23rd INTERNATIONAL MARITIME LAW ARBITRATION MOOT

July 2024

香 港 大 學

THE UNIVERSITY OF HONG KONG

In the matter of an Arbitration under the International Arbitration Act (Cap 143A, Rev Ed 2002) and the Singapore Chamber of Maritime Arbitration Rules

Tomahawk Maritime S.A. (Claimant)

——v——

Veggies of Earth Banking Ltd (Respondent)

MEMORANDUM ON BEHALF OF

TOMAHAWK MARITIME S.A. (CLAIMANT)

COUNSEL

Ms LOONG Tin Yiu, ALEXA	Ms POON Sze Ching, FLORENCE	Mr TSUI Zealot, KENNETH	Mr WONG Tsz Shing OSCAR

TEAM F

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TEAM F

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LIST OF ABBREVIATIONS

Abbreviation	Full Title
B/L	The bill of lading dated 4 September 2023 (B/L No. COW–001A).
C/P	The tanker voyage charterparty (in the amended VEGOILVOY form) agreed between the Claimant and the Charterer.
C/P Clause A	Clause A of the C/P.
C/P Clause 1	Clause 1 of the C/P.
Cargo	The cargo of 16,999.01 MT crude palm oil shipped on the Claimant's vessel from Bintulu to Busan
Charterer	Yu Shipping Ltd
Claimant	Tomahawk Maritime S.A.
COGSA	Carriage of Goods by Sea Act 1992.
D&CC	The Statement of Defence & Counterclaim filed by Bauhinia Law LLC dated 16 February 2024.
Discharge LOI	The letter of indemnity issued by the Charterer to the Claimant pursuant to Rider Clauses Clause 57 requesting discharge without presentation of the B/L.
Facility Agreement	The facility agreement entered into between the Respondent and the Charterer.
FOB	Free on Board

Gileum Refinery	Gileum Refinery Co. Ltd
Good Oil	Good Oil Sdn Bhd
Hague–Visby Rules	International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (1924), as amended by the Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (1968).
LC	The letter of credit issued by the Respondent to Good Oil under the Facility Agreement.
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)
Next Employment	The Claimant's employment subsequent to the voyage from Bintulu to Busan, with strict laycan 1–14 October 2023 at Kaohsiung.
Notice of Arbitration	The Notice of Arbitration issued by Beefeater Solicitors LLP (solicitors for the Claimant) to the Respondent dated 22 December 2023.
Payment LOI	The letter of indemnity issued by Good Oil to the Respondent for making payment for the Cargo without being presented with the B/L.
PRC	The People's Republic of China
Procedural Order No. 1	Procedural Order No.1 issued by the Tribunal dated 29 February

	2024.
Reply	The Statement of Reply and Defence to Counterclaim filed by Beefeater Solicitors LLP dated 1 March 2024.
Respondent	Veggies of Earth Banking Ltd.
Rider Clause 1	Clause 1 of the Rider Clauses.
Rider Clauses	Tomahawk Maritime Rider Clauses expressly incorporated into the C/P.
Sales Contract	The sales contract entered into between the Charterer and Good Oil.
SCMA	Singapore Chamber of Maritime Arbitration.
SCMA Rules	The SCMA Arbitration Rules 4th edition.
SOC	The Statement of Claim filed by Beefeater Solicitors LLP dated 19 January 2024.
Vessel	MT "NIUYANG"

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STATEMENT OF FACTS

1. The present dispute arises out of the B/L no. COW–001A dated 4 September 2023 for the Cargo, which was signed and issued by agent(s) of the Claimant.
2. The Charterer purchased the Cargo from Good Oil under a sale contract, which required payment to be made with a letter of credit. Under the Facility Agreement between the Charterer and the Respondent, the Respondent issued the LC to Good Oil. The Claimant chartered the Vessel to the Charterer for carriage of the Cargo according to the C/P, the terms of which were expressly incorporated into the B/L. The C/P provided that "*Vessel's next employment is at Kaohsiung with strict laycan 1–14 October 2023"*. The Respondent received the C/P on 29 September 2023.
3. The Vessel arrived at Busan on 20 September 2023 and had been waiting for discharge instructions until 3 October 2023. On 28 September 2023, the Charterer informed the Claimant that they were waiting for instructions from cargo interests. On 29 September 2023, the Claimant reminded the Charterer that the Vessel had to leave Busan latest by 7 October 2023. Four hours later, Yu replied that "*all relevant parties are aware of the Vessel's limitation*".
4. On 3 October 2023, the Respondent advanced payment to Good Oil against the Payment LOI without production of the B/L and informed the Charterer of the same. When the Charterer urged the Respondent to grant trust receipt as a solution to release the Vessel for the Next Employment, the Respondent replied, "*If you're afraid of the demurrage accruing, you must do so as you deem fit as Charterers and we will not interfere as long as the loan is repaid.*" The Charterer invoked Rider Clause 57 by issuing the Discharge LOI to the Claimant on the same day and discharge began on 4 October 2023 at 0630 LT.
5. The Vessel left Busan on 8 October 2023, but its progress to Kaohsiung was hampered due to adverse wind and sea conditions. As a result of the delay, the Claimant suffered the loss of a lower hire rate of USD 30,000 per day for the Next Employment.
6. The Claimant issued the Notice of Arbitration against the Respondent on 22 December 2023.

ARGUMENTATION

I. THE TRIBUNAL HAS JURISDICTION TO HEAR THE CASE

7. The Tribunal has jurisdiction to hear the present dispute because: (A) The arbitration clause in Rider Clause 76 is validly incorporated into the C/P; (B) Parties have impliedly chosen Singaporean law to govern the arbitration agreement; as (C) parties intended the arbitration to be seated in Singapore and not Guangzhou. In any event, (D) if the arbitration is seated in Guangzhou, English law would govern the arbitration agreement. Therefore, (E) regardless of whether Singaporean or English law applies, Rider Clause 76 is a valid arbitration agreement.

A. Rider Clause 76 is validly incorporated into the B/L

8. Irrespective of the proper putative applicable law, Rider Clause 76 has been incorporated into the B/L because: (1) the C/P expressly incorporates the Rider Clauses; and (2) the B/L expressly incorporates the C/P terms.

9. Firstly, the C/P Terms are followed by a set of Rider Clauses. To incorporate a clause into a charterparty, clear and specific words of reference allowing parties to understand which clause to be incorporated are necessary.[1]

10. Here, the C/P in the amended VEGOILVOY form expressly inserts the phrase "*See Rider Clauses*" by way of "*Special provision*s" in Section H of Part I. These are clear and specific words that incorporate all the Rider Clauses, including Rider Clause 76, into the C/P.

11. Rider Clause 47 provides that main terms followed by the Rider Clauses shall apply if conflicting. Therefore, Rider Clause 76 prevails and is incorporated into the C/P terms over the standard arbitration clause in Clause 31 of Part II of the main terms.

[1] Guenter Treitel and Francis Reynolds, *Carver on Bills of Lading* (Sweet & Maxwell, 5th ed, 2022) ("*Carver on Bills of Lading, 5th ed*") [3–044]; Melis Özdel, *Bills of Lading Incorporating Charterparties* (Hart Publishing, 2015) ("Bills of Lading Incorporating *Charterparties*") 64; *The "Epsilon Rosa"* [2003] EWCA Civ 938 [2002] 2 Lloyd's Rep 701 (EWCA); *The "Channel Ranger"* [2014] 1 Lloyd's Rep 337, 339 (EWHC) (Males J).

12. Furthermore, the B/L has incorporated Rider Clause 76 of the C/P. General words are sufficient to incorporate a law and arbitration clause in the C/P into a bill of lading, considering the objective intention of the parties and the context.[2]

13. The Conditions of Carriage attached to the B/L provides that all terms and conditions of the charterparty, "*including the Law and Arbitration Clause*", are incorporated.

14. Rider Clause 76 is the only clause in the C/P entitled Law and Arbitration. In any event, as submitted above, as Rider Clause 76 prevails over Clause 31, Rider Clause 76 is validly incorporated in the B/L.

B. Singaporean law should govern the arbitration agreement

15. Rider Clause 76 provides that, "*General Average and Arbitration… to be in Guangzhou with… SCMA Rules. English law to apply to the CP*".

16. The Respondent's challenge on the validity of Rider Clause 76 as an arbitration agreement turns on the proper law governing the arbitration agreement. As the Claimant has commenced arbitration in Singapore, the putative applicable law to determine the law governing the arbitration agreement is Singaporean law. Under Singaporean law, the choice-of-law framework is set out in the three-limb approach in *BCY v BCZ*,[3] which was subsequently affirmed in the English decision of *Enka*[4] and Singaporean decision of *BNA v BNB.*[5] The Tribunal should consider: (a) the express choice of the proper law governing the arbitration agreement, (b) the

[2] *Carver on Bills of Lading*, *5th ed* [3–034 (8);(13)]; [3–095]; [3–099]; *Prenn v Simmonds* [1971] 1 WLR 1381 (UKHL) 1385 (Lord Wilberforce); *Reardon Smith Line Ltd v Yngvar Hansen–Tangen* [1976] 1 WLR 989 (UKHL); *Investors Compensation Scheme Ltd v West Bromwich Building Society (No 1)* [1997] UKHL 28 [1998] 1 WLR 896 (UKHL); *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 (UKHL) 251 (Lord Reid); *Arnold v Britton* [2015] UKSC 36 [2015] AC 1619 [15] (UKSC) (Lord Neuberger).

[3] *BCY v BZY* [2016] SGHC 249 [2017] 2 SLR 357 [40] (SGHC) (Steven Chong J), applying the English decision of *Sulamérica Cia Nacional de Seguros SA and others v Enesa Engelharia SA* [2012] EWCA Civ 638 [2013] 1 WLR 102 [9] (EWCA) (Moore–Bick LJ).

[4] *Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb" ("Enka")* [2020] UKSC 38 [2020] 1 WLR 4117 (UKSC) (Lord Hamblen and Lord Leggatt).

[5] *BNA v BNB and another* [2019] SGCA 84 [2020] 1 SLR 456 (SGCA) (Steven Chong JA).

implied choice of the proper law governing the arbitration agreement, and (c) the system of law with the closest and most real connection with the arbitration agreement.

17. For (a), the Claimant accepts that Rider Clause 76 does not include any express choice of law governing the arbitration agreement. An express choice of law of arbitration would only be found "where there is explicit language stating so in no uncertain terms".[6] Merely specifying that a contract shall be governed under a particular law is insufficient to constitute an express choice of the proper law of arbitration.[7] Here, Rider Clause 76 specifically provides for English law "*to apply to the CP*". Thus, parties have expressly chosen English law to govern the C/P (and by virtue of incorporation, the B/L), but not the arbitration agreement.

18. For (b), the arbitral Tribunal would have to ascertain whether there are indications from the parties' agreement as to their implied intention.[8] These include, for instance, whether the arbitration clause provides for arbitration by specialist arbitrators or a local trade exchange or association with specific expertise,[9] or whether parties desired the application of a neutral law to their agreement.[10] Here, parties intend to adopt the SCMA rules to govern the arbitration. It can be inferred that parties intended to submit any potential dispute to a specialised arbitration institution with relevant expertise in Singapore. That Singapore is the default seat of the arbitration under Rule 32.1 of the SCMA Rules is one strong indication of the parties' intention that Singaporean law should be the governing law of the arbitration agreement.

19. Further, the parties clearly intended a neutral law to apply to the arbitration agreement given the international character of the carriage contract under the B/L with the Claimant from Panama and the Respondent from Hong Kong. Singapore is considered as one of such popular neutral seats of

[6] *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 [2023] 1 SLR 349 [66] (SGCA) (Judith Prakash JCA).
[7] BNA v BNB [59].
[8] AV Dicey and J H C Morris, *Dicey, Morris & Collins on the Conflict of Laws* (Sweet & Maxwell, 16th ed, 2022) ("*Dicey, Morris & Collins")* [16–019].
[9] *Egon Oldendorff v Libera Corp* [1995] 2 Lloyd's Rep 64 (EWHC); *Egon Oldendorff v Libera Corp (No.2)* [1996] 1 Lloyd's Rep 380 (EWHC), approved by *Enka* [114].
[10] *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Co Ltd* [2013] EWHC 4071 (Comm.) [2014] 1 Lloyd's Rep 479 (EWHC) (Hamblen J), approved by *Enka* [114].

arbitration. Parties are more likely to have intended for the arbitration agreement to be governed by a legal regime that is supportive of international arbitration such as Singapore.[11]

C. Parties intended Singapore, not Guangzhou, to be the seat of arbitration

20. Insofar as the Respondent may argue that the implied choice of law governing the arbitration agreement is PRC law as the seat of arbitration is Guangzhou, the Claimant's position is that this is misconceived as Singapore is the seat of arbitration.

21. The phrase "*arbitration… to be held in Guangzhou*" in Rider Clause 76 is not determinative of Guangzhou as the seat of arbitration. When there are clear words or significant contrary indicia to establish that some other seat or curial law had been agreed, such natural meaning can be rebutted.[12] In this case, there are contrary indicia that point to Guangzhou being only the place where the arbitration is to be held, which is far less significant than being the seat of arbitration.[13]

22. Firstly, the purpose of contractual interpretation is to give effect to the objectively ascertained express intention of the contracting parties as it emerges from the contextual meaning of the relevant contractual language.[14] The Tribunal should give a meaning that reflects the meaning most likely to have been ascribed to the term by the parties in the circumstances, looking at their negotiations, their prior relationship, the practices of the industry or trade, and the parties' commercial objectives (including the overall allocation of risk and liability in the contract as a whole).[15]

23. The present dispute has little, if any, connection to the PRC. None of the parties are PRC entities. The C/P and the B/L were not concluded in the PRC, and the place of performance of either

[11] *Enka* [142]–[143].
[12] *Shagang South–Asia (Hong Kong) Trading Co Ltd v Daewoo Logistics* [2015] EWHC 194 (Comm) [2015] 1 Lloyd's Rep 504 (EWHC), applied *in BNA v BNB* [67] (Hamblen J).
[13] BNA v BNB [65].
[14] *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd* [2015] SGCA 55 [2015] 5 SLR 1187 [30]–[42] (SGCA) (Andrew Phang JA).
[15] *Verona Capital Pty Ltd v Ramba Energy West Jambi Ltd* [2016] SGHC 55 [42] (SGHC) (Aedit Abdullah JC).

contract was also not in the PRC. There is no commercial reason to construe Rider Clause 76 to mean that parties intended Guangzhou to be the seat of arbitration.

24. Secondly, parties would not have intended for a PRC court to supervise or deal with a dispute over a contract governed by English law. Here, both the C/P and the B/L are governed by English law. If the seat of arbitration was Guangzhou such that Guangzhou courts as the seat court have supervisory jurisdiction, Guangzhou courts would have to deal with issues arising from English law with the assistance of expert evidence on the same. This would have required parties to incur unnecessary costs. Contrarily, if the arbitration is to be supervised by Singaporean courts, as a matter of practice in common law jurisdictions, issues of English law could be dealt with by submissions.[16] In any event, the PRC is a civil law jurisdiction, while Singapore is a common law jurisdiction which is more accustomed to dealing with issues of English law. It makes more commercial sense that parties intend the present arbitration proceedings to be governed by Singaporean law.

25. Thirdly, under the validation principle, if an international arbitration agreement would be invalidated under the application of a law, the better approach would be to apply another law that would uphold the arbitration agreement.[17] In the absence of contrary language, the parties' overriding objective in entering into an international arbitration agreement is to make an agreement that is valid and enforceable rather than a "mere waste paper".[18] Should the arbitration agreement be governed by PRC law, this would lead to the absurd result that the arbitration agreement be rendered invalid by virtue of Clause 16 of the PRC Arbitration Law. This would have the effect of defeating parties' intention to resolve their dispute by arbitration.

[16] *Shagang South–Asia (Hong Kong) Trading Co Ltd* [24].
[17] G B Born, *International Commercial Arbitration* (Wolters Kluwer, 3rd ed, 2024) [4.04] ("*Born on International Commercial Arbitration*"), cited in *Enka* [95]–[109] and *Kabab–ji SAL v Kout Food Group* [2021] UKSC 48 [2022] 2 All ER 911 [49]–[52] (UKSC) (Lord Hamblen and Lord Leggatt).
[18] *Hamlyn & Co. v. Talisker Distillery* [1894] AC 202, 215 (UKHL); *Anupam Mittal* [74] (Judith Prakash JCA).

26. Fourthly and alternatively, the reference to general average in Rider Clause 76 means that the reference to Guangzhou is not to be construed strictly and exclusively as the seat of arbitration. Besides providing for the governing law and arbitration clause with respect to the C/P, Rider Clause 76, when read together with Rider Clause 2, also covers dispute relating to general average. When coupled with the reference to general average, "*in Guangzhou*" means that Guangzhou is the place where adjustment as to general average is to take place.[19] The reference to Guangzhou should thus be construed flexibly as the venue, instead of the seat of arbitration.
27. Therefore, having regard to the context of the C/P, there are significant contrary indicia that parties intend to have the arbitration held in Guangzhou only as a matter of convenience.
28. For (c), Singaporean law is the law with the closest and most real connection with the arbitration agreement. The exercise to locate the law with the closest and most real connection should only be conducted if the Tribunal finds there is neither an express nor an implied choice of law. In particular, when identifying such law, the Tribunal should give effect to the commercial purpose of the contract.[20] As is often the case in contracts made between parties of different nationalities, a popular seat of international arbitration has been chosen as a neutral forum with which neither party is connected. In that case, parties would be less likely to have adopted each of the laws from their own jurisdictions, but rather the laws from a neutral seat of arbitration.[21] Singaporean law is such a neutral law by reason of the matters stated in paragraph 19 above.
29. Rule 32.1 of the SCMA rules provides that the seat of arbitration shall be Singapore unless otherwise agreed by the parties. Here, the seat of arbitration is Singapore by reason of the matters above. The arbitration agreement should thus be governed by Singaporean law.

[19] *Transamerican Ocean Contractors Inc. v Transchemical Rotterdam B.V. (The "Ioanna")* [1978] 1 Lloyd's Rep 238, 242 (EWCA) (Stephenson LJ); *Transfield Shipping Inc Panama v Sino–Add (Singapore) Pte Ltd* [2001] SGHC 239 [29]–[31] (SGHC) (Judith Prakash J).
[20] *Born on International Commercial Arbitration*, §4.04; Enka, at [142]–[143]; *Premium Nafta Prods. Ltd v Fili Shipping Co. Ltd* [2007] UKHL 40 [2007] 4 All ER 951 [8] (UKHL) (Lord Hoffmann).
[21] *Enka* [142]–[143].

D. Alternatively, English law shall govern the arbitration agreement

30. Should the Tribunal decide Guangzhou to be the seat of the arbitration, the arbitration agreement should alternatively be governed by English law which is the law governing the C/P and the B/L.[22]

31. As a starting point, a choice of governing law for the contract will generally apply to an arbitration agreement which forms part of the contract either as a matter of inference or as an implied choice of law.[23] This is because arbitration agreements are not concluded in a vacuum, but are usually part of a substantive contract. The governing law of the main contract will "generally be understood as including an express choice of law applicable to an arbitration agreement which forms part of the contract".[24] Where the substantive contract contains an express choice of law, this is a strong indication as to the parties' intention as to the governing law of the arbitration agreement in the absence of any indication to the contrary.[25] In any event, the distinction between express and implied is not a "sharp" one in such context.[26]

32. That a different country is chosen as the seat is not sufficient to negate such an inference,[27] except when provisions of the law of the seat required a contrary conclusion.[28] Here, from the perspective of PRC law as the law of the seat, it only requires PRC law to be the governing law of the arbitration agreement where parties have not agreed on the same pursuant to Article 5 of the New York Convention;[29] there is no mandatory requirement that PRC law must govern the

[22] *BCY* [43];[49], as applied in *Enka*.
[23] *Unicredit Bank GmbH v RusChemAlliance* [2024] EWCA Civ 64 [45] (CA) (Males LJ), applying *Enka*.
[24] *Unicredit v RusChemAlliance* [45].
[25] *Enka* [170].
[26] *Unicredit v RusChemAlliance* [45]; *Enka* [35].
[27] *Born on International Commercial Arbitration* [4.04], cited in *Enka* [170]; *Kabab–Ji SAL* [35]; *Arsanovia Ltd v. Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm) [17]–[21] (EWHC) (Andrew Smith J).
[28] *Enka* [70]–[72]; [95]–[109]; [170]; *Kabab–ji SAL* [35]; *SQD v QYP* [2023] EWHC 2145 [17] (HC) (Bright J).
[29] Article 16, Interpretation of the Supreme People's Court concerning Some Issues on Application of the Arbitration Law of the People's Republic of China

arbitration agreement. Therefore, even if the seat is Guangzhou, it does not negate the inference that English law should govern the arbitration agreement.[30]

33. Therefore, as English law is the governing law of the C/P and the B/L, it should also be the governing law of the arbitration agreement.[31] This is not displaced by the seat of arbitration being Guangzhou.

34. By reason of the matters above, the arbitration agreement would be governed by either Singaporean law or English law. Irrespective of whether Singaporean or English law applies, the arbitration agreement in Rider Clause 76 is valid under s.6 of the UK Arbitration Act 1996, or alternatively s. 2A of the Singapore International Arbitration Act 1994 (Cap 143A). The Tribunal has jurisdiction to hear the present dispute.

E. English law is the governing law of the dispute

35. Under s.46(1)(a) of the UK Arbitration Act 1996, a Tribunal shall apply the law chosen by the parties to be the governing law for the substance of the dispute. Similarly, Rule 31.1 of the SCMA Rules provides that the Tribunal shall "apply the law designated by the parties as applicable to the substance of the dispute".

36. As submitted above, Rider Clause 76 is incorporated into the B/L. Despite its express provision for English law "*to apply to the CP*", it should be read accordingly when incorporated into the B/L such that English law is also the governing law of the B/L.[32] English law will thus be applied to determine the substantive issues below.

[30] *Unicredit v RusChemAlliance* [67].
[31] *Enka* [170(iv)].
[32] The court is tolerant of a certain degree of "verbal manipulation" in the application of an arbitration clause to the context of bill of lading, see: *Pride Shipping Corporation v. Chung Hwa Pulp Corporation and another* ("*The Oinoussin Pride*") [1991] 1 Lloyd's Rep 126 (QB).

II. STANDING

37. The Claimant has title to sue because: (A) the B/L is an "owner's bill" (i.e. a carriage of contract with the Claimant as the carrier); and (B) the Respondent can be sued on the B/L under s.3(1) of COGSA.

A. The B/L is an owner's bill

38. The question whether a bill is an owner's or a charterer's bill is one of construction of the bill of lading.[33] It depends on: (1) the way in which the bill is signed; (2) the authority of the signer; and (3) other terms of the bill and charterparty.[34]

39. The B/L here is an owner's bill because it was purported to be signed on behalf of the Master who is an agent of the Claimant as the shipowner.[35] The C/P is a voyage charterparty and not a demise charterparty because: (i) the preamble of the C/P stated that the Vessel shall receive from the Charterer the Cargo at the port of loading for delivery to the port of discharge;[36] (ii) the owner was obligated to issue the B/L to shippers by virtue of Rider Clause 24;[37] and (iii) agents working at load and discharge ports are owner's agents (by virtue of Rider Clause 4, owners should appoint charterer's nominated agents at load and discharge ports, and these agents should be employed, instructed, paid by, and be responsible by the owner).[38] This analysis is reinforced by the fact that the Charterer signed the Discharge LOI to request the Claimant as the shipowner to commence discharge.[39]

[33] *The Berkshire* [1974] 1 Lloyd's Rep 185 (KB) 187 (Brandon J).
[34] *Carver on Bills of Lading, 5th ed*, 4–037.
[35] *The Berkshire*; *Baumwoll Manufactur Von Carl Scheibler v Furness* [1893] AC 8 (UKHL).
[36] Moot problem, p 12.
[37] Moot problem, p 23.
[38] Moot problem, p 21.
[39] Moot problem, p 9 (Statement of Claim at [13]).

B. The Respondent can be sued on the B/L under COGSA s.3(1)

40. As submitted above, by virtue of Rider Clause 76, English law governs the contract of carriage under the B/L. COGSA applies in the present case; there is no dispute that the B/L is a bill of lading[40] which is capable of transfer by delivery.[41]

41. Section 3(1)(b) of COGSA allows a holder of a bill of lading to be sued on the bill as if he had been a party to that contract of carriage when he makes a claim under the bill.[42] In this case, the Respondent became the lawful holder of the bill on 3 October 2023[43] and counterclaimed for mis–delivery against the Claimant as carrier. Hence, the Respondent is subject to the same liabilities under the B/L as if it had been a party to the B/L by virtue of s.3(1)(b). Such liabilities are not limited to those starting from 3 October 2023 and the Respondent is liable for all liabilities as further discussed below regardless of when such liability started to incur.[44]

III. THE RESPONDENT FAILED TO DISCHARGE / PROCURE TO DISCHARGE WITHIN LAYTIME OR A REASONABLE TIME

42. It is submitted that the Respondent should be responsible for both demurrage and consequential loss as: (A) it has breached the express term by failing to discharge within laytime; (B) further, it has breached the implied term to take delivery within a reasonable time. As a result of (A) and (B), failed to procure the discharge and/or take delivery within the timeframe.

A. The Respondent failed to discharge the Cargo within laytime

[40] COGSA s 1(1).
[41] COGSA s 1(2) (a).
[42] The claim amounts to a sufficiently final claim for the meaning of s 3(1) (b) as discussed in *Primetrade AG v Ythan Ltd* [2005] EWHC 2399 (Comm) [2006] 1 All ER 367 [103]–[111] (EWHC) (Aikens J), adopting the analysis of Lord Hobhouse in *Borealis AB v Stargas Ltd (The Berge Sisar)* [1999] QB 863 [1998] 4 All ER 821 [32]–[33] (EWCA) (Sir Brian Neill).
[43] D&CC para 16, Moot Problem p 37.
[44] Law Com, No.196, Scot. Law Com. No.130 [3.22]–[7.20] (1991); *Brandt v Liverpool, Brazil and River Plate Steam Navigation Co Ltd* [1924] 1 KB 575 (EWCA).

43. Pursuant to Rider Clause 27, which has been incorporated into the B/L, the Respondent, being the consignee of the B/L, shall be responsible and liable for the payment of demurrage.

44. The Respondent agrees that it bears the liability to ensure that the Cargo is discharged within laytime permitted under the C/P as incorporated into the B/L but denies liability in failing to discharge within laytime.[45]

45. It is submitted that the discharge of goods clearly exceeded the permitted laytime of 96 hours. Pursuant to C/P Clause 4, laytime started to run on 20 September 2023 at 1443 LT, which was six running hours after the tender of the notice of readiness. No event interrupted or stopped the running of laytime which ended on 24 September 2023 at 1443 LT. Nevertheless, discharge only began on 4 October 2023 at 0630 LT. Discharge was completed on 7 October 2023 at 2348 LT, or 321 hours and 5 minutes late (i.e. 13 days, 9 hours, 5 minutes) beyond the permitted laycan. There can be no doubt that the Claimant is liable to pay demurrage.

46. As C/P Clause 11 stipulates that demurrage is to be paid per running hour and pro ram, and C/P Clause G provides for demurrage per hour to be at USD $1,500, demurrage should therefore be calculated as follows:

322 (running hours) x USD $1,500 = USD $483,000.

B. The Respondent failed to take delivery within a reasonable time

47. In addition to the liability for demurrage, the Claimant submits that the B/L contains an implied term that the consignee should take delivery of the Cargo within a reasonable time and that the Respondent as the consignee has breached the same.

[45] See D&CC paras 12–14, Moot Problem p 37. The Respondent admitted its expressed obligation to discharge within laytime and its dispute as to the Claimant's complaint on its failure to discharge within laytime / take delivery within a reasonable time only pertain to the issue of whether the Claimant's loss is only limited to demurrage.

(1) The Purported Implied Term should be implied for business efficacy

48. It is trite that terms will be implied into a contract only if: (i) to do so is to give effect to what was so obvious that it goes without saying or to do so is necessary to give the contract business efficacy; (ii) such terms are terms that notional reasonable people, in the position of the parties at the time of contracting, would have agreed; (iii) such terms are fair and that the parties would, in any event, have agreed; and (iv) the terms must be capable of clear expression and does not contradict express terms of the contract.[46]

49. The implied term that the Respondent should take delivery of the Cargo within a reasonable time is an obvious term that goes without saying and is necessary to give business efficacy to the carriage contract under the B/L.

50. Firstly, it was clearly known to the parties at the time of entering into the C/P that the Vessel's next employment was at Kaohsiung "*with strict laycan 1–14 October 2023 for a period of 2 years*" (emphasis added) as stated in Rider Clause 38. Rider Clause 35 further provided for the Vessel "*to proceed directly to discharge port*" upon completion of loading. These terms were also known to the parties of the B/L by virtue of the incorporation of the same terms into the B/L. In order to ensure that the Vessel can meet the strict laycan for the next employment, it goes without saying that the consignee should take delivery of the Cargo within a reasonable time. In other words, the implied term is necessary to ensure that the Vessel can meet the next employment in time and give business efficacy to Rider Clause 38. It would be absurd that the Claimant would have no recourse against the consignee if the consignee delayed in taking delivery of the Cargo such that the Vessel failed to meet the Next Employment in time.

[46] *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72 [2016] AC 742 [14]–[21]; [57]; [75]–[77] (UKSC) (Lord Neuberger); *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10 [2009] 1 WLR 1988 (UKPC); *a*[2017] UKPC 2 [2017] ICR 531 (UKPC); *Ukraine v The Law Debenture Trust Corp PLC* [2018] EWCA Civ 2026 (EWCA); *Shirlaw v Southern Foundries* [1939] 2 KB 206, 227 (EWCA) (MacKinnon LJ); *The Moorcock* (1889) 14 PD 64 (EWCA).

51. Secondly, time is of the essence under the C/P. Time is of the essence where (i) the circumstances of the contract and the nature of the subject matter indicate that time must be complied with;[47] and (ii) time was originally of the essence of the contract, but one party has been guilty of delay, the other party may give notice requiring the contract to be performed within a reasonable time.[48]

52. For (i), Rider Clauses 35 and 38 indicate that time is to be of the essence and the Vessel has to leave the port for the Next Employment. These clauses suggest that there is an employment directly after this voyage, hence indicating that time must be complied with.

53. For (ii), in any event, after the Respondent and/or the Charterer failed to perform discharge operation despite the end of laytime, the Respondent had been given multiple notices requiring the contract to be performed within a reasonable time. This included reminders given by the Charterer that (a) the Vessel had to leave by 30 September 2023 and that (b) the Respondent should process urgently as the Vessel had to leave by 7 October 2023.[49] These email correspondences had made it sufficiently clear that time had been made of the essence.[50] The implication of the implied term is therefore necessary to give effect to the condition of time being of the essence.

54. Thirdly, the Claimant had no option but to wait for the consignee to take delivery of the Cargo as the Cargo of crude palm oil could not be disposed of simply by leaving them on the dockside.[51] In any event, there is no evidence that storage facilities for crude palm oil were readily available at the port of discharge.

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[47] Hugh Beale. *Chitty on Contracts* (Sweet & Maxwell, 35th ed, 2023) ("*Chitty on Contracts 35th ed*") [28–029(2)].
[48] *Chitty on Contracts 35th ed* [28–030].
[49] Moot Problem pp 47–48 (emails dated 29 September 2023 at 09:14am and 12:17pm).
[50] cf a letter which only seeks additional payment: *Shawton Engineering Ltd v DGP International Ltd* [2005] EWCA Civ 1359 [2006] BLR 1 [44] (CA) (May LJ).
[51] *The Arne* [1904] P 154, 160 (DC) (Sir F H June); *Hick v Rodocanachi* [1891] 2 QB 626, 632 (CA) (Lindley LJ); Sir Bernard Eder et al, *Scrutton on Charterparties and Bills of Lading* (Sweet & Maxwell, 23rd ed, 2015) ("*Scrutton on Charterparties, 23rd ed"*) [15–005].

55. This analysis is supported by *Tradigrain SA v King Diamond Shipping SA (The "Spiros C")*,[52] where a term requiring goods to be unloaded by the consignee within a reasonable time was implied into a contract of carriage as the shipper could not keep ship waiting for an unlimited time.[53] In other words, the consignee bears the duty to present the bills of lading and take delivery of the cargo within a reasonable time in order to prevent unreasonable delay to the vessel. It is thus fair and reasonable in the circumstances to imply the term into the B/L.

56. The implied term does not contradict any express term of the B/L, in particular the express provisions for laytime and demurrage. In *The Spiros C*, that the bill of lading contained a rate of discharge did not prevent the term from being implied. What constituted reasonable time under the implied term can be assessed by reference to the 96–hour permitted laytime and all other material circumstances.[54]

57. Further, while it is accepted that demurrage liquidates the whole of the damages arising from the charterer's breach of a charterparty in failing to complete cargo operations within the laytime, this is subject to exceptions: (i) contrary indication in the charterparty; or (ii) if the shipowner may seek to recover damages in addition to demurrage arising from delay if it could prove a breach of an obligation separate from an obligation to complete cargo operation.[55]

58. For (i), Rider Clause 38 was a special provision which does not usually appear in charterparties. It was specifically inserted into the C/P as a Rider Clause together with the usual provision of

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[52] [2000] 2 Lloyd's Rep 319 (CA) (Henry, Brooke, Rix LJJ).

[53] [2000] 2 Lloyd's Rep 319 [72]–[75] (CA) (Rix LJ) [72]–[75]; *Fowler v Knoop* (1878) 4 QBD 299 (EWQB); Simon Baughen, *Summerskill on Laytime. ("Summerskill on Laytime, 7th ed") (*Sweet & Maxwell, 7th ed, 2013) [12–11]; cf *Miramar Maritime Corporation v Holborn Oil Trading ("The Miramar")* [1984] 2 Lloyd's Rep 129 [1984] AC 676 (HL), as Rix LJ observed in *The Spiros C* [74], "there is nothing in *The Mirarmar* that deals directly with the question of such an implied term (on taking delivery from the shipowner)'. It is only when there is a "regime (in the bill of lading) which would excuse a shipper from liability for discharge and place it solely on the receiver or charterer" when a term requiring the consignor to unload the goods within a reasonable time could not be implied, see *Scrutton on Charterparties, 23rd ed* [15–055].

[54] *Tradigrain SA and others v. King Diamond Shipping SA ("The Spiros C")* [1999] 2 Lloyd's Rep 91, 99–100 (QB) (Colman J), this was not rejected by the Court of Appeal in *The Spiros C* [2000] 2 Lloyd's Rep 319 (CA).

[55] *The Bonde* [1991] 1 Lloyd's Rep 136 (KB); *The Luxmar* [2007] EWCA Civ 494 [2007] 2 Lloyd's Rep 542 (CA), *K Line Pte Ltd v Priminds Shipping (HK) Co Ltd ("The Eternal Bliss")* [2021] EWCA Civ 1712 [2022] Bus LR 67 [52] (CA) (Males LJ).

laycan and demurrage. Rider Clause 38 does not expressly refer to any other clauses, particularly those relating to laytime and demurrage. Should the parties intend that demurrage would liquidate all damages arising from the failure to complete discharge within the laytime, there would be no need to insert this provision into the C/P. Not only does Rider Clause 38 refer to the Next Employment at Kaohsiung and the strict laycan, but it also specifically mentioned that the Next Employment was for a period of 2 years. It was thus within the reasonable contemplation of the parties that any delay in the discharge may result in the Claimant suffering a significant loss of losing the 2–year fixture. It could not have been the intention of the parties that such a significant loss be entirely covered by demurrage at merely US$1,500 per hour.

59. For (ii), the breach of the implied term is a breach independent of cargo operation in that the demurrage regime in the C/P and the B /L only covers the time "… *permitted the Charterer for loading, discharging*"[56] and does not cover taking delivery. Alternatively, whether the operation of the implied term depends on reasonable time, demurrage operates strictly within the permitted laytime (subject to stoppage and interruptions).[57] Further, in *London Arbitration 19/80 LMLN 19, 24 July 1980,* the arbitral tribunal ruled that a breach of an implied duty to act with reasonable diligence in respect of the discharge, which contributed to delay in discharge and by nature is similar to demurrage, was independent of a breach of an ordinary term arising out of demurrage.

60. While *Sea Master Shipping Inc v Arab Bank (Switzerland) Ltd and another (The "Sea Master*")[58] refused to imply a term for the consignee to take delivery within a reasonable time, the case is distinguishable. In *Sea Master*, the common law duty to discharge the cargo rested exclusively on the shipowner; this was not displaced by various clauses, which among other things, was

[56] C/P Clause 5, Moot Problem p 14.
[57] See also paragraph 52 of this skeleton; *Scrutton on Charterparties, 23rd ed* [2–108]; Lombard North Central Plc v Butterworth [1987] QB 527 (CA); Topalsson GmbH v Rolls–Royce Motor Cars Ltd [2023] EWHC 1765 (TCC) [295]–[296] (TCC) (Justice O'Farrell DBE).
[58] [2021] 1 Lloyd's Rep 500 [2020] EWHC 2030 (Comm) (HC) (HHJ Pelling QC).

concerned *solely* with who was to pay for the cargo operation.[59] Here, (a) C/P Clause 6(a) provides that "…*the Vessel shall load and discharge at any safe place… which shall be designated and procured by the Charterer… at the expense, risk and peril of the Charterer*"; (b) Clause 7(a) provides that, *"[the Cargo]… shall be pumped out of the Vessel… where delivery of [the Cargo] shall be taken by the Charterer or consignee*."; (c) Clauses 7(b) and (c) provide that "*All hose…and other necessary equipment and labor to accomplish delivery of cargo to be provided by Charterer at Charterer's risk and expense*" and *"[stevedoring]…is to be arranged and paid for by the Charterer*". These clauses clearly provide that the Charterer bears the responsibility to provide major equipment and labour essential for discharge operation, including lighterage, hoses, stevedores and labour. Such an obligation implies that the responsibility for discharge is transferred to the Charterer,[60] whereas the Respondent bears the duty to take delivery of the Cargo.[61]

(2) The Respondent breached the implied term

61. The Respondent was in breach of the implied term as it never requested nor actually took delivery. This was despite the Charterer having informed the Respondent about (a) the arrival of the Vessel at the port of discharge on 20 September 2023; (b) the expiring laytime on 22 September 2023; and (c) the imminent need of the Vessel to meet the Next Employment on 29 September 2023. Yet, the Respondent never (a) provided instructions on berthing; (b) requested

[59] cf *Sea Master* [2021] 1 Lloyd's Rep 500 [23]; [25]–[26] (HC) (HHJ Pelling QC). In *Sea Master*, the relevant clause concerned solely with who is to pay for the operation, and the language used by the parties does not have the effect of shifting responsibility for discharge onto the charterers or receivers or of imposing on the receivers of charterers any obligation beyond appointing and paying stevedores.

[60] *Government of Ceylon v Chandris* [1965] 2 Lloyd's Rep 204 (KB); *Sea Master* [2021] 1 Lloyd's Rep 500 [28] (HC) (HHJ Pelling QC). As HHJ Pelling QC stated in *Sea Master*, when the clause writes "…the Charterers shall appoint their own Broker or Agent and Stevedores both at the port of loading and the port of discharge", it implies responsibility for discharge not merely the cost of discharge to be bore by the charterer.

[61] This is consistent with the general understanding that (i) loading and discharging are joint operations; and (ii) the shipowner has to put the goods in a position that the consignee can take delivery of them… the moment the goods are put within the reach of the consignee he must take his part in the operation, see *Petersen v Freebody* [1895] 2 QB 294, 297 (CA) (Lord Esher MR); *The Johanna Oldendorff (Oldendorff (EL) & Co GmbH v Tradax Export SA)* [1973] 2 Lloyd's Rep 285, 304 (HL) (Lord Diplock); *Scrutton on Charterparties, 23rd ed* [13–002]–[13–003].

the Charterer to take delivery; nor (c) supplied steam to take delivery. It was the Charterer who ultimately took delivery.

62. As laytime had already expired on 24 September 2023 at 1443 LT and the Charterer took more than 13 days to take delivery, the prolonged delay was clearly unreasonable.

IV. DAMAGES

63. It is trite that no loss may be recovered by way of damages if it is too remote a consequence of the breach. The loss has to be reasonably contemplated by the parties when the contract was formed.[62] A claimant will not be allowed to recover losses that were unlikely to occur in the usual course of things if the defendant cannot reasonably be regarded as having assumed responsibility for losses of the particular kind suffered.[63]

64. The Respondent had specific knowledge about the next fixture by reason of Rider Clause 38 which has been referred to in paragraph 53 above.

65. As a result of the unreasonable delay in taking delivery, the Vessel could only leave Busan on 8 October and was approximately 300 nautical miles from Kaohsiung when the fixture was cancelled on 16 October. But for the delay in discharge and/or the detention related to the delay in taking delivery, the Claimant would have been able to leave earlier to meet the next fixture.

66. The loss of profit due to the breach is quantified as follows:

Initial Hire rate for Kaohsiung Charterparty: USD $35,000 per day

Discounted Hire rate: USD $30,000 per day

Difference in Hire rate x 2-year duration: USD 5,000 x 365 x 2 = USD $3,650,000

[62] *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 (EWCA).
[63] *Transfield Shipping Inc v Mercator Shipping Inc ("The Achilleas")* [2008] UKHL 48, [2009] 1 AC 61 [6] (HL) (Baronness Hale); *C Czarnikow Ltd v Koufos (The Heron II)* [1967] 2 Lloyd's Rep 457, [1969] 1 AC 350 382–383 (HL) (Lord Reid).

V. DEFENCE TO THE MISDELIVERY COUNTERCLAIM

67. The Respondent counterclaims for damages for mis–delivering the Cargo. The Claimant is not liable as any breach by the Claimant was not the effective and/or proximate cause to the Respondent's loss.

68. Generally, the carrier is entitled to and obliged to deliver against production of a bill of lading ("the presentation rule").[64] In deciding whether the Claimant's breach (if any) was the effective cause of the Respondent's loss, the Respondent must show that in the event of the Claimant's performance, it would have enforced its security against the Cargo so as to recoup its lending.[65]

69. It is submitted that even if the Claimant was in breach of the presentation rule, the breach was not the effective cause of the Respondent's loss because: (A) the Respondent did not look to the B/L as security; and (B) the Respondent consented to or acquiesced in the discharge against the Discharge LOI.

A. The Respondent did not look to the B/L as security

70. Firstly, it was part of the LC arrangement between the Respondent and the Charterer that the LC was payable to Good Oil against shipping documents (i.e. the B/L) or a LOI.[66] Thus, the Respondent was at all material times aware that it may be paying against a LOI and not the B/L. In *Standard Chartered Bank (Singapore Limited) v Maersk Tankers Singapore Ptd Ltd*,[67] the Singapore High Court considered the English case of *The Nika*, and ruled that where the claimant bank permitted payment under the LC without presentation of the bills of lading by the seller of

[64] *Unicredit* [45] [46] (Popplewell LJ), *Glyn Mills Currie & Co v East and West India Dock Co* (1882) 7 App Cas 591, 596; 610 (HL) (Lord Selborne LC); *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] AC 576, 586 (PC) (Lord Denning); *Kuwait Petroleum Corp v I&D Oil Carriers Ltd ("The Houda")* [1994] 2 Lloyd's Rep 541, 552–553; 556–557 (CA) (Neill LJ); *Motis Exports Ltd v Dampskibsselskabet Af 1912 A/S (No.1*) [1999] 1 All ER (Comm) 571 (KB).
[65] *Unicredit* [103] (Popplewell LJ); *Fimbank Plc v Discover Investment Corp ("The Nika")* [2020] 2 WLUK 49 [2021] 1 Lloyd's Rep 109 (KB); *The "Yue You 902" and another matter* [2020] SGHCR 3, [2020] 3 SLR 573 (SGHC); *Oversea–Chinese Banking Corp Ltd v Owner and/or Demise Charterer of the vessel ("STI Orchard")* [2022] SGHCR 6 (SGHC); *Standard Chartered Bank (Singapore Limited) v Maersk Tankers Singapore Ptd Ltd* [2022] SGHC 242 (SGHC).
[66] Moot problem, p 43–44 (email dated 22 December 2023 at 3:14pm, Answer 3).
[67] [2022] SGHC 242 (SGHC).

the cargo, but against a LOI, that raised a triable issue as to whether the bank saw the bill as security.[68]

71. The Respondent never inquired with the Charterer as to the whereabouts of the B/L throughout their email correspondences. Further, as reflected in the email dated 3 October 2023 at 4:02pm,[69] the Respondent was content with and permitted payment under the LC to Good Oils without being provided with the B/L, but only on the strength of the Payment LOI by Good Oils dated 3 October 2023. The Payment LOI specifically stated that it was made "*[i]n consideration of [the Respondent] making payment…and having agreed to accept delivery of the Cargo without having been provided with the full set of 3/3 original bills of lading required to be presented by us in accordance with the Underlying Agreement"*…(emphasis added).

72. The Respondent had thus chosen to make the payment *before* it had become the indorsee and holder of the B/L. In effect, the Respondent accepted the probable scenario that the Charterer may not repay the LC loan, thereby incurring losses, without the security of the B/L as its lawful holder. Rather, the Respondent looked to the Payment LOI provided by Good Oils to safeguard its interests, rather than the B/L. That the Respondent refused to grant a trust receipt was thus irrelevant for the same reason.

73. Secondly, the Respondent never intended to take delivery of the Cargo and was never concerned with its whereabouts. The Respondent is in the banking business and naturally did not have any commercial interest to take delivery of the Cargo. Seen in this light, the Respondent's inquiry with the Charterer by the email dated 3 October 2023 at 3:18pm as to whether the Cargo had been sold was no more than that; at best, the Respondent only made that inquiry with a view to ensure that the Charterer had the means to repay the Respondent.

[68] *Standard Chartered Bank (Singapore Limited) v Maersk Tankers Singapore Ptd Ltd* [34]–[36];[54];[56] (Ang Cheng Hock J).
[69] Moot problem, p 46.

74. The Respondent thus never saw the Cargo as security for repayment of its loan to the Charterer. That the Respondent was only concerned with repayment and neither looked to the B/L and/or the Cargo for repayment was most clearly shown when: the Respondent told the Charterer in the email dated 3 October 2023 at 4:42pm that it would let the Charterer "*do as you deem fit as Charterers [to resolve the issue of accruing demurrage] and we will not interfere as long as the loan is repaid*" (emphasis added); and when the Respondent requested the Korean buyers' export LC to be lodged with it in order to hold them against the Charterer for repayment of the debt outlined in the Collection Notice.[70]

75. Thirdly, the Respondent would not have halted discharge against the Payment LOI as it was aware at all times that the Cargo would be on–sold by the Charterers to the Korean buyers.

76. Here, it was implicit in the Respondent's inquiry with the Charterer as to whether the Cargo "*[had] been sold yet*" that the Respondent was at all material times aware and implicitly agreed that the Cargo would be sold by the Charterer. This is reinforced by the Respondent's email dated 3 October 2023 at 4:02pm that the Respondent intended to require the end–buyers to pay it directly ("*until export LC from Korean buyers lodged with us*"). That by permitting payment without being presented with the B/L, the Respondent accepted that by the time it comes into possession of the B/L (if it ever occurs), the title of the Cargo may have passed onto the Korean buyers and the B/L would become worthless. Further, as the Cargo was delivered to Gileum Oil Refinery which was the Notify Party of the B/L,[71] it can be inferred that the Respondent could have anticipated that the Cargo would be processed into various petroleum products before possibly being sold further. By the time, the Cargo would have further changed character and the B/L would similarly become worthless. The Respondent consented or acquiesced to discharge against the Discharge LOI.

[70] Moot problem, pp 46–47 (email dated 3 October 2023 at 3:18pm and 4:02pm).
[71] Moot problem, pp 30; 33.

77. Further and/or alternatively in the event that the Respondent looked to the B/L as a document of title,[72] the Respondent consented or acquiesced to the discharge of the Cargo against the Discharge LOI.

78. The Respondent at all material times was aware of the terms of the B/L and the C/P, the latter of which includes Rider Clause 57. The Respondent received a copy of the C/P on 29 September 2023.[73] The Respondent was informed as early as 1 October 2023 that the Charterer would be taking delivery of the Cargo by invoking Rider Clause 57[74] but chose not to raise any objection or attempt to take delivery of the Cargo. The Respondent was thus aware that there was a distinct risk that the Cargo would be released to the Charterer without the Respondent receiving any security, be it the B/L or any letter of indemnity.

79. On 3 October at 4:42pm, the Respondent responded to the Charterer's request for trust receipt saying that, "*you must do so as you deem fit as Charterers and we will not interfere as long as the loan is repaid"*.[75] Seen in the context of the Respondent's knowledge of the terms of the C/P, including the Charterer's option of issuing a letter of indemnity under Clause 57, the Respondent turned a blind eye to the distinct risk of, if not actually consented to the Charterer invoking Rider Clause 57 as was previously notified. It is irrelevant that the Respondent subsequently became the lawful holder of the B/L on the same day as it did not retract the 4:42pm email.

80. By reason of the matters above, had the Respondent initially refused to discharge without production of the B/L, the following alternative scenarios could have happened:

[72] M G Bridge, H N Bennett and J P Benjamin, *Benjamin's Sale of Goods* (Sweet & Maxwell, 12th ed, 2024) [18–044] discussing the decision of Moulder J on causation in *Unicredit*, which was affirmed by the CA. That if the claim were based on the bill of lading's being a document of title, and so conversion, it could be defended on the ground that there was consent to the conduct that gave rise to the loss.
[73] Moot problem, p 47 (email dated 29 September 2023 at 12:17pm).
[74] Moot problem, p 40 (Reply at para13).
[75] Moot problem, p 46 (email dated 3 October 2023 at 4:42pm).

a. Neither the Charterer or the Korean buyers was able to obtain delivery of the Cargo, in which case, given the Charterer's financial conditions, the Charterer would still be unable to repay the Respondent; or

b. The Charterer would still have invoked Rider Clause 57 and taken delivery without presenting the B/L.

81. Any breach of the presentation rule by the Claimant was not the effective cause of the Respondent's loss, since the outcome would be the same as the present case; and that the Respondent's conduct was the effective cause of its loss.

VI. PRAYER FOR RELIEF

82. For the reasons set out above, the Claimant is seeking the following orders and declarations:

(1) A declaration that the Respondent shall be liable for the sum of USD$4,133,000, being the sum of demurrage of USD $483,000 and damages of USD $3,650,000;

(2) An order that interest be awarded on the judgment sum; and

(3) An order that costs be to the Claimant.