23rd INTERNATIONAL MARITIME LAW ARBITRATION MOOT JULY 2024

In the matter of an International Arbitration under the Singapore Chamber of Maritime Arbitration (SCMA, 4th edition) Rules

Between

TOMAHAWK MARITIME S.A.

……CLAIMANT

AND

VEGGIES OF EARTH BANKING LTD

…… RESPONDENT

CLAIMANT'S MEMORANDUM

UNIVERSITY OF VERSAILLES - PARIS SACLAY

TEAM **L**

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Bill of Lading / BL	Tanker Bill of Lading NO. COW-001A
Cargo	16,999.01 MT cargo of crude palm oil
Carry on	Carry on Advisory Services LLP
Charterer / Shipper	Yu Shipping Ltd.
Charterparty	Tanker Voyage Charter Party
Claimant / Tomahawk	Tomahawk Maritime S.A.
D&CC	Statement of Defense and Counterclaim
Seller / Good Oils	Good Oils Snd Bnd
Interim liquidator	Carry on Advisory Services LLP
LC	Letter of credit
LOI	Letter of Indemnity
Parties	Claimant & Respondent
Respondent	Veggies of Earth Banking Ltd.
SCMA Rules / SCMA Arbitration Rules	Singapore Chamber of Maritime Law Arbitration Rules (4th Edition)
Statement of Reply and Defense to CC	Statement of Reply and Defense to Counterclaim
Tribunal	Arbitral Tribunal
Vessel	Niuyang

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STATEMENT OF FACTS

1. The current memorandum is placed under the name of and in the interest of Tomahawk Maritime S.A. (the "**Claimant**"), as required by the procedural calendar created following the constitution of the Arbitral Tribunal (the "**Tribunal**").
2. The parties ("**Parties**") to these arbitration proceedings ("**Arbitration**" or "**Arbitration proceedings**") are Tomahawk Maritime S.A., a company registered and existing under the laws of Panama, and Veggies of Earth Banking Ltd. (the "**Respondent**" or "**Consignee**"), being a financial institution registered and existing under the laws of Hong Kong.
3. This Arbitration is hereby governed by the Singapore Chamber of Maritime Law Arbitration Rules ("**SCMA**" Rules) in its 4th edition, in force since the 1st January 2022.
4. On the **1st of September 2023**, the Claimant entered into a Tanker Voyage Charter Party ("**Charterparty**") with Yu Shipping Ltd. (the "**Charterer**"). Within the Charterparty, the Respondent, owner of Niuyang (the "**Vessel**"), agreed to its use for the carriage of a 16,999.01 MT cargo of crude palm oil (the "**Cargo**") from Bintulu, Malaysia, to Busan, South Korea.
5. The Vessel, having arrived in Bintulu on the **3rd of September 2023**, was loaded completely and set sail on the **6th of September 2023**, the same day on which the Bill of Lading ("**Bill of Lading**" or "**BL**") was issued and consigned to the Respondent.
6. The Vessel arrived in Busan on the **20th of September 2023**, on which day the Notice of Readiness ("**NOR**") was tendered and accepted by the Charterers. Despite this acceptance and numerous chasers, no berthing and discharge instructions were received by the Vessel. On the **28th of September 2023**, Charterers simply communicated that they were awaiting instructions from the cargo interests. The following day, **29th of September 2023**, the Claimant reminded the Charterers about the Vessel's next fixture at Kaohsiung, Taiwan, and the absolute necessity for it to set sail from Busan on the **7th of October 2023**. The Charterers

responded by confirming that "*all relevant parties are aware of the Vessel's limitation*[1]" and that a copy of the Charterparty documents had been passed on to the consignee.

7. After daily reminders were continuously sent to the Charterers, the Claimant notified the Charterers, on the **3rd of October 2023**, that they would look to them to recover all losses and/or damages incurred if the Vessel's next employment was cancelled. The Charterers responded merely to counter this position and to invoke the option to deliver using Letter of Indemnity ("**LOI**"). The signed LOI was attached and they finally requested that the Claimant commence discharge.
8. Following the receipt of berthing and discharge instructions, the discharge of the Cargo commenced on the **4th of October 2023** and was completed on the **7th of October 2023**.
9. The Vessel departed Busan in the early hours of the **8th of October 2023**, but unfortunately due to the excessive delays at the discharge port, it was unable to arrive at Kaohsiung within the strict laytime (**1st-14th October 2023**). On the **16th of October 2023**, the Vessel's next fixture issued their notice cancelling the charterparty. After extensive negotiations, the Claimant was able to reinstate the Vessel's employment but at a significantly lower hire rate of USD 30,000 a day.
10. As a result of such exceptional loss, on the **15th of November 2023**, the Claimant issued a demand to the Charterers claiming USD 3,650,000 as compensation for the cancellation. On the **22nd of November 2023**, the Claimant received a response from Carry on Advisory Services LLP, acting as the Charterer's interim liquidators, which stated that they were considering the demand.
11. Unexpectedly, on the **29th of November 2023**, the Respondent wrote to the Claimant claiming to be the legal holder of the Bill of Lading. Arbitration proceedings were therefore commenced against the Respondent, by Notice of Arbitration, on the **22nd of December 2023**.

[1] International Maritime Law Arbitration Moot 2024, *Moot Problem*, 26 December 2023 V.1, Statement of claim, p.8,[11]

A Response to the Notice of Arbitration was formed by the Respondent's representative, Bauhinia Law LLC, on the **5th of January 2024**.

12. As part of the Arbitration Proceedings, a Statement of Claim ("**Statement of Claim**") was issued by the Claimant on the **19th of January 2024**. This was followed with a Statement of Defense and Counterclaim ("**D&CC**") by the Respondent on the **16th of February 2024**, and subsequently by a Statement of Reply and Defense to Counterclaim ("**Statement of Reply and Defense to CC**") dated **1st of March 2024**.

SUMMARY OF THE ISSUES

13. **Issue 1: The Tribunal has jurisdiction.** The Claimant supports that the governing law of the arbitration agreement is Singapore law and that the seat of arbitration is Singapore, in accordance with Rule 32 of the SCMA Rules. If the Tribunal finds otherwise, the seat of arbitration is Guangzhou and the governing law is English Law. Finally, if the Tribunal finds the governing law to be PRC law, the arbitration agreement shall still be valid. Therefore, in either situation, the arbitration agreement is valid and this Tribunal has jurisdiction.

14. **Issue 2: The Claimant is entitled to claim for unliquidated damages in addition to or as an alternative for demurrage.** Due to the breach of an express obligation to discharge the Vessel within laytime, the Respondent, being fully aware of the Vessel's further laycan at Kaohsiung and being the legal holder of the BOL, is to cover the consequential losses suffered, which are not compensated by demurrage.

15. **Issue 3: The Respondent's counterclaim for mis-delivery should be rejected or allowed nominal damages only.** The Respondent accepted the LOI which expressly states their consent to make payment for the Cargo without presentation of the BOL, was made aware of the Vessel's arrival at Busan and failed to make any attempts to take delivery of the Cargo itself. Therefore, any loss incurred was effectively caused by the Respondent's own conduct.

TITLE 1: PROCEDURE- THE ARBITRAL TRIBUNAL HAS JURISDICTION TO RULE OVER THE CLAIMS

16. In accordance with the principle ‘competence-competence’ an arbitral tribunal has the authority to rule on its own jurisdiction.[2] In the present case, there is no evidence that undermines the Tribunal’s authority to rule on this dispute. The seat of the arbitration designated by the arbitration agreement embodied in the Bill of Lading is Singapore, which means that the governing law is Singapore law (**I**). Alternatively, if the Tribunal finds the seat of arbitration to be in Guangzhou, the law governing the main contract shall be considered as the law governing the arbitration agreement (**II**). Alternatively, if the Tribunal finds the law governing the arbitration agreement to be PRC law, it should still be considered as valid (**III**). Finally, a second arbitration agreement is incorporated in the Charterparty which confirms the will of the parties to go to arbitration (**IV**).

I - The seat of the arbitration is Singapore and the law governing the arbitration agreement is Singapore law

17. The Claimant requests that the dispute be referred to arbitration in accordance with the arbitration agreement under the terms of the Bill of Lading. The arbitration agreement is embodied in an arbitration clause incorporated in the Bill of Lading providing as follows: *“General Average and Arbitration, if any, to be held in Guangzhou with three arbitrators and SCMA Rules. English law to apply to the CP.”*
18. The SCMA rules have been designated to govern any disputes that may arise between the parties. This includes the application of Rule 32 of the SCMA Rules[3], and therefore the

[2] *SCMA Arbitration Rules* 4th Edition, Rule 30
[3] *SCMA Arbitration Rules* 4th Edition, Rule 32

application of the International Arbitration Act. The SCMA Rules provide that where the seat of arbitration is Singapore, the *lex arbitri* is that of Singapore.

19. In this case, the mention of Guangzhou does not override the designation of Singapore as the seat of arbitration, given that it was not expressly agreed by the PARTIES to establish Guangzhou as the seat of arbitration. The seat of arbitration determines the legal jurisdiction that governs the arbitration proceedings.
20. As a consequence of Singapore being the seat of arbitration, the law governing the arbitration agreement is Singapore law. Thus this arbitration agreement is valid and the Tribunal has jurisdiction to rule on this dispute.

II - The seat of the arbitration is Guangzhou and the law governing the arbitration agreement is English law

21. In more and less recent cases[4], a three-step approach was applied in order to decide which law shall govern the proceedings.
22. First of all, following one of the most basic principles in arbitration, the will of the parties, the Tribunal has to look for an express choice of law in the arbitration agreement. Therefore, the law governing the arbitration agreement has to be the one chosen by the parties. In the absence of such a choice, the Tribunal will generally choose the law governing the main contract to apply to the arbitration agreement[5].
23. This presumption also known as the Sulamérica presumption[6] falls if there are provisions of the law of the seat of arbitration chosen which designate the law of the said State to govern

[4] *Sulamerica CIA Nacional De Seguros SA & Ors* v *Enesa Engenharia SA & Ors* [2012] EWCA Civ 638; *Enka Insaat Ve Sanayi AS* v *OOO Insurance Company Chubb & Ors* (Rev 1) [2020] EWCA Civ 574
[5] *Ibid*
[6] *Sulamerica CIA Nacional De Seguros SA & Ors* v *Enesa Engenharia SA & Ors* [2012] EWCA Civ 638

the arbitration agreement, or if there is a significant risk that, if governed by the same law as the main contract, the arbitration agreement would be ineffective[7].

24. Finally, the third stage of the inquiry is to turn to the system of law most closely connected to the arbitration agreement, generally, the seat of the arbitration[8].

25. But it should also be taken into account that these steps are meant to keep the arbitration agreement effective. In Sulamérica, the Court applied a validation principle by stating that *"commercial parties are generally unlikely to have intended a choice of governing law for the contract to apply to an arbitration agreement if there is "at least a serious risk" that a choice of that law would "significantly undermine" that agreement"*. Following this objective, it is clear that if the law of the seat of arbitration renders the arbitration agreement invalid, when the law of the main contract does not, the latter should prevail.

26. Indeed the arbitration agreement is a contractual clause and should be interpreted based on its natural and ordinary meaning to most effectively fulfil the parties' intentions. Therefore, if the arbitration agreement is deemed invalid under the law of the seat of arbitration, the law governing the main contract should apply to the arbitration clause. This exception is based on the assumption that the parties' will was to go to arbitration, thus they intended for the arbitration agreement to be effective[9]. Moreover in the case of *Hamlyn & Co v Talisker Distillery*[10], certain Lords of the House of Lords appeared to support applying the law that would uphold the disputed arbitration agreement's validity, rather than the law under which it would be deemed invalid[11].

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[7] *Ibid*

[8] Mihaela Maravela, "Enka v Chubb Revisited: The Choice of Governing Law of the Contract and the Law of the Arbitration Agreement", 11 october 2020, Kluwer Arbitration Blog, available at <https://arbitrationblog.kluwerarbitration.com/2020/10/11/enka-v-chubb-revisited-the-choice-of-governing-law-of-the-contract-and-the-law-of-the-arbitration-agreement/>

[9] Ardavan Arzadeh, "The law governing arbitration agreements in England", [2013] L.M.C.L.Q 31, [35] *available at* <https://www.i-law.com/ilaw/doc/view.htm?id=317866#CLQ:20130031.14>

[10] *Hamlyn & Co.* v *Talisker Distillery and others* [1894]

[11] Ardavan Arzadeh, "The law governing arbitration agreements in England", [2013] L.M.C.L.Q 31, [35] *available at* <https://www.i-law.com/ilaw/doc/view.htm?id=317866#CLQ:20130031.14>

27. In the case Insigma Technology Co Ltd v Alstom Technology[12], it was stated that *"the court should, as far as possible, construe an arbitration agreement so as to give effect to a clear intention evinced by the parties to settle their disputes by arbitration"*. This principle gives rise to two subsidiary principles, firstly, courts should not construe arbitration agreements restrictively or strictly, and secondly, courts should prefer a commercially logical and sensible construction over a commercially illogical one[13]. The third and final principle which can be drawn from the case *Insigma* is that *"a defect in an arbitration agreement does not render it void ab initio unless the defect is so fundamental or irretrievable as to negate the parties' intent or agreement to arbitrate"*[14].
28. In this case, no express choice of law was made in the arbitration agreement in order to govern the proceedings. Therefore, it is necessary to turn to the second step, that the presumed law should be the law of the main contract. As said before, the Sulamérica presumption falls if there is a choice of seat. However, in this case, the consequences arising from the choice of the law of the seat undermines the clear intention of the parties.
29. It would not make sense to draft an arbitration clause with the intention that it should be invalid. This type of behaviour would be contrary to good faith and the validation principle.
30. If choosing the law of the seat, PRC law, to govern the arbitration clause would invalidate the arbitration clause as the Respondent points out, as the law of the main contract is set aside when there is a significant risk that it would invalidate the arbitration agreement, it is natural that in the process of this three-step inquiry, the same shall occur to the law of the seat of arbitration.

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[12] *Insigma Technology Co Ltd* v *Alstom Technology* [2009] 3 SLR(R) 936

[13] Cheryl Zhu, "BNA v BNB: Singapore High Court Upholds Tribunal's Jurisdiction by Interpreting Agreement for "Arbitration in Shanghai" to Provide for a Singapore Seat", 9 July 2019, Morrison Foester, available at <https://www.mofo.com/resources/insights/190710-singapore-uphold-tribunal-jurisdiction>

[14] *Ibid*

31. In this case, the Charterparty is governed by English law as mentioned in the arbitration agreement, *"English law to apply to the CP."*[15] This choice of law is justified by the prevalence of the law that gives validity to the arbitration clause, in accordance with the will of the Parties.

32. The third stage of the inquiry only applies when there is no express or implied choice of the law governing the arbitration agreement. Given that there is an implied choice with the law of the contract, the third stage is not considered in this case. However, it is obvious that the system of law most closely connected to the arbitration agreement is not PRC law. Indeed, the Vessel travelled from Bintulu in Malaysia to Busan in South Korea, the Claimant is registered in Panama[16].

33. Moreover, in this case, there is no defect so fundamental or irretrievable as to negate the parties's intent to arbitrate considering the arbitration clause designates an arbitration centre and a seat of arbitration whether the Tribunal finds it to be Singapore or Guangzhou.

34. In conclusion, the law governing the arbitration agreement should be the one governing the contract, i.e. English law.

III- The seat of the arbitration is Guangzhou and the law governing the arbitration agreement is PRC law but the arbitration agreement is still valid

35. In the case Daesung v Praxair[17], the Respondent stated that the agreement was invalid since it designated the Singapore International Arbitration Center (SIAC), a foreign institution therefore forbidden from conducting arbitration proceedings in China. But the Shanghai No. 1 Intermediate People's Court decided otherwise and found that arbitration is a dispute

[15] International Maritime Law Arbitration Moot 2024, *Moot Problem*, 26 December 2023 V.1, p. 28 [76]
[16] International Maritime Law Arbitration Moot 2024, *Moot Problem*, 26 December 2023 V.1,p. 7
[17] *Daesung Industrial Gases Co Ltd* v *Praxair (China) Investment Co Ltd* [2019] SGHC 142

resolution method where both parties are voluntary, and that it does not matter whether China's arbitration market is open to foreign countries or not[18].

36. It was also found that had there been any ban on foreign arbitral institutions administering arbitrations in the PRC, it would have been against the recent trends in international commercial arbitration.[19]

37. Moreover, in this decision, it was emphasised that the arbitration agreement was considered *"foreign related"*. Indeed, the Court stated that according to PRC law, a civil relationship can be considered as foreign-related civil relations "*(1) if one or both of the parties are foreign citizens, foreign legal persons or other organisations, or stateless persons; (2) if one or both parties' habitual residence is outside the territory of the People's Republic of China; or (3) other circumstances that can be considered as foreign-related civil relations."*[20]

38. In this case, both parties' intention was to go to arbitration as they both agreed to add an arbitration clause in the Bill of Lading, and they designated the SCMA rules to apply, no matter what would be the impact of the seat being in the PRC.

39. In addition, banning SCMA from administering an arbitration in the PRC would go against the recent trends in international commercial arbitration, especially considering that China has progressed in the field and *"makes headway in building international commercial arbitration centers"*[21].

40. Moreover, as said before, one of the parties is registered in Panama and all the circumstances indicate that this case would be considered as *"foreign related"*[22] by the People's Court, and therefore that the arbitration clause would not be invalidated by PRC law, and a foreign arbitration centre can be allowed to administer the conflict.

[18] *Ibid.* at [48(1)]
[19] *Ibid* at [48(3) and (4)]
[20] *Ibid,* [28]
[21] Huaxia, "China makes headway in building international commercial arbitration centers" Xinhua news, 4 October 2024, available at <https://english.news.cn/20240410/e6f327e81f1d48608caf08df49e53340/c.html>
[22] *Daesung Industrial Gases Co Ltd* v *Praxair (China) Investment Co Ltd* [2019] SGHC 142, [28]

41. In conclusion, if the Tribunal finds the seat of the arbitration to be in Guangzhou and the applicable law to be PRC law, the latter doesn't have any effect on the arbitration agreement incorporated in the Bill of Lading which would still be valid.

IV - The second arbitration agreement embodied in the Charterparty

42. In the rider clauses, Clause 47 called "charterparty conflict" designates the main terms of the charterparty as the priority in terms of conflict resolution, followed by Charterers' rider clauses: *"Main terms followed by Charterers' rider clauses shall apply if conflicting."*[23]
43. The main terms of the charter party relating to the conflict resolution are as follows:
44. *"Any dispute arising from the making, performance or termination of this Charter Party shall be settled in New York, Owner and Charterer each appointing an arbitrator, who shall be a merchant, broker or individual experienced in the shipping business [...] Such arbitration shall be conducted in conformity with the provisions and procedure of the United States Arbitration Act."*[24]
45. This arbitration clause clearly designates New York as the seat of arbitration, a seat where arbitration is free from any laws that could prevent it. Therefore, there are two separate arbitration clauses in two related contracts, which demonstrates the intent to go to arbitration in case of a conflict.
46. Moreover, this clause requires that such arbitration shall be conducted in conformity with the United States Arbitration Act. The latter states as follows:

    "§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate
47. *A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such*

[23] International Maritime Law Arbitration Moot 2024, *Moot Problem*, 26 December 2023 V.1,p. 26
[24] International Maritime Law Arbitration Moot 2024, *Moot Problem*, 26 December 2023 V.1,p. 19

contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[25]

48. In this case the US Arbitration Act clearly supports the validity of the arbitration agreement. In addition with the fact that there are two arbitration clauses signed by the Parties, it is clear that in order to respect the Parties' will, one of the arbitration agreements must be valid. Therefore the Tribunal must find that they have jurisdiction.

[25] The United States Arbitration Act 9 USC Chapter 1: General Provisions from Title 9 - Arbitration

TITLE 2: MERITS - The Claimant claims additional damages to demurrage and rejects the Respondent's counterclaim for mis-delivery

49. In accordance with rider clause 76, the arguments made in favour of the merits of this Arbitration are hereby governed by English law, due to its application to the Charterparty.
50. After finding that this Tribunal has jurisdiction, the Claimant claims additional damages to demurrage for the loss suffered, amounting to USD 3,650,000, which resulted directly from the Respondent's breach of their obligations (**Section 1**).
51. Additionally, the Claimant requests that the Respondent's counterclaim for damages, in the amount of USD 4,249,752.50, regarding the alleged mis-delivery of the Cargo be rejected or awarded nominal damages only (**Section 2**)

SECTION 1: The Claimant is entitled to claim unliquidated damages in addition to or as an alternative to demurrage

52. Due to the extensive loss suffered, the Claimant claims additional damages to demurrage from the Respondent due to their negligent conduct. Not only was the Respondent the legal holder of the Bill of Lading and therefore had the rights and obligations under the Charterparty transferred to him (**I**), but the Respondent also breached these obligations (**II**). As a result of these breaches, a claim for additional damages is necessary in order to compensate the Claimant for the significant loss suffered (**III**).

I - The Respondent has been transferred the rights and obligations under the Charterparty as the legal holder of the Bill of Lading

53. The Bill of Lading ("**BL**") is a document of "*crucial importance*" issued by the carrier which details the state and shipment of the cargo and gives title of that shipment to a specified

person.[26] Thus, a bill of lading constitutes conclusive evidence to the shipment of the goods.[27] Such a bill of lading, attesting the fact that the goods are in apparent good order and condition, is referred to as a "*clean*" bill of lading which, once issued, fulfils the Seller's obligations and passes liability onto the Carrier.

54. A bill of lading also acts as a document of title, a document which is used as proof of the possession or control of goods.[28] The bill of lading remains in force as a symbol and carries with it not only the full ownership of the goods, but also the rights created by the contract of carriage between the shipper and the shipowner.[29] It is the lawful holder of the bill of lading that has transferred to him/her all the rights to sue under the contract of carriage as if he had been a party to that contract.[30] In the absence of a statutory definition of the term legal holder of the bill of lading, section 5(2) of the Carriage of Goods by Sea Act 1992 ("**COGSA**") links the notion to a person who is in possession of the BL and is either consignee, or has been endorsed through delivery of the BL or the BL has become "*spent*".

55. Case law shows that it is possible for banks to become lawful holders of a bill of lading, but that in practice, the documents that are presented to the bank are normally held "*to the order of the seller*".[31] By referencing an ICC report, a judge found that in practice, once documents are presented to the bank, those documents belong to the presenter until the documents are taken up.[32] While concluding likewise, Lord Justice Moore-Bick found, in the *Erin Schulte* case, that banks which receive and retain the possession of the BL within the context of a documentary credit for the purpose of establishing compliant presentation can be identified as a holder within the meaning of section 5(2) COGSA 1992.[33]

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[26] Andrea Lista, *International Commercial Sales: The Sale of Goods on Shipment Terms* (Lloyd's Commercial Law Library, Routledge 2018) 71
[27] Carriage of Goods by Sea Act 1992, s 4
[28] Factors Act 1889, s 1(4)
[29] *Bowen LJ in Sanders Brothers v Maclean & Co* (1883) 11 QBD 327, 341.2
[30] Carriage of Goods by Sea Act 1992, s 2
[31] *Primetrade AG v Ythan ltd (The Ythan)* 2006 1 Lloyd's Rep. 457, 465
[32] *Credit Industriel et Commercial v China Merchants Bank* 2002 EWHC 973, [71]
[33] *Standard Chartered Bank v Dorcester LNG (2) Limited ("The Erin Schulte")* 2014 EWCA Civ. 1382

56. However, it has been held and ruled on appeal that the express consignment of the goods to the bank, followed by the delivery of the bills to them, was the equivalent of a personal endorsement.[34] The Bill of Ladings Act 1855 codifies that "*Every Consignee of Goods named in a Bill of Lading […] shall have transferred to and vested in him all Rights of Suit, and be* ***subject to the same Liabilities*** *in respect of such Goods as if the Contract contained in the Bill of Lading had been made with himself.*"[35]

57. In this case, the clean bill of lading was issued on the 6th of September 2023 and expressly consigned to Veggies of Earth Banking Ltd., a financial institution acting in the present arbitration proceedings as Respondent.[36] Therefore, there is no need for the bill of lading to be endorsed nor for the documents to be taken up by payment for the Respondent to become the legal holder of the BL. Due to being the consignee, the Respondent became the legal holder of the BL as soon as they were in possession of it, which was consequently on the 6th September when it was issued.

58. However, if the Tribunal finds that the Respondent was merely holding the BL to the order of the Seller, Yu Shipping Ltd., it must be found that they became the legal holder of the BL once payment for the goods had been made. The Respondent, having issued a letter of credit ("**LC**") and accordingly paid Good Oils under said LC, was thus endorsed as legal holder of the BL on the 3rd October.

59. As a result, the Respondent, having been named consignee on the BL, carries the obligations and liabilities of the Charterparty as if he were in fact party to said contract. Therefore, not only does Veggies of Earth Banking Ltd. have an obligation to comply with the terms of the Charterparty concerning demurrage, but also an obligation to take delivery of the goods.

[34] *Credit Industriel et Commercial v China Merchants Bank* 2002 EWHC 973, [21] : see *East West Corporation v DKBS 1912 and Akts* Svendborg [2002] EWHC 83 (Comm), [2002] 2 Lloyd's Rep 182, [104]
[35] Bill of Ladings Act (1855) c. 111, s. I Rights under Bills of Lading to vest in Consignee or Endorsee.
[36] International Maritime Law Arbitration Moot 2024, *Moot Problem*, 26 December 2023 V.1, Statement of Claim, Annex C, Tanker Bill of Lading NO. COW-001A, p.30

II - The Respondent was in breach of its contractual obligations

60. The Respondent, as the legal holder of the BL, has breached two separate obligations when it comes to the claim for additional or alternative damages to demurrage. Firstly, the Respondent breached their express obligation to take delivery within the laytime provided in the Charterparty. (**A**) Secondly, the Respondent breached the implied term to take delivery within a reasonable time. (**B**)

A - The Respondent breached its obligation to deliver within the laytime set out in the Charterparty

61. Demurrage refers to a fixed sum of money payable daily by the user of a ship (a charterer) to a shipowner for taking longer than the agreed period of time to load or discharge goods onto or from a ship.[37] The time in which the parties agree to load or discharge is called laytime and demurrage is payable for the days it takes to complete the loading or discharge that exceeds this laytime.

62. "*Once on demurrage always on demurrage*", this famous proverb stems from *The Spalmatori* case, in which Lord Reid explains that once a Vessel is on demurrage, no exceptions or interruptions will prevent demurrage of being payable unless the clause is clearly worded to give that effect.[38] Demonstrating its importance through the strict requirement for clarity in the charterparty provisions, demurrage is "*a sum payable under and by virtue*" of a contract.[39]

63. "*A liability for demurrage is a* ***liability for liquidated damages for breach of contract****. The breach of contract is the failure to discharge (or load) within the permitted laytime. The obligation has two different aspects: the first is the* ***obligation to discharge*** *and the second is to* ***do so within the limited time****.*"[40]

[37] Linda Jacques, "Demurrage" (*LA Marine - Lester Aldridge LLP*, 18 January 2023)
[38] *Union of India v. Compania Naviera Aeolus* (*The Spalmatori*) [1964] A.C. 868, 879
[39] *Lockhart v Falk (1874-75) L.R. 10 Ex. 132*
[40] *Islamic Republic of Iran Shipping Lines v. Ierax Shipping Co.* [1991] 1 Lloyd's Rep 81, 87

64. In this case, clause E of the Charterparty states "*Total Laytime 96 hours for loading;* ***96 hours for discharging*** *(Running hours.)*". The term "running hours" means that laytime runs continuously during both day and night and irrespective of normal working hours.[41] Pursuant to clause 4 of the Charterparty, laytime is to commence either at the expiration of 6 (running) hours after tender of the Notice of Readiness ("**NOR**"), or immediately upon Vessel's arrival in berth, whichever occurs first. Once the laytime expires, the owner, being the Claimant, is allowed to claim for demurrage. Clause G of the Charterparty informs us that the rate of demurrage is USD 1500 per hour.

65. On the 20th of September, the Vessel arrived at Busan, but no berthing or discharge instructions were received by the Vessel. The Notice of Readiness was tendered and accepted on the 20th of September, but berthing instructions were only received on the 3rd October. Therefore, in accordance with clause 4 of the Charterparty, laytime commenced at 1443 LT on the 20th of September 2023, being 6 hours after the tender of the Notice of Readiness which was performed (before berthing) at 0843 LT.

66. Since the laytime then expired 96 hours later, at 1443 LT on the 24th of September, and discharge had not been completed, the Respondent breached its obligation to take delivery of the cargo and procure/complete discharge within the laytime stipulated by the Charterparty. Therefore, demurrage, at a rate of USD 1500 per hour, began to incur from 1443 LT on the 24th of September. Discharge was only completed on the 7th October 2023 at 2348 LT, thus incurring (13days x 24h) + 9h05min : 321h05min x 1500 USD : 481'500 USD (for the 321 hours) + 125 USD (for the additional 5 minutes) = 481'625 USD in demurrage costs between the time the Notice of Readiness was tendered and the completion of the discharge of the cargo (calculated *pro rata*).

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[41] Timothy Young KC, Michael Ashcroft, Julian Cooke, Andrew Taylor, John Kimball, LeRoy Lambert, David Martowski, Michael Sturley, *Voyage Charters* (5th edn. 2002), p.428, [15.11]

67. The Tribunal shall find that the Respondent breached its contractual obligation to discharge within laytime and therefore is required to pay USD 481'625 in demurrage.

B - The Respondent has breached the common law requirement to take delivery within a reasonable time

68. "*If, by the terms of the charterparty, the charterer has agreed to discharge the ship within a fixed period of time, that is an* ***absolute and unconditional engagement****, for the non performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing it. If there is no fixed time, the* ***law implies an agreement****, on his part,* ***to discharge the cargo within a reasonable time****.*"[42]

69. Stemming from the obligations of the legal holder of the bill of lading, the concept of an implied term originated in a duty to "*use all reasonable diligence*" when discharging the cargo.[43] Justice Blackburn clarified that the contract implied by the law is that the merchant and shipowner should each use reasonable despatch in performing his part of the discharge.[44] Throughout case law, this implied term was referred to as an implied contract in the Bill of Lading to discharge within a reasonable time, which cannot be varied by the charterparty.[45] However, it is highlighted that the notion of a reasonable time "*must always depend upon the circumstances*".[46]

70. Whether or not the Charterparty or the Bill of Lading contains express terms as to the time in which discharge was to take place, the Respondent, as legal holder of the BL and as consignee, has an obligation to discharge the Cargo within a reasonable time. Such an agreement is implied by law. As Lord Ashbourne comprehensively stated; "*The questions left*

[42] *William Postlethwaite v John Freeland and Alexander Freeland* (1880), 5 App. Cas. 599, 608 (Lord Selborne, THE LORD CHANCELLOR)
[43] *Rogers v Hunter* (1827) 2 Carrington and Payne 601 172 E.R. 273, [602] (Lord Tenterden, C. J.)
[44] *Ford & Others v Cotesworth and Another* (1868-69) L.R. 4 Q.B. 127, 137 (Blackburn, J.)
[45] *Fowler v Knoop* (1878) 4 Q.B.D. 299, at p.303-304 (Bramwell, L.J.)
[46] *Hick v Raymond & Reid* [1893] A.C. 22 (1892), at p.29 (Lord Herschell, L.C.)

to the jury were, whether, looking to the ordinary state of things at the port, there was ***any unreasonable delay***"[47]?

71. In this case, the Respondent caused an unreasonable delay at the discharge port by failing to supply the necessary documents to procure the discharge. As can be seen from the correspondence supplied in Annex A of the statement of reply and defence to counterclaim, the Respondent, VOE, was "***not agreeable*** *to releasing the cargo*".[48] It was only on the 3rd of October that the Respondent permitted the Charterers to "*do as you deem fit*" in order for discharge to commence.[49] Not only did the Respondent continuously refuse to grant a trust receipt which would have allowed the discharge within a reasonable time, but they were fully aware and repeatedly reminded of the Vessel's strict laycan for its next employment.

72. Yu Shipping informed the Respondent of the Vessel's arrival in Busan on the 20th of September and immediately requested to apply for a trust receipt. On September 22nd, the Respondent was also informed by Yu Shipping that the laytime was expiring.[50] Having had little response from the Respondent and having received repeated chasers from the Claimant, on the 29th of September, Yu Shipping reaffirmed their request for trust receipt and imposed a deadline from which the Vessel had to depart from Busan for its next employment, being the 30th of September. This deadline was pushed back to the 7th of October and the Charterparty was transferred by Yu Shipping to the Respondent the same day. These exchanges as well as Yu Shipping made it perfectly clear that "*all relevant parties are aware of the Vessel's limitation*".[51] The Respondent was therefore fully aware of the expiration of the laytime, of Vessel's next employment and the urgency of its need to leave Busan.

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[47] *Pantland Hick Appellant; v Raymond & Reid Respondents* [1893] A.C. 22, 35 (Lord Ashbourne)
[48] International Maritime Law Arbitration Moot 2024, *Moot Problem*, 26 December 2023 V.1, p.44
[49] Ibid, p.46
[50] International Maritime Law Arbitration Moot 2024, *Moot Problem*, 26 December 2023 V.1, p.48
[51] International Maritime Law Arbitration Moot 2024, *Moot Problem*, 26 December 2023 V.1, Statement of Claim, p.8

73. Once started at 0630 LT on the 4th of October 2023, the discharge of the Cargo took a total time of (3days x 24h) + 17h18min: 89h18min to discharge as it was completed on the 7th of October at 2348 LT. In considering this, had the discharge commenced upon tender of the NOR and not otherwise delayed directly by the Respondent, it would have been completed within the laytime (96h) provided by the charterparty and thus, within a reasonable time.

74. In *Ford v Cotesworth*, the Court found that the landing of the cargo had been rendered impossible by a cause over which the defendant had no control.[52] However, this is not the case in this situation. The Respondent supported their refusal to grant trust receipt on the basis that they themselves had not yet received the export letter of credit from the Korean Buyers. These circumstances do not in any way render the discharge of the Cargo impossible, nor were they out of the control of the Respondent as once he informed Yu Shipping that they could act as they saw fit, discharge could commence by presentation of a Letter of Indemnity. The Respondent's omissions can therefore not rely upon such a defence of impossibility.

75. As a result of the Respondent's failure to grant trust receipt, the discharge incurred over a 2-week delay, between the 20th of September (Vessel's arrival) and the 7th of October (completion of the discharge). Bearing in mind that the original laytime was only 4 days, a delay totalling 17 days can only be construed as unreasonable, especially given the complete unilateral responsibility, unjustified reasoning and complete knowledge regarding the consequences of the Respondent in causing such a delay. Finally, the loss caused by the delay is so significant that the Claimant suffered a loss of income amounting to USD 3'650'000 (5'000 USD x 365 days x 2 years).

76. The Tribunal must find therefore that the Respondent breached its obligation to procure and/or take delivery within a reasonable time, causing a significant loss to the Claimant that needs to be compensated by additional damages.

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[52] *Ford and Others v Cotesworth and Another* (1868-69) L.R. 4 Q.B. 127, 137 (Blackburn, J.)

III - A claim for additional damages is necessary to compensate the loss caused

77. As Lord Diplock stated, "*Every failure to perform a primary obligation is a breach of contract. The* ***secondary obligation*** *on the part of the contract breaker to which it gives rise by implication of the common law is to pay* ***monetary compensation*** *to the other party* ***for the loss*** *sustained by him in consequence of the breach*."[53]. This affirmed the principle that a breach of contract allows the party who sustained any loss to recover damages as a remedy. The common law rule is that the party who sustained the loss is to be placed in the same situation, with respect to damages, as if the contract had been performed and the breach had not occurred.[54]

78. Nevertheless, the question of whether additional damages to demurrage can be sought for a breach of the charterparty is "*a question of* ***considerable importance*** *in shipping circles*"[55] and creates grave "*uncertainty*" [56].

79. In the case of *Reidar v Arcos*, where there was no clause stipulating any fixed number of days on demurrage, the Court of Appeal held that the charterer's suffered a loss as a direct result of the breach, which reflected the difference between the amount of freight which they would have earned and the amount which they in fact earned. Such loss was deemed recoverable as additional damages. Lord Justice Banks based his conclusion on the distinction between allowed detention and undue detention,[57] but more so on their being no suggestion by previous authority[58] that a demurrage claim would exclude a claim for special damages arising from the detention of the vessel.[59] Lord Justice Atkin clarified that the provisions for demurrage quantify the damages, not for the complete breach, but only for those arising out

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[53] *Photo Production v Securicor* [1980] AC 827, 849
[54] *Robinson v Harman* (1848) 1 Ex 850, per Parke B at 855; Principle reasserted in *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20, [2018] 2 W.L.R. 1353
[55] *Aktieselskabet Reidar v Arcos, Limited* [1927] 1 K.B. 352, 362 (Atkin L.J.)
[56] Edwin Peel, "The scope of a demurrage clause" L.Q.R. 2022, 138(Jul), 348-353, 348
[57] *Lockhart v Falk L. R. 10 Ex. 132* , 135
[58] *Saxon Ship Co. v. Union Steamship Co* 4 Com. Cas. 298
[59] *Aktieselskabet Reidar v Arcos, Limited* [1927] 1 K.B. 352, 362 (Banks L.J.)

of the detention of the vessel, meaning the breach is never fully repaired and the damages are not completely mitigated by demurrage.[60]

80. It is said that the better interpretation of *Reidar v Arcos* is that losses can be recovered in addition to demurrage.[61] However, it is necessary to show damage of a different kind to allow a claim for additional damages.[62] The *Atlus* confirmed the possibility of claiming unliquidated damages if the breach gave rise to damages of a different character.[63]

81. In the present arbitration, the demurrage provisions do not provide a limit of days on demurrage, implying that they constitute days in which the Respondent is in breach of the charterparty for failing to procure discharge within the laytime.[64] Therefore demurrage, calculated to the small and disproportionate sum of USD 481'625, only covers "*all normal running expenses*"[65] and not the entirely separate loss of USD 3'650'000 resulting from the change in hire rate of the Vessel's next employment. Like undue detention, the Respondent caused the Vessel to be detained in Busan beyond any reasonable amount of time, whilst having complete knowledge of the Vessel's future employment and strict laycan of 1-14 October in Kaohsiung.

82. Therefore, due to the breach causing a completely different kind of loss to the Claimant, the Tribunal shall allow the claim of USD 3'650'000 in order to mitigate the Respondent's breach and place the Claimant in the same position as if it had not occurred.

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[60] Ibid, 363 (Atkin L.J.)
[61] The Hon Mr Justice David Foxton, Steven Berry QC, Christopher Smith QC, *Scrutton on Charterparties* (24th Edn.Sweet & Maxwell, 2020) 15-001, 15-006
[62] Cooke J., Young T. et al., *Voyage Charters*, 4th Ed. (2014), [16.14]
[63] *Total Transport Corp of Panama v Amoco Transport Co (The Altus)* [1985] 1 Lloyd's Rep. 423
[64] See *Aktieselskabet Reidar v Arcos, Limited* [1927] 1 K.B. 352, 363 (Atkins L.J.)
[65] *Triton Navigation Ltd v Vitol SA* (*The Nikmary)* [2003] EWHC 46 (Comm); [2003] 1 Lloyd's Rep. 151, [47]

SECTION 2: The Respondent's counterclaims must be dismissed

83. The Respondent's claims to be entitled to damages in the amount of USD 4'249'752.50 as a result of an alleged mis-delivery of the Cargo. This counterclaim should be entirely dismissed by the Tribunal as the Respondent consented to the delivery of the Cargo without presentation of the Bill of Lading (**I**). Moreover, the delivery of the Cargo pursuant to the Letter of Indemnity did not cause the Respondent to suffer any loss (**II**).

I - Clause 57 of the Charterparty: The Respondent consented to the delivery of the Cargo without the BL

84. A shipowner can only release cargo upon presentation of an original set of BLs – it cannot release the cargo to anyone else, not even the cargo owner if it fails to present the BLs.
85. The attitude of the English and Singapore courts with respect to a carrier's reliance on exemption clauses in misdelivery claims has been very strict. However, there is nothing in principle to prevent a carrier from including a very clearly worded exemption clause in the bill of lading to cover claims for delivery without presentation of bills of lading.[66]
86. Letters of indemnity ("**LOI**") act as an unofficial form of insurance in instances where a party is requested to step out of the bounds of its contracted obligations. For instance where the carrier is asked to deliver the cargo without production of the original bill of lading as the cargo has reached its destination before the bill of lading.
87. For commercial reasons charterers often require discharge of the cargo against a LOI and this requirement is also inserted into the charter parties. A seller, whose cargo has arrived at the discharge port before the BLs, would typically issue a Discharge LOI to the shipowner, effectively indemnifying the shipowner against any claim that may arise from releasing the cargo without presentation of the BLs.

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[66] *Carewins Development (China) Limited v. Bright Fortune Shipping Limited* [2009] 3 HKLRD 409

88. The Letter of Credit ("**LC**") issued by the Respondent provided that payment will be made against presentation of the shipping documents (including the Bill of Lading) or, in lieu of the shipping documents, a letter of indemnity. The Respondent accepted the presentation of a letter of indemnity which expressly states that the Respondent had agreed to make payment for the Cargo without presentation of the Bill of Lading.[67]

89. Therefore the Respondent did not suffer loss, because it was aware of the intended delivery without presentation of the bill, and would have authorised or permitted the Owners to do so. [68]

90. In this case, article 57 of the Tomahawk Maritime Rider clauses mentions the possibility of discharge without the BLs: "*57. Discharge without bills of lading - In the absence of original b/ls at discharge port(s), owners release the entire cargo to receivers* ***against charterers' LOI*** *without bank guarantee (LOI wording always to be in Owners' P and I Club format).*"[69]

91. This clause, and the payment terms under the sale contract, reflected the fact that it is common in this trade for bills of lading not to be available for presentation to the vessel at the time of delivery.

92. The arrangements amongst the Parties, and specifically reference to a clause in the material agreement expressly authorised the Respondent's customer to take delivery of the goods from the Vessel without presentation of the bills of lading.[70]

93. Ahead of the Vessel's arrival at the discharge port, the receivers requested that the cargo be delivered without production of the original bills. The Charterparty contained a clause to enable this against the provision of an LOI. [71]

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[67] International Maritime Law Arbitration Moot 2024, *Moot Problem*, 26 December 2023 V.1, Statement of reply and defense to counterclaim p. 40-41

[68] International Maritime Law Arbitration Moot 2024, *Moot Problem*, 26 December 2023 V.1, Statement of reply and defence to counterclaim , p.40

[69] International Maritime Law Arbitration Moot 2024, *Moot Problem*, 26 December 2023 V.1, Tomahawk Rider clauses, p. 28

[70] *ING Bank NV, Singapore Branchv v. The Demise Charterer of the Ship or Vessel "Navig8 Ametrine"* [2022] SGHCR 5

[71] *Laemthong International Lines Co Ltd v Artis (The Laemthong Glory) (No 2)* [2004] EWHC 2738 (Comm)

94. The wording of this effectively drafted exclusion clause is very clear, and should be reviewed by the Tribunal.

II - The Respondent did not suffer any loss

95. The Respondent was informed of the Vessel's arrival at Busan on 1st of October 2023 and that the Charterer would be taking delivery of the Cargo by invoking Clause 57 of the Charterparty. The Respondent's claim for misdelivery should therefore be rejected.

96. Even if the court admits that there is a breach of contract by the Claimant for the misdelivery of the cargo, the Respondent had ultimately caused its own loss by firstly agreeing to make payment for the Cargo without presentation of the BL and secondly by failing to take delivery of the Cargo itself. If the actual breach therefore caused no loss, a small sum, fixed without regard to the amount of loss, will be awarded as nominal damages.[72] The misdelivery claim was not caused by reason of the Claimant's breach of contract but by reason of the Respondent's own negligent conduct in not taking delivery of the cargo. [73] Therefore the Tribunal should award nominal damages only.

[72] See "Damages for Breach of Contract" NYU School of law, available at <https://www.law.nyu.edu/sites/default/files/ECM_PRO_063763.pdf >

[73]*Galtrade LTD v BP Oil International LTD (THE "PIONEER")*[2022] Lloyd's Rep 129 Vol. 1

PRAYER FOR RELIEF

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

(a) **STATE** that the seat of arbitration is Singapore and the governing law of the arbitration agreement is Singapore law **or**;

(b) **STATE** that the seat of arbitration is Guangzhou and the governing law of the arbitration agreement is English law;

(c) **STATE** that the arbitration agreement incorporated in the Bill of Lading is valid and the Tribunal has jurisdiction;

(d) **FIND** that the Claimant is entitled to claim for unliquidated damages in addition to or as an alternative to demurrage;

(e) **AWARD** the Claimant USD 3’650’000 in additional damages for the loss quantified by reference to the discounted hire rate of the Vessel’s next employment;

(f) **REJECT** the Respondent’s claim for mis-delivery or otherwise award nominal damages only;

(g) **AWARD** the Claimant interests, costs, or such further order or relief as the Tribunal deems fit.