23rd INTERNATIONAL MARITIME LAW ARBITRATION MOOT JULY 2024

In the matter of an International Arbitration under the Singapore Chamber of Maritime Arbitration (SCMA, 4th edition) Rules

Between**TOMAHAWK MARITIME S.A.**

……CLAIMANT

AND

VEGGIES OF EARTH BANKING LTD

…… RESPONDENT

RESPONDENT'S MEMORANDUM

UNIVERSITY OF VERSAILLES - PARIS SACLAY

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TEAM L

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LIST OF ABBREVIATIONS

Bill of Lading / BL	Tanker Bill of Lading NO. COW-001A
Cargo	16,999.01 MT cargo of crude palm oil
Carry on	Carry on Advisory Services LLP
Charterer / Shipper	Yu Shipping Ltd.
Charterparty	Tanker Voyage Charter Party
Claimant / Tomahawk	Tomahawk Maritime S.A.
D&CC	Statement of Defense and Counterclaim
Good Oils / Seller	Good Oils Snd Bnd
Interim liquidator	Carry on Advisory Services LLP
LC	Letter of credit
Parties	Claimant & Respondent
Respondent	Veggies of Earth Banking Ltd.
SCMA Rules / SCMA Arbitration Rules	Singapore Chamber of Maritime Law Arbitration Rules (4th Edition)
Statement of Reply and Defense to CC	Statement of Reply and Defense to Counterclaim
Tribunal	Arbitral Tribunal
Vessel	Niuyang

LIST OF AUTHORITIES

CASE LAW

LEGISLATION

Legal Sources	**Full citation**	**Quoted on page:**
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COSGA	Carriage of Goods by Sea Act 1992	18,19
Factors Act	Factors Act 1889	18
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DOCTRINE

Doctrine	**Quoted on page:**
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JOURNAL ARTICLES

STATEMENT OF FACTS

1. The current memorandum is placed under the name of and in the interest of Veggies of Earth Banking Ltd. (the "**Respondent**"), as required by the procedural calendar created following the constitution of the Arbitral Tribunal (the "**Tribunal**").
2. The parties ("**Parties**") to these arbitration proceedings ("**Arbitration**" or "**Arbitration proceedings**") are Veggies of Earth Banking Ltd., a financial institution registered and existing under the laws of Hong Kong, and Tomahawk Maritime S.A. (the "**Claimant**"), a company registered and existing under the laws of Panama,.
3. This Arbitration is hereby governed by the Singapore Chamber of Maritime Law Arbitration Rules ("**SCMA**" Rules) in its 4th edition, in force since the 1st January 2022.
4. On the **1st of September 2023**, the Claimant entered into a Tanker Voyage Charter Party ("**Charterparty**") with Yu Shipping Ltd. (the "**Charterer**" or "**Shipper**").Within the Charterparty, the Respondent, owner of Niuyang (the "**Vessel**"), agreed to its use for the carriage of a 16,999.01 MT cargo of crude palm oil (the "**Cargo**") from Bintulu, Malaysia, to Busan, South Korea.
5. The Respondent is the financier of the Cargo. On the **14th of August 2023**, Yu Shipping Ltd. purchased the Cargo from Good Oils Snd Bnd (hereafter "**Good Oils**" or "**Seller**") with payment to be made by way of a letter of credit ("**LC**"). The LC was issued by the Respondent who paid for the Cargo under the LC, on behalf of Yu Shipping Ltd.. The Respondent therefore had advanced funds to Yu Shipping Ltd. and looked to the Cargo as security for the loan.
6. The Vessel, having arrived in Bintulu on the **3rd of September 2023**, was loaded and set sail on the **6th of September 2023**, the same day on which the Bill of Lading ("**Bill of Lading**" or "**BL**") was issued.

7. The Respondent was informed that the Vessel had arrived in Busan on the **20th of September 2023**. However, no documents had been presented to the Respondent and therefore no berthing or discharge instructions were sent to the Vessel. It wasn't until the **29th of September 2023**, that the Claimant requested to apply for trust receipt. The Respondent, in responding in less than an hour, confirmed that the request would be processed once the documents were presented. On the **3rd of October**, the Respondent informed the Charterer that they were unable to grant trust receipt until they possessed both the export LC and the BL. The Respondent reaffirmed their decision, but also assured that they would not interfere as long as the loan is repaid.
8. Following the receipt of the LOI as well as berthing and discharge instructions, the discharge of the Cargo commenced on the **4th of October 2023** and was duly completed on the **7th of October 2023**.
9. The Vessel departed Busan on the **8th of October 2023**, but due to the adverse weather and sea conditions that the Vessel encountered, was unable to arrive at Kaohsiung within the strict laytime (**1st-14th October 2023**). On the **16th of October 2023**, the Vessel's next fixture issued their notice cancelling the charterparty. However, the Claimant was able to reinstate the Vessel's employment at a slightly lower hire rate of USD 30,000 as opposed to USD 35,000 a day.
10. Unaware of any correspondence or demands made between the Claimant and Carry On Advisory Services LLP ("**Carry on**" or "**Interim Liquidators**"), the Respondent wrote to the Claimant asserting themselves as legal holder of the Bill of Lading on the **29th of November 2023**.
11. Following this, arbitration proceedings were wrongfully commenced against the Respondent, by Notice of Arbitration, on the **22nd of December 2023**. A Response to the Notice of Arbitration was formed by the Respondent on the **5th of January 2024** in order to contest the validity of the Arbitration and completely reject the Claimant's claim.

12. As part of the Arbitration proceedings, a Statement of Claim ("**Statement of Claim**") was issued by the Claimant on the **19th of January 2024**. This was followed by a Statement of Defense and Counterclaim ("**D&CC**") by the Respondent on the **16th of February 2024**, and subsequently by a Statement of Reply and Defense to Counterclaim ("**Statement of Reply and Defense to CC**") dated **1st of March 2024**.

SUMMARY OF THE ISSUES

13. The Respondent rejects the Claimant's Claims as set out in the Statement of Claim for the following reasons;
14. **Issue 1: There is no valid arbitration clause.** The law applicable to determine the validity of the arbitration clause is PRC law, under which the Singapore Chamber of Maritime Arbitration is not an "Arbitration Commission" therefore rendering the agreement invalid and the Tribunal lacks jurisdiction. The seat of the arbitration designated by the arbitration agreement embodied in the Bill of Lading is Guangzhou, which means that the governing law is PRC law
15. **Issue 2: The Claimant is not entitled to claim losses quantified by reference to the negotiation discount for the Vessel's next employment.** With the existence of an express term within the Chartparty, an implied term to take delivery within a reasonable time is unnecessary. The breach of this express term is entirely covered by demurrage, thus the Claimant's claim is limited to demurrage only.
16. **Issue 3: The Respondent is entitled to damages amounting to USD 4'249'752.50 arising from the Claimant's mis-delivery of the Cargo.** As lawful holder of the Bill of Lading, the Respondent is entitled to delivery of the Cargo upon presentation of said BL. In breach of its obligations, the Claimant delivered the Cargo against a Letter of Indemnity resulting in the aforementioned damages.

TITLE 1: PROCEDURE - THE ARBITRAL TRIBUNAL DOES NOT HAVE JURISDICTION TO RULE OVER THE CLAIMS

17. Under the principle 'competence-competence' [1]provided by Section 30 of the Arbitration Act 1996, an arbitral tribunal has the power to rule on its own jurisdiction, unless otherwise agreed by the parties[2]. Following this doctrine, the Respondent asserts that the Tribunal lacks jurisdiction in accordance with the arbitration agreement. Firstly, the arbitration agreement designating Singapore is not valid under the PCR law which means that the arbitration clause is invalid and that TRIBUNAL lacks jurisdiction (**I**). Also, the seat of the arbitration designated by the arbitration agreement embodied in the Bill of Lading is Guangzhou, which means that the governing law is PRC law (**II**). Alternatively, if the TRIBUNAL finds that the seat of the arbitration is Singapore, a second arbitration agreement is incorporated in the CHARTERPARTY which confirms the parties' intention to invalid arbitration clause embodied in Bill of Lading (**III**) .

I - The arbitration agreement is not valid under the Law of the Arbitration People's Republic of China (PRC Law).

18. When it comes to determining the law that applies in assessing the validity of an arbitration clause, the location of the arbitration seat is of crucial importance. Indeed, the High Court of Singapore highlighted in the *Mittal v Westbridge Ventures II Investment Holding*[3]*s* case*,* that since the law of the seat will apply during the post-award stage to determine whether the issues

[1] *SCMA Arbitration Rules* 4th Edition, Rule 30
[2] Arbitration Act 1996, s 30
[3] *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1

addressed in the arbitration award were subject to arbitration or not, the validity of the arbitration clause should be determined following the law of the seat.

19. In our case, the arbitration agreement is embodied in an arbitration clause incorporated in the Bill of Lading providing as follows: *"General Average and Arbitration, if any, to be held in Guangzhou with three arbitrators and SCMA Rules. English law to apply to the CP."*

    The clause designates Guangzhou as the seat of arbitration. Therefore, the validity of the clause depends on the PRC law.

20. Clause 16 (c) of the PRC Law provides that in addition to the expression of the parties' intention to submit to arbitration and the matters to be arbitrated;[4] an arbitration agreement shall contain the Arbitration Commission selected by the parties.

21. Arbitration Commission is defined by Clause 10 of the PRC Law as follows : *"**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 organise the relevant departments and the Chamber of Commerce for the formation of an arbitration commission. The establishment of an arbitration commission **shall be registered with the judicial administrative department of the relevant province**, autonomous region or municipalities directly under the Central Government."*

[4] Law of the Arbitration People's Republic of China, Clause 16 (a) and (b)

22. Following the definition of Clause 10 of the Arbitration Law Singapore Chamber of Maritime Arbitration is not an "*Arbitration Commission*"and does not satisfy the third requirement for a valid arbitration clause. The clause is therefore invalid.

23. Moreover, if the arbitration agreement is not valid under PRC law , this leads to the fact that the recognition enforcement of the award may be refused. Indeed, Article V(1)(a) of the New York Convention provides that "*recognition and enforcement of [an] award may be refused ... if ... the [arbitration] agreement is not valid under the law to which the parties have subjected it…".*

24. The article operates at the enforcement stage to focus attention on the law to which the parties subjected their arbitration agreement[5]. As already stated, parties subjected their arbitration agreement to the PRC law since the seat is in Guangzhou. The arbitration clause being null and void under the PRC law, by application of the Article V(1)(a) of the New York Convention, the recognition of an award may be refused thus the application of such clause would present a high risk of legal instability. Also, in cases where there is neither an explicit nor implicit selection of law, Art V(1)(a) specifies a specialised default provision whereby the arbitration agreement will be governed by "the law of the country where the award was made"[6]. In the present case, PRC will apply.

[5] New York Convention 1959, Art. V(1)(a)
[6] See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) [478] and [506]–[507]

II - The seat of arbitration is Guangzhou, therefore the law governing the arbitration agreement is the PRC law

25. As reminded in *BNA v BNB and another* case*,'an arbitration agreement by definition is the product of negotiations between the parties.'*[7] In case of conflicts of law the BCY three-stage framework serves as a method for determining the appropriate law governing the arbitration agreement outlined by the English Court of Appeal in the Sulamérica case . This framework aligns with the well-established common law principles for determining the applicable law of any contract, as indicated in Sulamérica [8] Consequently, arguments will predominantly be aimed at addressing each of the three stages within the framework.

A - First step : the express choice of law

26. During the initial stage of the assessment, the Court scrutinises whether the parties explicitly selected the applicable law of the arbitration agreement [9]. If a lack of clarity is found, the second step of the framework can then be initiated.
27. The express choice of the English law regarding the Charter Party is only a strong indicator of the governing law of the arbitration agreement unless there are indications to the contrary.[10]
28. Although English law is designated in the main contract, the fact that the arbitration seat is designated as Guangzhou introduces sufficient ambiguity to attest to the lack of clarity in the clause.
29. Therefore, the second step of the "three-stage *BCY* framework" can be initiated.

[7] *BNA v BNB and Another* [2019] SGCA 84, [1]
[8] *Sulamérica Cia Nacional de Seguros SA and others v Enesa Engelharia SA and others* [2013] 1 WLR 102
[9] *BNA v BNB and Another* [2019] SGCA 84, [46]
[10] *Sulamérica Cia Nacional de Seguros S.A. vs Enesa Engenharia S.A.* [2012] EWCA Civ 638, [11]

B - Second step : the implicit choice of law

30. In the second step, if there is no explicit choice, the Court investigates whether the parties implicitly selected the applicable law to govern their arbitration agreement.

    In this case, many arguments support the scenario of the implicit choice of the PRC law.

31. Firstly, an arbitration clause that specifies a city for arbitration designates the seat of the arbitration, therefore the seat of arbitration is Guangzhou.

32. In the *BNA v BNB and another case*, the Court of Appeal of Singapore provided clarification on how to interpret arbitration clauses that specify a city for arbitration. In the previous case, Juges highlighted that *where parties specify only one geographical location in an arbitration agreement, and particularly where, as here, the parties express a choice for "arbitration in [that location]", that should most naturally be construed as a reference to the parties' choice of seat.*[11]

    In the present case, the arbitration clause states that "*arbitration, if any, to be held in Guangzhou*". Therefore, the uncertainty about the seat's location has been entirely dispelled, and there is no doubt that Guangzhou has been selected as the arbitration seat.

33. Also, since the choice of the seat undermines the clear intention of the parties the PRC shall apply. Indeed, as outlined in the *Sulamérica* case, in the absence of an explicit choice, the presumed law for the arbitration clause should be that of the main contract.[12] However, this presumption falls if the parties made a choice of seat . In this present case , the consequences arising from the choice of the law of the seat undermines the clear intention of the parties to apply the English law or to have the arbitration seated in Singapore .

    Therefore, by choosing Guangzhou as the seat of their arbitration, the parties had the clear intention to apply the PRC law to their agreement.

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[11] *BNA v BNB and another* (2019) SCGA 84 27 Dec 2019, [65]
[12] *Sulamérica Cia Nacional de Seguros S.A. contre Enesa Engenharia S.A.* [2012] EWCA Civ 638, [11]

34. Furthermore, the law of the seat prevails over the law of the contract as the law implicit in the arbitration clause.

35. As held in *Firstlink investments corp ltd* case**,** it cannot be presumed that commercial parties consistently desire the same legal system to regulate their obligations' fulfilment within a contract[13]. Therefore, in the present case the fact that the main contract is governed by English law does not imply in any way that English law must apply to the arbitration clause. On the contrary, *' the very choice of an arbitral seat presupposes parties' intention to have the law of that seat recognise and enforce the arbitration agreement'*[14]**.**

In the present case, by choosing Guangzhou as the seat of their arbitration, the parties had the intention to give the law of the seat recognized and enforce the arbitration agreement, meaning the PRC law.

C - Third step : the law with the closest and most real connection to the dispute

36. As the parties' implied choice of the proper law has already been demonstrated in the second step of the three-step framework that the PRC law should apply, it won't be necessary to develop this last step to determine which law has the closest and most real connection to the dispute. It will be simply asserted that as held in *C v D* case[15], it would be "*rare*" for the governing law to differ from the law of the arbitration venue. This is because an arbitration agreement is more closely associated with the chosen arbitration location than with the governing law of the main contract.

[13] *Firstlink investments corp ltd v GT Payment Pte Ltd and others, [2014] SGHCR 12* [13]
[14] *Firstlink investments corp ltd v GT Payment Pte Ltd and others* [2014] SGHCR 12, [14]
[15] *C v D* [2007] EWCA Civ 1282, [24]

III- Alternatively, Clause 47 incorporated in the CHARTERPARTY confirms the parties' intent to invalid arbitration clause embodied in Bill of Lading

37. Clause 47 contained in the charter party, the "charterparty conflict"[16] clause, designates the main terms of the charterparty as the priority in terms of conflict resolution.

38. The main terms of the charter party relating to the conflict resolution are as follows : *"Any dispute arising from the making, performance or termination of this* ***Charter Party*** *shall be settled in* ***New York****, Owner and Charterer each appointing an arbitrator, who shall be a merchant, broker or individual experienced in the shipping business [...] Such arbitration shall be conducted in conformity with the provisions and procedure of the* ***United States Arbitration Act****."*[17]

39. By stipulating this clause and especially the priority of this clause in the charter party, parties clearly decided to invalidate the application of the arbitration clause embodied in the bill of lading[18]. This also confirms the lack of clear intent of the parties to apply the SCMA rules in priority. Therefore the clause embodied in the bill of lading is not valid. Tribunal does not have jurisdiction.

[16] International Maritime Law Arbitration Moot 2024, *Moot Problem*, 26 December 2023 V.1, p.19 [47]
[17] International Maritime Law Arbitration Moot 2024, *Moot Problem*, 26 December 2023 V.1, p.19 [31]
[18] International Maritime Law Arbitration Moot 2024, *Moot Problem*, 26 December 2023 V.1, p.2 [5]

TITLE 2: MERITS - The Respondent rejects the claims made by the Claimant and seeks damages for the mis-delivery of the Cargo

40. In accordance with rider clause 76, the arguments made in favour of the merits of this Arbitration are hereby governed by English law, due to its application to the Charterparty.
41. The Respondent rejects the claims made by the Claimant in its Statement of Claim. The Respondent therefore contends that the Claimant is not entitled to claim losses quantified by reference to the negotiation discount of the Vessel's next employment (**Section 1**).
42. Additionally, the Respondent counterclaims damages amounting to USD 4,249,752.50 arising from the Claimant breach of mis-delivery of the Cargo (**Section II**).

SECTION 1: The Claimant is NOT entitled to claim losses quantified by reference to the negotiation discount for the Vessel's next employment

43. While rejecting the Claimant's claim for additional damages to demurrage, the Respondent argues that there is no need to imply a term to take delivery within a reasonable time (**I**) as the Respondent does not dispute the existence of an express term in the Charterparty. However, the Claimant's claim for losses due to a breach of the express term to take delivery within laytime is to be strictly limited to demurrage only (**II**).

I - It is unnecessary to imply a term to take delivery within a reasonable time

44. Like in the case of *Nagusina Naviera v Allied Maritime Inc*, the courts have often had to determine whether charterers, under a charter with no duration, are under any obligation as to the time within which discharge of the cargo is to be effected. Whilst dismissing the appeal, Lord

Justice Mance described the idea of an implied term as an "*unusual contention*".[19] In *Tradigrain,* it was even suggested that there was "*no authority to support*" the existence of an implied term.[20]

45. In considering that "*one of England's leading commercial judges thought there was little, if anything, in the argument of an implied term*", a London arbitral tribunal found that the concept of reasonable time had to be interpreted so as to include any amount of time that did not frustrate the charter and that therefore, the only possible test was to determine what would be a frustrating amount of time.[21]

46. "*If, by the terms of the charterparty, the charterer has agreed to discharge the ship within a fixed period of time, that is an* ***absolute and unconditional engagement"***[22]. As is clearly stated in *Postlethwaite*, an express term provided for in a charterparty binds the parties, whereas an implied term is only to be applied "*if there is no fixed time*".[23] Likewise, in *Hick v Raymond*, it was found that the law did imply a term, but exclusively where the contract did not expressly fix any time for the performance of a contractual obligation.[24]

47. In the present arbitration, both the Claimant and the Respondent admit that there exists an express term in the Bill of Lading.[25] The Bill of Lading clearly states that it is carried under and pursuant to the terms of the Charterparty, dated 1st of September 2023.[26] By incorporating the terms of the Charterparty, the BL contains an express clause (clause E of the Charterparty[27])

[19] *Nagusina Naviera v Allied Maritime Inc* [2002] EWCA Civ 1147, [3] (Mance L.J.)
[20] *Tradigrain SA & Ors v King Diamond Marine Ltd ('The Spiros C')* [2000] C.L.C. 1503, [74]
[21] *London Arbitration 25/07*, "Charterparty – Time charter trip – Vessel incurring substantial delay at discharge port – Owners claiming to have incurred financial loss – Whether implied term that charterers would discharge cargo within reasonable time" (2007) 731 LMLN 3(2)
[22] *William Postlethwaite v John Freeland and Alexander Freeland* (1880), 5 App. Cas. 599, 608 (Selborne L.C.)
[23] Ibid.
[24] *Pantland Hick Appellant; v Raymond & Reid Respondents* [1893] A.C. 22, 32 (Watson L.)
[25] International Maritime Law Arbitration Moot 2024, *Moot Problem*, 26 December 2023 V.1, p.10 [17] and p.37 [12]
[26] Ibid, Bill of Lading, p.4
[27] International Maritime Law Arbitration Moot 2024, *Moot Problem*, 26 December 2023 V.1, Statement of Claim, Annex A, p.12 [E]

which indicates that discharge should be performed within 96 (running) hours. This laytime provision creates an absolute express engagement between the Claimant and the Respondent, the breach of which is to be solely covered by demurrage. This clause renders the application of an implied term unnecessary as the Charterer is already under an express obligation in regard to the duration within which discharge is to take place.

48. If, however, the Tribunal finds the implied term applies, the discharge was only delayed, between the 20th of September and the 7th of October, for 13 days (not including laytime). In stark contrast to the "*unexplained and inexplicable*" 3-month delay present in the *Nagusina Naviera* case, the Respondent's less than 2-week delay cannot be said to be either unreasonable or frustrating.[28] The delay in discharge was caused by Good Oils failure to deliver the Bill of Lading to the Respondent as well as Yu Shipping's troubling finances.[29] In consideration of these circumstances "*which were are outside the control of the consignee*"[30], the Respondent cannot be deemed to have caused an unreasonable delay.

49. The Tribunal shall therefore hold that the law should not, in presence of an express term, imply a term that the consignee will take delivery within a reasonable time. If such a term is implied, the Tribunal will find that the Respondent did not cause an unreasonable or frustrating delay.

II - The Claimant's claim for losses is limited to demurrage only

50. Under no circumstance is the Claimant entitled to claim for additional damages to demurrage, their claim is entirely limited to demurrage only. This is partly due to the break in the chain of

[28] *Nagusina Naviera v Allied Maritime Inc* [2002] EWCA Civ 1147, [45] (Mance L.J.)
[29] International Maritime Law Arbitration Moot 2024, *Moot Problem*, 26 December 2023 V.1, Statement of Reply and Defense to Counterclaim, Annex A, p.46
[30] *Pantland Hick Appellant; v Raymond & Reid Respondents* [1893] A.C. 22,34 (Ashbourne L.)

causation that occurs when the Vessel encountered adverse weather on their voyage from Busan to Kaohsiung (**A**), but also because demurrage covers all damages arising from a failure to take delivery within laytime (**B**).

A - The chain of causation was broken when the Vessel encountered adverse wind and sea conditions delaying their transit from Busan to Kaohsiung

51. Legal causation requires the breach of contract to be the direct cause of the loss. A Claimant will be unable to recover damages in respect of the loss which he has suffered if he cannot establish a causal link between his loss and the defendant's breach of contract.[31] Therefore, there lies the possibility of alternative causes to the loss which break the chain of causation. Such was argued in the case of *Monarch Steamship Co v Karlshamns Oljefabrieker,* where it was found that natural events may break the chain of causation.[32]
52. If the chain of causation is broken, then it must be shown that the loss crystalised after the break.[33] For example, steps taken by a Claimant after the negligence of the defendant are taken of his own account and may break the chain of causation, so that the loss recoverable is only that which crystallises before the intervention.[34] The loss created after the break of causation is not recoverable by the Claimant due to it not being directly caused by the Respondent.
53. After completing the discharge of the Cargo on the 7th of October, the Vessel departed for Kaohsiung in the early hours of the 8th of October. However, during the Vessel's voyage between Busan and Kaohsiung, it was met with adverse wind and sea conditions, which "*hampered*" the Vessel's progress.[35] As a result, the Vessel arrived in Kaohsiung outside the strict laycan imposed

[31] Ewan McKendrick, *Contract Law* (Hart Law Masters 15th edn, 2023) [21.12]
[32] *Monarch Steamship Co v Karlshamns Oljefabrieker* [1949] AC 196
[33] *Primavera v Allied Dunbar Assurance Plc* [2002] EWCA Civ 1327
[34] *Lambert v Lewis* [1982] AC 225
[35] International Maritime Law Arbitration Moot 2024, *Moot Problem*, 26 December 2023 V.1, Statement of Claim, p.9, [15]

by the Vessel's next employment, cancelling the charterparty which was reinstated at a lower hire rate.

54. It is conclusive that the loss (difference in hire rate) crystallised on the **16th of October 2023** when the Vessel's next fixture issued their notice cancelling the charterparty.[36] This occurred when the Vessel was approximately 300 nautical miles from Kaohsiung. In judging that the Vessel would have been moving at between 10-15 knots, it would therefore be logical to suppose that the cancellation happened when the Vessel was approximately 24h-30h away from arriving at port in Kaohsiung. As informed by the Claimant and Yu Shipping, the Vessel had to leave Busan by the 7th October in order to meet the laycan (1-14 oct.) in Kaohsiung. Therefore, supposing that the Vessel arrived in Kaohsiung on the 17th/18th of October, but that the Vessel departed from Busan on the 8th (at 0214 LT, with a mere 2-hour delay), it can be deduced that the weather conditions caused an additional and approximated 4-day delay to the voyage. Thus, the Vessel would have likely arrived in Kaohsiung during the laycan, and the cancellation might not have happened but for the natural events that hampered the Vessel's passage. Furthermore, the loss suffered from the change in hire rate crystalised only after the additional delay caused by the weather. The cancellation happening only after the break in causation, that being the bad weather encountered by the vessel, means that it was unlikely to have been caused by the Respondent's breach and is not recoverable in damages.

55. The Tribunal shall consequently find that the adverse wind and sea conditions broke the chain of causation, rendering the Claimant's claim for additional damages inadmissible.

[36] International Maritime Law Arbitration Moot 2024, *Moot Problem*, 26 December 2023 V.1, Statement of Claim, p.9, [15]

B - Demurrage covers all damages arising from a failure to take delivery within laytime

56. 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*"[37]. Demurrage must liquidate both "*all normal running expenses*"[38] of the vessel for the period of delay, but also the expected loss of earnings from future voyages arising from the delay. Robert Gay went insofar as to explain that "*these are two sides of the same coin*"[39], implying that both losses are covered by demurrage in the same way that loss of profit and wasted expenses are covered by damages for the repudiation of a contract.

57. There has been, over the years, a significant number of case law on the issue of additional damages to demurrage. Nevertheless, it has been repeatedly put forward that a claim for additional damages requires a different kind of loss as well as a breach of an independent obligation.[40] In *Suisse Atlantique*, where the breach caused no loss other than that of freight on additional voyages, it was deemed that the damages were undoubtedly covered by demurrage fixed in the charterparty provision.[41] Here, Lord Wilberforce came to the conclusion that the parties were bound by the demurrage provision and could "*recover no more than the appropriate amount demurrage*"[42].

58. Moreover, in the highly anticipated and debated case *Eternal Bliss*, Lord Justice Males, delivering the judgement for the Court of Appeal, concluded firmly that "*demurrage liquidates*

[37] The Hon Mr Justice David Foxton, Steven Berry QC, Christopher Smith QC, *Scrutton on Charterparties* (24th Edn.Sweet & Maxwell, 2020), Art 170
[38] *Triton Navigation SA v Vitol SA (The Nikmary)* [2003] EWHC 46 (Comm); [2003] 1 Lloyd's Rep 151, [47] (Moore-Bick J.)
[39] Robert Gay, "Damages which are not disposed of by demurrage: What is a separate type of loss?" (2021) 27 JIML, p.181
[40] *Richco International Ltd v Alfred C Toepfer International GmbH (The Bonde)* [1991] 1 Lloyd's Rep. 136
[41] *Suisse Atlantique Société d'Armement Maritime S.A. Appellants v N.V. Rotterdamsche Kolen Centrale Respondents* [1967] 1 A.C. 361
[42] Ibid, 438 (Wilberforce L.)

the whole of the damages arising from the charterer's breach of charter in failing to complete cargo operation within laytime".[43] Henceforth, it is now clearly confirmed that the shipper has to prove that the charterer committed a breach of a separate obligation in order to claim additional damages to demurrage.

59. In the present arbitration, no separate breach can even be reproached to the Respondent other than that of failing to procure and/or take delivery within the laytime fixed by the charterparty. Therefore, no matter the loss of freight or future employment, the Claimant cannot claim additional damages amounting to the loss in hire rate for the Vessel's next employment. Such loss is wholly covered by demurrage and demurrage only.
60. The Tribunal will consequently find that the Claimant is not entitled under any circumstance to claims losses for the negotiated discount of the Vessel's next employment.

SECTION 2: The Claimant is liable to the Respondent for a set-off for the mis-delivery of the Cargo carried pursuant to Bill of Lading No. COW-011A amounting to USD 4, 249, 752.50.

61. The Respondent sought damages on the ground that the Claimant had delivered the cargo without presentation of the original bill of lading in breach of the contract of carriage contained in or evidenced by the bill of lading, (**I**) and therefore is entitled to seek for damages for the misdelivery of the cargo (**II**).
62. The Respondent pleaded the Bills of Lading incorporated the terms of the voyage charterparty between Yu shipping and the Claimant, and as a result of an English governing law clause in that

[43] *K Line Pte Limited v Priminds Shipping (HK) Co Limited (Eternal Bliss)* [2021] EWCA Civ 1712, [52] (Males L.J)

charterparty, English law applies to the determination of the plaintiff's claims against the Claimant in the present proceedings.

I - The Claimant breached the contract by delivering otherwise than against the presentation of the bill of lading

63. The Claimant by not delivering the cargo to the lawful holder of the Bill of Lading (**A**) has breached the contract carriage. In fact the Respondent did not give his consent to take upon the delivery of the cargo without a presentation of the originals B/Ls (**B**), the Respondent is therefore the only entitled to the delivery of the cargo (**C**).

A - The Respondent is the lawful holder of the Bill of Lading

64. Under S.5 (2)(b) of the COGSA, a person in possession upon completion by delivery of any endorsement or transfer of the B/L is a holder.

65. A bill of lading also acts as a document of title, a document which is used as proof of the possession of control of goods .[44] The bill of lading remains in force as a symbol and carries with it not only the full ownership of the goods, but also the rights created by the contract of carriage between the shipper and the shipowner . [45]

66. It is the lawful holder of the bill of lading that has transferred to him/her all the rights of suit under the contract of carriage as if he had been a party to that contract. [46]

67. In the absence of a statutory definition of the term legal holder of the bill of lading, section 5(2) of the Carriage of Goods by Sea Act 1992 ("COGSA") links the notion to a person who is in

[44] Factors Act 1889, s 1(4)
[45] *Sanders Brothers v Maclean & Co* (1883) 11 QBD 327, 341.2 (Bowen L.J)
[46] Carriage of Goods by Sea Act 1992, s 2

possession of the BL and is either consignee, or has been endorsed through delivery of the BL or the BL has become "*spent*".

68. In this instant case, the clean bill of lading was issued on the 6th of September 2023 and expressly consigned to Veggies of Earth Banking Ltd., a financial institution acting in the present arbitration proceedings as Respondent.[47] Therefore, there is no need for the bill of lading to be endorsed nor for the documents to be taken up by payment for the Respondent to become the legal holder of the BL.
69. Due to being the consignee, the Respondent became the legal holder of the BL as soon as they were in possession of it, which was consequently on the 6th September when it was issued. The Respondent is in possession by virtue of delivery, and are thus the lawful holders of the B/L.
70. Additionally they are the holders of the B/L in good faith under s. 5(2) of the COGSA as they hold the B/L on the payment of the entire purchase of the price on the cargo. [48] All « rights of suit » under the B/L contract thus stand transferred to the Respondent.[49]

B - The Respondent did not consent to the delivery of the cargo without presentation of the B/L

71. The Claimant submitted that the Respondent did not have the rights to sue for misdelivery as they accepted the presentation of a letter of indemnity, which expressly states that the Respondent had agreed to make payment for the Cargo without presentation of the Bill of Lading. [50]

[47] International Maritime Law Arbitration Moot 2024, *Moot Problem*, 26 December 2023 V.1, Statement of Claim, Annex C, Tanker Bill of Lading NO. COW-001A, p.30
[48] *Aegean Sea Traders Corp v Repsol Petroleo SA & Anor- The "Aegean Sea"* [1998] CLC 1090, 1118
[49] Carriage of Goods by Sea Act, 1992, s 2(1)
[50] International Maritime Law Arbitration Moot 2024, *Moot Problem*, 26 December 2023 V.1, The Statement of Reply and Defence to Counterclaim, p.40

72. In this case, the Respondent had permitted the discharge of the cargo against the LOI did not indicate, without, more that the Respondent had given up its rights to demand delivery of the cargo upon prevention of the Bills of Lading. This was because payment under the LC, upon the presentation of commercial invoice and the LOI, was permitted only if the Bills of Lading were not available. [51]
73. Further, the LC required that the Bills of Lading be indorsed "*to the order of [the Respondent]*". In short the Respondent never intended to abandon its rights under the Bills of Lading to demand delivery of the Palm Oil Cargo from the Claimant.
74. In fact the e-mail exchanges between the parties, which have been disclosed so far in these proceedings, show that the financing granted by the Respondent to Claimant was granted on a secured basis.[52]

    The effective or proximate cause of the Respondent's loss was in fact the misdelivery by the Claimant of the Cargo without presentation of the Bills of Lading.

C - The Respondent is entitled to the delivery of the cargo

75. A B/L is a "*key to the warehouse*"[53] and a document transferring constructive possession of goods. Thus, a holder of the B/L is entitled to the immediate possession of the goods.
76. The words "rights of suits" have not been defended under the COGSA. However, East West Corporation recognized that the right includes the right to delivery of the cargo on the presentation of the B/L.

[51] *Standard Chartered Bank (Singapore) LTD v Maersk Tankers Singapore PTE LTD Wilson Oil Trading PTE LTD* [2022] SGHC 242, Summary Judgment of the Assistant Registrar
[52] International Maritime Law Arbitration Moot 2024, *Moot Problem*, 26 December 2023 V.1, p.46-49
[53] P Todd, "The Bill of Lading and Delivery: Common Law Actions" [2006] LMCQ 4(Nov) 539, 545

77. It is the essence of the B/L contract that the carrier is bound to deliver **only against the presentation of the bill of lading**. "*A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage,* ***the bill of lading by the law merchant is universally recognized as its symbol****, and the indorsement and delivery of the bill of lading operates as symbolical delivery of the cargo*" [54]

78. By obtaining symbolic possession, the transferee appears to obtain, in effect, the same rights as a possessor of the goods themselves would possess. [55]

79. A carrier who delivers without the production of the B/L does so at his risk and peril. He is liable for the breach of the B/L contract even if he has delivered to a person entitled to the possession of the cargo.[56]

80. This is a contractual obligation : the contract is to deliver to the person entitled under the bill of lading on production of the bill.

81. Here, the Claimant has discharged the cargo to the Sellers without the presentation of the B/L. They are in breach of contract and thus liable to the Claimants, the lawful holders of the B/L. Accordingly, the contractual right to the delivery of the cargo is vested in the Respondent. The Claimant has breached the contract of carriage by delivering the goods to the Korean Buyers and is liable to the Respondent for the same.

[54] *Sanders v. Maclean* (1883) 11 Q.B.D. 327, 341 (Bowen L.J)
[55] M. Bools, *The bill of Lading : A document of Title to Goods* (L.L.P. 1997), 180-181, the courts mean by symbolic possession all those rights that normally go with actual possession.
[56] *Kuwait Petroleum Corporation v I & D Oil Caterers - The Houda* [1994] 2 Lloyd's Rep 541 , 553 ; *Sucre Export SA v Northern River Shipping Ltd - The Sormovskiy 3068* [1994] CLC 433, 442

II - The Respondent is entitled to seek damages for misdelivery of the cargo

82. In this case the Respondent as 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. The Respondent paid for the cargo and viewed the Cargo as security for the loan (**A**) and therefore is entitled to claim for damages for misdelivery. (**B**)

A - The cargo as security to the loan

83. Where bills of lading are held, generally by a bank, as security for an advance, it is often necessary for the debtor to sell the goods in order to obtain the funds required to pay the advance. This need may be satisfied, and the interests of the bank to a large extent protected, by the use of trust receipts.

84. These documents are by no means uniform in content, but their essential features are as follows. They provide for the release by the bank of the bills of lading to the debtor as trustee for the bank, and authorise him to sell the documents or the goods on behalf of the bank.[57]

85. Under the trust receipt, the bank is the owner of the goods and the Customer undertakes to deal with the goods represented by the bills of lading as the agent of the bank. The trust receipt in substance that the bill of lading and the goods held thereunder are and continue to be the property of the banking house as **security for its advances**.[58]

86. Banks financing international purchase and sale of goods, that reliance on bills of lading as security means have to ensure that that security is well drawn out in the form of a proper endorsement to the bank. [59]

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[57] Michael Bridge, *Benjamin's Sale of Goods* (Sweet & Maxwell, 11th Ed, 2021) at para 18-504
[58] L. Vold, "Trust receipt security in financing of sales" (Cornell Law review, Vol 15, Issue 4 June 1930) Art. 2 p. 547
[59] *Oversea-Chinese Banking Corporation Limited v. Owner and/or Demise Charterer of the Vessel "STI Orchard"* [2022] SGHCR 6

87. The bills of lading is endorsed to the order in blank to the Respondent[60], they rely on the bills of lading as security for financing of their customers' purchase of goods.

88. In this case , the Respondent refused to directly give the trust receipt loan waiting for a letter of Credit from the Korean Buyers. [61]The bank wanted to have proof that the loan will be repaid due to Yu shipping's unstable and uncertain financial state and therefore be protected against the debtor's insolvency, though not against his dishonesty.

89. The Respondent undeniably saw the cargo as a guarantee of this reimbursement. They added that "*payment to be made under the LC by us will be booked as a trust receipt loan for the time being*" .

90. When The Respondent extended financing to Yu shipping the underlying arrangements suggested the Respondent did intend to take security through a pledge of the B/L and therefore the cargo.

91. Claimant's misdelivery had caused the Respondent's loss, Respondent had suffered a recoverable loss from the defendant's breach of the contract of carriage. The Respondent looked to the bills of lading as security for its financing of Yu shipping's purchase of the cargo. The test of causation should be applied.

B -The Respondent is entitled to claim loss for misdelivery

92. The cause of the Respondent's loss is misdelivery by the Claimant in breach of contract of carriage.

[60] International Maritime Law Arbitration Moot 2024, *Moot Problem*, 26 December 2023 V.1, Tanker Bill of Lading, p. 4
[61] International Maritime Law Arbitration Moot 2024, *Moot Problem*, 26 December 2023 V.1, Statement of Claim, p. 46 to 48

93. As the lawful holder of the Bills of Lading from 3 October 2023. The Respondent has suffered a recoverable loss from the Claimant's breach of the contract of carriage and is entitled to substantial damages.

94. For non-delivery, damages payable is the market value at the time and place at which they should have been delivered.[62] There is no need to deduct the "*any value which the goods have at the port of loading, freight and other saving*" as they have already been paid. This way Respondent is restored to the position "*as if the contract had been performed*".[63] Thus the damages are quantified at USD 4,249,752.50 using the best evidence of the market value of the Cargo at Busan.

[62] *Rodocanachi Sons & Co v Milburn Brothers* (1886) 18 QBD 67; *Attorney General of the Republic of Ghana v Texaco Overseas Tankships Ltd – The "Texaco Melbourne"* [1994] 1 Lloyd's Rep 473 (HL); Steward C. Boyd, Scrutton

[63] *Robinson v Harman* [1848] 1 Exch 850 (HL) 855 (Parke); *Wertheim (Sally) v Chicoutimi Pulp Co* [1911] A.C.

PRAYER FOR RELIEF

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

(a) **REJECT** the Claimant's claims as set out in the Statement of Claim;

(b) **STATE** that the seat of arbitration to be Guangzhou and the applicable law to the arbitration agreement is PRC law;

(c) **STATE** that the arbitration clause as invalid and the Tribunal lacks jurisdiction;

(d) **FIND** that the Claimant is not entitled to claim losses quantified by reference to the negotiated discount for the Vessel's next employment;

(e) **AWARD** the Respondent damages amounting to USD 4'249'752.50, or alternatively the value of the Cargo to be assessed, arising from the Claimant's mis-delivery of the Cargo.

(f) **AWARD** the Claimant interests, costs, or such further order or relief as the Tribunal deems fit.