INTERNATIONAL MARITIME LAW ARBITRATION MOOT

2024

7 JULY – 12 JULY 2024

MEMORANDUM FOR RESPONDENT

UNIVERSITY OF COPENHAGEN

ON BEHALF OF:	**AGAINST:**
Veggies of Earth Banking Ltd.	Tomahawk Maritime S.A.
Room 1818, 18/F Farmers Building	C/O Trust Company Complex
18 Gardens Road	Ajeltake Road, Ajeltake Island
Tuen Mun	Majuro, Marshall Islands
Hong Kong SAR	MH 96960

COUNSEL – TEAM Q

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TABLE OF AUTHORITIES

TREATIES AND LEGISLATION

ABBREVIATION	REFERENCE
Carriage of Goods by Sea Act 1992	Carriage of Goods by Sea Act 1992 as amended 20 September 2023.
NY Convention	The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.
PRC Arbitration Law	Arbitration Law of the People's Republic of China of 1994.
SCMA Rules	Arbitration Rules of the Singapore Chamber of Maritime Arbitration, fourth edition, 1 January 2022.

CASES

ABBREVIATION	REFERENCE
Enka v Chubb	Enka Insaat Ve Sanayi A.S. (Respondent) v OOO Insurance Company Chubb (Appellant) [2020] EWCA Civ 574.
The Achilleas	Transfield Shipping Inc v Mercator Shipping Inc (“The Achilleas”) [2008] UKHL 48.
The Eternal Bliss	K Line Pte Ltd v Priminds Shipping (HK) Co Ltd (“The Eternal Bliss”) [2021] EWCA Civ 1712.
The Sienna	Unicredit Bank AG v Euronav NV (“The Sienna”) [2023] EWCA Civ 417.
The Sormovskiy	Sucre Export SA v Northern River Shipping Ltd (“The Sormovskiy 3086”) [1994] 2 Lloyd's Rep. 266.

BOOKS AND ARTICLES

Aikens R and others, *Bills of lading*, (3rd edn., Informa Law from Routledge 2021).

Cooke J, and others, *Voyage Charters*, (4th edn, Informa Law from Routledge 2014).

Born GB *International Commercial Arbitration*, (2nd edn, Kluwer Law International 2021).

Hill J, *Determining the seat of an international arbitration: Party autonomy and the interpretation of arbitration agreement*, (The International and Comparative Law Quarterly, vol. 63, no. 3, 2014).

Kramer A, *The Law of Contract Damages*, (1st edn, Bloomsbury Publishing Plc 2022).

Schofield J, *Laytime and Demurrage*, (7th edn. Taylor & Francis Ltd 2016).

OTHERS

Procedural Order No. 1	IMLAM Procedural Order No. 1 (Clarifications).
Moot Problem	International Maritime Law Arbitration Moot 2024 Moot Problem of 26 December 2023 (v1).

TABLE OF ABBREVIATIONS

ABBREVIATIONS	REFERENCE
Arbitration Agreement	Tomahawk Maritime S.A. Rider Clause 76, first sentence.
B/L	Bill of Lading No. COW-001A dated 4 September 2023.
Cargo	16,699.01 MT crude palm oil.
Charterer	Yu Shipping Ltd.
CP	Charterparty between Tomahawk Maritime S.A. and Yu Shipping Ltd. dated 1 September 2023.
Claimant or Owner	Tomahawk Maritime S.A.
Contracting Parties	Tomahawk Maritime S.A. and Yu Shipping Ltd.
Demurrage Clause	Clause 11 (a) to the Charterparty dated 1 September 2023.
Good Oils	Good Oils Sdn. Bhd.
LOI-Y	Letter of Indemnity issued by Yu Shipping Ltd. to Tomahawk Maritime S.A. on 3 October 2023.
LOI-G	Letter of Indemnity issued by Good Oils Sdn. Bhd. to Veggies of Earth Banking Ltd. on 3 October 2023.
Parties	Tomahawk Maritime S.A. and Veggies of Earth Banking Ltd.
Respondent	Veggies of Earth Banking Ltd.
Vessel	M/S NIUYANG.

STATEMENT OF FACTS

The Claimant is a company registered and existing under the laws of Panama. The Claimant is the registered owner of the Vessel which was chartered by the Charterer under the CP. The Respondent is a financial institution registered and existing under the laws of Hong Kong.

14 August 2023	The Charterer purchased the Cargo from Good Oils on FOB terms. The sales contract required the Charterer to provide a letter of credit for the payment of the Cargo.
1 September 2023	The CP between the Claimant as the Owner and the Charterer was concluded for the employment of the Vessel. According to the CP, the readiness date was 2 September 2023 and 9 September 2023 was the cancellation date.
3 September 2023	Notice of Readiness tendered for the Vessel in accordance with the CP at 0300 LT.
4 September 2023	The B/L was issued for the Cargo and consigned to the Respondent. The B/L provided that it was issued under and pursuant to the terms of the CP.
6 September 2023	Loading of the Cargo was completed and the Vessel departed from Bintulu.
20 September 2023	The Vessel arrived at Busan. Notice of Readiness was tendered 0843 LT and accepted on the same day. The Charterers gave no berthing or discharge instructions to the Vessel. The Respondent received an email from the Charterer informing them of the arrival of the Vessel. The Respondent had not received the B/L.

20 September - 3 October 2023	Correspondence between the Respondent and the Charterer. The Charterer informed the Respondent that the Vessel had arrived at its destination and that the Charterer wanted to apply for a trust receipt. The Respondent refused to issue a trust receipt because of the financial situation of the Charterer.
29 September 2023	The Respondent was informed by the Charterer that the Vessel had to leave Busan no later than 7 October 2023 in order to arrive in time for the next employment and attached a copy of the CP.
3 October 2023	LOI-Y sent from the Charterer to the Claimant.
3 October 2023	LOI-G sent from the Good Oils to the Respondent.
4 October 2023	Berthing and discharging instructions received by the Vessel and discharge of the Cargo commenced.
7 October 2023	Discharge of the Cargo completed.
8 October 2023	Vessel departed Busan at 0214 LT.
14 October 2023	Cancelling date of the Vessel’s next employment.
16 October 2023	Time charterer for the Vessel's next employment issued notice of cancellation.
15 November 2023	Claimant issued a claim to the Charterers claiming USD 3,650,000 in damages for the cancellation of the time charterparty.
22 November 2023	The Claimant received a response from the interim liquidators appointed over the Charterer stating that they were considering the claim.
29 November 2023	The Respondent wrote to the Claimant informing them that they were the holder of the B/L.
22 December 2023	Notice of Arbitration received by the Respondent.

SUMMARY OF ARGUMENTS

I. THE TRIBUNAL DOES NOT HAVE JURISDICTION TO HEAR THIS DISPUTE

The Respondent submits that the seat of arbitration is in Guangzhou which entails that the Arbitration Agreement is invalid, and the Tribunal does not have jurisdiction to hear this dispute. The doctrine of separability stipulates that PRC Arbitration Law is to apply to the Arbitration Agreement and takes precedence over the SCMA Rules. Further, the Respondent submits that the validation principle does not apply in the present dispute as the principle should not be extended to validating arbitration proceedings which are in direct conflict with the agreed wording expressly selected by the Contracting Parties.

II. THE RESPONDENT IS NOT LIABLE TO PAY USD 3,650,000 IN DAMAGES TO THE CLAIMANT

The Respondent submits that the Claimant does not have a claim for damages. The Claimant's loss is too remote as the information regarding the Vessel's next employment was insufficient for the Respondent to quantify any potential loss. Furthermore, the Claimant was at fault for not storing the Cargo on shore and departing Busan in time for the Vessel's next employment.

Alternatively, the Respondent submits that the losses arising from delays should be covered by demurrage. However, a claim for demurrage has exceeded the timebar.

Finally, the Respondent submits that a claim for damages in addition to demurrage requires a separate breach of contract which has not been proven by the Claimant.

III. THE RESPONDENT IS ENTITLED TO USD 4,249,752.50 DUE TO THE MIS-DELIVERY

The Respondent submits that the Claimant is liable to pay damages to the Respondent for mis-delivering the Cargo. By mis-delivering the Cargo, the Claimant breached the B/L and caused the Respondent to suffer an actionable financial loss. The suffered loss is causal as the loss would never have been suffered but for the Claimant's breach of B/L. The loss is not too remote in relation to the breach of B/L as the Claimant was aware of the value of the Cargo and that the Cargo must be delivered to the holder of the B/L.

ARGUMENTS

I. THE TRIBUNAL DOES NOT HAVE JURISDICTION TO HEAR THIS DISPUTE

1 The Respondent submits that the Tribunal does not have jurisdiction to hear this dispute because the Arbitration Agreement in the CP is invalid under PRC law.

A. The seat of arbitration is Guangzhou

2 The Respondent submits that the governing law of the Arbitration Agreement is PRC law as the seat of arbitration is Guangzhou.

3 There are different methods of determining the law applicable to an arbitration agreement. In the absence of an express choice, the default rule is to apply the law of the seat chosen by the parties.[1]

4 The Arbitration Agreement explicitly states that:

> "General Average and Arbitration, if any, to be in Guangzhou with three arbitrators and SCMA Rules."[2]

5 Further, it is stated that the SCMA Rules are to apply to the arbitration. SCMA Rule 32.1 specifies that the seat of arbitration is to be Singapore unless otherwise agreed by the parties. Since it is specified that arbitration is to be in Guangzhou and since no other location is mentioned in the Arbitration Agreement, the parties must have intended Guangzhou to be the seat of arbitration. Thus, the seat of arbitration can only be Guangzhou.

6 Alternatively, if the Tribunal finds that the Arbitration Agreement does not expressly designate Guangzhou as the seat of arbitration, the Respondent submits that the seat of arbitration is still Guangzhou, as this is the result of the interpretation of the Arbitration

[1] Gary B Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2021) §4.04[A].
[2] Arbitration Agreement (Moot Problem, page 28).

Agreement.

7 Rider Clause 76 contains a choice-of-law clause stipulating that English law is applicable to disputes arising from the CP. No choice of law has been made in relation to determining the validity of the Arbitration Agreement and therefore this assessment must be made pursuant to the law chosen to apply to the CP as this is the only express indicator regarding choice of law.

8 The Respondent therefore submits that English principles of interpretation must be applied to determine which law governs the Arbitration Agreement.[3]

9 Under English law principles, the seat of arbitration is in most cases the city and/or country mentioned in the arbitration agreement even if the words "seat" or "place" are not used.[4]

10 In the Arbitration Agreement, Guangzhou is the only territorial signpost and thereby it is the only implied choice of seat of arbitration. There is nothing in the Arbitration Agreement to suggest that Guangzhou is merely the physical location of the arbitration.

11 As the seat of arbitration is Guangzhou, PRC Arbitration Law applies. It is undisputed that PRC Arbitration Law entails that the Arbitration Agreement is invalid[5] and on this basis the Tribunal must dismiss the case.

B. The doctrine of separability entails that PRC Arbitration Law applies

12 The Respondent submits that the choice of English law solely applies to the CP and thus does not govern the validity of the Arbitration Agreement which is to be determined pursuant to PRC Arbitration Law.

13 In accordance with the doctrine of separability, an arbitration agreement is to be treated

[3] Enka Insaat Ve Sanayi A.S. (Respondent) v OOO Insurance Company Chubb (Appellant) [2020] EWCA Civ 574, para 170 (iv).
[4] Jonathan Hill, *Determining the seat of an international arbitration: Party autonomy and the interpretation of arbitration agreements*, (The International and Comparative Law Quarterly, vol. 63, no. 3, 2014) 521.
[5] Procedural Order No. 1, sec. 1.v.

as a separate agreement to a charterparty.[6]

14 This view is also supported by Born:

> "If parties do not include a provision in their arbitration agreement, the better view is that a general choice-of-law provision in the parties' underlying contract does not ordinarily extend to the separable arbitration clause".[7]

15 In addition, the NY Convention applies to arbitral awards and agreements made in one contracting state which is sought to be enforced in another. The doctrine of separability is inter alia presumed in the NY Convention, which is incorporated in the English Arbitration Act.[8]

16 Section 103(2)(b) of the English Arbitration Act states that the enforcement and recognition of an award may be refused if the the person against whom it is invoked proves:

> "[...] that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made" (our emphasis).

17 In the present dispute, the Contracting Parties have agreed that "English law to apply to the CP".[9] The Contracting Parties have thus only agreed upon the choice of law applying to the CP. The wording does not indicate that the choice of law applying to the CP should extend to the Arbitration Agreement.

18 Accordingly, in the absence of a choice of law applying to the Arbitration Agreement, the default rule is to apply the law of the seat of arbitration to determine the validity of

[6] Gary B Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2021) § 4.02.
[7] Ibid. § 4.04(A)(4).
[8] Ibid. § 3.02(A)(2).
[9] Rider Clause 76 of the CP.

the Arbitration Agreement.[10]

19 If a general choice of law-clause is to apply to the arbitration agreement, the purpose of the NY Convention regarding the doctrine of separability and provisions on the seat of arbitration becomes illusory.[11]

20 Following the doctrine of separability the Contracting Parties merely agreed for English law to apply to the CP and thereby not the Arbitration Agreement. As the Contracting Parties have not designated a law applicable to the Arbitration Agreement, the Respondent submits that PRC Arbitration Law governs the issue of the validity of the Arbitration Agreement pursuant to the doctrine of separability and section 103(2)(b) of the English Arbitration Agreement as the award is to be made in Guangzhou.

C. The PRC Arbitration Law takes precedence over the SCMA Rules

21 The Respondent submits that in order to determine the validity of the Arbitration Agreement, it is necessary to comply with the conditions set out in the PRC Arbitration Law as the seat of arbitration is Guangzhou.

22 Pursuant to SCMA Rule 2.1, the law of the seat of arbitration shall prevail if it cannot be derogated from and is in conflict with the SCMA Rules.

23 The conditions for determining the validity of an arbitration agreement set out in Clauses 16 and 10 of the PRC Arbitration Law are not met and cannot be derogated from, which automatically leads to the Tribunal not having jurisdiction to hear this dispute.[12] Therefore, this dispute should be dismissed.

D. The validation principle does not render the Arbitration Agreement valid

24 The Respondent submits that the reasoning applied in *Enka v Chubb* renders the

[10] Enka Insaat Ve Sanayi A.S. (Respondent) v OOO Insurance Company Chubb (Appellant) [2020] EWCA Civ 574, para 170 (viii); and Gary B Born, International Commercial Arbitration (2nd edn, Kluwer Law International 2021) § 4.04(A)(1)(b)(iv).
[11] Gary B Born, *International Commercial Arbitration,* (2nd edn, Kluwer Law International 2021) § 4.04(A)(4).
[12] Procedural Order No. 1, sec. 1.v.

Arbitration Agreement invalid.

25 The reasoning of the case sets out a framework to be used in determining the governing law of an arbitration clause. It appears from the reasoning in *Enka v Chubb* that the validation principle is one of several factors which may be included in this assessment.[13] Therefore, the validation principle cannot be solely relied upon to render an otherwise express and clear arbitration clause valid.

26 In the case, Lord Hamblen and Lord Leggatt stated that:

> "[...] Where the parties have chosen a seat of arbitration, this will generally be the law of the seat, even if this differs from the law applicable to the parties' substantive contractual obligations".[14]

27 This principle entails that PRC Arbitration Law is to apply to the Arbitration Agreement as the seat of arbitration is Guangzhou, as agreed by the Contracting Parties in the Arbitration Agreement even though English Law applies to disputes arising under the CP.

28 Another decisive principle established in *Enka v Chubb* is that an arbitration agreement should be governed by the law with which it is most closely connected.

29 Lord Hamblen and Lord Leggatt stated that:

> "Where, however, the parties have selected a place for the arbitration of disputes, there is authority for, as a general rule, regarding the law with which the arbitration agreement is most closely connected as the law of the seat of arbitration" (our emphasis).[15]

30 The Arbitration Agreement is most closely connected with PRC Arbitration Law as the seat of arbitration is Guangzhou. Therefore, the governing law of the Arbitration

[13] Enka Insaat Ve Sanayi A.S. (Respondent) v OOO Insurance Company Chubb (Appellant) [2020] EWCA Civ 574, para 170.
[14] Ibid. para 170 (viii).
[15] Ibid. para 119.

Agreement is the PRC Arbitration Law.

31 The Respondent submits that there are limits to the applicability of the validation principle also used in *Enka v Chubb*[16]. The validation principle should not be extended to validating arbitration proceedings of arbitrations agreements which are null and void.[17]

32 In the present dispute, the validation principle cannot be used to render the Arbitration Agreement valid since it is in direct conflict with the agreed wording expressly selected by the Contracting Parties.

33 The validation principle cannot be applied as there is no room for interpretation in regards to the seat of arbitration and the law applicable to disputes arising under the CP. In order to make the Arbitration Agreement valid, it would be necessary to inappropriately go directly against the wording.

34 Further, this would also be in conflict with the principle of the party autonomy.[18] The consequences of invalidation are simply that the Parties would have to seek traditional dispute resolution, which is very much a possibility and an available option.

35 Consequently, the Arbitration Agreement is void and the Tribunal does not have jurisdiction to hear this dispute.

[16] Ibid. para 95-96.
[17] Ibid. para 130.
[18] Gary B Born, *International Commercial Arbitration,* (2nd edn, Kluwer Law International 2021) § 1.02(B)(6).

II. THE RESPONDENT IS NOT LIABLE TO PAY USD 3,650,000 IN DAMAGES TO THE CLAIMANT

36 The Respondent rejects the Claimant's claim of USD 3,650,000 in damages as the conditions for claiming damages are not met.

A. The Claimant is not entitled to damages

37 The Respondent submits that the loss is too remote and the Claimant broke the chain of causation.

a. The loss is too remote

38 The Respondent submits that the loss is too remote as it was suffered in relation to a subsequent charterparty.

39 In *The Achilleas,* Lord Hoffman stated that the shipowner bears the losses arising from the follow-on charters because such losses are too remote:

> "[...] Such a risk would be completely unquantifiable, because although the parties would regard it as likely that the owners would at some time during the currency of the charter enter into a forward fixture, they would have no idea when that would be done or what its length or other terms would be [...]".[19]

40 Lord Hoffmann further stated that:

> "[...] the findings of the arbitrators and the commercial background to the agreement are sufficient to make it clear that the charterer cannot reasonably be regarded as having assumed the risk of the owner's loss of profit on the following charter [...]".[20]

41 These arguments were supported by Lord Hope, who stated that the charterer would

[19] Transfield Shipping Inc v Mercator Shipping Inc ("The Achilleas") [2009] AC 61 (HL) para 23. This view was accepted by the majority.
[20] Ibid. para 26.

need information that would enable him to assess the extent of any liability in order to have assumed the risk for such a loss.[21]

42 Equal arguments must be made in the present dispute, as the Respondent has no insight in the terms of the following time charter. Rider Clause 38 of the CP merely stipulates that there was a "strict laycan" for the next employment "of 2 years". This wording is insufficient for the Respondent to be able to quantify a potential loss.

43 The Respondent was only made aware of the terms of the CP on 29 September 2023[22], when the Vessel was already on demurrage. The test for remoteness requires that the Respondent was made aware of the terms no later than 4 September 2023 which was the time of conclusion of the contract.[23]

44 Consequently, the risk of the Vessel missing its next employment was unquantifiable at the time of contracting the B/L. Thus, Rider Clause 38 does not provide sufficient information in order to establish any responsibility for the Respondent for the subsequent time charter, as the loss was too remote. Hence, the Respondent cannot be held liable for the loss.

b. The Claimant has broken the chain of causation

45 The Respondent submits that the Claimant broke the chain of causation as they failed to discharge and store the Cargo.

46 Under English law, it is a requirement to consider both factual and legal causation.[24] Events may break the chain of causation between the breach and the claimed loss. Such events may originate from the claimant himself, third parties or acts of God.[25]

47 Pursuant to English law, the Owner has the right to discharge and warehouse the cargo,

[21] Ibid. para 36.
[22] Procedural Order No. 1, sec. 1.iii.
[23] Adam Kramer, *The Law of Contract Damages*, (1st edn., Bloomsbury Publishing Plc 2022) 459.
[24] Ibid. 388-389 and 454-455.
[25] Julian Cooke and others, *Voyage Charters* (4th edn, Informa Law from Routledge 2014) 634.

when the Owner has waited for a reasonable time without an entitled party taking possession of the cargo.[26]

48 The laytime expired on 24 September 2023 at 0843 LT. At this point, it would have been reasonable for the Claimant to discharge and store the Cargo on shore without delivering the Cargo to Gileum Refinery Co., Ltd. or any other party, in order to reach Kaohsiung before the cancellation date of the Vessel's next employment.

49 By not adhering to the right to discharge and store the Cargo, the loss suffered by the Claimant was a result of the Claimant's own conduct of such an impact that it caused a break in the chain of causation.

50 The Claimant's suffered loss is not causal to the actions of the Respondent but rather a result of the Claimant's own conduct which caused a break in the chain of causation for which the Respondent cannot be held liable.

B. The Claimant's loss is covered by demurrage

51 If the Tribunal finds that the Respondent is liable for damages, the Respondent submits that damages are cut off as the claim is covered by demurrage, which is time-barred.

52 The Claimant claims damages for a loss resulting from the delay of the Vessel in discharging the Cargo.

53 Demurrage is defined as liquidated damages for failure to complete loading and discharging in the allowed laytime which constitutes a breach of charter.[27]

54 Under English law, the main rule is that demurrage covers all losses caused by delays.[28] If parties to a contract intend to exclude consequential damages for delays, it has to be expressly agreed upon in the charterparty.[29]

55 The Contracting Parties have not expressly excluded consequential losses arising from

[26] Ibid. 222-223.
[27] John Schofield, *Laytime and Demurrage*, (7th edn. Taylor & Francis Ltd 2016) 439.
[28] K Line Pte Ltd v Priminds Shipping (HK) Co Ltd ("The Eternal Bliss") [2021] EWCA Civ 1712, para. 52.
[29] Ibid. para. 18.

missing future employments. The Claimant's loss arose from the Vessel not reaching Kaohsiung before the cancellation date. Therefore, the claim is covered by demurrage as it is caused by delay.

56 Rider Clause 38 of the CP stipulates that:

> "After this voyage, Vessel's next employment is at Kaohsiung with strict laycan 1-14 October for period of 2 years".

57 The Contracting Parties purposely included the clause in the CP. However, there is no clause governing a potential remedy for not meeting the laycan for the subsequent voyage. This indicates that the Contracting Parties did not intend for there to be any such remedy, and that any loss arising from such a situation must be included in the demurrage rate.

58 The demurrage rate is the result of a negotiation between the Contracting Parties, in which the loss of prospective freight earnings is likely to be a factor and consequently contained in the demurrage rate.[30]

59 The Respondent submits that the Claimant's loss falls within the definition of demurrage, as the financial loss stems from the Vessel's idle state. The Claimant's remedy is therefore limited to demurrage.

60 However, it is agreed in Rider Clause 14 that demurrage claims must be presented within 90 days after discharge is completed. With discharge completed on 7 October 2023, the deadline to present a demurrage claim was 5 January 2024. The Claimant's right to claim demurrage has thus lapsed.

[30] Ibid. para. 54.

a. There is no separate breach

61 If the Tribunal finds that demurrage is due, the Respondent submits that the Claimant is not entitled to claim damages in addition to demurrage as there is no separate breach of the CP.

62 In *The Eternal Bliss*, the English Supreme Court stated that a claim for damages in addition to demurrage requires a separate breach of contract.[31] It was concluded that an owner seeking damages for the financial loss incurred due to a vessel's idleness must be covered by demurrage.[32] For losses unrelated to the vessel's financial loss due to idleness, the owner must prove that the charterer has breached another express contractual provision.[33]

63 The Respondent submits that an argument regarding the use of the Vessel as a storage facility cannot be made, as this de facto was not the case. The Vessel had only been on demurrage for 10 days before it left Busan. This cannot be considered as using the Vessel as a storage facility as it is not an unreasonable amount of time for a vessel to be on demurrage.[34]

64 If the Tribunal finds that the Respondent is liable for demurrage, this must amount to USD 481,500, as the NOR was issued on 20 September 2023 at 0843 LT, and the Vessel completed discharge on 7 October 2023 at 2348 LT. This leaves the Vessel with 327 hours of idle time and 321 hours of demurrage time, which must be paid at USD 1,500 per hour.

65 Conclusively, the Respondent has not caused a separate breach of the CP. Therefore, the Respondent cannot be held liable to pay any damages in addition to demurrage.

[31] Ibid. para. 52.
[32] Ibid. para. 52.
[33] Ibid. para. 52.
[34] John Schofield, *Laytime and Demurrage*, (7th edn. Taylor & Francis Ltd 2016) 443-448.

III. THE RESPONDENT IS ENTITLED TO USD 4,249,752.50 DUE TO THE MIS-DELIVERY

66 The Respondent submits that the Claimant is liable to pay USD 4,249,752.50 because the Cargo was mis-delivered.

A. The Claimant breached the contract causing the Respondent's loss

67 The Claimant breached the B/L by mis-delivering the Cargo. As a result of the Claimant's breach, the Respondent suffered an actionable financial loss.

68 The Carriage of Goods by Sea Act 1992, section 2(1) stipulates that it is the holder of the bill of lading that has the right to take delivery of the cargo.

69 The purpose of a bill of lading is inter alia to confer rights to the cargo.[35] The carrier is always at risk of facing a mis-delivery claim when delivering cargo without receiving a bill of lading.[36]

70 In addition to being the holder of the B/L, the Respondent is also the consignee on the B/L. Therefore, the Claimant could never have been in any doubt as to their obligation to deliver the Cargo only to the Respondent or to a party designated by the Respondent.

71 When the Claimant, despite this knowledge, chose to deliver the Cargo to an undesignated third party against a letter of indemnity, this was entirely at their own risk.

72 Although Rider Clause 57 of the CP obligates the Claimant to deliver the Cargo against a letter of indemnity, this obligation is only valid in relation to the Charterer. In the legal relationship between the Claimant and the Respondent, the LOI-Y has no effect.[37] Therefore, Rider Clause 57 of the CP cannot justify the delivery, and the Claimant remains responsible in the contractual relationship to the holder of the B/L, the Respondent.

[35] Richard Aikens and others, *Bills of lading*, (3rd edn., Informa Law from Routledge 2021) 19-20.
[36] Unicredit Bank AG v Euronav NV ("The Sienna") [2023] EWCA Civ 417, para 46.
[37] This view on the legal relationship between the owner and the consignee was equally applied by Justice Clarke in *The Sormovskiy* 3086[1994] 2 Lloyd's Rep. 266.

B. The Respondent's loss is causal to the actions of the Claimant

73 The Respondent submits that the suffered loss is causal to the actions of the Claimant.

74 The "but for"-test, stipulates that factual causation exists where the loss would not have incurred but for the breach of contract.[38]

75 In the present dispute, the loss would never have been suffered but for the Claimant's breach of the B/L by mis-delivering the Cargo without production of the bill of lading.

76 In *The Sienna,* it was established that the carrier's mis-delivery without production of bills of lading did not cause any loss to the holder of the bill of lading, as the loss would have been suffered in any event.[39]

77 Cardinally, the findings of the case were based on the belief of the holder of the bill of lading that they were wholly and largely secured in other ways than the cargo.[40] Additionally, the holder of the bill of lading had no specific concerns about the charterer's economic background in the case, so it was irrelevant whether the cargo was delivered to the actual or an alternative buyer.[41] Therefore, the loss was not causal.

78 The circumstances in the present dispute are irreconcilable with the facts in *The Sienna*. First, the Respondent was not secured in other ways than the Cargo after discharge. Second, the Respondent had specific concerns about the Charterers financials, which was clearly stated in the e-mail from the Respondent to the Charterer at 16:02 on 3 October 2023:

> "Due to latest review of Yu Maritime's financial we are unable to grant trust receipt for release of goods [...]".[42]

79 It was significant for the Respondent that there was a lack of trust in the economic

[38] Adam Kramer, *The Law of Contract Damages,* (1st edn., Bloomsbury Publishing Plc 2022) 388-389.
[39] Unicredit Bank AG v Euronav NV ("The Sienna") [2023] EWCA Civ 417, para 107.
[40] Ibid. para 115.
[41] Ibid. para 115.
[42] Moot Problem, page 46.

background of the Charterer. It is inconceivable that a reasonable businessperson would ever have approved delivery without the production of the bill of lading, knowing that the charterer was financially unstable, without security. Thus, there is no basis to assume that the loss would have been suffered in any event had the Claimant not mis-delivered the Cargo to the Korean buyers.

80 The Respondent submits that there is no break in the chain of causation in relation to the Respondent's loss. The Respondent repeatedly rejected the proposed granting of a trust receipt to the Charterer without presentation of documents against the letter of credit.[43] Throughout the communication the Respondent has been unwilling to allow delivery without production of the B/L.[44]

81 In the e-mail correspondence of 3 October 2023, the Respondent informed the Charterer that:

> "If you are afraid of the demurrage accruing, you must do as you deem fit as Charterers".[45]

82 This wording cannot be understood as an acceptance of mis-delivery, but solely as permission to discharge the Cargo in order to avoid the demurrage accruing.

83 If the Respondent intended to allow the Claimant to deliver the Cargo without production of the B/L, this would have been agreed with the Claimant as the proper contracting party and not the Charterer. Such waiver from the holder of the bill of lading to the carrier must clearly authorise or instruct the carrier to deliver without production of the bill of lading.[46]

84 In the present dispute no such authorisation or instruction was given from the

[43] Ibid. page 46-49.
[44] Ibid. page 46-49.
[45] Ibid. page 46.
[46] This view is supported by Richard Aikens and others, *Bills of lading*, (3rd edn., Informa Law from Routledge 2021) 149.

Respondent to the Claimant. Therefore, the Claimant was not at liberty to deliver the Cargo without the production of the B/L.

C. The loss was not too remote

85 The Respondent submits that the suffered loss is not too remote in relation to the breach of the B/L.

86 The Claimant was aware of the value of the Cargo and that the Cargo must be delivered to the B/L holder.

87 Lord Hoffman stated in *The Achilleas* that:

> "[...] the question of whether a given type of loss is one for which a party assumed contractual responsibility involves the interpretation of the contract as a whole against its commercial background [...]" (our emphasis).[47]

88 It must have been within the reasonable contemplation of the Parties that a loss equivalent to the value of the Cargo would be suffered if the Cargo was mis-delivered.

89 The Claimant assumed responsibility for the delivery of the Cargo to the rightful receiver when the B/L was issued. Based on the commercial background of the B/L as well as the Claimant's experience within the shipping industry, it must have been evident for the Claimant that delivery to a person not entitled to the Cargo would constitute a breach of their contractual obligations and result in an actionable loss.

90 Conclusively, the loss suffered by the Respondent was foreseeable for the Claimant and thus not too remote.

[47] Transfield Shipping Inc v Mercator Shipping Inc ("The Achilleas") [2009] AC 61 (HL) para 25.

REQUEST FOR RELIEF

For the above reasons, the Respondent respectfully requests the Tribunal to find that:

a) The Tribunal lacks jurisdiction to hear this dispute due to invalidity of the Arbitration Agreement;

b) The Claimant does not have a claim for damages for missing the next employment. If the Tribunal finds that the claim is covered by demurrage, it is time-barred; and

c) The Respondent is entitled to the sum of USD 4,249,752.50 for the suffered loss in relation to the mis-delivery.

The Respondent reserves the right to amend its request for relief as may be required.