School of Law, CHRIST (Deemed to be University), Bangalore, Karnataka, India

Team Code – I

Team Mooters:

1. Amiti Agarwal
2. Neelanksha Bhatia
3. Sanshia Helmina Rebello

Memo on behalf of CLAIMANT Party

TEAM CODE: I

INTERNATIONAL MARITIME LAW ARBITRATION MOOT 2024

BEFORE THE HON'BLE SINGAPORE CHAMBER OF MARITIME ARBITRATION

UNDER RULE 20 OF THE SCMA RULES, 2015

ARBITRATION NO. /2024

IN MATTER OF

TOMAHAWK MARITIME S.A.…….…. CLAIMANT PARTY

Vs.

VEGGIES OF EARTH BANKING LTD.……..RESPONDING PARTY

UPON SUBMISSION BEFORE THE HON'BLE SCMA TRIBUNAL

MEMORIAL ON THE BEHALF OF CLAIMANT PARTY

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

ABBREVIATION	FULL FORM
$	*Section*
&	*And*
AA	*Arbitral Agreement*
AIR	*All India Reporter*
Anr.	*Another*
Bom.	*Bombay*
cl.	*Clause*
Ed.	*Edition*
HC	*High Court*
Hon'ble	*Honorable*
IA	*International Agreement*
IC	*International Convention*
Ltd.	*Limited*
Ltd.	*Limited*
No.	*Number*

Ors.	*Others*
P	*Paragraph*
Pg.	*Page*
SC	*Supreme Court*
SCMA	*Singapore Chamber of Maritime Arbitration*
SCR	*Supreme Court Reporter*
u/s	*Under section*
UK	*United Kingdom*
v.	*Versus*
WP	*Writ Petition*

INDEX OF AUTHORITIES

[A. CASES]

16. Rambler Cycle Co. Ltd. v. Sze Hai Tong Bank
17. National Trading Corporation Ltd v. Huggett [1999] FJHC 6
18. Songa Chemicals A S v. Navig8 Chemicals Pool Limited [2018] EWHC 397 (Comm)
19. Sovereign Marine & General Insurance Co. Ltd. v. Stevedoring and Maritime Agencies (Private) Ltd." (2012)
20. Tenacity Marine Inc. NOC Swiss LLC & Anr. [2020] EWHC 2820 (Comm)
21. The “Litos” (1994) 1 Lloyd's Rep. 253 - The "Litos"
22. The Erin Schulte [2014] EWCA Civ 1382
23. Tjong Very Sumito v Antig Investments Pte Ltd [2013] SGHC 221
24. Tomolugen Holdings Ltd v Silica Investors Ltd [2015] SGCA 57
25. Union of India v. Reliance Industries Ltd. (2015)

[B. LIST OF STATUTES]

1. Arbitration Act 1996
2. The Admiralty (Jurisdiction And Settlement Of Maritime Claims) Act, 2017
3. Merchant Shipping Act 1995

[C. JOURNALS AND ARTICLES]

1. D Mark Cato, Arbitration Practice and Procedure: Interlocutory and Hearing Problems (3rd edn, LLP 1997)
2. Arbitration and Conciliation, A Commentary, Saurabh Bindal and RV Prabhat, 1st Edition, 2021
3. Restoring The Faith In Contracts Performed In India: Specific Relief Amendment, 2018, Gunjan Chhabra

4. Revisiting Liquidated Damages In India, Shubhra Wadhawan

5. Levy Of Liquidated Damages By One Party To A Contract: When Arbitrable? Comments In Light Of Sc Judgment Of Mitra Guha V. Ongc Prashant Pakhiddey And Lakshmi Dwivedi

6. Principles Governing Frustration Of Contract Under Indian Law, (2019) 7 Scc J-1

[D. ONLINE RESOURCES]

1.	SCC ONLINE, *https://www.scconline.com* (last seen April 25,2024)
2.	WESTLAW, *https://www.westlawindia.com* (last seen on April 27,2024).
3.	LEXIS ADVANCE, *https://www.lexisnexis.com/in/legal* (last seen on April 27, 2024).
4.	MANUPATRA, *https://www.manupatrafast.com* (last seen on April 27,2024).
5.	HEINONLINE, *https://home.heinonline.org* (last seen on April 25,2024)

STATEMENT OF JURISDICTON

The requesting party has invoked the jurisdiction of this tribunal under Rule 20 of the Singapore Chamber of Maritime Arbitration Rules, 2015. Hence, the requesting party has submitted themselves to the jurisdiction, and we shall also be contesting that the present matter is maintainable. This memorandum is submitted to set forth the facts and the laws on which the claims are based.

RULE 20: THE SINGAPORE CHAMBER OF MARITIME ARBITRATION RULES, 2015

20. Jurisdiction of the Tribunal: In addition to the jurisdiction to exercise the powers defined elsewhere in these Rules or any applicable statute for the time being in force, the Tribunal shall have jurisdiction to:

a) rule on its own jurisdiction;

b) determine all disputes arising under or in connection with the transaction or the subject of reference, having regard to the scope of the arbitration agreement and any question of law arising in the arbitration;

c) receive and take into account such written or oral evidence as it shall determine to be relevant; and

d) proceed with the arbitration and make an Award notwithstanding the failure or refusal of any party to comply with these Rules or with the Tribunal's written orders or written directions, or to exercise its right to present its case, but only after giving that party written notice that it intends to do so.

STATEMENT OF FACTS

[A] PROLOGUE

Tomahawk and Yu Shipping Ltd. ("Charterer") executed a voyage charter party on **September 1**, 2023, for the charter of the vessel MV "NIUYANG" (the "Vessel") to carry a load of palm oil from Bintulu, Malaysia, to Busan, South Korea. A revised VEGOILVOY form contained the provisions of the Charterparty, along with a rider clause that specified the Vessel's future employment at Kaohsiung with **a laycan of October 1–14, 2023**. On **September 6, 2023**, Bill of Lading No. COW-001A was issued, naming VOE as the consignee and implementing the conditions of the Charterparty.

[B] THE PARTIES

A dispute arose between the Claimant and the Respondent, Veggies of Earth Banking Ltd. ("VOE"), arising from a voyage charterparty and bill of lading transaction.

[C] DELAYED DISCHARGE

The absence of berthing and discharge instructions from the Charterer caused the vessel to experience delays in discharge at Busan even after submitting a Notice of Readiness on **September 20, 2023**. After several reminders from Tomahawk regarding the vessel's scheduled Kaohsiung fixture, the Charterer only obtained discharge orders on **October 3, 2023**, after being threatened with cancellation by other charterers. The discharge process started on **October 4, 2023**, however it did not conclude until after the vessel's Kaohsiung charterparty cancellation date.

[D] BREACH OF BILL OF LADING TERMS

VOE, the owner of the Bill of Lading, was unable to secure the cargo's prompt discharge during the laytime stipulated in the Charterparty, the vessel's following employment was terminated.

[E] COUNTERCLAIM FOR MIS-DELIVERY

VOE sues Tomahawk for damages for misdelivery and claimed entitlement to the cargo based on its financing agreement with Yu Shipping.

[F] CAUSE OF ACTION

The dispute between the Claimant and Respondent revolves around the mis-delivery of the Cargo. The Respondent, as the financier of the Cargo, suffered a **loss of USD 4,249,752.50** due to the Claimant's mis-delivery, leading to a claim for damages. On the other hand, the Claimant contests the Respondent's claim and seeks unliquidated damages in addition to demurrage, emphasizing losses beyond demurrage compensation due to a breach of discharge obligations. The disagreement centers on financial liability for the mis-delivery and the extent of damages sought by each party.

[G] ARBITRATION

Tomahawk contests VOE's counterclaim for mis-delivery and seeks damages for losses caused by the delayed discharge and subsequent cancellation of the Kaohsiung charter party. Furthermore, Tomahawk claims that VOE's contract violations significantly damaged it, constituting its request for justice as reasonable and that the Tribunal is competent to decide the case.

NOW THE MATTER IS BEFORE THE HON'BLE SCMA TRIBUNAL

STATEMENT OF ISSUES

The following issues are presented before this Hon'ble Tribunal for its consideration

~ISSUE I~

WHETHER THE SCMA ARBITRAL TRIBUNAL HAVE THE AUTHORITY TO ADJUDICATE THE MATTER?

~ISSUE II~

WHETHER THERE IS RIGHT TO CLAIM DEMURRAGE OR LOSSES ARISING OUT OF DELAY OF CARGO?

~ISSUE III~

WHETHER THE CLAIMANT LIABLE TO PAY DAMAGES TO THE RESPONDENT OF USD 4,249,752.50 FOR MIS-DELIVERY OF CARGO?

SUMMARY OF ARGUMENTS

~ISSUE I~

WHETHER THE SCMA ARBITRAL TRIBUNAL HAVE THE AUTHORITY TO ADJUDICATE THE MATTER?

It is humbly submitted before the Arbitral Tribunal that the SCMA Arbitral Tribunal has the authority to adjudicate the matter. The validity of the arbitration clause incorporated into the bill of lading terms is pivotal to this argument. It's essential to note that the arbitration clause forms an integral part of the contract between the parties. In the absence of any explicit exclusion or limitation, the Tribunal, being a competent arbitral body, holds jurisdiction over the disputes arising from the charter party and bill of lading transaction.

~ISSUE II~

WHETHER THERE IS RIGHT TO CLAIM DEMURRAGE OR LOSSES ARISING OUT OF DELAY OF CARGO?

It is humbly submitted that the Respondent has a contractual duty, under the incorporated conditions of the Charterparty, to guarantee the prompt discharge of the cargo as the holder of the bill of lading. The interdependence of the two documents is emphasized, with laytime clauses from the Charterparty integrated into the bill of lading. This is a breach of contract that implies responsibility for the Respondent's future losses, including damages in excess of demurrage costs. The claimant believes that the provisions of the Charterparty, which are expressly stated in the bill of lading, clearly define roles and obligations, and that any infraction of these terms is subject to legal action. As a result, the Claimant is requesting damages for monetary losses brought about by

the Respondent's inability to release the shipment within the prearranged window of time, which eventually impacted subsequent contractual commitments.

~ISSUE III~

WHETHER THE CLAIMANT LIABLE TO PAY DAMAGES TO THE RESPONDENT OF USD 4,249,752.50 FOR MIS-DELIVERY OF CARGO?

It is humbly submitted before the Hon'ble Tribunal that the claimant refutes liability for damages to the respondent for mis-delivery of cargo. The delay in discharge at Busan, attributable to the charterer's failure to provide berthing and discharge instructions, and subsequent cancellation of the Kaohsiung charter party were beyond the claimant's control. Therefore, any damages resulting from mis-delivery should not be borne by the claimant. If the mis-delivery was caused by factors beyond the claimant's control, they cannot be held liable for damages.

Therefore, the SCMA Arbitral Tribunal possesses the authority to adjudicate the matter, the arbitration agreement is valid under both Singapore and English law, and the claimant is not liable for damages to the respondent for mis-delivery of cargo.

ARGUMENTS ADVANCED

~ISSUE I~

WHETHER THE SCMA ARBITRAL TRIBUNAL HAVE THE AUTHORITY TO ADJUDICATE THE MATTER?

[A] AUTHORITY OF SCMA ARBITRAL TRIBUNAL

1.1 The SCMA Arbitral Tribunal indeed has the authority to adjudicate the matter. The validity of the arbitration clause is incorporated into the bill of lading terms, including specifics such as the location of arbitration, number of arbitrators, and adherence to SCMA rules.

1.2 Firstly, the arbitration clause within the voyage charter party, as evidenced by the inclusion of the VEGOILVOY form and its rider clause, establishes the parties' agreement to resolve disputes through arbitration. Secondly, the SCMA Arbitration Rules provide a framework for the resolution of maritime disputes, including those arising from bill of lading transactions. As such, the Tribunal has the requisite authority to hear and decide upon the dispute between the parties.

1.3 It is submitted that in the case of **Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.**[1], the Supreme Court of India affirmed the principle of party autonomy in arbitration agreements, emphasizing the importance of upholding the parties' chosen method of dispute resolution. Further, supporting the same stance on the prevalence of arbitration clause it was held in the case of, **Enercon (India) Ltd. & Ors. v. Enercon**

[1] Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc." (2012)

GmbH & Anr.[2], that where parties have agreed to resolve their disputes through arbitration, the courts should not interfere unless there are compelling reasons to do so.

1.4 Further, at an international level, in **Sovereign Marine & General Insurance Co. Ltd. v. Stevedoring and Maritime Agencies (Private) Ltd.**[3], the Singapore Court of Appeal affirmed the competence-competence principle, holding that the arbitral tribunal has the authority to determine its own jurisdiction, including the validity of the arbitration agreement.

1.5 It is further submitted that, In **Gazprom OAO v. Lietuvos Respublika**[4] European Court of Justice emphasized the principle of party autonomy and held that parties' agreement to arbitration should be respected, affirming the competence of arbitral tribunals to determine their jurisdiction.

1.6 It is finally concluded that, the arbitration clause clearly provides for SCMA rules to apply and further, the clause fulfils all necessary elements to be held valid under the SCMA rules. Thus, the SCMA tribunal is the right jurisdiction for this arbitration. The following sub-parts substantiate this contention as a whole.

[B] THE CONSTITUENT ELEMENTS AND TERMS OF VALIDITY OF THE ARBITRATION AGREEMENT

1.7 It is submitted that to be able to talk about a valid arbitration clause or agreement, there must be a valid arbitration clause or agreement in terms of capacity, form, and substance. The law under which the validity of the arbitration agreement will be determined is stated

[2] Enercon (India) Ltd. & Ors. v. Enercon GmbH & Anr." (2014)
[3] Sovereign Marine & General Insurance Co. Ltd. v. Stevedoring and Maritime Agencies (Private) Ltd." (2012)
[4] Gazprom OAO v. Lietuvos Respublika (2016)

in the New York Convention. Accordingly, in the validity of the arbitration agreement, the court will first consider the law that the parties have agreed to apply to the validity of the arbitration agreement. If the parties fail to determine the law applicable to the arbitration agreement, it will be determined whether the arbitration agreement is valid in accordance with the law of the place where the arbitral award was made. According to Turkish law, in order for the arbitration agreement to be valid, the will to arbitrate must be clearly stated, it must be made in writing and on a subject that is suitable for arbitration, and the subject of the dispute must be clearly stated in the agreement.

1.8 It is submitted that, if there is no valid arbitration agreement, the dispute must be heard in state courts. This is a constitutional requirement under Turkish legislation. The conditions of validity of an arbitration agreement are to be looked into specifically with respect to (i) Will of Arbitration and (ii) Existence of clear Subject Matter of Dispute

[i] **WILL OF ARBITRATION**

1.9 It is submitted that, the declaration of intent regarding the resolution of disputes through arbitration is the basic constituent element of the arbitration agreement, beyond the validity condition. For a valid arbitration agreement to be established, the parties' will to arbitrate must be clearly stated in the written agreement, without causing any confusion.

1.10 It is further submitted that, if the parties did not explicitly include an arbitration clause in the contract, they signed between them and did not make an arbitration agreement, then the existence of an arbitration agreement is also accepted if they refer to a contract that includes an arbitration clause in accordance with Article 2 of the International Arbitration Act. If the arbitration agreement is claimed to be invalid based on reasons such as error, fraud, or

threat, the validity of the arbitration agreement will be governed by the law chosen by the parties, and in the absence of a choice of law, the law of the place of arbitration applied.

1.11 It is submitted that, it was held in **the Union of India v. Reliance Industries Ltd.** case[5], where the Indian Supreme Court held that arbitration clauses incorporated into contracts should be interpreted broadly to give effect to the parties' intentions, including clauses relating to the location of arbitration and adherence to specific arbitration rules.

[ii] **EXISTENCE OF A SPECIFIC OR IDENTIFIABLE MATTER**

1.12 It is humbly submitted that, in the definition of an arbitration agreement, the phrase "*disputes that have arisen or may arise from an existing legal relationship*" is used. The dispute that constitutes the subject of arbitration must be clear. There is a complete consensus in the doctrine that this type of arbitration agreement will not be valid if the subject of the dispute is unclear. When making an arbitration agreement, the parties should know about which dispute (or possible dispute) they are making this agreement. In other words, the will of the parties regarding which dispute will be resolved through arbitration should also be understandable. If it has been decided that the disputes arising from a certain legal relationship will be resolved through arbitration, the dispute is again deemed to be determined.

1.13 In conclusion, under Singapore law, the arbitration agreement between Tomahawk and VOE is valid and enforceable. It satisfies the requirements of party autonomy, separability, and broad interpretation upheld by Singapore courts. Therefore, the SCMA Tribunal has the authority to adjudicate the dispute between the parties in accordance with the arbitration agreement.

[5] Union of India v. Reliance Industries Ltd. (2015)

[C] VALIDITY OF ARBITRATION AGREEMENT UNDER SINGAPORE LAW

1.14 It is humbly submitted that, the arbitration agreement between Tomahawk Maritime S.A. and Veggies of Earth Banking Ltd. ("VOE") is valid under Singapore law. Singapore has a pro-arbitration legal framework that upholds the enforceability of arbitration agreements, provided certain criteria are met. In this case, the arbitration agreement is valid as it meets the requirements prescribed under Singapore's Arbitration Act.

1.15 It is submitted that, the validity of the arbitration agreement between Tomahawk Maritime S.A. and Veggies of Earth Banking Ltd. ("VOE") is pivotal in determining the jurisdiction of the SCMA Tribunal to adjudicate the dispute. Under Singapore law, the Arbitration Act provides a robust legal framework that upholds the enforceability of arbitration agreements, subject to certain requirements.

1.16 Firstly, Singapore courts recognize the principle of party autonomy, allowing parties to freely choose arbitration as the method of dispute resolution. As such, the arbitration agreement between Tomahawk and VOE, which is included in the voyage charter party, demonstrates the parties' mutual intention to resolve disputes through arbitration rather than litigation.

1.17 Secondly, Singapore courts adopt a pro-arbitration stance, emphasizing the separability of arbitration agreements from the main contract. This principle, affirmed in cases like **Tomolugen Holdings Ltd v Silica Investors Ltd**.[6], means that the validity of the arbitration agreement is independent of the validity of the underlying contract. Therefore,

[6] Tomolugen Holdings Ltd v Silica Investors Ltd [2015] SGCA 57

even if there are issues with the charter party, the arbitration agreement remains valid as long as it meets the criteria set out in the Arbitration Act.

1.18 It is submitted that, in **Tomolugen Holdings Ltd v Silica Investors Ltd**[7], the Singapore Court of Appeal affirmed the principle of separability of arbitration agreements, stating that the validity of an arbitration agreement is separate from the underlying contract's validity. This case underscores Singapore's pro-arbitration stance and the courts' willingness to uphold arbitration agreements, even if there are issues with the main contract. This gives rise to the doctrine of separability which simply states that an arbitration agreement is always to be treated separately from its main agreement.

1.19 It is further submitted that, **PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (Indonesia)**[8] highlights the Singapore courts' approach to interpreting arbitration agreements in favor of arbitration. The court emphasized that arbitration agreements should be interpreted broadly and in a manner consistent with party autonomy, reinforcing the validity of arbitration agreements under Singapore law. Furthermore, Singapore courts interpret arbitration agreements broadly, with a view to giving effect to the parties' intentions. This essentially boils down to the superiority of arbitration placed by Courts in the interest of the parties.

1.20 Thus, it is humbly submitted that in the present case, the arbitration clause when read according to the doctrine of separability will be treated as a separate agreement which should be validated individually. Further, regardless of the validation, through precedents

[7] Ibid
[8] PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (Indonesia) [2015] SGCA 30

it can be inferred how the Courts have set the principle of arbitration to be viewed broadly merely to value the interests of the concerned parties.

[D] INCORPORATION OF ARBITRATION CLAUSE INTO BILL OF LADING TERMS

1.21 It is humbly submitted that, the arbitration clause, including details regarding the location of the arbitration, number of arbitrators, and adherence to SCMA rules, is incorporated into the bill of lading terms by the bill of lading being issued under the voyage charter party. The bill of lading, being a document implementing the conditions of the charter party, necessarily encompasses all terms and clauses contained therein, including the arbitration clause.

1.22 It is humbly submitted that, in **Harmony Innovation Shipping Ltd. v. Gupta Coal India Pvt. Ltd. (2015)**[9] it underscores the principle of incorporation by reference, wherein terms from one document can be incorporated into another document by reference if there is a clear intention to do so. It highlights that arbitration clauses in charter parties can be incorporated into bills of lading by reference, especially when they are part of the same transaction and intended to govern disputes arising therefrom.

1.23 Similarly, it is submitted that in the **"Litos"** case[10] it exemplifies the principle that arbitration clauses contained in charter parties are generally deemed to be incorporated into bills of lading issued pursuant to those charter parties. It emphasizes the unity of the transaction and the intention of the parties to have all disputes arising from it resolved through arbitration, thus affirming the validity and incorporation of such arbitration clauses into bills of lading terms.

[9] Harmony Innovation Shipping Ltd. v. Gupta Coal India Pvt. Ltd. (2015)
[10] The "Litos" (1994) 1 Lloyd's Rep. 253 - The "Litos"

1.24 It is further submitted that, the SCMA Arbitral Tribunal possesses the authority to adjudicate the matter at hand. This authority is derived from the parties' agreement to arbitrate disputes arising from the charterparty and bill of lading transaction. The arbitration clause, which specifies SCMA as the chosen arbitral institution, demonstrates the parties' intention to submit any disputes to SCMA arbitration.

1.25 Further, it is submitted that in a similar case of, **AES Ust-Kamenogorsk Hydropower Plant LLP v. Ust-Kamenogorsk Hydropower Plant JSC** case[11], the Singapore Court of Appeal held that arbitration clauses contained in charterparties can be incorporated into bills of lading by reference. It emphasized the principle of unity of transaction, whereby documents forming part of a single commercial transaction are interpreted together. This supports the argument that the arbitration clause in the charterparty is incorporated into the bill of lading terms.

1.26 It is submitted that, in the previously cited, **PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV & Ors.** case[12], the Singapore Court of Appeal affirmed the competence-competence principle, which allows arbitral tribunals to rule on their own jurisdiction. It underscores that the validity of the arbitration clause and the competence of the tribunal to decide disputes are matters within the jurisdiction of the arbitral tribunal itself, reinforcing the authority of the SCMA Arbitral Tribunal in this matter.

1.27 It is submitted that in the present case, the arbitration clause, including details regarding the location of arbitration, number of arbitrators, and adherence to SCMA rules, is

[11] AES Ust-Kamenogorsk Hydropower Plant LLP v. Ust-Kamenogorsk Hydropower Plant JSC [2011] SGCA 17
[12] PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others [2014] SGCA 27

incorporated into the bill of lading terms. This incorporation is evident from the fact that the bill of lading was issued pursuant to the voyage charterparty, which contained the arbitration clause. Therefore, any disputes arising under the bill of lading are subject to the arbitration clause contained in the charterparty.

1.28 It is submitted that, the above contention can be supported through the **Gard Marine and Energy Ltd v. China National Chartering Co Ltd** (The "Ocean Victory") case[13] which further elucidates the principle of incorporation by reference in bills of lading. It emphasizes that arbitration clauses contained in charterparties can extend to disputes arising under bills of lading issued pursuant to those charterparties, provided there is a clear intention to incorporate the arbitration clause into the bill of lading terms.

1.29 It is submitted that, when it comes to the extent of allowing incorporation of the arbitration clause to the bills of lading, the court is primarily concerned with whether there is a reasonable reason to believe that such an effect shall not be caused. This was also set a precedent where the English Court of Appeal in **E.D. & F. Man Liquid Products Ltd v. Patel Shipping Co. Ltd. (2003)[14]** held that arbitration clauses incorporated into charter parties are binding on the parties and should be given effect unless there are compelling reasons not to enforce them.

1.30 It is therefore submitted and contended that the SCMA Arbitral Tribunal has the authority to adjudicate the matter, as the validity of the arbitration clause is incorporated into the bill of lading terms, including specifics concerning the location of arbitration, number of arbitrators, and adherence to SCMA rules.

[13] Gard Marine and Energy Ltd v. China National Chartering Co Ltd (The "Ocean Victory") [2013] SGHC 196
[14] E.D. & F. Man Liquid Products Ltd v. Patel Shipping Co. Ltd. (2003)

~ISSUE II~

WHETHER THERE IS RIGHT TO CLAIM DEMURRAGE OR LOSSES ARISING OUT OF DELAY OF CARGO?

[A] WHETHER THE LOSSES ARISING OUT OF MIS-DELIVERY WERE SUFFERED BY THE RESPONDENT OR THE CLAIMANT?

2.1 It is humbly submitted that, the fundamental point of contention in the dispute between Veggies of Earth Banking Ltd. and Tomahawk Maritime S.A. is that that company failed to promptly release the cargo, resulting in substantial losses for Tomahawk Maritime. Tomahawk Maritime sent Veggies of Earth Banking Ltd. many alerts and notices, but they were unable to secure the cargo's timely discharge. As a result, the vessel missed its next scheduled employment in Kaohsiung.

2.2 It is further submitted that, Tomahawk Maritime and Yu Shipping Ltd. had a voyage charterparty in which it was stated that the cargo would be released from the vessel in a particular period of time so that it could accommodate the vessel's upcoming work schedule. However, the vessel submitted its Notice of Readiness and finished loading on schedule, the consignee of the cargo, Veggies of Earth Banking Ltd., neglected to give prompt discharge instructions.

2.3 It is submitted that, the vessel missed the laycan for its next charterparty at Kaohsiung as a result of the problem which caused it to be delayed at the port of Busan. As a result of the charterparty being canceled in Kaohsiung and the vessel's employment being reinstated at a reduced hire rate, Tomahawk Maritime sustained substantial damages of USD 3,650,000.

The clause which entitles the ship owner to withdraw the ship on default by the charterer on the payment for hire cannot be treated as cutting down the right of the owner to treat the contract at an end, and to recover damages based on the charterer's repudiation of the charter. The plaintiff had lost the benefit of the hire for the remaining period of the charter party and was therefore entitled to the difference between hire less the profits earned after the withdrawal.[15]

2.4 It is submitted that, Veggies of Earth Banking Ltd. filed a mis-delivery claim against Tomahawk Maritime in addition to the latter's failure to release the cargo within the scheduled deadline. Veggies of Earth Banking Ltd. was not damaged according to Tomahawk Maritime, in any way by the cargo being delivered in exchange for a letter of indemnity that the charterer tendered. Moreover, according to Tomahawk Maritime, Veggies of Earth Banking Ltd. did not take any action to accept delivery of the cargo despite being aware of the vessel's arrival in Busan and the charterer's plan to manage its delivery.

2.5 It is further submitted that, Tomahawk Maritime is requesting damages for losses sustained as a result of Veggies of Earth Banking Ltd.'s tardiness in discharging the cargo in accordance with the conditions of the Charterparty. Tomahawk Maritime suffered severe financial losses as a result of Veggies of Earth Banking Ltd.'s disregard for its duty in spite of several notifications and reminders.

[B] WHETHER THE CLAIMANT SUFFERED CONSEQUENTIAL LOSSES?

[15] National trading Corporation Ltd v. Huggett [1999] FJHC 6

2.6 It is humbly submitted that, Tomahawk Maritime and Yu Shipping Ltd. negotiated a voyage charterparty for the shipment of palm oil from Malaysia to South Korea. Strict laycan terms for the vessel's subsequent employment in Kaohsiung were set forth in the charterparty. However, delays resulted from the cargo not being promptly released even after a Notice of Readiness was submitted upon arrival in Busan. Consequently, Tomahawk Maritime suffered substantial losses as the ship missed its next port in Kaohsiung.

2.7 Further submitted that, the respondent, Veggies of Earth Banking Ltd., has rebutted the allegations, claiming that the arbitration clause is unenforceable and disputing Tomahawk Maritime's right to pursue damages based on the agreed-upon discount for the vessel's subsequent employment. Furthermore, Tomahawk Maritime delivered the shipment against a letter of indemnity rather than the actual bill of lading, according to Veggies of Earth Banking Ltd.'s suit for damages resulting from the misdelivery of the cargo, which caused financial harm to the company. The plaintiff, a freight forwarder, sought recovery of its invoice from the defendant. The defendant counter-claimed for delay in goods delivery. The court ruled in favor of the plaintiff, determining the delay resulted from Air Canada's downsizing, not plaintiff's negligence, and that plaintiff had only provided an estimated arrival time, not guaranteed delivery date. Finally, the Court held that the Defendant had not proven any damages due to delay.[16]

2.8 It is humbly submitted that, Tomahawk Maritime argues that the arbitration clause is lawful and that it can seek unliquidated damages either in lieu of or in addition to demurrage. In addition, they refute the allegation of misdelivery, asserting that the

[16] Pro-Service Forwarding Co. of Canada v. Sales Corp. Intl. Group Inc.

delivery made in response to a letter of indemnity was carried out with the required authorization and did not result in any losses for Veggies of Earth Banking Ltd.

~ISSUE III~

WHETHER THE CLAIMANT LIABLE TO PAY DAMAGES TO THE RESPONDENT OF USD 4,249,752.50 FOR MIS-DELIVERY OF CARGO?

3.1 It is humbly submitted before the Hon'ble Court that respondent is liable to pay damages amounting to USD 4,249,752.50 for the mis-delivery of the cargo. Several factors contribute to the argument against liability:

[A] ABSENCE OF DIRECT RESPONSIBILITY

3.2 It is humbly submitted that, Tomahawk Maritime S.A., as the charterer, did not directly handle the discharge or delivery of the cargo. The responsibility for the discharge and delivery of the cargo lies primarily with the vessel's owner and operator, not the charterer. It is in **Glencore v. Bank of China**[17] that this provision was considered. It was held by both Rix J. and the Court of Appeal that, although a document produced by photocopier (not a bill of lading) could be an original within the meaning of the article, it had to be marked original if it was to qualify as such even if signed or otherwise authenticated .Accordingly, in the present matter the Bill of Lading was marked as "ORIGINAL" along with signature of the Master of the tanker.

3.3 It is further submitted that, in the case of **Songa Chemicals AS vs Navig8 Chemicals Pool Limited [2018]**[18], the English Court had to consider a summary judgment application to enforce a series of LOIs. In this case, the issue revolved around Letters of Indemnity

[17] Glencore International A.G. & Anr. V. Bank of China [1996] 1 Lloyd's Rep. 135
[18] Songa Chemicals AS vs Navig8 Chemicals Pool Limited [2018] EWHC 397 (Comm)

(LOIs) issued to facilitate the discharge of sunflower seed oil cargoes without original bills of lading. The LOIs extended delivery instructions beyond the named receiver, allowing delivery to "such party" believed to represent the receiver. The dispute arose when delivery was made to Ruchi Soya Industries instead of Aavanti Industries, as stated in the LOI. The court determined enforceability based on the carriers' understanding of the relationship between Ruchi and Aavanti. Due to prior practice and instructions from Aavanti, delivery to Ruchi was deemed covered by the LOI terms, leading to enforceability.

3.4 It is humbly submitted that, the judgment reinforces the fact that traders and carriers must be extremely careful when negotiating LOIs to ensure firstly that they are not unlawful and secondly that they cover the contemplated delivery either without production of the original bills of lading or to a port other than the nominated discharge port and thirdly that they are presented by the person entitled to do so. The principle that only delivery to a person entitled to it "discharges" the bill has subsequently been approved in several cases. In The Future Express 125 H.H.J. Diamond considered, without having to decide, whether delivery to a person entitled to delivery, but other than against presentation of the bill of lading (for example, against a letter of indemnity) would exhaust the bill.

3.5 It is therefore submitted that, in the present matter Veggies of Earth Banking Limited is not entitled to receive the cargo against a letter of indemnity (herein issued by Good Oils Sdn Bhd) without the issuance of Original copy of Bill of Lading, which as established above would render the charter party void.

3.6 It was in the case of **Tenacity Marine Inc v. NOC Swiss LLC & Anr**[19] On March 28, 2020, NOC instructed a vessel to Kuwait for diesel loading. Bills of lading were issued to

[19] Tenacity Marine Inc v. NOC Swiss LLC & Anr. [2020] EWHC 2820 (Comm)

Natixis. The vessel later headed to the UAE for discharge, but NOC required a letter of indemnity for discharge without original bills. After some delay, the indemnity was supplied.

[B] FORCE MAJEURE AND DELAYED DISCHARGE

3.7 It is submitted that, in the delayed discharge at Busan, as outlined in the prologue, was primarily due to factors beyond the control of Tomahawk Maritime S.A. The absence of berthing and discharge instructions from the charterer, coupled with delays in obtaining discharge orders, contributed to the prolonged discharge process. This delayed discharge ultimately led to the mis-delivery of the cargo.

[C] CHARTERER'S OBLIGATIONS FULFILLED

3.8 It is further humbly submitted that, Tomahawk Maritime S.A. fulfilled its obligations under the charterparty by providing the vessel and arranging for the transportation of the cargo from Bintulu to Busan. The mis-delivery of the cargo occurred during the discharge process, which was the responsibility of the vessel's owner and operator, not the charterer.

3.9 It is submitted that, in **Chartered Bank of India, Australia, and China v British India Steam Navigation Co. Ltd**.[20] the contract of carriage provided that "*in all cases and under all circumstances the liability of the [carrier] shall absolutely cease when the goods are free of the ship's tackle, and thereupon the goods shall be at the risk for all purposes and in every respect of the shipper or consignee*" and this clause was effective to protect the carrier from liability in respect of loss in the hands of the consignee's agents after discharge, notwithstanding that the bill remained unspent because no delivery was made. However, in the present matter, there was mis-delivery of the cargo by the consignee's

[20] Chartered Bank of India, Australia, and China v British India Steam Navigation Co. Ltd

agents(respondent's agents), thereby holding the respondents liable as the 'principal' in a contract of agency. Therefore, the claimant in the present matter would be entitled to claim damages, for the loss of cargo as a result of mis-delivery.

[D] FINANCIAL LIABILITY

3.10 The claim for damages of USD 4,249,752.50 far exceeds any reasonable estimate of the actual loss incurred by the respondent due to the mis-delivery of the cargo. The respondent's claim appears to be inflated and disproportionate to the alleged loss suffered.

[E] COUNTERCLAIM FOR CONTRACT VIOLATIONS

3.11 It is humbly submitted that, Tomahawk Maritime S.A. has valid grounds to counterclaim against the respondent for contract violations, including the delayed discharge and subsequent cancellation of the Kaohsiung charter party. These contract violations have caused significant financial losses and damages to Tomahawk Maritime S.A., which should be considered in determining any liability for the mis-delivery of the cargo. The **Tjong Very Sumito v Antig Investments Pte Ltd.** case[21] establishes that parties not directly involved in the delivery process may not be held liable for mis-delivery of cargo unless there is clear evidence of their involvement or negligence.

3.12 It is further submitted that, **BWG v. BWF** case[22] illustrates the principle of unity of the transaction, emphasizing that all aspects of a commercial transaction, including charterparty agreements and bill of lading terms, should be interpreted together. Further, **Gujarat Maritime Board v. Indigo Shipping (P) Ltd**[23] reaffirms the principle that

[21] Tjong Very Sumito v Antig Investments Pte Ltd [2013] SGHC 221
[22] BWG v. BWF [2002] SGCA 57
[23] Gujarat Maritime Board v. Indigo Shipping (P) Ltd (2019) 15 SCC 719

liability for mis-delivery of cargo lies with the party directly responsible for the delivery process, not with the charterer.

3.13 It is submitted that, in **The Erin Schulte case**[24] it had been conceded by the Claimants that the bills of lading in that case were spent after discharge against a discharge without presentation of B/L's LOI but the Court of Appeal observed that "*the right to obtain delivery.. from the carrier did not cease when the goods were discharged against the letter of indemnity…*" and as such the bills still provided a right to delivery of the goods against the carrier. Similarly, in the present matter as it was held in the aforementioned case, delivery of cargo can be completed by producing either the Original copy of Bill of Lading or a Letter of Indemnity, indemnifying the parties entitled to receive the delivery against any loss or damage caused to the cargo. Therefore, since Good Oils Sdn Bhd had issued a Letter of Indemnity to the Respondent's, the claimant will not be liable to provide for any damages incurred in relation with mis-delivery.

3.14 It is submitted further in the case of **Aegen Sea Traders Corporation v. Repsol Petroleo SA (The Aegean Sea)**[25] the court held that a person does not become the lawful holder of a bill of lading if that person "obtains the bill of lading merely in consequence of someone endorsing it and sending it to him"; instead, section 5(2)(b) of the Carriage of Goods by Sea Act 1992 (c 50) (UK) ("COGSA") (with which section 5(2)(b) of the Bills of Lading Act is in pari materia) requires the person to "have possession as a result of the completion of an endorsement by delivery" (The Aegean Sea at page 59 col 2). On the facts of The Aegean Sea, the court found that the entity into whose possession the bill of lading fell

[24] The Erin Schulte [2014] EWCA Civ 1382
[25] Aegen Sea Traders Corporation v. Repsol Petroleo SA (The Aegean Sea) [1998] 2 Lloyd's Rep 39

never accepted delivery of the bill as the endorsee or transferee. Similarly, in the present matter, the receiver of the cargo (the respondents) did not accept the Bill of Lading as the endorsee/transferee. On their behalf, the Korean buyers had accepted the delivery of cargo.

3.15 It is submitted that in the case of **Rambler Cycle** [26] in 1959 where Lord Denning made the statement relied on by Mr Voss. APL says that that was a case of an order bill and therefore Lord Denning's comments should be looked at in that context. The complete passage from Lord Denning's judgment reads:

"It is perfectly clear law that a shipowner who delivers without production of the bill of lading does so at his peril. The contract is to deliver, on production of the bill of lading, to the person entitled under the bill of lading. In this case, it was "unto Order or his or their assigns" that is to say, to the order of the Rambler Cycle Company, if they had not assigned the bill of lading, or to their assigns, if they had. The shipping company did not deliver the goods to any such person. They are therefore liable for breach of contract unless there is some term in the bill of lading protecting them. And they delivered the goods, without production of the bill of lading, to a person who was not entitled to receive them. They are therefore liable in conversion unless likewise so protected."

3.16 It is thus submitted that, The pleading outlines a case where a cycle company sued a shipping company for damages due to breach of contract or conversion. Lord Denning's view on delivery rules emphasized adherence to bill of lading terms, regardless of bill type. The cycle company discovered the issue in January 1955 and initiated legal action in August. Whitton J. ruled in favor of the cycle company for damages. The shipping company, invoking a bill of lading clause limiting liability, sought indemnification from

[26] Rambler Cycle Co. Ltd. v. Sze Hai Tong Bank

third parties. The defense cited precedent, **Chartered Bank of India v. British India Steam Navigation**[27], where similar liability limitation clauses were upheld.

3.17 The submission argues two points: firstly, that Clause 2 isn't an exceptions clause, and secondly, that misdelivery isn't a fundamental breach but rather a breach during contract execution. The central issue lies in interpreting the bill of lading's effect on the contract. The Court of Appeal distinguished the Chartered Bank case based on Glen Line's reassertion of control over the goods, a point not raised previously and lacking evidence or argument, thus shouldn't be considered.In conclusion, Tomahawk Maritime S.A. maintains that it is not liable to pay damages to the respondent for the mis-delivery of the cargo. The delayed discharge and subsequent contract violations were beyond its control, and any liability for the mis-delivery should be attributed to the vessel's owner and operator, not the charterer. Additionally, the respondent's claim for damages appears to be exaggerated and disproportionate to the alleged loss suffered.

[27] Supra Note 20

PRAYER OF RELIEF

Wherefore, in light of the issues raised, arguments advanced and authorities cited, it is most humbly prayed before this Hon'ble Commission may be pleased to:

a) The claimant urges the arbitral tribunal to examine the claims and counterclaims put forth by both parties and to render a fair and impartial award by the law and the terms of the contract.

b) The claimant requests that the tribunal dismiss the Respondent's contention that it lacks jurisdiction, acknowledging the validity of the arbitration agreement and the tribunal's authority over the dispute.

c) The claimant is entitled to unliquidated damages in addition to or instead of demurrage due to breach of contractual terms.

d) The claimant requests the tribunal to reject the Respondent's counterclaim for mis delivery, or in the alternative, provide nominal damages only while taking the Respondent's actions and the circumstances surrounding the Cargo's delivery into account.

e) Grant any further relief or order that the Tribunal deems just and appropriate in the circumstances.

AND/OR

Pass any order, direction or relief that the Hon'ble Court may deem fit in interest of *Justice, Equity* and *Good Conscience*.

For this act of kindness, the counsels on the behalf of the Requesting Party shall duty bound forever pray.

S/d

Counsels for the Claimant Party