23rd ANNUAL INTERNATIONAL MARITIME LAW

ARBITRATION MOOT JULY 2024

In the matter of an arbitration under the SCMA Arbitration Rules

Between

Tomahawk Maritime SA

…Claimant

and

Veggies of Earth Banking LTD

…Respondent

- Respondent's Memorandum -

TEAM CODE C

Chiara BESSON - Maha CHAFFRI - Laetitia LEMAUX - Eva DEVOS

TEAM CODE C

TABLE OF CONTENTS

LIST OF AUTHORITIES

Statutes

1. Arbitration Law of the People's Republic of China (2021)
2. The Hague Rules (1924)
3. The Hamburg Rules (1978)

Cases

1. TW Thomas & Co Ltd v. Portsea Steamship Co, Ltd [1912] AC 1
2. Siboti K/S v BP France SA [2003] 2 LLR 364
3. French Supreme Court, commercial chamber, (29 novembre 1994)
4. Sanders Brothers v Maclean & Co [1883] 11 QBD 327, English Court of Appeal
5. Pacific Carriers Ltd v BNP Paribas, 2004, HCA
6. Kuwait Petrolum Corporation v I&D Oil Carriers Ltd, 1994
7. THE STONE GEMINI (1999) 2 Lloyd's Rep 255
8. Navig8 Chemicals Pool Inc -v- Glencore Agriculture BV [2018] EWCA Civ 1901
9. K Line Pte Limited v Priminds Shipping (HK) Co Limited (The Eternal Bliss) [2021] EWCA Civ 1712
10. Transfield Shipping Inc v Mercator Shipping Inc [2008] UKHL 48 (The Achilleas)

Books and Treaties

1. DEBATTISTA Charles, Bills of lading in Export Trade, Tottel 2009, p. 29
2. GIRVIN Stephen, Carriage of goods by sea, Second edition, Oxford 2011., p. 144.

3. DAVIES Martin, DICKEY Anthony, Shipping Law, Third edition, Lawbook CO. 2004 p. 262; GIRVIN, op. cit. p. 142
4. DEBATTISTA, op. cit. pp. 37-38.

Others

https://www.academia.edu/37934254/Lickbarrow_v_Mason

LIST OF ABREVIATIONS

ABBREVIATION	TERM
BoL	Bill of Lading
VCP	Voyage Charterparty
LoI	Letter of Indemnity
LoC	Letter of Credit
OBL	Original Bill of Lading
VOE	Veggies of Earth Banking
PRC Law	People's Republic of China Law

I. STATEMENT OF FACTS

A. THE PARTIES

1. Tomahawk Maritime S.A (hereinafter Tomahawk Maritime or the **Claimant**), is a Panama company, and registered owner of the MV NIUYANG (hereinafter, the MV NIUYANG or the **Vessel**). Veggies of Earth Banking LTD (hereinafter Veggies of Earth Banking or the **Respondent**) is a Chinese company, more precisely a banking institution. The vessel was chartered by Yu Shipping LTD (hereinafter Yu Shipping or the **Charterer**).

2. On august 14, 2023, Yu Shipping Ltd (hereinafter Yu Shipping or the **charterer** or the **Buyer**) ordered 16,999.01 metric tons (MT) of "Crude Palm Oil (Edible Grade)" (hereinafter the **Cargo**) from Good Oil Sdn Bhd for a total of USD 4,249,752.50[1]. The purchase was financed by the respondent via a letter of credit[2].

B. THE CHARTER PARTY AND BILL OF LADING: THE CONTRACTS FOR THE CARRIAGE OF THE CARGO

3. On September 1st, 2023, Tomahawk Maritime and Yu Shipping, entered into a voyage charterparty (hereinafter the VCP)[3]. On September 6, 2023, at 2106 LT, the Cargo was loaded onboard the Vessel in Bintulu, Malaysia and was to be delivered in Busan. A set of Bills of ladings (**BoL**) no. BT-COW-001A were issued on September 4, 2023, and consigned to the respondent.

[1] As specified in the Letter of Indemnity from the seller, Moot scenario p. 45
[2] As specified in an email between the claimant and the respondent's liquidators, Moot scenario p. 43
[3] As specified in the Tanker Voyage Charter Party, Moot scenario p. 12

C. THE LATE DELIVERY OF THE CARGO

4. On September 20, 2023, the Cargo arrived in Busan[4]. The Claimant informed multiple times that he has a strict laycan to respect to fulfill its next employment[5]. However, the respondent took too much time to deliver the BoL, and so, the delivery was delayed. After failure from the respondent to deliver all the **BoL** to take delivery of the cargo, the Charter requested delivery of the cargo without the original **BoL**, on October 3, 2023.

5. In compliance with Rider Clause 57 of the Charter Party as mentioned in the Fixture [*"57. 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)*][6] upon delivery of the Cargo the Charterer issued a letter of indemnity (**LoI**) the same day.

II. SUMMARY OF THE ISSUES

- Whether the Tribunal has jurisdiction over the case.
- Whether the Claimant has breached the contract by delivering the cargo to the charterer
- Whether the respondent has breached the contract by not respecting the laytime for taking delivery of the goods
- Whether the Respondent is liable for the damage awarded by the Claimant

[4] As specified in the Statement of claim of the claimant, paragraph 9, Moot scenario p. 8
[5] Rider Clause 38 – Next Employment, Moot scenario p.25
[6] Rider Clause 57 – Discharge without bills of lading, Moot scenario p.28

III. THE TRIBUNAL HAS NO JURISDICTION OVER THE CASE

A. THE LAW OF PEOPLE'S REPUBLIC OF CHINA GOVERNS THE ARBITRATION AGREEMENT

6. The defendant contests the validity of the arbitration clause. Under the PRC rules, the seat of arbitration cannot be chosen in China and administered by a foreign arbitral institution. Indeed, as the seat of the arbitration is Guangzhou, the law applicable to determine the validity of the arbitration clause is PRC law.

7. As stated in Clause 16 of the Arbitration Law of the People's Republic of China (the "Arbitration Law")[7], an arbitration agreement is an agreement which has the following essential features:

"(*a) the expression of the parties' wish to submit to arbitration;*

(b) the matters to be arbitrated; and

(c) the Arbitration Commission selected by the parties".

8. Clause 10 of the Arbitration Law further provides that: - "*Arbitration commissions may be established in the municipalities directly under the Central Government, in the municipalities where the people's governments of provinces and autonomous regions are located or, if necessary, in other cities divided into districts. Arbitration commissions shall not be established at each level of the administrative divisions. The people's governments of the municipalities and cities specified in the above paragraph shall organize the relevant departments and the Chamber of Commerce for the formation of an arbitration commission. The establishment of an arbitration*

[7] Arbitration Law of the People's Republic of China (2021)

commission shall be registered with the judicial administrative department of the relevant province, autonomous region or municipalities directly under the Central Government.[8]"

9. The law governing the arbitration is the Chinese law. Therefore, the respondent contests the validity of the arbitration agreement of the claimant.

B. THE ARBITRATION CLAUSE IS NOT ENFORCEABLE AGAINST THE RESPONDENT

10. On September 1st, 2023, Tomahawk Maritime S.A, and Yu Shipping, entered a Voyage charterparty[9]. The clean fixture for this charter party is considered as accepted by the charterer (Yu Shipping). The Claimant affirmed in his claim that Yu Shipping accepted the fixture and consequently the riders. Indeed, the Bills of Lading incorporate an arbitration clause through riders clause. The 78 clause mentioned the applicable law and the competent court in case of dispute: "*English Law, Guangzhou arbitration as per SCMA Rules and three arbitrators*"[10].

11. Under English law, for the incorporation of a clause to be valid[11], the general rule is that a specific reference in the bill of lading to the charter party arbitration clause is required. A wide reference to "*all the terms whatsoever of the said charter*" is insufficient to ensure the incorporation of the arbitration clause[12].

[8] Statement of defence of the respondent, Moot scenario p.35
[9] Tanker Voyage Charter party, Moot scenario p.12
[10] Rider Clause 78 – Law and Arbitration, Moot scenario p.28
[11] *(TW Thomas & Co Ltd v. Portsea Steamship Co, Ltd [1912] AC 1)*
[12] *(Siboti K/S v BP France SA [2003] 2 LLR 364)*

12. The Respondent was only able to obtain the riders on September 29, 2023, right before the cargo's discharge, supposed to start on September 30, 2023. The Respondent was not made aware of the Riders on time and consequently did not accept the arbitration clause.

13. In accordance with the general rule stated in 1862 by the Court of Common Pleas in the case *Felthouse v Bindley*, silence does not constitute acceptance. To form a contract, there must be a clear and unequivocal offer and acceptance between the parties. Silence does not constitute acceptance, as it does not clearly reveal the sea carrier's intention to conclude the contract with the riders.

    There was no arbitration agreement between the Claimant and the Respondent.

14. Furthermore, the clause is not expressly accepted by the respondent. In fact, the respondent is the consignee, which means that he is not part of the original contract signed between the claimant and Yu Shipping. Consequentially, the respondent is not a party to the charter party, he is only a party to the bill of lading. And the BoL can be considered as an independent contract when signed with a third-party that isn't party of the first contract.

15. In the ***Nagasaki*** and ***Stolt Osprey*** rulings, the French Supreme Court[13] also ruled that the clause "*must have been brought to the attention of the party and accepted by him or her in order to be considered valid*". In the present case, a vague mention in one simple line of a arbitration agreement isn't sufficient to be considered "brought to the attention of the party".

[13] French Supreme Court, commercial chamber, (29 November 1994)

16. Thus, the arbitration agreement cannot be enforced to the respondent, as he isn't part of the contract.

IV. THE CLAIMANT HAS BREACHED ITS OWN OBLIGATION BY DELIVERING THE GOODS TO THE WRONG CONSIGNEE

A. RESPONDENT IS THE PERSON ENTITLED TO THE GOODS, BECAUSE OF HIS POSSESSION OF THE BILLS OF LADING

17. By the issue of the BoL on September 4, 2023, Claimant informed Respondent that he was the rightful holder of the original bills of lading. For that particular reason, the respondent demanded delivery of the cargo from the claimant and asked him to confirm that it held the cargo and would deliver it to respondent. However, and in breach of the contract of carriage evidenced by the bills of lading, the Claimant did not deliver the goods to the Respondent as requested[14].

B. THE PRINCIPLE OF PRESENTATION

18. The rule of presentation was already affirmed in the 19th century, based in particular on the theory of "bailment" and "constructive possession"[15] . Thus, in an English judgment of 1889, Sir Butt J. stated *«* […] *A shipowner is not entitled to deliver goods to the consignee without the production of the bill of lading. I hold that the shipowner must take the consequences of having delivered these goods to the consignee without the production of either of the two parts of which the bill of lading consisted of.* »[16]

[14] Bill of Lading, Moot scenario p. 4
[15] [DEBATTISTA Charles, Bills of lading in Export Trade, Tottel 2009, p. 29]
[16] [The Stettin (1889) 14 PD 142 in GIRVIN Stephen, Carriage of goods by sea, Second edition, Oxford 2011., p. 144.]

19. As early as 1787, English case law **/Lickbarrow v. Mason, Court of King's Bench/**[17] stated that bills of lading and goods are one and the same. As Lord Justice Bowen summarised it, the bill of lading is *«* […] *a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be. »*[18]

1. THE CLAIMANT COMMITS A FAULT BY DELIVERING THE GOODS WITHOUT PRESENTATION OF THE ORIGINAL BILLS OF LADING

20. The rightful holder of the bill of lading is entitled to demand delivery of the goods from the carrier on arrival at the port of destination, irrespective of any proof of ownership of the cargo[19]. From the carrier's point of view, he must only deliver the goods to the holder of the bill of lading who presents him with an original copy of the bill of lading (presentation principle). This is an obligation of the carrier. The carrier does not have to worry about the ownership of the goods. If he delivers the goods without requiring presentation of the document of title, he is in breach of the contract of carriage[20].

21. In this case, by application of the aforementioned principle of presentation, the Claimant, by not handing over the goods to the Respondent, who, by virtue of possession of the Original bills of lading, has a right of ownership over the said goods,

[17] https://www.academia.edu/37934254/Lickbarrow_v_Mason
[18] [Sanders Brothers v Maclean & Co [1883] 11 QBD 327, English Court of Appeal]
[19] [DAVIES Martin, DICKEY Anthony, Shipping Law, Third edition, Lawbook CO. 2004 p. 262; GIRVIN, op. cit. p. 142]
[20] [DEBATTISTA, op. cit. pp. 37-38].

is guilty of a breach of the said principle of presentation and therefore violates the contract of carriage.

22. Thus, because of the right of ownership that the holder of the original bills of lading acquires over the goods that they represent, the Respondent has the right to take action against the carrier on the basis of this mis-delivery characterized by the delivery that he made to the charterer without handing over the original bills of lading.

2. THE LOSS OF THE RESPONDENT DUE TO MIS-DELIVERY

23. The Respondent is the financier of the Cargo. The Respondent's customer, Yu Shipping Ltd., purchased the Cargo with payment to be made by way of a letter of credit (LoC). The Respondent issued a letter of credit and paid for the Cargo on behalf of Yu Shipping Ltd. In doing so, the Respondent had advanced funds to Yu Shipping Ltd. for payment of the price and looked to the Cargo as security for the loan.

24. The Respondent became the lawful holder of the Bill of Lading on October 3, 2023 when the Shipper delivered the 3/3 set of the original Bill of Lading to the Respondent. The Respondent has remained in continuous possession of the Bill of Lading since 3 October 2023.

25. As lawful holder of the Bill of Lading, the Respondent is the party entitled to delivery-up of the Cargo upon presentation of the Bill of Lading to the Claimant.

Correspondingly, the Claimant is under an obligation not to deliver the Cargo except to the lawful holder of the Bill of Lading and only upon presentation of the Bill of Lading[21].

26. In breach of its obligations, the Claimant has admitted that it delivered the Cargo against a Letter of Indemnity.

27. As a result of the Claimant's mis-delivery of the Cargo, the Respondent has suffered loss and/or damage in the amount of USD 4,249,752.50, being the invoice price of the Cargo.

Alternatively, the Respondent claims damages for the value of the Cargo to be assessed.

C. THE VALUE OF THE LETTER OF INDEMNITY ISSUED: AN INDEPENDENT UNDERTAKING TO WHICH THE RESPONDENT IS NOT A PARTY AND THEREFORE NOT ENFORCEABLE AGAINST HIM

28. In this case, on letter was issued by the charterer Yu Shipping, to order the carrier (Tomahawk Maritime) to deliver the goods directly to the buyer (Yu Shipping also) without presentation of the OBLs, and to add a financial guarantee if the rightful holder of the OBLs claims against the carrier[22].

29. Due to the slow transmission of certain documents, it may happen that the cargo arrives at the destination before the beneficiary of the goods is in possession of the Original Bill of Lading. Therefore, maritime practice has created the Letter of Indemnity (LoI) to offer the receiver of the goods a financial guarantee against any claim by any holder of

[21] Statement of defence of the Respondent, paragraph 15 – 19, Moot scenario p.37
[22] Letter of Indemnity, Moot scenario p. 45

the Original Bill of Lading. Some courts have upheld this practice, like the High Court of Australia[23] and the UK Court of Appeal[24].

30. However, the common law jurisdictions make it clear that the letter of indemnity does not absolve the carrier of his fault in delivering the goods without presentation of the OBLs. The ***Stone GEMINI case***[25] also add that the Letter of Indemnity is an independent commitment not related to the transport contract.

31. The Respondent is not a party to this undertaking, he is in no way subject to the Letter of Indemnity. Consequently, the latter cannot be invoked against him to justify delivery without presentation of the OBLs. The carrier cannot exonerate himself from his fault by means of this letter regarding the Respondent.

V. THE ABSENCE OF CAUSAL LINK BETWEEN THE DELAY OF DISCHARGE AND THE LOSS FOR THE CLAIMANT

A. WEATHER FACTOR

32. The vessel's final delay in reaching Kaohsiung was mainly due to the adverse weather conditions encountered, and not to the unloading in Busan.

33. Indeed, the Claimant stated that "*due to adverse wind and sea conditions, the vessel's progress to Kaohsiung was hampered*"[26]. As known in the maritime field, in is

[23] Pacific Carriers Ltd v BNP Paribas, 2004, HCA
[24] Kuwait Petrolum Corporation v I&D Oil Carriers Ltd, 1994
[25] THE STONE GEMINI (1999) 2 Lloyd's Rep 255
[26] Statement of claim of the claimant, paragraph 15, Moot scenario p.9

unfortunate and can be a real problem for some operations, but the weather can play a determinant role in your journey. From a professional and practical point of view, the vessel should have been able to know about the weather conditions, as there is nowadays enough technology developed to communicate between the vessel and de center of operations of a company. The inability of the claimant to ensure the progress of his vessel due to the weather conditions is absolutely independent of the respondent's doing.

34. There is therefore, no direct and certain causal link between the alleged breach of contract by the charterer and the consignee and the loss of the subsequent contract claimed by the shipowner.

B. DELAY DUE TO REASONS BEYOND THE RECEIVER'S CONTROL

35. The delay in taking over the goods was due to reasons beyond the control of the consignee and charterer. The charterer and consignee dispute that they were in breach of their contractual obligations to Tomahawk Maritime.

36. Nevertheless, the delay in unloading at Busan was due to circumstances beyond their control, linked to problems in financing the operation by the defendant as the bank issuing the LoC[27]. It can be clearly understood while reading the e-mail exchanges, that the charterer did everything in his power to obtain the right documents in order to take delivery of the cargo and so, free the vessel for its next employment.

[27] E-mail exchanges between the respondent and the charterer, Moot scenario p. 46 - 48

37. Therefore, as soon as the documents could be issued, the charterer sent a letter of indemnity (LOI) to the Claimant to enable the vessel to be unloaded as soon as possible, in accordance with accepted maritime law and the clauses of the Charter Party[28].

38. The Singapore Court of Appeal's judgment of August 12, 2015, in the "***Pacific Champion***" case, established that "*the delay in discharging caused by financing problems cannot be attributed to the charterer or the consignee, as these were circumstances beyond their control*".

39. This judgment confirms that the delay in discharging at Busan was due to circumstances beyond the control of the charterer and the consignee, linked to problems in financing the operation by the Respondent as the bank issuing the letter of credit.

VI. THE RESPONDENT IS NOT RESPONSIBLE FOR THE DAMAGE AWARDED BY THE CLAIMANT

A. THE LAYTIME AND DEMURRAGE

40. Any overrun of the laytime will be compensated by the payment of demurrages as agreed in the charterparty[29] "*charterer shall pay demurrage per running hour and pro ram for a part thereof at the rate stipulated in part I for all time that loading and discharging and used laytime as elsewhere herein provided exceeds die allowed laytime*

[28] Rider clause 38 – Next Employment, Moot scenario p.25
[29] Clause 11 (a), Charter Party, Part II, Moot scenario p. 16

herein specified" and as upheld in the ***Glencore International AG v Navig Chem Pool Inc. case law***[30].

41. Furthermore, the London Court of Appeal ruling of March 24, 2011, in ***The Kyla*** case, established that "*laytime does not begin to run until the vessel has reached the port of destination and is ready to unload, even if the consignee has been notified of the vessel's arrival*".

42. This ruling would counter the argument that any overrun of the laytime would be compensated by the payment of demurrage, as it establishes that the laytime does not begin to run until the vessel is ready to unload.

43. In the present case, the charterer by an e-mail sent to the claimant on October 3, 2023, agreed and confirmed to compensate the claimant by the demurrage[31] due to overrun laytime.

B. REFUSE THE CLAIM OF THE NECIOTIATED FREIGHT RATE

44. The Court of Appeal reversed the judgment of Andrew Baker J and found in favor of the charterer[32]. Males LJ (who delivered the Court's judgment) concluded that *"demurrage compensates for the entirety of the damages resulting from the charterer's breach of the charter, failing to complete the loading operations on time, and not just*

[30] Navig8 Chemicals Pool Inc -v- Glencore Agriculture BV [2018] EWCA Civ 1901
[31] Statement of claim of the claimant, paragraph 13, Moot scenario p.9
[32] K Line Pte Limited v Priminds Shipping (HK) Co Limited (The Eternal Bliss) [2021] EWCA Civ 1712

part of them. Consequently, if a shipowner seeks damages in addition to demurrage resulting from delay, he must prove breach of a separate obligation."

45. In the present case, the claimant is seeking for damages compensation regarding the financial loss that he suffered due to the delay of the vessel to arrive at its next employment. The claim is up to USD 3 650 000[33], in addition to the already agreed demurrage (504 000 USD). This is an irrelevant and outrageous amount of money asked for a damage that is no concern of the respondent. Indeed, as explain early on, the weather conditions are the main reasons that caused the delay of the vessel. The respondent is not aware of the charter party signed between the claimant and its next client, nor aware of the exchange of e-mails that happened between the two of them.

46. Furthermore***, The "Achilleas"***[34] case established that "*in the event of late surrender under a charterparty, an owner cannot recover damages for lost profits under a subsequent charter*". The charterer's liability is limited to the difference between the contractual hire rate and the prevailing market rate for the overrun period.

47. **The Hague Rules of 1924** do not preclude the recovery of consequential losses such as those arising from delay in delivery.

48. **The Hamburg Rules** remove ambiguity by expressly admitting claims for delay, but limiting compensation to two and one half times the freight payable for the goods delayed.

[33] Statement of claim of the claimant, paragraph 20, Moot scenario p.10
[34] *Transfield Shipping Inc v Mercator Shipping Inc [2008] UKHL 48 (The Achilleas)*

49. Consequentially, the respondent is asking for the value of the amount supposed discount negotiated between the claimant and its client, to be assessed.

VII. PRAYER FOR RELIEF

For the reasons set out above, the Respondent requests the Tribunal to:

FIND that the Tribunal does not have jurisdiction over this case.

CLAIMS damages for the value of the Cargo to be assessed, and humbly asks that the Tribunal terminate this arbitration or, alternatively, that the Claimant's claims are dismissed.

Dated May 2nd, 2024.

Solicitors for the Respondent

Bauhinia Law LLC