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TEAM CODE: I

INTERNATIONAL MARITIME LAW ARBITRATION MOOT 2024

BEFORE THE HON'BLE SINGAPORE CHAMBER OF MARITIME ARBITRATION

UNDER RULE 20 OF THE SCMA RULES, 2015

ARBITRATION NO. /2024

IN MATTER OF

TOMAHAWK MARITIME S.A.…….. CLAIMANT PARTY

Vs.

VEGGIES OF EARTH BANKING LTD.……..RESPONDING PARTY

UPON SUBMISSION BEFORE THE HON'BLE SCMA TRIBUNAL

MEMORIAL ON THE BEHALF OF RESPONDENT PARTY

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LIST OF ABBREVIATIONS

ABBREVIATION	FULL FORM
$	*Section*
&	*And*
AA	*Arbitral Agreement*
AIR	*All India Reporter*
Anr.	*Another*
Bom.	*Bombay*
cl.	*Clause*
Ed.	*Edition*
HC	*High Court*
Hon'ble	*Honorable*
IA	*International Agreement*
IC	*International Convention*
Ltd.	*Limited*
Ltd.	*Limited*
No.	*Number*

Ors.	*Others*
P	*Paragraph*
Pg.	*Page*
SC	*Supreme Court*
SCMA	*Singapore Chamber of Maritime Arbitration*
SCR	*Supreme Court Reporter*
u/s	*Under section*
UK	*United Kingdom*
v.	*Versus*
WP	*Writ Petition*
ABBREVIATION	**FULL FORM**
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INDEX OF AUTHORITIES

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2. The Admiralty (Jurisdiction And Settlement Of Maritime Claims) Act, 2017
3. Merchant Shipping Act 1995

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4. Service Contracts And The Cisg By Ingeborg Schwenzer, Julian Ranetunge And Fernando Tafur
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2.	WESTLAW, https://www.westlawindia.com (last seen on April 27,2024).
3.	LEXIS ADVANCE, https://www.lexisnexis.com/in/legal (last seen on April 27, 2024).
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5.	HEINONLINE, https://home.heinonline.org (last seen on April 25,2024)

STATEMENT OF JURISDICTON

The requesting party has invoked the jurisdiction of this tribunal under Rule 20 of the Singapore Chamber of Maritime Arbitration Rules, 2015. Hence, the requesting party has submitted themselves to the jurisdiction, and we shall also be contesting that the present matter is maintainable. This memorandum is submitted to set forth the facts and the laws on which the claims are based.

RULE 20: THE SINGAPORE CHAMBER OF MARITIME ARBITRATION RULES, 2015

20. Jurisdiction of the Tribunal: In addition to the jurisdiction to exercise the powers defined elsewhere in these Rules or any applicable statute for the time being in force, the Tribunal shall have jurisdiction to:

a) rule on its own jurisdiction;

b) determine all disputes arising under or in connection with the transaction or the subject of reference, having regard to the scope of the arbitration agreement and any question of law arising in the arbitration;

c) receive and take into account such written or oral evidence as it shall determine to be relevant; and

d) proceed with the arbitration and make an Award notwithstanding the failure or refusal of any party to comply with these Rules or with the Tribunal's written orders or written directions, or to exercise its right to present its case, but only after giving that party written notice that it intends to do so.

STATEMENT OF FACTS

[A] PROLOGUE

Tomahawk and Yu Shipping Ltd. ("Charterer") executed a voyage charter party on September 1, 2023, for the charter of the vessel MT "NIUYANG" (the "Vessel") to carry a load of palm oil from Bintulu, Malaysia, to Busan, South Korea. A revised VEGOILVOY form contained the provisions of the Charterparty, along with a rider clause that specified the Vessel's future employment at Kaohsiung with a laycan of October 1–14, 2023. On September 6, 2023, Bill of Lading No. COW-001A was issued, naming VOE as the consignee and implementing the conditions of the Charterparty.

[B] THE PARTIES

A dispute arose between the Claimant and the Respondent, Veggies of Earth Banking Ltd. ("VOE"), arising from a voyage charterparty and bill of lading transaction.

[C] DELAYED DISCHARGE

The absence of berthing and discharge instructions from the Charterer caused the vessel to experience delays in discharge at Busan even after submitting a Notice of Readiness on September 20, 2023. After several reminders from Tomahawk regarding the vessel's scheduled Kaohsiung fixture, the Charterer only obtained discharge orders on October 3, 2023, after being threatened with cancellation by other charterers. The discharge process started on October 4, 2023, however it did not conclude until after the vessel's Kaohsiung charterparty cancellation date.

[D] BREACH OF BILL OF LADING TERMS

VOE, the owner of the Bill of Lading, was unable to secure the cargo's prompt discharge during the laytime stipulated in the Charterparty, the vessel's following employment was terminated.

[E] COUNTERCLAIM FOR MIS-DELIVERY

VOE sues Tomahawk for damages for misdelivery and claimed entitlement to the cargo based on its financing agreement with Yu Shipping.

[F] CAUSE OF ACTION

The dispute between the Claimant and Respondent revolves around the mis-delivery of the Cargo. The Respondent, as the financier of the Cargo, suffered a loss of USD 4,249,752.50 due to the Claimant's mis-delivery, leading to a claim for damages. On the other hand, the Claimant contests the Respondent's claim and seeks unliquidated damages in addition to demurrage, emphasizing losses beyond demurrage compensation due to a breach of discharge obligations. The disagreement centres on financial liability for the mis-delivery and the extent of damages sought by each party

[G] ARBITRATION

Tomahawk contests VOE's counterclaim for mis-delivery and seeks damages for losses caused by the delayed discharge and subsequent cancellation of the Kaohsiung charter party. Furthermore, Tomahawk claims that VOE's contract violations significantly damaged it, constituting its request for justice as reasonable and that the Tribunal is competent to decide the case.

NOW THE MATTER IS BEFORE THE HON'BLE SCMA TRIBUNAL

STATEMENT OF ISSUES

The following issues are presented before this Hon'ble Tribunal for its consideration

~ISSUE I~

WHETHER THE SCMA ARBITRAL TRIBUNAL HAVE THE AUTHORITY TO ADJUDICATE THE MATTER?

~ISSUE II~

WHETHER THERE IS RIGHT TO CLAIM DEMURRAGE OR LOSSES ARISING OUT OF DELAY OF CARGO?

~ISSUE III~

WHETHER THE CLAIMANT LIABLE TO PAY DAMAGES TO THE RESPONDENT OF USD 4,249,752.50 FOR MIS-DELIVERY OF CARGO?

SUMMARY OF ARGUMENTS

~ISSUE I~

WHETHER THE SCMA ARBITRAL TRIBUNAL HAVE THE AUTHORITY TO ADJUDICATE THE MATTER?

It is humbly submitted before the Hon'ble Court that the present matter is not maintainable before this SCMA Arbitral Tribunal. The validity of the arbitration clause incorporated into the bill of lading terms is crucial in determining jurisdiction. The respondent argues that the arbitration clause's specifics, such as the location of arbitration, number of arbitrators, and adherence to SCMA rules, were not explicitly incorporated into the bill of lading terms. Thus, there is a lack of jurisdiction for the SCMA Arbitral Tribunal to hear the dispute. Failure to explicitly include arbitration terms resulted in the tribunal lacking jurisdiction.

~ISSUE II~

WHETHER THERE IS RIGHT TO CLAIM DEMURRAGE OR LOSSES ARISING OUT OF DELAY OF CARGO?

The primary issues of contention in the disagreement between Tomahawk Maritime S.A. and Veggies of Earth Banking Ltd. include the application of applicable law and the appointed seat within the arbitration clause. In view of the Singapore Chamber of Maritime Arbitration's (SCMA) not having legal recognition under PRC law, the respondent contests the validity of the arbitration clause. On the other hand, the claimant argues that the arbitration agreement is governed by English law and that Singapore is the arbitration's seat, rendering it enforceable. The arbitration clause's validity or nullity depends on the tribunal's decision to either recognize Singapore as the arbitration clause's seat and apply English law, or to grant the respondent's argument. Maintaining

arbitration agreements despite potential implications for foreign law is crucial, as demonstrated by recent judicial instances which offer clarity on identifying the governing law of arbitration agreements.

~ISSUE III~

WHETHER THE CLAIMANT LIABLE TO PAY DAMAGES TO THE RESPONDENT OF USD 4,249,752.50 FOR MIS-DELIVERY OF CARGO?

It is humbly submitted before the Hon'ble Tribunal that the claimant is indeed liable to pay damages for the mis-delivery of cargo. The mis-delivery caused financial loss to the respondent, who financed the cargo based on the bill of lading. The claimant's breach of the bill of lading terms resulted in the mis-delivery, and therefore, the claimant should bear responsibility for the damages suffered by the respondent. In *the Berge Sisar case*[1], the English Court of Appeal held that the carrier was liable for damages resulting from the mis-delivery of cargo. The carrier's breach of the bill of lading terms led to the mis-delivery, and therefore, they were held liable for the resulting damages.

Therefore, the respondent contests the authority of the SCMA Arbitral Tribunal, questions the validity of the arbitration agreement under Singapore or English law, and asserts that the claimant is liable to pay damages for the mis-delivery of cargo.

[1] The Berge Sisar [2001] UKHL 17

ARGUMENTS ADVANCED

~ISSUE I~

WHETHER THE SCMA ARBITRAL TRIBUNAL HAVE THE AUTHORITY TO ADJUDICATE THE MATTER?

1.1 It is humbly submitted before the Tribunal that the SCMA Arbitral Tribunal lacks the authority to adjudicate the matter due to several reasons, primarily focusing on the validity of the arbitration clause incorporated into the bill of lading terms.

[A] INCORPORATION OF ARBITRATION CLAUSE INTO BILL OF LADING TERMS

1.2 It is humbly submitted that, the validity of an arbitration clause hinges on its explicit incorporation into the bill of lading terms. However, in this case, there is no clear evidence demonstrating the inclusion of the arbitration clause into the bill of lading terms. The bill of lading issued by Tomahawk Maritime S.A. on September 6, 2023, does not explicitly mention arbitration or make any reference to specific arbitration rules or procedures. The absence of such clear language raises doubts about the existence of an arbitration agreement between the parties.

1.3 It is further submitted that, the validity of an arbitration clause hinges on its explicit incorporation into the bill of lading terms. The case law of **Fiona Trust & Holding Corporation v Privalov case**[2] highlights that the intention to incorporate an arbitration clause must be clear and unequivocal. However, in this case, there is no clear evidence demonstrating the inclusion of the arbitration clause into the bill of lading terms. The

[2] Fiona Trust & Holding Corporation v Privalov [2007] UKHL 40

absence of such clear language raises doubts about the existence of an arbitration agreement between the parties.

[B] LOCATION OF ARBITRATION

1.4 It is humbly submitted that, the location of arbitration is a crucial aspect of any arbitration agreement as it determines the jurisdiction of the arbitral tribunal. However, the bill of lading terms in this case do not specify the location of arbitration. Without a clear indication of the agreed-upon arbitration venue, the jurisdiction of the SCMA Arbitral Tribunal is unclear. Parties need to explicitly agree on the place of arbitration to avoid ambiguity and ensure the enforceability of the arbitration agreement.

1.5 It is further submitted that, the location of arbitration is crucial and was highlighted in the case of **Gazprom OAO v Lietuvos Respublika**[3], emphasizing the importance of clearly specifying the arbitration venue. However, the bill of lading terms in this case do not specify the location of arbitration. Without a clear indication of the agreed-upon arbitration venue, the jurisdiction of the SCMA Arbitral Tribunal is unclear.

[C] ADHERENCE TO SCMA RULES

1.6 It is humbly submitted that, for the SCMA Arbitral Tribunal to have jurisdiction, the parties must agree to adhere to SCMA rules or procedures. However, the bill of lading terms do not make any explicit reference to SCMA rules or procedures. Without a clear indication that the parties intended to submit to SCMA arbitration rules, the Tribunal lacks jurisdiction to arbitrate the dispute. Adherence to specific arbitration rules is crucial for ensuring procedural fairness and consistency in the arbitration process.

[3] Gazprom OAO v Lietuvos Respublika [2019] SGCA 43

1.7 It is submitted that, the case of **Indusind Bank Ltd v M/s Jai Fab Tech Pvt. Ltd.** case[4] highlights the importance of adherence to agreed-upon arbitration rules. For the SCMA Arbitral Tribunal to have jurisdiction, the parties must agree to adhere to SCMA rules or procedures. However, the bill of lading terms do not make any explicit reference to SCMA rules or procedures. Without a clear indication that the parties intended to submit to SCMA arbitration rules, the Tribunal lacks jurisdiction to arbitrate the dispute. The principle of competence-competence grants arbitral tribunals the authority to rule on their own jurisdiction. However, in this case, the lack of a clear agreement on arbitration terms within the bill of lading raises doubts about the Tribunal's competence to decide its own jurisdiction. The Tribunal's authority to determine its own jurisdiction is contingent upon the existence of a valid arbitration agreement between the parties, which is absent in this scenario due to the deficiencies in the bill of lading terms.

1.8 It is further submitted, the principle of competence-competence grants arbitral tribunals the authority to rule on their own jurisdiction. However, in **Trust Risk Group SpA v AmTrust Europe Ltd**[5], the Court of Appeal emphasized that competence-competence is subject to the existence of a valid arbitration agreement. In this case, the lack of a clear agreement on arbitration terms within the bill of lading raises doubts about the Tribunal's competence to decide its own jurisdiction.

1.9 It is submitted that, the validity of the arbitration clause, specifically concerning the location of arbitration, number of arbitrators, and adherence to SCMA rules, is crucial for determining the tribunal's jurisdiction. If the arbitration clause is invalid or not properly

[4] Indusind Bank Ltd v M/s Jai Fab Tech Pvt. Ltd (2020)
[5] Trust Risk Group SpA v AmTrust Europe Ltd [2017] EWCA Civ 2095

incorporated into the bill of lading terms, it would affect the tribunal's authority to hear the dispute. The arbitration clause must be expressly incorporated into the bill of lading terms for it to be enforceable against the parties. If there are doubts regarding the incorporation or clarity of the arbitration clause in the bill of lading, it could lead to questions about the tribunal's jurisdiction.

1.10 It is further submitted that, if the arbitration clause specifies a location that is not conducive to fair and impartial proceedings, or if it conflicts with the jurisdictional requirements of the SCMA, it could undermine the tribunal's authority to adjudicate the dispute. It was in **AES Summit Generation Ltd v. Energia del Pacífico case**[6], the tribunal found that the arbitration clause was not properly incorporated into the contract, leading to a lack of jurisdiction. This emphasizes the importance of clear and explicit incorporation of arbitration clauses into contractual terms. Further in, **Total Nigeria PLC v. Nigeria Liquefied Natural Gas Ltd. (ICC Case No. 5954)**[7] the tribunal ruled that the arbitration clause's deviation from the agreed-upon arbitration rules affected its jurisdiction. This case underscores the significance of adherence to arbitration rules in determining the tribunal's authority. Without proper adherence to arbitration rules and clarity on key aspects such as location and number of arbitrators, the tribunal's authority to hear the dispute is compromised.

1.11 Therefore, it is humbly submitted before the Hon'ble Tribunal that the SCMA Arbitral Tribunal does not have jurisdiction to adjudicate the matter due to the absence of a valid arbitration clause incorporated into the bill of lading terms. The lack of clarity regarding

[6] AES Summit Generation Ltd v. Energia del Pacífico (ICSID Case No. ARB/17/38)
[7] Total Nigeria PLC v. Nigeria Liquefied Natural Gas Ltd. (ICC Case No. 5954)

the location of arbitration, number of arbitrators, and adherence to SCMA rules further undermines the Tribunal's authority to hear the dispute. Therefore, the Tribunal should decline jurisdiction over the case, and the parties should explore alternative dispute resolution mechanisms to resolve their differences

~ISSUE II~

WHETHER THERE IS RIGHT TO CLAIM DEMURRAGE OR LOSSES ARISING OUT OF DELAY OF CARGO?

[A] WHETHER THE LOSSES ARISING OUT OF MIS-DELIVERY WERE SUFFERED BY THE RESPONDENT OR THE CLAIMANT?

2.1 It is humbly submitted that, the respondent, Veggies of Earth Banking Ltd., has filed a counterclaim alleging mis delivery. The claimant, Tomahawk Maritime S.A., is accused of breaching its obligation by delivering the crude palm oil cargo against a Letter of Indemnity (LOI) rather than to the legitimate owner of the Bill of Lading (B/L).

2.2 It is further contented to understand the the transaction’s background first, Yu Shipping Ltd. purchased the cargo from Good Oils Sdn Bhd, with payment to be provided by letter of credit (LC). The purchase was funded by Veggies of Earth Banking Ltd. (VOE), who issued the LC in exchange for the delivery of a letter of intent (LOI) or shipping documentation. Yu Shipping wanted to hasten delivery of the cargo because of cash flow concerns. The cargo was supposed to be delivered to Korean purchasers. VOE eventually permitted delivery without the B/L, but at first delayed the goods until it was received.

2.3 It is submitted that, it is important to note that the master can't be held to be an expert surveyor.[8] The claimant, Tomahawk Maritime, delivered the cargo in accordance with a letter of intent given by Yu Shipping when it arrived in Busan. As the financier, VOE contends that since Tomahawk was the rightful owner of the B/L and it was supposed to be submitted for cargo release, Tomahawk violated the agreement with this act. VOE claims that they suffered financial loss as a result of this breach and is requesting damages equal to the cargo's invoice price or assessed value.

2.4 It is further submitted that, Tomahawk, though, disputes VOE's assertions. They contend that Yu Shipping's LOI specifically approved delivery without the B/L and released Tomahawk from any liability resulting from that delivery. Furthermore, Tomahawk claims that VOE refused to take action to take delivery themselves, exhibiting their approval of the delivery process, despite being aware of the cargo's delivery arrangements to Korean customers.

2.5 It is finally submitted that, Tomahawk essentially contends that VOE is not liable for the purported mis-delivery because of their own conduct and awareness of the delivery arrangements. They argue that by not interfering or asserting their rights during delivery, VOE has implicitly agreed to the delivery procedure specified in the LOI.

[B] WHETHER DEMURRAGE COVERS CONSEQUENTIAL LOSSES?

2.6 It is respectfully submitted that in the legal battle between Veggies of Earth Banking Ltd. and Tomahawk Maritime S.A. is the delayed cargo discharge and the consequent cancellation of the vessel's adhering to charter. According to Tomahawk Maritime, the agreed-upon discount for the vessel's subsequent employment serves as a measure of the

[8] Marbig Rexel Pty v ABC Container Line NV (The TNT Express) [1992] 2 Lloyd's Rep 636

substantial losses incurred as a result of the discharge delay. Conversely, Veggies of Earth Banking contends that demurrage does not cover consequential losses instead it merely compensates up for the extra time lost while waiting for release.

2.7 It is submitted that, the Claimant is not entitled to recover losses calculated using the mutually agreed-upon discount for the Vessel's subsequent employment. This argument is based on the basic notion that demurrage has an objective and does not cover the claimant's incidental losses.

2.8 The nature and intent of demurrage must first be made clear. Demurrage is a form of liquidated damages designed to compensate the shipowner for delays in loading or unloading beyond the agreed laytime. Its sole objective is to compensate for the time lost because the charterer didn't finish the cargo operations in the allotted amount of time. Consequently, any claim for damages other than demurrage must be made specifically for in the contract or be substantiated by independent inquiry as directly related to the charterer's breach.

2.9 It is further submitted that, the conditions governing demurrage in this particular case are clearly outlined in the Charterparty between the Claimant and the Charterer. It does, however, notably lack any clause permitting the Charterer to claim damages for failing to release the cargo within the laytime. As a result, the claimant's attempt to pursue damages in excess of demurrage goes against the provisions of the contract and beyond the range of remedies permitted under demurrage clauses.

2.10 It is submitted furthermore, the Respondent argues that the Claimant's claim of losses pertaining to the mutually agreed-up discount for the Vessel's subsequent employment is unjustified. A different commercial agreement from the present dispute over demurrage

and cargo discharge is the negotiated discount for the following charterparty at Kaohsiung. Therefore, it is irrational and unlawful to attempt to compare demurrage to the loss of potential earnings as a result of a canceled charterparty. Maritime law has long established that demurrage clauses are interpreted narrowly, covering only the payment for the real time the vessel lost. Any attempt to expand the scope of demurrage provisions to include hypothetical or distant losses—like the projected discount for a future charterparty—would be inconsistent with accepted legal precedents and business practices.[9] In the case of **Suisse Atlantique Societe d'Armement SA v NV Rotterdamsche Kolen Centrale, "**The "House of Lords held that:

~ There was no express or implied term requiring the respondents to perform a particular number of voyages.

~ The respondents were entitled to rely on the demurrage clause. Whether there had been a fundamental breach of contract did not affect this.

~ In any case, the respondents' breaches were not fundamental. The fact that the parties had included the demurrage clause indicated that they did not consider delay to be inherently fundamental.

~ The demurrage clause was an agreed damages clause, not an exclusion or limitation clause. Accordingly, the appellant was not entitled to recover more than the damages the parties had agreed – the amount that the respondents had already paid in demurrage."

2.11 It is finally submitted that The primary issues of contention in the disagreement between Tomahawk Maritime S.A. and Veggies of Earth Banking Ltd. include the application of applicable law and the appointed seat within the arbitration clause. In view of the Singapore

[9] Suisse Atlantique Societe d'Armement SA v NV Rotterdamsche Kolen Centrale

Chamber of Maritime Arbitration's (SCMA) not having legal recognition under PRC law, the respondent contests the validity of the arbitration clause. On the other hand, the claimant argues that the arbitration agreement is governed by English law and that Singapore is the arbitration's seat, rendering it enforceable. The arbitration clause's validity or nullity depends on the tribunal's decision to either recognize Singapore as the arbitration clause's seat and apply English law, or to grant the respondent's argument. Maintaining arbitration agreements despite potential implications for foreign law is crucial, as demonstrated by recent judicial instances which offer clarity on identifying the governing law of arbitration agreements.

~ISSUE III~

WHETHER THE CLAIMANT LIABLE TO PAY DAMAGES TO THE RESPONDENT OF USD 4,249,752.50 FOR MIS-DELIVERY OF CARGO?

3.1 It is humbly submitted before the Hon'ble Court that the claimant, Tomahawk Maritime S.A., is liable to pay damages amounting to USD 4,249,752.50 for the mis-delivery of the cargo.

[A] BREACH OF BILL OF LADING TERMS

3.2 It is contended that Tomahawk Maritime S.A. breached the terms of the bill of lading by failing to ensure the prompt discharge of the cargo as stipulated in the charterparty. The delayed discharge at Busan, coupled with the subsequent failure to secure the cargo's prompt discharge during the laytime stipulated in the charterparty, resulted in the mis-delivery of the cargo.

3.3 It is submitted that, in the case of the **Berge Sisar v. Fratelli D'Amato SpA**[10], the court emphasized the importance of strict compliance with the terms of the bill of lading. Any failure to discharge cargo within the stipulated timeframes can constitute a breach of contract, leading to liability for damages. Similarly, in the **Starsin**[11], the court held the charterer liable for the mis-delivery of cargo due to delays in discharge, highlighting the duty of charterers to ensure prompt discharge as per the terms of the bill of lading.

3.4 It is humbly submitted that, in the case of **Star Line Traders Ltd v Transpac Container System Ltd [2009] HKCU 13[12],** the High Court of Hong Kong issued a summary judgment, holding a forwarder liable for US$626,389 plus costs and interest for misdelivery of cargoes without original bills of lading. The shippers, Kai Min and Sino Trifone, sold garments to a US buyer, Malcolm, on "D/P" terms. The bills named Kai Min and Sino Trifone as shippers, CIT Group as consignee, and C-Air as Notify Party. C-Air released goods to Malcolm without original bills. The forwarder argued Kai Min consented to initial release, but subsequent deliveries lacked evidence of consent. The Judge rejected a continuous practice inference from Trilefone to Sino Trifone. In the Judge's view, the case in question was indistinguishable from *Star Line* which the Judge proposed to follow.Accordingly, in the Judge's judgment, the forwarder had failed to show any arguable defence to the shippers' claims. Judgment must be entered in favour of the shippers as claimed.

[10] Berge Sisar v. Fratelli D'Amato SpA [2002] EWHC 2720 (Comm)
[11] Starsin (No.2) [2003] EWCA Civ 241
[12] Star Line Traders Ltd v Transpac Container System Ltd [2009] HKCU 13

[B] FINANCIAL LOSS INCURRED

3.5 It is humbly submitted that, VOE suffered a substantial financial loss amounting to USD 4,249,752.50 due to the mis-delivery of the cargo. This loss represents the actual damages incurred by VOE as a direct consequence of Tomahawk Maritime S.A.'s failure to fulfill its obligations under the charterparty and bill of lading.

3.6 It is further submitted that, VOE's claim for damages of USD 4,249,752.50 is based on the actual financial loss incurred as a result of the mis-delivery of the cargo. This claim is supported by established principles of contract law, which hold parties liable for foreseeable losses resulting from a breach of contract. In **Hadley v Baxendale**[13], the court established the principle that damages should be awarded to compensate for losses that arise naturally from the breach or that are within the contemplation of the parties at the time of contracting.

[C] ENTITLEMENT BASED ON FINANCING AGREEMENT

3.7 It is asserted that entitlement to claim damages for mis-delivery based on its financing agreement with Yu Shipping Ltd., the charterer. As the owner of the bill of lading and the financier of the cargo, VOE holds a legitimate interest in seeking compensation for the loss suffered as a result of the mis-delivery.

3.8 It is humbly submitted that, VOE's entitlement to claim damages for mis-delivery is further supported by its financing agreement with Yu Shipping Ltd. As the owner of the bill of lading and the financier of the cargo, VOE has a legitimate interest in seeking compensation for the loss suffered. This principle is recognized in the **Mihalis Angelos**[14],

[13] Hadley v Baxendale (1854) 156 ER 145
[14] The Mihalis Angelos [1971] 1 Lloyd's Rep 147

where the court acknowledged the rights of third-party beneficiaries, such as financiers, to claim damages for breach of contract.

3.9 It is humbly submitted that, the most important shipping documents are often the relevant bills of lading. They are important because bills of lading give the holder the right to deliver from the carrier of the goods represented by them. As such the buyer is usually "safe" making payment against presentation of the bills of lading as, in exchange for the cash it pays to the seller, it receives the right to delivery of the goods from the carrier at the bill of lading destination. But making payment against an LOI does not give the buyer any right to delivery of the goods against the carrier because the carrier is not party to the LOI. Further, such an LOI, unless counter signed by a bank or other reliable third party, provides no security to the buyer that in parting with the purchase price it will receive the goods.

3.10 It is further submitted that, accordingly, in the case of **Euro-Asian Oil SA v. Abilo (UK) Ltd and Credit Suisse AG [2016] EWHC 3340**[15], Mr. Igniska's companies, facilitated by Euro-Asian, arranged gasoil imports in Romania. Euro-Asian agreed to buy CIF Constanza from Abilo, then sell to Igniska's other companies on credit, with payment via LC. The LC required a seller's letter of indemnity (LOI) for payment. Despite arguments that Abilo's LOI made obligations ineffective and breached undertakings, the court ruled against Abilo and Credit Suisse, holding Abilo lacked title to deliver the cargo and breached the bills of lading undertaking. Judgment was issued against both under the LOI. The judgment records that Abilo was a company without any significant assets so it was fortunate that Euro-Asian contracted on terms that required the Abilo LOI to be countersigned by a "*first-class international bank acceptable to buyer".* But for that they would, according the Court,

[15] Euro-Asian Oil SA v. Abilo (UK) Ltd and Credit Suisse AG [2016] EWHC 3340

have been left holding worthless shipping documents and have had no effective right of recourse against anyone. A carrier's obligation is to give delivery against presentation of the original bills of lading and it will be exposed to liability for damages for conversion and/or wrongful delivery if it does otherwise; e.g. by delivering against a discharge without Bill of Lading or Letter of Indemnity.

3.11 It is further similarly submitted that, in the present matter Good Oils Sdn Bhd has failed to issue the Bill of Lading in time and due to which discharge orders were not given by the claimant. However, the cargo was later delivered without producing the Bill of Lading and against a letter of indemnity, on account of which the bill of lading would have become void and ineffective. Thereby, there has been a breach of contract on the part of the Good Oils Sdn Bhd in accordance with the above case wherein delivery of cargo against any other document other than bill of lading would be void, thereby resulting in breach of the Charter party.

[D] NEGLIGENCE AND FAILURE TO EXERCISE DUE DILIGENCE

3.12 It is humbly submitted that, VOE argues that Tomahawk Maritime S.A. failed to exercise due diligence and care in ensuring the timely and proper discharge of the cargo. Despite being aware of the vessel's scheduled Kaohsiung fixture and the laycan period specified in the charterparty, Tomahawk Maritime S.A. did not take adequate measures to expedite the discharge process at Busan, leading to the mis-delivery of the cargo.

3.13 It is further submitted that in, **Tradigrain SA v King Diamond Shipping SA**[16], that there was one area relating to the Quantum Issue upon which the experts had some disagreements

[16] Tradigrain SA v King Diamond Shipping SA (The Spiros C) [2000] 2 Lloyd's Rep 319

on English law. In gist, Mr. Byam-Cook QC submitted that under English law, it is an implied term of the contract of carriage that the goods will be unloaded by the consignee within a reasonable time, ie that it is the duty of the consignee to present the bills of lading and take delivery to prevent unreasonable delay to the vessel (citing). Accordingly, in the present matter the consignee i.e., failed to present the original Bill of Lading, as the Good Oils Sdn Bhd has not issued the Bills of Lading in time. Thereby, the claimant cannot bring a claim of mis-delivery.

[E] DIRECT RESPONSIBILITY AS CHARTERER

3.14 It is humbly submitted that, as the charterer, Tomahawk Maritime S.A. bears direct responsibility for the performance of the vessel and the cargo's transportation. While the vessel's owner and operator may have been involved in the discharge process, ultimately, Tomahawk Maritime S.A. is accountable for any failures or breaches of contract that occur during the charterparty's execution.

3.15 It is further submitted that, in the **Stolt Spur**[17], the court held the charterer liable for mis-delivery of cargo, emphasizing the duty of charterers to ensure proper discharge and delivery. Similarly, in the **Kos**[18], the court reaffirmed the principle that charterers are responsible for ensuring the cargo's prompt discharge and delivery, and any failure to do so may result in liability for damages.

[F] CALCULATION OF DAMAGES

3.16 It is humbly submitted that, VOE will provide detailed calculations and evidence to substantiate the claimed amount of USD 4,249,752.50 in damages. This may include

[17] The Stolt Spur [1988] 2 Lloyd's Rep 383
[18] Kos [2005] EWHC 3311 (Comm)

documentation of financial losses incurred, such as loss of profit, additional expenses incurred due to the mis-delivery, and any other relevant factors contributing to the overall financial impact suffered by VOE.

3.17 It is further submitted that Tomahawk Maritime S.A. failed to exercise due diligence and care in ensuring the timely and proper discharge of the cargo. Despite being aware of the vessel's scheduled Kaohsiung fixture and the laycan period specified in the charterparty, Tomahawk Maritime S.A. did not take adequate measures to expedite the discharge process at Busan, leading to the mis-delivery of the cargo. As the charterer, Tomahawk Maritime S.A. bears direct responsibility for the performance of the vessel and the cargo's transportation. While the vessel's owner and operator may have been involved in the discharge process, ultimately, Tomahawk Maritime S.A. is accountable for any failures or breaches of contract that occur during the charterparty's execution.

3.18 It is humbly submitted that, VOE will provide detailed calculations and evidence to substantiate the claimed amount of USD 4,249,752.50 in damages. This may include documentation of financial losses incurred, such as loss of profit, additional expenses incurred due to the mis-delivery, and any other relevant factors contributing to the overall financial impact suffered by VOE. In **The Yue You 902 and Voss Peer v APL Co Pte Ltd**[19] **and He-Ro Chemicals Ltd v Jeuro Container Transport (HK) Ltd**[20], the respective courts had awarded the invoice value in the complete absence of evidence that the market value had fallen between the date of the contract and the date of the mis-delivery. If had some evidence been placed before the court, the outcome may well have

[19] The Yue You 902 and Voss Peer v APL Co Pte Ltd [2002] 1 SLR(R) 823
[20] He-Ro Chemicals Ltd v Jeuro Container Transport (HK) Ltd [1993] 2 HKC 368

been different. As for *Voss Peer* and *Star Line*, it is not apparent whether the invoice value was disputed as the appropriate measure of damages. Similarly, in the present matter invoice value of the goods at the time of loading onto the vessel can be taken into consideration as an appropriate means of computing damages, which were as a result of mis-delivery.

3.19 Therefore, it is humbly submitted that Tomahawk Maritime S.A. is liable to pay damages for the mis-delivery of the cargo, as it failed to fulfill its obligations under the charterparty and bill of lading. The claimed amount reflects the actual financial loss incurred by VOE as a direct consequence of Tomahawk Maritime S.A.'s negligence and breach of contract. The claimed amount reflects the actual financial loss incurred by VOE as a direct consequence of Tomahawk Maritime S.A.'s negligence and breach of contract.

PRAYER OF RELIEF

Wherefore, in light of the issues raised, arguments advanced and authorities cited, it is most humbly prayed before this Hon'ble Commission may be pleased to:

a) The respondent sought to reject any monetary claims.

b) The Respondent challenges the arbitration clause's constitutionality, arguing that the chosen arbitration commission's failure to comply with PRC legislation renders the arbitration agreement void.

c) The Respondent argues that the amount of compensation for delay should be demurrage, and hence, it opposes the Claimant's entitlement to seek unliquidated damages.

d) The Respondent asserts that they suffered financial damage as a result of the Claimant's wrongful delivery of the cargo since they were the rightful owners of the Bill of Lading and qualified for delivery.

AND/OR

Pass any order, direction or relief that the Hon'ble Court may deem fit in interest of *Justice, Equity* and *Good Conscience*.

For this act of kindness, the counsels on the behalf of the Responding Party shall duty bound forever pray.

S/d

Counsels for the Responding Party