This legal opinion concerns the matter of Buyer Petroleum Pte Ltd ("BUYER") and Seller Petrochemical Pte Ltd ("SELLER") (hereinafter collectively referred to as the "parties") as regards a Sale Contract agreed between them on 8 July 2020 with reference numbers BP12345FO-LO and SPPL200703LPC (the "Sale Contract"). SELLER has made a claim against BUYER in the amount of US$183,333.33 due either by way of demurrage under clause 10 of the Sale Contract or damages for breaches of other contractual and general law obligations.

1. BUYER is not liable for demurrage under clause 10 of the Sale Contract.

a. The literal meaning of clause 10 will be adopted by the Arbitral Tribunal (the "Tribunal")

The Tribunal, being bound under the rule in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*") at [57] and *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd)* [2015] 5 SLR 1187 ("*YES*") at [32], will give precedence to the literal wording of the express terms of clause 10 in construing the laytime provisions. Under the literal reading of clause 10, laytime did not begin during the period from 27 July to 4 August 2020 (hereinafter referred to as the "waiting period").

The Tribunal will adopt this reading of clause 10 as it will also be bound by the rule in *YES* (at [32]) to give effect to the positive intentions of the parties at the time the Sale Contract was concluded. The conduct of SELLER demonstrated its positive intention for the literal reading of clause 10 to take precedence. On 9 July 2020 SELLER proposed amendments to clause 10 for laytime to commence "BERTH **OR NO BERTH** 36 HOUR (THIRTY SIX) HOURS AFTER NOR IS GIVEN, WHICHEVER IS EARLIER" (emphasis added). The vigour with which SELLER subsequently attempted to incorporate the amendment into the agreement indicates that, at the time the Sale Contract was concluded, it clearly understood that it was bound under the literal reading of clause 10, i.e. that laytime would commence strictly only when the MT OIL TANKER was all fast alongside berth, regardless of how long the waiting period would be. The Tribunal will be bound to uphold SELLER's intention for the literal wording of clause 10 to take precedence over any contextual meaning now being relied on by SELLER to avoid its commercially unfavourable result.

b. It is not clear that the provision provides only for situations in which MT OIL TANKER were to miss her berthing slot.

The express wording of clause 10 does not stipulate that it applies only to instances where the MT OIL TANKER missed her berthing slot. SELLER has yet to adduce any evidence to demonstrate that, during the course of negotiations, the parties had expressly agreed that the applicability of the Clause would be as such.

It is also incorrect for SELLER to assert that "with priority sequence" reflects an intention for the clause to apply only where the berthing slot is missed. It was in the general commercial interest of the parties for the vessel to be berthed with priority sequence, regardless of when NOR was tendered. It is commercially absurd to argue that the parties only intended for BUYER to accommodate the vessel with priority sequence in the sole instance where it missed its berthing slot.

c. Even if BUYER is not entitled to rely on clause 10, under general law, laytime had not commenced at all during the waiting period

At general law, laytime in a sale contract (as opposed to a charterparty) only runs from the time that SELLER places the cargo at the disposal of BUYER (*Ets Soules v Intertradex* [1991] Lloyd's Rep 378 "*Ets Soules*" at 388). Under Note A4 of the INCOTERMS 2000 for DES contracts, disposable cargoes must be placed "in such a way as to enable them to be removed from the vessel by unloading equipment appropriate to the nature of the goods". When read with clause 13 of the Sale Contract, the cargo could only be at the disposal of BUYER when it was ready to be discharged through the permanent flange connection of MT OIL TANKER. This would have at least required MT OIL TANKER to first be all fast alongside berth.

Given the above, laytime did not commence during the waiting period as it did not necessarily follow from the tendering of NOR that the cargo was at BUYER's disposal. As of 27 July when NOR was tendered, MT OIL TANKER had not berthed and was anchored in the Ningbo and Zhoushan area; the cargo aboard could not have been removed from MT OIL TANKER by BUYER in such a state and location.

Moreover, it would be commercially absurd for laytime to have commenced once NOR was tendered. The UK Court of Appeal found in *Ets Soules* that laytime did not run under a CIF contract even when the vessel in question waited 13 days for a berth, as the imposition of liability for demurrage during the waiting period there would be give rise to "open-ended" liability on part of the CIF buyer. While BUYER in this instance is a DES buyer, the Tribunal will be right to find that the commencement of laytime here would give rise to similarly open-ended liability, which is a commercially absurd result which militates against commencement of laytime during the waiting period.

d. SELLER barred from using industry custom to support its construction of clause 10

Even if SELLER wishes to rely on industry custom, if it exists, to support its reading of clause 10 it is not entitled to admit evidence of such custom. Under the rule in *Zurich Insurance* at [122], if the Tribunal is satisfied that the parties intended to embody their entire agreement in a written contract, no extrinsic evidence is admissible to contradict, vary, add to, or subtract from its terms (see also ss 93–94 of the *Evidence Act*). Clause 22 of the Sale Contract evidences the express intention of the parties for the Sale Contract to embody the entire agreement.

2. **BUYER is under no obligation to act with reasonable diligence and reasonable despatch to enable the Vessel to become an arrived ship for the purposes of the commencement of laytime.**

    a. The obligations under the charterparty for MT OIL TANKER are not imposed upon BUYER in the Sale Contract.

As a matter of law, the obligation to act with reasonable despatch, as set out in *Paragon Shipping Pte Ltd v Freight Connect (S) Pte Ltd* [2014] 4 SLR 574 ("*Paragon*") extends only to charterers in a charterparty and does not extend to parties to sale contracts. This follows from the decision in *Ets Soules*, which held that "overriding regard" to the nature and effect of the sale contract must be had where the disputed laytime clause exists in the sale contract as opposed to the related charterparty. If the Tribunal is to follow the decision in *Ets Soules* it must not extend the charterparty obligation to enable the vessel to become an "arrived ship", as to do so would confound the nature and effect of the underlying sale contract. The need to determine whether MT OIL TANKER had become an "arrived ship" would require the Tribunal to treat the DES sale contract as though it were a "port" or "berth" charterparty, a commercially absurd result cautioned against in *Ets Soules*.

    b. BUYER not in breach if under such an obligation.

Even if the Tribunal should find that BUYER is under such an obligation, it will find that BUYER has acted with such reasonable despatch. BUYER had booked ullage capacity for the dates of the discharge window to facilitate the berthing and unloading of MT OIL TANKER. Further to this, BUYER had sent a representative to Ningbo during this period with the specific intention of bringing forward the final delivery date, with the result that the discharge date was indeed brought forward from 10 August 2020 (total waiting time of 15 days) to 4 August 2020, shortening the waiting time by 7 days.

3. **BUYER is not in breach of obligation to accept delivery within a reasonable time in accordance with s 59 of the Singapore Sale of Goods Act.**

    a. Cargo was not in deliverable condition at any point during the waiting period

As argued above, the effect of the INCOTERMS 2010 read with clause 13 of the Sale Contract is that the cargo could only be in a deliverable state when the vessel was ready to discharge the cargo through the permanent flange connection. Given that MT OIL TANKER had never berthed at any terminal at any point during the waiting period, it could not possibly have been ready to deliver the cargo. Time elapsed for BUYER to accept delivery of the cargo during the waiting period was thus zero.

It is not disputed that BUYER accepted delivery expeditiously and without any delay once the MT OIL TANKER had become all fast alongside the alternative berth of Zhoushan Jinrun terminal, which was the actual time when the SELLER placed the cargo in a deliverable state for BUYER to accept delivery.

    b. Even if cargo was in a deliverable state, BUYER accepted delivery within a reasonable time frame considering the lack of shore ullage capacity in the Ningbo and Zhoushan area

In the alternative, BUYER will still be found to have accepted delivery within a reasonable time.

First, BUYER made reasonable efforts to take delivery of the cargo by booking ullage capacity in advance for the delivery date range.

Second, what is considered a reasonable time frame must also be lengthened given the shortage of ullage capacity in the Ningbo and Zhoushan area at the time. BUYER's attempts to secure its sub-buyer's commitment to a costlier alternative would reasonably be expected to have taken longer given the commercial disadvantages of the arrangement. Similarly, reasonable time would have been needed for BUYER to send its representative to the Ningbo and Zhoushan area to personally search for alternatives and expedite the discharge of the cargo.

Subsequently, when the alternative terminal was found, further time would have been needed for BUYER to arrange for the relevant contractual and customs documentation with the alternative terminal, while also waiting for vessels earlier in the terminal's lineup to load or discharge, a process which can take an average of two or three days per vessel in the Ningbo and Zhoushan area.

The above considerations make the total waiting time of 9 days reasonable.

4. **BUYER is not in breach of its obligation under the Sale Contract to try its best to accommodate the Vessel "with priority sequence".**

BUYER had sent a representative to Ningbo during this period with the specific intention of securing shore tank capacity earlier to accept SELLER's delivery of the cargo, bringing the discharge date forward from 10 August 2020 (total waiting time of 15 days) to 4 August 2020. Furthermore, it had also negotiated successfully with its sub-buyer to secure alternative berthing and ullage capacity at a commercially disadvantageous cost, thus underscoring its commitment to accommodate the vessel as soon as possible.

5. BUYER is not liable to pay demurrage under the Sale Contract

Under clause 10, demurrage shall only be calculable at the end of laytime which commences when MT OIL TANKER is all fast alongside berth. Laytime thus did not commence during the waiting period and thus no demurrage is payable for the entirety of the waiting period.

6. SELLER's alternative claims for damages fail for want of legal causation

a. BUYER not subject to such obligations or in breach of those obligations

As argued above, BUYER is not subject to such obligations at general law. Where and if BUYER is found subject to such obligations at general law or under the Sale Contract, BUYER has reasonably discharged all those obligations and is not liable for breach.

b. Even if BUYER in breach, breaches were not legal cause of SELLER's loss

Even if BUYER has breached of any of the above obligations, BUYER is not liable in damages for want of legal causation.

Where a supervening act or event has broken the chain of causation, BUYER will be freed from liability for its breach(es): *Jet Holding v Cooper Cameron (Singapore) Pte Ltd* [2006] 3 SLR(R) 769 ("*Jet Holding*") at [108]. The Tribunal will find that the SELLER's losses, viz. demurrage costs, were legally caused by SELLER's own breach in delivering the cargo outside of the nominated delivery date range.

BUYER had in fact made strenuous efforts to obtain SELER's timely nomination of the date range for the specific purpose of securing an advance booking for shore ullage. Given that SELLER did not deliver the cargo within the date range that SELLER itself nominated, thus resulting in the expiration of BUYER's booking slot for shore ullage, SELLER's own breach was the main cause in the chain of causation leading to subsequent delays in securing alternative berthing and tankage arrangements.

SELLER may argue that its breach in failing to deliver the cargo within the delivery date range would not have made a difference to the end result given the previous renter's delays in lifting its cargo from the tanks at Ningbo Gangxin. While this would have prevented BUYER from accepting delivery even if SELLER had managed to deliver the cargo within the delivery date range, BUYER's breaches would still not be considered the legal cause of SELLER's losses as the delays from the previous renter would in any event amount to a supervening event within the meaning in *Jet Holding* that breaks the chain of causation.

7. BUYER is not precluded from relying on force majeure clause

Under Clause 17 of the Sale Contract, BUYER is not precluded from relying on force majeure to excuse it from delays in taking delivery from SELLER. BUYER may potentially rely on Clause 17 as the delays in obtaining berthing and shore ullage arose from factors beyond BUYER's control, viz. previous renter's delays in lifting cargo from tankage at Ningbo Gangxin, SELER's own breach in tendering NOR outside of the delivery date range, and the lack of ullage capacity limiting the availability of alternative arrangements.

The potential success of a plea of force majeure is extremely sensitive to the claims of SELLER and BUYER and the evidence adduced before the Tribunal. As such, detailed analysis on the strength of BUYER's position under the force majeure clause should only be considered if SELLER ultimately chooses to litigate the matter.