International Maritime Law Arbitration Moot

2024

NALSAR UNIVERSITY OF LAW,

INDIA

MEMORANDUM FOR RESPONDENT

ON BEHALF OF:	**AGAINST:**
Veggies of Earth Banking Ltd. (Respondent)	*Tomahawk Maritime S.A (Claimant)*

TEAM CODE: S

Aadvika Anandal | Kavya Reddy Putha | Prathiti Mulinti | Sahithi Ragampudi | Shakti Reddy

TABLE OF CONTENTS

LIST OF ABBREVIATIONS IV

LIST OF AUTHORITIES V

STATEMENT OF FACTS 1

SUBMISSIONS ON PROCEDURAL ISSUES 3

I. PRC law will apply. 3

a. The Arbitration Clause is separate from the C/P and BoL. 3

b. Guangzhou being the seat of arbitration determines the applicable law. 4

i. Guangzhou is the seat of arbitration. 4

ii. The seat of arbitration determines the applicable law. 5

II. SCMA rules cannot apply. 5

a. The conduct of the arbitration procedure will be subject to PRC law. 6

b. Arbitration Law prohibits SCMA Rules from being applicable. 6

i. The requirements of Article 16 of Arbitration Law are not met. 6

ii. Arbitration Law takes precedence over SCMA Rules 7

SUBMISSIONS ON THE MERITS 8

ARGUMENTS ON THE SUBSTANCE .... ERROR! BOOKMARK NOT DEFINED.

III. The CLAIMANT is not entitled to claim for the negotiated discount 8

a. There is no separate loss incurred by the CLAIMANT. 8

i. There is no separate breach of contract for the recovery of damages............................ 9

ii. There is no causation for the losses. 10

d. The CLAIMANT's claims for losses are limited to a claim for demurrage only. ..... **Error! Bookmark not defined.**

c. Alternatively, the claim for demurrage is time-barred... 11

II. The Respondent is not liable to pay demurrage and damages 11

a. The Bill of Lading does not bind the RESPONDENT to pay demurrage 11

b. There was no additional breach on part of the RESPONDENT**Error! Bookmark not defined.**

III. The Claimant Ought To Pay Damages For The Mis delivery Of The Cargo 13

a. Straight Consigned Bill is a Document of Title 14

b. Violation of the Presentation Rule is a Violation of the Contract of Carriage 15

i. The COGSA has a clearly established presentation rule 15

ii. The holder of the Bills of Lading is entitled to the possession of the cargo................ 16

c. The Act of the Claimant is not covered under the exceptions to the Presentation Rule... 17

d. The Claimant is liable for Tort of Conversion... 18

e. The Claimant is in Violation of the Contract of Carriage.. 18

IV. THE CLAIMANT IS LIABLE TO PAY DAMAGES FOR MISDELIVERY 19

a. Liability for Non-Delivery of Cargo.. 19

b. Costs claimed under the Tort of Conversion 20

LIST OF ABBREVIATIONS

Arbitration	Present arbitration between *Tomahawk Maritime S.A v Veggies of Earth Banking Ltd.*
BoL	Bill of Lading No. COW-100A dated 4.09.2023
Cargo	Shipment of 16.999/01 Metric Tonnes of crude palm oil
Charterer	Yu Shipping Ltd.
Charterparty	Charterparty between Tomahawk Maritime S.A and Yu Shipping Ltd.
CLAIMANT	Tomahawk Maritime S.A
COGSA 1971	Carriage of Goods by Sea Act 1971 (UK)
Model Law	*UNCITRAL Model Law on International Commercial Abitration 1985.*
PRC	People's Republic of China
RESPONDENT	Veggies of Earth Banking Ltd.
Rider Clauses	Tomahawk Maritime Rider Clauses
SCMA	Singapore Chamber of Maritime Arbitration
Vessel	NIUYANG

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Article 2, Carriage of Goods by Sea Act, 1992..16

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LCIA Arbitration Rules, 2020

Netherlands Arbitration Act, 1986

New York Convention

SCMA Rules

UNCITRAL Model law on International Commercial Arbitration

STATEMENT OF FACTS

1. On 1st September, 2023, the CLAIMANT entered into a Tanker Voyage Charterparty ("**Charterparty**") with Yu Shipping Ltd. (the "**Charterer**") for the delivery of a cargo of palm oil from Bintulu, Malaysia to Busan, South Korea in the vessel MT "NIUYANG" ("**The Vessel**") to the RESPONDENT.

I. THE PARTIES AGREED THAT THE CARRIAGE OF THE CARGO IS TO BE COMPLETED BY 30TH SEPTEMBER, 2023. SUBSEQUENT TO THIS, THE PARTIES WERE AWARE OF THE VESSEL'S NEXT STRICT LAYCAN FOR THE FOLLOWING CHARTERPARTY, BETWEEN 1ST – 14TH OCTOBER, 2023, AT KAOHSIUNG.

2. On 3rd September, 2023, the vessel arrived at Bintulu and tendered its Notice of Readiness ("**NoR**"). The loading of the cargo into the vessel was completed by 6th September, 2023. The vessel set sail on the same day.

3. On 6th September, 2023, the Bill of Lading No. COW-001A ("**BoL**") was issued and duly consigned to the RESPONDENT. Both the Charterparty and the BoL are governed by the English Law.

4. On 20th September, 2023, the vessel arrived at Busan and tendered a NoR for the discharge of the cargo. The vessel was not discharged subsequent to this in the absence of berthing and discharge instructions.

5. On 4th October, discharge instructions were received by the vessel. The discharge commenced and was completed on 7th October, 2023. On 8th October, 2023, the vessel set sail from Busan to meet its next laycan.

6. On account of adverse weather conditions, the journey of the vessel was further delayed. On 16th October, 2023, the charterers of the next laycan issued a notice to the CLAIMANT cancelling their charterparty. Upon negotiations, the CLAIMANT was able to reinstate the contract at a lower hire price of USD 30,000 per day.

7. The CLAIMANT commenced arbitration proceedings against the RESPONDENT for the recovery of the losses incurred by it due to the reduced hire price caused because of the delay in the subsequent laycan.

8. The issues to be decided before the tribunal are-

    (i) Whether the arbitration commenced by the CLAIMANT against the RESPONDENT is valid and if this tribunal has the jurisdiction to decide on this matter.

    (ii) Whether the CLAIMANT is entitled to a claim of liquidated damages in addition or as an alternative to demurrage.

    (iii) Whether the RESPONDENT'S counter-claim of mis-delivery of the cargo is valid.

SUBMISSIONS ON PROCEDURAL ISSUES

1. The purported arbitration agreement is invalid, and the Tribunal lacks jurisdiction. The tribunal doesn't possess jurisdiction to arbitrate on the dispute brought before it as PRC law applies to the arbitral proceedings **(I)** and SCMA Rules cannot apply to the proceedings **(II)**.

II. PRC LAW WILL APPLY.

The Arbitration Clause is separate from the C/P and BoL.

2. The principle of separability asserts that an arbitration clause within a contract is distinct from the main contract it is a part of.[1] Consequently, even if the main contract is terminated, the arbitration clause remains intact. Its continuity persists specifically for adjudicating claims arising from breaches, and it governs the mechanism for resolving such disputes.[2]

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[1] *Sulamérica CIA Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638; *Martellio Jr. v. Burbank*, 341 N.J. Super. 520, 775 A.2d 620 (App. Div. 2001); *Matermaco SA v PPM Cranes Inc., Legris Industries SA, Tribunal de Commerce*, Court of First Instance, (2000) 25 YBCA 641–1164 (Belgium).

[2] *UNCITRAL Model Law on International Commercial Arbitration,* Art 23(1) & 16(1); *LCIA Arbitration Rules 2020*, Art 23(2); *ICC Rules of Arbitration,* Art 6(9); *Prima Paint Co. v. Flood Conklin Mfg. Co.* [1967] 388 U.S. 395, 402; *Buckeye Check Cashing, Inc. v. Cardegna*, [2006] 126 S. Ct. 1204; McDougall & Ioannou, *Separability saved: U.S. Supreme Court eliminates threat to international arbitration*, 21 Mealey's Int'l Arb. Rep. [2006]; *Preston v. Ferre*r, 552 U.S. 346 [2008]; Netherlands, Arbitration Act 1986, S. 1053; England, Arbitration Act 1996, S. 7; India, Arbitration and Conciliation Act 1996, S. 16; Brazil, Brazilian Arbitration Act of 1996, S. 8; Marrella, *International business law and international commercial arbitration: The Italian approach* [1997] ADRLJ 25; Rogers & Launders, *Separability: The indestructible arbitration clause* [1994] 10 Arb Intl 71; Svernlou, *What isn't, ain't: The current status of the doctrine of separability* [1991] 8 J Intl Arb 37; *Harbour Assurance Co. Ltd v Kansa General International Insurance Co. Ltd* [1993] 1 Lloyd's Re; Merkin, *Separability and illegality in arbitration* [2007] 17 Arb LM 1; *Fiona Trust & Holding Corp v Privalov* [2007] 24 J Intl Arb 445; *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43, [2005] Arb LR 557; *Beijing Jianlong Heavy Industry Group v Golden Ocean Group Ltd* [2013] EWHC 1063 (Comm); *Arbitration Law of the People's Republic of China*, S. 19; *CIETAC Rules*, Art 5(4); Wexia, China's search for complete separability of the arbitral agreement [2007] 3 Asian Intl Arb J 163; Yeoh & Fu, *The People's courts and arbitration: A snapshot of recent and judicial attitudes on arbitrability and enforcement* [2007] 24 J Intl Arb 635.

3. Rider Clause 78 of the C/P is the arbitration clause.[3] It makes a clear distinction between the law governing the arbitration procedure and the law governing the main contract. The principle of separability establishes the independence of the arbitration clause from the main contract. Consequently, although English law governs the C/P, the arbitration process falls under PRC law as the arbitration's location in Guangzhou.

Guangzhou being the seat of arbitration determines the applicable law.

i. Guangzhou is the seat of arbitration.

4. There exists a distinct territorial nexus between the location of arbitration, commonly referred to as the "seat," and the legal framework governing the arbitration, known as the lex arbitri.[4] The determination of the seat is not solely determined by its geographic location but rather by the legal connection between the arbitration and the law of the place where it is formally situated. Consequently, arbitration proceedings are conducted within the legal framework of the relevant country, also known as the curial law.[5] Rider Clause 78 of the C/P explicitly refers to Guangzhou as the geographical location of arbitral proceedings and thus making it is the seat of arbitration.[6]

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[3] Record, 28: Rider Clause 78.

[4] *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th ed, 2015), 322, 105-106; Park, *The lex loci arbitri and international commercial arbitration* [1983] 32 ICLQ 21; Jarvin, *Le lieu de l'arbitrage* [1993] 4 ICC Bulletin 7; Born, *International Commercial Arbitration* [2014] 2nd edn, Kluwer Law International, 1530–1531; Kaufmann-Kohler, *Identifying and applying the law governing the arbitral procedure: The role of the law of the place of arbitration* [1999] 9 ICCA Congress Series 336; *New York Convention*, Art 5 (1)(a), (d) & (e); English Arbitration Act 1996, S. 2 & 3; Reymond, *Where is an arbitral award made?* [1992] 108 LQR 1, at 3; *UNCITRAL Model Law on International Commercial Arbitration,* Art 1(2).

[5] *Ibid.*

[6] Record, 28: Rider Clause 78.

ii. The seat of arbitration determines the applicable law.

5. In Rider Clause 78 of the C/P, the seat of arbitration has been made explicit. But there has been no deliberation on the law applicable to the agreement to arbitrate.[7] When no express designation has been made and it becomes necessary to determine the law applicable to the agreement to arbitrate. The principal choice—in the absence of any express or implied choice by the parties—lies between the law of the seat of the arbitration and the law that governs the contract as a whole.[8]
6. It is well-established that that selecting a country as the seat of arbitration implies the parties' acceptance that the laws of that country will govern the conduct and oversight of the arbitration. This suggests that the parties intended for the laws of the chosen country to govern all aspects of the arbitration agreement.[9]
7. And the separability of the arbitration clause as enumerated in **I.a.** clearly expresses the intention for the arbitration procedure to be governed by a different law from that which governs the main agreement. Hence, the seat of arbitration determines the applicable law. Hence, as Guangzhou is the seat of arbitration, PRC law governing arbitration will apply to the arbitration procedure.

III. SCMA RULES CANNOT APPLY.

[7] *Ibid.*

[8] *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th ed, 2015), 322, 99.

[9] *LCIA Arbitration Rules 2020*, Art 16(4); *New York Convention,* Art 5(1)(a); *UNCITRAL Model Law on International Commercial Arbitration,* Art 34(2)(a); *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWHC 42 (Comm); *C v D,* [2007] EWCA Civ 1282, [2008] 1 All ER (Comm) 1001; *XL Insurance Ltd v Owens Corning,* [2001] All ER (Comm) 530.

a. The conduct of the arbitration procedure will be subject to PRC law.

8. Each state will decide for itself what laws it wishes to lay down to govern the conduct of arbitrations within its own territory. Countries while setting out the code of law specifically designed for international arbitration often refer the Model Law, which serves as the baseline for any state wishing to modernise its law of arbitration.[10] Article 19 of the Model Law clearly lays down that the conduct of an international arbitration depends on the provisions of the law of the place of arbitration.[11] As established in I., PRC law is the applicable law and hence, the arbitral proceedings will be subject to Arbitration Law of the PRC ("Arbitration Law").

b. Arbitration Law prohibits SCMA Rules from being applicable.

i. The requirements of Article 16 of Arbitration Law are not met.

9. Under Article 16 of Arbitration law, an arbitration agreement shall contain the following particulars: (1) the express intention of arbitration; (2) matters that may be submitted to arbitration; and (3) the Arbitration Commission appointed.[12]

10. Rider Clause 78 doesn't satisfy 16 (3). Under Article 10, an Arbitration Commission may be set up in the capital city of a province, autonomous region or municipality directly under the Central Government, and also in other cities divided into districts if the circumstances require, with no need to set up at every administrative level.[13]

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[10] *UNCITRAL Model Law on International Commercial Arbitration.*

[11] *UNCITRAL Model Law on International Commercial Arbitration,* Art 19.

[12] *Arbitration Law of the People's Republic of China,* Art 16.

[13] *Arbitration Law of the People's Republic of China*; Art 10.

11. In PRC, arbitration is a professional service which requires special approval from the administrative authorities. The Chinese government has not opened the domestic arbitration market. Therefore, according to the law, foreign arbitration institutions may not conduct arbitration proceedings in the PRC.[14] Therefore, the clause stipulating the mere application of SCMA Rules is invalid since it is in violation of the Arbitration Law.

12. In the Züblin case, the Supreme People's Court ("SPC") ruled invalid an arbitration clause specifying ICC-administered proceedings seated in Shanghai. The SPC's grounds for refusal were limited to finding a breach of article 16 of the Arbitration Law, in that no arbitral commission at all (foreign or domestic) had been specified.[15] Similarly in the Rider Clause 78, no arbitral commission has been mentioned, consequently invalidating the entire arbitration clause.[16]

ii. Arbitration Law takes precedence over SCMA Rules

13. Rule 2.1 of the 4th Edition of the SCMA Arbitration Rules clarify that if any of these Rules conflict with any law of the seat of arbitration from which the parities cannot derogate, then in such case such applicable law shall prevail.[17] This establishes the primacy of the PRC law over SCMA Rules. Hence, even if the SCMA finds the Arbitration Agreement valid and finds the

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[14] Minority Opinion, Anhui Longlide Wrapping and Printing Co., Ltd v. BP Agnati S.R.L., The Supreme People's Court (25 March 2013), in Fan Yang, Foreign-related Arbitration in China: Commentary and Cases, Part IV.

[15] *Züblin International GmbH v. Wuxi Woke General Engineering Rubber Co., Ltd.* [2003] Min Si Ta Zi No23.

[16] Record, 28: Rider Clause 78.

[17] Rule 2.1, SCMA Rules, 4th Ed.

Tribunal to possess jurisdiction. The holdings of the PRC Courts in light of Arbitration Law will be prevail.

SUBMISSIONS ON THE MERITS

14. The terms of the charter party as between the Claimants and the Charterers has been incorporated into the bill of lading.[18] Further, pursuant to the Law and Arbitration clause, which has been incorporated into the Bill of Lading by specific reference, English law shall be applied to this dispute.[19]

I. THE CLAIMANT IS NOT ENTITLED TO CLAIM FOR THE NEGOTIATED DISCOUNT.

15. The Claimant is not entitled to claim for the negotiated discount since (**a**) the Claimant's claim for losses is limited to demurrage if any, and (**b**) there is no separate loss incurred by the Respondent.

a. The Claimant's claim for losses is limited to demurrage, if any

16. Demurrage is the exclusive remedy for all consequences of the failure to complete cargo operations within the agreed laytime and accordingly, if damages are to be recovered in addition to demurrage arising from delay, a separate breach of the charterparty must be proved.[20] What is liquidated by demurrage must be the loss of earnings from future voyages that is caused *directly* by the delay to the vessel.[21] In the case of *Eternal Bliss,* the Court of

[18] Record, 31: Bill of Lading, Conditions of Carriage, Clause 1.

[19] Record, 28: Rider Clauses 76.

[20] *K Line Pte v Priminds Shipping (HK) Co. Ltd (The "Eternal Bliss")*.

[21] *Ibid.*

Appeals has held that demurrage liquidated all claims arising out of the breach of obligations to load or discharge the vessel within the agreed lay days.[22] All losses suffered by owners due to delay in loading and/or discharging, will be covered exclusively by demurrage.[23] Therefore, there is no scope for damages claims by owners for loss of subsequent fixtures due to delay, nor for recovery of cargo claims. Demurrage liquidates not only the expected loss of earnings from future voyages arising from the delay to the vessel but also the ordinary running expenses of the vessel for the period of the delay.[24] Therefore, for breach of laytime provision, the Claimant's claim for losses are limited to a claim for demurrage only.[25]

b. There is no separate loss incurred by the CLAIMANT.

i. There is no separate breach of contract for the recovery of damages

17. In *the Eternal Bliss*, it was held that in order for the shipowner to recover damages in addition to demurrage, there would have to be not only a separate *type* of loss but also a separate *breach* by the party in the position of the charterer.[26] In the decision of *The Bonde,* the court while applying *Reidar,*[27] held that in order to recover damages in addition to demurrage, the owner was required to demonstrate that "in addition to... *breach of the charterers' obligation to complete loading within the lay days, it is a requirement that the plaintiff demonstrate that*

[22] *Ibid*.

[23] Robert Gay, 'Damages which are not disposed of by demurrage: What is a separate type of loss?' [2021] 27 JIML, 178.

[24] Katrien Storms, Christa Sys, Thierry Vanelslander, Ruben Van Deuren, 'Demurrage and Detention: from operational challenges towards solutions'.

[25] Record, 35: Statement of Defence and Counterclaim [14].

[26] *K Line Pte v Priminds Shipping (HK) Co. Ltd (The "Eternal Bliss")* [2021] EWCA Civ 1712.

[27] *Aktieselskabet Reidar v Arcos Ltd* [1926] 25 L.l.L. Rep. 30.

such additional loss is not only different in character from loss of use but stems from breach of an additional and/or independent obligation."[28]

18. Demurrage clause provides an estimate of the loss likely to be suffered if the ship is kept beyond the lay days. The loss, damage and expense suffered by the CLAIMANT was not caused by any separate breach of charter other than the obligation to discharge within the contractual laytime. Therefore, there is no separate loss caused by a separate breach of contract.

ii. There is no causation for the losses.

19. Moreover, the loss and damage suffered by the CLAIMANT with respect to the loss of earnings from the next voyage cannot be directly attributed to the breach of contract by the RESPONDENT to discharge within contractual laytime. The Vessel's progress to Kaohsiung was delayed and hampered due to adverse wind and sea conditions.[29] This event broke the chain of causation. The main principle in the law of damages is that the party is only entitled to recover damages for actual losses suffered as a result of unlawful act or omission from the defendant.

20. Breaks in the chain of causation occurs when there is some act or omission that causes the link to be broken.[30] The basic rules of causation require that the breach of contract must be the effective or dominant cause of damage stemming from a breach of legal duty.[31] In this case, the loss in terms of the delayed arrival of the Vessel was primarily caused by the adverse wind and sea conditions which hampered the progress. Therefore, the losses and damages incurred

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[28] *Richco International Ltd v Alfred C Toepfer International GmbH (the "Bonde")* [1991] 1 Lloyd's Rep 136.

[29] Record, 7: Statement of Claim [15].

[30] Geron Ibrahimi, 'The Relationship Between Causation and Remoteness of Damages' [2017] GJPLR, 7-74.

[31] *Ibid.*

by the CLAIMANT in relation to the discounted hire rate of the next employment of the Vessel cannot be directly attributable to the breach of contract by the RESPONDENT. Subsequently, the RESPONDENT cannot be held to be liable to compensate for these losses.

21. The Claimant asserted that the ship would have reached on time if it left on 7th October, 2023.[32] The Respondent submits that it completed its obligations in line with this predictive date set by the Claimant as the berthing and discharge instructions were delivered by then. The future delays and consequences cannot be attributed to the Respondent.

II. THE RESPONDENT IS NOT LIABLE TO PAY DEMURRAGE AND DAMAGES

22. The Respondent is not liable to pay demurrage and damages because (**a**) the claim for demurrage is time barred and (**b**) the B/L does not bind the Respondent to pay demurrage.

a. The claim for demurrage is time-barred

23. According to clause 14 of the Tomahawk Maritime rider clauses, the owners are to present the demurrage claim within 90 days after the completion of discharge with all supporting documents otherwise the owners shall waive such a claim.[33] The discharge was completed on 7 October 2023.[34] The claim for demurrage was raised on 19 January 2024, after the lapse of 90 days from the date of completion of discharge.[35] Therefore, the claim for demurrage is time-barred and it is as if the CLAIMANT had waived the claim.

[32] Record, 8: Statement of Claim [11].

[33] Record, 28: Rider Clause 14.

[34] Record, 7: Statement of Claim, [14]

[35] Record, 7: Statement of Claim.

The Bill of Lading does not bind the RESPONDENT to pay demurrage

24. In the bill of lading, there is no intimation regarding demurrage payable. If there is no such intimation that the person receiving the goods thereunder was to pay demurrage, the RESPONDENT cannot be held liable.[36] Had it been proved that any part of the cargo was received by the RESPONDENT on the terms of the bill of lading, there would be evidence of a contract to pay demurrage. However, the goods were released on a letter of indemnity, resulting in a mis-delivery of goods. Owing to this, it cannot be said that there exists a contract under the bill of lading where the RESPONDENT will pay demurrage to the CLAIMANTs.[37]

25. In *Fal Oil v. Petronas*, in deciding whether the construction of the sale contract and the charterparty are to be construed together, it was decided that the two must be treated independent of each other, including laytime and demurrage clauses. In the present fact scenario, the subsequent charterparty which imposed a laycan of 1st to 14th October, 2023, should be read entirely exclusively from the sale contract between the RESPONDENT and CLAIMANT. There is no obligation of paying demurrages owing to delay, that can be directly attributed to the RESPONDENT.[38]

26. In *The Bonde*,[39] it was said that a breach additional from the failure to load within the laytime or at the agreed rate was to be established for claims that fell outside the purview of the demurrage clause. The importation of the charterparty into the contract for goods regime as far as the incidence of demurrage is concerned, should carry with it *mutatis mutandis* the

[36] *Chappel v. Comfort* [1862] 31 L.J. C.P. 58.

[37] *County of Lancaster Steamship v. Sharp* [1871] L.R. 6 Q.B. 522

[38] *Fal Oil Co. Ltd. And Another v. Petronas Trading Corporation Sdn Bhd (The "Devon")* [2004] EWCA Civ 822.

[39] *Richco International Ltd. v Alfred C. Toepfer International G.M.B.H. (The "Bonde")* [1991] 1 Lloyd's Rep 143.

restrictions which apply to the parties remedies so far as breach of laytime or loading rate provisions are concerned.[40]

27. As damages have been pre-agreed or liquidated in the demurrages clause, the owner is under no duty to mitigate and will have to take reasonable steps to prevent prolonging the period of detention of the ship.[41]

SUBMISSIONS ON THE COUNTERCLAIM

I. THERE WAS A MIS DELIVERY OF THE CARGO BY THE CLAIMANTS

28. The RESPONDENT asserts a set off for the losses incurred as a result of mis delivery of cargo on part of the CLAIMANT since **(a)** a Straight consigned bill is a document of title, **(b)** Violation of the presentation rule is a violation of the Contract of Carriage, **(c)** the Act of the Claimant is not covered under the exceptions to the Presentation Rule.

29. In Maritime law, a Bill of Lading contains or evidences the contract of carriage between the carrier and the shipper[42] and its holder is considered to be the person entitled to the possession or other legal or equitable interests in the cargo.[43] The presentation rule is an established principle as even when the delivery is made to the entitled person, without surrendering the Bill of Lading, it amounts to the breach of contract.[44]

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[40] *Ibid* at 136.

[41] Storms K, Sys C, Vanelslander T et al, 'Demurrage and Detention: From Operational Challenges Towards Solutions' (2023) 8 Journal of Shipping Trade 3.

[42] *Glyn Mills & Co. v East and West India Dock Co* [1882] 7 App. Cas. 591, 596; The Maurice Desgagnes [1977] 1 Lloyd's Rep. 290, 293.

[43] Hill, Christopher, Maritime Law, (London, LLP, 6th edn., 2003), Wilson John F., Carriage of Goods by Sea, (Pearson , 7th Ed., 2010 *Borealis AB v Stargas Ltd and another -The Berge Star* [2002] 2 AC 205, 226 [30].

[44] *MB Pyramid Sound NV v. Briese Schiffahrts GmbH and Co KG MS Sina and Latvian Shipping Association Ltd (The Ines)* [1995] 2 Lloyd's Rep 144; *Kuwait Petroleum Corporation v I & D Oil Caterers - The Houda* [1994] 2 Lloyd"s Rep 541 , 553;.

a. Straight Consigned Bill is a Document of Title

30. Article 1(b) of the Hague Visby Rules makes reference of *'bill of lading or similar document of title'*.[45] In the case of *Barber v. Meverstein*, a Bill of lading was deemed to be a document that gave its holder symbolic possession of goods and practically the 'key to the warehouse.'[46] The document, therefore serves a purpose of transferring the construction possession of the goods to its holder.

31. A Straight Consigned Bill is a non-negotiable and non-transferable document wherein the consignee is a named party, but without any reference to "to order."[47] It is a B/L well within the meaning of COGSA 1971[48] and the Hague Rules.[49] This evidences a contractual obligation on the carrier to deliver to that named party (only), subject to any re-direction by to the shipper.[50] Further, any purported endorsement or transfer to other parties is of no effect on the carrier.

32. The circumstances in which parties use straight bills and the distinct commercial importance attached by the parties to delivery only against production needs to be taken into consideration. In *The Rafaela S* whilst drawing a distinction between a straight bill of lading and a sea waybill, the House of Lords held *"In the hands of the named consignee the straight bill of lading is his document of title"* and that it *"shares all the principal characteristics of a bill of lading."*[51]

[45] Article 1(b), Hague Visby Rules.

[46] *Lickbarrow v Mason* (1787) 2 TR 63, 100 ER 35;

[47] Aikens, Sir Richard, Miriam Goldby, and Richard Lord QC. *Bills of Lading*. Routledge, 2021.

[48] Carriage of Goods by Sea Act 1992 (UK).

[49] Hague-Visby Rules.

[50] Borealis v. Stargas (2002) 2 A.C 205.

[51] The Rafaela S (2012) 18 J.I.M.L 39.

Thus, the straight B/L qualifies as a document of title at common law. The bill of lading here functions as the bearer bill and is a Document of title relating to the cargo.[52]

33. The bill of lading dated 4 September 2023 is a Straight Consigned Bill with the consignee, being the RESPONDENT is a named party is the holder of the original B/L at all material times.[53] The CLAIMANT therefore, failed to deliver the cargo as demanded and instead delivered the cargo to Gileum Refineries without the production of original B/Ls in exchange of a letter of indemnity for the delivery.[54] The RESPONDENT did not instruct, order or endorse the bill of lading for any other third party. Thus, the CLAIMANT is liable for the breach of contract for parting with the possession of goods.

b. Violation of the Presentation Rule is a Violation of the Contract of Carriage

i. The COGSA has a clearly established presentation rule

34. The requirement to present the bill of lading before goods are delivered stems from its role as document of title. This mandate ensues that delivery occurs only upon presentation of this document, safeguarding the rights and responsibilities of both the carrier and the consignee within the framework of the Contract of carriage.[55] The presentation rule in Common law was based on the theory of bailment and constructive possession, making delivery of goods by the carrier based on the production of bill of lading. COGSA has codified this principle in English

[52] Carewins Development (China) Ltd v. Bright Fortune Shipping Ltd (2009) 5HKC 160 (2) (Bokhary PJ).

[53] Record 4; Notice of Arbitration.

[54] Record 9; Statement of Claim.

[55] JF Wilson Carriage of Goods by Sea 7 ed (1988) 132; *Louis Dreyfus v Lauro*, (1938) 60 LL.L Rep. 94.,; *Sucre*

Law, which states that a lawful holder of the bill of lading has all the vested rights under the contact of carriage.[56]

ii. The holder of the Bills of Lading is entitled to the possession of the cargo

35. A carrier choosing to hand over cargo to a party without first verifying the bill of lading does so at their own risk.[57] Such actions expose the carrier to potential claims of mis delivery such as the one duly raised by the RESPONDENT, who is rightfully entitled to receive the goods.

36. The RESPONDENT became the lawful holder of the B/L on 3 October 2023 and has been in continuous possession of it since.[58] The *Sormovskiy 3068, Clarke J*, in interpreting an analogous provision, held that:

"A shipowner must not deliver the goods otherwise than against presentation of an original bill of lading ... one would expect one of the bills of lading to be "accomplished" by being presented to the master or shipowner"[59]

37. An obligation is imposed on the CLAIMANT to deliver it only against the bill of lading.[60] The RESPONDENT is the holder of the document in good faith as they paid for the purchase of the cargo under the letter of credit on behalf of Yu Shipping Ltd.[61] By doing this, the Respondent had provided funds to Yu Shipping Ltd. to cover the payment of the price and relied on the Cargo as collateral for the loan. This vests the RESPONDENT with the right to

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[56] Article 2, Carriage of Goods by Sea Act, 1992.

[57] *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] 3 All ER 182 at 184.

[58] Record 37; Statement of Defence and Counterclaim.

[59] *Sucre Export SA v Northern River Shipping Ltd - The Sormovskiy 3068* [1994] CLC 433, 442

[60] *The Starsin* [2003] 1 Lloyd's Rep 571, 575 *Motis Exports Ltd v Dampskibsselskabet AF 1912* [2000] 1 Lloyd's Rep 211, 217; *The Dolphina* [2012] 1 Lloyd's Rep 304, 329.

[61] Supra Note 17.

delivery of the cargo. Hence, the discharge of Cargo against a letter of Indemnity, is a breach of the contract of carriage.

c. The Act of the Claimant is not covered under the exceptions to the Presentation Rule

38. In the present scenario the CLAIMANT has clearly violated the presentation rule as it does not fit under any exceptions of the rule.

39. The exceptions to the presentation rules come in three forms: *Firstly*, parties may contractually agree to delivery without the production of a bill of lading.[62] Here, the parties have the option to allow the consignee to provide alternative documents from the shipper if a bill of lading is unavailable.[63] *Secondly*, the law at the place of discharge or customary practices at the port may sometimes authorize delivery without a bill of lading. However, for this custom to apply, it must be reasonable, certain, consistent with the contract, universally recognized, and compliant with the law. *Lastly,* an exception arises in cases of delayed delivery; the master cannot indefinitely retain cargo on board. If the holder fails to claim the cargo within a reasonable timeframe, the master may land and warehouse it at the owner's expense. In such instances, the carrier assumes the role of an involuntary bailee, subject to a lower standard of care than as a carrier.[64]

40. In the present scenario none of the exceptions can be applied to the agreement between the Claimants and the Respondent. As for the *first* exception, it is irrelevant that RESPONDENT was

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[62] Davies, Martin & Dickey, Anthony, Shipping Law, (Lawbook Co., 3rd ed., 2004) p. 165

[63] Wilson John F., Carriage of Goods by Sea, (Pearson , 7th Ed., 2010).

[64] *The Timur Queen (2000) case*, Singapore High Court.

contractually obliged to deliver against a letter of indemnity. Letters of indemnity provide a remedy for the shipowner in the event of mis delivery, not a licence to misdeliver with impunity. *Secondly*, there is no customary or statutory practice at the Busan Port which allows delivery without bills of lading. As for countries with civil law jurisdiction as well, the presentation rule is widely adopted in domestic legislation. *Lastly*, there has been no unreasonable delay in taking the delivery. In light of the commercial interests that the RESPONDENT holds it purported to view the cargo as a security for the loan. ,

The Claimant is liable for Tort of Conversion

41. A bill of lading serves as a document transferring constructive possession and operates as a "key to the warehouse." Consequently, the holder of the bill has the right to demand immediate possession of the goods. If the carrier delivers the cargo to an unauthorized party, it constitutes conversion of goods and breaches the contract, infringing upon the holder's title. Such unauthorized interference with the goods constitutes the tort of conversion. In the present case, the CLAIMANT delivered the cargo without the presentation of B/L to Gileum Refinery which is conversion as the carrier has delivered at its own peril.[65]

The Claimant is in Violation of the Contract of Carriage

42. The contract of carriage was for the delivery of the cargo to the holder of the bills of lading at the Busan Port. The Respondent, is the financier and the contractual carrier of the cargo being the lawful holder of the bill of lading. The CLAIMANT, being the carrier misdelivered the

[65] *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] 2 Lloyd's Rep 114, 120; *Skibsaktieselskapet Thor Thoresens Linje v H Tyrer & Co Ltd* [1929] 35 Ll L Rep 163, *170; Voss v APL Co Pte Ltd* [2002] 2 Lloyd's Rep 707, 716.

goods to Gileum Refinery Co Ltd., against the bill of lading which was in possession of the RESPONDENT since 3 October 2023.

43. Thus, the CLAIMANT is in violation of the Contract of Carriage for delivery of the cargo to a third party without the knowledge or instruction of the RESPONDENT who was entitled to lawful possession of the cargo.

II. THE CLAIMANT IS LIABLE TO PAY DAMAGES FOR MISDELIVERY

a. Liability for Non-Delivery of Cargo

44. The CLAIMANT is liable for non- delivery of the cargo to the RESPONDENT and mis delivery of it to Good Oils. The measure of damages for non- delivery is the actual true value of the cargo, which is the market price[66] of the goods at the time [67]and at the place where they had to be delivered.[68]. In the present case the place of delivery was the Busan Port, South Korea. Thus, the Respondent are liable according to the market price at South Korea. Hence the Claimants should get a sum of USD 4, 249,752.50 which represents the invoice value of cargo.[69]

45. Alternatively, the RESPONDENT claims damages for the value of the Cargo to be assessed. Since they are the lawful holders of bill of lading which provided them with constructive possession of the goods, they lost out on their security against the payment made. The B/L provided them with the constructive possession of the goods. The RESPONDENT as a

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[66] *Koufos v C. Czarnikow Ltd*. [1967] 3 W.L.R. 1491.

[67] *Sharpe (C) & Co Ltd v Nosawa & Co* [1917] 2 KB 814 (KBD).

[68] *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory* [1979] AC 91;.; HG Beale (ed)., Chitty on Contracts (Common Law Library, 31st edn, Sweet & Maxwell, 2012) 1856; *Attorney General of the Republic of Ghana v Texaco Overseas Tankships Ltd – "Texaco Melbourne*" (1993) 1 Lloyd"s Rep 471 (CA).

[69] Moot Scenario, para 11.

financial institution acted reasonably and had issued the LoC according to the established procedure.

b. Costs claimed under the Tort of Conversion

46. The CLAIMANT is held liable for loss if its actions are the legal cause of the loss.[70] There is no requirement for establishing factual causation in conversion[71]. The legal cause of loss is determined by identifying the predominant cause of loss.[72] The RESPONDENT argues that by delivering the cargo to incorrect party, without the presentation of bills of lading deprived the Claimant of the security of repayment which was given through a line of credit. This consequently caused RESPONDENT loss. This loss is not remote and is reasonably foreseeable.

[70] *Rhaman v Arearose Ltd* [2001] QB 351, 367-8; M A Jones, 'Causation in Tort: General Principles' in Anthony M Dugdale et al (eds).,Clerk & Lindsell on Torts (Sweet and Maxwell, 19th ed, 2006) 43, 44.

[71] *Kuwait Airways Corporation v Iraq Airways Co* (Nos 4 & 5) [2002] 2 AC 883, 1093.

[72] *Yorkshire Dale Steamship Co Ltd v Minister of War Transport* [1942] AC 691, 706; *Cork v Kirby Maclean Ltd* [1952] 2 All ER 402, 407.

REQUEST FOR RELIEF

For the reasons set out above, the RESPONDENT respectfully requests the Tribunal to find the following:

(1) That the arbitration commenced by the CLAIMANT against the RESPONDENT is invalid and this tribunal lacks jurisdiction to decide on this matter.

(2) That the CLAIMANT is not entitled to a claim of liquidated damages in addition or as an alternative to demurrage.

(3) That the RESPONDENT's counter-claim of mis-delivery of the cargo is valid.