INTERNATIONAL MARITIME LAW ARBITRATION MOOT

2024

7 JULY – 12 JULY 2024

MEMORANDUM FOR CLAIMANT

UNIVERSITY OF COPENHAGEN

ON BEHALF OF:

Tomahawk Maritime S.A.

C/O Trust Company Complex

Ajeltake Road, Ajeltake Island

Majuro, Marshall Islands

MH 96960

AGAINST:

Veggies of Earth Banking Ltd.

Room 1818, 18/F Farmers Building

18 Gardens Road

Tuen Mun

Hong Kong SAR

COUNSEL – TEAM Q

Aja Stokholm Bjørkmann · Daniel Hopmann · Edward Lind-Holm

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Counsel - Team Q

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TABLE OF AUTHORITIES

TREATIES AND LEGISLATION

ABBREVIATION	REFERENCE
Carriage of Goods by Sea Act 1992	Carriage of Goods by Sea Act 1992 as amended 20 September 2023.
English Arbitration Act	English Arbitration Act 1996 (Chapter 23).
NY Convention	The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.
SCMA Rules	Arbitration Rules of the Singapore Chamber of Maritime Arbitration, fourth edition, 1 January 2022.
PRC Arbitration Law	Arbitration Law of the People's Republic of China of 1994.

CASES

ABBREVIATION	REFERENCE
Enka v Chubb	Enka Insaat Ve Sanayi A.S. (Respondent) v OOO Insurance Company Chubb (Appellant) [2020] EWCA Civ 574.
The Eternal Bliss	K Line Pte Ltd v Priminds Shipping (HK) Co Ltd ("The Eternal Bliss") [2021] EWCA Civ 1712.
ICC Case No. ICC-FA-2021-071	ICCA Yearbook Commercial Arbitration 2021 - Volume XLVI, page 94-99, ICC Case No. ICC-FA-2021-071.

Sulamérica v Enesa	Sulamérica Cia Nacional de Seguros S.A v Enesa Engenharia S.A [2012] EWCA Civ 638.
The Achilleas	Transfield Shipping Inc v Mercator Shipping Inc ("The Achilleas") [2008] UKHL 48.
The Sienna	Unicredit Bank AG v Euronav NV ("The Sienna") [2022] EWHC 957 (Comm) Unicredit Bank AG v Euronav NV ("The Sienna") [2023] EWCA Civ 417.

BOOKS AND ARTICLES

Aikens R and others, *Bills of lading*, (3rd edn., Informa Law from Routledge 2021).

Baatz Y, *Maritime Law*, (5th edn, Informa Law from Routledge 2021).

Born GB *International Commercial Arbitration*, (2nd edn, Kluwer Law International 2021).

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Kramer A, *The Law of Contract Damages*, (1st edn, Bloomsbury Publishing Plc 2022).

Schofield J, *Laytime and Demurrage*, (7th edn. Taylor & Francis Ltd 2016).

OTHERS

Moot Problem	International Maritime Law Arbitration Moot 2024 Moot Problem of 26 December 2023 (v1).
Procedural Order No. 1	IMLAM Procedural Order No. 1 (Clarifications).

TABLE OF ABBREVIATIONS

ABBREVIATIONS	REFERENCE
Arbitration Agreement	Tomahawk Maritima S.A. Rider Clause 76, first sentence.
B/L	Bill of Lading No. COW-001A dated 4 September 2023.
Cargo	16,699.01 MT crude palm oil.
Charterer	Yu Shipping Ltd.
Contracting Parties	The parties to the CP, Tomahawk Maritime S.A. and Yu Shipping Ltd.
CP	Charterparty between Tomahawk Maritime S.A. and Yu Shipping Ltd. dated 1 September 2023.
Claimant	Tomahawk Maritime S.A.
Demurrage Clause	Clause 11 (a) to the Charterparty dated 1 September 2023.
Good Oils	Good Oils Sdn. Bhd.
LOI-Y	Letter of Indemnity issued by Yu Shipping Ltd. to Tomahawk Maritime S.A. on 3 October 2023.
LOI-G	Letter of Indemnity issued by Good Oils Sdn. Bhd. to Veggies of Earth Banking Ltd. on 3 October 2023.
Parties	The parties to this dispute, Tomahawk Maritime S.A. and Veggies Earth Banking Ltd.
Respondent	Veggies of Earth Banking Ltd.
Vessel	M/S NIUYANG.

STATEMENT OF FACTS

The Claimant is a company registered and existing under the laws of Panama. The Claimant is the registered owner of the Vessel which was chartered by the Charterer under the CP. The Respondent is a financial institution registered and existing under the laws of Hong Kong.

14 August 2023	The Charterer purchased the Cargo from Good Oils on FOB terms. The sales contract required the Charterer to provide a letter of credit for the payment of the Cargo.
1 September 2023	The CP between the Claimant as the Owner and the Charterer was concluded for the employment of the Vessel. According to the CP, the readiness date was 2 September 2023 and 9 September 2023 was the cancellation date.
3 September 2023	Notice of Readiness tendered for the Vessel in accordance with the CP at 0300 LT.
4 September 2023	The B/L was issued for the Cargo and consigned to the Respondent. The B/L provided that it was issued under and pursuant to the terms of the CP.
6 September 2023	Loading of the Cargo was completed, and the Vessel departed from Bintulu.
20 September 2023	The Vessel arrived at Busan. Notice of Readiness was tendered at 0843 LT and accepted on the same day, but no berthing or discharge instructions were received by the Vessel. The Charterer sent an e-mail to the Respondent informing them of the arrival of the Vessel.

20 September - 3 October 2023	Correspondence between the Claimant and the Charterer regarding the Vessel's next employment. The Charterer noted that all relevant parties were aware of the Vessel's time limitations. The Claimant reiterated the laycan for the Vessel's next employment and gave the Charterer notice that any losses or damages would be the responsibility of the Charterer. The Charterer expressed their disagreement with the Claimant's position and invoked Rider Clause 57 regulating the discharge of the Cargo to the receiver against the Charterer's Letter of Indemnity.
29 September 2023	The Respondent was informed by the Charterer that the Vessel had to leave Busan by 7 October in order to arrive in time for the next employment and attached a copy of the CP.
3 October 2023	LOI-Y sent from the Charterer to the Claimant.
3 October 2023	LOI-G sent from Good Oils to the Respondent.
3 October 2023	Correspondence between the Charterer and the Respondent regarding discharge and grant of trust receipt.
4 October 2023	Berthing and discharging instructions received by the Vessel and discharge of the Cargo commenced.
7 October 2023	Discharge of the Cargo completed.
8 October 2023	Vessel departed Busan at 0214 LT.
14 October 2023	Cancelling date of the Vessel's next employment.
16 October 2023	Time charterer for the Vessel's next employment issued notice of cancellation due to the Vessel not being ready. At this time, the Vessel was 300 nautical miles from Kaohsiung where the time charter was to commence.

15 November 2023	Claimant issued a claim against the Charterer claiming USD 3,650,000 in damages for the cancellation of the time charterparty.
22 November 2023	The Claimant received a response from the interim liquidators appointed over the Charterer stating that they were considering the claim.
29 November 2023	The Respondent wrote to the Claimant informing them that they were the holder of the B/L.
22 December 2023	Notice of Arbitration sent to the Respondent and their representative.

SUMMARY OF ARGUMENTS

I. THE TRIBUNAL HAS JURISDICTION TO HEAR THIS DISPUTE

The Claimant submits that the Arbitration Agreement is valid pursuant to the validation principle. Alternatively, if the Tribunal decides not to apply the validation principle, the Claimant submits that it must apply the three-stage test set out in *Sulamérica v Enesa.* Consequently, as the Contracting Parties have agreed that English law is the governing law of the CP, this must be extended to the Arbitration Agreement as the implied choice of law, thereby validating the Arbitration Agreement. More alternatively, if the Tribunal finds that the three-stage test does not result in English law being the governing law of the Arbitration Agreement, a literal interpretation of the Arbitration Agreement must be applied. This leads to the seat of arbitration being in Singapore and the physical place of the hearings in Guangzhou. Consequently, the Arbitration Agreement is valid.

II. THE RESPONDENT IS LIABLE TO PAY USD 3,650,000 IN DAMAGES TO THE CLAIMANT FOR ITS FAILURE TO PROCURE DISCHARGE

The Respondent has breached their obligations in the B/L by delaying the discharge of the Vessel resulting in the cancellation of its next employment in Kaohsiung. The Claimant submits that the Respondent had the intention to use the Vessel as a storage facility until 29 November 2023. Due to the actions of the Claimant, the actual use of the Vessel as a storage facility was limited until discharge commenced on 4 October 2023. The time in which the Vessel was used as a storage facility constitutes a breach of the CP, thus making the Respondent liable for damages in relation to the cancellation of the next employment.

III. REJECTION OF THE RESPONDENT'S MIS-DELIVERY CLAIM

The Claimant submits that the Respondent's claim must be rejected as it lacks causation as the loss would have been suffered despite the Claimant's mis-delivery of the Cargo. The Respondent broke the chain of causation by not informing the Claimant that they had received the B/L before 29 November 2023 and consequently causing the Claimant to deliver the cargo to buyers appointed by the Charterer.

ARGUMENTS

I. THE TRIBUNAL HAS JURISDICTION TO HEAR THIS DISPUTE

1 The Claimant submits that the Tribunal has jurisdiction to hear this dispute because the Arbitration Agreement in the CP is valid and incorporated into the B/L.

A. The Arbitration Agreement is valid pursuant to the validation principle

2 The Claimant submits that the Arbitration Agreement is valid in accordance with English law pursuant to the validation principle, as the application of PRC Arbitration Law would render the Arbitration Agreement invalid.[1]

3 There are different methods of determining the law applicable to an arbitration agreement. In the absence of an express choice, the default rule is to apply the law of the seat chosen by the parties.[2] However, if the law of the seat renders the agreement invalid, the validation principle must be applied as the parties intended for disputes to be settled by arbitration. Thus, the purpose of this principle is to ensure that arbitration remains an available method of dispute resolution.[3]

4 The validation principle is a general principle which validates an arbitration agreement, if the agreement is effective under any potentially applicable nation's laws connected to the parties' contract.[4] As stated by Born, courts and tribunals often seek to avoid national rules rendering an arbitration agreement invalid by applying inter alia the validation principle in order to give the agreement in question validity and effect.[5]

5 It is clear from Clause 31 of the CP and the Arbitration Agreement that the intention of the Contracting Parties was to solve disputes by arbitration as this has been agreed upon.

[1] IMLAM Procedural Order No. 1, sec. 1.v.
[2] Gary B Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2021) §4.04[A].
[3] Ibid.
[4] Ibid, §4.01.
[5] Ibid, §25.04[A]7[a].

Therefore, in order not to invalidate the Arbitration Agreement, the validation principle should be applied.

6 Rider Clause 76 contains a choice-of-law clause which states that English law is to apply to the CP. This demonstrates the connection between the application of English law and the provisions in the CP, including the Arbitration Agreement. Consequently, English law should be applied, thereby upholding the Arbitration Agreement.

7 In the English Supreme Court case *Enka v Chubb*, Lord Hamblen and Lord Leggatt found that:

> "This principle [the validation principle] may apply if, in determining whether the parties have agreed on a choice of governing law, a putative governing law would render all or a part of the contract ineffective".[6]

8 The reasoning in *Enka v Chubb* should be applied in the present dispute, as the application of PRC Arbitration Law will render the Arbitration Agreement invalid[7] contrary to the application of English law.

9 The NY Convention applies to arbitral awards and agreements made in one contracting state which are sought to be enforced in another state, which is essential for the enforcement of the Arbitral Award that is to be made in the present dispute.[8]

10 According to Born, article V(1)(a) of the NY Convention requires the application of the validation principle.[9] The English Arbitration Act incorporates the NY Convention into English law.[10] The English Arbitration Act sections 100(1)-(2) and 103(2)(b) infer the application of the validation principle regarding the determination of the choice of the law governing an international arbitration agreement. This is based on the view that the

[6] Enka Insaat Ve Sanayi A.S. (Respondent) v OOO Insurance Company Chubb (Appellant) [2020] EWCA Civ 574, para 96. This view was accepted by the majority.
[7] Moot Problem, page 5 and 36 and IMLAM Procedural Order No. 1, sec. 1.v.
[8] NY Convention Article 1(1).
[9] Gary B Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2021) §4.04[A][1][b]
[10] The English Arbitration Act, part III, articles 100-104.

validation principle reflects the parties' implied choice of law for their arbitration agreement.[11]

11 As the Contracting Parties have agreed upon English law to govern the CP, the validation of the Arbitration Agreement must be assessed under English law pursuant to the validation principle as also reflected in section 103(2)(b) of the English Arbitration Act.

12 Moreover, arbitral tribunals are generally unwilling to apply a law to govern the arbitration agreement if that law renders the arbitration agreement invalid.[12] Instead, an arbitral tribunal will apply the validation principle which gives effect to the arbitration agreement despite the choice of law agreed upon by the parties.[13]

13 The doctrine of separability stipulates that a matrix contract and an arbitration agreement must be treated separately as they are different agreements in nature.[14] However, a choice-of law-clause governing the substance of a contract does not *necessarily* extend to the arbitration agreement.[15]

14 It was stated by Lord Hamblen and Lord Leggatt in *Enka v Chubb* that:

> "Where the law applicable to the arbitration agreement is not specified, a choice of governing law for the contract will generally apply to an arbitration agreement which forms part of the contract" (our emphasis).[16]

15 In the present dispute, the Contracting Parties have agreed upon English law to govern

[11] Gary B Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2021) §25.04[A]7[a].
[12] Ibid, §26.05[C][1][f][i][1].
[13] Ibid.
[14] Ibid, §3.01.
[15] Ibid, §4.02.
[16] Enka Insaat Ve Sanayi A.S. (Respondent) v OOO Insurance Company Chubb (Appellant) [2020] EWCA Civ 574, para. 170(iv).

the CP.[17] The doctrine of separability would result in English law not being applicable to the Arbitration Agreement. However, the application of the validation principle entails that English law will govern the Arbitration Agreement as this will uphold the Arbitration Agreement.

16 As use of the validation principle is both supported in the reasoning of *Enka v Chubb*, the English Arbitration Act, and by scholars, it must be applied in the present dispute, entailing the validity of the Arbitration Agreement under English law.

B. English law applies to the Arbitration Agreement pursuant to the three-stage test

17 If the Tribunal decides not to apply the validation principle, the Claimant submits that it must apply the three-stage test set out in *Sulamérica v Enesa* by Justice Moore-Bick.[18]

18 Following the three-stage test, the Tribunal would first have to examine the Contracting Parties' express choice of law. In the absence of an express choice, the Tribunal would have to assess whether the Parties made an implied choice. Failing such a choice of law by the Parties, the Tribunal must identify the law with which the Arbitration Agreement has the closest and most real connection.[19]

19 The Contracting Parties have agreed upon a law to govern the CP and not the Arbitration Agreement. Consequently, it must be ascertained whether they have made an implied choice to govern the Arbitration Agreement.

20 In *Sulamérica v Enesa*, the English Court of Appeal established the presumption that the law governing the charterparty also governs the arbitration agreement in the bill of lading.[20]

[17] Rider Clause 76 of the CP.
[18] Sulamérica Cia Nacional de Seguros S.A v Enesa Engenharia S.A [2012] EWCA Civ 638, para 25.
[19] Sulamérica Cia Nacional de Seguros S.A v Enesa Engenharia S.A [2012] EWCA Civ 638, para. 25; Enka Insaat Ve Sanayi A.S. (Respondent) v OOO Insurance Company Chubb (Appellant) [2020] EWCA Civ 574, para. 170.
[20] Sulamérica Cia Nacional de Seguros S.A v Enesa Engenharia S.A [2012] EWCA Civ 638, para. 29.

21 The methodology is further supported by section 103(2)(b) of the English Arbitration Act stating the presumption in favour of the law of the seat of arbitration in cases "failing any indication" in the parties' agreement of the choice of law governing the arbitration agreement.

22 In the present dispute, Rider Clause 76 of the CP is an express choice-of-law clause stating that English law governs the CP. This is a strong indication of the Contracting Parties' intention to apply English law.

23 If the Contracting Parties had intended to differentiate between the law governing the CP and the law governing the arbitration proceedings, it would have been pertinent to do so explicitly.[21]

24 This reasoning was also applied in *ICC Case No. ICC-FA-2021-071*, where the governing law of the contract and the arbitration agreement were contained in the same clause.[22] The sole arbitrator stated that:

> "If the parties had intended a different law to apply to the arbitration clause, they would presumably have specified this. This is especially true in the present case <u>where the choice of law and the arbitration clause are part of one and the same Article</u> […]" (our emphasis).[23]

25 The arbitrator consequently decided that the choice of governing law for the contract was made with respect to both the contract and the arbitration agreement.[24]

26 In the present dispute, the choice-of-law clause and the Arbitration Agreement are part of the same clause, whereby the reasoning in the ICC case ought to be applied. The result is that English law is applicable to the Arbitration Agreement.

[21] Enka Insaat Ve Sanayi A.S. (Respondent) v OOO Insurance Company Chubb (Appellant) [2020] EWCA Civ 574, para 170(v).
[22] The parties and possible seats of the case were not disclosed.
[23] ICCA Yearbook Commercial Arbitration 2021 - Volume XLVI, page 94-99, ICC Case No. ICC-FA-2021-071, para 50.
[24] Ibid.

27 In conclusion, English law is to govern the Arbitration Agreement which validates the Arbitration Agreement.

C. The seat of arbitration is Singapore

28 More alternatively, if the Tribunal finds that the three-stage test set out in *Sulamérica v Enesa* does not result in English law being the governing law of the Arbitration Agreement, a literal interpretation of the Arbitration Agreement must be applied.

29 It is explicitly agreed that three arbitrators and SCMA Rules are to apply to disputes arising from the CP. By applying a literal interpretation there is no doubt that the SCMA Rules are to apply as the use of three arbitrators are in line with SCMA Rule 8.2.

30 The Claimant submits that the wording "to be in Guangzhou"[25] solely means the physical place where the arbitration is to be held. It is possible to hold the physical hearings in another country than Singapore pursuant to SCMA Rule 32.3, without placing the seat of arbitration in that country. The unclear wording regarding the seat of arbitration should be set aside. Consequently, SCMA Rule 2.1 must be applied stipulating that Singapore is the seat of arbitration as there is no doubt that the SCMA Rules are applicable to this dispute.

[25] Arbitration Agreement.

II. THE RESPONDENT IS LIABLE TO PAY USD 3,650,000 IN DAMAGES TO THE CLAIMANT FOR ITS FAILURE TO PROCURE DISCHARGE

31 The Claimant submits that the Respondent is liable for the Vessel missing its next employment resulting in the time charterparty being renegotiated to a lower hire. The loss suffered by Claimant amounts to the sum of USD 3,650,000. As it is a financial loss, it is actionable.

A. Claimant has title to sue the Respondent

32 The Claimant's title to sue the Respondent arises from the contractual obligation entered into between the parties, in this case the B/L.[26] Thus, based on the obligations and rights contained either directly or indirectly therein, it forms the basis for the Claimant's title to sue.

33 The Respondent, being the lawful holder of the B/L, becomes a party to the contract with the Claimant pursuant to article 2(1)(a) of the Carriage of Goods by Sea Act 1992. This gives the Claimant title to sue the Respondent.

B. The Respondent is in breach of the contract

a. The Respondent is liable for not procuring discharge of the Cargo

34 The Claimant submits that the Respondent has breached their obligations in the B/L by delaying the Vessel resulting in the cancellation of its next employment in Kaohsiung.

35 According to Clause 5(a) of the CP referring to Part I(E) of the CP, the Vessel must be discharged within 96 running hours. Clause 5(a) of the CP is germane to the B/L, as laytime clauses are related to the shipment, carriage, and delivery of the goods.[27] Laytime is the permitted time in which discharge and loading of the vessel must be completed without payment of additional freight.[28] As this is related to the shipment,

[26] Yvonne Baatz, *Maritime Law* (5th edn, Informa Law from Routledge 2021) 112.
[27] Julian Cooke and others, *Voyage Charters* (4th edn, Informa Law from Routledge 2014) 507.
[28] John Schofield, *Laytime and Demurrage*, (7th edn. Taylor & Francis Ltd 2016) 3.

carriage, and delivery of the cargo, such clauses in a charterparty are germane to a bill of lading.[29]Therefore, Clause 5(a) is incorporated by the general reference clause in the B/L.

36 The laytime began on 20 September 2023 at 1443 LT. The Vessel was discharged on 7 October 2023 at 2348 LT, exceeding the laytime with 321 running hours.[30] Exceeding laytime constitutes a breach of the CP.[31]

37 The Respondent was the consignee under the B/L. Therefore, the responsibility for discharging the Vessel was also attributed to the Respondent.[32] The delay of the discharge was due to the Respondent's passivity and lack of instructions on the commencement of discharge. The Respondent had numerous opportunities to fulfil its obligation to discharge but failed to do so within any reasonable time. Consequently, the Respondent is liable for the Claimant's loss suffered by the breach of contract.

b. The Vessel was used as a storage facility

38 The Claimant submits that the Respondent used the Vessel as a de facto storage facility. This constitutes a separate breach to the laytime clause and Demurrage Clause, as the use of the Vessel as a storage facility is outside the scope of both the CP and the B/L.[33]

39 On 29 November 2023, the Respondent informed the Claimant that the Respondent was the holder of the B/L demonstrating that the Respondent had no intention to take delivery of the Cargo prior to this date. This strongly indicates that the Respondent intended to use the Vessel as a storage facility from the time laytime expired on 24 September 2023 at 0843 LT until at least 29 November 2023.

40 Consequently, the period from the end of the laytime on 24 September 2023 at 0843

[29] John Schofield, *Laytime and Demurrage*, (7th edn. Taylor & Francis Ltd 2016) 507-508.
[30] The laytime starts 6 hours after NOR was tendered pursuant to CP Clause 4(a).
[31] John Schofield, *Laytime and Demurrage*, (7th edn. Taylor & Francis Ltd 2016) 439.
[32] Julian Cooke and others, *Voyage Charters* (4th edn, Informa Law from Routledge 2014) 365.
[33] Yvonne Baatz, *Maritime Law* (5th edn, Informa Law from Routledge 2021) 191.

LT until the commencement of discharge on 4 October 2023 at 0630 LT must be considered as the period during which the Vessel was used as a de facto storage facility.

41 The Respondent could have discharged the Cargo and stored the Cargo on shore without exceeding the permitted laytime. The circumstances relating to the B/L could have been clarified with the Charterer at a later stage without risking the fulfilment of the Vessel's next employment. The Respondent chose not to discharge the Cargo, thus exceeding laytime and violating their responsibilities pursuant to the B/L and the CP.

42 Conclusively, the Vessel would have been in Busan for two months if the Claimant had not discharged the Cargo themselves.

43 In *The Eternal Bliss*, the Court of Appeal stated that the charterer was only liable for the claim exceeding demurrage, provided that a separate breach of the charterparty was demonstrated in addition to the failure to comply with the laytime provision.[34]

44 The conflict in *The Eternal Bliss* concerned a delay caused by congestion resulting in the deterioration of the cargo.[35] This was an external factor that the parties were unable to prevent or control.

45 In the present dispute, the detention of the Vessel directly caused the Claimant's loss. The failure to discharge the Vessel in a timely manner was only a contributing factor to the loss which constitutes the separate breach of the CP.

46 The Respondent has breached the CP by using the Vessel as a storage facility and thereby causing the delay. The delay fundamentally differs from *The Eternal Bliss*, in which the delay was not caused by either of the contracting parties. The reasoning in *The Eternal Bliss* can therefore only be applied in a limited manner as the nature of the delay in the two cases are completely different.

[34] K Line Pte Ltd v Priminds Shipping (HK) Co Ltd ("The Eternal Bliss") [2021] EWCA Civ 1712, para 4.
[35] Ibid. para 7.

47 The requirement of a separate breach in *The Eternal Bliss* must be met, but the outcome of the case cannot be applied, as the substance of this dispute differs substantially from that in *The Eternal Bliss.*

48 The Claimant submits that when a party is responsible for procuring discharge and has knowingly delayed the vessel for their own purposes, the responsible party becomes liable for damages for detention as an alternative remedy, as this delay is not covered by demurrage.[36]

49 In the present case, the Respondent delayed the Vessel by using it as a storage facility, instead of discharging the Cargo into a storage facility on shore. In the e-mail correspondence from 20 September 2023 to 3 October 2023 between the Respondent and the Charterer, the Respondent indicated that they were willing to delay the Vessel until they received a satisfactory security for the granted loan to the Charterer.

50 The Respondent was in a position where they did not have incentive to discharge the Vessel with due despatch, as they knew that they could not be held liable for demurrage as indicated in their e-mail to the Charterer of 3 October 2023 at 0442 PM.

51 The Charterer had financial issues, which was apparent to the Respondent since they did not agree to issue a trust receipt on 3 October 2023.

52 The Respondent refused to issue the trust receipt when not having the B/L in hand. Further, they did not take possession nor initiate the discharge of the Cargo when they did receive the B/L and thus the Respondent intentionally delayed the Vessel. This constitutes a separate breach of the CP.

C. The Claimant's loss is causal to the actions of the Respondent

53 The Claimant submits that there is causation between the suffered loss and the breach of the CP caused by the Respondent.

[36] Yvonne Baatz, *Maritime Law* (5th edn, Informa Law from Routledge 2021) 191.

54 Under English law, it is a requirement to consider both factual and legal causation.[37] The "but for"-test, stipulates that factual causation exists where the loss would not have incurred but for the breach of contract.[38]

55 If the Vessel had not been delayed due to the passivity of the Respondent regarding the discharge, the loss would not have been suffered. In other words, the Claimant's loss would not have incurred but for the Respondent's breach of the CP.

56 Conduct of the claimant can break the chain of causation. The conduct must be of such impact that the true cause of the loss was the conduct of the claimant.[39]

57 The bad weather during the Vessel's journey from Busan to Kaohsiung does not constitute a break in the chain of causation as this was not caused by the conduct of the Claimant. The Contracting Parties had agreed a laytime that would allow the Vessel to reach Kaohsiung in time even if the laytime was exceeded with a few days.[40]

58 Consequently, the suffered loss was a direct result of the delay of the discharge of the Vessel and there has been no break in the chain of causation, thus establishing causation between the Claimant's loss and the Respondent's failure to act.

D. The loss is not too remote

59 The Claimant submits that the loss is not too remote a consequence of the breach.

60 *The Achilleas* re-stated the contract remoteness principle and expanded the test of remoteness through the reasonable contemplation test.[41]

61 Whether the loss in question was reasonably within the contemplation of the Parties must be considered at the time of entering into the contract.[42] This was when the

[37] Adam Kramer, *The Law of Contract Damages*, (1st edn., Bloomsbury Publishing Plc 2022) 388-389 and 454-455.
[38] Ibid. 388-389.
[39] Julian Cooke and others, *Voyage Charters* (4th edn, Informa Law from Routledge 2014) 635.
[40] Clause 5(a) of the CP referring to Part I(E) of the CP.
[41] Transfield Shipping Inc v Mercator Shipping Inc ("The Achilleas") [2008] UKHL 48, paras 25-26.
[42] Adam Kramer, *The Law of Contract Damages*, (1st edn. Bloomsbury Publishing Plc 2022) 459.

Respondent became consignee under the B/L.

62 A reasonable person must have considered the risk of the damage when entering the contract, as the Vessel's next employment was explicitly written into the CP. As the Respondent is the consignee to the B/L, the Respondent must have been aware of the provisions in the CP, including the strict laycan[43] no later than the 4 September 2023 when the B/L was issued.

63 Therefore, it must have been clear to the Respondent that the next employment would be cancelled if the Vessel was not discharged in time to reach its next employment in Kaohsiung.

64 Conclusively, the loss was foreseeable to the Respondent and thus not too remote as it was clear that passivity from the Respondent's behalf would result in the loss.

E. Mitigation and no own fault by Claimant

65 The Claimant submits that they have acted loyally in relation to their duty to mitigate and bears no fault in causing the loss.

66 The loss was mitigated by the Claimant by renegotiating the next employment. The time charterparty was renegotiated to a hire amounting to USD 30,000 per day opposed to cancellation of the entire charter.

[43] Rider Clause 38.

III. REJECTION OF THE RESPONDENT'S MIS-DELIVERY CLAIM

67 The Claimant denies that the Respondent has a claim for mis-delivery as the claim lacks causation inter alia based on the principles in *The Sienna.* Further, the Respondent has broken the chain of causation.

A. The Respondent's claim lacks causation

68 The Claimant submits that the Cargo was delivered to the correct receiver and that the loss and damage would have been suffered in any event.

69 The Claimant submits that Gileum Refinery was always meant to be the receiver of the Cargo and was presumably also the buyer, as Gileum Refinery is located in Seoul, South Korea[44]. The prerequisites for the transport of the Cargo have thus not changed, and the loss and damages would have been suffered in any event, including in the event that the loading and discharge had been completed within the permitted laytime.

70 In the LOI-Y, the Charterer agreed to indemnify the Claimant for the delivery of the Cargo to Gileum Refinery "or to such party as you believe to be or to represent us or acting on behalf of us" without production of the B/L. In the e-mail dated 3 October 2023 at 15:47 from the Charterer to the Respondent, the Charterer informed the Respondent that "Cargo has been sold to Korean buyers".[45]

71 Further, in the B/L it was specified that Gileum Refinery was the notifying party, which typically equates the receiver or ultimate buyer of the Cargo[46] , or at the very least the party to be notified of a vessel's arrival.

72 In *The Sienna,* the scenario was similar to the present dispute. Unicredit Bank, who had obtained the bill of lading as security for payment of the cargo, claimed damages for mis-delivery because the charterer had instructed the shipper to deliver the goods

[44] Moot Problem, page 4.
[45] Ibid. page 47.
[46] Richard Aikens and others, *Bills of lading,* (3rd edn., Informa Law from Routledge 2021) 96.

against a letter of indemnity to a buyer.[47] However, the claim was rejected on the grounds of lack of causation. It was argued that the cargo would have been delivered to the buyer anyway, even if Unicredit Bank had had the bill of lading in hand in time.[48] The shipper's delivery of the cargo thus did not lead to a different outcome, and the shipper was acquitted of the claim.

73 The same must apply in the present case. The Claimant has merely fulfilled its obligation under Rider Clause 57 and delivered the Cargo to the agreed buyers, Gileum Refinery. If the Claimant had waited to deliver the Cargo and only delivered it upon production of the B/L, the outcome would have been the same.[49] Therefore, the Claimant should be acquitted on the grounds of lack of causation.

74 Furthermore, *The Sienna* is comparable with the current dispute on the following premises. Mrs. Justice Moulder based her findings, which was approved by the Court of Appeal, first on the fact that *"*the Bank had no specific concerns about Gulf [the charterer] falling into default at this time*"*[50]. Second, the bank believed at the time that it was wholly secured in other ways than the cargo. Third, the bank had accepted who was to receive the cargo and had received invoices.[51]

75 Compared herewith, first, while the Respondent did have concerns about the Charterer's financial situation, the Respondent nevertheless agreed to delivery without production of the B/L and was indifferent in regard to the delivery, as long as the loan was repaid. Second, the Respondent believed at the time that it was wholly secured by the LOI-G in other ways than the Cargo. The Respondent failed to react when the LOI-G was no longer effective at delivery of the B/L. Third, the Respondent was aware and

[47] Unicredit Bank AG v Euronav NV ("The Sienna") [2023] EWCA Civ 417, para 23.
[48] Ibid. para 103.
[49] Supported by Adam Kramer, *The Law of Contract Damages,* (1st edn., Bloomsbury Publishing Plc 2022) 390-391.
[50] Unicredit Bank AG v Euronav NV ("The Sienna") [2022] EWHC 957 (Comm), para 120(i).
[51] Unicredit Bank AG v Euronav NV ("The Sienna") [2023] EWCA Civ 417, para 36.

indifferent of the receiver and had received an invoice for the Cargo.[52]

76 In conclusion, the Respondent's claim lacks causation as the Cargo was delivered to the correct receiver, and the loss would have been suffered in any event. Therefore, the claim must be rejected.

a. The Respondent has broken the chain of causation

77 The Claimant submits that the Respondent has broken the chain of causation and that the Claimant must therefore be acquitted of the claim for mis-delivery.

78 The Respondent remained passive as they did not inform the Claimant that they were the holder of the B/L until 29 November 2023 despite the fact that the Respondent received the B/L on 3 October 2023.

79 The Claimant submits that the Respondent's omissions substantially contributed to the loss. The Respondent accepted that there was a risk of the Cargo being delivered to another party against a letter of indemnity by failing to take possession of the Cargo.[53]

80 The Respondent's acceptance of delivery without production of the B/L, is further expressed in an e-mail dated 3 October 2023 from the Respondent to the Charterer stating:

> "[…] you must do as you deem fit as Charterers and we will not interfere as long as the loan is repaid" (our emphasis).[54]

81 As the holder of the B/L, the Respondent must have realised that the wording of that e-mail would result in the discharge and subsequently the delivery of the Cargo. Further, the Respondent expressly stated that they would not interfere, as long as the loan was repaid. However, it must have been clear to the Respondent that repayment would not

[52] Moot Problem, page 47.
[53] Supported by Julian Cooke and others, *Voyage Charters* (4th edn, Informa Law from Routledge 2014) 634.
[54] Moot Problem, page 46.

have been possible without selling, and thus delivering the Cargo to another party, without production of the B/L.

82 The Respondent had ample opportunity to collect the Cargo thus avoiding suffering a loss but chose not to do so. This constitutes a break in the chain of causation. Had the Respondent picked up the Cargo, they would have maintained the safety for the loan.

83 Thereby the chain of causation was broken, and the loss should not be the burden of the Claimant.

REQUEST FOR RELIEF

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

a) Finds that the Tribunal has jurisdiction to hear this dispute;

b) Finds that the Claimant is entitled to the total sum USD 3,650,000 for the Respondent's failure to procure discharge;

c) Declares that the Claimant is not liable for the Respondent's counterclaim; and

d) Awards the Claimant the interests and costs of these proceedings.

The Claimant reserves the right to amend its request for relief as may be required.