TWENTY FIFTH ANNUAL INTERNATIONAL MARITIME LAW ARBITRATION MOOT COMPETITION

2024

MURDOCH UNIVERSITY

PERTH, WESTERN AUSTRALIA

IN THE MATTER OF AN ARBITRATION HELD IN SINGAPORE

Claimant	**Respondent**
Tomahawk Maritime S.A.	Veggies of Earth Banking Ltd

MEMORANDUM FOR THE RESPONDENT

TEAM K

Affiqah Syuraih Juffri

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Neil Andrews et al, *Contractual Duties: Performance, Breach, Termination and Remedies* (Sweet & Maxwell, 2nd ed, 2017) 485

LIST OF ABBREVIATIONS

BOL	-	Bill of Lading
CP	-	Charterparty
LOI	-	Letter of Indemnity
SCMA	-	Singapore Chamber of Maritime Arbitration
USD	-	United States Dollars

STATEMENT OF FACTS

1. On 1 September 2023, Tomahawk Maritime S.A. (**Claimant**) entered into a Voyage Charterparty with Yu Shipping Limited (**Yu**), the Charterer, transporting palm oil (**Cargo**) from Bintulu to Busan aboard the MT NIUYANG (**Vessel**).
2. The Cargo purchase was financed by Veggies of Earth Banking (**Respondent**), who held the Bills of Lading (**BOL**) as collateral.
3. The MT NIUYANG arrived at Busan on schedule on 20 September 2023. However, the Respondent was not in possession of the BL at that time. As such, the cargo could not be discharged without the presentation of the Bill of Lading, which caused the Vessel to delay.
4. On 3 October 2023 the Respondent possessed all three copies of the Bills of Lading. On the same day, Yu presented the Claimant with a Letter of Indemnity (**LOI**), resulting in the discharge of the cargo on 4 October 2023. Yu subsequently went into liquidation.
5. The Vessel departed on 8 October 2023, but adverse weather conditions caused further delays for the vessel's voyage to Kaohsiung for its subsequent 2-year charterparty. Hence the vessel's hire rate for said charterparty was renegotiated to a lower rate with a total loss of USD 3,650,500.
6. The Claimant sought an action against the Respondent for losses incurred through the discounted hire rate from the delay in discharge. The Respondent counterclaimed for the Mis-delivery of the cargo resulting in a loss of USD 4,249,752.50.

Issues

The relevant issues in this matter are:

1) Whether the Singapore Chamber of Maritime Arbitration ('SCMA') has jurisdiction to hear the matter;
2) Whether the Claimant is entitled to make a claim for Damages beyond what would be covered by Demurrage;
3) Whether the Respondent is liable for the Claimant's Damages;
4) Whether the Respondent is entitled to make a Mis-delivery claim because they are the holder of the Bill of Lading; and
5) Whether the Claimant is liable for the Respondent's alleged Damages for Mis-delivery of the Cargo.

PART ONE: THE SINGAPORE CHAMBER OF MARITIME ARBITRATION (SCMA) DOES NOT HAVE JURISDICTION TO HEAR THE MATTER

I. Guangzhou is the seat of arbitration

7. The Respondent submits that the Singapore Chamber of Maritime Arbitration ("SCMA") has no jurisdiction to hear the matter between the Claimant and Respondent and that any claim otherwise is to be dismissed.
8. Clause 76 ('Arbitration Clause') of the Tomahawk Maritime Rider Clauses states that arbitration is to be held in Guangzhou, with SCMA rules to apply.[1]
9. The Respondent looks to the wording of the Arbitration Clause which clearly states that the Arbitration is 'to be held in Guangzhou'.

[1] Moot Problem, 28.

10. The three-step test that is used to determine what law is applicable to arbitration agreements considers whether there is an express or implied choice made by the parties for the applicable law, or if neither are present then whether there is a system of law in the arbitration agreement that is the closest and has the most real connection.[2]
11. The Respondent asserts that the parties did not expressly choose the law of the arbitration, but that an implied choice arises with the phrase "arbitration to be held in Guangzhou".
12. The Respondent asserts that if the matter is heard with Singaporean law to apply, there is factually similar precedent that demonstrates that the Arbitration is to be held with the seat as Guangzhou and Chinese law to apply.[3]
13. The Respondent asserts that, with Guangzhou as the seat of arbitration, it is invalid under Chinese law for a People's Republic of China (PRC) seated arbitration to be administered by a foreign arbitral institute such as the SCMA.[4]
14. In determining its own jurisdiction, the Tribunal is obliged to use the doctrine of competence-competence.
15. While the doctrine of competence-competence is applicable to Chinese jurisdictions,[5] there is no Court in China that will hear this matter due to the application of the SCMA rules.
16. Alternatively, if the matter is to be heard in Singapore the doctrine of competence-competence is also recognised by Singapore.[6]
17. The Respondent argues that the Singaporean Tribunal should determine that the matter is to be heard with Chinese law to apply, which renders the agreement invalid.

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[2] *BNA v BNB and Another* [2019] SGCA 84 at 46 – 48 and *Sul América Cia Nacional de Seguros SA v Enesa Engenharia Sam* [2013] 1 WLR 102 at 9.
[3] *BNA v BNB and Another* [2019] SGCA 84; *Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru [1988] 1 Lloyd's Rep 116 at 119; ABB Lummus Global Ltd v Keppel Fels Ltd* [1999] 2 Lloyd's Rep 24 at 31.
[4] *Arbitration Law of the People's Republic of China* (1995), Article 10.
[5] *Arbitration Law of the People's Republic of China* (1995) Article 20.

[6] *Singapore Chamber of Maritime Arbitration 4th Edition Rules* (2022) rule 30; *Arbitration Act (Singapore)* 2001 Section 21(1).

18. Thus, the Respondent argues that avenue results in an invalid arbitration clause.

II. Arbitration Clause is Not Valid under Chinese Law

19. The Tribunal may be aware that as a consequence of the Arbitration being heard in the PRC, the Arbitration Clause will be determined invalid as the PRC Arbitration Law requires that the arbitration commission overseeing the arbitration is an organ of the Chinese government.[7]

20. As the SCMA does not fall within this scope, the arbitration clause lacks a valid arbitration commission, making it invalid under Article 16 of the Arbitration Law of the PRC.

21. In the case *BNA v BNB and Another* [2019] SGCA 84 the Singaporean Court of Appeal took the phrase "arbitration in Shanghai" to mean Shanghai is to be recognised as the seat of the arbitration. The Court of Appeal referred to a plethora of cases that have applied the same interpretation.[8]

22. The Court of Appeal considered the argument that parties including an arbitration clause cannot simultaneously choose to invalidate this same clause by its wording.

23. The judgement found that to consider this argument there must be evidence that demonstrates the parties were aware that the choice of law of the arbitration agreement would impact the agreement's validity.[9]

24. The Court of Appeal determined upon the evidence present there was no indication that the parties were aware of the relation between PRC law and the SIAC as the administering institution.[10]

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[7] *Arbitration Law of the People's Republic of China* article 10.
[8] *Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru [1988]* 1 Lloyd's Rep 116 at 119; *ABB Lummus Global Ltd v Keppel Fels Ltd* [1999] 2 Lloyd's Rep 24 at 31; *Gary Born, International Commercial Arbitration: Commentary and Materials (2nd ed, 2001)* at p.2074 to 2075.
[9] *BNA v BNB and Another* [2019] SGCA 84 at 90.
[10] *BNA v BNB and Another* [2019] SGCA 84 at 90.

25. The Respondent asserts that in applying this case to the facts present, there is no evidence that demonstrates the parties had any awareness of the interactions between PRC law and the SCMA.
26. The Respondent asserts that due to the lack of this evidence, the Tribunal should consider the argument of the invalidity of the arbitration clause inapplicable for their determination.
27. The Respondent further asserts that it is not the responsibility of the Singaporean Tribunal to determine the invalidity of the Arbitration Clause under Chinese law. Rather the primary issue for consideration is determining whether Singaporean Tribunal does or does not have the jurisdiction to hear the matter.

PART TWO: THE CLAIMANT BREACHED ITS CONTRACTUAL OBLIGATIONS BY DELIVERING THE CARGO WITHOUT THE PRODUCTION OF THE ORIGINAL BILL OF LADING

28. The Respondent argues that the Claimant had no authority to discharge the cargo on a LOI in lieu of the BL as the discharge of cargo must occur upon the production of the BOL.[11]
29. The legal authority is long-standing and unequivocal that the shipowner is obliged to deliver and discharge the goods upon the production of the original BOL and that doing otherwise exposes them to suit from the lawful BL holder.[12]

[11] *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* 1959 AC 576 at 586; *Kuwait Petroleum Corporation v I & D Oil Carriers Ltd ("The Houda")* [1994] 2 Lloyd's Rep 541, pages 552, 553, 556 and 557.
[12] *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* 1959 AC 576 at 586; *Kuwait Petroleum Corporation v I & D Oil Carriers Ltd ("The Houda")* [1994] 2 Lloyd's Rep 541, pages 552, 553, 556 and 557.

30. The Respondent asserts that the Claimant cannot provide a defence to the wrongful discharge against a LOI.[13]
31. The BOL is not a contract itself, but rather, it is evidence of a contract of carriage of goods by sea where the Shipowner has taken possession of the goods from the shipper with the intent to deliver them to their contractual destination and then surrender their possession to "the person who, under the terms of the contract is entitled to obtain possession of them from the shipowners."[14]
32. The contract for delivery is not discharged by performance until the shipowner has surrendered their possession to the entitled person.[15]
33. Until the discharge of the contract occurs, the BOL remains to be a document of title of/for the goods by indorsement.[16]
34. The Respondent argues that in discharging against a LOI, the Claimant has breached their contractual obligations to ensure possession is transferred to the entitled party, the Claimant who is the holder of the BL.
35. The Respondent became the lawful holder of the BL upon their receipt of this docuent on 3 October 2023.[17] Prior to coming into possession of the bill of lading the Respondent was also listed as the Consignee on this document.
36. The LOI was presented by the Charterer to the Claimant on 3 October 2024, with the Claimant's release of the cargo beginning on 4 October 2024.[18]

[13] *BNP Paribas v Bandung Shipping Pte Ltd* [2003] 3 SLR(R) 611.
[14] Glyn Mills Currie & Co. v East and West India;
[15] *Sa Sucre Export v Northern River Shipping Ltd (The "Sormovskiy 3068")*[1994] Lloyd's Rep 266 at 271.
[16] *Sa Sucre Export v Northern River Shipping Ltd (The "Sormovskiy 3068")*[1994] Lloyd's Rep 266.
[17] Moot Problem, 37 para 15.

[18] Moot Problem, 9.

37. A LOI is designed to provide a remedy to the shipowner to release the Cargo only when the BOL is not available for presentation. However, the Claimant would still be liable to the original holder of the bill of lading as a consequence of the release of the Cargo on a LOI.

38. While Clause 57 permits the delivery of goods on the presentation of an LOI, the authority surrounding such discharge is strong in suggesting that it must only be done under exceptional circumstances. These exceptions are set out in *Barclays Bank* and in *The Sormovskiy.*

Exception under Barclays Bank

39. Where there is difficulty in getting a bill of lading to arrive at the discharge port in time, the parties can turn to a contractual term requiring the master to deliver the cargo against a LOI or a bank guarantee.[19]

40. This exception requires that the master or shipowner is reasonably satisfied that the person seeking the goods has an entitlement to the possession of them. The exception further requires that there is a reasonable explanation for what has occurred with the BOL.[20]

41. The BOL incorporates the Tomahawk Maritime Clauses, which includes Clause 57 that states:

> *In the absence of the original b/s at discharge port(s), owners to release the entire cargo to the receivers against charterer's LOI without bank guarantee (LOI wording always to be in Owner's P&I Club format).*[21]

42. On the first limb of the test, the Respondent argues that Clause 57 uses the term **'receivers'** as the only party to which it is permitted to have the goods released.

43. The Respondent argues that another term for 'receivers' in the context of maritime law is the term 'consignee'.

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[19] *Barclays Bank, Ltd. V. Commissioners Of Customs And Excise* [1963] 1 Lloyd's Rep. 81.at 274.
[20] *Barclays Bank, Ltd. V. Commissioners Of Customs And Excise* [1963] 1 Lloyd's Rep. 81.at 89; the *Sa Sucre Export v Northern River Shipping Ltd (The "Sormovskiy 3068")*[1994] Lloyd's Rep 266.
[21] Moot Problem Page 28.

44. The Consignee is ordinarily expected to be the receivers of goods at their destination.

45. More crucially, for the discharge of the goods, the receiver must also be the holder of the bill of lading. It does not matter that they may be the party listed as entitled to the goods[22] they must also be able to present the bill of lading.

46. The Respondent asserts that the test fails upon the first limb as the threshold of 'reasonably satisfied' in the Barclays Bank exception could not have been met by a Charterer appearing with a LOI claiming that the delayed arrival of the bill of lading permits them to receive the delivery.[23]

47. On the second limb of the test, the Respondent argues that the BOL was in transit and had reached the Respondent the day prior to the discharge of the goods. At the time the goods were wrongfully discharges, their location was with the Respondents who were the rightful party to the cargo.

Exceptions under Sormovskiy

48. The Respondent further argues that the exceptions permitting discharge under a LOI that arise in the Sormovskiy are not applicable to the facts of this case.

49. The Respondent notes that this area of law is still unsettled since *Sormovskiy* but that the *Motis* has challenged the exception under circumstances of a fraudulent bill of lading.

50. There are five propositions that arise from the *Sormovskiy*.

I The Shipowner is entitled to refuse delivery of goods

51. The first proposition, derived from *Barclays Bank*, is that the shipowner is entitled to refuse the delivery of goods, even to the true owner, unless the true owner can satisfactorily account for the absence of the bill of lading.[24]

[22] *The Dolphina* [2012] 1 SLR 992 at 141.
[23] *Barclays Bank, Ltd. V. Commissioners Of Customs And Excise* [1963] 1 Lloyd's Rep. 81.
[24] *Sa Sucre Export v Northern River Shipping Ltd (The "Sormovskiy 3068")*.

52. The Respondent argues that the Charterer cannot be considered as the party entitled to the goods as they did not hold the bill of lading nor were they a listed Consignee.

53. Thus, the Claimant could not rely on any assertions made by the Charterer regarding the whereabouts of the bill of lading.

54. The Respondent further argues that the Claimant would have been well within their rights to protect both themselves and the cargo by refusing the delivery of the cargo to the Charterer.

II The Shipowner is not obliged to deliver against an original Bill of Lading to someone other than the person entitled to possession

55. The second proposition furthers this argument as it states that "the shipowner is not obliged to deliver against an original Bill of Lading to someone other than the person entitled to possession.".[25]

56. This exception further demonstrates that even under circumstances where a bill of lading is presented, the shipowner must still ensure that they are not at risk of delivering the cargo to the wrong party. The Respondent states that this bolsters the argument that the primary responsibility of the Claimant was to ensure the delivery to the correct party per the bill of lading.

III Delivery can occur upon a bill of lading to someone other than the person entitled to possession

57. The third proposition is that delivery can occur upon a bill of lading to someone other than the person entitled to possession "unless they have notice of competing claims or knowledge of any circumstances raising a reasonable suspicion that the claimant is not entitled to the goods". [26]

[25] *Sa Sucre Export v Northern River Shipping Ltd (The "Sormovskiy 3068")* ; and *Herman Carlberg v Wemyss Coal Co. Ltd* [1915] S.C. 616 at 624.
[26] *Sa Sucre Export v Northern River Shipping Ltd (The "Sormovskiy 3068")* at 271.

58. The Respondent argues that this proposition is not relevant as the Claimant did not present the bill of ladings when the goods were discharged.

IV the bill of lading, by implication, if not expressly, makes the goods deliverable upon, and only upon, the surrender of the bill of lading

59. The fourth proposition is that "the bill of lading, by implication, if not expressly, makes the goods deliverable upon, and only upon, the surrender of the bill of lading."[27]
60. The Respondent argues that despite the *Sormovskiy* listing out exceptions it is still extremely explicit in its wording that delivery must be only upon the presentation of the bill of lading.

III. Claimant's Failure to Protect their Interests

61. The Respondent asserts that, considering the Claimant's concerns about the delay in discharge, the Respondent made an offer to the charterer, in good faith, that if their concern is accruing demurrage, then the Respondent would not interfere with the Charterer's actions upon the condition that their loan be repaid.
62. The Charterer failed to uphold this condition of the Respondent's terms and has subverted their responsibility to repay the loan by requesting the Claimant discharge the goods upon their LOI.
63. The Claimant has breached their contractual obligations by permitting this discharge upon the LOI.
64. The Respondent reiterates that the Claimant acted to their own detriment in accepting to deliver upon a LOI when both history and law have demonstrated that parties contracting in a term for delivery upon a LOI does not protect the Claimant from claims of misdelivery.

[27] *Sa Sucre Export v Northern River Shipping Ltd (The "Sormovskiy 3068")* at 272.

65. The Respondent argues that while the discharge of goods upon a LOI is becoming increasingly common in practice, it opens the shipowner up to liability particularly when discharging upon a LOI without a bank guarantee.

66. The terms of the rider clauses permit the discharge of goods without a bank guarantee, but the shipowner should have taken precautions to reduce their liability by requesting a bank guarantee prior to discharge.

67. In obliging to deliver the goods without the security of a bank guarantee, particularly when the shipowners have the right to refuse discharge of the goods until they are reasonably satisfied that the person entitled to the goods is the person before them, they have opened themselves up to the risk of a claim of misdelivery which is what has indeed taken place.

68. As the holders of the Bill of Lading the Respondent is asserting their entitlement to the goods, of the value of USD 4,249,752.50 that they have lost as a result of the misdelivery.

PART THREE: THE CLAIMANT IS NOT ENTITLED TO CLAIM FOR UNLIQUIDATED DAMAGES BEYOND DEMURRAGE

IV. The Respondent did not have special knowledge of the Kaohsiung Fixture

69. The second limb *Hadley v Baxendale* states that a defendant may be liable for a loss that the plaintiff highlighted.[28] There is an assumption of responsibility underlying this principle, where there is actual knowledge of both parties that a specific loss would result in a breach

[28] *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528, 539 (Asquith LJ).

of contract.[29] In this case, the Respondent had no special knowledge of the Kaohsiung Fixture until 29 September 2023, where the Vessel was already at the port of Busan.[30]

70. For the possibility of a particular loss, the loss of the Kaohsiung Fixture, to be considered by the Respondent, the details of that loss has to be known with some specificity.[31] In this case, the Respondent was unaware of the Vessel's subsequent Fixture until nine (9) days upon the Vessel's arrival at Busan.[32]

71. Hence, the Respondent should only be liable to the Claimant on demurrage due to the delay in discharging the cargo and not beyond that.

V. The Respondent is only liable to the Claimant to pay the demurrage accrued

72. In light of the case of the *Eternal Bliss*, where the scope of a demurrage clause is deemed wide enough to cover all losses caused by a delay, the Respondent contends that the loss in question was solely due to a delay.[33]

73. Further, not only did the Claimant fail to inform the Respondent of the subsequent Kaohsiung Fixture, but the Respondent also only had knowledge of the subsequent fixture nine (9) days after the arrival of the Vessel in Busan and that was through the insolvent charterer, Yu.[34]

74. Lord Roger in *The Achilleas* provides an example of what could be sufficient to demonstrate special knowledge under the current circumstances. His Lordship indicated that the

[29] *Jackson v Bank of Scotland* [2005] 1 WLR 377, 386 [35]–[36] (Lord Hope); *Satef-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA (The Pegase)* [1981] 1 Lloyd's Rep 175, 185 (Goff J); Neil Andrews et al, *Contractual Duties: Performance, Breach, Termination and Remedies* (Sweet & Maxwell, 2nd ed, 2017) 485 [23-039].
[30] Moot Problem 48.
[31] *Horne v Midland Railways Co* (1873) LR 8 CP 131; *British Columbia & Vancouver's Island Spar, Lumber & Saw-Mill Co Ltd v Nettleship* (1868) LR 3 CP 499.
[32] Moot Problem 48.
[33] *K Line Pte Limited v Priminds Shipping (HK) Co Limited ("The Eternal Bliss")* [2022] Bus Lr 67,CA [52].
[34] Moot Problem, 48.

[Respondent] could be held liable if the owners had highlighted the presence of a subsequent fixture that required the Vessel to be delivered by a specific date.[35]

75. Therefore, it is inappropriate to impose additional liabilities on the Respondent for the loss of a fixture that the Respondent had no knowledge of previously. Given that the Respondent had no special knowledge of the Kaohsiung Fixture at the time of contracting, they cannot be taken to have assumed responsibility for the loss of the hire rate.

76. Further, the Respondent asserts that the claimant shall not be entitled to damages beyond the demurrage clause, as no separate obligation, other than the obligation to deliver the cargo within a reasonable time, has been breached that gives rise to damages beyond demurrage.

77. As defined in *Scrutton on Charterparties*, demurrage is "*a sum agreed by the charterer to be paid as liquidated damages for delay beyond a stipulated or reasonable time for loading or unloading, generally referred to as the laydays or laytime*".[36]

78. In the Eternal Bliss, demurrage serves to liquidate damages arising from a [Respondent's] breach in failing to discharge cargo within the laytime provision stipulated. The case further added that if the [Claimant] shipowner seeks to claim damages beyond or in addition to demurrage arising from a delay, the Claimant needs to prove a breach of a separate obligation different to the breach of laytime.[37]

79. The Vessel arrived at the port of Busan on 20 September 2023 where laytime starts to commence at 0843LT.[38]

80. The charterparty provides ninety-six (96) hours for discharging cargo. Beyond that, the Respondent is liable to demurrage accrued at USD 1500 per hour.[39]

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[35] *The Achilleas* [2009] 1 AC 61, 80 [59].
[36] *Scrutton on Charterparties*, 24th edition (2020), Art 170.
[37] *K Line Pte Limited v Priminds Shipping (HK) Co Limited ("The Eternal Bliss")* [2022] Bus Lr 67,CA [52].
[38] Moot Problem 8.
[39] Moot Problem, 12-13.

81. The cargo was discharged on 7 October 2023 and departed on 8 October 2023. Hence, the Respondent is only liable for the demurrage from 23 September 2023 leading up to the departure of the Vessel.

82. The Claimant here is not able to satisfy a breach separate to that of laytime. The only breach alleged is that of the Vessel being unable to depart Busan on time, caused by a delay, therefore a separate breach cannot be made out and the Claimant is not entitled to compensation beyond demurrage.

VI. Implied Terms Do Not Apply

83. In the Statement of Claim, the Claimant asserts that an additional implied term applies that requires the Consignee to take delivery of the cargo within a 'reasonable time'.[40] A 'reasonable time' refers to what is reasonable under the circumstances.

84. The test for implied terms is set out in the *BP Refinery* case where it states:[41]

"[F]or a term to be implied, the following conditions (which may overlap) must be satisfied:

(1) it must be capable of clear expression;

(2) it must be reasonable and equitable;

(3) it must be so obvious that 'it goes without saying';

(4) it must not contradict any express term of the contract; or

(5) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it."

85. In construing the implied term, the Respondent looks at the last three elements to satisfy the test for implied terms.

A The Term Implied must be so obvious that it goes without saying

[40] Moot Problem, 10.
[41] *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 52 AJLR 20, [40].

86. The test for this involves considering the negotiation of the initial agreement between the parties, that an officious bystander would suggest some express provision for it in their agreement to the parties and both parties would agree that the suggested provision should be included in the Bill of Lading without question.[42]

87. The incorporation of the 96-hour deadline for the laytime of the Vessel in Clause E shows the parties obvious intention to ensure that the discharge of the cargo was conducted within a specified timeframe.[43]

88. Given that there is already an express provision in the charterparty that allows the Respondent to discharge the cargo within ninety-six (96) hours before demurrage starts accruing, the implied term of 'reasonable time' might not be necessary and would not have met the officious bystander test.

B The Term Implied must not contradict any express terms of the contract

89. The Respondent submits that the implied term of 'reasonable time' contradicts the express term provided as it seeks to incorporate a broader and less specific timeframe than already agreed.

90. Furthermore, there is no necessity to imply a term into the contract when an express term already exists within the contract.

91. There is an express obligation to discharge the Vessel within the specified laytime of ninety-six (96) hours.[44]

92. The Vessel arrived at Busan on 20 September 2023, meaning the laytime of ninety-six (96) hours expired on 24 September 2023.[45]

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[42] *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 52 AJLR 20, [40].
[43] Moot Problem 12.
[44] Moot Problem 10.
[45] Moot Problem 10.

93. Hence, the implied term of "reasonable time" is inconsistent with the ninety-six (96) hour time limit stipulated in the charterparty.

94. This fails the test that an implied term should not contradict the express term provided.

C The Term Implied it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it

95. Lord Neuberger, considered the question of when a term should be implied into a contract. He referenced cases that applied the traditional tests of "business necessity" and "obviousness", and recognised that at least one of those tests needed to be satisfied before a court could imply a term into a contract.[43]

96. He added that business necessity would only exist if, without the term, the contract lacked "commercial and practical coherence".[46] A term would only satisfy the obviousness test if it was "so obvious that it goes without saying".[47] This reiterates the high threshold that must be met before a court can imply a term into a contract.

97. The implied terms fail as it is inconsistent with the express term of provided in the charterparty. Therefore, the express provision of ninety-six (96) hours applies and Respondent is only liable for the demurrage accrued beyond ninety-six hours.

98. The Respondent asserts that implying a term into this contract is intended to provide relief for the Claimant for a matter that they had not seen at the formation of the contract, and they seek the term only to cater for circumstances that they render unfavourable to themselves.

99. Hence, the test for implied terms fails because there should 'no dilution of the requirements which have to be satisfied before a term will be implied.[48]

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[46] *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd and anr* [2015] UKSC 72, 21.

[47] *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd and anr* [2015] UKSC 72, 23.

[48] *Barton and others (Respondents) v Morris and another in place of Gwyn Jones (deceased) (Appellants)* [2023] UKSC 3, 22.

100. It was stated in the charterparty that "the shipowner is entitled to take reasonable measures to prevent the delay of the ship after the expiry of a reasonable time."

101. The Claimant had the choice to use this option to warehouse the goods in Busan after the Charterer failed to arrange delivery within the time they agreed with the Claimant, but they did not, and they remained in port well beyond the expiry of the laytime.

102. Had the Claimant been concerned about the loss of the subsequent charterparty then they could have exercised the options available to them to mitigate their own loss.

103. In most, possibly all, disputes about whether a term should be implied into a contract, it is only after the process of construing the express words is complete that the issue of an implied term falls to be considered. Hence, in this case, implied terms would not apply.

104. The Respondent asserts that the Claimant is under an obligation to take all reasonable steps to mitigate its loss. Mitigation only requires a party to act in the ordinary course of business.[49]

105. As mentioned above, the Claimant did not mitigate its loss by failing to warehouse the goods in the port of Busan despite being under time constraints to fulfill their subsequent fixture at Kaohsiung. Warehousing the goods is in the ordinary course of business.

106. Therefore, the Respondent is not liable to losses beyond the demurrage provision.

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[49] *British Westinghouse Electric & Manufacturing Company Ltd v Underground Electric Railways Company of London Ltd* [1912] AC 673, 689 (Haldane LC); *Dunkirk Colliery Company v Lever* (1878) 9 Ch D 20, 25 (James LJ); *The Asia Star* [2009] 2 Lloyd's Rep 387, 392 [26] (Prakash J).

VII. The Respondent is entitled to damages amounting to USD 4,249, 752.50

107. The Respondent seeks damages amounting to $4, 249, 752.50, the total value of the cargo, for the Claimant's breach of their contractual obligation to deliver upon a bill of lading which has resulted in the mis delivery of the cargo.

108. The Claimant opened themselves up to liability for the mis delivery of the goods when they delivered the cargo to the Charterer upon the presentation of a LOI.

109. There is no obligation that required the Claimant to discharge the ship. However, there is an obligation to deliver upon the presentation of a bill of lading.

110. The Respondent argues that the mis delivery could have been avoided had the Claimant exercised their right to refuse delivery until the bills of lading were presented whether that was to be by the Claimant or the Charterer.

PART FOUR: PRAYER FOR RELIEF

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

DETERMINE that the arbitration clause is invalid, and the Tribunal does not have jurisdiction to hear this matter;

FIND that the Claimant is not entitled to damages beyond the demurrage clause;

FIND that the Claimant breached their contractual obligations by discharging on a letter of indemnity; and

AWARD the Respondent damages in amount of USD 4, 249, 752.50 being the total value of the cargo