Ltd. v. Molena Alpha Inc. ('The Nanfri'), [1979] A.C. 757.
[176] COGHLIN ET AL., *supra* note 14, ¶ 4.94.
[177] SK Shipping PTE Ltd. v. Petroexport Ltd., [2010] 2 Lloyd's Rep. 158.
[178] MCGREGOR ET AL., *supra* note 73, ¶ 15.080.
[179] Antaios Compania Naviera SA v. Salen Rederierna AB, [1984] 2 Lloyd's Rep. 235.
[180] C/P, Cl 11(a).
[181] Federal Commerce & Navigation Co. Ltd. v. Molena Alpha Inc. ('The Nanfri'), [1979] A.C. 757.
[182] Scandinavian Trading Tanker Co. AB v. Flota Petrolera Ecuatoriana ('The Scaptrade'), [1983] 2 Lloyd's Rep. 253.
[183] Petroleum Shipping Ltd. v. Vatis (t/a Kronos Management) ('The Riza and the Sun'), [1997] 2 Lloyd's Rep. 314.
[184] Heyman v. Darwins Ltd., [1942] AC 356, 397.

at that instance.[185] The contract, therefore, was terminated by the charterers on accepting the owners' breach and they are entitled to damages.

X. CHARTERERS ARE ENTITLED TO ADVANCE HIRE PAID, VALUE OF BUNKERS, LOSS OF FIXTURE AND DAMAGES, FOR WITHDRAWAL OF VESSEL FROM C/P.

45. When there is a breach of contract by one party, the damages amount to what it loses by non-performance upon the due date of performance.[186] Charterers, in this case, are eligible to receive refunds and damages due to breach of contract by Owners. Charterers are entitled to a refund of advance hire paid, value of bunkers and loss of fixture **[A]** Further, they are entitled to damages for the wrongful withdrawal of the vessel **[B]**.

[A]. CHARTERERS ARE ENTITLED TO A REFUND OF ADVANCE HIRE PAID, VALUE OF BUNKERS AND LOSS OF FIXTURE.

46. Hire was paid by Charterers for the period during which the vessel was off hire due to sandblasting. The subsequent hires were deducted by them under the principle of set-off.[187] However, after the vessel was deviated to the Chinese Yard,[188] the charterers' instructions were not followed in any manner[189] and the vessel was wrongfully withdrawn. Subsequently, this withdrawal was accepted by Charterers.[190] Since no voyage took place after the vessel was dry-docked, the hire paid by the charterers was still due to them, because of *"failure of consideration"*[191] from Owners. This was to be returned to Owners after termination of the contract.

47. Due to the termination of C/P, there was no obligation to maintain the bunker quantity as per the Fixture Note.[192] The right to the bunkers bought by the charterers rested with them.[193] Even after the termination, no property in the bunkers was transferred to the owners,[194] and they remained bailees.[195] Therefore, the charterers are entitled to the value of bunkers present.[196]

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[185] Tropwood A.G. of Zug v. Jade Enterprises Ltd., [1981] 1 Lloyd's Rep. 45.
[186] STEWART C. BOYD ET AL., SCRUTTON ON CHARTERPARTIES AND BILLS OF LADING 351 (21st ed, 2008).
[187] C/P, Cl 23; C/P, Cl 105.
[188] Moot Proposition, Page 15, V/C dated 24 November 2013.
[189] Moot Proposition, Page 22, V/C dated 12 January 2014; Moot Proposition, Page 23, V/C dated 12 January 2014.
[190] Moot Proposition, Page 28, V/C dated 23 January 2014.
[191] C. A. Stewart & Co. v. Phs. Van Ommeren (London), Limited, [1918] 2 K.B. 560.
[192] Petroleum Shipping Ltd. v. Vatis (t/a Kronos Management) ('The Riza and the Sun'), [1997] 2 Lloyd's Rep. 314.
[193] The Saint Anna, [1980] 1 Lloyd's Rep. 180.
[194] The Eurostar, [1993] 1 Lloyd's Rep. 106.

48. The charterers instructed the owners to proceed to West Coast on November 24, 2013.[197] However, this was ignored by the owners who wrongfully withdrew vessel. Consequently, the charterers had a loss of fixture. As per the principle of remoteness of damages,[198] the loss was reasonably foreseeable by the parties while entering into C/P.[199] Therefore, it is submitted that the charterers are entitled to the loss of fixture, in addition to the aforementioned amounts.

[B]. CHARTERERS ARE ENTITLED TO DAMAGES FOR WRONGFUL WITHDRAWAL OF THE VESSEL

49. When a contract is repudiated, and consequently accepted by the other party, the contractual obligations are terminated.[200] Additionally, the party responsible for the breach of contract is liable to pay damages.[201] In the instant case, the wrongful withdrawal of vessel by Owners entitled Charterers to damages.[202] These damages include loss of profits[203] which would have normally accrued[204] to the charterers if the C/P had not been breached.[205] Due to the breach,[206] the charterers were unable to earn any profit from November 24, 2013 till January 23, 2014, when the C/P was terminated by them.[207] Thus, it is submitted that the charterers are entitled to damages for the wrongful withdrawal of the vessel.

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[195] The Span Terza, [1984], 1 Lloyd's Rep. 119.
[196] Moot Proposition, Page 28, V/C dated 23 January 2014.
[197] Moot Proposition, Page 14, V/C dated 24 November 2013.
[198] Hadley v. Baxendale, (1854) 9 Ex 341; Czarnikow v. Koufos ('The Heron II'), [1969] 1 A.C. 350.
[199] Sylvia Shipping Co. Ltd. v. Progress Bulk Carriers Ltd., [2010] EWHC 542.
[200] Vitol v. Norelf, [1996] A.C. 800.
[201] Vitol v. Norelf, [1996] A.C. 800.
[202] Federal Commerce & Navigation Co. Ltd. v. Molena Alpha Inc. ('The Nanfri'), [1979] A.C. 757.
[203] Alfred C. Toepfer Schiffahrtsgesellschaft G.M.B.H v. Tossa Marine Co. Ltd. ('The Derby'), [1985] 2 Lloyd's Rep. 325.
[204] Sofia Shipping Co. v. Amoco Transp Co., 628 F Supp. 116, 1986 AMC 2163 (S.D.N.Y. 1986).
[205] Hadley v. Baxendale, (1854) 9 Ex 341.
[206] COGHLIN ET AL., *supra* note 14, ¶ 4.88.
[207] Western Bulk Carriers K/S v. Li Hai Maritime Inc. (The Li Hai), [2005] EWHC 735.

PRAYER

In the light of the above submissions, Charterers request the tribunal to:

Declare that

I. The tribunal should not have jurisdiction to hear the present dispute.

II. The underlying C/P be governed by Indian law.

ADJUDGE that

I. Owners are responsible for damage to the holds.

II. Owners are responsible for consequent losses in hire and claims by sub- charterers due to damage to the holds.

III. Owners are liable for cost of sandblasting.

IV. Vessel to stay off-hire during the course of sandblasting

V. Owners are liable for losses due to dry-docking of the vessel

VI. Charterers had the option to Set-Off when the vessel was off hire for the duration of sandblasting

VII. The withdrawal of the vessel by Owners repudiated the contract.

VIII. Charterers are entitled to Advance hire paid, value of bunkers, Loss of Fixture, and damages, for withdrawal of the vessel from C/P.