Northumbria University NEWCASTLE

INTERNATIONAL MARITIME LAW ARBITRATION MOOT 2024

In the matter of an international arbitration

In the matter of an SCMA Arbitration under the SCMA Rules (4th edition)

MEMORANDUM FOR THE RESPONDENTS

ON BEHALF OF

Veggies of Earth Banking Ltd.
Respondents

AGAINST

Tomahawk Maritime S.A.
Claimants.

TEAM R

Faith Norialyn Baltazar

Ivan Jan En Yu

Kathrine May Lennox

Natasha Nicholson

TEAM R

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

Abbreviation	Term
Claimants	Tomahawk Maritime S.A.
Respondents	Veggies of Earth Banking Ltd (VOE).
Charterers	Yu Shipping Ltd.
Liquidators	Carry On Advisory Services LLP.
Good Oils	Good Oils Sdn Bhd.
Moot problem	24th Annual International Maritime Law Arbitration Moot 2024 Scenario.
Bill of Lading (B/L)	Tanker Bill of Lading Reference Number COW-001A Dated 4 September 2023 at Bintulu.
Vessel	MT NIUYANG (IMO No.392817).
Charterparty (CP)	Vegoil Voyage Charterparty Dated 1 September 2023.
Cargo	16,999.01 MT of Crude Palm Oil (Edible Grade) In Bulk.
SCMA Rules	Singapore Chamber of Maritime Arbitration Rules (4th Edition).
Arbitration Law	Arbitration Law of The People's Republic Of China.
D&CC	Defence and Counterclaim Dated 16 February 2024.

Letter of Indemnity (LoI)	Letter of Indemnity Sent By The Charterers To The Claimants Dated 3 October 2023.

LIST OF AUTHORITIES

CASES

AG of the Virgin Islands v Global Water Associates Ltd (2020) UKPC 18

Borealis v Gogas Trading (2011) 1 Lloyds Rep. 482

Brentwood Industries Inc v Guangdong Valve Anlong Machinery Complete Equipment Engineering Co [2015] SZFMSCZ No.62.

Cv D [2008] 1 All ER (Comm) 1001.

Galoo Ltd. v Bright Grahame Murray (1994) 1 W.L.R. 1360

Heskell v Continental Express 1950 83 LI . L. Rep. 438

Lickbarrow v Mason [1787] 2 T.R

Motis Export Ltd v Dampskibsselskabet AF 1912 Aktieselskab and Aktieselskabet Dampskibsselskabet Svendborg [1991], [2000] CA

Robinson v Harman (1848) 1 Exch 850

Stinnes v Halcoussis (the Yanxilas (1982) 2 Lloyds Rep. 445 at p 454

Sul America v Enesa Engeharia [2012] EWCA Civ 638.

The House of Lords in Fiona Trust and Holding Corp v Privalov [2008] 1 Llyod's Rep 254.

Transfield Shipping Inc v Mercator Shipping Inc (2008) UKHL 48

LEGISLATIONS

Arbitration Act 1996

Arbitration Law of the People's Republic of China

Singapore Chamber of Maritime Arbitration Rules (4th Edition)

BOOKS

Born, *International Commercial Arbitration* (2nd edn, 2014).

Carver on Charterparties, 2nd Edition.

Charterparties: Law, Practice and Emerging Legal Issues, 1st Edition, 2018.

Scrutton on Charterparties and Bills of Lading 25th Edition.

Voyage Charters, 5th Edition, 2022.

SUMMARY

THE DISPUTE

1. This is an arbitration claim under the International Arbitration Act 1994, arising out of the delayed delivery of 16,999.01 MT (metric tons) cargo of crude palm oil (edible grade) in bulk (the "**Cargo**") which has purportedly breached the terms of the Vegoil Voyage Charterparty dated 1st September 2023 (the "**Charterparty**") that have been incorporated in the Bill of Lading with the reference number COW-001A dated 4 September 2023 (the "**Bill of Lading**") and caused losses.

THE PARTIES

2. Tomahawk Maritime S.A. (the "**Claimants**") is a company registered and existing under the laws on Panama and is the registered owners of the MT "NIUYANG", IMO No.392817 (the "**Vessel**").
3. Veggies of Earth Banking Ltd (the "**Respondent**") is a financial institution registered and existing under the laws of Hong Kong.
4. Yu Shipping Ltd (the "**Charterers**") is the charterers of the vessel.
5. Carry on Advisory Services LLP ("the **Liquidators**") is the interim liquidator appointed over the Charterers.
6. Good Oils Sdn Bhd ("**Good Oils**") is the shipper of the cargo.

SALIENT FACTS

7. A Notice of Arbitration dated 22nd December 2023 was served on the Respondents by courier.[1] Under this Notice of Arbitration, the Claimants initiate arbitration in the Singapore Chamber of Maritime Arbitration (SCMA), English law as applicable to the Charterparty and Guangzhou as the venue, pursuant to Rider Clause 78 incorporated in the Bills of Lading.[2]

[1] *Moot Problem*, Notice of Arbitration, Page 2
[2] *Moot Problem,* Tomahawk Maritime Rider Clauses, page 28.

8. Via a Response to the Notice of Arbitration dated 5th January 2024, which was served on the Claimants via email, the Respondents contest the jurisdiction of the tribunal, rejects the claim and asserts a set-off for losses incurred as a result of the Claimant's mis-delivery of the cargo.[3]

9. The Respondents assert that the arbitration clause is invalidated by Clause 16 of the Arbitration Law of the People's Republic of China since PRC law is applicable to determine the validity of the arbitration clause where the seat of the arbitration is in Guangzhou.[4] It is asserted that an interpretation of the arbitration clause presents Guangzhou as the seat of the arbitration.

10. On September 1, the claimants entered into a Charterparty with the Charterer for the employment of the vessel to transport the Cargo from Bintulu, Malaysia, to Busan, South Korea. It was agreed that the carriage had to be completed by 30 September 2023 to allow for sufficient time for the next destination for the vessel; Kaohsiung, for which Clause 38 of the Charterparty outlines a strict laycan of 1-14 October 2023 for its arrival.[5]

11. Prior to the issuance of the Bill of Lading, the Respondents became involved as the financier of the Cargo purchased by the Charterer by issuing a letter of credit to pay for the Cargo on behalf of the Charterers. When the Shipper delivered the 3/3 set of the original Bill of Lading to the Respondent, they became the lawful holder on 3 October 2023 which entitles them to deliver-up of the Cargo when the Bill of Lading is presented. This right extends to an obligation that the Claimant may only deliver the Cargo to the lawful holder of the Bill of Lading.[6]

12. On September 3 2023, the Vessel arrived at Bintulu and the loading of the cargo was completed on September 6, 2023. The Bill of Lading was also issued on this day and consigned to the Respondent. The Vessel then departed for Busan on the same day and arrived on 20 September 2023. Although a Notice of Readiness was tendered at 0843 LT and accepted at 0915 LT on the arrival date, no berthing and discharge instructions were received.[7]

[3] *Moot Problem,* Response to Notice of Arbitration, page 5
[4] *Moot Problem,* Statement of Defence and Counterclaim, page 36, paragraph 6.
[5] *Moot Problem,* Tomahawk Maritime Rider Clauses, page 25.
[6] *Moot Problem,* Statement of Defence and Counterclaim, page 37, paragraph 15.
[7] *Moot Problem*, Statement of Claim, page 8, paragraphs 9-10.

13. On 28 September 2023, following numerous chasers from the Claimants, the Charterers responded that they were awaiting further instructions. The Claimants assert that the Charterers were reminded of the laycan deadline, were aware of the vessel's next fixture and were also on notice that the Claimants would look to recover all losses and/or damages should the Vessel fail to meet the strict laycan. In response, the Charterers provided an option for delivery to be done using the Letter of Indemnity (the "**LOI**") under clause 57 of the Charterparty. Following this exchange, the Vessel was fully discharged on 7 October 2023 at 2348 LT which resulted in a departure from Busan on 8 October 2023 at 0214 LT, a day later than the latest date specified in the Laycan.[8]

14. Furthermore, adverse wind and sea conditions along with the delayed discharge had caused the Vessel's failure to arrive in Kaohsiung within the Laycan period. In recognition of the delay, the Charterers had issued notice on 16 October 2023 that served to cancel the Charterparty. The Vessel's employment was subsequently reinstated at a lower hire rate of USD 30,000 per day following negotiation with the Claimant.[9]

15. In light of the events above, the Claimants allege that the Respondents had breached their expressed and implied contractual obligations to discharge and/or take delivery of the Cargo within 96 hours of the laytime pursuant to Clause 4 of the Charterparty. The Claimants further allege that as a result of the breach, the Vessel had lost its next employment at Kaohsiung, causing loss amounting to USD 3,650,000.

16. The Respondents concede that there has been a breach of the laytime provisions, but asserts that claims for these breaches are limited to a claim for demurrage only, as stipulated in the contract of carriage. Under the terms of the contract, the Claimant's claim for losses additional to demurrage are not valid.

[8] *Moot Problem*, Statement of Claim, pages 8-9, paragraphs 11-14.
[9] *Moot Problem*, Statement of Claim, page 9, paragraph 15.

17. Further, the Respondent disputes that the delay in discharging the cargo may be solely attributable to their actions. There were factors contributing to the delay that were beyond their control, such as adverse weather conditions and the financials of the Charterers that made it unfavourable for them to grant the trust receipt for the release of goods on a timely basis while the Vessel was in Busan.

18. Lastly, in addition to contending against the Claimant's claims, the Respondent asserts a counterclaim for losses and damages amounting to USD 4,249,752.50. The basis of this claim is that the Claimants had delivered the cargo on a LOI tendered by the Charterer, instead of upon presentation of the Bill of Lading. Although Clause 57 of the Charterparty entitles the delivery of the cargo to be done without the presentation of the Bill of Lading, this is subject to the absence of the original Bill of Lading. In this regard, the Claimant had breached the terms of the contract through mis delivery of the Cargo and failing to allow an opportunity for the Respondent to exercise their rights as the holder of the Bill of Lading. The Claimant's mis delivery of the cargo is directly attributable to the financial losses of the Respondent.

ISSUES IN DISPUTE

19. The following issues are in dispute:

    a). Does the Tribunal have jurisdiction?

    c) Are the Claimants entitled to damages beyond demurrage?

    d) Are the Respondents entitled to damages for mis-delivery of the cargo?

SUBMISSIONS ADVANCED ON BEHALF OF THE RESPONDENTS

I. THE LAW GOVERNING THE ARBITRATION AGREEMENT IS CHINESE LAW.

20. It is submitted that the arbitration commenced by the Claimant is not valid, hence the Tribunal lacks jurisdiction. The claimants rely upon the following purported arbitration clause incorporated into the B/L:

> *"General Average and Arbitration, if any, to be held in Guangzhou with three arbitrators and SCMA Rules. English law to apply to the CP."*[10]

21. The Claimants argue that the seat of arbitration is Singapore under the Singapore Chamber of Maritime Arbitration Rules (4th Edition) (the "**SCMA Rules**") however that cannot be accepted as Rider Clause 78 expressly states that the putative chosen seat of arbitration is Guangzhou. In *Sul America v Enesa Engeharia*,[11] the choice of a seat was a strong indicator that the parties intended English law to govern all aspects of the separable arbitration agreement. As such, Chinese law, the People's Republic of China (the "**PRC**"), governs the arbitration clause.[12]

22. Specifically, the arbitration clause is invalid under Clause 16 of the Arbitration Law of the People's Republic of China (the "**Arbitration Law**") which provides the following requirements for a valid arbitration agreement:

> *(a) the expression of the parties' wish to submit to arbitration;*
>
> *(b) the matters to be arbitrated; and*
>
> *(c) the Arbitration Commission selected by the parties.*

23. The latter requirement is not satisfied because the SCMA is not an Arbitration Commission under the meaning in Clause 10 of the Arbitration Law, which provides the following:

> *"Arbitration commissions may be established in the municipalities directly under the Central Government, in the municipalities where the people's governments of*

[10] *Moot problem,* Tomahawk Rider Clauses, page 28.
[11] [2012] EWCA Civ 638.
[12] Dicey, Morris & Collins on the Conflict of Laws 16th Ed.

provinces and autonomous regions are located or, if necessary, in other cities divided into districts. Arbitration commissions shall not be established at each level of the administrative divisions. The people's governments of the municipalities and cities specified in the above paragraph shall organize the relevant departments and the Chamber of Commerce for the formation of an arbitration commission. The establishment of an arbitration commission shall be registered with the judicial administrative department of the relevant province, autonomous region or municipalities directly under the Central Government."

24. Upon application, the Singapore Chamber of Maritime Arbitration is not established under the Chinese government; it is a foreign institution. Even if the interpretation of the meaning of "arbitration commission" is broadened, it only expands at judicial level and not legislative level, hence would still not be supported under the Arbitration Law.

25. In *Brentwood Industries Inc v Guangdong Valve Anlong Machinery Complete Equipment Engineering Co,*[13] it was held that the SCMA does not satisfy Clause 10 of the Arbitration Law as is not registered within the Chinese administrative department, being Singapore and not Chinese, thus is not an arbitral institution. The SCMA, being a foreign institution, was not allowed to conduct arbitration activities in China.

26. As such, it is invalid under Chinese law for a PRC-seated arbitration in Guangzhou to be administered by a foreign arbitral institute such as SCMA.

27. Furthermore, the arbitration agreement is separable from the underlaying contract.[14] Regardless of English law governing the charterparty, the agreement to arbitrate has a closer and more real connection to the place of arbitration, Guangzhou, which the parties have agreed to.[15] Hence, Chinese law applies to the arbitration agreement and not Singapore nor English law.

[13] [2015] SZFMSCZ No.62.
[14]Section 7 of the Arbitration Act 1996, reinforced by the reasoning in *The House of Lords in Fiona Trust and Holding Corp v Privalov* [2008] 1 Llyod's Rep 254.
[15] *Cv D* [2008] 1 All ER (Comm) 1001.

28. It is complex to determine the choice of law applicable to an international commercial arbitration agreement,[16] although it is clear in this case, considering the arguments mentioned, that the arbitration agreement is invalid under Chinese law. Therefore, it is submitted that this Tribunal lacks jurisdiction.

II. THE CLAIMANT IS NOT ENTITLED TO CLAIM FOR CONSEQUENTIAL LOSSES BEYOND DEMURRAGE

29. Although the Respondent concedes that there has been a breach of the laytime provisions, any claim in addition to demurrage is contended against on the grounds of there being insufficient causal link and damages being too remote for the consequential losses being claimed.

30. As a starting point, the case of *Robinson v Harman*[17] has laid down the fundamental principle that where a claimant is seeking damages arising from breach of contract to compensate for expectation loss, the court should award damages as if the contract had been performed.

31. This is the basic starting point for any court or arbitral tribunal when determining the appropriate sum in damages to award the victim of a breach of contract, including in cases involving breach of a voyage charterparty.

32. The ordinary rules of contract apply accordingly, and the compensatory principle is subject to limitations such as the causal link between the breach and the losses sustained, and the foreseeability of the losses at the time of contract formation.

33. With regards to the element of causation, it is trite in contract law that where a breach is asserted for a claim for damages, the breach must have had a causal link to the losses suffered.

[16] Born, *International Commercial Arbitration* (2nd edn, 2014) p 472.
[17] (1848) 1 Exch 850

34. Where the extent of the causal link is concerned, the case of *Galoo Ltd. v Bright Grahame Murray*[18] provides that the breach must have been a dominant or effective cause as opposed to merely providing the opportunity or occasion for loss to be suffered.

35. In maritime disputes, this position is followed as seen in *Heskell v Continental Express*[19] where it was held that it is enough for the breach to be an 'effective' cause of the loss; it does not have to be the sole cause.

36. On the facts, it is strongly argued that the chain of causation is broken between the Respondent's actions and the losses sustained by the Claimant. This is due to various other factors that were outside the control of the Respondent, including the financial situation of the charterers that made it unfavourable to grant the trust receipt for the release of goods on a timely basis while the vessel was in Busan, and also the adverse weather conditions that hampered the vessel's journey to Kaohsiung. It is asserted that the Respondent's breach had merely provided a chance for the loss, instead of being the main and effective cause.

37. In contending that there was a break in the chain of causation, the Respondent possesses only an evidential burden to prove as such, whereas the legal burden rests on the claimant to prove that it was the respondent's breach of contract that caused the loss (*Borealis v Gogas Trading*[20])

38. In terms of the remoteness of damages, the current position as seen in the case of *AG of the Virgin Islands v Global Water Associates Ltd*[21] is simply the stance that no loss may be recovered by damages if the cause of action is too remote a consequence of the breach.

39. It is particularly pertinent to note that the test for remoteness and whether the loss in question was fairly and reasonably within the contemplation of the parties falls at the time they made the contract (*Stinnes v Halcoussis (the Yanxilas)*[22])

[18] (1994) 1 W.L.R. 1360
[19] 1950 83 LI . L. Rep. 438
[20] (2011) 1 Lloyds Rep. 482
[21] (2020) UKPC 18
[22] (1982) 2 Lloyds Rep. 445 at p 454

40. On the facts, it can be seen that the Respondent was only initially involved as a consignee to the Bill of Lading issued on 6 September 2023, which meant that they had no access to the charterparty that provides for the Claimant's subsequent fixture. The Charterer had only passed a copy of the charterparty documents to the consignee on 29 September 2023.

41. In consideration of the timeframes in which the documents were exchanged, it is apparent that at the time of the Respondent's involvement as a consignee to the Bill of Lading, the Claimant's losses from the subsequent fixture could not have been within their contemplation at the time.

42. This position is further supported by the case of *Transfield Shipping Inc v Mercator Shipping Inc*[23] wherein the court dismissed a shipowner's claim for the loss of value of follow-up employment. The basis of the decision took into account of factors such as arrangements between owners and new charterers being outside the control and knowledge of the defaulting party, and that the commercial background of the agreement would have prevented the defaulting party from being reasonably regarded as assuming responsibility for the loss from the follow-on charterparty.

43. It is thereby the Respondent's submission that in light of all the circumstances, the losses that the Claimant had suffered on their subsequent charterparty could not have been within the Respondent's contemplation.

44. Lastly, it is the Respondent's submission that as the charterparty contains demurrage provisions that are invoked when delays are caused by the vessel wating for discharge, the Claimant is only entitled to compensation on the demurrage and not for any other consequential losses suffered.

[23] (2008) UKHL 48

III. THE CLAIMANTS BREACHED THE TERMS OF THE CHARTERPARTY BY MISDELIVERING THE CARGO

45. The respondents paid for the cargo on behalf of Yu shipping ltd and subsequently took the cargo as security for the loan[24]. They then became holder of the Bill of Lading on 3 October 2023 and remained in continuous possession since.[25]

46. Under the principles of maritime trade, as the respondents were the lawful holders of the Bill of Lading, they were entitled to the delivery of the cargo upon presentation of the BOL[26]. The claimants were under an obligation to only deliver the cargo to the respondents (as holders of the BOL) and only upon presentation of the BOL.

47. It has been longstanding authority that if a carrier, who is obligated not to deliver without the presentation of an original bill, chooses to deliver the cargo regardless, does so at its own risk, potentially subjecting itself to legal action from the rightful holder[27].

48. However, as the claimants were under pressure to leave the port of Busan to meet their laycan period at Kaohsiung, they delivered the cargo against the letter of indemnity as admitted in their statement of claim[28].

49. Furthermore, it was stated in the case of *Motis Export Ltd v Dampskibsselskabet AF 1912 Aktieselskab and Aktieselskabet Dampskibsselskabet Svendborg* [1991][29]

> '*It is the essence of such contract that a shipowner is both entitled and bound to deliver the goods against production of an original bill of lading, provided he has no notice of any other claim or better title to the goods'*

[24] *Moot Problem,* Veggie of Earth Banking Ltd, Statement of Defence and Counterclaim, page 37, paragraph 15
[25] *Moot Problem,* Veggie of Earth Banking Ltd, Statement of Defence and Counterclaim, page 37, paragraph 16
[26] Lickbarrow v Mason [1787] 2 T.R
[27] Ibid
[28] *Moot Problem,* Tomahawk Maritime S.A., Statement of claim, paragraph, page 9 paragraph 13.
[29] Motis Export Ltd v Dampskibsselskabet AF 1912 Aktieselskab and Aktieselskabet Dampskibsselskabet Svendborg [1991], [2000] CA

Moreover, Lord Justice Leggatt stated '*Delivery without production of the bill of lading constitutes a breach of contract ...'*

50. The claimants may attempt to argue that they had the permission of the charterers (Yu Shipping), who were party to the original contract, however it was held in *Kuwait Petroleum Corporation v I & D Oil Carriers Ltd (The "Houda")* [1994][30] that,

> '*... the general principle that once a bill of lading has been issued only a holder of the bill can demand delivery of the goods at the port of discharge ... it is the principle that the bill of lading can be used as a document of title so that the transfer of the document transfers also the right to demand the cargo from the ship at discharge'*

51. Furthermore, the respondents wrote to the claimants on the 29th November informing them that they were the holders of the BOL[31], so the claimants were fully aware that delivery should have only been taken by the respondents.

52. The respondents suffered a loss amounting to USD 4,249752.50[32] and that loss was a direct consequence of the claimant's breach of contract and are therefore entitled to reprieve. Moreover, by delivering the cargo against the Letter of Indemnity the claimants breached their contractual obligation to the respondents and should be held liable for the losses resulting from that breach. "But for" the actions of the claimants the respondents would not have incurred that loss as they would have been in control of the cargo and could have ensured its safety.

[30] Kuwait Petroleum Corporation v I & D Oil Carriers Ltd (The "Houda") [1994] CA
[31] *Moot Problem,* Tomahawk Maritime S.A., Statement of claim, paragraph, page 10, paragraph 17
[32] *Moot Problem,* Veggie of Earth Banking Ltd, Statement of Defence and Counterclaim, page 37, paragraph 19

PRAYER

IN THE LIGHT OF THE ISSUES RAISED, ARGUMENTS ADVANCED, AND AUTHORITIES CITED, IT IS HUMBLY PRAYED THAT THE TRIBUNAL MAY BE PLEASED TO DECLARE THAT:

I. The Tribunal does not have jurisdiction to deal with this matter;

II. The Claimants are not entitled to claim for consequential losses beyond demurrage; and

III. The Claimants breached the terms of the charterparty by misdelivering the cargo.

THEREFORE, THE TRIBUNAL IS HUMBLY INVITED TO TERMINATE THIS ARBITRATION OR, ALTERNATIVELY, DISMISS THE CLAIMANT'S CLAIMS.

AND THE TRIBUNAL IS HUMBLY INVITED TO GRANT THE RESPONDENTS RELIEF OF:

a) The sum of USD 4,249,752.50, being the loss and/or damage that the Respondent has suffered; or

b) Damages for the value of the Cargo to be assessed; or

c) Such further order or relief as the Tribunal deems fit in the interest of justice, fairness, and good conscience.

ALL OF WHICH IS HUMBLY PRAYED,
COUNSELS FOR THE RESPONDENTS