22nd INTERNATIONAL MARITIME LAW ARBITRATION MOOT

July 2024

IN THE MATTER OF AN INTERNATIONAL ARBITRATION TO BE ADJUDICATED BY THIS TRIBUNAL

BETWEEN:

TOMAHAWK MARITIME S.A. …. *CLAIMANT*

AND

VEGGIES OF EARTH BANKING LTD. …. *RESPONDENT*

MEMORANDUM ON BEHALF OF VEGGIES OF EARTH BANKING LTD.
(RESPONDENT)

COUNSEL

COUNSEL NO 1 (NAME) COUNSEL NO 2 (NAME) COUNSEL NO 3 (NAME)

TEAM NAME

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LIST OF ABBREVIATIONS

Abbreviation	Full Title
Bill(s) of Lading	The Tanker Bill of Lading dated 4 September 2023 (B/L No. COW-001A)
C/P	The Tanker Voyage Charter party dated 1 September 2023 (VEGOILVOY 1/27/50)
Cargo	The cargo of 16,999.01 MT cargo of crude palm oil shipped on board the Vessel under the Bill of Lading
Claimant	Tomahawk Maritime S.A.
COGSA	Carriage of Goods by Sea Act 1992
LOI	Letter of indemnity dated 3 October 2023
L/C	Letter of credit issued to Yu Shipping Ltd.
Master	Capt. NGAU TAU, Master of the vessel at the material times
Notice of Arbitration	The Notice of Arbitration issued by BEEFEATER SOLICITORS LLP (solicitors for the CLAIMANT) to the RESPONDENT dated 22 December 2023
PRC Arbitration Law	Arbitration Law of the People's Republic of China
Respondent	Veggies of Earth Banking Ltd
Record	2024 International Maritime Law Arbitration Moot Problem

Rider Clauses	The Tanker Voyage Charter party dated 1 September 2023 (VEGOILVOY 1/27/50) rider clauses
SCMA	Singapore Chamber of Maritime Arbitration
SCMA Rules	The SCMA Arbitration Rules 4th edition
Vessel	MT. NIUYANG

LIST OF AUTHORITIES

CASES AND ARBITRAL AWARDS	
No.	Case Name
1	*BNA vs BNB and another* [2019] SGCA 84 (Singapore)
2	*Hadley v Baxendale* [1854] EWHC J70 (United Kingdom)
3	*Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, HL
4	*Leduc v. Ward* (1888) 20 Q.B.D. 475
5	*Lickbarrow v Mason* [1794] 5 TR 683.
6	*London Arbitration 1/23*
7	*Miramar Maritime Corp v Holborn Oil Trading Ltd (The Miramar)* [1984] 1 AC 676; [1984] 2 Lloyd's Rep 129
8	*Official Assignee of Madras v Mercantile Bank of India Ltd* [1935] AC 53 (PC)
9	*Shagang South-Asia (Hong Kong) Trading Co Ltd v Daewoo Logistics* [2015] EWHC 194
10	*The Sormovskiy 3068* [1994] 2 Lloyd's Rep 266, QB
11	*The Sea Master, Sea Master Shipping Inc v Arab Bank (Switzerland) Ltd* [2020] EWHC 2030 (Comm) (United Kingdom)
12	*Tradigrain S.A. and Others v. King Diamond Shipping S.A. (The "Spiros C")* [2000] 2 Lloyd's Rep. 319
13	*Trafigura Maritime Logistics Pte Ltd v Clearlake Shipping Pte Ltd & Anor; and Clearlake Shipping Pte Ltd v Petroleo Brasileiro S.A.* [2020] EWHC 995 (Comm)

14	*Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48 (United Kingdom)
15	*Unicredit Bank AG v Euronav NV (The Sienna)* [2023] EWCA Civ 417

LEGISLATIONS	
No.	Title of Legislation
1	Arbitration Law of the People's Republic of China, 1994 (People's Republic of China).
2	Carriage of Goods by Sea Act, 1992 (United Kingdom).
3	Singapore Chambers of Maritime Arbitration (SCMA) Rules (4th Edition) (Singapore).

BOOKS	
No.	Title
1	John Schofield, *Laytime and Demurrage* (Informa Law, 8th edn, 2022)
2	Julian Cooke et al, *Voyage Charters* (Informa Law, 5th ed, 2022).
3	Richard Aikens et al, *Bills of Lading* (Informa Law, 2nd edn, 2016)
4	Simon Baughen, *Shipping Law* (Routledge, 8th edn, 2023)

STATEMENT OF FACTS

1. This arbitration proceeding stems from a Voyage Charter party (the "Charterparty") executed on September 1st, 2023, between Tomahawk (the "Claimants") and Yu Shipping Ltd (the "Charterers"). The charter party governed the transportation of a consignment of crude palm oil from Bintulu, Malaysia, to Busan, South Korea, utilizing an amended VEGOILVOY charter form with supplemental rider clauses.
2. Upon the loading of the cargo, a Bill of Lading numbered COW-001A was issued on September 4th, 2023, acknowledging the receipt of 16,999.01 metric tons of crude palm oil. The Bill of Lading explicitly integrated the terms of the charter party, including the arbitration clause. Veggies of Earth Banking Ltd (the "Respondents"), the lawful holder of the Bill of Lading, and the financier of the Charterers, is also the Respondent in this arbitration.
3. Upon payment for the Cargo, the Respondent thus became the lawful holder of the Bill of Lading and had the constructive possession of the Bill.
4. The vessel had arrived in Busan on September 20th, 2023, and a notice of readiness was tendered the same day, whereas the Owners tried to contact the Charterers to initiate the discharge. However, the original Bill of Lading was only physically delivered to the Respondents on October 3, 2023.
5. Therefore, the discharge began only on October 4th, 2023, and completed on October 7th, 2023.
6. After the discharge, the vessel sailed towards its next port of call, where it was stuck outside the port limits due to bad weather.

7. This delay led to the Vessel missing the cancellation date (1-14 October 2023, Kaohsiung) of its subsequent two-year time charter fixture. Consequently, the time charterers exercised their prerogative to cancel the fixture on October 16th, 2023. However, the Claimants managed to secure the re-employment of the Vessel through negotiations, nevertheless, the new hire rate was lower. The Claimants blame the Respondents for the said delay and in addition to or as an alternative to the demurrage, seek unliquidated damages from the Respondents.
8. The claimant appointed Mr Nivor Ohm as its party-nominated arbitrator on 22 December 2023. The respondent appointed Dieter Strick of Address: 4404 South Street London SE49 3EP as its party-nominated arbitrator on 5 January 2024, reserving its right to raise its objection to the jurisdiction of the Tribunal at the appropriate juncture.
9. The arbitration agreement is embodied in an arbitration clause incorporated in the BL providing as follows:

   "*General Average and Arbitration, if any, to be held in Guangzhou with three arbitrators and SCMA Rules. English law to apply to the CP*."
10. The Claimants assert a claim against the Respondents for the breach of the laytime provisions by failing to discharge the cargo within the stipulated 96-hour period outlined in the Charterparty.
11. The breaches of laytime provisions entitle the aggrieved party to claims for demurrage only, as prescribed by the contractual terms.

12. The Respondent has maintained continuous possession of the Bill of Lading since 3 October 2023. As the lawful holder of the Bill of Lading, the Respondent is entitled to the delivery of the Cargo upon presentation of the Bill of Lading to the Claimant.
13. The Claimant breached its obligations by delivering the Cargo against a Letter of Indemnity, disregarding the Respondent's rights as the lawful holder of the Bill of Lading. The Respondents, in their capacity as the rightful holder of the Bill of Lading, refute the Claimants' claim and submit a counterclaim for losses arising from the Claimants' purported breach of the Bill of Lading, pertaining to the misdelivery of the cargo to the Charterers without the production of the original Bill of Lading
14. The misdelivery of the Cargo by the Claimant has caused the Respondent substantial loss and/or damage amounting to USD 4,249,752.50, equivalent to the invoice price of the Cargo.
15. The Respondents also challenge the validity of the Arbitration clause.

ARGUMENTS

I. INVALIDITY OF THE ARBITRATION CLAUSE

1. The Respondent acknowledges the appropriate interpretation that recognizes a valid arbitration clause with pre-determined parameters. This interpretation construes the clause as mandating arbitration, "if any," to be held in Guangzhou, China, with three arbitrators appointed under the Singapore Chambers of Maritime Arbitration (SCMA) Rules.

2. In that respect, if the interpretation of a valid arbitration clause with a designated seat in Guangzhou is adopted, the applicable law for determining the clause's validity becomes relevant.
3. The Respondent maintains that, given the designated seat of arbitration is in Guangzhou and that there is a potential conflict between the chosen arbitral institution and PRC law. While the clause mandates administration by the SCMA, PRC law might invalidate the administration of PRC-seated arbitrations to domestic institutions with foreign arbitral institution rules. This potential conflict could render the clause invalid under PRC law.
4. Furthermore, Article 10 of the PRC Arbitration Law provides that "… 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…"
5. Therefore, it is submitted that the SCMA potentially does not qualify as an "Arbitration Commission" under Article 10 of the PRC Arbitration Law. This implies that a very important factor in successfully holding an arbitration in China is lacking.
6. It is further submitted that the arbitration "seat" encompasses not just the geographical location but also the legal framework governing the proceedings as supported by the Singapore Supreme Court decision in *BNA vs BNB*.[1]

[1] *BNA vs BNB and another* [2019] SGCA 84.

7. However, the Respondents contend that even if the legal framework for the arbitration requires further analysis, the designation of Guangzhou as the seat demonstrates a clear intention to have the dispute resolved within the PRC legal system.

8. Moreover, the parties (The Respondent and The Claimant) have agreed upon the application of SMRA rules, further solidifying the jurisdictional framework. Additionally, the parties have mutually agreed upon the application of SMRA rules, which, according to Rule 32.1, typically designate Singapore as the seat of arbitration unless otherwise specified.

9. In *Shagang South-Asia (Hong Kong) Trading*,[2] the court's decision in this case emphasizes the primacy of the chosen arbitration location in determining procedural law application. And despite any mention of English law, the agreement's selection of Hong Kong for arbitration implies the application of Hong Kong procedural law.

10. Therefore, we submit that the arbitration agreement is invalid, and the Tribunal lacks jurisdiction. As Guangzhou is the putative chosen seat of arbitration, it is invalid under PRC law for a PRC-seated arbitration to be administered by a foreign arbitral institute.

II. THE CLAIMANTS ARE NOT ENTITLED TO CLAIM FOR UNLIQUIDATED DAMAGES

1. The existence of express terms governing cargo delivery, such as laytime and demurrage provisions within the voyage charter, precludes the implication of an additional term regarding the speed of delivery, or as asserted by the Claimants, as

[2] *Shagang South-Asia (Hong Kong) Trading Co Ltd v Daewoo Logistics* [2015] EWHC 194.

'reasonable discharge'.[3] It has been held by the Courts where an express agreed contractual mechanism of laytime and demurrage exists, there is no need to consider any implied terms in such instances.[4]

2. Furthermore, it is submitted that it is an established principle to treat demurrage as the exclusive remedy for exceeding laytime and for any breach of the charterer's obligation to load/discharge within the laytime stipulated in the charter party.[5]
3. With regards to Clause 38 of the rider Clauses, the Respondents assert that this agreement was specifically made between the Charterers and the Claimants,[6] the Respondents were not privy to this arrangement and the Respondents lacked actual knowledge of any potential consequences when entering the agreement until they received the copy of the Charterparty and the Bill of Lading, when the vessel was already on demurrage.[7]
4. Furthermore, as per a strict construction of Clause 38, it merely identifies the next employment and does not specifically allocate the risks or any consequences to any breach in this context.[8]
5. Moreover, the losses claimed by the Claimants cannot be considered foreseeable and are too remote under the established principles of *Hadley v Baxendale*.[9] Recoverable

[3] Julian Cooke et al, *Voyage Charters* (Informa Law, 5th ed, 2022), para 9.3.
[4] *The Sea Master, Sea Master Shipping Inc v Arab Bank (Switzerland) Ltd* [2020] EWHC 2030 (Comm).
[5] *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48.
[6] *Leduc v. Ward* (1888) 20 Q.B.D. 475, 484.
[7] Record 9.
[8] Record 38.
[9] *Hadley v Baxendale* [1854] EWHC J70.

losses must either naturally flow from the breach itself or be reasonably contemplated by both parties at the time of contracting.[10]

6. Even if the rider Clause 38 could be interpreted as creating an independent obligation, the discharge was completed with sufficient time to reach the next port within the lay can period of the subsequent charter. The actual delay resulted solely from adverse weather near the following port of call. Absent this unforeseen event, the owners would have met the lay can requirement of their subsequent charter.
7. Therefore, for the reasons listed above, the Respondents cannot be held liable for the said unliquidated damages. However, the demurrage liability of the Respondents depends upon a successful incorporation of the demurrage terms into the Bill of Lading.[11]

III. COUNTERCLAIM FOR THE MISDELIVERY

1. The Bill of Lading acts as a critical document in cargo transportation, functioning as a title document.[12] This implies that whoever possesses the original Bill of Lading holds the legal right to claim the cargo upon presentation at the destination port.[13] It is submitted that as per the Carriage of Goods by Sea Act 1992, the Respondents are lawful holders of the legal Bill of Lading.[14] This allows them to rightfully enjoy the rights of the terms of the Bill of Lading.[15]

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[10] *See* London Arbitration 1/23.
[11] *Miramar Maritime Corp v Holborn Oil Trading Ltd (The Miramar)* [1984] 1 AC 676; [1984] 2 Lloyd's Rep 129.
[12] *Lickbarrow v Mason* [1794] 5 TR 683.
[13] Carriage of Goods by Sea Act 1992, s. 2(1) ("COGSA").
[14] COGSA, s. 3(1), s. 5(2).
[15] COGSA, s. 2(1).

2. Correspondingly, the Claimant had a legal obligation to withhold delivery of the cargo until the lawful holder comes forward,[16] i.e., in this case, the Respondents.[17] By failing to obtain the Bill of Lading before releasing the cargo, the Claimants have breached their obligations as a carrier.[18]
3. With regards to Clause 57 allowing discharge without the production of a Bill of Lading, it is submitted that the Respondents were not privy to the said arrangement.[19] The Respondents were made privy to this arrangement only when the copies of the Bill of Lading and Charterparty were shared, when the vessel was already ready for discharge, thus constituting a late notice. It is an established principle that the incorporated clause must not affect the basic obligation of the shipowner to make delivery only on the presentation of an original bill of lading.[20] Therefore, the Claimant must be prevented from imposing the terms of Clause 57 on the Respondents and the Claimants must be held responsible for the value of the goods.[21]
4. With regards to the Claimant's allegation for issuing a Letter of Credit to the Charterer against a separate Letter of Indemnity, it is submitted that in the oil trade, due to its nature, it is a common market practice to issue such a Letter of Credit against shipping documents apart from the Bill of Lading.[22] Therefore, such conduct does not misplace

[16] *See Official Assignee of Madras v Mercantile Bank of India Ltd* [1935] AC 53 (PC).
[17] Richard Aikens et al, *Bills of Lading* (Informa Law, 2nd edn, 2016) para 5.31.
[18] Simon Baughen, *Shipping Law* (Routledge, 8th edn, 2023), 61-62.
[19] *Leduc v. Ward* (n 6).
[20] *The Sormovskiy 3068* [1994] 2 Lloyd's Rep 266, QB.
[21] *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, HL.
[22] *See Trafigura Maritime Logistics Pte Ltd v Clearlake Shipping Pte Ltd & Anor; and Clearlake Shipping Pte Ltd v Petroleo Brasileiro S.A.* [2020] EWHC 995 (Comm); *Unicredit Bank AG v Euronav NV (The Sienna)* [2023] EWCA Civ 417.

the carrier's duty to deliver the cargo only against a presentation of a Bill of Lading by a lawful holder, and neither does it imply the Respondent's consent to do so.

PRAYER FOR RELIEF

Considering the issues raised, arguments put forward and sources cited, the counsel for the RESPONDENTS respectfully seek the following orders and declaration:

i. That the arbitration clause is invalid, and the Tribunal lacks jurisdiction.

ii. That the CLAIMANT'S claim for unliquidated damages is unfounded and the claims be dismissed in full.

iii. That the RESPONDENT is entitled to recover losses amounting to USD 4,249,752.50; and

iv. An order that costs be to the RESPONDENT.