INTERNATIONAL MARITIME LAW ARBITRATION MOOT 2024

IN THE MATTER OF AN ARBITRATION UNDER THE RULES OF THE SINGAPORE CHAMBER OF MARITIME ARBITRATION (4TH ED, 2022)

CLAIMANT

< TOMAHWAK MARITIME S.A.>

v

<VEGGIES OF EARTH BANKING LTD>

RESPONDENT

TEAM CODE: TEAM U

RESPONDENT MEMORANDUM

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LIST OF ABBREVIATIONS

ABBREVIATION	TERM
Rider Clauses	Tomahawk Maritime Rider Clauses
Background	International Maritime Law Arbitration Moot 2024 Moot Problem
BL	Original set of three bills of lading, reference number COW-001A dated 4 September 2023
Cargo	17,000 MT of Crude Palm Oil
Charterer	Yu Shipping Ltd
Claimant	Tomahawk Maritime S.A.
COGSA 1992	Carriage of Goods by Sea Act 1992
CP	The voyage charterparty between Claimant and Yu Shipping Ltd
Gileum Refinery	Gileum Refinery Co Ltd
LC	Letter of Credit
Liquidators	Carry On Advisory Services LLP
LOI	Letter of Indemnity issued by Good Oils Sdn Bhd (For Account of Yu Shipping Ltd) to Veggies of Earth Banking Ltd, dated 3 October 2023
Parties	Claimant and Respondent
PO1	Procedural Order No.1 (dated 29 February 2024)
Respondent	Veggies of Earth Banking Ltd
Rider Clauses	Tomahawk Maritime Rider Clauses
SCMA	Singapore Chamber of Maritime Arbitration

SCMA Rules	Singapore Chamber of Maritime Arbitration Rules (4th Edition, adopted 01 January 2022)
Shipper	Good Oils Sdn Bhd
Vessel	MV NIUYANG (IMO No. 392817)

LIST OF AUTHORITIES

A. Statutes

Carriage of Goods by Sea Act 1992 ("COGSA 1992")

B. Cases

Anupam Mittal v Westbridge Ventures II Investment Holdings [2023] 1 SLR 349

BCY v BCZ [2017] 3 SLR 357

BNA v BVB and another [2020] 1 SLR 456

Forsa Multimedia Limited v C&C Logistics (Hk) Limited [2011] HKCU 254

Goulandris Brothers Ltd. v B. Goldman & Sons Ltd. [1958] 1 Q.B. 74.

ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel "Navig8 Ametrine [2022] SGHCR 5

Inverkip Steamship Co. v. Bunge [1917] 2 K.B. 193

Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc ("*The Jordan II*") [2004] UKHL 49

K Line Pte Ltd v Priminds Shipping (HK) Co Ltd ("*The Eternal Bliss* (HC)") [2020] EWHC 2373

K Line Pte Ltd v Priminds Shipping (HK) Co Ltd ("*The Eternal Bliss* (CA)") [2022] 1 Lloyd's Rep 22

Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2016] AC 742

National Shipping Co of Saudi Arabia v BP Oil Supply Co ("*The Abqaiq*") [2011] EWCA Civ 1127

UCO Bank v Golden Shore Transportation Pte Ltd ("*UCO Bank*") [2006] 1 SLR(R) 1

Unicredit Bank AG v Euronav NV ("*The Sienna*") [2023] 1 All ER (Comm) 166

C. Books

Gary B Born, International Commercial Arbitration (Kluwer Law International, 2nd Ed, 2014)

Girvin, Stephen, Carriage of Goods by Sea (Oxford University Press, 3rd edn, 2022)

Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 19th Ed, 2014)

Sir Richard Aikens et al, Bills of Lading (Informa Law, 3rd Ed, 2020)

D. Journal Articles

Gay, R., "Damages in addition to demurrage", [2004] L.M.C.L.Q. 72

E. Others

The Singapore Chamber of Maritime Arbitration Rules (4th Edition)

STATEMENT OF FACTS

1 Veggies of the Earth Banking Ltd (the "**Respondent**") financed a transaction between Yu Shipping Ltd (the "**Charterer**") and Good Oil Sdn Bhd (the "**Shipper**") for the purchase of 17,000 MT of edible crude palm oil (the "**Cargo**") by a letter of credit (the "**LC**").[1] The Cargo was shipped from Bintulu to Busan under Bill of Lading No. COW-001A (the "**BL**"), which was consigned to the Respondent or to order.[2] The vessel MV "NIUYANG" (the "**Vessel**") was chartered for the carriage under a voyage charterparty (the "**CP**") between the Charterer and the Vessel's owner, Tomahawk Maritime S.A. (the "**Claimant**").[3]

2 The Vessel reached Busan on 20 September 2023. Due to repeated chasers by the Claimant,[4] the Charterers instructed the Claimant to commence discharge of the Cargo on 3 October 2023 against a letter of indemnity (the "**LOI**") instead of the BLs.[5] On 8 October 2023, the Vessel departed for its subsequent employment at Kaohsiung.[6] However, its progress was hampered by adverse wind and sea conditions, and the subsequent fixture was cancelled before being renegotiated at a lower hire rate.[7]

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[1] Background, p 37.
[2] Background, p 4.
[3] Background, p 12.
[4] Background, p 8-9.
[5] Background, p 9.
[6] Background, p 9.
[7] Background, p 9.

3 On 22 December 2023, the Claimant sent a notice of arbitration to the Respondent.[8] It claims against the Respondent for losses in relation to the Vessel's subsequent employment, allegedly incurred by the Respondent's failure to take prompt delivery of the Cargo at Busan.[9] The Respondent rejects the Claimant's assertions, and contends that:

a) this Tribunal lacks jurisdiction as the arbitration agreement is invalid under the governing law of the arbitration agreement;

b) the Claimant's claim for demurrage is time barred. Alternatively, the Claimant can only claim the quantum of demurrage and nothing more; and

c) the Claimant is liable in damages for misdelivering the cargo.

[8] Background, p 2.
[9] Background, p 10.

ARGUMENTS

I. THIS TRIBUNAL LACKS JURISDICTION

A. THE ARBITRATION AGREEMENT IS INVALID UNDER PRC LAW, WHICH IS THE LAW GOVERNING THE ARBITRATION AGREEMENT

4 It is accepted that this Tribunal can rule on its own jurisdiction.[10] As the arbitration agreement is invalid under the law governing the arbitration agreement – the law of the People's Republic of China ("**PRC**") – this Tribunal lacks jurisdiction.

5 The disputed arbitration agreement is Clause 76 of the Rider Clauses ("**Clause 76**") to the CP,[11] which was specifically incorporated into the BL[12] that evidences the contract of carriage by Clause 1 of the BL.[13] Clause 76 provides that arbitration is "to be in Guangzhou with three arbitrators and SCMA Rules. English law to apply to the CP."[14]

6 Questions as to the validity of an arbitration agreement are determined by the proper law of the arbitration agreement.[15] A three-step test applies to determine this law.[16] The court will consider:

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[10] The Singapore Chamber of Maritime Arbitration Rules (4th Edition) ("the SCMA Rules"), r 30.1(a); *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2015] SGCA 57, [25].
[11] Background, p 28.
[12] Background, p 31.
[13] Background, p 31.
[14] Background, p 28.
[15] *BNA v BVB and another* [2020] 1 SLR 456, [55].
[16] *BCY v BCZ* [2017] 3 SLR 357, [40]; *Sulamérica Cia Nacional de Seguros SA and others v Enasa Engelharia SA and others* [2013] 1 WLR 102, [9] and [25].

a) if parties expressly chose the proper law of the arbitration agreement;

b) otherwise, if parties impliedly chose a proper law to govern the arbitration agreement; and

c) if they did not, conclude that the proper law of the arbitration agreement is the system with which the arbitration agreement has its closest and most real connection.

(1) The Parties did not expressly choose a law to govern the arbitration agreement

7 Clause 76 merely specifies that English law governs the CP, not the arbitration agreement.[17] The fact that the underlying contract is to be governed by a particular law is insufficient to constitute an express choice of the proper law of the arbitration agreement.[18] Instead, there must be explicit language stating the choice of law for the arbitration agreement clearly and unequivocally.[19]

8 In *Anupam Mittal v Westbridge Ventures II Investment Holdings*, the disputed clause was a "Governing Law and Arbitration" clause that stated that the "[a]greement and its performance shall be governed by and [interpreted] in accordance with the laws of the Republic of India". The court found that this was not an express choice of the law governing the arbitration agreement, notwithstanding that the arbitration agreement was contained within the main contract.[20] Likewise, although Clause 76 is a governing law and

[17] Background, p 28.
[18] *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] 1 SLR 349, [65].
[19] *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] 1 SLR 349, [66].
[20] *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] 1 SLR 349, [66].

arbitration clause stating that English law applies to the CP, this is not a conclusive determination of the governing law of the arbitration agreement.

9 It is immaterial that the arbitration agreement and choice of law governing the CP are contained within a single provision. The established principle remains that the governing law of the substantive contract should not be automatically presumed to govern the arbitration agreement. Under the doctrine of separability, the arbitration agreement is considered distinct from the substantive contract.[21] Since Clause 76 does not expressly and unequivocally state the choice of law governing the arbitration agreement,[22] the Parties cannot be taken to have expressly chosen a law governing the arbitration agreement.

(2) The Parties had impliedly chosen PRC law to govern the arbitration agreement

10 Where parties choose a law to govern the substantive contract, the starting point is that they impliedly intended this law to govern the arbitration agreement.[23] However, this may be displaced by contrary indicia such as the terms of the arbitration agreement or how its effectiveness would be impacted by the choice of the same governing law for the arbitration agreement. [24]

[21] *Sulamérica Cia Nacional de Seguros SA and others v Enasa Engelharia SA and others* [2013] 1 WLR 102, [9].
[22] Background, p 28.
[23] *BNA v BVB and another* [2020] 1 SLR 456, [62].
[24] *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] 1 SLR 349, [67].

11 There are a line of authorities which support the propositition that parties specifying one geographical location is most naturally construed to be a reference to the parties' choice of seat of arbitration. First, in *BNA*, the court the natural meaning of the prhase "arbitration in Shanghai" is that Shanghai is to be construed as the seat of arbitration.[25] Second, in *Naviera*, the court adopted the phrase "arbitration in London" as a way of referring to London as as the seat of arbitration.[26] Lastly, in *Shagang*, the court held that despite the fact that English law was to be applied was not sufficient to amount to contrary indicia and the phrase "Arbitration to be held in Hong Kong" was sufficient to infer that Hong Kong was the seat of arbitration.[27]

12 Presently, given that there is only one geographical location referenced in Clause 76 which is Guangzhou,[28] this Tribunal should interpret such reference as specifying the arbitral seat.[29] The choice of the arbitral seat is most likely to be the governing law of the arbitration agreement.[30] As such, the implied choice of the governing law should be PRC law.

(3) The legal system most closely connected to the arbitration agreement is PRC law

13 Even if PRC law was not the implied choice, this Tribunal should impute PRC law as the governing law of the arbitration agreement. Pursuant to Rule 31.1 of the SCMA Rules, the

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[25] *BNA v BVB and another* ("*BNA*") [2020] 1 SLR 456, [64]-[65].
[26] *Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru* ("*Naviera*") [1988] 1 Lloyd's Rep 116, 119 (*per* Kerr LJ).
[27] *Shagang South-Asia (Hong Kong) Trading Co Ltd v Daewoo Logistics* ("*Shagang*") [2015] 1 Lloyd's Rep 504, [38]-[39].
[28] Background, p 28.
[29] Gary B Born, International Commercial Arbitration (Kluwer Law International, 2nd Ed, 2014), pp 2074-2075.
[30] *Sulamérica Cia Nacional de Seguros SA and others v Enasa Engelharia SA and others* [2013] 1 WLR 102, [26].

tribunal will apply the law that it considers applicable in the event that parties failed to designate a choice of law.[31] In the absence of a choice of law, the applicable law is what a reasonable person ought to have intended if they thought about the matter when they made the contract.[32] The general rule is that the law with which the arbitration agreement is most closely connected is the law of the seat of the arbitration.[33]

14 Presently, since the seat of arbitration is Guangzhou, it follows that the governing law should be PRC law. Since an essential feature required to constitute an arbitration agreement under Clause 16 of the Arbitration Law of China is absent, the arbitration agreement is invalid under PRC law.[34] This cannot be contested by the Claimant as it has agreed that no issue arises as to the interpretation of Chinese law.[35]

II. THE CLAIMANT CANNOT CLAIM FOR DEMURRAGE AND THE NEGOTIATED DISCOUNT

A. THE CLAIMANT'S DEMURRAGE CLAIM IS TIME-BARRED

15 Clause 14 of the Rider Clauses requires the owners to "present [the] demurrage claim within 90 days after completion of discharge with all supporting documents". In interpreting Clause 14, the court will analyse the language used within its commercial

[31] The Singapore Chamber of Maritime Arbitration Rules (4th Edition) ("the SCMA Rules"), r 31.1.
[32] *Pacific Recreation Pte Ltd v S Y Technology Inc* [2008] 2 SLR(R) 491, [49].
[33] *Sulamérica Cia Nacional de Seguros SA and others v Enesa Engelharia SA and others* [2013] 1 WLR 102, [32].
[34] Background, p 36.
[35] PO1, [1.v].

context and consider the contract's broader commercial objectives.[36] For a time-bar clause to serve its commercial purpose, the presentation of a claim must include sufficient factual detail to allow the charterer's to assess the claim's validity.[37] This may include documents such as notices of readiness, statement of facts, letters of protests, and invoices to support the owner's claim on liability.[38]

16 Here, the Claimant had only presented the claim with all supporting documents through the Statement of Claim, which is dated 19 January 2024.[39] This occurred more than 90 days after the completion of discharge on 7 October 2023. Therefore, the demurrage claim should be time-barred under Clause 14 of the Rider Clauses.

B. EVEN IF THE DEMURRAGE CLAIM IS NOT TIME-BARRED, THE CLAIMANT IS ONLY ENTITLED TO CLAIM FOR THE DEMURRAGE QUANTUM

17 In the absence of an explicitly stated demurrage duration, the agreed-upon demurrage rate shall apply for the entire period of delay.[40] The Respondent's liability for demurrage is strictly limited to the quantum set out and agreed to in the Rider Clauses.[41] The Vessel's Notice of Readiness was tendered at Busan on 20 September 2023 at 0843LT and it completed discharge on 7 October 2023 at 2348LT.[42] Since laytime for discharge was 96

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[36] *Tankreederei GmbH & Co KG v Marubeni Corporation* ("*Amalie Essberger*") [2019] EWHC 3402, [10].
[37] *National Shipping Co of Saudi Arabia v BP Oil Supply Co* ("*The Abqaiq*") [2011] EWCA Civ 1127, [54].
[38] *National Shipping Co of Saudi Arabia v BP Oil Supply Co* ("*The Abqaiq*") [2011] EWCA Civ 1127, [57].
[39] Background, p 39.
[40] *Inverkip Steamship Co. v. Bunge* ("*Inverkip*") [1917] 2 K.B. 193, 195.
[41] Background, p 13.
[42] Background, p 8.

hours and the agreed-upon demurrage rate was USD1500 per hour, the Respondent's liability should only be limited to USD490,625.

18 The Claimant cannot claim for consequential losses stemming from the vessel's subsequent engagement at Kaohsiung for the following reasons. First, it is established that damages in addition to demurrage is not be recoverable. Second, the Respondent did not breach the contract of carriage, as there was no implied term that the Respondent was to procure the discharge of or take delivery of the Cargo within a reasonable time.

(1) Damages in addition to demurrage is not recoverable

19 In *The Bonde*, the court adjudicated a dispute wherein the sellers had guaranteed a specific loading rate for wheat, with carrying charges due if unloading did not occur within the specified time. Despite an extension granted under Grain and Feed Trade Association rules, the sellers levied carrying charges, leading to a ruling that demurrage constitutes the exclusive remedy for an owner's losses stemming from the charterer's failure to discharge cargo within laytime, irrespective of the nature of the losses incurred due to delay.[43] Applying this principle to the present case affirms that demurrage should remain the singular remedy, regardless of the type of loss caused by the delay.

20 The principle of demurrage as an exclusive remedy was echoed in *The Eternal Bliss* (HC), where the High Court considered a claim for damages due to a ship's inability to berth,

[43] *Richco International Ltd. V. Alfred C. Toepfer International G.M.B.H.* (*The "Bonde*") [1991] 1 Lloyd's Rep. 136

resulting in cargo damage. The initial ruling allowed for claims beyond demurrage for breach of laytime obligations, suggesting a potential for dual recovery for losses arising from the same delay.[44] This interpretation, however, was contentious as it could lead to disputes over the applicability of the demurrage clause to specific types of losses, such as those from bottom fouling.[45]

21 The ensuing appeal in *The Eternal Bliss* (CA) highlighted a critical policy consideration: demurrage should act as a liquidated and all-encompassing remedy for the consequences of failing to meet agreed cargo operations deadlines.[46] The court favoured this approach for various reasons. First, while it is possible for parties to contractually agree that only some of the damages arising from a breach are to be liquidated, it would nevertheless be highly unusual for commercial people to reach to such an unusual agreement.[47] Second, demurrage should liquidate all damages flowing from the breach because it maintains the certainty and scope intended for a liquidated damages clause, thereby reducing the potential for disputes.[48] This aligns with the holding in *The Nikmary* where Moore-Bick J stated that demurrage not only covers the loss of prospective freight but all normal running expenses.[49]

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[44] *K Line Pte Ltd v Priminds Shipping (HK) Co Ltd* ("*The Eternal Bliss* (HC)") [2020] EWHC 2373, [128].
[45] Gay, R., "Damages in addition to demurrage", [2004] L.M.C.L.Q. 72, p 79.
[46] *K Line Pte Ltd v Priminds Shipping (HK) Co Ltd* ("*The Eternal Bliss* (CA)") [2022] 1 Lloyd's Rep 22, [53].
[47] *K Line Pte Ltd v Priminds Shipping (HK) Co Ltd* ("*The Eternal Bliss* (CA)") [2022] 1 Lloyd's Rep 22, [53].
[48] *K Line Pte Ltd v Priminds Shipping (HK) Co Ltd* ("*The Eternal Bliss* (CA)") [2022] 1 Lloyd's Rep 22, [57].
[49] *Triton Navigation v Vito*l ("*The Nikmary*") [2003] EWHC 46, [47].

22 Consequently, advocating for both liquidated and unliquidated damages based on the same event—delay—disregards established legal principles and undermines the certainty that demurrage clauses aim to provide. For these reasons, the Respondent's liability for damages should be strictly confined to the liquidated sum of USD 490,625.

(2) There can be no implied term that the Respondent was to procure the discharge of or take delivery of the Cargo from the Vessel within a reasonable time

23 The general principles for the implication of terms are set out in the following: (a) the term is necessary to give the contract business efficacy or to give effect to something so obvious that it goes without saying that it should be included into the contract, (b) the contracting parties would have agreed to the term had it been suggested to them, and (c) the term is capable of clear expression and does not contradict express terms in the relevant contract.[50]

(a) The Respondent cannot be responsible for the discharge of the Cargo

24 The shipowner is primarily responsible for cargo operations.[51] Any shift in responsibility must be explicitly articulated, otherwise the duty of cargo discharge cannot be transferred from the shipowners to any other party.[52] In *The Sea Master*, the issue was whether the bank could be compelled to undertake discharge operations given the charterer's insolvency.[53] The court found that absent of contractual provisions that explicitly shifted

[50] *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742.
[51] *Sea Master Shipping Inc v Arab Bank (Switzerland) Ltd* ("*The Sea Master*") [2020] EWHC 2030 (Comm), [21].
[52] *Sea Master Shipping Inc v Arab Bank (Switzerland) Ltd* ("*The Sea Master*") [2020] EWHC 2030 (Comm), [21].
[53] *Sea Master Shipping Inc v Arab Bank (Switzerland) Ltd* ("*The Sea Master*") [2020] EWHC 2030 (Comm), [4].

this duty to the bank, it remained with the shipowner.[54] Such clarity in contractual responsibilities is vital to prevent unwarranted assumptions about the shifting of roles in cargo operations.[55]

25 Similarly, there are no contractual terms explicitly shifting responsibility for discharge to the Respondent, and the duty to discharge cargo instead laid with the Claimant. The Claimant cannot argue that Clause 27 of the Rider Clauses is such a contractual term. While Clause 27 states that both the consignee and the cargo receivers bear responsibility for demurrage payments, it does not extend the Respondent's responsibilities to include the physical act of discharging the cargo.

26 Absent such clear contractual language, the Respondent is not responsible for discharge operations. Ultimately, it is anomolous to imply such a discharge obligation as discharge is an obligation that rested exclusively on the shipowner and implying such a term would run counter to the structure of a voyage charter.[56]

(b) The Respondent was not obliged to take delivery of the Cargo within reasonable time

27 As highlighted in the HC in *The Sea Master*, delivery of cargo is not a collaborative process:[57] there is no commercial necessity at all to imply a term suggesting that the

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[54] *Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc* ("*The Jordan II*") [2004] UKHL 49, [11]-[14].
[55] *Sea Master Shipping Inc v Arab Bank (Switzerland) Ltd* ("*The Sea Master*") [2020] EWHC 2030 (Comm), [21].
[56] *The Spiros C* [2000] 2 Lloyd's Rep. 319, [63].
[57] *Sea Master Shipping Inc v Arab Bank (Switzerland) Ltd* ("*The Sea Master*") [2020] EWHC 2030 (Comm), [38].

Respondent needs to even be a part of the cargo discharge. Furthermore, as held in *The Bao Yue* that if a bill of lading holder does not claim delivery within a reasonable time, the master may land and warehouse the cargo and in some circumstances, it may be his duty to do so.[58] For these reasons, it is not commercially justified to infer an obligation upon the Respondent to partake in the delivery of the cargo.

28 Lastly, the Respondent was not obliged to take delivery of the cargo within reasonable time. Contrary to the Claimant's argument, the Respondent was not the final recipient of the cargo; Gileum Refinery were the ones supposed to receive the Cargo. Even if the Respondent is recognised as a receiver of the cargo in any capacity, it is essential to recognise that the duty of delivery is not a collaborative task but rests solely with the shipowner. This unilateral responsibility cannot be extended to the Respondent without explicit contractual language to that effect.[59]

29 It would not be necessary to imply such a wide term as submitted by the Claimant as there already exist a more nuanced obligation at general law that should the receiver of cargo not claim the delivery within reasonable time, the shipowner is only entitled to charge the cargo owner with expenses incurred while warehousing and landing the cargo.[60]

30 It is trite law that one can only incorporate a term before or during time of contract. This is not the case as the CP was signed on 1 September 2023 and these terms, which were

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[58] *The Bao Yue* [2015] EWHC 2288 (Comm), [49].
[59] *Sea Master Shipping Inc v Arab Bank (Switzerland) Ltd* ("*The Sea Master*") [2020] EWHC 2030 (Comm), [40].
[60] *Sea Master Shipping Inc v Arab Bank (Switzerland) Ltd* ("*The Sea Master*") [2020] EWHC 2030 (Comm), [41].

incorporated into the BL, were then signed on 4 September 2023. Both of which are almost a month before the day in which the Respondent and all other relevant parties were told of the Vessel's next fixture in Kaohsiung. As affirmed by the Claimant in paragraph 10 of the Reply and Defence, the Charterers only informed the Respondents of the Vessel's next employment on 1 October 2023. With these series of events, it is hard to see how the Claimant can argue that the Parties had the intention to include this term in the contract.

31 That said, the Claimant may argue that there is an implied undertaking that the vessel will proceed on the voyage, load and discharge at the time agreed or within a reasonable time.[61] This would result in the incorporation of the implied term. However, it is submitted that this would be contrary to the existing laws governing demurrage, as established in the Court of Appeal case of *The Eternal Bliss* (CA).[62]

III. THE CLAIMANT IS LIABLE FOR MISDELIVERY

A. THE RESPONDENT, AS THE LAWFUL HOLDER OF THE BL, IS VESTED WITH RIGHTS OF SUIT UNDER THE CONTRACT OF CARRIAGE

32 The lawful holder of a bill of lading is vested with rights of suit under the contract of carriage.[63] The Respondent would be the lawful holder if (a) it is the holder of the BL and (b) it became the holder in good faith.[64] Since the BL is not indorsed, the Respondent

[61] Girvin, Stephen, Carriage of Goods by Sea (Oxford University Press, 3rd edn, 2022), para 2.2.
[62] *K Line Pte Ltd v Priminds Shipping (HK) Co Ltd* ("*The Eternal Bliss* (CA)") [2022] 1 Lloyd's Rep 22.
[63] Carriage of Goods by Sea Act 1992, c.50 ("COGSA 1992"), s 2(1)(a).
[64] Carriage of Goods by Sea Act 1992, c.50 ("COGSA 1992"), s 5(2).

would be the holder of the BL if it is in possession of the BL, and by virtue of being the person identified in the BL, is the consignee of the goods to which the BL relates.[65] Alternatively, if the BL was spent when the Respondent received it, the Respondent would be vested with rights of suit if it became the holder of the BL in pursuance of any contractual or other arrangements made before the time the BL was purportedly spent.[66]

33 The Respondent is clearly the holder of the BL – it has physically possessed the BL since 3 October 2023[67] and is the named consignee, since the BL identifies the consignee as "Veggies of Earth Banking Ltd or Order".[68] It also became the holder in good faith. Good faith connotes honest conduct,[69] and will not be present when one acquires the bill by theft, fraud or violence.[70] The Respondent's conduct was aligned with the ordinary course of business and devoid of any deceit or dishonesty. As a financier, it issued a letter of credit and advanced payment for the Charterer's purchase of the Cargo. The Cargo, represented by the BL, was security for this loan. Furthermore, the Respondent was clearly concerned with being paid back their loan and this was evinced in the email correspondence between the Liquidators and the Claimant.[71]

34 The Claimant cannot argue that the Respondent did not view the Cargo as security for its loan and consequently did not satisfy the good faith requirement. It is acknowledged that

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[65] COGSA 1992 s 5(2)(a).
[66] COGSA 1992 s 5(2)(c).
[67] Background, p 37.
[68] Background, p 30.
[69] *The Aegean Sea* [1998] 2 Lloyd's Rep 39, 60.
[70] Sir Richard Aikens et al, Bills of Lading (Informa Law, 3rd Ed, 2020), [9.61].
[71] Background, p 43-44.

the court in *The STI Orchard* found it "at least arguable" that the threshold of honest conduct is not met where a bank that did not intend the bills as security when it first financed the transaction later attempts to bring a claim on such purported security.[72] However, *The STI Orchard* is weak support for this proposition – as a High Court Registry case on summary judgement, the standard of proof required in *The STI Orchard* was merely that of an arguable case rather than on the balance of probabilities.[73]

35 Further, the court's citation of *UCO Bank v Golden Shore Transportation Pte Ltd* for the proposition that good faith precludes situations where possession is obtained by improper means[74] is misplaced. As held in *The Yue You 902,* the phrase "other improper means" in *UCO Bank* refers only to improper means involving dishonesty.[75] "Good faith" ought to be interpreted narrowly – it does not require the observance of reasonable commercial standards of fair dealing,[76] nor does it require the holder to have a real interest in the goods before taking possession of the bills.[77]

36 As such, so long as its means of obtaining possession of the bills was honest – meaning that the bills were not obtained through theft, fraud or violence – even if a financier did not originally intend for the bills to serve as security, it would still be the holder in good faith.

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[72] *Oversea-Chinese Banking Corporate Limited v Owner and/or Demise Charter of the vessel "STI Orchard"* ("*The STI Orchard*") [2022] SGHCR 6, [60].
[73] *Oversea-Chinese Banking Corporate Limited v Owner and/or Demise Charter of the vessel "STI Orchard"* ("*The STI Orchard*") [2022] SGHCR 6, [60].
[74] *UCO Bank v Golden Shore Transportation Pte Ltd* ("*UCO Bank*") [2006] 1 SLR(R) 1, [39]-[40].
[75] *The Yue You 902* [2020] 3 SLR 573, [106].
[76] *The Aegean Sea* [1998] 2 Lloyd's Rep 39, 60.
[77] *The Yue You 902* [2020] 3 SLR 573, [103].

Here, the Respondent had obtained the BL through a legitimate commercial arrangement with the buyer, Yu Shipping Ltd, and not through any dishonest means.

B. THE CLAIMANT BREACHED THE CONTRACT OF CARRIAGE BY DELIVERING AGAINST THE LOI

37 A carrier is obliged to only deliver on presentation of the bills of lading.[78] The failure to do so constitutes a breach of the contract of carriage. The Claimant, as the shipowner, was the contractual carrier. A bill signed by or for the Master is generally presumed to be an owner's bill unless the contract was made with the charterer alone.[79] The BLs clearly state "in Witness Whereof, the master has signed",[80] and there is nothing to displace this presumption. Therefore, the Claimant was bound by the contract of carriage.

38 The Cargo was discharged against a Letter of Indemnity ("**LOI**") provided by the Charterer without the presentation of the BL by the Claimant.[81] This was *prima facie* a breach of the contract of carriage.

[78] *Sze Hai Tong Bank v Rambler Cycle Co Ltd* [1959] MLJ 200, 201.
[79] *The Rewia* [1991] 2 Lloyd's Rep 325, 333.
[80] Background, p 4.
[81] Background, p 7.

C. THE RESPONDENT DID NOT CONSENT TO DELIVERY AGAINST THE LOI

39 There are only three ways to establish the defence of consent:

a) Express consent in the form of written instructions from the holder to the shipowner to release the goods without production of the original bills of lading;

b) Acquiescence in the form of inactivity under such circumstances that the holder's assent to the release of the goods without production of the original bills of lading may be reasonably inferred from it; or

c) Actual authority from the holder for a third party to take delivery of the goods without production of the original bills of lading.[82]

(1) The Respondent did not expressly consent to delivery without production of the BL

40 The delivery against a bill of lading was a contractual one which could be varied by express consent to the contrary.[83] In *Forsa*, the court was determining the issue of whether the plaintiff-consignee was entitled to the release of the goods without production of the original Bill.[84] The court held that the plaintiff-consignee was entitled as the shipper had issued clear instructions in writing to the defendant to release the goods to the plaintiff immediately. The clear express instructions amounted to a waiver in the requirement to present the bill of lading. Presently, there were no such instructions to amount to a waiver.

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[82] *Oversea-Chinese Banking Corporate Limited v Owner and/or Demise Charter of the vessel "STI Orchard"* ("*The STI Orchard*") [2022] SGHCR 6, [70]; *Halsbury's Laws of England* vol 16 (Butterworths, 4th Ed) (1992 Reissue) para 924; *Fimbank Plc v Discover Investment Corporation* ("*The Nika*") [2021] 1 Lloyd's Rep 109, [26].
[83] *Unicredit Bank AG v Euronav NV* ("*The Sienna*") [2023] 1 All ER (Comm) 166, [108].
[84] *Forsa Multimedia Limited v C&C Logistics (Hk) Limited* [2011] HKCU 254 ("*Forsa*"), [19].

41 First, the email correspondence between the Respondent and the Charterer does not amount to express consent. The Respondents simply stated that the Charterer was to "do as [it] deem[ed] fit".[85] Thus, unlike in *Forsa* where the shipper had issued a letter in unambiguous terms giving instructions to the shipowner to release the goods immediately,[86] the email correspondence in the present case was not sufficiently clear to constitute a waiver of the requirement to deliver only against the presentation of the BLs.

42 Secondly, the argument that the Respondent could not have viewed the cargo as security for its loan to the Charterer is speculative and does not establish consent. Following the legal framework elucidated in *The Miracle Hope*,[87] it is established that any deviation from the agreed delivery terms, especially in scenarios where the cargo acts as collateral, must be explicitly consented to by the party with the security interest. Here, where the Cargo served as collateral,[88] the Respondent must expressly agree to deviate from the standard delivery method stipulated in the BL. The absence of such express consent is critical. Invoking the defence of consent becomes legally untenable because of the absence of clear evidence or indication of the Respondent's consent to the use of an LOI for the Cargo delivery.

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[85] Background, p 46.
[86] *Forsa Multimedia Limited v C&C Logistics (Hk) Limited* [2011] HKCU 254 ("*Forsa*"), [19].
[87] *The Miracle Hope* [2020] SGHCR 3, [49].
[88] *The "Yue You 902"* [2019] SGHC 106, [121].

(2) The Respondent did not acquiesce to delivery without presentation of the BL

43 Acquiescence is quiescence under circumstances where assent may be reasonably inferred from it.[89] The Respondent's failure to proactively take delivery of the cargo does not amount to acquiescence to delivery against an LOI. The defence of acquiescene is generally difficult to establish and that there must have been clear communication between the bank and the carrier at the time of such delivery.[90] As such, silence on part of the Respondent cannot amount to acquiescence.

44 While the LC issued by the Respondent did provide for payment against shipping documents, including the BL, this does not constitute consent to deliver the Cargo under an LOI. The Respondent did not unequivocally consent to delivery of the cargo under the terms of the LOI. Furthermore, the Respondent being informed of the vessel's arrival at Busan and the Charterer's intent to take delivery does not equate to consent for Cargo delivery via an LOI – being informed of an event is different from agreeing to it.

(3) There was no actual authority

45 For actual authority to be present, the court will look at the arrangment between parties and whether there was any express authority given by the bank to another party to take delivery of the goods without the presentation of the bills of lading.[91] Presently, nothing suggests

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[89] *The "Neptra Premier"* [2001] 2 SLR(R) 754 ("*Nepta Premier"*), [38].
[90] Sir Richard Aikens et al, Bills of Lading (Informa Law, 3rd Ed, 2020), para 8.48-8.49.
[91] *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel "Navig8 Ametrine* [2022] SGHCR 5, [32].

that there was actual authority from the holder for a third party to take delivery of the goods without production of the original bills of lading.

D. THE CLAIMANT'S MISDELIVERY RESULTED IN ACTUAL DAMAGE TO THE RESPONDENT

46 For substantial damages to be awarded, the misdelivery must be the effective or proximate cause of the loss faced by the aggrieved party.[92] Here, the Respondent suffered substantial damage and ought to be awarded more than nominal damages. In *The Sienna*, it was found that the breach by the shipowner in misdelivering the cargo was not the effective cause of any loss as the failure to recoup the lending by the bank would have occurred in any event. However, here, it was possible for the Respondent to recoup its lending to the Charterers as the Cargo was intended to be the security for the loan.[93] As such, the misdelivery by the Claimant was the effective cause of the loss.

47 Furthermore, damages in cases of misdelivery under a contract of carriage are typically assessed based on the actual loss suffered.[94] This includes the market value of the goods at the time and place they should have been delivered, adjusted for any costs saved due to non-delivery. It would be insufficient to merely award nominal damages here. Nominal

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[92] *Unicredit Bank AG v Euronav NV* ("*The Sienna*") [2023] 1 All ER (Comm) 166, [103].
[93] Background, p 27.
[94] *The "Yue You 902"* [2019] SGHC 106, [139]; Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 19th Ed, 2014).

damages are typically awarded when a legal wrong has occurred but no actual monetary loss has resulted.[95]

48 However, in this case, the Respondent had suffered significant financial losses amounting to USD 4,249,752.50 due to the cargo's misdelivery,[96] justifying a claim for actual damages. The Respondent fulfilled their financial obligation expecting the proper delivery of the Cargo, which forms the basis for claiming the full market value as damages.

IV. PRAYER FOR RELIEF

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

a) declare that it does not have the jurisdiction to determine the Claimant's claim for damages;

b) declare that Claimant's claim for losses are only limited to demurrage provided that the demurrage claim is not time-barred; and

c) award the damages amounting to USD 4,249,752.50 to the Respondent for the misdelivery caused by the Claimant.

[95] *Goulandris Brothers Ltd. v B. Goldman & Sons Ltd.* [1958] 1 Q.B. 74.
[96] Background, p 37 and 45.