TWENTY-THIRD INTERNATIONAL MARITIME LAW
ARBITRATION MOOT 2024

NATIONAL LAW SCHOOL OF INDIA UNIVERSITY

MEMORANDUM FOR CLAIMANT

ON BEHALF OF

Tomahawk Maritime S.A.
Represented By:
Ms. Hong Rou
40-00 Good Ideas Nook
Singapore 564738

CLAIMANT

AGAINST

Veggies of Earth Banking Ltd.
18 Gardens Road
Tuen Mun
Hong Kong SAR

RESPONDENT

TEAM CODE D

Rishab Devaiah Ittira • Nidhi Agrawal • Kartik Kalra

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INDEX OF ABBREVIATIONS

Abbreviation	Term
¶(¶)	Paragraph(s)
§	Section
$	United States Dollars
Art(s).	Article/Articles
B/L	Bill of Lading (No. COW-001A) between Respondent and Yu Shipping Ltd. dated 4 September 2023
Chtrs./Charterer-Buyers	Yu Shipping Ltd. (Charterers)
Cl.	Clause
CoC	Conditions of Carriage, B/L
COGSA	Carriage of Goods by Sea Act, 1992
CP	Charterparty between Tomahawk Maritime S.A. and Yu Shipping Ltd. dated 1 September 2023
CRC	Claimant's Rider Clauses, as provided in Clause H, CP
FoR	Facts on Record
FoR	Facts on Record
GR	Gileum Refinery Co. Ltd.
LC	Letter of Credit from Respondent to GoodOils
LoI-I	Letter of Indemnity from Good Oil Sdn. Bhd. to Respondent
LoI-II	Letter of Indemnity from Charterers (Yu Shipping Ltd.) to Claimant
mts	Metric tonnes
MVN	MV NIUYANG
R.	Rule
Seller	Good Oil Sdn. Bhd.
the Parties	Claimant and Respondent

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LIST OF DATES

14 August 2023	Charterer purchased cargo from Seller on FOB basis.
1 September 2023	Charterparty entered into between Claimant and Charterer.
3 September 2023	MVN arrived at Bintulu, tendered notice of readiness at 0300 LT.
4 September 2023	Respondent and Charterer entered into B/L.
20 September 2023	MVN arrived at Busan. Notice of Readiness tendered at 0843L, accepted at 0915LT.
28 September 2023	Charterers responded to Claimant, stating that they were waiting for Respondent's instructions.
29 September 2023	Claimant's reminder to Charterer about MVN's next fixture.
29 September 2023	Charterer's response stating that all relevant parties were aware of MVN's limitation, and that a copy of CP documents had been passed to the consignee.
3 October 2023	Claimants messaged Charterers, highlighting that the next CP may be cancelled, putting them on notice to recover all losses/damages in the event of such cancellation.
3 October 2023	Charterers were refused a trust receipt by the Respondent, and were asked to do *as they deem fit* to prevent demurrage accruing.
3 October 2023	Respondent made a payment under LC to Seller. B/L was not received, and LoI was issued by seller.
3 October 2023	Charters reminded owners that delay is covered/compensated by demurrage. They invoked LOI and requested owners to discharge.
3 October 2023	Discharge commenced at 0630LT.
7 October 2023	Claimant communicated that MVN must leave Busan to fulfil its follow-on fixture.
7 October 2023	Discharge completed at 2348LT.
9 October 2023	MVN departed Busan.
16 October 2023	Claimant received notice of cancellation from follow-on fixturers when MVN was 300 nautical miles away from Kaohsiung. After negotiation, the fixture was reinstated at $5,000/day lesser than originally agreed.

15 November 2023	Claimant issued a demand to Charterers claiming $3,650,000 for losses from its follow-on fixture.
22 November 2023	Claimant received a response from Carry on Advisory Services LLP (Charterers' interim liquidators), who were considering the $3,650,000 demand.
22 December 2023	Claimant issued notice of arbitration.
5 January 2024	Respondent replied to Claimant's notice of arbitration.
19 January 2024	Claimant issued its Statement of Claim.
16 February 2024	Respondent issued its Statement of Defence and Counter-Claim.
1 March 2024	Claimant issued its Statement of Reply and Defence to Counterclaim.

STATEMENT OF FACTS

CLAIMANT chartered MVN to Yu Shipping Ltd. on 1 September 2023 to carry 16,999.01 MT of palm oil from Bintulu, Malaysia to Busan, South Korea. *Cl. 38, CRC* states that MVN's follow-on fixture is at Kaohsiung, Taiwan, with a laycan of 1-14 October 2023. Accordingly, MVN arrived at Busan, South Korea on 20 September 2023. The 96-hour laytime provided in *Cl. E, Main Terms, CP* expired on 24 September 2023, but RESPONDENT failed to present B/L to obtain delivery. In order to fulfil the follow-on fixture, CLAIMANT reminded Charterers between 29 September 2023 and 3 October 2023 to complete cargo operations to enable the vessel's arrival at Kaohsiung.

RESPONDENT delayed delivery till 3 October 2023, effectively authorizing it on this date through communication to Charterers that they may "*do as [they] deem fit*". Accordingly, the Charterers issued an LOI to obtain delivery on this date. Discharge commenced on 4 October 2023, was completed on 7 October 2023, and MVN departed for Kaohsiung on 8 October 2023. Pursuant to Charterer's LOI, delivery was made to Gileum Refineries accordingly. Since *Cl. 76, CRC* provides that arbitration shall be in Guangzhou, with three arbitrators and SCMA Rules applicable, CLAIMANT initiated the instant arbitration, sending a notice thereof to RESPONDENT on 22 December 2023.

SUMMARY OF ARGUMENTS

ISSUE [1]

CLAIMANT submits that it has invoked arbitration under *Cl. 76, CP*, which incorporated in B/L. The arbitral seat is Singapore, and the arbitration agreement is governed by Singaporean law. Alternatively, if the arbitral seat is China, the governing law of the arbitration agreement is English law, owing to the validation principle's application. Thus, the arbitration agreement is valid in both instances.

ISSUE [2]

This Tribunal must award CLAIMANT $3,650,000 in unliquidated damages owing to its losses from its follow-on fixture, emanating from RESPONDENT's delays in completing cargo operations. RESPONDENT owed an "additional and/or independent obligation" to CLAIMANT to enable MVN's follow-on fixture, which it breached through delays. Alternatively, CP provisions show "contrary indications" suggesting that demurrage did not liquidate the all losses arising from RESPONDENT's breach of laytime-based obligations. CLAIMANT's losses, arising from its follow-on fixture, were caused by RESPONDENT, are not remote, and RESPONDENT assumed responsibility for them.

ISSUE [3]

Further, CLAIMANT is not liable for misdelivery. RESPONDENT does not hold title to sue under B/L, and cannot bring its counter-claim before this Tribunal. Alternatively, RESPONDENT's communications constitute authorization of delivery, since this is the only construction compatible with "business commonsense". Irrespective, RESPONDENT did not seek to exercise security over cargo, which is evident from its treatment of B/L as an inessential document in transacting with Seller and Chtrs. This Tribunal, therefore, must reject RESPONDENT's misdelivery counter-claim.

ARGUMENTS ADVANCED

[1] THE ARBITRAL TRIBUNAL HAS JURISDICTION

1. CLAIMANT submits that the Arbitral Tribunal has jurisdiction to hear the present dispute, as the arbitral agreement is valid under the law governing the arbitral agreement. CLAIMANT submits that the seat of arbitration is Singapore **[1.1]** and the Tribunal must apply the choice-of-law rules, recognised under *NYC*, resulting in a finding that the governing law is Singaporean law **[1.2].** Alternatively, if the arbitral seat is China, the governing law is English law **[1.3]**.

[1.1] THE SEAT OF ARBITRATION IS SINGAPORE

2. *Cl. 76, CRC* states that "*[a]rbitration, if any, to be in Guangzhou with three arbitrators and SCMA Rules*" [*FoR*, 38]. *Cl. 76, CP* is incorporated in B/L, given the specific reference to the arbitration clause [*The Good Luck*, ¶15; *Pride Shipping*, p. 131; *Fernández,* p. 59]. *R. 32, SCMA Rules* provides that, "*unless otherwise agreed by the parties*", the seat of arbitration shall be Singapore. *Art. 20(1), Model Law* provides that parties may choose the place of arbitration either directly or by delegation to an arbitral institution. *Rule 32.3, SCMA Rules* provides that parties may expressly designate the venue of arbitration. The venue, however, is juridically irrelevant [*Redfern*, §4.177*; BALCO,* ¶100]. The designated venue is equated to the seat of arbitration only when there is no *contrary indicia* [*Shashoua*, ¶34]. Further, the SCMA Model Arbitration Clause specifically mentions "*seated in*" for the designation of the arbitral seat [*SCMA*, p. 3]. Furthermore, courts have accepted the designation of the seat by the tribunal when there was only a designation of a venue in the arbitral agreement [*Atlas Power*, ¶47].

3. CLAIMANT submits that the mention of Guangzhou in *Cl. 76, CRC* must be read with R. *32.3*, *SCMA Rules*, as an express agreement for designating the location of physical hearing

and meetings of the tribunal. Therefore, the mention of Guangzhou in *Cl. 76, CRC* must be construed as a reference to the venue of arbitration. Consequently, the mention of Guangzhou is juridically irrelevant. The mention of Guangzhou cannot be equated to the arbitral seat, since there are sufficient contrary indicia, particularly *R. 32, SCMA Rules* providing for a default seat in the absence of party agreement. Parties, by choosing *SCMA Rules*, intended the institution's rules to govern arbitration proceedings [*Born*, §9.03]. *R. 32, SCMA Rules* is an integral provision that must be given full effect. Further, the potential invalidity of the arbitration agreement if the seat is China, evinces that Parties did not intend for China to be the arbitral seat. It is commonly accepted that parties intend to enter into valid arbitration agreements and avoid absurd results, such as arbitration agreements' invalidity [*Miles/Goh*, p. 391; *Enka* ¶72]. Lastly, Parties had the benefit of reference to the *SCMA Model Clauses* and chose not to use the term "*seated in*" as provided thereunder. Therefore, there is sufficient contrary indicia to demonstrate that the mention of Guangzhou must be read only as the venue's designation.

4. Therefore, as per *R. 32, SCMA Rules*, the arbitral seat is Singapore and *IAA* shall apply. The arbitration agreement suffers no defect, and is valid under Singaporean law. Guangzhou's mention is juridically irrelevant, and has no bearing on the law governing the arbitration agreement or the *lex arbitri*.

[1.2] CONFLICT OF LAW RULES RECOGNIZED UNDER THE NYC MUST BE APPLIED

5. *R. 31, SCMA Rules* provides that the Tribunal "*shall apply the law which it considers applicable*", adopting the *voie directe* framework [*Jones*, p. 913]. However, as established earlier, *IAA* is applicable as the law of the seat. *Art. 15A, IAA* provides that the rules of arbitration shall be given effect only if they are not inconsistent with *Model Law's* provisions. *Art. 28(2), Model Law* adopts the *voie indirecte* approach, directing the Tribunal to choose a set of conflict of law rules to determine the governing law. Therefore, it is

submitted that the Tribunal must choose a set of conflict-of-law rules to determine the governing law [*Jones*, p. 914].

6. Given the multiplicity of competing approaches in determining the applicable governing law [*Born*, §4.04; *Berger* p. 302; *Bernardini,* p. 199], it is submitted that the Tribunal must apply the rule under *Art. V(1)(a), NYC*. This approach – reading *Article II(3)* with *Article V* – foregrounds party intention and is applicable at the stage of determination of the validity of the arbitration agreement [*Enka* ¶130; *Van Den Berg*, p. 126]. This view has been endorsed in *Art. 34(2)(a)(i), Model Law*.

7. *Art. V(1)(a), NYC,* the prescribed choice-of-law rule, contains a three-stage enquiry. *First*, the applicable law is considered to be parties' express choice. *Second*, in the absence of an express choice, an implied choice is determined and applied [*Born,* §4.04; *Lew,* p. 142; *Kabab-ji,* ¶11]. *Third*, failing this, the rule prescribes the default application of the law of the seat [*Born*, §4.04(b)].

8. It is submitted that when the arbitral seat is Singapore, Singaporean law governs the arbitration agreement because, *first*, no express choice of law was made **[1.2.1]**; *second* the implied choice of law points to Singaporean law **[1.2.2]** and *third*, the default rule favours Singaporean law as the law governing the arbitration agreement **[1.2.3]**.

[1.2.1] <u>No Express Choice was Made by Parties</u>

9. *Cl. 76, CRC* provides that "*English law to govern CP*", not making an express choice of the law governing the arbitration agreement (*FoR*, p. 28). Express choice of law clauses specifically mentions, in no uncertain terms, the law that governs the arbitration agreement [*Thyssen* ¶22; *Born,* §4.02(b)]. *Cl. 76, CRC* does not meet this standard. Thus, this clause cannot be construed as an express choice of the law governing the arbitration agreement.

[1.2.2] <u>There is an Implied Choice of Singaporean Law</u>

10. The law of the arbitral seat is the parties' implied choice of law of the governing law governing the arbitration agreement [*Kabab-ji Fr*; *Nissho Iwai,* p. 1311]. CLAIMANT submits that this implied choice is justified by a large line of judicial decisions and commentary [*Hamlyn* ¶202; *Bangladesh Chem* ¶392; *FirstLink* ¶15; *Born*, §4.04].

11. The choice of the seat indirectly affects the choice of the law governing the arbitral procedure [*Kaufmann-Kohler*, p. 1319]. The procedural aspects addressed by the *lex arbitri* or law of the seat are also addressed by the arbitration agreement [*Cordero-Moss*, p. 98; *Schwab*, §37; *Wagner*, p. 578]. CLAIMANT submits that there exists an intimate connection between the law of the seat and the law of the arbitration agreement [*Petrasol BV; Thai-Lao* ¶122*; Born,* §4.04(a)]. Commercial parties reasonably expect all aspects of the arbitral procedure to be governed by a unified legal system [*Born*, §.4.04]. CLAIMANT submits that it is reasonable to assume that parties intended for the arbitration agreement to be governed by the same law as the *lex arbitri* in order to avoid the complexities involved in having different laws applicable to the enforcement procedure and the arbitration agreement's substantive validity [*Van Den Berg*, p. 292; *Born* §.4.04].

12. RESPONDENT may submit that the choice of the arbitral seat is an implied choice of the law governing the arbitration agreement. By choosing *SCMA Rules* and not expressly providing for an arbitral seat, Parties have chosen Singapore as the seat. This must be read as an implied choice of Singaporean law to govern the arbitration agreement. Parties, by expressly choosing *SCMA Rules* that provide for the default selection of Singapore as the seat, have chosen Singaporean law to govern all aspects of arbitral proceedings. Thus, the arbitration agreement – the primary procedural contract in this dispute – must also be governed by the same law.

13. Therefore, CLAIMANT submits that the choice of Singapore as the seat must be read as an implied choice to govern the arbitration agreement in accordance with Singaporean law.

[1.2.3] <u>Alternatively, the Default Rule also Points to Singaporean Law</u>

14. If the Tribunal does not find an implied choice of governing law, *Art. V(1)(a), NYC* provides for the application of the law of the arbitral seat to the arbitration agreement [*Born*, §4.04]. If Parties have not chosen a law governing the arbitration agreement, the law of the country where the award was made, i.e., the law of the seat of arbitration, must be applied [*Balthasar*, Part II ¶28; *Wolff*, ¶99]. Therefore, if this Tribunal does not find any indication of the choice of law, Singaporean law still applies as the law of the Seat.

[1.3] IF THE ARBITRATION IS SEATED IN CHINA, ENGLISH LAW IS THE GOVERNING LAW

15. If the choice-of-law analysis results in the application of a law invalidating the arbitration agreement, the validation principle prescribes that the law upholding the arbitration agreement must be applied [*Born*, §4.04]. This approach aligns with parties' implied intentions [*Hamlyn* ¶215; *Award in ICC Case No*. 7154 ¶1059-1061; *FirstLink* ¶17]. Further, if the seat is China, the Tribunal may directly determine the applicable law per *R. 31, SCMA*. Therefore, it is not necessary to choose a specific set of conflict-of-law rules [*Jones*, p. 97].

16. RESPONDENT contends that if the seat is China, the governing law must be Chinese law [*FoR*, p. 36]. However, the arbitration agreement would be invalid under thereunder [*PRC Law*, Arts. 10, 16]. CLAIMANT submits that there is no commercial or logical rationale for parties to choose a law that invalidates the agreement they entered into [*Born*, §4.04(b); *Hamlyn,* ¶215). Further, *Art. II(1)* and *II(3), NYC* provides for presumptive validity of arbitration agreements, and *Art. V(1)(a), NYC* applies the principle as an implied choice of law by Parties [*Berger*, p. 317; *Born*, §4.04]. CLAIMANT submits that there exists an

overriding intention of Parties to enter into a valid arbitration agreement [*Miles/Goh,* p. 391].

17. The only other law with connection to the dispute is the law of the B/L, which is English law. *Cl. 76, CP* is validly incorporated by specific reference, and the law of the CP is B/L's putative law [*The Njegos*, p. 90; *Yilmaz*, p. 201]. There is considerable authority in support of the proposition that the law of the substantive contract is the implied choice of law of the parties [*Enka*, ¶170; *Arsanovia*, ¶¶17-21]. The arbitration agreement is a clause integrated into the substantive contract. Therefore, the express choice of law in the main contract is a presumptive indication of an implied choice of law for the arbitration agreement [*Enka,* ¶170]. RESPONDENT may contend that the arbitration agreement is separable from the main contract. CLAIMANT, however, submits that the doctrine of separability is limited to preserving the arbitration agreement's validity when the main contract is deemed invalid [*Niranjan*, §9.05]. CP clauses are similarly severable [*FoR*, p. 12]. Therefore, it is clear that the law of the B/L has a connection with the arbitration agreement. This submission is not in contradiction with submission [1.2.2] that there is implied choice of law in favour of the law of the seat. The submission here is that when the law of the seat invalidates the arbitration agreement, the Tribunal must apply the other law – law of B/L, i.e., English law – with connection to the arbitration that retains the arbitration agreement's validity.

18. Thus, CLAIMANT submits that the law of the B/L, i.e., English law, must govern the arbitration agreement on the validation principle's application, since the arbitration agreement is valid under English law.

CONCLUSION

19. Therefore, the Tribunal has jurisdiction irrespective of whether the arbitral seat is Singapore or China, as the law governing the arbitration agreement preserves its validity.

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[2] RESPONDENT IS LIABLE FOR CLAIMANT'S LOSSES FROM FOLLOW-ON FIXTURE

20. Since this Tribunal has jurisdiction to hear the present dispute, it must award CLAIMANT $3,650,000 in unliquidated damages owing to its losses from its follow-on fixture, arising from RESPONDENT's delays in completing cargo operations. CLAIMANT submits that this sum is recoverable from RESPONDENT since, *first,* it satisfies the standards in *Eternal Bliss* and *The Bonde* **[1.1]**; and *second*, its losses were *caused* by RESPONDENT, are not *remote* in law, and there arises no question of RESPONDENT's *"assumption of responsibility"* **[1.2].**

[2.1] UNLIQUIDATED DAMAGES ARE RECOVERABLE FROM RESPONDENT

21. Based on the Court of Appeal's holding in *Eternal Bliss* and its affirmation of *The Bonde*, CLAIMANT must satisfy three conditions to claim non-demurrage damages. *First*, its loss should be distinct from the vessel's *loss of use*. *Second*, its loss should stem from the breach of an additional and/or independent obligation (to the completion of cargo operations). *Third*, if the laytime-based obligation is the only one breached, "contrary indications" suggesting that demurrage did *not* liquidate all losses arising therefrom must exist. Thus, there should either be two breaches or if there is a single breach, "contrary indications" must exist [*Eternal Bliss*, ¶57; *The Bonde*, p. 142].

22. This test is satisfied by Claimant, as, *first*, its losses are distinct from the vessel's loss of use **[2.1.1]**; *second*, they stem from an "additional obligation's" breach **[2.1.2]**; and *third*, CP contains "contrary indications" suggesting demurrage as not liquidating all delay-based losses **[2.1.3]**.

[2.1.1] Claimant's Loss is Distinct from "Loss of Use"

23. "Loss of use" concerns the loss of prospective freight earnings resulting from delays in cargo operations [*Eternal Bliss*, ¶54; *Suisse*, p. 541; *Schofield* §6.76]. Owing to RESPONDENT's delays, CLAIMANT lost profits that it could have made from its follow-on fixture. CLAIMANT's loss is distinct, since it pertains to *lost profits*, not the loss of *prospective freight earnings*.

[2.1.2] Claimant's Loss Stems from the Breach of an Additional Obligation

24. Claimant's loss stems from an additional obligation's breach, since, *first*, *Cl. 38, Cl. 43, CRC* are incorporated in B/L **[2.1.2.1]**; *second*, RESPONDENT's "additional obligation" to complete cargo operations to enable MVN's follow-on fixture must be implied **[2.1.2.2]**; and *third*, Claimant's loss stems this breach **[2.1.2.3]**.

[2.1.2.1] Cl. 38, Cl. 43, CRC are Incorporated in B/L

25. General words, such as those contained in *Cl. 1, CoC*, incorporate CP provisions "germane" to the shipment, carriage and delivery of the goods, or the payment of freight [*The Polar,* ¶76-87]. *Cl. 38, CRC* contains information of MVN's follow-on fixture, indicating that since its laycan is 1-14 October 2023, cargo operations must be completed to enable MVN's arrival accordingly. Since it governs cargo operations, i.e., delivery, *Cl. 38, CRC* is incorporated. *Cl. 43, CRC* is the force majeure clause, exempting "[e]ither party" from responsibility or liability in connection with, inter alia, "delays in discharging". Since it concerns liabilities during discharge, it is "germane" to goods' discharge. Akin to *The Polar* incorporating "war risk clauses" concerning insurance premia based on their ability to provide protection to parties during voyage, the force majeure clause provides Parties protection concerning discharge [*The Polar*, ¶89; *Mur Shipping* ¶¶112-114]. Hence, it is incorporated in B/L.

[2.1.2.2] RESPONDENT's Additional Obligation Must be Implied

26. A term must be implied based on "business necessity" if the contract lacks "commercial or practical coherence" without it. This is met if the term is essential to "make the contract work". The instrument overall must be examined for this determination [*Nazir Ali*, ¶7; *M&S*, ¶¶16, 22-3, 62; *Belize*, ¶21]. Based on this test, a term implying RESPONDENT's obligation to "complete cargo operations to enable MVN's follow-on fixture" is inferable from three sources. *First*, *Cl. 38, CRC*, which contains information of Claimant's follow-on fixture, indicates the necessity to arrive at Kaohsiung within laycan. *Second*, *Cl. 43, CRC,* in distinguishing between "demurrage" and "responsib[ilities] or liabil[ities] for delays in discharging…or failure to deliver", indicates the existence of a distinct *responsibility* for discharging (and taking delivery) whose *liability* is not demurrage. Consequently, the existence of an obligation to discharge, whose breach does *not* entitle CLAIMANT to demurrage, is being implied. *Third*, *B/L terms*, which distinguish between *"demurrage"* and *"all other monies due"*, affirm this takeaway from *Cl. 43, CRC*. Parties' presumed intention of this additional obligation's imposition, is therefore decipherable.

27. This presumed intention is evidenced in two communications. *First,* the communication between Chtrs. and RESPONDENT dated 29 September 2023, where Chtrs. cited the vessel's need to reach Kaohsiung within laycan [*FoR*, p. 48]. *Second*, the communication between Chtrs. and CLAIMANT dated 29 September 2023, where Chtrs. acknowledged that "all relevant parties [were] aware of the Vessel's limitation" [*FoR*, p. 8].

28. Implying this term is essential to "make the contract work". In the term's absence, a lost fixture's risk would be borne wholly by CLAIMANT, while the acts capable of causing this loss would be wholly RESPONDENT's, given its status as B/L holder [*Fimbank*, ¶34; *Cooke-II,* §18.171]. The contract lacks commercial coherence for CLAIMANT without the implied term, for its absence would mean that parties intended demurrage, payable at a low rate of

$1,500/hour, to liquidate large losses arising from follow-on fixtures [*Papadopoulos*, p. 10]. The implied term's absence results not only in financial disadvantage but indicates an entry into an unreasonable bargain lacking commercial coherence [*Toomey*, ¶91].

[2.1.2.3] Claimant's Loss Stems from RESPONDENT's Breach

29. RESPONDENT's "additional obligation" requires it to complete cargo operations to enable MVN's arrival within laycan at Kaohsiung. Since laycan is provided, the time for enabling despatch was known by RESPONDENT [*Pacific Voyager*, ¶14; *Pacific Voyager 2017*, ¶26]. Accordingly, Chtrs. informed RESPONDENT that MVN must depart by 30 September 2023. RESPONDENT did not enable this departure, by failing to present B/L. Later, Chtrs. informed RESPONDENT that MVN must leave by 7 October 2023. RESPONDENT did not enable this departure either, with Chtrs. issuing LoI-II only on 3 October 2023 [*FoR*, p. 47-8]. Thereafter, cargo was discharged, and MVN departed on 8 October 2023. RESPONDENT's series of acts preventing MVN's timely departure to fulfil its follow-on fixture constitutes breach. As a result, MVN was unable to arrive at Kaohsiung within laycan, and CLAIMANT suffered a loss of $5,000/day over two years. This loss *stemmed from* RESPONDENT's breach.

[2.1.3] CP, B/L Contain "Contrary Indications"

30. *Eternal Bliss* noted that "contrary indications" suggesting demurrage as *not* liquidating all laytime-related losses can be found in a charterparty. Its recommendation of drafting a demurrage-confining clause must be considered one *illustration* of how "contrary indications" can be expressed [¶¶52, 59].

31. "Contrary indications" confining demurrage are present in CP based on a combined reading of *Cl. 38, Cl. 43, CRC*. *First*, *Cl. 38, CRC*, in providing information on MVN's next employment, indicates RESPONDENT's responsibility to enable the follow-on fixture. *Second*, *Cl. 43, CRC*, in distinguishing "demurrage" from liabilities arising from "delays

in discharging", indicates the existence of a distinct *responsibility* for discharging within laytime whose *liability* is not demurrage. A sum distinct from demurrage, therefore, is envisioned as payable for breach of the responsibility to enable the follow-on fixture. *B/L Terms*, in distinguishing between "demurrage" and "all other monies due", indicate that demurrage was distinct from other dues – such as unliquidated damages – arising from CP's breach.

[2.2] CLAIMANT IS ENTITLED TO $3,650,000 IN UNLIQUIDATED DAMAGES

32. CLAIMANT is entitled to $3,650,000 in unliquidated damages, as, *first*, its losses were caused by RESPONDENT **[2.2.1]**; and *second*, its losses are not remote **[2.2.2]**.

[2.2.1] RESPONDENT Caused Claimant's Losses

33. A commonsensical assessment of the relationship between the breach and CLAIMANT's losses, including through the "but for" enquiry, must be done to determine causation. Even if RESPONDENT's breach is one *among* the relevant causes, a causal link is present [*Financial Conduct*, ¶181; *Allianz Insurance*, ¶19; *Cooke* §21.41]. To show a break in the causal chain, CLAIMANT's acts should "obliterate" RESPONDENT's wrongdoing [*Borealis*, ¶44]. For intervening events to break the causal chain, they must be outside parties' reasonable anticipation [*Oljefabriker*, p. 148]. If RESPONDENT would have completed cargo operations such that MVN could arrive at Kaohsiung within laycan, follow-on charterers would not have sought to cancel the two-year charterparty. *But for* RESPONDENT's delays, CLAIMANT would not have had to renegotiate the charter at $5,000 lesser than originally agreed.

34. A high threshold must be satisfied by RESPONDENT to claim intervening events to have broken the causal chain. In *Oljefabriker*, the House of Lords held that parties must anticipate a war's occurrence, and that its outbreak did not break the causal chain [p. 154]. Occasional weather adversities, which may hamper progress, should be in parties'

reasonable anticipation. At maximum, they may be considered an additional cause for Claimant's loss. An additional cause's presence does not erase the link between RESPONDENT's breach and Claimant's losses [*Girozentrale,* pp. 849, 857; *Chitty*, §26-068].

[2.2.2] Claimant's Losses are Not Remote

35. CLAIMANT's losses are not remote if they arise within *Baxendale's* first limb, i.e., through imputed knowledge, or within its second limb, i.e., through express communication of CLAIMANT's special circumstances [*Global Water,* ¶¶33-4]. CLAIMANT submits that its losses are not remote, as, *first*, they are recoverable under the second limb, where no question of RESPONDENT's "assumption of responsibility" is asked **[2.2.2.1]**; and *third*, if *Cl. 38, CRC* is unincorporated, they are recoverable under the first limb **[2.2.2.2]**.

[2.2.2.1] CLAIMANT's Losses are Recoverable Under *Baxendale's* Second Limb

36. Notice of CP terms does not bind a B/L holder, they must be specifically incorporated [*Siboti*, ¶24; *Varenna*, p. 596]. Since extraneous notice, i.e. *knowledge* of CP terms does not bind a B/L holder, the relevant form of RESPONDENT's knowledge is that which arises through incorporated terms. Since *Cl. 38, CRC* is incorporated, knowledge of its contents can be imputed. RESPONDENT possessed knowledge of Claimant's special circumstances, and its breach entitles CLAIMANT to unliquidated damages.

37. Further, the "assumption of responsibility" enquiry is undertaken only when losses occur within *Baxendale's* first limb. This is evidenced from *The Achilleas* and *The Sylvia*, where the House of Lords and Queen's Bench Division respectively engaged with this enquiry in the *absence of communication* of a follow-on fixture [¶¶6-8; ¶82]. In *John Grimes,* the Court of Appeal found this enquiry relevant in the absence of an "express term dealing with what types of losses a party is accepting potential liability for", creating limitations for the kinds of losses that arise without special knowledge (i.e., within the first limb) [¶24].

Claimant's losses, however, fall under *Baxendale's* second limb. Accordingly, there is no question of RESPONDENT's "assumption of responsibility".

[2.2.2.2] If *Cl. 38, CRC* is not Incorporated, CLAIMANT's Losses Arose Within the First Limb

38. *The Sylvia* confined the "assumption of responsibility" enquiry to circumstances where an unquantifiable, unpredictable, uncontrollable or disproportionate liability is being imposed, or where clear evidence of the liability being contrary to market understandings exists [*The Sylvia*, ¶22]. If the loss arises from a commercial relationship akin to that between disputing parties, it is likely to be quantifiable [*MTM Hong Kong*, ¶66]. Losses that a reasonable person would contemplate as a "serious possibility", as a "not unlikely" result of contractual breach at the time of contracting are recoverable [*The Heron II*, p. 388; *Global Water*, ¶32].

39. RESPONDENT assumed responsibility for CLAIMANT's loss. *First, the lost fixture's liability is quantifiable.* CLAIMANT's losses concern the loss of a follow-on fixture, an activity akin to the instant voyage [*MTM Hong Kong,* ¶66]. *Second, its liability is predictable.* CLAIMANT is a shipowner, and is in the business of letting out vessels to successive charterers [*Baughen*, p. 188]. It is *obvious* that CLAIMANT would affix multiple charterers, and a delay in one risks a follow-on fixture's cancellation [*Pacific Voyager,* ¶15; *Victoria Laundry*, p. 543]. *Third, its liability is controllable.* RESPONDENT's timely presentation of B/L, such that MVN could depart timely from Busan, was in RESPONDENT's control. *Fourth, its liability is not disproportionate.* The imposition of any lesser liability would conflict with the "compensatory principle" [*MTM Hong Kong*, ¶57; *Golden Victory*, ¶9]. And *fifth*, *its liability corresponds to market expectations.* Definitive market understandings making losses from follow-on fixtures unrecoverable do not exist [*The Sylvia*, ¶81; *MTM Hong Kong*, ¶66].

40. Given the nature of CLAIMANT's business, it must be in RESPONDENT's reasonable contemplation that delays in the instant fixture's completion *risk* subsequent fixtures' cancellation [*Pacific Voyager*, ¶14; *Victoria Laundry*, p. 543]. CLAIMANT's losses, therefore, occurred naturally in the usual course of things.

CONCLUSION

41. Owing to RESPONDENT's breach of its obligation to enable CLAIMANT's follow-on fixture, the Tribunal must award CLAIMANT $3,650,000 in unliquidated damages.

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[3] CLAIMANT IS NOT LIABLE FOR CARGO MISDELIVERY

42. *Cl 57, CRC* is incorporated in B/L since it provides for delivery under LoI without B/L's presentation [*The Annefield*, p. 3; *The Polar*, ¶82]. CLAIMANT submits that it delivered cargo under *Cl. 57, CRC*. Under §2*, COGSA*, a lawful B/L holder has the title to sue for possession over cargo "by virtue of a transaction…in pursuance of any contractual or other arrangements". Accordingly, no rights of suit are vested with a B/L holder in the absence of a contract of carriage and/or document of title evidenced by B/L [*The Sienna*, ¶25]. CLAIMANT questions B/L's contractual force as a contract of carriage and/or a document of title. CLAIMANT, therefore, was not liable to make delivery only on B/L's presentation.

43. CLAIMANT submits that it has committed no misdelivery, as, *first*, RESPONDENT caused its own loss by authorizing delivery **[3.1]**; *second*, RESPONDENT holds no title to sue under §2, *COGSA* since B/L had never been a contract of carriage and/or a document of title **[3.2]**; and *third*, RESPONDENT did not cause CLAIMANT's losses, for RESPONDENT would have authorized delivery irrespective of CLAIMANT's refusal to deliver **[3.3]**.

[3.1] RESPONDENT AUTHORIZED DELIVERY AND CAUSED ITS OWN LOSS

44. CLAIMANT argues that RESPONDENT authorized delivery. RESPONDENT's losses of $4,249,752.50 were caused by its own actions. In *The Sienna*, Popplewell, J. held that when

a bank was aware that cargo would have to be delivered without B/L and allowed it implicitly, it would be responsible for losses arising from misdelivery [*The Sienna*, ¶105; *The Sienna 2022*, ¶¶74, 121]. The "defence of consent" standard prohibits a B/L holder issuing (or presumed to have issued) delivery instructions to a shipowner to subsequently allege misdelivery if the shipowner had acted on them [*STI Orchard*, ¶70; *The Cherry*, ¶27].

45. CLAIMANT submits that RESPONDENT cannot claim misdelivery, as, *first*, it implicitly approved of delivery **[3.1.1]**; and *second*, it was aware of, and intended for cargo to be delivered without B/L's presentation **[3.1.2]**.

[3.1.1] RESPONDENT Implicitly Approved of Delivery

46. On 3 October 2023, RESPONDENT informed Chtrs. that *"[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"* [*FoR*, p. 46]. This communication demonstrates RESPONDENT's intention to enable Chtrs. to make decisions, including authorizing them to deliver cargo, as long as RESPONDENT's loan was repaid. This was also premised, pursuant to the above communication, in Chtrs.' interest "*to prevent demurrage*". RESPONDENT's authorization to Chtrs. to *"do as [they] deem fit"* must be construed in accordance with its language, as well as with "business commonsense" [*Rainy Sky*, ¶21]. RESPONDENT's communication constitutes an explicit approval to Chtrs. to deliver cargo, since it permitted them to take any action that *they deemed fit* to prevent demurrage and repay their loan.

47. Delivery was the only logical option available to Chtrs. aligning with the above communication, i.e., to prevent demurrage and repay RESPONDENT, since, *first*, this communication's only alternative construction, which would be to warehouse the cargo, conflicts with RESPONDENT's financial interests stated in the said email; *second*,

warehousing would pose additional costs for Chtrs., hindering repayment; and *third*, RESPONDENT was aware that repayment would occur only after Chtrs.' sale of cargo.

48. *First*, it is submitted that the only alternative to delivery available to Chtrs. was invoking *Cl. 29, Part II, CP*, i.e., to warehouse the cargo. Warehousing, however, would incur additional costs for Chtrs., conflicting with RESPONDENT's acknowledgement of Chtrs.' interest to prevent demurrage, i.e., to prevent its financial condition from deteriorating. Chtrs. asked for a sixteen-day trust receipt since they knew that repayment to RESPONDENT could occur after obtaining proceeds of sale. This evidences their weak financial condition [*FoR*, p. 46]. A direction to warehouse does not align with RESPONDENT's expressly stated interest of securing repayment, for it disables Chtrs. from obtaining the cargo's proceeds, and prevents them from utilizing its proceeds to pay RESPONDENT [*FoR*, p. 46]. Such a construction, therefore, militates against RESPONDENT's interest to obtain repayment.
49. *Second*, warehousing costs under *Cl. 29(c), Part II, CP* would be payable to CLAIMANT by Chtrs., and CLAIMANT would obtain a lien over warehoused cargo. Cargo would not be delivered to GR until Chtrs. paid CLAIMANT these costs, and GR would not pay for cargo until it obtained delivery [*Cooke-II*, §10.3]. A direction to warehouse, therefore, would require additional expenditure on Chtrs.' part to repay RESPONDENT – an outcome clearly conflicting with its stated intention to obtain repayment.
50. *Third*, RESPONDENT was aware that Chtrs. had already sold cargo to GR, as seen in email correspondence at 3:47 P.M. [*FoR*, p. 47]. Chtrs.' request for a trust receipt shows that payment could only be made after delivery. Since a trust receipt enables repayment using sale's proceeds, it implies that the sole method for Chtrs. to repay RESPONDENT was through allowing delivery [*FoR*, pp. 44, 47]. Hence, the only action that Chtrs. could have taken to *both* prevent the accrual of demurrage and enable the loan's repayment was to make

delivery. RESPONDENT, therefore, authorized delivery through its direction to Chtrs. dated 3 October 2023.

[3.1.2] RESPONDENT was Aware of Delivery Without B/L

51. RESPONDENT did not hold B/L on the day of discharge, i.e., 3 October 2023. Pursuant to its email at 4:02 P.M., RESPONDENT refused to grant a trust receipt to Chtrs. without receiving B/L from Seller [*FoR*, p. 46]. This is evidenced from LoI-I, which was provided by Seller to Respondent for payment under LC. LoI-I was issued instead of B/L [*FoR*, p. 45]. Subsequently, RESPONDENT made payment under LC to Seller based on cargo's invoice and LoI-I [*FoR*, p. 47]. RESPONDENT allowed discharge on 3 October 2023, since it was obligated to enable CLAIMANT's follow-on fixture. It could, therefore, not have intended a requirement of presenting B/L at Busan to take delivery. This is because RESPONDENT did not physically hold B/L while *yet* being its lawful owner on 3 October 2023. RESPONDENT knew that B/L would be unavailable at least until the commencement of discharge. These facts demonstrate RESPONDENT's awareness of delivery without B/L's presentation, allowing for it implicitly. It is, therefore, responsible for its losses.

[3.2] B/L IS NOT A CONTRACT OF CARRIAGE AND/OR A DOCUMENT OF TITLE

52. CLAIMANT submits that B/L is not a contract of carriage and/or a document of title, evinced from the B/L's role and function in the instant case. This is discernible from RESPONDENT's acts. The modern B/L serves three main functions: (a) a receipt by the carrier, acknowledging the shipment of goods on a vessel for carriage to a particular destination; (b) a memorandum of the terms of the contract of carriage; and (c) a document of title to cargo [*The Rafaela*, ¶38]. The consequence of (b) and (c) is to allow CLAIMANT or RESPONDENT to allow delivery pursuant to B/L's presentation. A factual enquiry must be undertaken to determine whether RESPONDENT intended B/L to be a contract of carriage and/or a document of title [*The Luna*, ¶49]. This factual enquiry into a contract's

construction involves an enquiry into parties' pre and post-contract conduct, alongside their intentions [*Midlink*, ¶52]. CLAIMANT submits that B/L was not a contract of carriage and/or a document of title, as, *first*, RESPONDENT had no obligation to transfer B/L for delivery **[3.2.1]**; and *second*, possession had already passed to buyers on 3 October 2023 **[3.2.2]**.

[3.2.1] <u>RESPONDENT Had No Obligation to Transfer B/L for Discharge</u>

53. In *The Luna*, charterer-buyers were granted a thirty-day credit period by a finance facility (the B/L holder), which had allowed delivery. In light of this financial arrangement, it was held that the sale and delivery of cargo by charterer-buyers was not contingent on B/L's presentation. Payment was required not under B/L, but on the presentation of commercial invoices [*The Luna*, ¶43]. Similarly, the financial arrangement between RESPONDENT and Chtrs. highlights the absence of RESPONDENT's obligation to transfer B/L to Chtrs. for making delivery. RESPONDENT booked the payment made to Seller under the LC as a trust loan receipt to Chtrs. [*FoR*, p. 46]. Consequently, to prevent demurrage from accruing, RESPONDENT allowed Chtrs. to act as *they deemed fit* [*FoR*, p. 46]. This arrangement did not specify a period for repayment of the trust loan receipt by Chtrs. In light of this, RESPONDENT had no obligation to transfer B/Ls to Chtrs. for payment, nor were Chtrs. expecting to receive B/L to claim delivery [*STI Orchard*, ¶60]. Consequently, Chtrs. and RESPONDENT could not intend to lawfully deal with the cargo upon B/L's presentation. Rather, Chtrs. could transact with cargo *"as [they] deem[ed] fit"*, with a timeline for repayment left unspecified. Hence, B/Ls neither enabled buyers to take delivery, nor restricted their ability to do the same.

54. If charterer-buyers were forbidden from transacting with cargo during the unspecified credit period and B/L remained with RESPONDENT, logically, cargo would be stored in MVN indefinitely. This would be contrary both to Chtrs.' rationale for obtaining credit,

i.e., to sell the cargo, as well as RESPONDENT's authorization of Chtrs.' to take appropriate decisions to enable loan repayment.

[3.2.2] Possession Had Already Passed to Buyers

55. In *The Luna*, the Singapore Court of Appeal held that a bank extending credit to charterer-buyers for the purchase of cargo would be prohibited from regaining delivered cargo from buyers' possession if it had authorised such delivery [¶49]. RESPONDENT was aware that cargo had been sold to GR. As argued above, RESPONDENT allowed Chtrs. to deliver cargo for the loan's repayment. RESPONDENT was aware that this would disallow them from regaining possession of the sold cargo even if they presented B/L to Claimant. Accordingly, RESPONDENT knew that delivery would be made immediately before the unspecified credit period ended. As a consequence, any attempt to regain possession or demand delivery would have been futile, for cargo would have been delivered to GR by then.

56. In *Maersk Princess*, possession of goods was transferred to buyers before a bank could finance the cargo purchase. Irrespective, the bank agreed to finance it. The Singapore High Court held that the bank could not have relied on B/L for delivery when possession had already passed to buyers [¶58]. RESPONDENT intended for the cargo to be delivered while it had possession of B/L notwithstanding its rights being infringed as B/L's lawful holder. This indicates the B/L did not have contractual force or possessory rights. Chong, J. remarked that such arrangements, akin to those of the instant case, would be known to the carrier responsible for loading and discharging the cargo [*The Luna*, ¶*55*]. It is, therefore, clear that CLAIMANT was aware of the status of B/L as neither a document of title and/or a contract of carriage. Considering **[3.2.1]** and **[3.2.2]** together, it is evident that neither RESPONDENT nor CLAIMANT intended for cargo to be delivered based on B/L's presentation.

[3.3] RESPONDENT DID NOT AIM TO HOLD B/L AS SECURITY

57. Causation requires RESPONDENT to show that on a balance of probabilities, in the event of delivery by CLAIMANT, it would have enforced its security over the cargo to protect its credit. Otherwise, the breach would not be an effective cause of loss, as the failure to recoup its credit would have occurred irrespective of Claimant's misdelivery [*The Sienna*, ¶103]. For this enquiry, implications of CLAIMANT's refusal to deliver without B/L's production on RESPONDENT's security over cargo must be assessed. If RESPONDENT would not have waived its security interest, and delivery was made by Claimant, causation is established. If, on the other hand, RESPONDENT would have waived its security interest, causation is not established. CLAIMANT submits that as RESPONDENT did not aim to hold the B/L as security, causation is not established, since, *first*, RESPONDENT made the payment under LC without receiving B/L **[3.3.1]**; and *second*, RESPONDENT – in looking at buyers only for payment – did not prevent delivery **[3.3.2]**.

[3.3.1] RESPONDENT Made the Payment Under LC Without Receiving B/L

58. As evidenced by email correspondence at 4:02 PM, RESPONDENT did not receive B/L before making the payment under the LC to Seller [*FoR*, p. 46]. Seller was to indorse B/L to the bank before the Seller could be paid, with the exception of a LoI [*FoR*, p. 44]. Seller, instead, provided LoI-I due to its inability to transfer B/L on time, which was accepted by RESPONDENT [*FoR*, p. 44]. In *Maersk Princess,* a similar situation arose, where a bank paid a seller without B/L's possession, which, in turn, indemnified the bank. It was held that the bank did not aim to use B/L as security. The LoI in *Maersk Princess* was identical to the one provided to RESPONDENT by the seller [*FoR*, p. 45; *Maersk Princes*, ¶57]. This highlights RESPONDENT's intention of not using B/L as security.

59. RESPONDENT may submit that it refused to grant a trust receipt to Chtrs. when it obtained knowledge of their weak financial condition. In *STI Orchard*, the Singapore High Court

held that a bank's attempts to "perfect" its security by having the B/L indorsed after obtaining knowledge of the buyer's weak financial condition, yet still allowing delivery, would preclude B/L's use as security [*STI Orchard*, ¶58]. In the instant case, RESPONDENT allowed discharge, and attempted to "perfect" its security over cargo only thereafter [*FoR*, p. 46]. In *Maersk Princess*, the Singapore High Court held that a bank's extension of credit without any security beyond a B/L (after allowing delivery) demonstrated its readiness to bear the risk of potential default of non-payment [¶55]. Similarly, RESPONDENT was initially hesitant to provide the trust receipt, but eventually provided a trust receipt loan, permitting delivery alongside. Since RESPONDENT did not receive B/L before the commencement of discharge, it did not seek to hold on to B/L as security.

[3.3.2] RESPONDENT Did Not Prevent Delivery and Looked at Buyers Only for Payment

60. As argued earlier, RESPONDENT was aware that cargo would have to be delivered by Chtrs. for repayment since cargo had been sold to GR. Chtrs. asked for a trust receipt for 16 days on the assumption that GR would make the payment on delivery [*FoR*, p. 44; 47]. RESPONDENT, therefore, allowed delivery to be made as long as it was repaid. Delivery was to be made immediately, with no recourse for RESPONDENT to exercise its security over cargo. In *The Luna*, in a similar situation, the bank did not prevent delivery without B/L presentation. It was held that the bank's conduct revealed its intention to focus only on payment from the buyers, not on exercising their security over B/L [*The Luna*, ¶55]. Hence, RESPONDENT only sought to recover the sum lent to Chtrs. Even if CLAIMANT refused to deliver without B/L, RESPONDENT would still have authorised it, since it never intended to use B/L as security.

CONCLUSION

61. Owing to RESPONDENT's lack of title to sue based on B/L not evincing a contract of carriage and/or a document of title, as well as its authorisation of delivery, the Tribunal must dismiss RESPONDENT's $4,249,752.50 claim for misdelivery.

PRAYER FOR RELIEF

For the above reasons, CLAIMANT requests the Tribunal to order that:

1. The Tribunal has jurisdiction to hear the dispute.
2. CLAIMANT is entitled to $3,650,000 in unliquidated damages owing to CLAIMANT's losses from its follow-on fixture, caused by RESPONDENT's delays in completing cargo operations.
3. CLAIMANT is not liable for misdelivery, since it delivered cargo under RESPONDENT's authorization, and B/L "COW-001A" was not a document of title and/or a contract of carriage.