INTERNATIONAL MARITIME LAW ARBITRATION MOOT 2024

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

MEMORANDUM FOR THE CLAIMANT

(Team A)

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

COUNSEL

Jerome TAN Jun Wei • JIN Haofeng • TEO Zi Yang

MEMORANDUM FOR THE CLAIMANT

(Team A)

I LIST OF AUTHORITIES

A. Legislation and Conventions

Carriage of Goods by Sea Act 1992 (UK)

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)

B. Institutional Rules

Singapore Chamber of Maritime Arbitration Rules (4th edn, 2022)

Singapore International Arbitration Centre Rules (5th edn, 2013)

C. Cases

BNA v BNB [2020] 1 Lloyd's Rep 55

Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb [2020] UKSC 38

Hamlyn & Co v Talisker Distillery [1894] AC 202

Ireland (George) v Livingston (Joseph Gibbons) (1871) LR 5 HL 395

Porteus v Watney (1878) 3 QBD 534

Shin-Etsu Chemical Co Ltd v. Aksh Optifibre Ltd (2005) 7 SCC 234

Suisse Atlantique Société D'armement Maritime S A v N V Rotterdamsche Kolen Centrale [1966] 2 WLR 944

The Eternal Bliss [2021] Lloyd's Rep Plus 122

The Houda [1994] 2 Lloyd's Rep 541

The Lips [1988] AC 395

The Maersk Princess [2023] 4 SLR 572

The Nika [2021] 1 Lloyd's Rep 109

The Sea Master [2021] 1 Lloyd's Rep 500

The Sienna [2023] EWCA Civ 471

The Sormovskiy 3068 [1994] 2 Lloyd's Rep 266

D. Arbitral Awards

Award in ICC Case No 11869 (2011) XXXVI YB Comm Arb 47

Judgment of 4 August 1993, Owerri Commercial Inc v Dielle Srl XIX YB Comm Arb 703

E. Secondary Authorities

Adrian Briggs, *Private International Law in English Courts* (2nd edn, OUP 2023)

Blackaby et al., *Redfern and Hunter on International Arbitration* (7th edn OUP 2022)

Hugh G. Beale and others (eds), *Chitty on Contracts* (35th edn, Sweet & Maxwell 2023)

John Schofield, *Laytime and Demurrage* (8th edn, Informa Law from Routledge 2022)

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

II STATEMENT OF FACTS

A. The Parties

1. The Claimant is Tomahawk Maritime S.A., a company registered under Panamanian law, and the shipowner of the vessel MT "NIUYANG" (the "**Vessel**"). The Respondent is Veggies of Earth Banking Ltd, a financial institution registered under Hong Kong law.

B. Facts Leading to the Present Dispute

2. The Claimant entered into a voyage charterparty dated 1 September 2023 (the "**Charterparty**") with Yu Shipping Ltd (the "**Charterer**") for the employment of the Vessel to carry a cargo of palm oil (the "**Cargo**") from Bintulu, Malaysia, to Busan, South Korea.

3. Prior to entering into the Charterparty, the Claimant had already entered into another 2-year time charterparty under which the Vessel had to be delivered at Kaohsiung with a strict laycan ending 14 October 2023 (the "**Kaohsiung Fixture**"). To ensure that the Claimant could meet the laycan under the Kaohsiung Fixture, the Claimant and the Charterer agreed that the carriage of the Cargo to Busan would be completed by 30 September 2023. Pursuant to this agreement, Clause 38 of the Tomahawk Maritime Rider Clauses (the "**Rider Clauses**") provided as follows:

> *"After this voyage, Vessel's next employment is at Kaohsiung with strict laycan 1-14 October 2023 for period of 2 years."*

4. The Cargo was loaded at Bintulu on 6 September 2023, and on the same day, Bill of Lading No. COW-001A (the "**Bill of Lading**") was issued for the Cargo and consigned to "Veggies of Earth Banking Ltd or Order", given that the Respondent was the financier of the Cargo. The Vessel then arrived at Busan on 20 September 2023. Notice of Readiness was tendered at 0843 Local Time ("**LT**") and accepted at 0915 LT on the same day.

5. Despite acceptance of the Notice of Readiness, no berthing and discharge instructions were received by the Vessel. The Respondent was reminded on 29 September 2023 that the Vessel needed to leave Busan urgently for its next employment at Kaohsiung and was provided with a copy of the Charterparty. Only on 3 October 2023 at 4.42pm did the Respondent send the Charterer an email stating, inter alia, "If you are afraid of the demurrage accruing, you must do as you deem fit as Charterers and we will not interfere as long as the loan is repaid."

6. On 3 October 2023 at 1337 LT, the Charterer invoked the option of taking delivery against a letter of indemnity under Clause 57 of the Rider Clauses (the "**LOI Clause**").

7. Discharge of the Cargo commenced on 4 October 2023 at 0630LT and was completed on 7 October 2023 at 2348LT. The Vessel departed Busan at 0214LT on 8 October 2023. On its way to Kaohsiung, the Vessel's progress was hampered by adverse sea and wind conditions. While the Vessel was about 300 nautical miles away from Kaohsiung, the charterers for the Kaohsiung Fixture

issued their notice on 16 October 2023 cancelling the charterparty. After negotiations, the Claimant managed to reinstate the Vessel's employment but at a lower hire rate of USD 30,000 per day instead of the original USD 35,000 per day.

8. The Charterer is currently in liquidation.

C. The Claims

9. Clause 76 of the Rider Clauses (the "**Arbitration Clause**") provides that:

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

10. Pursuant to the Arbitration Clause, the Claimant served a Notice of Arbitration on the Respondent on 22 December 2023, and is claiming for USD 3,650,000, being the discount in the rate of hire for the subsequent Kaohsiung fixture over 2 years (the "**Negotiated Discount**"). The Respondent avers that the Tribunal has no jurisdiction and that the Claimant's claim for losses is limited to demurrage only. The Respondent has also counterclaimed for misdelivery of the Cargo to the Charterer.

III THE TRIBUNAL HAS JURISDICTION OVER THE DISPUTE BECAUSE THE ARBITRATION AGREEMENT IS VALID

11. The Respondent alleges that the arbitration agreement ("**AA**") is invalid because it does not include an "Arbitration Commission selected by the parties", this being an essential requirement of an arbitration agreement under Clause 16 ("**Arbitration Commission Requirement**") of the Arbitration Law of the People's Republic of China (the "**PRC**") (Statement of Defence and Counterclaim ("**D&CC**"), Moot Problem p 36, at [6]-[8]).

12. The Arbitration Commission Requirement does not however render the AA invalid in this case. This is because the validity of the AA is determined in accordance with the law governing the AA, as chosen by the parties (see Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), Art V(1)(a)).

13. Here, the governing law of the AA is (i) English law, as impliedly chosen by the Parties; or (ii) alternatively, Singapore law, as the law of the seat. Accordingly, there is no question of the Arbitration Commission Requirement (being a requirement of PRC law) operating to invalidate the AA.

A. The law governing the AA is English law

i. By choosing English law to govern the Charterparty, the Parties have impliedly agreed for English law to also govern the AA

14. The Parties impliedly agreed for the law governing the AA to be the same as the law governing the Charterparty (and the Bill of Lading contract which incorporates the Charterparty) for the following reasons. First, reasonable commercial parties would generally intend for their contract to be "governed by a single system of law" (*Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38 ("*Enka*") [39]). Where the Parties have expressly chosen a particular law to govern the main contract, it would be unnatural to suggest that some other system of law which was not chosen by the Parties "should be applied to one of the clauses in that contract, simply because it happens to be an arbitration clause" (Blackaby et al., *Redfern and Hunter on International Arbitration* (7th edn OUP 2022) para 3.18).

15. The above suggestion is particularly justified in the present case because the choice of law provision that "English law to apply to the CP" is contained in the same clause as the AA, and the Arbitration Clause is specifically referred to as a part of the Charterparty (see Annex C to the Statement of Claim ("**SOC**"), Moot Problem p 31, Clause 1). Therefore, the most natural interpretation of the choice of law provision is that the Parties intended for English law to govern the AA as an integrated part of the Bill of Lading contract (see *Award in ICC Case No 11869* (2011) XXXVI YB Comm Arb 47, 53).

16. Second, leading common law jurisdictions have taken the approach that the law governing the main contract should be treated as an implied choice of the law governing the AA, subject to limited exceptions (see *Enka* [43] (UKSC); *BNA v BNB* [2020] 1 Lloyd's Rep 55 (SGCA) [61]-[62]; *Shin-Etsu Chemical Co Ltd v. Aksh Optifibre Ltd* (2005) 7 SCC 234 [81] (Indian Supreme Court)). The same practice has also been adopted in international arbitration practice (*Judgment of 4 August 1993, Owerri Commercial Inc v Dielle Srl* XIX YB Comm Arb 703 [11] (Hague Gerechtshof)).

17. Third, this approach is consistent with the doctrine of separability. The doctrine of separability, at its core, only serves to ensure the survival of the parties' intended method of dispute resolution if the main contract is invalid (Yoong A, 'Of principle, practicality, and precedents: the presumption of the arbitration agreement's governing law' (2021) 37 Arbitration International 653 [18]). In other words, an arbitration agreement is severable, but not for all purposes (Adrian Briggs, *Private International Law in English Courts* (2nd edn, OUP 2023) [12(B)(2)(a)(i)]).

18. Thus, insofar as the validity of the AA is not at issue, the AA should not be treated as a separate agreement from the Bill of Lading contract between the Parties when inferring their agreement on the law governing the AA.

19. For the aforementioned reasons, the validity of the AA should be determined by English law, being the law which has been impliedly chosen as the law

governing of the AA.

ii. Even on the Respondent's case that the seat of the arbitration is Guangzhou, the Parties must have intended that English law governs the validity of the AA

20. Furthermore, even if it is presumed (without admission) that the seat of the arbitration is Guangzhou (see D&CC, Moot Problem p 36, at [5]), PRC law (being the law of the seat) could not have been intended to apply as it would have placed the AA at risk of being found invalid (see [11] above).

21. As the wording of the AA clearly evinces the Parties' intention to arbitrate, it would be unreasonable for them to have also intended to subject the AA to a governing law under which it was at serious risk of being invalidated (*Hamlyn & Co v Talisker Distillery* [1894] AC 202, 208 (UKHL)).

22. Instead, it would be more reasonable to adopt "a form of purposive interpretation, ... which will give effect to – rather than defeat – an aim or purpose which the parties can be taken to have had in view" (*Enka* [106]; see also *Award in ICC Case No 11869* (2011) XXXVI YB Comm Arb 47, 57). Here, the Tribunal should give effect to the Parties' overriding intention to arbitrate their disputes and find that English law should apply to govern the AA instead of PRC law.

B. In the alternative, the seat of the arbitration should be Singapore, and the AA would be valid under Singapore law

i. The seat of the arbitration is Singapore

23. If the Tribunal disagrees with the Claimant's submissions above and takes the position that the law of the AA should be the law of the seat, then the Tribunal should find that the seat of the arbitration is Singapore, and Singapore law should thus apply.

24. Considering the potential invalidating effect of choosing "Guangzhou" as the seat of arbitration (see [11] above), it would be absurd for the Parties to, on the one hand, agree to submit their future disputes to arbitration, and on the other, choose an arbitral seat that would result in their agreement being invalidated. Such a scenario could not have been intended by the Parties where their overall intention to arbitrate has already been made clear (see [22] above).

25. Furthermore, Rule 32.1 of the Singapore Chamber of Maritime Arbitration Rules (4th Edition) (the "**SCMA Rules**") provides that:

> *"The seat of arbitration shall be Singapore unless otherwise agreed by the parties. Where the seat of the arbitration is Singapore, the International Arbitration Act (Chapter 143A) shall apply unless otherwise agreed by the parties."*

26. Given the invalidating effect of choosing Guangzhou as the seat, the Parties must have intended for Guangzhou to serve only as the venue of the arbitration, and for Singapore to be the seat of arbitration by default pursuant to Rule 32.1.

27. Therefore, this Tribunal should hold that Singapore is the seat of arbitration, and the AA will accordingly be governed by Singapore law, being the law of the seat.

ii. Conclusion

28. For the reasons stated above, the validity of the AA should be determined in accordance with English law, or alternatively, Singapore law. As the Arbitration Commission Requirement does not constitute a part of English law or Singapore law, the Tribunal should uphold the validity of the AA and find that it has jurisdiction over this case.

IV THE CLAIMANT IS ENTITLED TO CLAIM UNLIQUIDATED DAMAGES IN ADDITION TO DEMURRAGE

29. Preliminarily, as it has brought a claim under the Bill of Lading contract, the Respondent became "subject to the same liabilities under that that contract as if [it] had been a party to that contract" by virtue of the Carriage of Goods by Sea Act 1992 (UK) s 3(1)(b). The main dispute is whether "the Claimant's claim for losses [is] limited to a claim for demurrage only" (D&CC, Moot Problem p 37, at [14]).

30. As a matter of law, the Claimant can claim damages in addition to demurrage for losses which arose from the breach of a separate obligation (*The Eternal Bliss* [2021] Lloyd's Rep Plus 122 ("*The Eternal Bliss*") [52] (EWCA)). This is the case even if the separate breaches arose from the same facts (John Schofield, *Laytime and Demurrage* (8th edn, Informa Law from Routledge 2022) ("Schofield") para 6.46).

A. The Respondent has breached an implied term that the Charterer or consignee would take delivery of the Cargo within a time which reasonably allows the Vessel to reach the port of Kaohsiung before the expiration of the laycan on 14 October 2023 (the "Implied Term")

i. The Implied Term should be implied in fact

31. The general principles when implying terms into a bill of lading are as follows (*The Sea Master* [2021] 1 Lloyd's Rep 500 [13] (EWHC); see also Hugh G. Beale and others (eds), *Chitty on Contracts* (35th edn, Sweet & Maxwell 2023) ("*Chitty on Contracts*") at paras 17-006 - 17-013):

(a) The term must be necessary "to give the contract business efficacy or to give effect to what was so obvious that it goes without saying", or without the term "the contract would lack commercial or practical coherence".

(b) The term should appear fair or should be one which would have been agreed to by the parties if it had been suggested to them.

(c) The term must be capable of clear expression and should "not contradict the express terms of the contract".

(d) The implied term must only be assessed after the express terms have been interpreted.

32. Firstly, the Claimant and the Respondent would have agreed to the Implied Term if it had been suggested to them by an officious bystander. It is common ground between the Parties that Clause 38 of the Rider Clauses ("**Clause 38**") (Annex B to the SOC, Moot Problem p 25, Clause 38) is meant to capture the Charterer's specifically negotiated agreement with the Claimant that sufficient time would be allowed for the Vessel to arrive in Kaohsiung within the laycan for the next charterparty (SOC, Moot Problem p 7, at [5]-[6]; D&CC, Moot Problem p 36, at [10]). The Implied Term therefore gives effect to the clear

objective of allowing the Vessel to leave Busan within such time that it could meet the laycan under the Kaohsiung Fixture.

33. Secondly, the Implied Term is necessary to give the Bill of Lading contract business efficacy. It is common ground that the Respondent was under an obligation to "ensure that the Cargo is discharged within the laytime", this having been incorporated into the Bill of Lading (SOC Moot Problem, p 10, at [17]; D&CC, Moot Problem p 37, at [12]). However, it is commercially necessary to import a stronger obligation which requires the Charterer, consignee or receiver to also take delivery of the Cargo.

34. This is simply because it is required by Clause 7 in Part II of the VEGOILVOY form ("**Clause 7**") (Annex A to the SOC, Moot Problem p 15, Clause 7). Through the words "where delivery of the cargo shall be taken", Clause 7 transforms discharge and the taking of delivery into simultaneous operations. Furthermore, on the wording of Clause 7, the obligation to take delivery is placed on the "Charterer or consignee". So, the Implied Term must likewise bind the Charterer, consignee or receiver to take delivery of the Cargo. Clause 38 then informs the timing by which the Charterer, consignee, or receiver should take delivery. In other words, delivery should be taken within a time which reasonably allows the Vessel to reach the port of Kaohsiung before the expiration of the laycan on 14 October 2023.

35. Evidently, the Implied Term arises from the natural implications of what has been expressly agreed by the parties in Clause 7 and Clause 38 and is therefore necessary to give these clauses business efficacy. For the same reason, the Implied Term does not contradict the express terms of the Charterparty after the express terms have been properly construed.

36. Overall, for the reasons set out earlier, the Implied Term should be implied in fact.

ii. The Respondent has breached the Implied Term

37. To fulfil its obligation under the Implied Term, the Respondent must take delivery of the Cargo within such a time that the Vessel could reasonably reach the port of Kaohsiung before the expiration of the laycan on 14 October 2023.

38. The Cargo was not discharged and delivered until 7 October 2023 at 2348LT, and the Vessel could only depart from Busan and proceed to Kaohsiung on 8 October 2023 at 0214LT (SOC, Moot Problem p 9, at [14]). The Vessel encountered adverse wind and sea conditions during the voyage, but these conditions were by no means extraordinary. A reasonable time would account for what the Parties "ought to have foreseen at the time of entry into the contract" (*Chitty on Contracts* at para 25-013). Here, a reasonable time of departure would necessarily account for the ordinary delays of travel such as adverse sea and wind conditions. Yet, the Vessel was still 300 nautical miles away from Kaohsiung on 16 October 2023, two whole days after the expiration of the laycan (SOC, Moot Problem p 9, at [15]). Clearly, discharge and delivery had

not been completed within a time which reasonably allowed the Vessel to meet its laycan on 14 October 2023. Therefore, the Respondent has breached the Implied Term. As a result of this breach, the Claimant suffered losses in the form of the Negotiated Discount (see [43] below).

B. There is no issue of double recovery in claiming the Negotiated Discount in addition to demurrage

39. The Negotiated Discount is claimable in addition to demurrage as the breach of the Implied Term and the breach of the laytime clause (Annex A to the SOC, pp 12 and 14, Clauses E and 5) have resulted in losses which are different in nature.

40. A demurrage clause is generally not meant to impose a limitation on all liability arising from delayed discharge (*Suisse Atlantique Société D'armement Maritime S A v N V Rotterdamsche Kolen Centrale* [1966] 2 WLR 944, 956 (UKHL)). Demurrage is a liability in damages for the breach of contract of carriage in "detaining the chartered ship beyond the stipulated lay days" (*The Lips* [1988] AC 395, 42 (UKHL); Girvin para 33.74). As such, the essence of the breach leading to liability in demurrage is the detention of the vessel (*Porteus v Watney* (1878) 3 QBD 534, 544 (EWCA); Girvin para 33.74). The loss arising from the detention of a vessel is the loss of use of the vessel, when the vessel may be chartered again to earn profit (Schofield para 6.76).

41. Instead, the breach of the Implied Term resulted in a loss of the Claimant's expectation interest under the Kaohsiung Fixture, i.e., the Negotiated Discount. Thus, the nature of the loss claimed in the Negotiated Discount is distinct in nature from the nature of the loss claimed in demurrage.

42. Overall, for the breach of the Implied Term, the Claimant should be entitled to claim the Negotiated Discount in addition to demurrage.

C. The loss arising from the breach of the Implied Term amounts to USD 3,650,000.

43. As a result of the breach of the Implied Term, the Vessel could not reach Kaohsiung by 14 October 2023, and the Kaohsiung Fixture was cancelled on 16 October 2023 by the charterers in the Kaohsiung Fixture (SOC, Moot Problem p 9, at [15]). Subsequently, the Claimant was only able to reinstate the Vessel's employment at a lower rate of USD 30,000 per day instead of USD 35,000 per day (SOC, Moot Problem pp 9-10, at [15] and [20]). Over the period of 2 years of the Kaohsiung Fixture, the Claimant would have thus lost the difference in hire which the Vessel would have otherwise earned, being USD 5,000 x 365 x 2 = USD 3,650,000.

V The Respondent's claim for misdelivery should be rejected or otherwise awarded nominal damages

A. The Respondent authorised the Charterer to take delivery of the Cargo without presentation of the Bill of Lading

44. There would be no loss caused if delivery without presentation of the Bill of Lading is made "to the person entitled to possession" (*The Sormovskiy 3068* [1994] 2 Lloyd's Rep 266, 274 (EWHC)). In the present case, while there was a misdelivery, the Claimant should not be liable for substantial damages as the Respondent had authorised the Charterer to take delivery of the Cargo without presentation of the Bill of Lading (*The Nika* [2021] 1 Lloyd's Rep 109 [27]-[28] (EWHC); *The Sienna* [2023] EWCA Civ 471 ("*The Sienna*") [104]).

45. The Respondent's express authorisation may be found in its email to the Charterer, where the Respondent told the Charterer "[i]f you are afraid of the demurrage accruing, you must do as you deem fit as Charterers and we will not interfere as long as the loan is repaid." (Annex A to the Statement of Reply and Defence to Counterclaim ("**R&DCC**"), Moot Problem p 46, Email from Respondent on 3 October 2023 at 4.42pm) (the "**Respondent's Instructions**").

46. The above interpretation is supported by a close reading of the Respondent's Instructions. By using the words "as Charterers", the Respondent was clearly instructing the Charterer to exercise its powers *qua* "charterer" to invoke the LOI Clause (Annex B to the SOC, Moot Problem p 28, Clause 57). In stating

that it would "not interfere as long as the loan is repaid", the Respondent also indicated its indifference as to whether the Cargo was delivered without production of the Bill of Lading.

47. This interpretation is also consistent with the context in which the Respondent's Instructions were given. First, prior to giving its instructions, the Respondent was notified by the Charterer that the Vessel needed to depart for Kaohsiung by 7 October 2023 and was under time pressure for discharging (Annex A to the R&DCC, Moot Problem p 47, Email from Charterer on 29 September 2023 at 12.17pm). Moreover, the Respondent had been provided with a copy of the Charterparty by the Charterer (Annex A to the R&DCC, Moot Problem p 47, Email from Charterer on 29 September 2023 at 12.17pm), and therefore the Respondent knew that:

(a) the Vessel's next employment was at Kaohsiung and had a strict laycan between 1 October 2023 to 14 October 2023 (Annex B to the SOC, Moot Problem p 25, Clause 38);

(b) if the Respondent became the lawful holder of the Bill of Lading and demanded delivery of the cargo, it would be liable for the payment of demurrage which had accrued (Annex B to the SOC, Moot Problem p 24, Clause 27);

(c) under Clause 25 of the Charterparty (Annex A to the SOC, Moot Problem p 18, Clause 25), the Claimant would have been entitled to exercise a lien over the Cargo for the payment of demurrage against the Respondent; and

(d) the Charterer could procure the release of the Cargo under the LOI

Clause (Annex B to the SOC, Moot Problem p 28, Clause 57).

48. Since the Respondent knew that it would be liable in damages for delayed discharge beyond laytime, the Respondent should also appreciate that its security interest in the Bill of Lading would be increasingly prejudiced by a further delay in procuring the discharge and delivery of the Cargo. This explains why the Respondent's Instruction was sent.

49. Second, the Respondent must have known that the Charterer would have interpreted its instructions as an authorisation to take delivery. This is because the Charterer had shown that it was keen on procuring the discharge and delivery of the Cargo by repeatedly applying to the Respondent for a trust receipt (Annex A to the R&DCC, pp 46-47, Emails from Charterer on 3 October 2023 at 3.47pm and 4.27pm). Consequently, the Respondent must have contemplated the possibility of the Charterer obtaining discharge without the Bill of Lading as such practice "is by no means uncommon in the oil cargo trade" (*The Houda* [1994] 2 Lloyd's Rep 541, 551 col 1 (EWCA)). In fact, this was the only practical way through which the Charterer could have prevented demurrage from accruing.

50. Third, the Respondent paid the sum of USD 4,249,752.50 against a Letter of Indemnity and a commercial invoice provided by Good Oils Sdn Bhd without presentation of the original Bill of Lading (Annex A to the R&DCC, Moot Problem p 45). This clearly indicates that the Respondent was prepared to give up its security if the commercial context required it.

51. For these reasons, on a proper construction of the Respondent's Instructions, the Respondent clearly authorised the Charterer to arrange for delivery of the Cargo without production of the Bill of Lading.

52. In the alternative, even if the Tribunal finds that the Respondent's Instruction is equivocal, the Respondent should still be bound by the Charterer's invocation of the LOI Clause. It was observed in *Ireland (George) v Livingston (Joseph Gibbons)* (1871) LR 5 HL 395, 416 that:

> *"if a principal gives an order to an agent in such uncertain terms as to be susceptible of two different meanings, and the agent bonâ fide adopts one of them and acts upon it, it is not competent to the principal to repudiate the act as unauthorized because he meant the order to be read in the other sense of which it is equally capable."*

53. Given that the Respondent's Instruction was given under circumstances where it could reasonably be understood by the Charterer as authorising it to invoke the LOI clause, the Respondent is bound by the Charterer's action.

54. Based on the above reasons, the Respondent has no substantial claim as its loss was not caused by the delivery without presentation of the Bill of Lading (see [44] above).

B. In the alternative, the loss was not caused because the Respondent would have agreed to the Claimant's request to deliver the Cargo without presentation of the Bill of Lading

55. The Respondent can only prove the causation of its loss if it can show, on the balance of probabilities, that it "would have enforced its security against the Cargo so as to recoup its lending" in the event that the shipowners had properly performed its delivery obligation by only delivering the cargo against presentation of the Bill of Lading (*The Sienna* [103]).

56. In other words, causation is not made out if the Respondent would have consented to delivery without presentation of the Bill of Lading if asked by the Claimant (*The Maersk Princess* [2023] 4 SLR 572 ("*The Maersk Princess*") [45] (SGHC)). Whether the Respondent would have given its consent is ultimately a question of fact, which may be determined by reference to, among other things:

(a) the financing arrangements between the Respondent and the Charterer (*The Maersk Princess* [49]);

(b) the Respondent's knowledge when entering into these financing arrangements (*The Maersk Princess* [49]); and

(c) in light of the circumstances at the time the misdelivery occurred.

57. Considering the financial arrangement under the LC and the Respondent's knowledge at the material time (see [47]-[50] above), the Respondent would have agreed to the Claimant's request to deliver the Cargo without presentation of the Bill of Lading. Thus, causation is not made out and the Respondent did not suffer a claimable loss.

58. Overall, if the Tribunal is prepared to find that there was no misdelivery and/or the Claimant had not caused the Respondent's loss for the aforementioned reasons, then the Respondent's claim for misdelivery should be rejected or otherwise awarded nominal damages.

VI Prayer for Relief

59. For the reasons set out above, the Claimant respectfully requests this Tribunal to:

(a) **find** that it has jurisdiction over all claims in the present dispute;

(b) **find** that the Respondent has breached a separate obligation from the obligations set out in the laytime and demurrage provisions;

(c) **award** damages, costs and interests on the amounts awarded to the Claimant; and

(d) **declare** that the Respondent's claim for misdelivery should be rejected or otherwise awarded nominal damages.