Northumbria University NEWCASTLE

INTERNATIONAL MARITIME LAW ARBITRATION MOOT 2024

In the matter of an international arbitration

In the matter of an SCMA Arbitration under the SCMA Rules (4th edition)

MEMORANDUM FOR THE CLAIMANTS

ON BEHALF OF	**AGAINST**
Tomahawk Maritime S.A.	**Veggies of Earth Banking Ltd.**
Claimants	Respondents

TEAM R

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LIST OF ABBREVIATIONS

Abbreviation	Term
Claimants	Tomahawk Maritime S.A.
Respondents	Veggies of Earth Banking Ltd (VOE).
Charterers	Yu Shipping Ltd.
Liquidators	Carry On Advisory Services LLP.
Good Oils	Good Oils Sdn Bhd.
Moot problem	24th Annual International Maritime Law Arbitration Moot 2024 Scenario.
Bill of Lading (B/L)	Tanker Bill of Lading Reference Number COW-001A Dated 4 September 2023 at Bintulu.
Vessel	MT NIUYANG (IMO No.392817).
Charterparty (CP)	Vegoil Voyage Charterparty Dated 1 September 2023.
Cargo	16,999.01 MT of Crude Palm Oil (Edible Grade) In Bulk.
SCMA Rules	Singapore Chamber of Maritime Arbitration Rules (4th Edition).
Arbitration Law	Arbitration Law of The People's Republic Of China.
D&CC	Defence and Counterclaim Dated 16 February 2024.

Letter of Indemnity (LoI)	Letter of Indemnity Sent By The Charterers To The Claimants Dated 3 October 2023.

LIST OF AUTHORITIES

CASES

C v D [2008] 1 All E.R. (Comm) 1001.

Daesung Industrial Gases Co Ltd and Another v Praxair (China) Investment Co Ltd [2020] H01 MT No.83.

Farenco Shipping Co Ltd v Daebo Shipping Co Ltd (The 'Bremen Max') [2008] EWHC 2755 *(Comm)*

Galoo Ltd. v Bright Grahame Murray (1994) 1 W.L.R. 1360

Hadley v Baxendale [1854] EWHC J70

Heskell v Continental Express 1950 83 LI . L. Rep. 438 [2008] UKHL 48

MTM Hong Kong [2015] All ER (D) 11

Oldendorff GmbH & Co KG v Sea Powerful II Special Maritime Enterprises [2016] EWHC 3212 *(Comm)*

President of India v Metcalfe (The 'Dunelmia') [1969] 2 QB 123, [1970] 1 QB 289

Robinson v Harman (1848) 1 Exch 850

Sul America v Enesa Engenharia [2012] EWCA Civ 638.

Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd [2010] 2 Lloyd's Rep. 81

The 'STI Orchard' (Winson Oil Trading PTE LTD, intervener) [2022] SGHC 6

Tomahawk Maritime Rider Clauses

Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)

UniCredit Bank AG v Euronav NV (The 'Sienna') [2023] EWCA Civ 471

X*L Insurance Ltd v Owens Corning* [2001] 1 All E.R. (Comm) 530.

LEGISLATIONS

Arbitration Law of the People's Republic of China

Carriage of Goods by Sea 1992

International Arbitration Act

Singapore Chamber of Maritime Arbitration Rules (4th Edition)

BOOKS

Baris Soyer and Andrew Tettenborn, Charterparties: Law, Practice and Emerging Legal Issues, 1st Edition, 2018

Redfern and Hunter on International Arbitration (6th Edition).

Scrutton on Charterparties and Bills of Lading (25th Edition)

Voyage Charters (5th Edition)

SUMMARY

THE DISPUTE

1. This is an arbitration claim under the International Arbitration Act (Chapter 143A), arising from a dispute relating to the delayed delivery of the 16,999.01 MT of crude palm oil (edible grade) in bulk (the "**Cargo**") under the tanker Bill of Lading Reference Number COW-001A dated 4 September 2023 (the "**Bill of Lading**") from Bintulu, Malaysia, to Busan, South Korea.[1]

THE PARTIES

2. Tomahawk Maritime S.A. (the "**Claimants**") is a company registered and existing under the laws on Panama and is the registered owners of the MT "NIUYANG", IMO No.392817 (the "**Vessel**").

3. Veggies of Earth Banking Ltd (the "**Respondent**") is a financial institution registered and existing under the laws of Hong Kong.

4. Yu Shipping Ltd (the "**Charterers**") is the charterers of the vessel.

5. Carry on Advisory Services LLP ("the **Liquidators**") is the liquidators appointed over the Charterers.

6. Good Oils Sdn Bhd ("**Good Oils**") is the shipper of the cargo.

SALIENT FACTS

7. A Notice of Arbitration dated 22 December 2023 was served on the Respondents using Singapore law, where the seat of arbitration is Singapore in accordance with the arbitration agreement incorporated into the Bill of Lading.[2]

[1] *Moot Problem,* Tanker Bill of Lading, page 30-31.
[2] *Moot Problem,* Notice of Arbitration, Page 2.

8. The Claimants and the Charterer entered a Vegoil Voyage Charterparty dated 1 September 2023 ("the **Charterparty**") which expressed that the goods were to be carried from Bintulu, Malaysia to Busan, South Korea. The Charterparty is governed under English law as per Rider Clause 78.[3]

9. It was agreed between the Claimant and the Charterer that the carriage of goods was to be completed by 30 September 2023 because the Vessel was to be delivered to the next charterparty in Kaohsiung within the strict laycon of 1-14 October 2023.This was incorporated into Rider Clause 38 of the Charterparty.[4]

10. On 3 September 2023, the Vessel arrived at Bintulu and a Notice of Readiness was sent at 0300 LT. On 6 September 2023, the loading of the cargo was completed at 2106 LT and the Bill of Lading was issued and consigned to the Respondent. The Vessel departed from Bintulu the same day at 2106 LT.

11. On 20 September 2023, the Vessel arrived at Busan. The same day, a Notice of Readiness was tendered at 0843 LT and accepted at 0915 LT, however, no berthing and discharge instructions were received. Following numerous chasers sent by the Claimants, the Charterers updated the Claimants on 28 September 2023 that they were awaiting further instructions.

12. Furthermore, the Claimant reminded the Charterers of the laycan deadline and the need for the Vessel to depart by 7 October 2023 from Busan at the latest. Email correspondence between both parties shows that the Charterers were aware of the Vessels next fixture and had been put on notice that the Claimants would look to recover all losses and/or damages should the Vessel fail to meet the strict laycan. The Charterers also invoked the option to deliver the goods under the Letter of Indemnity (the "**LOI**").[5]

[3] *Moot Problem,* Tomahawk Maritime Rider Clauses, page 28.
[4] *Moot Problem,* Tomahawk Maritime Rider Clauses, page 25.
[5] *Moot Problem,* Letter of Indemnity, pages 33-34.

13. The Vessel was discharged over the course of three days, from 4 October 2023 at 0630LT until 7 October 2023 at 2348L. Consequently, the Vessel only departed Busan on 8 October 2023 at 0214 LT which was one day after the latest date specified by the Claimants for the Vessel to meet the laycan.

14. Due to the delayed discharge, and further delays by adverse wind and sea conditions, the Vessel did not arrive in Kaohsiung within the laycan of 1-14 October 2023. Therefore, the charterparty for the Vessels next fixture was cancelled on 16 October 2023, which the Claimants did reinstate however at a lower hire rate of USD 30,000 per day.

15. Subsequently, a notice was issued by the Claimants on 15 November 2023 seeking USD 3,650,000 compensation from the charterers. The Liquidators informed the Claimants on 22 November 2023 that they were considering this demand.

16. As the Respondents claim to be the holders of the Bill of Lading, they breached their express obligation to discharge the Vessel within the laytime permitted under the Charterparty and incorporated into the Bills of Lading. Moreover, or alternatively, the Respondents breached the implied term under the Bills of Lading in failing to complete discharge and /or take delivery within a reasonable time as per Clause 4 of the Charterparty.[6]

17. The Respondent has rejected the Claimants claim as set out in the Defence and Counterclaim dated 16 February 2024 ("the **D&CC**"). The Respondents dispute the jurisdiction, alleging that the arbitration is invalid under Chinese law,[7] and dispute the Claimants claim for losses, alleging they are limited to a claim for demurrage only.[8]

18. Moreover, the Respondents counterclaim damages of USD 3,399,820, alleging that the Claimants misdelivered the cargo in breach of the LOI.[9]

[6] *Moot Problem,* Tomahawk Maritime Rider Clauses, page 14.
[7] *Moot Problem,* Defence and Counterclaim, page 35-36, paragraphs 4-8.
[8] *Moot Problem,* Defence and Counterclaim, page 36-37, paragraphs 9-14.
[9] *Moot Problem,* Defence and Counterclaim, page 37-38, paragraphs 15-19.

19. The Claimant denies all allegations made against them, as set out in the Claimant's Statement of Reply and Defence to Counterclaim dated 1 March 2024.[10]

ISSUES IN DISPUTE

20. The following issues are in dispute:

a). Does the Tribunal have jurisdiction?

b) Did the Respondents breach the terms of the charterparty?

c) Are the Claimants entitled to damages beyond demurrage?

d) Are the Respondents entitled to damages for mis-delivery of the cargo?

[10] *Moot Problem,* Statement of Reply and Defence to Counterclaim, pages 39-41.

SUBMISSIONS ADVANCED ON BEHALF OF THE CLAIMANT

I. THE TRIBUNAL HAS JURISDICTION.

I.I. The arbitration agreement is valid under Singapore law.

21. It is submitted that the arbitration commenced is valid as it is in accordance with the arbitration agreement under the terms of the B/L, specifically, Rider Clause 78 provides the following:

> *"General Average and Arbitration, if any, to be held in Guangzhou with three arbitrators and SCMA Rules. English law to apply to the CP."*[11]

22. It has been argued by the Respondents that the chosen seat of arbitration is Guangzhou, however this is rejected as under the terms of the B/L Guangzhou is merely the place of arbitration and not the seat of arbitration. Notably, it is not compulsory that arbitration must commence at the place of arbitration, considering that international commercial arbitration generally involves multi-nationalities.[12]
23. Subsequently, it is submitted that Singapore is the seat of arbitration under the Singapore Chamber of Maritime Arbitration Rules (4th Edition) (the "**SCMA Rules**"), the governing law of the B/L, expressly stated in the arbitration agreement. Specifically, Rule 32 of the SCMA provides that:

> *"The seat of arbitration shall be Singapore unless otherwise agreed by the parties. Where the seat of arbitration is Singapore, the International Arbitration Act (Chapter 143A) shall apply unless otherwise agreed by the parties".*

24. As such, in the absence of any other agreement under Rule 32 of the SCMA, the seat of arbitration is Singapore and not Guangzhou.

25. In *Daesung Industrial Gases Co Ltd and Another v Praxair (China) Investment Co Ltd*,[13] it was held that an arbitration agreement submitting the dispute to Singapore International Arbitration Centre (SIAC) arbitration in Shanghai, China, was valid. This was because it

[11] *Moot problem,* Tomahawk Rider Clauses, page 28.
[12] Redfern and Hunter on International Arbitration (6th Edition).
[13] [2020] H01 MT No.83.

complied with Clause 16 of the Arbitration Law of the People's Republic of China (the **"Arbitration Law"**) which stipulates the following requirements for a valid arbitration agreement:

> *(a) the expression of the parties' wish to submit to arbitration;*
>
> *(b) the matters to be arbitrated; and*
>
> *(c) the Arbitration Commission selected by the parties.*

26. Notably, the Respondents have argued that the SCMA is not an Arbitration Commission, hence invalidating the arbitration agreement, under Clause 10 of the Arbitration Law which provides the following:

> *"Arbitration commissions may be established in the municipalities directly under the Central Government, in the municipalities where the people's governments of provinces and autonomous regions are located or, if necessary, in other cities divided into districts. Arbitration commissions shall not be established at each level of the administrative divisions. The people's governments of the municipalities and cities specified in the above paragraph shall organize the relevant departments and the Chamber of Commerce for the formation of an arbitration commission. The establishment of an arbitration commission shall be registered with the judicial administrative department of the relevant province, autonomous region or municipalities directly under the Central Government."*

27. However, this argument is rejected by the Claimants. The Respondents fail to consider relevant judicial interpretations and the development trend of international commercial arbitration. Specifically, under interpretation in Supreme People's Court on Several Issues Concerning the Application of the Arbitration Law of the People's Republic of China, Article 128(2) which stipulates:

> *"If the parties are unwilling to resort to consultations or mediation, or the consultation or mediation fails, the parties may apply to an arbitration organization for arbitration according to the arbitration agreement. The parties to a contract involving foreign interests may, according to the arbitration agreement,*

apply to a Chinese arbitration organization or any other arbitration organization for arbitration. If the parties did not conclude an arbitration agreement or the arbitration agreement is invalid, they may initiate an action to a people's court. With regard to judgment, arbitral award and letter of mediation already becoming legally effective, the parties shall execute them; if a refusal for performance occurs, the other party may apply for a compulsory enforcement to a people's court."

28. Hence, where "arbitration commission" is substituted to mean "arbitration institution", foreign-related arbitration agreements are valid.

I.II. The law governing the arbitration agreement can be English law

29. Alternatively, if the seat of arbitration is Guangzhou, and not Singapore, the arbitration agreement is still valid under English law. Rider Clause 78 expressly states that English law governs the charterparty,[14] and this has been incorporated into the B/L which provides the following:

"1) All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated."[15]

30. Therefore, English law governs both the charterparty and the B/L.[16] In X*L Insurance Ltd v Owens Corning*,[17] it was held that an express choice of law governing the substantive contract, in the absence of any indication to the contrary, was a strong indication of an implied choice of the same law in relation to the arbitration agreement. As such, the applicable governing law of the arbitration agreement is English law.
31. Notably, there is no rule of law that the governing law of the arbitration agreement must be the law of the place of the seat of arbitration.[18] Moreover, it would not be appropriate to

[14] *Moot problem,* Tomahawk Rider Clauses, page 28.
[15] *Moot problem,* Tanker Bill of Lading, page 31, paragraph 1.
[16] *Moot problem,* Tomahawk Rider Clauses, page 28.
[17] [2001] 1 All E.R. (Comm) 530.
[18] *C v D* [2008] 1 All E.R. (Comm) 1001.

imply that the parties would choose or agree that Chinese law would govern the arbitration agreement as it would render the agreement ineffective and contravene its purpose.[19]

32. Considering the arguments above, and the fact that the Tribunal has discretion to decide the jurisdiction of this dispute, it is submitted that the arbitration agreement is valid as it is governed by Singapore law, or in the alternative English law.

II. THE RESPONDENTS BREACHED THE TERMS OF THE CHARTERPARTY

II.I The Bill of Lading was subject to the same terms and conditions as Charterparty

33. The Bill of Lading No. COW-001A (issued 6th September 2023) provided that the shipment and cargo for Veggies of Earth Banking was carried under the and pursuant to the terms of the Charterparty (CP) dated 01.09.2023 between Tomahawk Maritime SA (Owner) and Yu Shipping Ltd. (Charterers)[20].
34. This indicates the Bill of Lading (BOL) incorporates all terms and conditions of the CP between the Tomahawk Maritime and Yu Shipping Ltd, meaning the BOL is subject to the same contractual agreement as the CP. As a result, Veggie of Earth Banking ltd are legally bound by the terms within the CP and therefore all terms, conditions, limitations etc are legally enforceable under the BOL.

II.II Delayed Discharge

35. Clause E of the CP obliged the holder of the BOL to discharge the cargo within the laytime permitted under the terms of the contract[21]. Veggie of Earth Banking wrote to the claimants on 29th November 2023 claiming to be the holder of the BOL, the respondents therefore had a contractual obligation to discharge the cargo within the permitted laytime[22]

[19] *Sul America v Enesa Engenharia* [2012] EWCA Civ 638.
[20] *Moot Problem*, Tomahawk Maritime S.A., Statement of Claim, page 8 paragraph 8.
[21] *Moot Problem,* Charterparty, Clause E
[22] *Moot Problem,* Tomahawk Maritime S.A, Statement of Claim, page 10 paragraph 17.

36. All parties involved including the respondents were aware of the CP agreement and the vessels next employment contract with strict laycan period of 1-14 October 2023 as evidenced by charterer statements made to claimants when anchored at Busan[23]
37. Clause 4 of the CP provided that the cargo should have been discharged within 96 hours of the laytime commencing[24]. Furthermore, according to information provided by the claimant, there was an agreement between Tomahawk Maritime S.A and the Yu Shipping Ltd (as charters) that the carriage of cargo to Busan was to be completed by the 30th September 2023[25].
38. The vessel arrived at Busan on 20th September and the notice of readiness was accepted that same day[26], this would have marked the start of the laytime period.
39. However, as outlined in the statement of claim discharge instructions were delayed and the vessel only received berthing and discharge instructions on the 4th October at 630LT. Due to the delay, the discharge of the cargo was only completed on 7th October 2023[27].
40. Clearly the respondents failed to comply with the laytime permitted under the CP as they failed to discharge or take delivery of the cargo of crude palm oil within the contractually agreed timeframe. Consequently, the claimants were unable to depart the port of Busan until 8th October 2023[28] and were unable to meet the strict laycan period for their next employment.
41. The claimants next employer cancelled the charter as was their right which forced Tomahawk maritime to renegotiate a charter at a lower rate to reinstate their next employment. This had significant financial implication for the claimants as the renegotiated rate was 5000 USD below the originally agreed day rate[29]
42. This loss was a clear consequence of the respondent's breach and under English Law which governs the BOL No. COW-0011A, parties are liable for losses which result from their failure to perform contractual obligations.

[23] *Moot Problem*, Tomahawk Maritime S.A, Statement of claim, page 8 paragraph 11.
[24] *Moot Problem,* Tomahawk Maritime S.A, Statement of Claim, page 10 paragraph 19.
[25] *Moot Problem,* Tomahawk Maritime S.A, Statement of Claim, page 7 paragraph 6
[26] *Moot Problem,* Tomahawk Maritime S.A, Statement of Claim, page 8 paragraph 7
[27] *Moot Problem,* Tomahawk Maritime S.A., Statement of Claim, page 9 paragraph 14
[28] *Ibid*
[29] *Moot Problem,* Tomahawk Maritime S.A., Statement of Claim, page 9 paragraph 15

43. When a party breaches their contract, they are liable for consequential losses if such losses were foreseeable[30]. The respondents were fully aware of the CP agreement including the claimants next employment and laycan period.
44. Given the nature of the contract and specific clauses relating to vessels next employment, any reasonable person could foresee that the delayed discharge would have resulted in the claimants missing their strict laycan period. Therefore, the respondents could reasonably foresee that their breach of contract caused the vessel to miss their next charter, which in turn would lead to a cancellation of charter and ultimately financial loss for the claimant.

II.III Claimants' attempt to mitigate their losses

45. By renegotiating with their future employer, the claimants have taken reasonable steps to mitigate the loss that arose from the respondent's breach. While they may not have been able to fully mitigate their loss, they did manage to secure future employment.
46. If they had failed to renegotiate, the respondents may have been liable for the full cost of the future charter as the consequential loss suffered by the claimants would have been a foreseeable event[31], i.e.
    - Initial Hire rate for Kaohsiung Charterparty: USD 35,000 per day
    - Duration of contract = 2 years
    - Potential loss= (2x365) x (35,000) = 25,550,000= USD 25.55 million

III. THE RESPONDENTS' BREACH OF VESSEL DISCHARGE WITHIN LAYTIME CAUSED CONSEQUENTIAL LOSSES BEYOND DEMURRAGE

III.I The Claimant is entitled to damages

47. Having established that the Respondents have failed in facilitating discharge and/or delivery of the cargo within the stipulated timeframe, whether this breach entitles the Claimant to damages for losing their next employment falls upon the compensatory principle.

[30] Hadley v Baxendale [1854] EWHC J70
[31] *MTM Hong Kong* [2015] All ER (D) 11

48. The case of *Robinson v Harman*[32] has laid down the fundamental principle that where a claimant is seeking damages arising from breach of contract to compensate for expectation loss, the court should award damages as if the contract had been performed.
49. This is the basic starting point for any court or arbitral tribunal when determining the appropriate sum in damages to award the victim of a breach of contract, including in cases involving breach of a voyage charterparty.
50. In application, if the contractual term of discharging the cargo within the relevant timeframe had been performed, then the Claimant would have been, or likely to have been in a better position to have the Vessel successfully make it to its next employment at Kaohsiung.
51. Therefore, the relevant sum that the Claimant seeks involves the loss of value for the subsequent fixture as it contains losses that they might not have sustained had the contract had been performed.

III.II There is a sufficient causal link between the Respondents' breach of contract and the claimant's losses

52. In conjunction with the presence of the element of breach, a successful claim for breach of contract has to be accompanied by a causal link between the breach and the losses recoverable.
53. It is trite law in contract that where a breach is asserted for a claim for damages, the breach must have had a causal link to the losses suffered. Where the extent of the causal link is concerned, the case of *Galoo Ltd. v Bright Grahame Murray*[33] provides that the breach must have been a dominant or effective cause as opposed to merely providing the opportunity or occasion for loss to be suffered.
54. In maritime disputes, this position is followed as seen in *Heskell v Continental Express*[34] where it was held that it is enough for the breach to be an 'effective' cause of the loss; it does not have to be the sole cause.

[32] (1848) 1 Exch 850
[33] (1994) 1 W.L.R. 1360
[34] 1950 83 LI . L. Rep. 438

55. On the facts, the agreement for the completion of the carriage of the Cargo to Busan by 30 September 2023 was specifically arranged to allow sufficient time for the Vessel's next employment, as explicitly stated in Clause 37 of the Rider Clauses to the Charterparty. Although the Vessel arrived at Busan in time, and despite repeated chasers and daily reminders, the Respondents as the holder of the Bill of Lading had failed to discharge the Vessel within the laytime.
56. The result of this failure is that the Vessel only departed Busan on 8 October 2023, a day later than the latest possible date for departure. Although adverse wind and sea conditions were also a contributing factor in hampering the Vessel's progress, it does not absolve the Respondent's responsibility as their breach need not be the sole cause. Regardless of the weather conditions, the failure to discharge the cargo within the agreed laytime has directly impacted the Claimant's ability to fulfil its next employment.
57. In consequence of these delays, the Claimant had to reinstate the Vessel's employment at a discounted hire rate when its Charterers had issued a notice cancelling the Charterparty owing to its distance from Kaohsiung.
58. In light of these considerations, it is evident that the Respondent's breach has a sufficient causal link to the losses suffered by the Claimant.

III.III The damages are not too remote to be claimed

59. Another significant consideration for the courts in the determination of whether the Claimant is entitled to damages involves the issue of remoteness in damages.
60. Where shipowners are claiming for the loss of value of follow-on employment, the leading position has been stablished in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)*[35] where the House of Lords clarified that;

> "*merely foreseeing a type of loss as a consequence of a breach of contract is not sufficient for it to be recoverable. The loss must also have been within the reasonable contemplation of the parties at the time of contracting*."

[35] [2008] UKHL 48

61. The court went on to emphasize that the loss must have been either assumed liability for in the contract, likely to result naturally from the breach or contemplated by the parties as being "likely to happen in the ordinary course of things as a result of the breach." In the *Transfield* case, the court had ruled that the loss of profit from a subsequent fixture beyond the overrun period was not within the reasonable contemplation of the parties and the claim was therefore dismissed. This basis of the judgement included the fact that the follow-on charter arrangements were outside the knowledge or control of the Respondent, the commercial nature of the agreement and the unusual market volatility. Subsequently, this position must be distinguished from the present case, as the unusual facts of *Transfield* are not present.
62. As a starting point, it is pertinent to note that unlike in *Transfield*, the subsequent charterparty at Kaohsiung was known to the Respondent. The details of the charterparty were also provided to them by the Charterer on 1 October 2023.[36] In effect, this means that the Respondent should have reasonably been aware of not only the Vessel's next employment, but also of the magnitude of the losses that the Claimant would suffer if the Vessel could not be delivered to its subsequent fixture in time. It should be further noted that unlike in *Tranfield* there is no indication of any volatility in the market rate in the present case.
63. Therefore, in the absence of the unusual elements of *Transfield*, shipowners should be in a position to claim for the loss of value of follow-on employment that have been caused by breach of contract. This is supported by the case of *Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd*[37] where it was held that claims of this nature were not too remote and fell within the first limb of *Hadley*. The approach to damages taken by the arbitrators in *Sylvia* included the difference between the profit that could have been earned on the broken charterparty and the profit earned under the substitute charter. Accordingly, the Claimants have appropriately reflected this approach in their amount claimed.
64. It is pertinent to note at this point that the Respondent is contending that the Claimant is only entitled to the amount on demurrage as stipulated in the contract of carriage, the terms of which stipulate that the Claimant's claim for losses additional to demurrage are invalid.

[36] *Annex A*
[37] [2010] 2 Lloyd's Rep. 81

65. This contention is fallacious on the basis that demurrage operates only to compensate for losses incurred by the additional time spent by the Vessel waiting for the completion of discharge. It would not apply if the other party had incurred quantifiable and consequential losses arising from failures to complete discharge within the laytime.
66. Overall, in light of the compensatory principle, the sufficient causal link and the damages being not too remote, it is the Claimant's submission that they are entitled to consequential losses beyond demurrage for the Respondent's breach.

IV. THE RESPONDENTS ARE NOT ENTITLED TO DAMAGES FOR MISDELIVERY OF THE CARGO

67. In determining whether the Respondents are entitled to damages for mis delivery of the cargo, the initial issue that needs to be dealt with is whether being the legal holder of the Bills of Lading entitles them to the delivery of the cargo.
68. Under section 5(2) of the Carrier of Goods by Sea Act 1992[38], 'the holder of a bill of lading' is defined as "(a) the named consignee who is in possession of a bill of lading, or (b a person in possession of the bill as the result of the completion, by delivery, of the indorsement of the bill of lading to him (or transfer of a bearer bill)."

69. In applying this authority on the matter at hand, it can be established that the Respondent under the second provision is the lawful holder of the Bill of Lading since 3 October 2023[39]. Therefore, the Respondent are entitled to the cargo.
70. Bills of lading enables the goods to be pledged as a security whilst the goods are at sea[40]. However, in order for the pledge to extend beyond documentation to the goods, the bill of lading must provide the holder a symbolic possession[41].
71. In the case of *The Dunelmia*[42] it was established that under a charterparty in usual terms, the goods carried under the bill of lading may be shipped, or consigned to, the charterer

[38] Carrier of Goods by Sea Act 1992
[39] Statement Defence and Counterclaim, paragraph 16.
[40] Official Assignee of Madras v Mercantile Bank of India Ltd [1935] AC.
[41] Voyage Charters
[42] President of India v Metcalfe (The 'Dunelmia') [1969] 2 QB 123, [1970] 1 QB 289.

himself. When the bill of lading falls in the hands of the shipowner, it becomes a mere receipt for goods and the terms of the contract between the shipowner and the charterer will be exclusively contained in the charterparty.

72. It is contained in the Bill of Lading B/L No. COW 001A, that the Bill of Lading is only an evidence, to the contract of carriage and not the contract itself which would give the Respondent the right to sue under section 2 of the COGSA 1992.
73. The claimant has delivered the cargo against the Letter of Indemnity not upon the bill of lading, to the named party in the letter of indemnity:

> *'We, Yu Shipping Ltd, hereby represent and undertake that we are the party lawfully entitled to delivery of the said cargo and request you to deliver the said cargo to Gileum Refinery Co. Ltd, or such party as you believe to be or to represent us to be acting on behalf of us at Busan, South Korea without production of the original bills of lading.'*

74. In the case of *The 'Sienna'*[43], it was determined that carriers are commonly under an obligation towards the Charterer under the Charterparty terms to deliver without the production of the bill.
75. Also, in the case of *The 'Bremen Max'*[44] it was held that the undertakings provided in the LOI were conditional upon delivery by the owners to the person in the LOI.
76. It was also provided in the case of *The 'Zagora'*[45] the wording contained in the LOI provided that the delivery took place and that the agent that represented the owners, as the named party in the LOI.
77. As contained under paragraph 57[46], it is provided that the cargo can be discharged without the bills of lading:

> *"In the absence of the original b/ls at the discharge port(s), owners to release the entire cargo to receivers against charterers' LOI without bank guarantee (LOI wording always to bin Owners' P and I Club."*

[43] UniCredit Bank AG v Euronav NV (The 'Sienna') [2023] EWCA Civ 471
[44] Farenco Shipping Co Ltd v Daebo Shipping Co Ltd (The 'Bremen Max') [2008] EWHC 2755 (Comm)
[45] Oldendorff GmbH & Co KG v Sea Powerful II Special Maritime Enterprises [2016] EWHC 3212 (Comm)
[46] Tomahawk Maritime Rider Clauses

78. Therefore, in consideration of the wording in the LOI and the action that the claimant takes, also in respect of the rider clause, the claimant has done what they are supposed to do because they have delivered it to the named person in the LOI, Gileum Refinery Co., Ltd.
79. Furthermore, it is arguable that the respondents consented to the delivery without the production of the bill of lading, and so they did not rely on the bill of lading as a security for the underlying transaction.
80. In the case of *The 'STI Orchard'*[47], the key issue was whether the bills of lading was intended to be relied on as a security. It was found that the bank did not intend to use the cargo as a security because they have consented to the delivery of the cargo without the presentation of the bill of lading.
81. As provided in the correspondence between the respondent and Yu Shipping, it can be construed that the respondent has consented to this delivery:

> *"If you are afraid of the demurrage accruing, you must do so* ***as you deem fit as Charterers*** *and we will not interfere as long as the loan is repaid."*

82. From the wording contained in the correspondence, it is clear that the respondent was not intending to hold the bill of lading as a security and if they did so, by consenting to the delivery of the cargo without the production of the bill of lading, they have caused their own losses.

[47] The 'STI Orchard' (Winson Oil Trading PTE LTD, intervener) [2022] SGHC 6

PRAYER

IN THE LIGHT OF THE ISSUES RAISED, ARGUMENTS ADVANCED, AND AUTHORITIES CITED, IT IS HUMBLY PRAYED THAT THE TRIBUNAL MAY BE PLEASED TO DECLARE THAT:

I. The Tribunal has jurisdiction to deal with this matter;

II. The Respondents breached the terms of the charterparty;

III. The Respondents' breach of vessel discharge within laytime caused consequential losses beyond demurrage; and

IV. The Respondents are not entitled to damages for misdelivery of the cargo.

THEREFORE, THE TRIBUNAL IS HUMBLY INVITED TO GRANT THE CLAIMANTS RELIEF OF:

a) The sum of USD 3,650,000, arising from the loss suffered by the Claimants quantified as follows:

   a. Initial Hire rate for Kaohsiung Charterparty: USD 35,000 per day

   b. Discounted Hire rate: USD 30,000 per day

   c. Difference in Hire rate x 2 year duration: USD 5,000 x 365 x 2 = USD 3,650,000;

b) Interest; and

c) Costs; or

d) Such further order or relief as the Tribunal deems fit in the interest of justice, fairness, and good conscience.

ALL OF WHICH IS HUMBLY PRAYED,

COUNSELS FOR THE CLAIMANT.