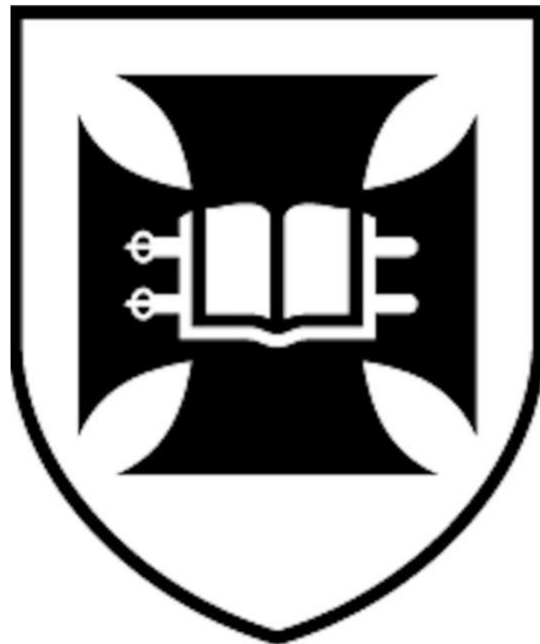
23RD ANNUAL INTERNATIONAL MARITIME LAW ARBITRATION MOOT



UNIVERSITY OF QUEENSLAND

AUSTRALIA

MEMORANDUM FOR CLAIMANT

Team N

CLAIMANT	v	**RESPONDENT**
Tomahawk Maritime S.A.		**Veggies of Earth Banking Ltd**

COUNSEL

Simaima Gordon | Elijah Larsen | Asha Varghese | Heidi Willis

MEMORANDUM FOR CLAIMANT

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CLAIMANT	v	**RESPONDENT**
Tomahawk Maritime S.A.		**Veggies of Earth Banking Ltd**

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LIST OF ABBREVIATIONS

ABBREVIATION	TERM
BoL	Bill of Lading No. COW-011A
Charterparty	VEGOILVOY Charterparty dated 1 September 2023 between Tomahawk Maritime S.A. and Yu Shipping Ltd
CLAIMANT	Tomahawk Maritime S.A.
Contract of Carriage	The contract of carriage as evidenced by Bill of Lading No. COW-011A
Kaohsiung charter	The MV NIUYANG's 2-year time charterparty at the port of Kaohsiung with the laycan 1-14 October 2023
LC	Letter of Credit
LoI	Letter of Indemnity
RESPONDENT	Veggies of Earth Banking Ltd.
Cargo	16,999.01 metric tonnes of crude palm oil (edible grade) carried by the MV NIUYANG
Vessel	MV NIUYANG
Yu Shipping	Yu Shipping Ltd
SCMA	Singapore Chamber of Maritime Arbitration
PRC	People's Republic of China
Korean Buyer	Gileum Refinery Co., Ltd.
Good Oils	Good Oil Sdn Bhd

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STATEMENT OF FACTS

The financing arrangement

1. Yu Shipping bought 16,999 tonnes of palm oil (**the Cargo)** from Good Oil Sdn Bhd (**Good Oils**) on 14 August 2023 under a free-on-board sale contract. Good Oils was to be paid for the Cargo at the discharge port. [1]
2. Veggies of Earth Banking (**RESPONDENT**) is a trade finance institution.[2] As Yu Shipping's financier,[3] it issued Good Oils a Letter of Credit (**LC**) stating that it would pay the purchase price on behalf of the Charterer once the Vessel arrived at the discharge port.[4] After that payment, Good Oils was to present RESPONDENT with either the Bill of Lading (**BoL**) or a Letter of Indemnity (**LoI**), which would permit discharge.[5]
3. After paying the purchase price, RESPONDENT was also to issue Yu Shipping with a trust receipt, allowing it to take possession of the goods. The Charterer would then hold the proceeds on trust for RESPONDENT. [6]
4. The Charterer would then sell the Cargo to a third party and use those funds to repay RESPONDENT.[7]

[1] Record at 43 (email from Al Swell to Butcher Kim and Hong Rou on 22 December 2023 at 3:14pm).
[2] Record at 7 [2]; record at 36 [10].
[3] Record at 37 [15]; record at 43 (email from Al Swell to Butcher Kim and Hong Rou on 22 December 2023 at 3:14pm).
[4] Record at 43 (email from Al Swell to Butcher Kim and Hong Rou on 22 December 2023 at 3:14pm).
[5] Record at 3 (email from Al Swell to Butcher Kim and Hong Rou on 22 December 2023 at 3:14pm); record at 40 [12]; record at 48 (email from 'Turn Ip' (VOE) to E-Operations (Yu Shipping) on 29 September 2023 at 9:58am); record at 47 (email from 'Turn Ip' (VOE) to E-Operations (Yu Shipping) on 3 October 2023 at 3:47pm).
[6] Record at 49 (email from 'E-Operations' (Yu Shipping) to 'Trade Finance' (VOE) on 20 September 2023 at 4:33pm); record at 48 (email from 'E-Operations' (Yu Shipping) to 'Trade Finance' (VOE) on 29 September 2023 at 9:58am); record at 47 (email from from 'E-Operations' (Yu Shipping) to 'Trade Finance' VOE on 3 October 2023 at 3:47pm); record at 46 (email from 'Turn Ip' (VOE) to E-Operations (Yu Shipping) on 3 October 2023 at 4:02pm); record at 46 (email from 'E-Operations' (Yu Shipping) to 'Trade Finance' (VOE) on 3 October 2023 4:27pm); record at 43 (email from Al Swell to Butcher Kim and Hong Rou on 22 December 2023 at 3:14pm).
[7] Record at 43 (email from Al Swell to Butcher Kim and Hong Rou on 22 December 2023 at 3:14pm); record at 47 (email from from 'E-Operations' (Yu Shipping) to 'Trade Finance' (VOE) on 3 October 2023 at 3:47pm); record at 46 (email from 'Turn Ip' (VOE) to E-Operations (Yu Shipping) on 3 October 2023 at 4:02pm).

The voyage

5. Tomahawk Maritime S.A. (**CLAIMANT**) is the owner of the '*MV Niuyang'* (the **Vessel**).[8] On 1 September 2023, Yu Shipping chartered the Vessel from CLAIMANT for a voyage from Bintulu, Malaysia to Busan, South Korea, carrying the Cargo.[9] The third-party purchaser of the Cargo at Busan was Gileum Refinery Co (**the Korean Buyer**).[10]
6. In negotiating the charterparty, CLAIMANT and Charterer agreed that the Cargo would be discharged by 30 September 2023, because CLAIMANT had to meet a subsequent two-year time charterparty at Kaohsiung with a strict cancelling date of 14 October 2023 (**the Kaohsiung charter**).[11]
7. Bill of Lading COW-011A (**BoL**) was signed on 4 September 2023 with RESPONDENT as the named consignee.[12] The Vessel sailed from Bintulu on 6 September 2023 and arrived in Busan on 20 September 2023.[13] On the same day, Yu Shipping requested that RESPONDENT issue a trust receipt. [14] RESPONDENT denied the request.[15]

Delay at Busan

8. Laytime expired on 24 September 2023.[16] Between 20 and 29 September Yu Shipping repeatedly requested that RESPONDENT provide a trust receipt.[17] RESPONDENT denied

[8] Record at 7 [1],[3]; record at 36 [10].
[9] Record at 7 [3]; record at 36 [10].
[10] Record at 4; record at 43 (email from Al Swell to Butcher Kim and Hong Rou on 22 December 2023 at 3:14pm); record at 47 (email from 'E-Operations' (Yu Shipping) to 'Trade Finance' (VOE) on 3 October 2023 at 3:47pm).
[11] Record at 7 [5]; record at 36 [10].
[12] Record at [4]; record at 8 [8]; record at 36 [10].
[13] Record at [9]; record at 36 [10].
[14] Record at 49 (email from 'E-Operations' (Yu Shipping) to 'Trade Finance' (VOE) on 20 September 2023 at 4:33pm).
[15] Record at 49 (email from 'Turn Ip' (VOE) to 'E-Operations' (Yu Shipping) on 20 September at 5:23pm); record at 48 (email from 'Turn Ip' (VOE) to E-Operations (Yu Shipping) on 29 September 2023 at 9:58am); record at 46 (email from 'Turn Ip' (VOE) to E-Operations (Yu Shipping) on 3 October 2023 at 4:02pm).
[16] Record at 12, record at 48 (email from 'E-Operations' (Yu Shipping) to 'Trade Finance (VOE) on 22 September at 5:01pm).
[17] Record at 49 (email from 'E-Operations' (Yu Shipping) to 'Trade Finance' (VOE) on 20 September 2023 at 4:33pm); record at 48 (email from 'E-Operations' (Yu Shipping) to 'Trade Finance' (VOE) on 22 September at 5:01pm); record at 48 (email from 'E-Operations' (Yu Shipping) to 'Trade Finance' (VOE) on 29 September 2023 at 9:14am); record at 47 (email from 'E-Operations (Yu Shipping) to 'Trade Finance' (VOE) on 29 September 2023 at 12:17pm); 47 (email from from 'E-Operations' (Yu Shipping) to 'Trade Finance' (VOE) on

every request.[18]

9. On 29 September 2023, Yu Shipping once again urged RESPONDENT to permit discharge of the Vessel by issuing a trust receipt. It also notified RESPONDENT that the Vessel had to depart Busan by 30 September and gave RESPONDENT notice of the Vessel's Kaohsiung charter.[19]

10. At 12:17pm on 3 October 2023, CLAIMANT reminded Yu Shipping that the Vessel is likely to miss its next employment. It also notified Yu Shipping that the Kaohsiung charterer will cancel the fixture if the Vessel misses the cancelling date. [20]

11. So, at 1:37pm on 3 October 2023, after still no response from RESPONDENT the Charterer requested that CLAIMANT commence discharge,[21] and attached a LoI.[22]

12. RESPONDENT did not respond to Yu Shipping until 3:18pm, when it notified the latter that it had received the LoI from Good Oils, thus satisfying the terms of the LC.[23] Yu Shipping then again requested a trust receipt.[24]

13. At 4:42pm, RESPONDENT reiterated that they were not going to issue the Charterer with a trust receipt, as they now required the BoL because of the Charterer's *'financials'*. They stated that the Charterer must *'do as they see fit'* if they are afraid of demurrage accruing.[25]

14. The Vessel commenced discharge at 6:30am on 4 October 2023, pursuant to the

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3 October 2023 at 3:47pm); email from 'E-Operations' (Yu Shipping) to 'Trade Finance' (VOE) on 3 October 2023 4:27pm.

[18] Record at 49 (email from 'Turn Ip' (VOE) to 'E-Operations' (Yu Shipping) on 20 September at 5:23pm); record at 49 (email from 'Turn Ip' (VOE) to 'E-Operations' (Yu Shipping) on 22 September at 5:23pm); record at 46 (email from 'Turn Ip (VOE)' to 'E-Operations (Yu)' sent at 4:02PM October 3 2023); record at (email from 'Turn Ip (VOE)' to 'E-Operations (Yu)' sent 4:42PM October 3 2023).

[19] Record at 48 (email from 'E-Operations' (Yu Shipping) to 'Trade Finance' (VOE) on 29 September 2023 at 9:14am).

[20] Record at 47 (email from 'E-Operations (Yu Shipping) to 'Trade Finance' (VOE) on 29 September 2023 at 12:17pm).

[21] Record at 9 [14]; Record at 36 [10].

[22] Record at 33.

[23] Record at 47 (email from 'Turn Ip' (VOE) to 'E-Operations' (Yu Shipping) on October 3 2023 at 3:18pm).

[24] Record at 47 (email from 'E-Operations' (Yu Shipping) to 'Trade Finance' (VOE) on 3 October 2023 at 3:47pm).

[25] Record at 46, (email from 'Turn Ip (VOE)' to 'E-Operations (Yu Shipping)' on October 3 2023 at 4:42PM).

Charterer's LoI.[26] It departed Busan on 8 October 2023.[27] In the approach voyage to Kaohsiung, the Vessel encountered *'adverse'* weather which further delayed its progress.[28]

15. The Charterer then went insolvent. [29]
16. The Kaohsiung charter was cancelled on 16 September 2023, as the Vessel missed the cancelling date.[30] CLAIMANT managed to re-negotiate with the Kaohsiung charterer, but at a lower hire rate.[31]
17. CLAIMANT claims USD $3,650,000.00 from RESPONDENT, being the difference between the original and the re-negotiated hire rate for the Kaohsiung fixture.[32]

[26] Record at 9 [14]; record at 36 [10].
[27] Record at 9 [14]; record at 36 [10].
[28] Record at 9 [15]; record at 36 [10].
[29] Record at 9-10 [16]; record at 43-44.
[30] Record at 9 [15]; record at 36 [10].
[31] Record at 9 [15]; record at 36 [10].
[32] Record at 10 [20].

THE TRIBUNAL HAS JURISDICTION

1. RESPONDENT challenges the Tribunal's jurisdiction on the basis that the arbitration agreement between the parties is invalid under the law of the People's Republic of China (**PRC**). But RESPONDENT'S challenge must fail because the arbitration agreement is governed **(I)** by English law or **(II)** alternatively, by Singaporean law, and the arbitration agreement is valid under either law.

I. ENGLISH LAW GOVERNS THE ARBITRATION AGREEMENT

2. As the parties have not expressly designated the law governing the arbitration agreement, the putative law which would validate the agreement is used to determine its validity. [33]

3. The arbitration agreement is valid under English law, so English law should be applied to determine questions relating to its validity. Before turning to the question of validity, however, CLAIMANT must establish that English law would apply according to its own conflict of laws principles.[34]

4. Under English conflict of laws rules, the law governing the validity and interpretation of an arbitration agreement is governed by the law expressly or impliedly chosen by the parties or, in the absence of such a choice, the law with which the agreement is most closely connected.[35]

5. In the Contract of Carriage, the parties did not expressly choose the law applicable to their arbitration agreement, but agreed '*English law to apply to the CP'*.[36]

6. By choosing English law to govern the Contract of Carriage, the parties impliedly chose

[33] *Kabab-Ji SAL v Lout Food Group* [2021] UKSC 48; 2 All ER 911 at 920 [27]; *Dicey, Morris & Collins, The Conflict of Laws*, 15th ed (2012) at [32R-106] 32-110 - 32-113; *Born, International Commercial Arbitration*, 3rd ed (2021) at 623, 637, 3786.
[34] *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331; 221 ALR 213 at [13] per Gleeson CJ, at [91], [102] per Gummow and Hayne JJ, at [171], [174] per Kirby J, at [261] per Callinan J, at [271] per Heydon J; *Born, International Commercial Arbitration*, 3rd ed (2021) at 1508-9.
[35] *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb* ('*Enka*') [2020] UKSC 38; 1 WLR 4117; 2 Lloyd's Rep. 449 at [38].
[36] Record at 28 [76].

English law to govern the arbitration agreement as well.[37] A choice of governing law for the contract will generally apply to an arbitration agreement which forms part of that contract.[38] That is so for the simple reason that, where the parties have expressly chosen a particular law to govern their agreement, there is no reason to infer that the parties intended some other law – which the parties have not expressly chosen – to govern the arbitration agreement within their broader contract.[39]

7. While English law recognises the possibility of dépeçage,[40] a choice of the seat, without more, will not negate the inference that the law governing the underlying contract also governs the arbitration agreement.[41] The seat of arbitration is not in and of itself an implied choice of law applicable to the arbitration agreement.[42]

8. Accordingly, even if Guangzhou was the seat of arbitration (which CLAIMANT denies),[43] it does not negate the inference that, by expressly stipulating that English law governed the Contract of Carriage, the parties also agreed that English law would govern the arbitration agreement contained within it.

9. A choice of seat may be the better indication of the parties' implied choice of law for the arbitration agreement where the law of the underlying contract would render the arbitration agreement invalid.[44] But the inverse situation applies here: under PRC law the arbitration agreement is invalid.[45]

10. Thus, even *if* Guangzhou were the arbitral seat, the parties cannot have intended that a law which would render their arbitration agreement invalid should prevail over an express

[37] Ibid [27], [170]. See also *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* ('*Sulamérica*') [2012] EWCA Civ 638; WLR (D) 148; [2012] 1 Lloyd's Rep. 671 at [5].
[38] *Enka* [2020] UKSC 38; 1 WLR 4117; 2 Lloyd's Rep 449 at [170(iv)].
[39] Ibid at [43].
[40] Ibid at [38].
[41] Ibid at [170]
[42] Ibid at [117].
[43] See *infra* [16] – [20].
[44] *Enka* [2020] UKSC 38; 1 WLR 4117; 2 Lloyd's Rep. 449 at [170(vi)].
[45] *Arbitration Law of the People's Republic of China 1994,* Article 16(3), Article 10 and Article 19.

choice of law which would uphold their arbitration agreement.[46]

11. English courts assume that commercial parties are "generally unlikely" to have chosen a governing law for their arbitration agreement where there is "a serious risk" that the choice of law would invalidate or undermine that agreement.[47] Indeed, an interpretation that would render an arbitration agreement invalid "gives rise to a very powerful inference that such a meaning could not rationally have been intended".[48] There is no good reason why the Tribunal should depart from that sensible assumption in this case. Commercial parties do not intend their arbitration agreements to be '*mere wastepaper'*.[49]

12. It has now been recognised in a substantial majority of jurisdictions that arbitration agreements should be interpreted in light of a 'pro-arbitration' presumption.[50] Arbitral tribunals also apply a validation principle to this effect.[51]

13. Putting these indications of the parties' intentions to one side, applying the governing law of the underlying contract to the arbitration agreement provides certainty, consistency, avoids unnecessary complexity where there is no contrary indication, and it ensures commercial coherence.[52]

14. Accordingly, English law governs the validity of the arbitration agreement, and applying that

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[46] *Sulamérica* [2012] EWCA Civ 638; WLR (D) 148; [2012] 1 Lloyd's Rep. 671 at [30] – [32]; *Enka* [2020] UKSC 38; 1 WLR 4117; 2 Lloyd's Rep. 449 at [105], [109].

[47] [*Enka* [2020] UKSC 38; 1 WLR 4117; 2 Lloyd's Rep. 449 at [109], quoting *Sulamérica* [2012] EWCA Civ 638; WLR (D) 148; [2012] 1 Lloyd's Rep. 671 at [31]].

[48] *Enka* [2020] UKSC 38; 1 WLR 4117; 2 Lloyd's Rep. 449 [106].

[49] *Hamlyn & Co v Talisker Distillery* [1894] AC 202, 215.

[50] *Enka* [2020] UKSC 38; 1 WLR 4117; 2 Lloyd's Rep. 449 [107]; see also *Gary B Born, International Commercial Arbitration* (Kluwer Law International, 2009), 502-503, 514. See eg. Swiss Law on Private International Law, Art 178; *Mediterranee Compagnia Francese Di Assicurazioni E Riassicurazioni v Achille Laur*o, 712 F.2d 50 (3d Cir. 1983); *Remy Amerique, Inc. v. Touzet Distrib*., SARL, 816 F.Supp. 213, 216 (S.D.N.Y 1993); Judgment of 24 February 1994, *Ministry of Public Works v Société Bec Frères*, XXII Y.B Comm. Arb. 682 (Paris Cour d'appel) (1997); Judgement of 16 October 2003, 22 ASA Bull. 364 (Swiss Federal Tribunal) (2004).

[51] Award in ICC case No. 11869; Partial Award in ICC case No. 7920; Partial Award in ICC case 6474; *Gary B Born, International Commercial Arbitration* (Kluwer Law International, 2009) at 546; Institute of International Law, Santiago de Compstela, *Resolution on Arbitration between States, State Enterprises or State Entities and Foreign Entities,* 12 September 1989; Award in ICC case No. 715 (1994), 121 J.D.I (Clunet) 1059, 1061.

[52] *UniCredit Bank v Ruschemalliance LLC* (2024) EWCA Civ 64; [2024] 1 Lloyd's Rep. 350 at [46].

law the arbitration agreement is plainly valid.[53]

II. ALTERNATIVELY, SINGAPOREAN LAW GOVERNS THE ARBITRATION AGREEMENT

15. If the parties' choice of English law to govern the Contract of Carriage does not apply to the arbitration agreement, the seat of arbitration is either the next best indicia of the parties' implied choice of law, or the law with the closest connection to the arbitration agreement.[54]

16. Claimant acknowledges that an agreement to arbitrate "in" a place is generally taken to be an agreement as to the seat of arbitration. [55] But the fact that the parties agreed to arbitrate '*in Guangzhou*'[56] does not assist Respondent in circumstances where parties' arbitration agreement is invalid under PRC law.

17. Arbitration agreements, like any commercial contract, must be interpreted in a way which seeks to give effect to, rather than defeat, the purpose which the parties' had in view.[57] In particular, when faced with competing interpretations of an arbitration agreement, English courts will not – without good reason – adopt the interpretation that may invalidate or significantly undermine the arbitration agreement.[58]

18. To construe the parties' agreement to arbitrate "in Guangzhou" as the choice of seat at least gives rise to a serious risk that the arbitration agreement will be significant undermined, if not invalidated. The seat is fundamental in international arbitration: '*[b]y agreeing to a seat of arbitration the parties submit themselves to the jurisdiction of the courts of that place and to its law and coercive powers for the purposes of deciding any issue relating to*

[53] See, eg, *Herculito Maritime Ltd v Gunvor International BV* (*'The Polar'*) [2024] UKSC 2; 2 All ER 263; 1 Lloyd's Rep 85 at [16].
[54] *Enka* [2020] UKSC 38; 1 WLR 4117; 2 Lloyd's Rep. 449 [170(vi), (viii)].
[55] *Kabab-Ji* [2021] UKSC 48; 2 All ER 911 [48]; See also *Naviera Amazónica Peruana SA v Compania Internacional de Seguros del Peru* [1988] 1 Lloyd's Rep 116 at 119; *ABB Lummus Global Ltd v Keppel Fels Ltd* [1999] 2 Lloyd's Rep 24 at 31; *Shagang South-Asia (Hong Kong) Trading Co Ltd v Daewoo Logistics* [2015] EWHC 194 (Comm); 1 Lloyd's Rep 504; *BNA v BNB* [2019] SGCA 84; 1 Lloyd's Rep 55, 64-66; *Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd* [2016] SGCA 238; [2017] 1 Lloyd's Rep 59.
[56] Record at 28 [76].
[57] *Enka* [2020] UKSC 38; 1 WLR 4117; 2 Lloyd's Rep. 449 [106].
[58] Ibid at [105], [109]; *Sulamérica* [2012] EWCA Civ 638; WLR (D) 148; [2012] 1 Lloyd's Rep. 671 at [30]–[32].

the validity or enforceability of their arbitration agreement'.[59] Accordingly, the parties should not be taken lightly to have agreed to an arbitral seat whose law would invalidate their arbitral agreement.

19. This is consistent not only with the case law regarding the interpretation of arbitration agreements, but commercial contracts generally: the more unreasonable a result, the more unlikely it is that the parties could have intended for it.[60] Importantly, if the parties did intend for such a result, it should have been made '*abundantly clear*' through express words or significant evidence demonstrating a contrary intention.[61]

20. Applying the above principles, if the parties have not impliedly chosen English law to govern their arbitration agreement, the Tribunal can still uphold the parties' agreement to arbitrate without doing unnecessary violence to the words actually used.[62]

21. The parties expressly agreed to arbitrate pursuant to the '*SCMA Rules*'.[63] Rule 32.1 of the SCMA Rules provides that *'[t]he seat of arbitration shall be Singapore unless otherwise agreed by the parties*'. With this provision expressly incorporated into the Contract of Carriage, the parties' agreement to arbitrate '*in Guangzhou*' should be read as an agreement on the default location of physical hearings, such that the seat of arbitration is Singapore pursuant to rule 32.1.

22. Accordingly, if the parties have not impliedly agreed that English law governs their arbitration agreement, then Singaporean law – as the law of the seat – governs either as an alternative implied choice or as the law with the closest connection to the arbitration agreement.[64] The arbitration agreement is valid, and thus Respondent's jurisdictional

[59] *Enka* [2020] UKSC 38; 1 WLR 4117; 2 Lloyd's Rep 449 [121].
[60] *Wickman Machine Tools Sales Ltd v Schuler AG* (1974) AC 235; [1973] 2 All ER 39; [1973] 2 Lloyd's Rep. 53 at [251], cited in *Rainy Sky SA v Kookmin Bank* ('*Rainy Sky*') [2011] UKSC 50; 1 WLR 2900; [2012] 1 Lloyd's Rep. 34 at [16].
[61] Ibid.
[62] *BCCI v Ali* [2001] UKHL 8; [2002] 1 AC 251 at [39].
[63] Record at 28 [76].
[64] *Enka* [2020] UKSC 38; 1 WLR 4117; 2 Lloyd's Rep. 449 [170(v)–(vi), (viii)].

challenge must fail.

RESPONDENT IS LIABLE FOR UNLIQUIDATED DAMAGES

23. Respondent is liable to CLAIMANT for unliquidated damages because: **(I)** demurrage does not liquidate CLAIMANT'S loss of hire rate on its subsequent employment. In any event, **(II)** RESPONDENT breached a separate obligation from the laytime provisions, which caused a separate loss from that which demurrage compensates. Further, **(III)** RESPONDENT was the cause of CLAIMANT'S loss and **(IV)** CLAIMANT'S loss is not too remote.

24. On 3 October 2023, RESPONDENT became the lawful holder of the BoL.[65] As such, they have been vested with all rights of suit under the Contract of Carriage pursuant to the *Carriage of Goods by Sea Act 1992* (UK) (**'COGSA'**).[66]

25. Given that RESPONDENT has made a claim under the Contract of Carriage[67] and thereby seeks to enforce its rights under that contract,[68] it is subject to '*the same liabilities under that contract as if [it] had been a party to [the Contract of Carriage].*'[69]

26. The COGSA operates with retrospective effect, such that RESPONDENT is put in the same position as if it had been a party to the Contract of Carriage from the date of its issue.[70]

27. Thus, RESPONDENT'S knowledge of the terms of the Contract of Carriage is immaterial to its liability under that contract. Further, when identifying the parties' intention for the purposes of construing the terms of the Contract of Carriage, the relevant parties are CLAIMANT and Yu Shipping.

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[65] Record, page 37 at [16].
[66] COGSA s 2 (1).
[67] Record, page 37 [15].
[68] *Borealis AB v Stargas Ltd ('The Berge Sisar')* [2001] UKHL 17; [2002] 2 AC 205; [2001] 1 Lloyd's Rep 663 at [33]. See also *Scrutton on Charterparties*, 22nd Ed, 2011 at 2-032.
[69] COGSA s (3)(1)(b); see also *Scrutton on Charterparties*, 22nd Ed, 2011 at 2-029.
[70] *UniCredit Bank AG v Euronav NV ('The Sienna')* [2023] EWCA Civ 471; [2024] 1 All ER (Comm) 36; 1 Lloyd's Rep 117 at [28], [83-4]; *Monarch S.S. Co v Karlshamns Oljefabriker ('Monarch*') [1949] AC 196, 218; *The Berge Sisar* [2001] UKHL 17; [2002] 2 AC 205; [2001] 1 Lloyd's Rep 663 at [33]; see also *Scrutton on Charterparties,* 22nd Ed, 2008 at 31; *Carver on Bills of Lading* 3rd Ed, 2011 at [5-085].

I. DEMURRAGE DOES NOT LIQUIDATE CLAIMANT'S LOSS

28. RESPONDENT failed to discharge the Cargo within laytime,[71] and thereby breached the Contract of Carriage.[72] The availability of demurrage is no answer to CLAIMANT'S claim for damages for this breach: CLAIMANT can recover unliquidated damages for its loss of hire under the Kaohsiung Charter because this loss was separate to the damage liquidated by demurrage under the Contract of Carriage.

29. '*[I]n the absence of any contrary indication*', demurrage liquidates all of the damages arising from a charterer's failure to complete Cargo operations within the laytime.[73]

30. Clause 11 of the Charterparty reflects the parties' express agreement that demurrage is payable '*for all time that loading and discharging and used laytime… exceeds [the] laytime allowed.*'[74] This is different from the demurrage clause before the Court of the Appeal in *The Eternal Bliss,* which merely provided for demurrage *simpliciter*.[75] Properly construed, the parties agreed in cl 11 that demurrage liquidates, in this instance, no more than CLAIMANT'S damages for loss of profitable use of the Vessel during the two weeks the Vessel was detained waiting for RESPONDENT to take delivery.[76]

31. Construing the demurrage provisions of the Contract of Carriage in the way contended by RESPONDENT leads to an uncommercial result. Reasonable commercial parties are unlikely to have agreed that an hourly sum of $1500USD compensates for the loss of the Kaohsiung charter,[77] particularly when the surrounding circumstances to the Contract of Carriage

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[71] Record at 8-9 [9-14]; 36 [10].
[72] Record at 37 [14].
[73] *K Line Pte Ltd v Priminds Shipping (HK) Co Ltd* (*'The Eternal Bliss'*) [2021] EWCA Civ 1712; [2022] 3 All ER 396; 1 Lloyds Rep 12 at [52].
[74] Record at 16 [11].
[75] *The Eternal Bliss* [2021] EWCA Civ 1712; [2022] 3 All ER 396; 1 Lloyds Rep 12 at [6].
[76] *Chandris v Isbrandtsen*-Moller [1951] 1 KB 240; [1950] 2 All ER 618; 83 Ll.L Rep 385, at 394-5. Cf the demurrage provisions in *Eternal Bliss* [2021] EWCA Civ 1712; [2022] 3 All ER 396; 1 Lloyds Rep 12 at [6]; *Richco International Ltd v Alfred C Toepfer GmbH ('The Bonde')* [1991] 1 Lloyd's Rep 136 at 138; *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale;* [1967] 1 AC 361; [1966] 2 WLR 944; [1966] 1 Lloyds Rep 529, 538.
[77] Record at 13.

include the parties' mutual knowledge that the Vessel was to be delivered into that two-year time charterparty.[78]

32. For these reasons, and those in relation to causation and remoteness,[79] CLAIMANT can recover its damages for the loss of hire under the Kaohsiung Charter.

II. IN ANY EVENT, RESPONDENT BREACHED CLAUSE 38

33. CLAIMANT can recover unliquidated damages because RESPONDENT breached a separate obligation from the laytime provisions, and that breach caused a separate type of loss to that which demurrage compensates.[80]

34. This is because: **(A)** Clause 38 of the rider clauses[81] requires RESPONDENT to take delivery of the Cargo by 30 September 2023; **(B)** Clause 38 is incorporated into the Contract of Carriage, so RESPONDENT is bound by the obligation; and **(C)** CLAIMANT suffered a loss separate to the type compensated by demurrage.

35. Given that there is no limitation on the period for which demurrage is payable, [82] CLAIMANT accepts that there is no basis on which to imply a term to take delivery within a reasonable time.[83]

A. CLAUSE 38 REQUIRES RESPONDENT TO TAKE DELIVERY BY 30 SEPTEMBER 2023

36. Although at first blush cl 38 does not appear to impose a positive obligation on Respondent, '*once a clause is embodied in a commercial contract, it has simply to be construed in its context, from the objective point of view of reasonable persons in the shoes of the contracting parties*.'[84] Properly construed, cl 38 requires RESPONDENT to complete

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[78] *Investors Compensation Scheme Ltd. v West Bromwich Building Society* [1997] UKHL 28; [1998] 1 WLR 896.
[79] Infra [III], [IV].
[80] *Eternal Bliss* [2021] EWCA Civ 1712; [2022] 3 All ER 396; 1 Lloyds Rep 12. See also *The Bonde* [1991] 1 Lloyds Rep 136; *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale*; [1967] 1 AC 361; [1966] 2 WLR 944; [1966] 1 Lloyds Rep 529 at [539]; *Reidar v Arcos* [1927] 1 KB 352.
[81] Record at 25.
[82] Record at 16 [11(a)].
[83] See *Inverkip Steamship Company, Limited, v Bunge & Co* [1917] 2 KB 193, 201.
[84] *President of India v Jebsens (UK) Ltd* [1991] 1 Lloyds Rep 1, 9 HL(E).

discharge by 30 September 2023.[85]

i. Proper construction of clause 38

37. A *'reasonable person, circumstanced as the actual parties were,'*[86] would understand that a *charterparty* clause specifying that the Vessel must be at a certain place by a cancelling date imposes an obligation to take delivery in sufficient time for the Vessel to leave to meet the cancelling date.

38. It is not decisive that the parties did not use express words to impose this obligation.[87] Rider clauses in maritime contracts often contain expressions and clauses which are incomprehensible on their dictionary definition but have an understood meaning to the parties involved.[88]

39. The rider clauses were not drafted by skilled legal professionals, but this is all the more reason to find that '*however linguistically inapposite, the words would apply to something that mattered.'*[89] Indeed, where industry laypeople draw up commercial contracts, provisions in that contract are not likely to be redundant.[90]

40. Charterparty provisions which state that a vessel must be at a certain port by a specified date have been construed as containing an obligation to complete any prior undertaking by the last date when it is '*reasonably certain*'[91] that the vessel could leave and still be at the specified port at the specified time. [92]

[85] *Marley v Rawlings* [2014] UKSC 2; [2015] AC 157.
[86] *Sirius International Insurance Co v FAI General Insurance Ltd* [2004] UKHL 54; [2004] 1 WLR 3251; [2005] 1 Lloyd's Rep 461, at [18].
[87] *Charrington & Co v Wooder* [1914] A.C. 71 at 82.
[88] See eg. *Poralu Maritime Australia Pty Ltd v MV Dijksgracht* [2022] FCA 1038; [2023] 2 Lloyd's Rep 18; *Anglo-Saxon Petroleum Co Ltd v Adamastos Shipping Co Ltd* [1959] 133, 161; [1958] 2 WLR 688, 702, citing *Nelson Line (Liverpool) Ltd. v. James Nelson & Sons Ltd* [1908] AC 16, 19-20.
[89] *Trafigura Maritime Logistics Pte Ltd v Clearlake Shipping Pte Ltd ('The Miracle Hope')* [2022] EWHC 2234 (Comm); [2023] 2 Lloyd's Rep 610, 610 at [29].
[90] Cf *Beaufort Developments (NI) Ltd v Gilbert-Ash (NI) Ltd* [1999] 1 AC 266 at 273-4 per Lord Hoffmann.
[91] *CSSA Chartering and Shipping Services SA v Mitsui OSK Lines Ltd ('The Pacific Voyager*') [2017] EWHC 2579; [2018] 2 All ER (Comm) 62; [2018] 1 Lloyds Rep 57.
[92] See *Marbienes Compania Naviera S.A. v Ferrostaal A.G.* (*The "Democritos*") [1976] 2 Lloyd's Rep 149; *Monroe Brothers Ltd v Ryan* [1935] 2 KB 28; 51 Lloyd's Rep 179.

41. Clause 38 states both the location and '*strict*' cancelling date of the Vessel's next employment.[93] As they are being used in a '*technical or trade sense*',[94] these words provide the information necessary for a maritime officious bystander[95] to conclude that the Cargo must be delivered by the last date that the Vessel could leave Busan and still make the laycan.

42. Thus, the effect of cl 38 is that, in this case, RESPONDENT must take delivery from the Vessel in time for it to make its subsequent employment in Kaohsiung, with the laycan 1-14 October 2023.

43. Clause 38 construed in this way is not inconsistent with the Contract of Carriage.[96]

44. On its literal interpretation alone, it would be hard to see why cl 38 is included in the '*Special Provisions'*[97] of the charterparty at all. Clause 38 must be given some meaning[98] – this itself favours CLAIMANT'S interpretation.[99] On RESPONDENT'S case, cl 38 would serve no purpose.

45. CLAIMANT and Yu shipping agreed that cl 38 would hold a place in the special provisions of their contract; this shows that it must have an operative meaning.

46. Where there is ambiguity around the effect of a term, '*it is generally appropriate to adopt the interpretation which is most consistent with business common sense*.'[100] In the maritime context, courts focus less on the precise words of the contract and more on the underlying

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[93] Record at 25 [38].
[94] *IRC v Raphael* [1935] A.C. 96; [1934] 11 WLUK 42, at 143 per Lord Wright.
[95] *Vardinoyannis v The Egyptian General Petroleum Corporation* ('*The Evaggelos TH')* [1971] 2 Lloyds Rep 200, 204.
[96] See, eg, *R & H Hall plc v. Vertom Sheepvaart en Handelsmaatschappij BV* (*The Lee Frances),* LMLN 253, 15 July 1989 (Com Ct) per Steyn J.
[97] Record at 13.
[98] *Beckett Investment Management Group Ltd v Hall* [2007] EWCA Civ 613; [2007] ICR 1539; *Dwr Cymru Cyfyngedig (Welsh Water) v Corus UK Ltd* [2007] EWCA Civ 285.
[99] *Rainy Sky* [2011] UKSC 50 [29]; 1 WLR 2900, at 2912; [2012] 1 Lloyd's Rep 34 at [29]; *Barclays Bank plc v HHY Luxembourg SARL* [2010] EWCA Civ 1248; [2011] 1 BCLC 336 at [25]-[26].
[100] *Rainy Sky* [2011] UKSC 50; 1 W.L.R. 2900; [2012] 1 Lloyd's Rep 34.

commercial aims of the parties involved. [101]

47. Finally, only this interpretation is coherent with the facts known to the parties. Yu Shipping and CLAIMANT agreed to discharge the Vessel by 30 September. This is represented by cl 38.[102] RESPONDENT does not contest this.[103]

48. Therefore, cl 38 contains an obligation to take delivery by a time when it is reasonably certain that the Vessel could make its subsequent Kaohsiung fixture. RESPONDENT is subject to this obligation.[104]

ii. Clause 38 is incorporated into the Contract of Carriage

49. Clause 38 is incorporated into the Contract of Carriage because the incorporation clauses are *prima facie* sufficient to incorporate the charterparty,[105] and it is '*germane*' to the delivery of the Cargo.[106]

50. On examination of the specific language of the BoL, it reads, '*all conditions, Liberties and exceptions whatsoever of the said charter',* and overleaf, *'all terms, conditions, liberties and exceptions of the Charter Party… are herewith incorporated.'*[107]

51. The incorporation clause overleaf on the BoL is '*perhaps the widest of those in common use*'.[108] Further, the use of the word '*whatsoever*' on the BoL is apt to import even the most '*unusual*' clauses.[109]

52. The second stage of the incorporation analysis requires determining whether a clause is sufficiently germane to the subject matter of the charterparty.[110]

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[101] *BS&N Ltd (BVI) v Micado Shipping Ltd (Malta) ('The Seaflower') (No. 1)* [2001] 1 All E.R. (Comm) 240; [2001] CLC 421; [2001] 1 Lloyd's Rep 34 at [83]; *Nelson Line (Liverpool) Ltd. v. James Nelson & Sons Ltd* [1908] AC 16 at 19-20.
[102] Record at 7 [6].
[103] Record at 36 [10].
[104] Supra at [2] – [5].
[105] *Skips A/S Nordheim v Syrian Petroleum Co Ltd (The 'Varenna')* [1984] QB 599; 1 Lloyd's Rep 416.
[106] *Thomas & Co Ltd v Portsea SS Co Ltd* [1912] AC 1 at [6].
[107] Record at 30-31.
[108] *Scrutton on Charterparties*, 22nd Ed (2011) at 100.
[109] *Garbis Maritime Corpn v Philippine National Oil Co* ('*The Garbis*') [1982] 2 Lloyd's Rep 283 at 288-289.
[110] *Thomas & Co Ltd v Portsea SS Co Ltd* [1912] AC 1.

53. Clause 38, properly construed, is germane to the discharge operation as it imposes an obligation to discharge by a certain time.

B. CLAIMANT SUFFERED A SEPARATE LOSS TO THAT COMPENSATED BY DEMURRAGE

54. Clause 38 demonstrates the objective intention of CLAIMANT and Yu Shipping to limit the scope of demurrage so that it liquidates all damages arising from delay *unless* those damages arise as a result of the Vessel's failure to make the Kaohsiung laycan. Clauses obliging a party to discharge by a certain date confine the meaning of demurrage in the contracts of carriage wherein they are found.[111]

55. This limitation on the scope of demurrage is also consistent with the facts known to the contracting parties. At the time of the formation of the Charterparty, Yu Shipping knew the laycan, location and duration of the Vessel's next employment, and cl 38 was inserted as a result of their negotiations with CLAIMANT.

56. This accords with business common sense. It would make no business sense to insert a 'Next Employment' clause if it did not confine what demurrage liquidates when that demurrage (as in this case) runs for the whole of the exceeded laytime. If CLAIMANT and Yu Shipping intended that demurrage compensate for the whole of the delay, they would not have inserted cl 38 into the Charterparty.

57. RESPONDENT has breached an obligation other than the laytime provisions which has caused CLAIMANT to suffer a loss that, in this Contract of Carriage, is not liquidated by demurrage.

III. RESPONDENT CAUSED CLAIMANT'S LOSS

58. By their failure to permit Yu Shipping to provide berthing and discharge instructions, **(A)** RESPONDENT breached cl 38. Further, **(B)** the '*adverse wind and sea conditions'* do not break the chain of causation.

[111] *R & H Hall plc v. Vertom Sheepvaart en Handelsmaatschappij BV* (*The Lee Frances),* LMLN 253, 15 July 1989 (Com Ct) per Steyn J.

A. RESPONDENT BREACHED CLAUSE 38

59. Under its proper construction, RESPONDENT breached cl 38 as discharge was completed at 2348 LT on 7 October 2023.[112]

60. Once the Vessel arrived at Busan on 20 September, Yu Shipping was awaiting authorisation from RESPONDENT, as financier, to provide discharge and berthing instructions to the CLAIMANT. Yu Shipping requested this authorisation on 20,[113] 22[114] and 29 September.[115]

61. Although Yu Shipping ultimately issued a LoI without RESPONDENT'S authorisation,[116] it was only forced to do so after its repeated requests were denied by RESPONDENT and the Vessel had been detained for 13 days.

62. But for[117] RESPONDENT'S failure to issue this authorisation, the Vessel would have arrived at Kaohsiung by the cancelling date.

B. RESPONDENT'S BREACH CAUSED CLAIMANT'S LOSS

63. The '*adverse wind and sea conditions*'[118] do not break the chain of causation, for three reasons.

64. *First,* adverse wind and sea conditions are a foreseeable '*ordinary peril*' of the carriage of goods by sea.[119] Foreseeable events do not break the chain of causation.[120] Causation is a question of fact.[121] There is no evidence that the weather was so '*adverse*'[122] as to be unforeseeable.

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[112] Record at 7 [6]. See also Record at 48 (email from E-Operations (Yu) to Trade Finance (VOE) dated 29 September 2023 at 9:14am).
[113] Record at 49 (Email from E-Operations (Yu) to Trade Finance (VOE) 4:33pm).
[114] Record at 48 (Email from E-Operations (Yu) to Trade Finance (VOE) 5:01pm).
[115] Record at 48 (Email from E-Operations (Yu) to Trade Finance (VOE) 9:14am).
[116] Record at 33; Record at 9 [13]; Record at 46 (Email from Turn Ip (VOE) to E-Operations (Yu) 4:42pm).
[117] *Cork v Kirby Maclean Ltd* [1952] 2 All ER 402 (CA) at 407B; See also *Powell v University Hospitals Sussex NHS Foundation Trust* [2023] EWHC 736 (KB) at [23].
[118] Record at 9 [15].
[119] *Great China Metal Industries Co. Ltd. v Malaysian International Shipping Corporation Berhad* ('*The Bunga Seroja*') [1998] HCA 65; 196 CLR 161; [1999] 1 Lloyd's Rep 512 at [42].
[120] *Monarch S.S. Co v Karlshamns Oljefabriker* [1949] A.C. 196, 214-215.
[121] *Leyland Shipping Co Ltd v Norwich Union* [1918] AC 350, 362.
[122] Record at 9 [15].

65. *Second,* the Vessel would have met the laycan but for RESPONDENT'S failure to permit Yu Shipping to take delivery on or before 30 September 2023. Without adverse weather, the approach voyage to Kaohsiung would have taken 7 days.[123] If the Vessel had departed Busan on 30 September 2023 the weather would have had to have delayed the Vessel by more than 7 days to cause it to miss the Kaohsiung fixture – the storm did not delay the Vessel's progress by 7 days.[124] Accordingly, but for RESPONDENT'S conduct, the Vessel would have arrived in Kaohsiung by, at the very latest, 14 October 2023.

66. *Third,* in any event, causation is established because the breach '*materially contributed'* to the loss.[125] This is because the probability that any adverse weather would cause the Vessel to miss the Kaohsiung laycan increased as the delay at Busan continued.[126]

IV. CLAIMANT'S LOSS IS NOT TOO REMOTE

67. CLAIMANT'S loss of hire on a subsequent time charter is not too remote because it is of a kind within the reasonable contemplation of the parties at the time of contracting.[127]

68. RESPONDENT was informed of the cancelling date, location, and duration of the Vessel's subsequent fixture on 29 September 2023.[128] On 3 October 2023, RESPONDENT became the lawful holder of the BoL and entered into the Contract of Carriage with CLAIMANT. Clause 38 of the Contract of Carriage provides written notice of the features of the subsequent charter. RESPONDENT therefore had pre-contractual notice of the loss CLAIMANT would likely suffer if the Vessel was delayed in Busan past 30 September 2023.

69. Given that RESPONDENT had actual knowledge that the subsequent charter was for a period

[123] Record at 47 (Email from E-Operations (Yu) to Trade Finance (VOE)
[124] Record at 9 [15].
[125] *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1990] 1 QB 665, 716; [1987] 2 All ER 923, 955–956.
[126] *Monarch S.S. Co v Karlshamns Oljefabriker* [1949] A.C. 196, 215-216; *The Wilhelm* (1966) 14 L.T. 636; *Associated Portland Cement Manufacturers (1900), Ltd v Houlder Brothers & Co., Ltd* (1917) 86 L.J. (K.B.) 1495.
[127] See *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 K.B. 528, 537-539; *Czarnikow v Koufos, The Heron II* [1969] 1 AC 350, 385; *Transfield Shipping Inc v Mercator Shipping Inc ('The Achilleas')* [2008] UKHL 48; [2009] A.C. 61; [2008] 2 Lloyd's Rep 275 [9], [11], [60], [91].
[128] Record at 43.

of two years, and, as a commercial maritime actor, ought to have known about the likelihood of fluctuation in the time charter market, it had notice of the possible extent of CLAIMANT'S loss were the subsequent time charter to be cancelled.[129]

70. By contracting with notice of the kind and possible extent of loss that CLAIMANT would likely suffer if the Vessel did not reach Kaohsiung by the cancelling date, this loss was quantifiable and foreseeable,[130] such that RESPONDENT assumed responsibility for it.[131] This is the loss actually suffered by CLAIMANT.

71. CLAIMANT mitigated this loss by renegotiating with the subsequent charterer and entering into a new time charterparty.

CLAIMANT IS NOT LIABLE TO RESPONDENT FOR MISDELIVERY

72. Claimant is not liable to pay Respondent the value of the Cargo because (**I**) CLAIMANT did not misdeliver the Cargo. In any event, (**II**) CLAIMANT did not cause RESPONDENT'S loss. Furthermore, (**III**) RESPONDENT cannot claim damages in conversion.

I. CLAIMANT DID NOT MISDELIVER THE CARGO

A. CLAIMANT WAS REQUIRED BY CLAUSE 57 OF THE CONTRACT OF CARRIAGE TO DELIVER AGAINST YU SHIPPING'S LETTER OF INDEMNITY

73. The Contract of Carriage incorporates[132] cl 57 of the Rider Clauses.[133] That clause required Claimant to release the Cargo upon production of Yu Shipping's LoI, even in the absence of the original BoL.[134]

74. The Tribunal is not bound by the *The Sienna*[135] to find that compliance with cl 57

[129] *The Achilleas* [2008] UKHL 48 ; [2009] A.C. 61; [2008] 2 Lloyd's Rep 275 at [32].
[130] *The Achilleas* [2008] UKHL 48 ; [2009] A.C. 61; [2008] 2 Lloyd's Rep 275 at [32].
[131] See *Hadley v Baxendale* (1854) 23 LJ Ex 179; 9 Exch 341; 156 ER 145 at 151 [354-5]; *The Achilleas* [2008] UKHL 48 ; [2009] A.C. 61; [2008] 2 Lloyd's Rep 275 at [33], citing *Satef-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA* ('*The Pegase*') [1981] 1 Lloyd's Rep 175 at 183.
[132] *Thomas & Co Ltd v Portsea SS Co Ltd* [1912] AC 1 at [6] (Lord Atkinson); See also *Scrutton on Charterparties* 24th Edition (2020) at [6-016] – [6-018] endorsed in *The Polar* [2024] UKSC 2; 2 All ER 263; 1 Lloyd's Rep 85 at [77].
[133] Record at 28.
[134] Record at 24 [28].
[135] *The Sienna* [2023] EWCA Civ 471; [2024] 1 All ER (Comm) 36; 1 Lloyd's Rep 117

nevertheless constitutes a breach of the Contract of Carriage. That case concerned a materially different clause, which provided that the shipowner could make delivery without the bill of lading '*in consideration of Charterers indemnifying Owners*'.[136]

75. The Tribunal should not find that, by complying with one mandatory clause of the Contract of Carriage, the CLAIMANT is automatically in breach of another. This result would be unjust, particularly because CLAIMANT has no recourse against Yu Shipping.

B. RESPONDENT HAD NO TITLE TO THE CARGO

76. RESPONDENT cannot claim for misdelivery of the goods because it never had title to the goods by virtue of being a holder of the BoL. That is because the parties never intended the BoL to function as a document of title.[137]

77. The Tribunal should infer that the underlying chain of sale transactions between the parties did not require the BoL to be presented for delivery to occur. It would be for RESPONDENT to provide evidence about the terms of the sale contract. In circumstances where they have not, it is open to the Tribunal to draw this inference.

78. Further, the trust receipt financing arrangement between RESPONDENT and Yu Shipping contemplated that the Cargo would be sold prior to RESPONDENT becoming a lawful holder of the BoL. RESPONDENT never looked to the BoL as providing the '*keys to the warehouse*'[138] because it never sought possession of the Cargo or looked to the Cargo as security.[139]

II. IN ANY EVENT, CLAIMANT DID NOT CAUSE RESPONDENT'S LOSS

79. CLAIMANT'S decision to deliver other than against production of the BoL was not the cause

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[136] *The Sienna* [2023] EWCA Civ 471; [2024] 1 All ER (Comm) 36; 1 Lloyd's Rep 117 [6].
[137] *The Luna* [2021] SGHC 84; [2022] 1 Lloyd's Rep 216 [71-2].
[138] *The Luna* [2021] SGHC 84; [2022] 1 Lloyd's Rep 216, citing *Carver on Bills of Lading* (Sweet & Maxwell, 3rd Ed, 2011).
[139] See *Infra* III.

of RESPONDENT'S loss because RESPONDENT never looked to the BoL as security.[140] The true cause of RESPONDENT'S loss is Yu Shipping's insolvency. This is for 5 reasons.

80. *First*, RESPONDENT entered a trust receipt financing arrangement with Yu Shipping. This arrangement would involve RESPONDENT authorising Yu Shipping to sell the cargo to the Korean Buyers, and that in turn Yu Shipping remit those sale proceeds to RESPONDENT to satisfy its loan.[141] Therefore, RESPONDENT looked to the BoL not for its possessory title but as something to trade, in order to ultimately recoup its advance to Good Oils. This trust receipt financing arrangement inherently involved that the Cargo could be discharged by CLAIMANT without production of the BoL.[142] It was not within RESPONDENT'S commercial contemplation that the BoL would act as security for the debt owed by Yu Shipping.[143]

81. *Second,* RESPONDENT '*implicitly, if not expressly approved of discharge without production of the bill of lading*', by consenting to CLAIMANT'S discharge against a LoI.[144] RESPONDENT told Yu Shipping that if it was afraid of demurrage accruing, '*you must do as you deem fit as Charterers and will not interfere so long as the loan is repaid.*'[145] The fact that Yu Shipping initiated discharge prior to receiving this authorisation[146] is of no moment; RESPONDENT would have consented to what actually occurred.[147]

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[140] *Standard Charterered Bank (Singapore) Ltd v Maersk Tankers Singapore Pte Ltd ('The Maersk Princess')* [2022] SGHC 242; [2023] 1 Lloyd's Rep 509 at [48].
[141] See *STI Orchard*, [2022] SGHCR 6; [2023] 1 Lloyd's Rep 22 at [56] quoting M Bridge, *Benjamin's Sale of Goods* (Sweet & Maxwell, 11th Ed, 2021) at [18-504]: 'These documents are by no means uniform in content, but their essential features are as follows. They provide for the release by the bank of the bills of lading to the debtor as trustee for the bank, and authorise him to sell the documents or the goods on behalf of the bank. The debtor, for his part, undertakes to hold the goods and their proceeds in trust for the bank, and to remit the proceeds to the bank, at least up to the amount of the advance.'
[142] *The Sienna* [2022] 2 Lloyd's Rep 467 at [89]-[90] (Moulder J's findings on causation were not disturbed on appeal: 1 Lloyd's Rep 117); cited in *The Maersk Princess* [2022] SGHC 242; [2023] 1 Lloyd's Rep 509, 514 at [39(a)].
[143] Facts, 37[15]; *Unicredit Bank AG v Euronav NV* (*'The Sienna'*) [2023] EWCA Civ 471; 1 All ER (Comm) 36; [2024] 1 Lloyd's Rep 177 at [89] – [90]; See also *Fimbank plc v Discover Investment Corpn* ('*The Nika*') [2020] EWHC 254 (Comm); [2021] 1 Lloyd's Rep 109 at [20] – [22]; *STI Orchard* [2022] SGHCR 6; [2023] 1 Lloyd's Rep 22 at [58].
[144] *The Sienna* [2022] 2 Lloyd's Rep 467 at [92], [120]; *The Maersk Princess* [2022] SGHC 242; [2023] 1 Lloyd's Rep 509, 514 at [39(b)].
[145] Record at 46.
[146] Record at 46, (email from 'Turn Ip (VOE)' to 'E-Operations (Yu)' sent 4:42PM October 3 2023).
[147] *The Sienna* [2023] EWCA Civ 471; 1 All ER (Comm) 36; [2024] 1 Lloyd's Rep 177 at [92]; *The Nika* [2020] EWHC 254 (Comm); [2021] 1 Lloyd's Rep 109 at [26] – [28].

82. *Third,* RESPONDENT called on Yu Shipping to pay the loan after RESPONDENT had only received a LoI from Good Oils.[148] RESPONDENT expected that, under its financing arrangement, the Cargo would be sold to the Korean Buyers prior to its receipt of the BoL.[149] This only further exemplifies that RESPONDENT never sought a proprietary interest from the BoL.

III. CLAIMANT IS NOT LIABLE FOR CONVERSION OR BREACH OF BAILMENT

83. CLAIMANT was not bailee of RESPONDENT'S Cargo.[150] For the reasons set out above,[151] the BoL, in RESPONDENT'S hands, was not a document of title.

84. In any event, actions in conversion or breach of bailment fail for causation.[152]

[148] Record at 47 (email from Turn Ip (VOE) to E-Operations (Yu) 3 October 2023 3:18pm); (email from E-Operations (Yu) to Trade Finance (VOE) 3 October 2023 3:47pm).
[149] Record at 47 (email from Turn IP (VOE) to E-Operations (Yu) 3 October 2023 3:18pm); Record at 43, 45.
[150] See *Homburg Houtimport BV v Agrosin Private Ltd* ('*The Starsin'*) [2003] UKHL 12; [2004] 1 A.C. 715; [2003] 1 Lloyd's Rep 571 at [132]; see also *The Pioneer Container (KH Enterprise)* [1994] 2 AC 324; [1994] 3 WLR 1; [1994] 1 Lloyd's Rep 593 at 342.
[151] *Supra* I(B).
[152] See *supra* III(A).

PRAYER FOR RELIEF

For the reasons set out above, CLAIMANT seeks the following relief:

1. A declaration that the Tribunal has jurisdiction to hear this dispute.
2. RESPONDENT pay CLAIMANT the amount of USD 3,650,000.00 by way of unliquidated damages for the loss of the Kaohsiung charter.
3. A declaration that CLAIMANT is not liable to RESPONDENT for damages for misdelivery of the Cargo.
4. Costs.