International Maritime Law Arbitration Moot

2024

NALSAR UNIVERSITY OF LAW,

INDIA

MEMORANDUM FOR CLAIMANT

ON BEHALF OF:	**AGAINST:**
Tomahawk Maritime S.A (Claimant)	*Veggies of Earth Banking Ltd. (Respondent)*

TEAM CODE: S

Aadvika Anandal | Kavya Reddy Putha | Prathiti Mulinti | Sahithi Ragampudi | Shakti Reddy

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LIST OF ABBREVIATIONS

Arbitration	Present arbitration between *Tomahawk Maritime S.A v Veggies of Earth Banking Ltd.*
BoL	Bill of Lading No. COW-100A dated 4.09.2023
Cargo	Shipment of 16.999/01 Metric Tonnes of crude palm oil
Charterer	Yu Shipping Ltd.
Charterparty	Charterparty between Tomahawk Maritime S.A and Yu Shipping Ltd.
CLAIMANT	Tomahawk Maritime S.A
COGSA 1971	Carriage of Goods by Sea Act 1971 (UK)
LOC	Letter of Credit
LOI	Letter of Indemnity
PRC	People's Republic of China
RESPONDENT	Veggies of Earth Banking Ltd.
Rider Clauses	Tomahawk Maritime Rider Clauses
SCMA	Singapore Chamber of Maritime Arbitration
Vessel	NIUYANG

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STATEMENT OF FACTS

1. On 1st September 2023, the CLAIMANT entered into a Tanker Voyage Charterparty ("**Charterparty**") with Yu Shipping Ltd. (the "**Charterer**") for the delivery of a cargo of palm oil from Bintulu, Malaysia to Busan, South Korea in the vessel MT "NIUYANG" ("**The Vessel**") to the RESPONDENT.

2. The parties agreed that the carriage of the cargo is to be completed by 30th September 2023. Subsequent to this, the parties were aware of the vessel's next strict laycan for the following charterparty, between 1st – 14th October 2023, at Kaohsiung.

3. On 3rd September 2023, the vessel arrived at Bintulu and tendered its Notice of Readiness ("**NoR**"). The loading of the cargo into the vessel was completed by 6th September 2023. The vessel set sail on the same day.

4. On 6th September 2023, the Bill of Lading No. COW-001A ("**BoL**") was issued and duly consigned to the RESPONDENT. Both the Charterparty and the BoL are governed by the English Law.

5. On 20th September 2023, the vessel arrived at Busan and tendered a NoR for the discharge of the cargo. The vessel was not discharged subsequent to this in the absence of berthing and discharge instructions.

6. On 4th October, discharge instructions were received by the vessel. The discharge commenced and was completed on 7th October 2023. On 8th October 2023, the vessel set sail from Busan to meet its next laycan.

7. On account of adverse weather conditions, the journey of the vessel was further delayed. On 16th October 2023, the charterers of the next laycan issued a notice to the CLAIMANT cancelling their charterparty. Upon negotiations, the CLAIMANT was able to reinstate the contract at a lower hire price of USD 30,000 per day.

8. The CLAIMANT commenced arbitration proceedings against the RESPONDENT for the recovery of the losses incurred by it due to the reduced hire price caused because of the delay in the subsequent laycan.

9. The issues to be decided before the tribunal are-

   (i) Whether the arbitration commenced by the CLAIMANT against the RESPONDENT is valid and if this tribunal has the jurisdiction to decide on this matter.

   (ii) Whether the CLAIMANT is entitled to a claim of liquidated damages in addition or as an alternative to demurrage.

   (iii) Whether the RESPONDENT's counterclaim of mis-delivery of the cargo

SUBMISSIONS ON PROCEDURAL ISSUES

1. According to the doctrine of *Kompetenz-kompetenz*[1], the Tribunal has the jurisdiction to decide on its own substantive jurisdiction. The English law, the putative proper law of the contract[2], which governs this valid arbitration agreement gives the Tribunal the jurisdiction to interpret the arbitration clause.[3]
2. The Tribunal has the jurisdiction to decide on the dispute brought before it as the arbitration agreement is contained in the Rider Clause 78 of the C/P (**I**), the arbitration clause has been validly incorporated in the BoL (**II**), Guangzhou is not the seat of arbitration (**III**), the seat of the arbitration lies in Singapore (**IV**), alternatively, if the tribunal finds the seat of arbitration is Guangzhou, then the arbitration agreement is validly governed by the English law (**V**), and the application of the PRC arbitration law is contrary to general principles of international arbitration (**VI**).

I. THE ARBITRATION AGREEMENT IS CONTAINED IN THE RIDER CLAUSE 78 OF THE CHARTERPARTY.

[1] *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th ed, 2015), 322, 345.; *Dallah Real Estate and Tourism Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763, 830 [84] (Lord Collins of Mapesbury JSC).

[2] *Compania Naviera Micro SA v Shipley International Inc* (The "Parouth") [1982] 2 Lloyd's Rep 351, 353 (Ackner LJ); *Marc Rich & Co AG v Societa Italiana Impianti PA* ("The Atlantic Emperor") [1989] 1 Lloyd's Rep 548, 552-553 (Lloyd LJ); *National Navigation Co v Endesa Generacion SA* (The "Wadi Sudr") [2009] 1 Lloyd's Rep 666, 697 (Gloster J); *Solomon Lew v Kaikhushru Shiavax Nargolwala and others and another appeal* [2021] SGCA(I) 1.

[3] *Enka Insaat ve Sanayi AS v OOO* ("*Insurance Company Chubb*") [2020] 2 Lloyd's Rep 449, 473 (Hamblen LJ); *Sulamérica Cia Nacional de Seguros SA v Enesa Engelharia SA* [2012] 1 Lloyd's Rep 275, 278 (Moore-Bick LJ); *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2020] 1 Lloyd's Rep 269, 277 (Flaux LJ); *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2013] 1 Lloyd's Rep 235, 240; *BCY v BCZ* [2017] 3 SLR 357, 368 (Chong J).

3. There exists a valid arbitration clause wherein both the parties agreed to arbitrate upon the instance of any dispute. This intention of the parties is expressly indicated in Rider Clause 78 of the C/P.[4] Thus, there is a valid arbitration agreement between the parties.[5]

II. THE ARBITRATION CLAUSE HAS BEEN VALIDLY INCORPORATED IN THE BILL OF LADING.

4. Clause 1 of the BoL which provides for the conditions of carriage reads:

   "All the terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated."[6]

5. The BoL, thereby, validly identifies and incorporates the terms of the C/P, including the arbitration agreement by making an explicit reference to the C/P. Thus, the law governing the C/P, which is the English law, will be applicable to the BoL as well.

III. GUANGZHOU IS NOT THE SEAT OF ARBITRATION.

6. A choice of a geographical location does not indicate that the seat of arbitration lies in that country.[7] In *Naviera Amazonia Peruana SA v. Compania Internacional de Seguros del Peru,*[8]it was held that the choice of the place of arbitration may purely be for the reasons serving the convenience of the parties.[9] The place of arbitration does not dictate the seat of arbitration.

[4] Record, 28: Rider Clause 78.
[5] *Wellington Associates Ltd. v Mr Kirit Mehta* (2000) 4 SCC 272; *Sudarshan Chopra & Ors. v Company Law Board and Ors.* (2004)2 Arb LR 241.
[6] Record, 31: Bill of Lading.
[7] *Redfern and Hunter*, ; *Union of India v McDonnell Douglas Corporation* [1993] 2 Lloyd's Rep 48.
[8] *Naviera Amazonia Peruana SA v Compania Internacional de Seguros del Peru* [1988] 1 Lloyd's Rep 116 at 121.
[9] The Netherlands Arbitration Act 1986, s. 1037(3); *Spring Hope Rockwool v Industrial Clean Air Inc.* 504 F.Supp. 1385 (EDNC 1981); *Snyder v Smith* 736 F.2d 409 (7th Cir. 1984); *National Iranian Oil Co. v Ashland*

7. The arbitration clause in the C/P states:

   "General Average and Arbitration, if any, to be in Guangzhou…"[10]

   The clause does not state that the parties intended for Guangzhou to be the seat of arbitration. It merely indicates that they chose Guangzhou to be the geographical location in which the arbitration is to be conducted. Therefore, Guangzhou is only the place of arbitration and not the seat of arbitration.

IV. THE SEAT OF THE ARBITRATION LIES IN SINGAPORE.

8. The parties have expressly chosen for the SCMA rules to apply to the arbitration proceedings.[11] Choice of law clauses in arbitration agreements often indicate the national law that the parties wish to apply to the arbitration proceedings.[12] Rule 32 of the SCMA rules states that in absence of another choice of a seat, Singapore will be the seat of arbitration.[13] Furthermore, in the absence of an express choice of law, the Singaporean International Arbitration Act[14] will govern the arbitration agreement.
9. As it has been previously established, Guangzhou is not the seat of arbitration. In the lack of a chosen seat, due to the application of the SCMA rules, Singapore will be the seat of arbitration. The Singaporean International Arbitration Act does not prohibit the jurisdiction of this tribunal and therefore, these proceedings and the underlying arbitration agreement are valid.

Oil, Inc. 817 F.2d 326, 334 (5th Cir. 1987); *Clarendon National Insurance Co. v Lan* 152 F.Supp.2d 506, 524 (SDNY 2001).

[10] Record, 28: Rider Clause 78.

[11] *Ibid.*

[12] *Redfern and Hunter,* 3.114, 191.

[13] Rule 32, SCMA Rules, 4 th Ed.

[14] The Statutes of the Republic of Singapore, International Arbitration Act, 1994.

V. ALTERNATIVELY, IF THE TRIBUNAL FINDS THAT THE SEAT OF ARBITRATION IS GUANGZHOU, THEN THE ARBITRATION AGREEMENT IS VALIDLY GOVERNED BY ENGLISH LAW.

10. In order to determine the applicable law governing an arbitration agreement, a three-fold test applies; *First,* what the express choice of law is, *second,* what the implied choice of law is, and *third,* what law has the closest and most real connection to the agreement.[15]

11. In *Arsanovia Ltd. & Ors v. Cruz City 1 Mauritius Holdings*[16], it was observed that only in the absence of an express or implied choice of law clause will the court or tribunal inquire into whether there exists a law with the closest connect. In this case, there exists an implied choice by both the parties indicating that the English law shall govern the arbitration.[17] Thus, the same shall prevail.

12. The wording and language of arbitration agreements have been widely interpreted by courts and tribunals to the effect that the jurisdiction of a forum is most widely construed.[18] The CLAIMANT and RESPONDENT have unanimously agreed that the English law will govern the C/P.[19] Rider Clause 78 of the C/P is a clear and express agreement between the parties to adopt English law for the entire C/P, which includes the arbitration agreement.

13. The choice of English law as the governing law for the entire contract is an implicit indicator that the parties intended for the same to apply to the arbitration agreement as

[15] See, *Supra* Note 3.
[16] *Arsanovia Ltd. & Ors v. Cruz City 1 Mauritius Holdings* [2012] EWCA Civ. 638.
[17] Record, 28: Rider Clause 78.
[18] *Fiona Trust & holding Corporation v Yuri Privalov* [2007] EWCA Civ 20; *Premium Nafta Products Ltd. & Ors. v Fili Shipping Co. Ltd. & Ors.* [2007] UKHL 40; Gaillard and Savage (eds) *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999), para. 486.
[19] Record, 28: Rider Clause 78.

well.[20] Additionally, it is imperative to note that the application of English law has been mentioned under the clause titled '*law and arbitration*'. This indicates that it is implied that English law is the law governing the arbitration agreement as well.

14. Arbitration agreements are drawn in wide terms such that all disputes arising from a primary contract are referred to arbitration.[21] In the presence of a choice of law clause, such law will govern the entire underlying contract and the arbitration agreement.[22] In *Sulamérica,* the English Court of Appeal held that the choice of law that governs the main contract will be a strong indication that the parties intended for the same law to govern the arbitration agreement. In the absence of a contrary indication, it is reasonable to assume that the law chosen to govern the substantive contract shall govern the arbitration agreement.

VI. THE APPLICATION OF THE PRC ARBITRATION LAW IS CONTRARY TO THE GENERAL PRINCIPLES OF INTERNATIONAL ARBITRATION.

15. Clause 10 of the PRC arbitration law provides that no foreign tribunal can conduct its arbitral proceedings in China.[23] This kind of unbridled restriction is fundamentally contradictory to a State's commitment to arbitrate an international dispute. It is against principles of international arbitration for a State to invoke its own legislative or constitutional acts as prohibitions against an arbitration agreement.[24]

[20] *Sulamérica CIA Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638; *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th ed, 2015), 155, 156.
[21] *Arbitration clauses: Achieving effectiveness* (1998) 9 ICCA.
[22] *Compagnie Tuniesienne de Navigation SA v Compagnie d'Armement Maritime SA* [1970] 2 Lloyd's Rep 99, 116 (Lord Diplock); *Tzortzis and Sykias v Monark Line A/B* [1968] 1 Lloyd's Rep 337, 340 (Lord Denning MR); *Gary B Born, International Commercial Arbitration* (Kluwer Law International, 2009) vol II, 2123.
[23] Record, 28: Rider Clause 78.
[24] Article II, New York Convention, 1958.; *Gary Born,* International Commercial Arbitration, 3rd Ed. Kluwer Law International (2021), p.528, 670; Bargues Argo Indus, SA v Young Pecan Co., 20014 Rev. Arb. 733.

16. Therefore, the application of PRC arbitration law would be a clear violation of international public policy and therefore, the RESPONDENT cannot be allowed to invoke privileges under their own law to escape its obligations arising out of international contracts governed by private law.[25]

SUBMISSIONS ON THE MERITS

ARGUMENTS ON THE SUBSTANCE

17. The terms of the charter party as between the CLAIMANT and the Charterers has been incorporated into the bill of lading.[26] Further, pursuant to the Law and Arbitration clause, which has been incorporated into the Bill of Lading by specific reference, English law shall be applied to this dispute.[27]

VII. THE CLAIMANT IS ENTITLED TO CLAIM FOR UNLIQUIDATED DAMAGES IN ADDITION OR AS AN ALTERNATIVE TO DEMURRAGE

18. The CLAIMANT contends that they are entitled to claim damages. It is submitted that the CLAIMANT are entitled to unliquidated damages in addition to or as an alternative to demurrage as the CLAIMANT has suffered losses in earnings due (a); that the losses could not be adequately compensated by demurrage (b) and further; that the respondent is liable to compensate for the losses suffered (c).

a. The CLAIMANT has suffered losses in earnings

[25] Kuwait Foreign Trading Contracting & Inv. v Icori Estero SpA, 9 INTL ARB. REP. A1; Diques y Astilleros Nacionales CA v Raytheon Anschutz GmbH, STSJ M 1204/2012.
[26] Record, 31: Bill of Lading, Conditions of Carriage, Clause 1.
[27] Record, 28: Rider Clauses 76.

i. There is a breach of a contractual term to discharge the Vessel within laytime

1. Charterparties are contracts for the carriage of goods and set out the terms of contract as between the charterer and the shipowner, including in the context of cargo claim.[28] The charterer has the duties to 1) pay the freight 2) have a cargo available for loading on the vessel's arrival at the loading port, 3) load and discharge the cargo within the laytime allowed.[29] Laytime commences after a valid Notice of Readiness (NOR) has been tendered.[30]

19. The laytime provision contained in a charterparty or a bill of lading, is usually in the form of an undertaking by the charterers for the benefit of shipowners.[31] It limits the time allowed to the charterers for the performance of their share of the loading or discharging, by providing a fixed period or a method for calculating the time, or alternatively by allowing a reasonable time.[32] For any time beyond that period, the charterers are liable in demurrage.[33] Clause E of the charterparty specifies the total allowed laytime for discharging as 96 running hours.[34] Therefore, there is a breach of contractual terms by the RESPONDENT upon the failure to procure the discharge and/or take delivery of the cargo

[28] Roman T. Keenan, 'Charter Parties and Bill of Lading' [1959] MLR 346.
[29] Ibid.
[30] Julien Rabeux, 'Notice of Readiness in a Nutshell' (*West Pandi,* May 2017) <https://www.westpandi.com/getattachment/8d140487-574c-41e8-8a3e-38033e127082/defence guide_notice_of_readiness_4pp_v2_lr.pdf> Accessed 10 April 2024.
[31] Ibid.
[32] Christina Padyachee, Miceline Juliana Naude, 'Laytime and Demurrage implications in voyage charterparties for chemical tankers' [2021] IJLSD 496; North River Freighters Ltd. Vs. President of India (1956) 1 Q.B 333-348.
[33] Ibid.
[34] Record, 12: Charterparty, Clause E.

within 96 hours of the commencement of laytime. In this case, the failure to discharge within the contractual laytime has led to loss of earnings on the next voyage.

ii. The CLAIMANT has suffered a loss of earnings due to a delay in discharge.

20. The nature of damage of which the parties have estimated the quantum in their agreed sum for demurrage is that during the period of detention the vessel is unable to earn freight.[35] However, the owner's loss of earnings caused by delay is the potential earnings from future voyages which the owners will lose because the vessel will complete her present engagement five days later.[36]

21. Despite the acceptance of the Notice of Readiness on 20 September 2023, no effort was made to discharge the cargo until 4 October 2023. The CLAIMANT reminded the charterers that the vessel had to sail from Busan by 7 October 2023, at the latest, in order to meet the laycan for the next fixture.[37] Finally, birthing and discharge instructions were received by the Vessel and discharge commenced on 4 October 2023 and was completed on 7 October 2023. The Vessel departed on 8 October 2023 when it should have departed on 7 October 2023.[38]

22. This loss was caused due to the delay in discharge within the allowed laytime. The delay in discharge had caused the Vessel to have to depart much later than what was planned which resulted in the delay in the progress to Kaohsiung and subsequently led to the

[35] Robert Gay, 'Damages which are not disposed of by demurrage: What is a separate type of loss?' [2021] 27 JIML, 178.
[36] Evi Plomaritou, 'A Review of Shipowner's & Charterer's Obligations in Various Types of Charter' [2014] JSOE 307-321.
[37] Record, 7: Statement of Claim, [10].
[38] Record, 7: Statement of Claim [11].

charterers of the next fixture cancelling the charterparty. The owner should be able to recover the loss of the vessel's earnings for a future voyage. The CLAIMANT is therefore claiming compensation for the losses suffered due to the reinstatement with discounted hire rate caused by the delay in discharge of cargo beyond allowed laytime.

b. The losses suffered by the CLAIMANT cannot be adequately compensated under Demurrage

23. The losses suffered by the CLAIMANT cannot be adequately compensated under demurrage. Demurrage is linked to the loss of use of ship and is identified with the parties' estimating loss of future freight that the owner will suffer if the vessel is detained laytime.[39] The loss suffered by the CLAIMANT is not just that of possible future freight. The loss suffered is in the nature of the discounted hire rate that the CLAIMANT had to give the vessel on due to a delay in discharge of the cargo by the RESPONDENT. Demurrage is liquidated damages for the loss of use of ship.[40]

2. The decisions in *Aktieselskabet Reidar v. Arcos Ltd.* and the *Suisse Atlantique* case, is that where there has been a breach of the charter laytime provisions by the charterer failing to load and discharge in the period allowed, resulting in a detention of the ship and a consequent loss of earnings to the shipowner, then the only damages payable are the liquidated damages, i.e., demurrage.[41] If however, however, the shipowner can prove a separate breach of charter, although arising from the same circumstances, then he may recover damages at large if he can show that the consequences extended beyond the

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[39] *Moor Line v. Distillers Co*. (1912) SC 514

[40] Bariyima Sylvester Kokpan, 'Re-appraising the Concept of Laytime in Charterparties', [2017] Journal of Property Law and Contemporary Issues Journal.

[41] *Aktieselskabet Reidar v. Arcos Ltd (1926) 25 L.l.L. Rep. 30; Suisse Atlantique v Rotterdamsche Kolen [1967] 1 AC 1.*

detention of his vessel. Where a shipowner has suffered a different type of loss arising from a failure to load or discharge the vessel within permitted laytime, there should be no need for the owner to establish a separate breach of contract in order to recover damages in addition to demurrage.

24. In the case of *Total Transport Corporation v. Amoco Trading Co.*, the court relied on the interpretation set out in *Reidar v. Arcos* affirming that damages above demurrage were recoverable in the presence of separate losses, even when a single breach of charterparty had occurred.[42] There must be a proven head of loss which is recoverable as damages for that breach distinct from the loss of use of vehicle. Further, in the case of *Chandris v Isbrandtsen-Moller Co Inc*, it was held that damages could be recoverable in addition to liquidated damages for detention if it could be shown that there was a separate head of damage.[43]

25. Here, the damages being claimed are for the discounted hire rate that the CLAIMANT had to give the vessel on. Therefore, the loss suffered is distinct from the loss of use of vessel, and the CLAIMANT should be able to recover these unliquidated damages in addition to or in alternative to demurrage.

c. The RESPONDENT is liable to compensate for the losses suffered

i. *The* RESPONDENT is liable as the holder of the bill of lading

26. As the holder of the bill of lading, there are certain obligations that the consignee has to fulfil. Bills of lading indicate that the merchant party shall take delivery of the goods within

[42] *Total Transport Corporation v. Amoco Trading Co. [The Altus],* 1985 1 Lloyd's Rep. 423.
[43] *Chandris v Isbrandtsen-Moller Co Inc* [1951] 1 K.B. 240

fixed time.[44] Goods must be discharged in the manner and the time stipulated in the agreement or, if without such agreement, in a reasonable way in accordance with the customs, the practices or the special usages, and it shall not create unreasonable inconvenience to the carrier.[45]

27. If the consignee delays improperly but later claims or receives the goods even after they have been warehoused, the consignee shall still bear the liabilities to the carrier, such as paying for the freight and charges of storage and compensating the carrier for the damages caused by this delay.[46] Therefore, as the holder of the bill of lading and the consignee of the goods, the RESPONDENT is liable to compensate for the demurrage and subsequent losses suffered by the CLAIMANT caused due to the failure to discharge goods within permitted laytime.

ii. *It is implied in a contract of carriage that the consignee will take delivery of the cargo from the vessel in* a reasonable time.

28. The contractual obligations incurred upon the carrier arise through a contract of carriage.[47] It is entered between the carrier and the seller or the buyer. Delivery of goods to the consignee is therefore an essential undertaking as part of this contract.[48] If the consignee fails in taking delivery of the goods at the port of discharge, the carrier will be confronting problems.[49] Delivery is one of the essential obligations on the carrier under the contract of

[44] Li Wei-jun, "On Legal Issues on the Hindering of Delivery under Carriage of Goods by Sea, in Practice and Theory on Maritime Justice, Tang Neng-zhong (chief editor), 1 st ed., Law Press, 2002, PP.16-46.
[45] *Ibid*.
[46] *Ibid*.
[47] Jenny Olsen, 'Undelivered Goods under the Law of Carriage of Goods by Sea' (Master Thesis, Lund University, Spring 2013).
[48] *Supra* Note 36.
[49] *Supra* Note 35.

carriage. Taking the goods timely and properly is an obligation of the consignee or the party of the cargo interests.[50]

29. Under Common law regimes, taking delivery within the fixed period or reasonable time is generally an obligation on the consignee.[51] Where the bill of lading is silent as to the time within which the consignee is to discharge the ship

30. The consignee has a period of time from when the goods are discharged until it has to be collected.[52] The terms of this time are those that are stipulated in the contract of carriage or any other storage contract that applies after the goods are discharged.[53] It has been held that where a merchant has undertaken to discharge a ship within a fixed number of days, he is liable in demurrage for any delay of the ship beyond that period unless such delay is attributable to the fault of the shipowner or those for whom he is responsible.[54] Therefore, as under the contract of carriage, the RESPONDENT is liable for delay of discharge beyond the period of laytime.

VIII. THE RESPONDENT IS TO PAY DEMURRAGES OWING TO THE DELAY CAUSED

31. It is humbly submitted that the RESPONDENT is to pay demurrages owing to the delay caused since **(a)** The Charterparty and the Contract of Sale are to be read together and **(b)** the standards in the nature of trade is to be considered.

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[50] On Carrier's Remedies where the Consignee Fails to Take Delivery under Maritime Code of P. R. China, speech paper of the V International Conference of Maritime Law, October 2002, Shanghai.
[51] Professor William Tetley QC, Marine Cargo Claims, International Shipping Publications, 1988.
[52] *Ibid*.
[53] John Coccolatos, 'Charterer's Obligation to Discharge Cargo – Frustration, Causation and Demurrage' (*Steamship Manual*, 01 December 2012) <https://www.steamshipmutual.com/publications/articles/dgm1212>.
[54] *Alexander & Sons v Aktieselskabet Dampskibet Hansa and others* [1920] AC 88 (HL).

a. The Charterparty and the Contract of Sale are to be read together

32. Demurrage can be understood as liquidated damages for a breach of charter, to unload within a fixed period of time.[55] The acceptance of payment of demurrage by the RESPONDENT, without any objections, implies that it recognized that there was a delay caused owing to its actions.[56]

33. There is a Lien on the goods by the ship owner, until the dues and considerations have been paid.[57] Once the lien has been given up by way of delivery of goods, the ship owner has completed his duties. The obligation to reciprocate the consideration flowing from the ship owner's side now rests on the Respondent, who is the holder of goods. The subjective intention of the parties when the sale was negotiated could not have been that the only permissible circumstance for the CLAIMANT to claim for damages from the transaction is if and when the sellers had caused a delay amounting to a frustration of the contract.[58]

b. The Standards in the Nature of the Trade are to be Considered

3. Demurrages are awarded for the 'loss of use'. Where the laytime or demurrage clause operates in the nature of an indemnity, its link with the charterparty is stronger than an independent laytime and demurrage clause. In the event of breach of such a clause in a fluctuating market, the Claimant can claim damages for any difference between the market price at the actual bill of lading date and the date on which the bill would have been issued if the goods had been delivered at the contractual date.[59] In the present scenario,

[55] *Ibid*.
[56] Record, 37: Statement of Defence and Counterclaim
[57] Record, 18: Charterparty [25].
[58] *Sanders v Vanzeller* [1843] 4 QB 260.
[59] Aikens, Sir Richard, Miriam Goldby, and Richard Lord QC. *Bills of Lading*. Routledge, 2021.

considering the magnitude of the nature of trade involved, [60] the terms must be interpreted to mean that damages may be awarded in circumstances other than what may be strictly inferred from the terms of the charterparty.

SUBMISSIONS ON THE COUNTERCLAIM

34. Regarding the RESPONDENT's Counterclaim, the CLAIMANT is not liable to pay damages since **(A)** the delivery has been done in accordance with the Charterparty, **(B)** the RESPONDENT is not the lawful holder of the Bill of Lading

IX. THE RESPONDENT'S CLAIM FOR MIS DELIVERY OUGHT TO BE REJECTED

a. The B/L in question is a Charterparty Bill of Lading

35. The term Charterparty bill of lading is frequently used to denote a bill of lading that contains few express terms but that incorporates the terms of a charterparty.[61] UCP 600[62] defines for its purpose this type of a B/L in Article 22.[63] The most salient feature of this definition is that the document contains *'an indication that it is subject to a charterparty'*. The present B/L in issue clearly states that the *"freight is payable as per Charter Party.[64]"* Hence, the B/L in issue is a Charterparty bill of lading.

36. An exception to the rule that a bill of lading contains or evidences the contract of carriage is where the B/L is issued to the charterer in respect of the goods carried on board the chartered ship.[65] In cases, such as the present where the carrier under the B/L is the same

[60] *Congimex Cia Geral SARL v Tradax Export SA* [1983] 1 Lloyd's Rep 250.
[61] Aikens, Sir Richard, Miriam Goldby, and Richard Lord QC. *Bills of Lading*. Routledge, 2021
[62] Uniform Customs & Practice for Documentary Credits (UCP 600) (International Chamber of Commerce, 2007
[63] Uniform Customs & Practice for Documentary Credits (UCP 600) art 22.
[64] Record, 4: Notice of Arbitration
[65] *Supra* Note 1.

party as the "owner" for the purpose of the C/P, the B/L ceases to have any contractual force and constitutes a receipt only in the hands of the charterer. In that instance, the relevant contract of carriage is contained in the charterparty. As submitted earlier, the B/L validly identifies and incorporates the terms of the C/P.

b. Clause 57 of the C/P permits discharge without the B/L

37. The instructions provided for in the C/P for the purpose of delivery and discharge are to be followed. CLAUSE 57 of the C/P permits the discharge without the B/L.[66] It reads as follows:

"57. Discharge without bills of lading

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

38. The discharge of Cargo commenced on 4 October 2023. [67]Prior to this, on 3 October 2023 Yu Shipping Ltd. the charterer informed the CLAIMANT that the original B/L are not available to be presented.[68] Yu Shipping was to sell the Cargo and use the sale proceeds to repay the RespondentRESPODENT.[69] However, in the initial stage the RESPONDENT was not agreeable to the release until it received the B/L. Thus, the RESPONDENT's claim of being in continuous possession of the B/L since 3 October 2023 does not fall in line.

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[66] Record, 28: Tomahawk Maritime Rider Clauses.
[67] Record, 9: Statement of Claim.
[68] Record 33: Communication to Tomahawk Maritime by Yu Shipping Ltd.
[69] Record 44: Statement of Reply and Defence to Counterclaim; Communication between Al Swell and Butcher Kim.

39. On the same day as the invocation of CLAUSE 57 a letter of indemnity was presented to the RESPONDENT.[70] The RESPONDENT accepted the presentation of a letter of indemnity which expressly states that it agreed to make payment for the cargo without the presentation of the B/L. Moreover, the RESPONDENT was well aware of the arrival of the Vessel at Busan on 1 October 2023 and that the delivery of cargo would be taken by the invocation of CLAUSE 57.

40. Despite being cognizant, the RESPONDENT failed to take delivery of the Cargo and ultimately acquiesced to the charterers by saying that *"You must do as you seem fit as Charterers, and we will not interfere as long as the loan is repaid."* [71]This goes to show that the RESPONDENT never intended to take delivery of the cargo. In these circumstances it cannot be interpreted that they viewed the cargo as security for its loan to the charterer.

X. THE RESPONDENT IS NOT THE LAWFUL HOLDER OF THE BILL OF LADING

a. The requirement of good faith was not followed

41. The RESPONDENT made the payment on behalf of the Charterer, to Gileum Refineries, under the letter of credit and on the basis of the Payment LOI (not being the original B/L). The RESPONDENT has thus acquiesced to the delivery of the cargo to Gileum Refineries.

42. In accordance with Section 29(2) of the Bills of Exchange Act of 1882 of the United Kingdom, a holder in due course is one who has met the following conditions-

[70] Record 45: Letter of Indemnity.
[71] Record: 46, Communication between VOE and Yu Shipping.

"(a) That he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact:

(b) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it." [72]

43. Moreover, the Act provides a definition of the term *"Good faith"* under s90 which is read as follows:

"*A thing is deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly, whether it is done negligently or not".*[73]

44. In the present scenario, an examination of the RESPONDENT's conduct within the commercial framework of bills of lading, it is *prima facie* evident that their actions fail to meet criterion of good faith as required. It is imperative to have a clear and universally applicable understanding of this term, consistent with its usage across various contexts and jurisdictions. Hence, the most accurate definition is that of *"the observance of reasonable commercial standards of fair dealing in the conclusion and performance of the transaction concerned"* or as otherwise plainly put as *"honest conduct"* in the case of *UCO Bank v Golden Shore Transportation ("UCO Bank").*[74] Regrettably, in the current situation, it is evident that the RESPONDENT has not conducted themselves honestly under any circumstances.

[72] Bills of Exchange Act 1882, s 29(2) (UK).
[73] Bills of Exchange Act 1882, s 90 (UK).
[74] UCO Bank v Golden Shore Transportation Pte Ltd [2005] SGCA 42.

45. Following the course of action of the RESPONDENT it can be assumed that the party was not acting in a lawful manner and with good faith for two reasons, namely: (i) RESPONDENT was consistently cognizant of the delivery date of the Cargo and was further (ii) aware of CLAUSE 57.

46. The RESPONDENT was aware of the berthing of the Vessel at Bintulu on 3 September 2023. They were duly notified of the fact that Vessel had to sail to Kaohsiung by 30 September 2023 and further that it was pertinent the cargo be discharged by 7 October 2023.[75] Further Yu Shipping had duly informed the CLAIMANT that "*all relevant parties are aware of the Vessel's limitation*."[76] Yu Shipping's delay in giving discharge instructions is due to the hold-up caused by the RESPONDENT. The trust receipt was not granted to the charterers due to its persistence to not release the cargo until it received the B/L. This caused a delay.

47. The RESPONDENT consented to the goods being delivered in pursuance to the LOI. This is evidenced by the fact that they were copied on the LOI delivered on 3 October 2023, whereby he was aware that the Cargo would be delivered through it and not through the original Bills of Lading. At no time did the RESPONDENT express any opposition to this event, therefore tacitly consenting. The RESPONDENT paid the Charterer at a period after 3 October 2023 when the discharge had already commenced. These facts go to show that the RESPONDENT was at all times aware of the situation of the Vessel and the Cargo.

48. Finally, it must be highlighted that the RESPONDENT wrote to the CLAIMANT claiming to be the holder of the Bill of Lading on 29 November 2023.[77] This claim arose after the

[75] Record 46: Communication between Yu Shipping and VOE.
[76] Record 7: Statement of Claim.
[77] Record, 10: Statement of Claim.

appointment of interim liquidators, Carry On Advisory Services LLP which was considering the CLAIMANT's demand for compensation. This further goes to show that the RESPONDENT's interest in taking possession of the B/L was to merely obtain a bare right of suit against the carrier without any real interest in the goods under the B/L. Thus, these circumstances cannot be considered as one of good faith.

b. In Arguendo, the RESPONDENT failed in its obligation to discharge the cargo timely

49. *Arguendo*, even if it assumed that the RESPONDENT is the holder, they are obliged to ensure that the cargo is discharged within the laytime permitted under the terms of the Charterparty which they have failed to do. Lastly, as per Part II, General Exceptions Clause 17 of the Charterparty it is lucidly laid down that-

"Neither the vessel nor the Master or the Owner shall be liable for any loss of or damage or delay to the cargo……; any act or omission of the Charterer, shipper, consignee, owner of the goods or holder of the bill of lading, their agents and representatives."[78]

The failure to discharge the cargo in a timely manner and give instructions to Yu Shipping Ltd is an omission on part of the RESPONDENT, the liability for which cannot fall in the hands of the CLAIMANT as per the reading of the aforementioned clause.

50. It is contended that no damage was caused by delivery through the Letter of Indemnity. The lackadaisical conduct of the RESPONDENT was itself the effective cause of the loss, if

[78] Record, 17: Part II Charterparty

any such counterclaim were to be accepted. Thus, the mis delivery claim for the invoice of the cargo ought to be rejected.

REQUEST FOR RELIEF

For the reasons set out above, the CLAIMANT respectfully requests the Tribunal to find the following:

(1) That the arbitration commenced by the CLAIMANT against the RESPONDENT is valid and this tribunal has the jurisdiction to decide on this matter.

(2) That the CLAIMANT is entitled to a claim of liquidated damages in addition or as an alternative to demurrage.

(3) That the RESPONDENT's counterclaim of mis-delivery of the cargo is invalid