TWENTY FIFTH ANNUAL INTERNATIONAL MARITIME LAW ARBITRATION MOOT COMPETITION

2024

MURDOCH UNIVERSITY

PERTH, WESTERN AUSTRALIA

IN THE MATTER OF AN ARBITRATION HELD IN SINGAPORE

Claimant	**Respondent**
Tomahawk Maritime S.A.	Veggies of Earth Banking Ltd

MEMORANDUM FOR THE CLAIMANT

TEAM K

Affiqah Syuraih Juffri

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M. Ozdel, *Bills of Lading Incorporating Charterparties* (Hart Publishing, 2015).

Young KC, Timothy, Michael Ashcroft, Julian Cooke et al., 'Demurrage' in *Voyage Charters* (I-law, 5th Edition, 2022)

LIST OF ABBREVIATIONS:

BOL	-	Bill of Lading
CP	-	Charterparty
LOI	-	Letter of Indemnity
SCMA	-	Singapore Chamber of Maritime Arbitration
USD	-	United States Dollars

STATEMENT OF FACTS

1. On 1 September 2023, Tomahawk Maritime S.A. (**Claimant**) entered into a charterparty with Yu Shipping Limited (**Yu**), the charterer, transporting palm oil (**Cargo**) aboard the MT NUIYANG (**Vessel**) for a one-time charter trip between Bintulu to Busan using the BL (**BOL)**, dated 4 September 2023. The vessel was hired for 27 days at USD 35,000 per day.
2. The cargo was purchased by the charterer and funded by the Respondent, Veggies of Earth Banking, who held the Bills of Lading as collateral.
3. On 20 September 2023 the Vessel completed loading of 5,950 tonnes of cargo. The Notice of Readiness was tendered, and a request was made by Yu to the Respondent for the necessary documents that had been under a Letter of Indemnity (**LOI**).
4. However, delays were experienced in the discharge of the cargo resulting in its release under the LOI from the charterer, who subsequently went into liquidation. Adverse weather conditions caused further delays for the Vessel's voyage to Kaohsiung for its subsequent 2-year charterparty. The vessel's hire rate for said charterparty was hence renegotiated to a lower rate to USD 30,000 per day, with a total loss of USD 3,650,500.
5. The Claimant seeks an action against the respondent for losses incurred through the discounted hire rate due to the delay in discharge and the Respondent counterclaimed for the misdelivery of cargo.

ISSUES

The relevant issues in this matter are:

1) whether the Singapore Chamber of Maritime Arbitration ('SCMA') has jurisdiction to hear the matter;
2) whether the Claimant is entitled to make a claim for damages beyond what would be covered by demurrage;
3) whether the Respondent is liable for the Claimant's damages;
4) whether the Respondent is entitled to make a misdelivery claim; and
5) whether the Claimant is liable for the Respondent's alleged damages.

PART ONE: THE SCMA HAS JURISDICTION TO HEAR THE MATTER

6. The claimant asserts that the Singapore Chamber of Maritime Arbitration ("SCMA") has the jurisdiction to hear the matter between the Claimant and Respondent and that any jurisdictional challenge be dismissed.
7. The doctrine of competence-competence permits the Tribunal to determine its own jurisdiction.[1]
8. The doctrine permits the Tribunal to make decisions regarding the existence of an arbitration agreement and validity of an arbitral proceeding.[2]
9. The Claimant asserts that the Tribunal should determine that it has jurisdiction to hear this matter.
10. The arbitration clause specifies that the arbitration is subject to the SCMA rules.[3]
11. Rule 32.1 of the SCMA Rules determines that the seat of the arbitration is to be Singapore unless the parties have specified otherwise.[4]
12. Rule 32.3 of the SCMA Rules provides that physical hearings are to be held in Singapore unless parties agree otherwise. [5]
13. The arbitration agreement specifically states the location to be in Guangzhou, overriding rule 32.3.[6]

[1] *Harbour Assurance Co Ltd v Kansa General International Insurance Co Ltd* [1992] 1 Lloyd's Rep 81, [706].
[2] Gary Born, *International Commercial Arbitration: Commentary and Materials* (2nd ed, 2001), 85.
[3] Moot Problem, 28 [76].
[4] *Singapore Chamber of Maritime Arbitration 4th Edition Rules* (2022), rule 32.1.
[5] *Singapore Chamber of Maritime Arbitration 4th Edition Rules* (2022), rule 32.3.
[6] *Singapore Chamber of Maritime Arbitration 4th Edition Rules* (2022), rule 32.3.

14. The arbitration agreement makes no mention of the Seat being other than Singapore. The parties have clearly agreed to this and, thus, pursuant to rule 32.3,[7] the Tribunal should find the Seat to be Singapore.

15. If it was intended for the seat to be Guangzhou the clause would have specified this the same way in which it specified the location as Guangzhou.[8]

16. It is clear that the arbitration agreement intended the location of arbitration to be Singapore and the seat to be Guangzhou and that this was not an error in drafting.

17. Alternatively, even if the arbitration clause is deemed to have been poorly drafted, this should not impede the Tribunal's ability to arbitrate.

18. English courts prefer that parties with agreements to arbitrate are not impeded by improperly drafted arbitration clauses, pursuant to the judgement of Sir Anthony Moore: "commercial good sense does not suggest that the clause should be construed with legalistic rigidity so as to impede the parties from commencing arbitration proceedings."[9]

19. If the Tribunal is to find the seat to be Guangzhou, this will invalidate the arbitration agreement, impeding the Tribunal's ability to arbitrate, in contravention of the clear English law position to not allow arbitration to be impeded.

20. The Claimant asserts that, based upon the reasons outlined above, the Tribunal should determine that it has jurisdiction to hear the matter and that the arbitration clause is valid.

[7] *Singapore Chamber of Maritime Arbitration 4th Edition Rules* (2022), rule 32.3.
[8] Moot Problem, 28 [76].
[9] *Amec Civil Engineering Ltd v Secretary of State for Transport* 2005 EWCA Civ 291; [2015] 1 WLR 2339, [31].

PART TWO: THE CLAIMANT SHOULD BE ENTITLED TO RECOVER DAMAGES BEYOND THE DEMURRAGE CLAUSE.

21. The Claimant argues that they should be entitled to Damages in amount of USD 3,650,000 for the loss of renegotiating their subsequent Charterparty contract due to the Respondent's failure to present the BOL and discharge cargo within a reasonable time.
22. The Claimant asserts that such Damages are recoverable within the scope of English law and further that the presence of a Demurrage Clause does not deny the Claimant a right to seek Damages.

I. The Claimant's loss is recoverable within the second limb of damages in *Hadley v Baxendale* - consequential loss

23. The loss complained of here is a loss of future contract. The Respondent's delay in ensuring the timely discharge of the cargo resulted in the Claimant needing to renegotiate their second Charterparty contract at a loss.
24. The case of *The Achilleas*[10] established that a shipowner is entitled to damages where the Respondent causes a delay that results in a loss of future profits via cancellation or renegotiation of a second Charterparty contract. Based upon the second limb of damages in *Hadley v Baxendale,*[11] such (consequential) loss should have been reasonably contemplated by the parties. This has been affirmed by *The Sylvia*.[12]

[10] *Transfield Shipping Inc v Mercarator Shipping Inc* [2008] 2 Lloyd's Rep 275.
[11] *Hadley v Baxendale* (1854) 9 Exch 341.
[12] *Sylvia Shipping Co Limited v Progress Bulk Carriers Limited* [2010] 2 Lloyd's Rep 81.

25. The vessel's subsequent CP contract is a fact that was known by all parties. In addition to the express stipulation of this fact in the contract.[13] In addition to this express stipulation, the Charterer also made the Respondent aware of the vessel's next fixture in an email, stating: "Please note that the vessel will need to leave Busan by 30 September as it has to fulfil a subsequent employment at Kaoshiung."[14]

26. As all Parties, including the Respondent, were aware of the Vessel's subsequent Charterparty contract the loss complained of here is a 'not unlikely result of the breach' and could be reasonably contemplated by the Parties.[15] Thus, the loss complained of falls within the scope of a consequential loss.

II. The claimant should be entitled to damages rather than demurrage because there is no relevant demurrage claim.

27. Under the precedent held in the *Eternal Bliss,*[16] to satisfy an entitlement to damages beyond demurrage the Claimant must establish a separate breach to that of the laytime provision. However, the claimant argues that:

    (a) there is no demurrage claim to pursue here against the Respondent; and

    (b) alternatively, a separate breach can be made out by an implied term to discharge cargo within a reasonable time.

28. The presence of a demurrage clause here does not deny the claimant from seeking Damages from the Respondent because the demurrage clause is not enforceable against the Respondent.

[13] Moot Problem, 25 [38].
[14] Moot Problem, 48.
[15] *Hadley v Baxendale* (1854) 9 Exch 341.
[16] *K Line Pte Limited v Priminds Shipping (HK) Co Limited ("The Eternal Bliss")* [2022] Bus Lr 67, CA 14, 69.

29. Only a Charterer is required to pay Demurrage. A BOL holder is under no personal liability to pay demurrage unless there is an express stipulation in the BOL.[17]

30. The case of the *Mirimar*[18] held that Consignees are not personally liable to owners to pay demurrage. This would be an unreasonable presumption and if such were the case no reasonable businessman in the position of the Respondent would enter into such a contract.[19]

31. The Respondent here is the consignee as per the BOL. The Respondent is the financier of the Charterer's purchase of the cargo and the holder of the BOL as collateral.[20]

32. The BOL contains no express stipulation that the holder of the BOL be responsible to pay demurrage.

33. As the Respondent is not the Charterer and the BOL contains no express stipulation that the BOL holder be obliged to pay demurrage there is no relevant demurrage claim against the Respondent here and, therefore, the Claimant should be entitled to damages.

III. In the alternative, the loss complained of is in fact a breach separate to that of the demurrage clause.

34. Where the Tribunal finds that there is a relevant demurrage clause, the Claimant asserts that the loss complained of is a separate breach to that of the demurrage clause. It was never intended to be liquidated by the demurrage clause, which the Claimant asserts only liquidates the Respondent's breach of the 96-hour laytime clause.[21]

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[17] *Miramar Maritime Corporation v Holborn Oil Trading Limited* [1984] 1 Lloyd's Rep 129, 133; Young KC, Timothy, Michael Ashcroft, Julian Cooke et al., 'Demurrage' in *Voyage Charters* (I-law, 5th Edition, 2022).

[18] *Miramar Maritime Corporation v Holborn Oil Trading Limited* [1984] 1 Lloyd's Rep 129, 133.

[19] *Miramar Maritime Corporation v Holborn Oil Trading Limited* [1984] 1 Lloyd's Rep 129, 131.

[20] Moot Problem, 37 [15].

[21] Moot Problem, 12.

35. The case of *The Eternal Bliss* held that where a Claimant seeks compensation by way of unliquidated Damages where a demurrage clause is present, a breach separate to that covered by the demurrage clause must be identified.[22]

36. The Claimant submits that in seeking damages they are not relying upon breach of the laytime incorporated in the demurrage clause, but instead, upon the implied term that the Respondent must discharge the Cargo within a reasonable time.

37. The Claimant acknowledges that there is an expressed obligation to discharge the Vessel within the specified laytime of ninety-six (96) hours.[23]

38. The Vessel arrived at Busan on 20 September 2023[24], meaning the laytime of ninety-six (96) hours expired on 24 September 2023.

39. The Claimant asserts that an additional implied term applies that requires the Consignee to take delivery of the Cargo within a reasonable time. A 'reasonable time' refers to what is reasonable under the circumstances.

40. The test for implied terms is set out in the *BP Refinery* case where it states:

"For a term to be implied, the following conditions (which may overlap) must be satisfied:

A) it must be capable of clear expression; and

B) it must be reasonable and equitable; and

C) it must not contradict any express term of the contract; or

D) it must be so obvious that 'it goes without saying'; and

E) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;[25]

[22] *K Line Pte Limited v Priminds Shipping (HK) Co Limited ("The Eternal Bliss")* [2022] Bus Lr 67, CA 14, 69.
[23] Moot Problem, 12.
[24] Moot Problem, 8 [9].
[25] *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 18 CLR 266, [5].

41. Subsequently it has been clarified in *Marks and Spencer* that obviousness and business efficacy are interchangeable elements which give rise to an implied term. This is outlined in the judgment of Lord Neuberger PSC in *Marks and Spencer*: "I would accept that business necessity and obviousness, his second and third requirements, can be alternatives in the sense that only one of them needs to be satisfied."[26]

42. Thus, in addition to *either* business efficacy or obviousness, it is only necessary for the Tribunal to find that the implied term is:

    A) capable of clear expression;

    B) reasonable and equitable;

    C) does not contradict any express term of the contract.[27]

43. The Claimant therefore asserts that the required elements can be satisfied to imply a term that the cargo be discharged within a reasonable time.

A) The term implied for the delivery of the cargo is clearly expressed

44. For a term to be implied it must be capable of being expressed in a clear manner. In the Charterparty, Clause E stipulates that the vessel has a laytime of ninety-six (96) hours for discharge.

45. The BOL provides that:

    'All terms and conditions, liberties, and exceptions of the Charterparty, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated.'[28]

46. The Tomahawk Maritime Rider Clauses form part of the agreement between the Claimant and the Charterer of the delivery for the Cargo.[29] Clause 37 states that: After this voyage,

[26] *Marks and Spencer v BNP Paribas* (2015) 3 WLR 1843, [22].
[27] *Marks and Spencer v BNP Paribas* [2016] AC 742, [22].
[28] Moot Problem, 31 [1].
[29] Moot Problem, 13.

vessel's next employment is at Kaohsiung with strict laycan 1-14 October 2023 for a period of 2 years.[30]

47. The Claimant asserts that the contractual implied duty to discharge the Vessel within 96 hours is clearly expressed within clause E, certain in its operation and contains no compounding requirements.

B) The implied term that the consignee will take delivery of the cargo within a reasonable and equitable timeframe

49. No term will be implied that is not reasonable and equitable between the parties. That is that the term does not unduly burden one party disproportionately against the other.[31]

50. The Claimant asserts that an implied term sets the boundaries of 'a reasonable time' which is the period between the end of the 96 hour laytime and the date that the Vessel was required to be at the Kaohsiung port for its next employment.

51. The implied term does not unreasonably alter the responsibility of either party since it is a standard form of practice to import a time constraint on the completion of a contract. It is in the benefit of both parties that the Voyage Charterparty have specified start and end dates for their engagement so that subsequent Charterparties can be entered into and completed by the vessel.

52. The implied term facilitates the deployment of the vessel within a specified time frame to ensure the completion of the contract within a reasonable manner. It is equitable because it benefits both Parties to complete their necessary obligations.[32]

[30] Moot Problem 12.
[31] *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 18 CLR 266, [41].
[32] *Ford and others v Cotesworth and another* (1868) LR 4 QB 127.

53. A ‘reasonable time’ refers to what is reasonable under the circumstances. In the absence of any stipulation, each Party should use diligence in performing their obligations for the delivery at the port of discharge.

C) The implied term is not contradictory to any express term

54. An implied term can be interpreted into the contract where it does not contradict with an express term in the contract.[33] The Claimant asserts that there is no contradictory term. The implied term covers the time following the end of the laytime period and arises from the additional express term that describes the laycan for the subsequent voyage.

D) The implied term is so obvious that it goes without saying

55. Under the limbs of the *Marks v Spencer*[34] implied terms doctrine, a term may be implied where it is obvious in addition to the three elements outlined above.

56. The term must be so obvious that it ‘goes without saying.’[35] The test for this is that, considering the negotiation of the initial Agreement between the Parties, an officious bystander would suggest some express provision for it in their Agreement to the Parties and both Parties would agree that the suggested provision should be included in the BL without question.

57. In Clause E the Claimant and Charterer agreed to incorporate a 96-hour deadline for the laytime of the vessel.[36]

[33] *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 52 ALJR 20, [50].
[34] *Marks and Spencer v BNP Paribas* (2015) 3 WLR 1843, [22].
[35] *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 18 CLR 266, [40].
[36] Moot Problem, 12.

58. It is clear that the parties intended to construct the contract in a way that would not impede the Claimant's subsequent fixture. Such an intention is clear through the incorporation of the laytime provision (Clause E), which specifies a strict laytime of 96 hours.[37]

59. The inclusion of a term additional to the laytime clause specifying the vessel's next fixture, further indicates a clear intention that the vessel's next fixture not be impeded and gives rise to an implication that following the expiration of the strict laytime, the Cargo must be discharged within 'a reasonable time' so as to not impede the subsequent CP.

60. Furthermore, in order for the Charterparty to function according to its primary purpose all contract time frames must be honoured to ensure the Vessel does not lose out on subsequent contracts as a direct result of delays caused by prior or existing contracts.

E) The implied term is necessary to ensure business efficacy

61. Alternatively, if the Tribunal does not accept that the term is obvious, as per *Marks v Spencer*[38] then a term may still be implied if it is necessary for business efficacy.

62. Implied terms are required to give business efficacy to be incorporated into a contract.[39]

63. It has been made clear to the Respondent that the Vessel has subsequent employment.[40] A reasonable person would infer that there must be a deadline by which the Vessel must reach its next contract.

64. Thus, in order for the Vessel to function according to its primary business purpose all contract time frames must be honoured to ensure the Vessel does not lose out on subsequent contracts as a direct result of delays caused by prior or existing contracts.

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[37] Moot Problem, 12.
[38] *Marks and Spencer v BNP Paribas* (2015) 3 WLR 1843, [22].
[39] *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592, 605; quoted in *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 52 ALJR 20, [41].
[40] Moot Problem, 8 [11], 48.

IV. The Claimant has satisfied the requisite elements to establish an implied term.

65. Based upon the doctrine of implied terms outlined in *Marks v Spencer*[41], the claimant submits that the tribunal find that the implied term is:

    A) Reasonable and equitable;

    B) Capable of clear expression;

    C) Does not contradict any express term of the contract; and

    D) So obvious that it goes without saying.[42]

66. The above elements are sufficiently established to give rise to an implied term, pursuant to *Marks and Spencer*.[43] Therefore, a separate breach to that of the laytime provision can be satisfied and the Claimant should be entitled to damages in amount of USD 3,650,000.

PART THREE: THE CLAIMANT DID NOT BREACH ITS CONTRACTUAL OBLIGATIONS BY DISHCARGING THE CARGO AGAINST A LETTER OF INDEMNITY.

67. The Respondent asserts that the Claimant breached contractual obligations by discharging the cargo on a LOIrather than upon presentation of BOL. The Claimant argues that they are not liable for the Respondent's Misdelivery claim as they were: (a) acting in accordance with a specified provision in the Charterparty contract; (b) there is an exception to the rule to discharge on BOL; and (c) if the Claimant is held to be liable for

[41] *Marks and Spencer v BNP Paribas* (2015) 3 WLR 1843, [22].
[42] *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 52 ALJR 20, [40].
[43] *Marks and Spencer v BNP Paribas* (2015) 3 WLR 1843, [22].

the misdelivery claim only nominal damages should be awarded as the Respondent failed to mitigate their loss.

I. The Claimant was acting in accordance with a specified provision in the contract and the Respondent agreed to discharge on a LOI.

68. The claimant should not be held liable for the respondent's loss because they were: (a) acting in accordance with a specified provision in the Charterparty contract; and (b) the Respondent agreed to discharge upon a LOI and did nothing to prevent this from occurring.
69. It was held in the case of *Motis Exports* that an owner (of Cargo) can discharge on an indemnity if he has 'agreed in his contract with the shipowner that an indemnity will suffice…"[44]
70. The terms of the Charterparty contract have been incorporated into the BOL and thus bind the holder of the BOL – the Respondent – to the rules of the Charterparty contract.[45] The BOL specifically incorporates "all terms and conditions, liberties and exceptions of the Charterparty.'[46] At law, the respondent is the owner of the cargo because they are the legal holder of the BOL. The respondent as the holder of the BOL is subject to the terms of the charterparty, including the agreement to discharge upon a LOI in the absence of bills of lading. Clause 57 of the Rider clauses specifies that 'in the absence of BOL at discharge port(s), owners to release the entire cargo to receivers against charterer's LOI without bank guarantee.'[47]

[44] *Motis Exports Ltd. V Dampskibsselskabet AF 1912 Aktieselskab and Aktieselskabet dampskibsselskabet sevendborg* [1999] 1 Lloyd's Rep, 842.
[45] M. Ozdel, *Bills of Lading Incorporating Charterparties* (Hart Publishing, 2015).
[46] Moot Problem, 31.
[47] Moot Problem, 28.

71. The Claimant tendered the Notice of Readiness on 20th September 2023[48]. After the Respondent failed to present the BOL during the 96 hour laytime period the Claimant waited a further reasonable time of 9 days but the Respondent still failed to present the BOL. The Claimant was concerned about this further delay and the date was nearing the 7th October, the date the Vessel needed to depart in order to meet its' next fixture.[49] Under these circumstances, the Claimant acted in accordance with Rider Clause 57 and exercised its' right to discharge cargo on a LOI.[50]
72. In addition, the Respondent accepted this discharge of cargo upon the LOI..
73. In correspondence with the charterer regarding the vessel's strict laytime and the need to discharge the cargo, the respondent told the charterer to "do as they deem fit as charterers," and that the respondent would "not interfere as long as the loan is repaid."[51] This constitutes acceptance of the discharge on a LOI.

II. The Sormovsky Exception to the Rule to Discharge Only on Bills of Lading Should Apply.

74. The Claimant accepts that there is a general consensus amongst the courts that cargo only be discharged on presentation of a BOL.[52]
75. However, the claimant asserts that there is an exception outlined in the case of *The Sormovskiy*[53] that enables an owner to discharge cargo without a BOL if 'it was proved to his reasonable satisfaction both that the person seeking the goods was entitled to

[48] Moot Problem, 8 [9].
[49] Moot Problem, 8 [11].
[50] Moot Problem, 28.
[51] Moot Problem, 46.
[52] *Unicredit Bank A.G v Euronav N.V* [2023] EWCA Civ 471 (unreported), [46].
[53] *SA Sucre Export v Northern River Shipping Ltd. (The "Sormovskiy 3068"*) [1994] Lloyd's Rep 266.

possession of them and that there was some reasonable explanation of what had become of the bills of lading.'[54]

76. The claimant acknowledges that the *Motis Exports*[55] findings limit the Sormovskiy exception but assert that these findings only apply to cases of forged bills of lading.[56]

77. As stated in *UniCredit*, the scope of the *Sormovskiy* exception is 'not finally settled.'[57] Thus, it is open to the tribunal to apply it.

78. There are two elements to the *Sormovskiy* exception:

(a) it must have been proved to the claimant's reasonable satisfaction that the person seeking the goods was entitled to possession of them; and

(b) there was some reasonable explanation of what had happened to the bills of lading.[58]

A) It is proved to the claimant's reasonable satisfaction that the person seeking the goods is entitled to possession of them.

79. This test requires evaluation of whether the claimant can explain why the charterer was entitled to the goods.[59] The claimant asserts here that, based upon the facts available to them at the time of discharge they were satisfied that the charterer was entitled to possession of the goods.

80. The claimant asserts here that a general standard of reasonableness should be applied here. Would a reasonable person be satisfied the Charterer was entitled to the Cargo?[60]

81. The claimant's charterparty contract was with the charterer. Under the circumstances of this contract the claimant was only aware of the charterer's interest in the cargo, not the

[54] *SA Sucre Export v Northern River Shipping Ltd. (The "Sormovskiy 3068"*) [1994] Lloyd's Rep 266, 72.
[55] *Motis Exports Ltd. V Dampskibsselskabet AF 1912 Aktieselskab and Aktieselskabet dampskibsselskabet sevendborg* [1999] 1 Lloyd's Rep 842.
[56] *Motis Exports Ltd. V Dampskibsselskabet AF 1912 Aktieselskab and Aktieselskabet dampskibsselskabet sevendborg* [1999] 1 Lloyd's Rep 842.
[57] *Unicredit Bank A.G v Euronav N.V* [2023] EWCA Civ 471, 45.
[58] *SA Sucre Export v Northern River Shipping Ltd. (The "Sormovskiy 3068"*) [1994] Lloyd's Rep. 266, 72.
[59] *SA Sucre Export v Northern River Shipping Ltd. (The "Sormovskiy 3068"*) [1994] Lloyd's Rep 266, 274.
[60] *Vaughan v Menlove* 132 ER 490.

Respondent's and in fact, when the claimant became concerned regarding the discharge of the cargo they wrote their reminder to the charterer not the Respondent, indicating their perception that the charterer was the party lawfully entitled to the cargo.[61]

82. Further, the claimant did not become aware of the Respondent's interest in the cargo until the 29th November 2023, when the Respondent wrote to the claimant informing them they were the lawful holder of the BOL.[62]

83. All communication regarding the cargo was between the claimant and the charterer, the claimant never had any communication with the Respondent until the 29th November 2023[63], indicating they were not aware of the Respondent's interest in the cargo until this point.

B) There is some reasonable explanation of what had happened to the bills of lading.

84. The claimant asserts the tribunal should rely on the same general standard of what is reasonable.

85. Based upon the facts, the BOL appears to have been in transit to the shipper – Good Oils – indicated by the LOI issued from the shipper to the Respondent indemnifying the Respondent for any loss incurred from the shipper having not delivered the bills of lading.[64]

86. Additionally, when the Respondent came into possession of the bills of lading they were delivered to them by the shipper, indicating the bills of lading were in the process of transit to the shipper[65] at the time of the LOI being issued.

87. The claimant asserts that based upon the facts outlined above, the claimant was:

[61] Moot Problem, 8.
[62] Moot Problem, 10.
[63] Moot Problem, 10 [17].
[64] Moot Problem, 45.
[65] Moot Problem, 37.

(a) reasonably satisfied that the charterer was the party lawfully entitled to possession of the goods; and

(b) that there was some reasonable explanation of what had become of the bills of lading.

88. The claimant therefore asserts that because these elements are satisfied the tribunal should accept the *Sormovskiy* exception to discharging on bills of lading as applicable in these circumstances and negate the claimant of liability for the mis-delivery counterclaim.

III. If the Claimant is found in breach the Respondent failed to mitigate their loss and should only be entitled to nominal damages.

89. An injured party has an ongoing obligation to take all reasonable steps to mitigate its loss.[66]

90. Communication between the Respondent and the charterer indicates the Respondent's hesitancy to grant a trust receipt for the cargo until the BOL was received[67] and then the Respondent's acceptance of the cargo being discharged upon a LOI in their statement: "If you are afraid of the demurrage accruing, you must do as you deem fit as charterers and we will not interfere so long as the loan is repaid."[68] The Respondent's willingness to grant the Charterer discretion over dealing with the cargo is an indication that the Claimant had not turned their mind to their obligations to mitigate and to take action to avoid or minimise their loss on the Cargo.

91. Cargo discharge commenced at 06:30AM on the 4th October[69]. It is stated that the Respondent came into possession of the bills of lading on 3rd October.[70] It is not clear on

[66] *British Westinghouse Electric & Manufacturing Company Ltd v Underground Electric Railways Company of London Ltd* [1912] AC 673, [689].
[67] Moot Problem 46.
[68] Moot Problem, 46.
[69] Moot Problem, 9 [14].
[70] Moot Problem, 37 [16].

the agreed facts the exact time the Respondent came into possession of the bills of lading, however, the latest possible time could only be 11:59pm 3rd October. Between receiving the bills of lading and discharge commencing, the Respondent had, at the very least, 6.5 hours to present the bills of lading and take possession. An opportunity they did not take.

92. Hence, the Respondent took no reasonable steps to ensure discharge of the cargo even when they had an opportunity to do so. In fact, the respondents did not make the claimants aware of their interest in the cargo until 29 November 2023[71], some 53 days after the cargo discharge was completed on 8th October 2023.[72] The Respondents took over a month to inform the claimant of their interest in the cargo and have provided no insight as to why this took them so long.

93. In these circumstances the Claimant asserts that the Respondent failed to mitigate their loss and should be entitled only to Nominal Damages if the claimant is found in breach of their contractual obligations.

PART FOUR: PRAYER FOR RELIEF

For the reasons set out above, the Claimant respectfully requests this Tribunal to:

DETERMINE that the Tribunal has jurisdiction to hear this matter.

DECLARE that the Claimant is entitled to unliquidated damages beyond the demurrage clause.

FIND that the Respondent has breached their contractual obligations.

AWARD the Claimant damages in amount of USD 3,650,000; and

FIND that the Claimant did not breach their contractual obligations in delivering the cargo on a letter of indemnity.

[71] Moot Problem, 10 [17].
[72] Moot Problem, 9 [14].