IN THE MATTER OF AN INTERNATIONAL ARBITRATION

IN THE MATTER OF AN SCMA ARBITRATION UNDER THE SCMA RULES (4TH EDITION)

BETWEEN:

TOMAHAWK MARITIME SA

Claimant

-and-

VEGGIES OF EARTH BANKING LTD

Respondent

SKELETON ARGUMENT ON BEHALF OF

TOMAHAWK MARITIME SA (CLAIMANT)

2024 EDITION ANNUAL INTERNATIONAL MARITIME LAW

ARBITRATION MOOT

TABLE OF CONTENTS

I. Introduction

The present arbitration arises from the contractual relation between Tomahawk Maritime SA ("Tomahawk") as carrier and Veggies of Earth Baking, LTD ("Veggies") as consignee under a Bill of Lading evidencing a contract of carriage of goods by sea. A total of 16,999.01 tons of crude palm oil were loaded onto the Vessel on September 4, 2023, for which the bill of lading was issued. It contained an incorporation clause, claiming that the "*Shipment is carried under and pursuant to the terms of the charter dated 1.9.23"*. The charterparty referred to was concluded between Tomahawk and Yu Shipping Ltd ("YSL"), under an amended Vegoilvoy charter, for carriage from Bintulu, Malaysia to Busan, South Korea.

Tomahawk contends that the arbitration agreement is valid under the seat of the arbitration's law (Singapore). In the alternative, if Guangzhou is considered as the seat of the arbitration, English law governs the arbitration agreement rendering it valid, granting jurisdiction to the Arbitral Tribunal.

Tomahawk claims damages caused by Veggies' failure to unload the cargo within the allowed laytime, as incorporated into the B/L. Although the incorporation of the demurrage clause is not contested, Tomahawk argues that a separate breach of contract exists, either under Clause 38 of the C/P's Rider Clauses or an implied term to discharge within a reasonable time.

Lastly, Tomahawk contends that it is not liable against Veggies for delivery against a Letter of Indemnity ("LOI"). Clause 57 of the C/P's Rider Clauses was properly incorporated, which gave Tomahawk the right to release cargo against the LOI. Alternatively, Veggies cannot prove that they suffered real damage by virtue of delivery without a B/L because of their own behaviour. Therefore, Tomahawk is not liable to indemnify Veggies in any respect.

II. List of Authorities

A. Documents

a) Tanker Voyage Charterparty dated 01/09/2023, on an amended Vegoilvoy form with rider clauses between Yu shipping LTD and Tomahawk Maritime SA

b) Bill of Lading No. COW-001A, issued on 04/09/2023

c) Singapore Chamber of Maritime Arbitration Rules (4th edn)

d) Procedural Order No. 1 issued by the Arbitral Tribunal

B. Legislation

a) Arbitration Act 1996 ("AA96")

b) Arbitration Law of the People's Republic of China ("PRC AL")

c) International Arbitration Act (Chapter 143A) (Singapore) ("IAA")

d) Carriage of Goods by Sea Act 1992 ("COGSA92")

C. Cases

a) *Compagnie Tunisienne de Navigation SA v Compagnie d'Armement Maritime SA* [1971] AC 572 ("Compagnie Tunisiene")

b) *Dornoch Ltd v Mauritius Union Assurance Co Ltd* [2006] EWCA Civ 389, [2006] 2 Lloyd's Rep. 475 ("Dornoch v Mauritius")

c) *Braes of Doune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Services Ltd* [2008] EWHC 426 (TCC) ("Braes of Doune")

d) *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38 ("Enka v Chubb")

e) *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA ("Mittal v Westbridge")

f) *Mangistaumunaigaz Oil Production Association v United World Trading Inc* [1995] 1 Lloyd's Rep 617 (QB) ("MOPA v UWTI")

g) *K Line Pte Ltd v Priminds Shipping (HK) Co Ltd* ("The Eternal Bliss") [2021] EWCA Civ 1712

h) *Miramar Maritime Corp v Holborn Oil Trading* ("The Miramar") [1984] AC 676 (HL)

i) *Sea Master Shipping Inc v Arab Bank (Switzerland) Ltd & Anor* ("The Sea Master") [2020] EWHC 2030 (Comm)

j) *Transfield Shipping Inc v Mercator Shipping Inc* ("The Achilleas") [2008] UKHL 48; [2009] 1 AC 61

k) *Songa Chemicals AS v NaviG8 Chemicals Pool Limited* [2018] EWHC 397 (Comm) ("Songa Chemicals")

l) *SA Sucre Export v Northern River Shipping Ltd ("The Sormovskiy 3068")* [1994] 2 Lloyd's Rep 266 (QBD (Admlty Ct))

m) *FIMBank plc v Discover Investment Corporation ("The Nika")* [2020] EWHC 254 (Comm); [2021] 1 Lloyd's Rep 109

n) *Standard Chartered Bank (Singapore) Ltd v Maersk Tankers Singapore Pte Ltd Winson Oil Trading Pte Ltd, Intervening* ("The Maersk Princess") [2022] SGHC 242

o) *UniCredit Bank AG v Euronav NV* ("The Sienna") [2022] EWHC 957 (Comm); [2022] 2 Lloyd's Rep 467

III. List of Abbreviations

Abbreviation	Full Title
B/L	Bill of Lading No. COW-001A, issued on 04/09/2023
C/P	Tanker Voyage Charterparty dated 01/09/2023, on an amended Vegoilvoy form with rider clauses between Yu Shipping LTD and Tomahawk Maritime SA
Claimant/ Tomahawk	Tomahawk Maritime SA
COGSA92	Carriage of Goods by Sea Act 1992
LOC	Letter of Credit issued by Veggies of Earth Banking LTD
LOI	Letter of Indemnity for the Sale of 17,000 MT of Crude Palm Oil, issued by Good Oils SDN BHD on 3/10/23
Respondent/ Veggies	Veggies of Earth Banking LTD
SCMA Rules	Singapore Chamber of Maritime Arbitration Rules (4th edn)
YSL	Yu Shipping LTD

IV. Summary of Facts

Tomahawk and YSL concluded a C/P on 1 September 2023, for the carriage of 16,999.01 tons of crude palm oil from Bintulu, Malaysia to Busan, South Korea. The C/P contained, among other clauses, laytime, demurrage, next employment, charterparty conflict, discharge without bills of lading, and law and arbitration provisions. The cargo was loaded onto the Vessel on 4 September 2023, and the B/L was issued thereto. The B/L contained an incorporation clause, claiming that "*This shipment is carried under and pursuant to the terms of the Charter dated 01.09.2023"*.

The Vessel arrived at Busan on 20 September 2023. NOR by Tomahawk was accepted, but YSL did not provide instructions despite repeated notifications, arguing that cargo interests had not issued their orders. On 3 October 2023, YSL exercised their right under the C/P to deliver against a Letter of Indemnity. Veggies became the lawful holder of the B/L on the same date but declined to give any type of orders or even communicate with Tomahawk. Discharge commenced on 4 October 2023 and finished on 7 October 2023. Vessel departed on 8 October 2023, although it did not arrive on time at Kaohsiung to meet the next fixture's laytime provision. The next Charterer's exercised their cancellation option, but Tomahawk negotiated to reinstate the next fixture at a lower hire rate.

Tomahawk served a notice of arbitration on 22 December 2023 claiming damages for losses in the next fixture as unliquidated damages in addition to demurrage. Veggies appointed its arbitrator on 5 January 2024, reserving its right to raise its objection to the jurisdiction of the Tribunal at the appropriate procedural stage, raising a counterclaim for losses under the B/L for misdelivery.

V. Summary of Questions

A. Whether the arbitrator has jurisdiction to adjudicate the case under a valid arbitration agreement, as incorporated into the B/L.

B. Whether the Respondent is liable to pay demurrage and/or loss, damage and expense incurred by the Claimant as a breach of the laytime provisions and/or an obligation to take delivery of the cargo in a reasonable time.

C. Whether the Claimant is liable to pay for the loss incurred by the Respondent as a result of the delivery of the cargo.

VI. Pleadings

A. The Jurisdictional Issue

a. The issue arises from the interpretation of Clause 76 of the C/P's Rider Clauses, incorporated into the B/L. Claimant contends that the arbitration clause is valid and, consequently, confers jurisdiction to the arbitrator. To that end, Claimant further contends that the putative applicable law is Singaporean law or, in its defect, English law, given that Chinese law would render the arbitration clause invalid.

b. In a dispute as to whether the arbitration clause is valid, the *Compagnie Tunisienne* case dictates that the putative applicable law must be used.[1] However, in the present case the choice of putative law is not straightforward, since English, Singaporean and potentially Chinese laws are at stake. In such case, the arbitral tribunal, in applying the *Dornoch v Mauritius* case,[2] must determine and apply the *lex fori*, e.g. the law of the seat of the arbitration.

c. In support of the above, Claimant advances alternative arguments:

i. Firstly, the seat of the arbitration is in Singapore, and Guangzhou must be regarded as the place of hearings. This is a clear application of the *Braes of Doune* decision, where the Parties provided for a place of hearings rather than the seat. Much as in *Braes of Doune*,[3] the arbitration clause provides that real control was not to be given to Chinese courts, since they would be quite reluctant to apply the SCMA Rules (and English law as the law of the contract). Further, the parties being aware of this difficulty and foreseeing a smooth settlement of disputes, directed themselves towards a commercial solution. This is, to have recourse to rule 32 (1) of the SCMA Rules,[4] which provide that in the absence of a choice of the seat, Singapore

[1] *Compagnie Tunisienne de Navigation SA v Compagnie d'Armement Maritime SA* [1971] AC 572
[2] *Dornoch Ltd v Mauritius Union Assurance Co Ltd* [2006] EWCA Civ 389, [2006] 2 Lloyd's Rep. 475
[3] *Braes of Doune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Services Ltd* [2008] EWHC 426 (TCC)
[4] Singapore Chamber of Maritime Arbitration Rules (4th edn)

must be regarded as the seat. This is in line with rule 32.3 of the SCMA Rules, given that physical hearings and meetings can be agreed by the parties.

ii. As a second step, Singaporean law must be analysed to determine whether the arbitration agreement can be considered as valid. Under section 2A (1) of the International Arbitration Act (Chapter 143A) (Singapore), the agreement must convey an agreement to submit to arbitration all or certain disputes, which largely mirrors the English Arbitration Act 1996 section 6 (1). In this sense, English law, as reflected in *MOPA v UWTI*,[5] provides that an arbitration agreement is valid even if containing the phrase 'if any', since it must be regarded as meaning that the Parties have agreed beforehand to submit any dispute that may arise under the contract to arbitration. In the instant case, the arbitration clause enshrined in Clause 76 of the C/P Rider Clauses provides that *"General Average and arbitration, if any, under ICC London"*, which must be understood as an expression of consent to refer all disputes to arbitration. Therefore, the arbitration agreement is valid under Singaporean law, conferring jurisdiction.

iii. Alternatively, if the seat of the arbitration is in China, English law governs the arbitration agreement. While Claimant concedes that Chinese law enshrined in Article 16 of the Arbitration Law of the People's Republic of China would render the arbitration agreement invalid, it contends that such situation is irrelevant given how the UK Supreme Court outlined the relevant test in *Enka v Chubb* to determine the law of the arbitration agreement.[6] Absent an express choice of law of the arbitration agreement, regard must be due to an implied choice of law. The UK SC considered that a choice on the law of the contract amounted to an implied choice of

[5] *Mangistaumunaigaz Oil Production Association v United World Trading Inc* [1995] 1 Lloyd's Rep 617 (QB)
[6] *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38

law. This is further strengthened by the fact that an exception in the test is to disregard an otherwise applicable law if it would render invalid the arbitration agreement. In this case, the law governing the contract is English law and, given that Chinese law would render the arbitration agreement invalid, the former must prevail.

d. As a second step, English law must be analysed to determine whether the arbitration agreement can be considered as valid. Under section 6 (1) of the AA96, the agreement must convey an agreement to submit to arbitration all or certain disputes. Much as it has been already argued, Claimant contends that English law as reflected in *MOPA v UWTI* provides that an arbitration agreement is valid even if containing the phrase *'if any'*. In the instant case, the arbitration clause provides that *"General Average and arbitration, if any, under ICC London"*, which must be understood as an expression of consent to refer all disputes to arbitration as discussed above. Therefore, the arbitration agreement is valid under English law.

B. The Charterparty Claim

a. Veggies has become the lawful bill of lading holder by virtue of sections 2(1)(a) and 3(1)(b) of COGSA92, thus becoming liable under the contract of carriage against Tomahawk. As an endorsee, Veggie has claimed delivery of the goods and raised a claim for alleged damages. Consequently, Tomahawk can validly uphold its initial claim for damages arising from failure to unload cargo within a reasonable time, in contravention of Clause E Part I of the C/P, and Clause 38 of the Rider Clauses.

b. Under common law, demurrage is the sole remedy for failure to discharge within the agreed laytime ***unless*** the carrier can demonstrate an additional breach of contract, following *The Eternal Bliss* principles.[7] However,

[7] *K Line Pte Ltd v Priminds Shipping (HK) Co Ltd* ("The Eternal Bliss") [2021] EWCA Civ 1712

Tomahawk submits that there is a separate ground of breach of contract for which Veggies is liable to pay unliquidated damages.

c. Claimant contends that there is a distinct breach of contract based on the implied obligation incumbent upon Veggies to discharge within a reasonable period of time The Court of Appeal in *The Eternal Bliss* rightly identified that where a separate breach of contract is present, it is not contained in the demurrage clause and can be consequently claimed independently. In the instant case, Clause 57 of the C/P's Rider Clauses imposed an obligation upon Respondent to ensure that the Vessel departed from the port within a reasonable time to reach the port for the next fixture in time. This obligation, when interpreted for the B/L holder, can only extend to oblige them to finish unloading within a reasonable time, and not take undue delays. In this case, it is evident that Veggies took more than 18 days to discharge the cargo, which was a clear breach of this obligation.

d. Further, there is an implied term in the B/L that the cargo must be unloaded in a reasonable time. Although *The Sea Master* case provided that no implied obligation under the B/L to discharge could be inferred, [8] it is quite distinguishable from our case. In that case, the discharge operations were at the risk of the Owner, for which no additional duty could be posed upon the B/L holder. In contrast, Clause 7 of the C/P in this case allocates responsibility for discharge operations away from Claimant and, presumably, to Respondent. Therefore, the principle in *The Sea Master* is inapplicable, and an implied term can be found in the B/L, obliging Respondent to discharge within a reasonable time. It follows that Respondent's delay for more than 8 days to discharge is a clear breach of the B/L's terms, which constitute a distinct violation giving rise to damages in addition to demurrage. Lastly, Claimant contends that the damages were sufficiently foreseeable as to be recoverable. Under English law

[8] *Sea Master Shipping Inc v Arab Bank (Switzerland) Ltd & Anor* ("The Sea Master") [2020] EWHC 2030 (Comm)

as enshrined in *The Achilleas*,[9] the liable party must be sufficiently aware of the damage and his conduct so negligent, that it was evident that losses will follow. In this case, Veggies was vastly aware of the next fixture of the Vessel and was in control of the Vessel's departure because of its power to unload. Therefore, the loss that immediately ensued was clearly foreseeable and recoverable in these proceedings.

C. The Bill of Lading Claim

a. Claimant's discharge of the Cargo, commenced on 4 October 2023, did not constitute a mis-delivery of cargo, according to Clause 57 of the C/P's Rider Clauses, which was validly incorporated into the Bill of Lading (B/L). As the B/L incorporates the terms of the charterparty this clause is perfectly binding to Veggies. Clause 57 provides the possibility of delivering the cargo without the presentation of a B/L and instead with a Letter of Indemnity.

b. Under the English law the possibility of delivering goods with the presentation of a LOI:

i. The enforceability of the LOI as an exception to the original B/L is recognised in *The Sormovskiy 3068*[10] case acknowledged the difficulty for the B/L to arrive at the discharge port in time and stated 'by including a contractual term requiring the master to deliver the cargo against a LOI or bank guarantee' for the problem will be resolved.

[9] *Transfield Shipping Inc v Mercator Shipping Inc* ("The Achilleas") [2008] UKHL 48; [2009] 1 AC 61
[10] *SA Sucre Export v Northern River Shipping Ltd* (The Sormovskiy 3068) [1994] 2 Lloyd's Rep 266(QBD (Admlty Ct))

ii. In *Songa Chemicals*,[11] it is established the enforceability of LOI and extends the principle to include the receiver believed to be representing or acting on behalf of the named receiver.

c. Respondent has been the lawful holder of the B/L since 3 October 2023, thus Veggies as the lawful holder of the B/L, under section 3(1) of COGSA92, can incur liabilities if he has got the contractual rights under section 2(1).

d. Veggies conduct was the cause of the loss and not the breach of contract itself that Tomahawk might have encountered by delivering the goods without the presentation of the B/L. Veggies was aware that the cargo was going to be delivered without a B/L, and even if asked about it, Veggies would have still ordered delivery as it was also perfectly aware of the Vessel's limitations according to YSL's communication.

e. As it was agreed by the parties, the payment of the goods would be done against the presentation of shipping documents, which in this case is the letter of indemnity. Veggies accepted the indemnity. But within the letter of indemnity, it was stated expressly that Veggies agreed to pay for the cargo, to finance it, without the need to present the B/L. Therefore, without a doubt, Veggies was perfectly aware that the goods were going to be delivered without the providence of a B/L. In the case *The Nika*, the bank's claim failed as it was proven that the bank was aware the cargo had been discharged into a warehouse without production of a B/L.[12] In addition, Veggies received the bill soon after the discharge of the goods was completed, which also helps reinforce their potential agreement to the circumstances.

[11] [2018] EWHC 397 (Comm)
[12] *FIMBank plc v Discover Investment Corporation* ("The Nika") [2020] EWHC 254 (Comm); [2021] 1 Lloyd's Rep 109

f. Veggies might not have had a right to sue in the first place, as the B/L is a mere receipt itself. It is thought that in both English and Singapore law, it must have been intended at the time of the transfer of a B/L that rights to sue will also be transferred with it, otherwise the new holder will not inherit the right to sue. This was proven in the Singaporean case *The "STI Orchard"* [2022], SGHCR. The Singapore Court thought the bank's financing arrangements suggested it was not relying on the cargo or bills of lading as security, but was instead taking security over the proceeds of its customer's sale of the cargo after delivery. Also, the bank did not ensure either that the bills were made out to its order or indorsed in blank. Instead, the bank allowed the bills of lading to be issued or indorsed to the receiver's order.

g. Also, in *The Sienna*,[13] it is also established how the B/L is a mere receipt when transferred as a negotiable document. The Court of Appeal in that case reasoned that the status of the bill of lading at discharge was not determinative of the breach issue, where the bank could acquire contractual rights upon indorsement of the bill of lading, operating retrospectively, based on section 2 of COGSA92.

   i. In *The Sienna*, the B/L did not give the bank the right to sue the carrier for misdelivery. The Court found the bank's B/L was not in fact a contract of carriage giving a right to sue, but a mere receipt. That was because the carrier and the previous holder of the bill of lading were party to a charterparty for the hire of the ship – so the contractual relationship between them was covered by the charterparty and not by the bill of lading. The bill of lading was a mere receipt for the cargo. The charterparty was then novated to another charterer, and the bill of lading was later passed to the bank. The Court found the bill of lading remained a receipt and not a

[13] *UniCredit Bank AG v Euronav NV* ("The Sienna") [2022] EWHC 957 (Comm); [2022] 2 Lloyd's Rep 467

contract, and therefore Unicredit Bank never obtained a right to sue the carrier under it.

VII. Prayer for Relief

The Claimant respectfully request the arbitrator to adjudge and declare:

A. The arbitration agreement is valid and can grant jurisdiction to the Arbitral Tribunal to hear and adjudicate this dispute.

B. Respondent is liable to indemnify Claimant for the losses sustained by virtue of the delayed unloading, amounting to USD$4,249,752.50.

C. Claimant is not liable to indemnify Respondent for the delivery of the cargo without production of the B/L, given that it was lawfully performed under the provisions of the B/L.

Counsel for the Claimant

01.05.2024