INTERNATIONAL MARITIME LAW ARBITRATION MOOT 2024

IN THE MATTER OF AN ARBITRATION UNDER THE RULES OF THE SINGAPORE CHAMBER OF MARITIME ARBITRATION (4TH ED, 2022)

CLAIMANT

< TOMAHWAK MARITIME S.A.>

v

<VEGGIES OF EARTH BANKING LTD>

RESPONDENT

TEAM CODE: TEAM U

CLAIMANT MEMORANDUM

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

ABBREVIATION	TERM
Rider Clauses	Tomahawk Maritime Rider Clauses
Background	International Maritime Law Arbitration Moot 2024 Moot Problem
BL	Original set of three bills of lading, reference number COW-001A dated 4 September 2023
Cargo	17,000 MT of Crude Palm Oil
Charterers	Yu Shipping Ltd
Claimant	Tomahawk Maritime S.A.
COGSA 1992	Carriage of Goods by Sea Act 1992
CP	The voyage charterparty between Claimant and Yu Shipping Ltd
LOI	Letter of Indemnity issued by Good Oils Sdn Bhd (For Account of Yu Shipping Ltd) to Veggies of Earth Banking Ltd, dated 3 October 2023
Parties	Claimant and Respondent
Respondent	Veggies of Earth Banking Ltd
Rider Clauses	Tomahawk Maritime Rider Clauses
SCMA	Singapore Chamber of Maritime Arbitration
SCMA Rules	Singapore Chamber of Maritime Arbitration Rules (4th Edition, adopted 01 January 2022)
Vessel	MV NIUYANG (IMO No. 392817)

LIST OF AUTHORITIES

A. Statutes

Carriage of Goods by Sea Act 1992 ("COGSA 1992")

B. Cases

Oversea-Chinese Banking Corporation Limited v Owner and/or Demise Charterer of the vessel "Yue You 902" ("*The Yue You 902*") [2019] SGHC 10

Pacific Recreation Pte Ltd v S Y Technology Inc [2008] 2 SLR(R) 491

President of India v Lips Maritime Corporation ("*The Lips*") [1987] 2 Lloyd's Rep 311, p 315 (*per* Lord Brandon)

PT Garuda Indonesia v Birgen Air [2002] 1 SLR(R) 401

R & H Hall v. Vertom Scheepvaart en Handelsmaatshapi BV ("*The Lee Frances*") [1989] LMLN 253 (Unreported

Richco International Ltd v Alfred C Toepfer International GmbH ("*The Bonde*") [1991] 1 Lloyd's Rep 136

Sea Master Shipping Inc v Arab Bank (Switzerland) Ltd and another ("*Sea Master*") [2020] EWHC 2030

Shagang South-Asia (Hong Kong) Trading Co Ltd v Daewoo Logistics [2015] 1 Lloyd's Rep 504.

Skibsaktieselskapet Thor Thoresens Linje v H Tyrer & Co Ltd [1929] 35 Ll L Rep 163

Standard Chartered Bank (Singapore) Ltd v Maersk Tankers Singapore Pte Ltd (Winson Oil Trading Pte Ltd, intervener) ("*Maersk Tankers*") [2022] SGHC 242

Suisse Atlantique Sociόétόé d'Armement Maritime SA v. NV Rotterdamsche Kolen Centrale ("*Suisse Atlantique* (CA)") [1965] 1 Lloyd's Rep 533

Sulamérica Cia Nacional de Seguros SA v Enesa Engelharia SA [2013] 1 WLR 102

Sze Hai Tong Bank v Rambler Cycle Co Ltd [1959] MLJ 200

Tankreederei GmbH & Co KG -v- Marubeni Corporation ("*Amalie Essberger*") [2019] EWHC 3402

The Assunzione [1954] P 150

The "Neptra Premier" [2001] 2 SLR(R) 754

The Brij [2001] 1 Lloyd's Rep 431

The Cherry [2002] SGCA 49

Total Transport Corporation v Amoco Trading Co. ("*The Altus*") [1985] 1 Lloyd's Rep 423

*Triton Navigation v Vito*l ("*The Nikmary*") [2003] EWHC 46

Unicredit Bank AG v Euronav NV ("*The Sienna*") [2023] 1 All ER (Comm) 166

UTB LLC v Sheffield United Ltd [2019] EWHC 2322

C. Books

Baris Soyer, *Damages, Recoveries and Remedies in Shipping Law*, (Informa Law, 1st Edition, 2023)

Benjamin's Sale of Goods (5th Ed)

Chuah, J., *Law of International Trade: Cross-Border Commercial Transactions*, (Sweet & Maxwell, 7th Edition, 2023)

David Joseph, Jurisdiction and Arbitration Agreements and Their Enforcement (Sweet & Maxwell, 3rd Ed, 2015)

Dicey, Morris & Collins on the Conflict of Laws (Sweet & Maxwell, 15th edn, 2012)

Gary B Born, International Commercial Arbitration (Kluwer Law International, 2nd Ed, 2014

Girvin, Stephen, Carriage of Goods by Sea (Oxford University Press, 3rd edn, 2022)

Halsbury's Laws of England vol 16 (Butterworths, 4th Ed) (1992 Reissue)

Schofield, J., *Laytime and Demurrage* (Informa Law, 8th Edition, 2021

Sir Richard Aikens et al, Bills of Lading (Informa Law, 3rd Ed, 2020)

D. Journal Articles

Chan, Darius and Teo, Jim Yang, Re-formulating the test for ascertaining the proper law of an arbitration agreement: A comparative common law analysis. (2022). Journal of Private International Law. 17, (3), 439-472

Gay, R., "Damages in addition to demurrage", [2004] L.M.C.L.Q. 72

E. Others

Jim Leighton, "The Eternal Bliss: when certainty is not enough" Lloyd's Shipping & Trade Law 21(9) (30 November 2021)

Kalogianni, A., "Can a shipowner claim damages in addition to demurrage?" Maritime Risk International (October 2020)

The Singapore Chamber of Maritime Arbitration Rules (4th Edition)

STATEMENT OF FACTS

1 Tomahawk Maritime S.A. (the "**Claimant**") entered a Voyage Charterparty ("the **CP**") with Yu Shipping Ltd (the "**Charterers**") for the employment of the vessel MV "NIUYANG" (the "**Vessel**") to transport palm oil from Bintulu to Busan.[1] Accordingly, the Claimant and Charterers agreed that the voyage will be completed by 30 September 2023, such that the Vessel has sufficient time to meet its next employment.[2]

2 On 20 September 2023, the Vessel arrived at Busan. Notice of Readiness was tendered and accepted on the same day.[3] However, the Vessel did not receive berthing or discharge instructions.[4] The Claimant sent daily reminders to the Charterers, but the Charterers failed to act on them.[5] On 3 October 2023, the Claimants declared that should the next charterers exercise their cancellation rights, they will look to the Charterers to recover all losses.[6] The Charterers replied that they will be evoking the option to deliver the Cargo under an LOI.[7] Discharge commenced on 4 October 2023 and was completed on 7 October 2023.[8] The Vessel departed Busan on 8 October 2023.[9]

[1] Background, p 7.
[2] Background, p 7.
[3] Background, p 8.
[4] Background, p 8.
[5] Background, p 8.
[6] Background, p 9.
[7] Background, p 9.
[8] Background, p 9.
[9] Background, p 9.

3 However, due to its late departure from Busan, along with adverse sea and wind conditions, the Vessel failed to meet its next laycan.[10] Consequently, the Vessel's next fixture was cancelled. However, it was reinstated at a lower hire rate after some negotiations.[11]

4 The Claimant sent a notice of arbitration to Veggies of Earth Banking Ltd (the "**Respondent**") on 22 December 2023, claiming all losses arising from the reinstated employment. They allege that losses were caused by the Respondent's failure to take timely delivery of the Cargo.[12] The Claimant submits that:

a) this Tribunal has jurisdiction as the arbitration agreement is valid under the governing law of the arbitration agreement (the "**Jurisdiction Issue**");

b) the Claimant is entitled to claim for unliquidated damages in addition to demurrage as it incurred a separate head of loss. Alternatively, unliquidated damages can be claimed as the Respondent breached an implied term (the "**Demurrage Issue**"); and

c) the Claimant is not liable for misdelivery of the Cargo (the "**Misdelivery Issue**").

[10] Background, p 9.
[11] Background, p 9.
[12] Background, p 10.

ARGUMENTS

I. THIS TRIBUNAL HAS JURISDICTION

A. THE ARBITRATION AGREEMENT IS VALID UNDER SINGAPORE LAW

(1) The seat of arbitration is Singapore, not Guangzhou

5 The venue of the arbitration hearing is conceptually different from the seat of arbitration.[13] Mere stipulation of the venue of the arbitration does not conclusively indicate that parties have intended that venue to be the seat of arbitration.[14] As such, the phrase "Arbitration…to be in Guangzhou" in Clause 76[15] only shows that the location of the arbitration hearing was to be in Guangzhou, and cannot by itself show that parties designated the seat of arbitration to be Guangzhou.

6 Furthermore, where there is a reference in the arbitration agreement to a geographical location which is not a law district, it is more naturally construed as a reference to venue rather than the seat of arbitration.[16] Here, Clause 76 stipulates arbitration to be in Guangzhou which is merely a city rather than PRC which is a law district. As such, it is submitted that Guangzhou must have been intended by the parties to be the venue of the arbitration hearing rather than the seat of arbitration.

---

[13] *BNA v BNB and another* [2019] SGHC 142, [97].
[14] *PT Garuda Indonesia v Birgen Air* [2002] 1 SLR(R) 401, [23]-[24].
[15] Background, p 28.
[16] *BNA v BNB and another* [2019] SGHC 142, [110].

7 The starting position is that in the absence of a designated seat of arbitration, the venue of the arbitration will naturally be construed to be the seat of arbitration.[17] Furthermore, the phrase "arbitration to be in a particular country" creates the presumption that the location is the arbitral seat.[18] However, this presumption can be displaced by contrary indicia.[19]

8 In *FirstLink Investments*, the parties made specific references to the Stockholm Chamber of Commerce and the court held that this evinced the parties' intention to elect Sweden as the seat of arbitration as they deliberately agreed to refer all their disputes to a specific international arbitration institution.[20] Similarly, Clause 76 clearly expresses that the SCMA Rules apply.[21] It is submitted that the specific reference to SCMA evinces the intention of the parties to choose Singapore as the seat of arbitration.

9 Furthermore, by choosing specific institutional rules, the parties had effectively agreed to give discretion to that arbitration institution to fix a seat of arbitration.[22] Here, the SCMA Rules provide that the seat of arbitration shall be Singapore unless otherwise agreed by the parties.[23] Therefore, in the absence of the contrary, the Parties intended for Singapore to be the seat of arbitration as they both had expressly agreed that the SCMA Rules applies.

---

[17] *BNA v BNB* [2020] 1 SLR 456, [69].
[18] Gary B Born, International Commercial Arbitration (Kluwer Law International, 2nd Ed, 2014), pp 2074-2075; David Joseph, Jurisdiction and Arbitration Agreements and Their Enforcement (Sweet & Maxwell, 3rd Ed, 2015), para 6.40.
[19] *BNA v BNB* [2020] 1 SLR 456, [69]; *Shagang South-Asia (Hong Kong) Trading Co Ltd v Daewoo Logistics* [2015] 1 Lloyd's Rep 504, [38]-[39].
[20] *FirstLink Investments Corp Ltd v GT Payment Pte Ltd and others* [2014] SGHCR 12 ("*FirstLink Investments*"), [17].
[21] Background, p 28.
[22] *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56, [29].
[23] The Singapore Chamber of Maritime Arbitration Rules (4th Edition) ("the SCMA Rules"), r 32.1.

(2) Singapore law, as the law of the seat, governs the arbitration agreement

10 The law of the seat should be the governing law of the arbitration agreement.[24] In *C v D,* the law governing the arbitration agreement was English law by virtue of the parties' choice to have England as the seat of arbitration.[25] Given that the seat of the arbitration in Singapore was intended by the Parties, and that they expressly agreed that the arbitration should be governed by SCMA Rules, it follows that the governing law of the arbitration agreement should be Singapore law. As such, the arbitration agreement will be valid.

B. EVEN IF GUANGZHOU IS THE SEAT, THE ARBITRATION AGREEMENT IS VALID AS ENGLISH LAW WILL APPLY

11 The arbitration agreement is the foundation of the tribunal's jurisdiction – the law of the seat merely deals with matters of procedure, but the governing law of the arbitration agreement deals with matters of validity.[26] In determining the proper law of an arbitration agreement, the following framework shall be applied which involves three-steps:

a) the parties' express choice;

b) the implied choice of the parties as gleaned from their intentions at the time of contracting; and

c) the system of law with which the arbitration agreement has the closest and most real connection.[27]

---

[24] *FirstLink Investments Corp Ltd v GT Payment Pte Ltd and others* [2014] SGHCR 12, [16]; *Black Clawson International Ltd. v Papierwerke Waldhof-Aschaffenburg A.G.* [1981] 2 Lloyd's Rep 446, 453.
[25] *C v D* [2007] EWCA Civ 1282, [14]-[15].
[26] *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1, [53].
[27] *Sulamérica Cia Nacional de Seguros SA v Enesa Engelharia SA* [2013] 1 WLR 102, [9] and [25]; *BCY v BCZ* [2017] 3 SLR 357 ("*BCY*"), [40].

(1) The parties' express choice of law is English law

12 An express choice of law is a specific statement in the terms that the contract is to be governed by a specific law.[28] In *Kabab-Ji*, the choice of law clause stated "[t]his Agreement shall be governed by …". The court held that such a phrase is reasonably understood to denote all clauses, including the arbitration agreement.[29] As such, if an arbitration agreement is found as a clause incorporated within the main contract, the entire contract should be read together with the arbitration agreement found therein.[30]

13 Clause 76 of the Rider Clauses states that the law governing the CP is English law,[31] and the Rider Clauses containing the arbitration agreement have been incorporated into the CP.[32] There is no reason to infer that the parties have excluded the arbitration agreement from their choice for English law to govern all terms of the CP. Since there are no indications militating against this interpretation,[33] English law should be the express choice of law for the arbitration agreement.

(2) Even if English law was not the express choice, English law can be implied to govern the arbitration agreement

14 As held in *Sulamérica*, the express choice of law governing the substantive contract is a strong indication of the parties' implied intention in relation to the agreement to arbitrate.[34]

---

[28] Dicey, Morris & Collins on the Conflict of Laws (Sweet & Maxwell, 15th edn, 2012), [32-047].
[29] *Kabab-Ji SAL v Kout Food Group* [2021] UKSC 48 ("*Kabab-Ji*"), [39].
[30] *Enka Insaat Ve Sanayi AS v OOO "Insurance Company Chubb" & Ors* [2020] UKSC 38, [230].
[31] Background, p 28.
[32] Background, p 8 and 26.
[33] *Enka Insaat Ve Sanayi AS v OOO "Insurance Company Chubb" & Ors* [2020] UKSC 38, [43].
[34] *Sulamérica Cia Nacional de Seguros SA and others v Enesa Engelharia SA and others* [2013] 1 WLR 102 ("*Sulamérica*"), [26].

This indication may be rebutted by the facts, in particular by terms of the arbitration agreement or how its effectiveness will be impacted by the choice of the same governing law for the arbitration agreement.[35]

15 Even if the seat of arbitration is Guangzhou and that it is different from the place of the law of the CP, this by itself is insufficient to displace the position held in *Sulamérica*.[36] Here, English law should be the implied law to govern the arbitration agreement as the terms of the agreement merely stated that Guangzhou is the venue of the arbitration and in any event, English law would not have rendered the arbitration agreement invalid.[37]

(3) In any case, this Tribunal should impute English law as the choice of law for the arbitration agreement

16 Pursuant to Rule 31.1 of the SCMA Rules, the Tribunal will apply the law that it considers applicable in the event that parties failed to designate a choice of law.[38] In the absence of a choice of law, the applicable law is what a reasonable person ought to have intended if they thought about the matter when they made the contract.[39]

17 The general rule is that the law with which the arbitration agreement is most closely connected is the law of the seat of the arbitration.[40] However, if PRC law were to apply, it

---

[35] *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1, [68].
[36] *BCY v BCZ* [2017] 3 SLR 357, [65]; *Sulamérica Cia Nacional de Seguros SA and others v Enesa Engelharia SA and others* [2013] 1 WLR 102 ("*Sulamérica*"), [26].
[37] Background, p 28 and 39.
[38] The Singapore Chamber of Maritime Arbitration Rules (4th Edition) ("the SCMA Rules"), r 31.1.
[39] *Pacific Recreation Pte Ltd v S Y Technology Inc* [2008] 2 SLR(R) 491, [49]; *The Assunzione* [1954] P 150, 179.
[40] *Sulamérica Cia Nacional de Seguros SA and others v Enesa Engelharia SA and others* [2013] 1 WLR 102, [32].

would invalidate the arbitration agreement. Reasonable commercial parties would not have wanted the arbitration agreement to be invalidated.[41] If parties have subjected their underlying contract to a law that would, if applied to their arbitration agreement, invalidate that agreement, then by virtue of the validation principle, a different proper law ought to apply such as to validate the parties' arbitration agreement.[42]

18 Presently, the Respondent contends that PRC law will invalidate the arbitration agreement as a PRC-seated arbitration cannot be administered by a foreign arbitral institute, the SCMA.[43] In *Sulamérica*, the fact that there was a serious risk that a choice of Brazilian law would undermine the arbitration agreement was a powerful factor in deciding to take the law of the main contract as the parties' choice of law for the arbitration agreement.[44] Without prejudice to the Claimant's case that the arbitration agreement is valid even under PRC law, the validation principle should likewise apply here such that English law is the law governing the arbitration agreement. Not only would this accord with the governing law of the CP, but it validates the arbitration agreement. For these reasons, the imputed choice of law for the arbitration agreement between the Parties should be English law.

---

[41] *Enka Insaat Ve Sanayi AS v OOO "Insurance Company Chubb" & Ors* [2020] UKSC 38, [291].
[42] Gary Born, International Commercial Arbitration (Kluwer Law International, 2nd Ed, 2014) at pp 24-27; Chan, Darius and Teo, Jim Yang, Re-formulating the test for ascertaining the proper law of an arbitration agreement: A comparative common law analysis. (2022). Journal of Private International Law. 17, (3), 439-472, at p 445.
[43] Background, p 5.
[44] *Sulamérica Cia Nacional de Seguros SA and others v Enesa Engelharia SA and others* [2013] 1 WLR 102, [31].

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

A. THE CLAIM FOR DEMURRAGE SHOULD NOT BE TIME-BARRED

19 Preliminarily, the Claimant's demurrage claim is not time-barred as Claimant fulfilled its obligations under Clause 14 of the Rider Clauses by presenting the claim "within 90 days after completion of discharge with all supporting documents". Specifically, it sent the Notice of Arbitration along with the BL on 22 December 2023,[45] less than 90 days after discharge was completed on 7 October 2023.[46]

20 The phrase "supporting documents" which appears in Clause 14 has been defined as the factual material which a charterer would require in order to satisfy themselves on whether the claim was well-founded or not.[47] In *The Adventure*, it was held that the documents that were to be presented in connection with the demurrage claim need not be so extensive as this would place a heavy burden on shipowners.[48] Presently, the Claimant presented the demurrage claim with all the supporting documents because it had attached the BL to the Notice of Arbitration and the said BL also incorporated the terms of the Charterparty. These documents would have substantiated the Claimant's demurrage claim.[49] For these reasons, the claim is not barred under Clause 14.

---

[45] Background, p 2.
[46] Background, p 9.
[47] *Babanaft International Co S.A. v Avant Petroleum Inc* ("*The Oltenia*") [1982] 1 Lloyd's Rep 448, 453.
[48] *Kassiopi Maritime Co Ltd v Fal Shipping Co Ltd* ("*The Adventure*") [2015] EWHC 318 (Comm), [26]-[27]; *Tankreederei GmbH & Co KG -v- Marubeni Corporation* ("*Amalie Essberger*") [2019] EWHC 3402, [32].
[49] *National Shipping Company of Saudi Arabia v BP Oil Supply Company* ("*The Abqaiq*") [2011] EWCA Civ 1127, [38]-[42].

B. DAMAGES IN ADDITION OF DEMURRAGE SHOULD BE RECOVERABLE

(1) Proving a separate type of loss is enough to claim for damages

21 As held in *Reidar v Arcos Ltd*,[50] damages are recoverable in addition to liquidated damages for detention, and the shipowner does not need to show a separate breach of an obligation with respect to the charterparty if there is a separate head of loss. Similarly, in *The Altus* which found that damages flowing indirectly or consequentially from any detention of vessel (if it occurs) are recoverable.[51] For the Claimant to recover damages in addition to demurrage, it must thus prove that there was a separate head of loss.

22 The Respondent may argue that demurrage liquidates all damages arising from a charterer's breach of obligations to complete the Cargo operations within the laytime,[52] as held by the Court of Appeal in *The Eternal Bliss*. However, it is submitted that the holding in *The Eternal Bliss* (CA) should not be followed for the following reasons. First, the historical purpose of demurrage is to only compensate the loss of the use of vessel and it would go against the understanding of the shipping industry if additional losses would have been deemed liquidated by mere payment of demurrage.[53] Second, the Court of Appeal in *The Eternal Bliss* had even acknowledged that their finding causes unfairness to shipowners.[54] This is because shipowners would not have reasonably contemplate that the

---

[50] *Aktieselskabet Reidar v Arcos Ltd* ("*Reidar v Arcos Ltd*") [1927] 1 KB 352, 358-359.
[51] *Total Transport Corporation v Amoco Trading Co.* ("*The Altus*") [1985] 1 Lloyd's Rep 423, p 435.
[52] *K Line Pte Ltd v Priminds Shipping (HK) Co Ltd* ("*The Eternal Bliss* (CA)") [2022] 1 Lloyd's Rep 22, [57].
[53] Chuah, J., *Law of International Trade: Cross-Border Commercial Transactions*, (Sweet & Maxwell, 7th Edition, 2023), p 358; Jim Leighton, "The Eternal Bliss: when certainty is not enough" Lloyd's Shipping & Trade Law 21(9) (30 November 2021).
[54] *K Line Pte Ltd v Priminds Shipping (HK) Co Ltd* ("*The Eternal Bliss* (CA)") [2022] 1 Lloyd's Rep 22, [59]; Baris Soyer, *Damages, Recoveries and Remedies in Shipping Law*, (Informa Law, 1st Edition, 2023), p 41.

demurrage agreed upon would also cover other form of claims.[55] Third, the reasoning in *The Bonde*, which the court in *The Eternal Bliss* relied on, is faulty. The court in *The Bonde* mis-cited *Reidar v Arcos Ltd*, as the latter case does not stand for the proposition that an additional and different breach is legally required before damages for a separate and different head of loss may be recovered.[56]

23 It is submitted that the High Court's reasoning in *The Eternal Bliss* should be followed by this Tribunal instead. There, Baker J endorsed *Reidar v Arcos Ltd* and held that the shipowner was allowed to recover damages in addition to their demurrage claim.[57] First, the nature of demurrage supports the proposition that a separate head of loss should be recoverable. Demurrage is defined as the agreed amount of damages which is to be paid for the delay of the ship caused by a default of the charterers at either the commencement or the end of the voyage.[58] Therefore, demurrage should only cover damages for the shipowner's loss of use and nothing more.[59]

24 Second, the various authorities on damages in addition to demurrage advances the Claimant's position. In *Suisse Atlantique* (CA), Diplock LJ stated that demurrage is the liquidated damages for detention of the vessel.[60] This would mean that there is space for

---

[55] Kalogianni, A., "Can a shipowner claim damages in addition to demurrage?" Maritime Risk International (October 2020).
[56] *Richco International Ltd v Alfred C Toepfer International GmbH* ("*The Bonde*") [1991] 1 Lloyd's Rep 136), 142; *K Line Pte Ltd v Priminds Shipping (HK) Co Ltd* ("*The Eternal Bliss* (CA)") [2022] 1 Lloyd's Rep 22, [57].
[57] *K Line Pte Ltd v Priminds Shipping (HK) Co Ltd* ("*The Eternal Bliss* (HC)") [2020] EWHC 2373, [128].
[58] *Harris v Jacobs* [1885] 15 QBD 247, p 251; *President of India v Lips Maritime Corporation* ("*The Lips*") [1987] 2 Lloyd's Rep 311, p 315 (*per* Lord Brandon).
[59] *Dias Compania Naviera SA v Louis Dreyfus Corporation* [1978] 1 Lloyd's Rep 325, p 328.
[60] *Suisse Atlantique Sociόétόé d'Armement Maritime SA v. NV Rotterdamsche Kolen Centrale* ("*Suisse Atlantique* (CA)") [1965] 1 Lloyd's Rep 533, 538.

losses that are not included within "detention" to be recoverable.[61] Furthermore, in the subsequent case of *The Adelfa*, Evans J held that if further losses beyond demurrage can be shown, the shipowner should be able to recover such losses.[62]

(2) The loss of employment at Kaohsiung constituted a separate head of loss

25 It is submitted that the loss of employment at Kaohsiung due to the delayed discharge falls outside the scope of demurrage. The scope of demurrage is said to only liquidate the normal consequences of the delay of the vessel rather than every possible consequence.[63] As held in *Inverkip*, demurrage is limited to the detention of the vessel and only covers the vessel's loss of time.[64] In *Reidar v Arcos Ltd*, the shipowners were able to recover additional damages because their claim was in substance and in form distinct from any claim for the detention of the vessel.[65]

26 As such, demurrage only reflects the full cost to shipowners for keeping their ship detained in port.[66] On the present facts, the loss suffered by the Claimant was the loss of employment because the charterers for the vessel's next fixture had cancelled the charterparty.[67] It is argued that such loss should not be considered a normal consequence of the delay as it is intuitively distinct from anything that would be naturally included under demurrage.

---

[61] Gay, R., "Damages in addition to demurrage", [2004] L.M.C.L.Q. 72, p 79.
[62] *Adelfamar SA v. Silos e Mangimi Martini SpA* ("*The Adelfa*") [1988] 2 Lloyd's Rep 466, 472.
[63] Gay, R., "Damages in addition to demurrage", [2004] L.M.C.L.Q. 72, p 102.
[64] *Inverkip Steamship Co Ltd v. Bunge & Co* ("*Inverkip*") [1917] 2 KB 193, 198.
[65] *Aktieselskabet Reidar v Arcos Ltd* ("*Reidar v Arcos Ltd*") [1927] 1 KB 352, 362.
[66] *Triton Navigation v Vito*l ("*The Nikmary*") [2003] EWHC 46, [47].
[67] Background, p 9.

C. ALTERNATIVELY, THERE WAS A BREACH OF AN IMPLIED TERM THAT RESPONDENT WAS TO TAKE DELIVERY OF CARGO IN A REASONABLE TIME

27 Even if demurrage does liquidate the whole of the damage arising from the breach of the charterparty, the Claimant can still recover damages for the breach of a separate obligation. Here, the separate obligation is the Respondent's duty to take delivery of the Cargo in a reasonable time. The general rule, in the absence of a contractual provision to the contrary effect, is that the vessel owners have the sole obligation to discharge the Cargo.[68] While the CP and the BL do not expressly provide that the consignee must take delivery of the Cargo within reasonable time, there was an implied term obliging the Respondent to have done so ("the **Term**").

(1) The Term should be implied into the contract of carriage

28 The general applicable principles for the implication of terms are set out in *Marks & Spencer*.[69] First, a term can only be implied if it is necessary to give the contract business efficacy or to the extent that without such a term, the contract would lack practical or commercial coherence. Second, if such a term was suggested to the parties, they would have agreed to such. Third, the term implied must have been capable of clear expression. Most importantly, no term should be inconsistent with the express terms.[70]

---

[68] *Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc (The Jordan II*) [2005] 1 Lloyd's Rep 57, [11]-[14].
[69] *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* ("*Marks & Spencer*") [2016] AC 742).
[70] *UTB LLC v Sheffield United Ltd* [2019] EWHC 2322, [203].

29 Here, the Term should be implied because of the express clause within the Rider Clauses which stipulated that the consignee is to be held responsible and liable for the payment of demurrage.[71] In the *Sea Master*, the court held that the contract of carriage would not lack practical or commercial coherence if the implied term which obligated the bank who was the consignee to take delivery of the cargo within reasonable time as the charterparty expressly provided that the charterer was liable for demurrage.[72]

30 Conversely, the CP in the present case does not provide that the charterer was solely responsible for demurrage. Clause 27 shows that the consignee is also responsible if there were any delays that occurred. It follows that the Respondent who was the consignee should have done what it could to prevent any unreasonable delay to the vessel. Given that there is no inconsistency with the express terms of the CP, the Respondent was under an implied duty to take delivery of the Cargo when they became lawful holders of the BL on 3rd October.[73] For these reasons, the Term should be implied. Since the Term was breached when the Respondent failed to take delivery of the Cargo within a reasonable time, the Claimant should be able to recover damages.

(2) A breach of a separate obligation is sufficient for Claimant to recover damages

31 Even if there was a separate obligation, to recover for damages, there must have also been a separate type of loss.[74] In *Chandris*, even though there was a separate breach of the

[71] Background, p 24.
[72] *Sea Master Shipping Inc v Arab Bank (Switzerland) Ltd and another* ("*Sea Master*") [2020] EWHC 2030, [33].
[73] Background, p 37.
[74] Schofield, J., *Laytime and Demurrage* (Informa Law, 8th Edition, 2021), p 461.

charterparty besides the detention of the vessel, damages beyond demurrage were not available as the only loss was the prolongation of the vessel in the port.[75] If the loss of employment in Kaohsiung were to be taken to fall within the scope of what demurrage covers and simply a normal consequence of detention, it is still submitted that the breach of the Term will allow Claimant to still claim for damages in addition to demurrage.

32 There are various authorities which support the proposition that a separate breach is sufficient to claim damages even if the only loss fell within the normal or usual consequences of the detention of the vessel. In *London Arbitration 19/80*,[76] damages in addition to demurrage was allowed because the charterers' altercation with the receivers which resulted in the delay in the discharge of cargo, fell outside the ambit of laytime. This altercation was seen to be an independent cause of action and the vessel owners were entitled to damages in addition to demurrage.

33 Furthermore, in *The Lee Frances*,[77] it was held that the charterers were in breach of a separate provision within the charterparty which provided that the charterers guarantee discharge by a certain time. In breach of this separate obligation, the vessel owners were entitled to damages in addition to demurrage. For these reasons, given that the Respondent has failed to take delivery of the Cargo within a reasonable time and that the Term under the contract of carriage has been breached, this should be sufficient for the Claimant to obtain damages in addition to demurrage.

---

[75] *Chandris v Isbrandtsen-Moller* ("*Chandris*") [1951] 1 KB 240, p 249.
[76] London Arbitration 19/80 (24 July 1980) ("*London Arbitration 19/80*") LMLN 19.
[77] *R & H Hall v. Vertom Scheepvaart en Handelsmaatshapi BV* ("*The Lee Frances*") [1989] LMLN 253 (Unreported); Schofield, J., *Laytime and Demurrage* (Informa Law, 8th Edition, 2021), p 458-459.

III. THE CLAIMANT IS NOT LIABLE TO THE RESPONDENT IN MISDELIVERY

A. THE BL, BEING A STRAIGHT BILL OF LADING, DOES NOT REQUIRE PRESENTATION FOR THE DELIVERY OF THE CARGO

34 A carrier is obliged to only deliver cargo upon presentation of the bill of lading.[78] However, for a straight bill of lading, the carrier is entitled and bound to deliver the goods to the originally named consignee without production of the bill.[79] Here, the Respondent was named as the consignee under the BL,[80] making the bill a straight bill of lading.[81] As such, the Claimant should not be liable for misdelivery as presentation of the bill is not a precondition for delivery if the bill was a straight bill of lading.

B. EVEN IF PRESENTATION OF THE BL WAS REQUIRED, THE RESPONDENT IS NOT VESTED WITH RIGHTS OF SUIT AGAINST THE CLAIMANT AS IT IS NOT THE LAWFUL HOLDER OF THE BL

35 Here, as the BL is governed by English law, the Carriage of Goods by Sea Act 1992 ("COGSA 1992") applies. Pursuant to s 2(1) of the COGSA 1992, the lawful holder of a bill of lading is vested with the rights of suit under the contract of carriage.[82] To be a lawful holder, the Respondent must:

a) be a person with possession of the bill who, by virtue of being the person identified in the bill, is the consignee of the goods to which the bill relates; and

---

[78] *Skibsaktieselskapet Thor Thoresens Linje v H Tyrer & Co Ltd* [1929] 35 Ll L Rep 163, 170; *Sze Hai Tong Bank v Rambler Cycle Co Ltd* [1959] MLJ 200, 201.
[79] *The Brij* [2001] 1 Lloyd's Rep 431; *Benjamin's Sale of Goods* (5th Ed), para 18-014.
[80] Background, p 8.
[81] Girvin, Stephen, Carriage of Goods by Sea (Oxford University Press, 3rd edn, 2022), para 5.16.
[82] Carriage of Goods by Sea Act 1992 ("COGSA 1992"), s 2(1).

b) become the holder of the bill of lading in good faith.[83]

36 As held in *The Aegean Sea*, good faith connotes honest conduct.[84] It is arguable that a financier does not meet the threshold of honest conduct if it did not look to the bill of lading as security at the time it financed the purchase of the cargo, but later attempts to bring a claim on such purported security.[85] Here, the Respondent had not regarded the BL as security when it issued the letter of credit as it did not even take steps to take delivery of the Cargo despite knowing that the Cargo will be delivered to the Charterers. This was evinced in its email correspondence with the Claimant that the Charterers was to do what was deemed fit and that the Respondent will not interfere with the delivery of the Cargo.[86]

37 In *Maersk Tankers*, the court found that there was a triable issue as to whether the bank looked to the bills of lading as security, as the bank had been willing to permit payment under the letter of credit without presentation of the bill of lading and against a letter of indemnity.[87] Similarly, the Respondent was willing to permit payment under the letter of credit against an LOI,[88] as opposed to the presentation of the BL. The LOI accepted by the Respondent expressly stated that they agreed to accept delivery of the Cargo without the presentation of the full set of 3/3 original BL.[89]

---

[83] COGSA 1992, s 5(2)(a).
[84] *Aegean Sea Traders Corporation v Repsol Petroleo SA and another (The "Aegean Sea")* [1998] 2 Lloyd's Rep 39
[85] *Oversea-Chinese Banking Corporate Limited v Owner and/or Demise Charter of the vessel "STI Orchard"* ("*The STI Orchard*") [2022] SGHCR 6, [60].
[86] Background, p 43-44.
[87] *Standard Chartered Bank (Singapore) Ltd v Maersk Tankers Singapore Pte Ltd (Winson Oil Trading Pte Ltd, intervener)* ("*Maersk Tankers*") [2022] SGHC 242, [57].
[88] Background, p 43.
[89] Background, p 45.

38 Despite these indications that the Respondent had earlier not viewed the BL as security, it is now bringing the misdelivery counterclaim on the basis that the Claimant had breached the obligation to not deliver the Cargo except upon the presentation of the BL.[90] This shows that the Respondent does not meet the standard of conduct and consequently did not become the holder of the BL in good faith.

C. EVEN IF THE RESPONDENT WAS NOT THE LAWFUL HOLDER, IT CONSENTED TO THE CARGO BEING DISCHARGED WITHOUT THE PRESENTATION OF THE BL

39 While the defence of consent is generally difficult to establish,[91] it will apply when "something was said or done by the consenters which had affected the mind of the ship's master, encouraging him to make delivery without the bills of lading".[92] The defence of consent may be established through any of the following:

a) Express consent in the form of written instructions from the holder to shipowner;

b) Acquiescence; or

c) Actual authority from the holder for a third party to take delivery of the goods.[93]

---

[90] Background, p 37.
[91] Sir Richard Aikens et al, Bills of Lading (Informa Law, 3rd Ed, 2020), para 8.48-8.49.
[92] *Nederlandsche Handel-Maatschappij v Strathlorne Steamship Company* [1931] 39 Lloyd's Rep 171, 175-176.
[93] *Oversea-Chinese Banking Corporate Limited v Owner and/or Demise Charter of the vessel "STI Orchard"* ("*The STI Orchard*") [2022] SGHCR 6, [70]; *Halsbury's Laws of England* vol 16 (Butterworths, 4th Ed) (1992 Reissue) para 924; *Fimbank Plc v Discover Investment Corporation* ("*The Nika*") [2021] 1 Lloyd's Rep 109, [26].

(1) The defence of consent is established through acquiescence

40 Here, there was no express communication between the Parties prior to the discharge of the Cargo. But there was acquiescence in the form of inactivity under such circumstances that the Respondent's assent to the release of the Cargo without the production of the BL may be reasonably inferred from it.[94]

41 Here, the Respondents were informed that the Vessel had arrived at Busan on 1st October 2023 and that the Charterers would be taking delivery of the Cargo by invoking Clause 57 of the Rider Clauses in the Charterparty.[95] Despite its knowledge that the Cargo would be delivered to the Charterers, the Respondent did not take active steps to take delivery of the Cargo itself. Instead, the Respondent told the Charterers to "do as you deem fit as Charterers" and chose not to interfere as long as the loan is repaid.[96] For these reasons, the Respondent's non-intervention in the Charterers taking delivery of the Cargo without the BL suggests that it had acquiesced in the Claimant's release of the Cargo without production of the BL.

(2) The Respondent gave the Charterers actual authority to take delivery of the Cargo

42 Consent had been given in the form of actual authority from the Respondent to the Charterers to take delivery of the goods without production of the BL.[97] It was within the rights of the Respondent to have expressly communicated to the Charterers to not have the

---

[94] *The "Neptra Premier"* [2001] 2 SLR(R) 754, [38].
[95] Background, p 40.
[96] Background, p 46.
[97] *Fimbank Plc v Discover Investment Corporation* ("*The Nika*") [2021] 1 Lloyd's Rep 109, [26].

Cargo discharged without presentation of the BL. However, the Respondent had communicated that the Charterers should do what it deemed fit as Charterers and that the Respondent would not interfere as long as the loan was repaid.[98]

43 While the Respondent may allege that it had not been the holder of the BL at the time of the delivery in Busan, the defence of consent can cover instructions emanating from a person who subsequently become the holder of the bills of lading after delivery.[99] Here, Respondent had given express instructions for the Charterers to do as it saw fit in order not to incur demurrage, and Respondent had stated that it would not interfere with the Charterers' actions.[100] The most appropriate action for Charterers to take would have been to take delivery of the cargo such that the Vessel would be able to leave for Kaohsiung. Therefore, the Respondent authorised the Charterers to take delivery of the Cargo.

D. ALTERNATIVELY, THE RESPONDENT IS ESTOPPED FROM ASSERTING A MISDELIVERY CLAIM

44 To establish estoppel by acquiescence, the Claimant must prove the following five requirements (the "***Nasaka* requirement**"):

a) the Claimant must be mistaken as to his own legal rights;

b) the Claimant must have expended money or done some act on the faith of his mistaken belief;

c) the Respondent must know of his own rights;

---

[98] Background, p 44.
[99] *The Cherry* [2002] SGCA 49.
[100] Background, p 44.

d) the Respondent must know of the Claimant's mistaken belief; and

e) the Respondent must encourage the Claimant in the Claimant's expenditure of money or other act, either directly or by abstaining from asserting his legal right.[101]

45 The first *Nasaka* requirement requires the Claimant to have been mistaken about its entitlement to deliver the Cargo to the Charterers without the presentation of the BL.[102] Here, the Charterers invoked Clause 57 of the CP, which allowed the Claimant to release the Cargo to them upon presentation of the Charterers' LOI.[103] This evinces the Claimant's mistaken belief that it was entitled to deliver the Cargo to the Charterers, even without the presentation of the BL.

46 The second *Nasaka* requirement would have been fulfilled as well as the Claimant's mistaken belief led it to discharge the cargo after the Charterers had informed the Claimants to commence discharge after providing the LOI.[104] The third Nasaka requirement is satisfied as the Respondents knew of their rights to demand delivery of the Cargo when they wrote to the Claimant on 29th November 2023 claiming to be the holder of the BL.[105]

---

[101] *Halsbury's Laws of England* vol 16 (Butterworths, 4th Ed) (1992 Reissue) para 1473; *Oversea-Chinese Banking Corporation Limited v Owner and/or Demise Charterer of the vessel "Yue You 902"* ("*The Yue You 902*") [2019] SGHC 106, [125]; *Nasaka Industries (S) Pte Ltd v Aspac Aircargo Services Pte Ltd* [1999] 2 SLR(R) 817 ("*Nasaka*"), [70].
[102] *Oversea-Chinese Banking Corporation Limited v Owner and/or Demise Charterer of the vessel "Yue You 902"* ("*The Yue You 902*") [2019] SGHC 106, [126].
[103] Background, p 40.
[104] Background, p 9.
[105] Background, p 10.

47 Under the fourth *Nasaka* requirement, the Claimant must prove that the Respondent knew of its mistaken belief that it was entitled to deliver the goods to the Charterers without the presentation of the BL. In *Nasaka*, there was no evidence of any discussions between the parties prior to any of the shipments as to the person to whom the defendant was going to make delivery to.[106] The court held that in any case, the shipping instructions clearly showed that the consignee was the bank and there was no reason that led to misunderstanding on the part of the defendant.[107] While the named consignee of the BL was the Respondent bank, the present case is distinguishable from *Nasaka*.

48 Here, there were discussions prior to the release of the Cargo as the Respondent was informed of the Vessel's arrival at Busan at 1 October 2023 and that the Charterers would be taking delivery of the Cargo by invoking Clause 57 of the Rider Clauses of the CP.[108] Even if there was no actual knowledge, the Respondent had constructive knowledge of the terms in the CP that obligated the Claimant to release Cargo upon presentation of an LOI.[109] Therefore, the fourth *Nasaka* requirement is also fulfilled.

49 For the fifth requirement to be satisfied, there must have been something to which the Respondent's silence did to cause the Clamant to undertake an action it would not otherwise have done.[110] In *The Yue You 902*, the defendant had the benefit of an LOI to

---

[106] *Nasaka Industries (S) Pte Ltd v Aspac Aircargo Services Pte Ltd* ("*Nasaka*") [1999] 2 SLR(R) 817, [73].
[107] *Nasaka Industries (S) Pte Ltd v Aspac Aircargo Services Pte Ltd* ("*Nasaka*") [1999] 2 SLR(R) 817, [73].
[108] Background, p 40.
[109] Background, p 46-47.
[110] *Oversea-Chinese Banking Corporation Limited v Owner and/or Demise Charterer of the vessel "Yue You 902"* ("*The Yue You 902*") [2019] SGHC 106, [127].

cover it for potential liabilities arising from misdelivery. The court held that the defendant was induced to undertake the delivery of the cargo due to the coverage provided by the LOI and not because of the bank's silence.[111] While Clause 1 of the Charterers' LOI indemnifies the Claimant from the potential liabilities arising under the delivery of the Cargo, the present case is distinguishable from *The Yue You 902*.

50 Here, the Claimant had only exposed itself to such liabilities because of the Respondent's inaction. Prior to the presentation of the Charterers' LOI, the Claimant waited days for discharge instructions.[112] Furthermore, the Claimant had to discharge the Cargo by 30th September 2023 to allow sufficient time for the Vessel to arrive in Kaohsiung within the laycan for its next employment.[113] This, coupled with the Respondent's silence, eventually led to the Claimant releasing the Cargo when it was presented with the Charterers' LOI on 3rd October 2023. Since all five requirements are satisfied, the Respondent is estopped from raising its misdelivery claim.

E. IN ANY CASE, THE RESPONDENT DID NOT SUFFER ANY LOSSES DUE TO THE CARGO BEING DISCHARGED BY THE LOI

51 Even if the defence to misdelivery fails, the Claimant should only be liable to the Respondents for nominal damages. For substantial damages to be awarded, the misdelivery must be the effective or proximate cause of the loss faced by the aggrieved party.[114]

---

[111] *Oversea-Chinese Banking Corporation Limited v Owner and/or Demise Charterer of the vessel "Yue You 902"* ("*The Yue You 902*") [2019] SGHC 106s, [127].
[112] Background, p 8-9.
[113] Background, p 7.
[114] *Unicredit Bank AG v Euronav NV* ("*The Sienna*") [2023] 1 All ER (Comm) 166, [103].

52 In *The Nika*, the court found the parties had always intended for the cargo to be discharged without production of the bills of lading.[115] The effective loss there was because the bank became a victim of fraud when the cargo was then delivered because of forged bills of lading; however, this had nothing to do with the shipowner. Similarly, the Respondent had stated they would not interfere as long as its loan was repaid. The loss faced by the Respondent here was because of the failure to pay on part of the Charterers who have entered provisional liquidation, and it was not because of the fault of the Claimant.

53 Furthermore, the Claimant ought to be able to rely on the "no loss" defence which is the scenario where the carrier show the same events would have happened in that even if the bank had the original bills of lading at the point of time of discharge, they would have wanted the same person to receive it.[116] Here, the BL had been in possession of the Respondent since 3rd October 2023 and discharge happened on 4th October 2023.[117] It was well-within the rights of the Respondent to take delivery of it instead of having the Cargo discharged pursuant to the Charterers' LOI. This coupled with the continuous refusal to grant the trust receipt[118] to Charterers suggests that in any case, the Respondents had all along wanted the Charterers to receive it at the point of time of discharge. As such, the breach by the Claimant did not cause the loss in the first place.

[115] *Fimbank Plc v Discover Investment Corporation* ("*The Nika*") [2021] 1 Lloyd's Rep 109, [20]-[22].
[116] *Unicredit Bank AG v Euronav NV* ("*The Sienna*") [2023] 1 All ER (Comm) 166, [120]-[121].
[117] Background, p 9 and 37.
[118] Background, p 46.

54 Finally, the invoice value of the cargo should not necessarily be determinative of the quantum of loss and the proper assessment of damages should be on the basis of putting a plaintiff in the position, as far as money can do, in which it would have been had the contract been performed.[119] As earlier established, even if the contract had been performed, the same losses would have been incurred by the Respondents as their losses did not emanate from the breach by the Claimant.

IV. PRAYER FOR RELIEF

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

a) declare that it has jursidcition to determine the Claimant's claim for damages;

b) declare that the Claimant can claim for unliquidated damages in addition to demurrage amounting to USD 3,650,000;

c) award the Claimant any additional interests, and costs; and

d) declare that the Respondent is not entitled to the amount sought after in the misdelivery claim.

[119] *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel "Navig8 Ametrine"* ("*Navig8 Ametrine*") [2022] SGHCR 5, [35] and [48].