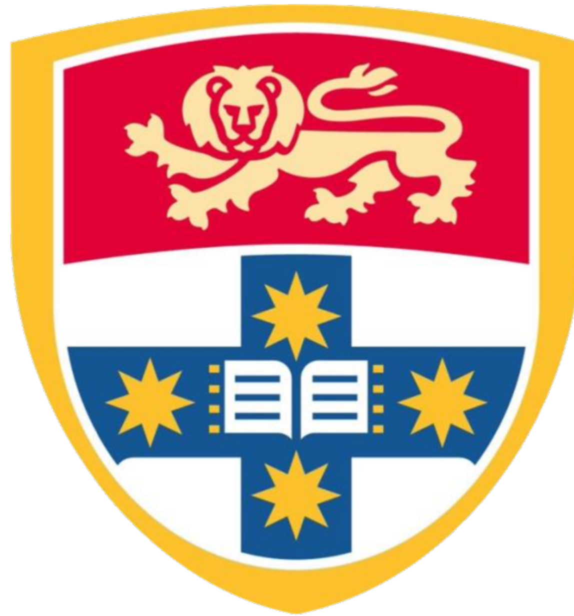
TWENTY-FIRST ANNUAL

INTERNATIONAL MARITIME LAW ARBITRATION MOOT

2024

MEMORANDUM FOR CLAIMANT



THE UNIVERSITY OF SYDNEY

TEAM T

ON BEHALF OF:	**AGAINST:**
VEGGIES OF EARTH BANKING LTD	TOMAHAWK MARITIME S.A.
RESPONDENT	**CLAIMANT**

COUNSEL

Angela Xue Catherine Nguyen Edward Goodman Noam Antonir

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TABLE OF ABBREVIATIONS

Arbitration	Present arbitration between *Tomahawk Maritime S.A. v Veggies of Earth Banking Ltd*
B/L(s)	Bill(s) of Lading No. COW-001A
Cargo	Shipment of 16,999.01 MT of Crude Palm Oil (Edible Grade)
Charterparty	Charterparty between Tomahawk Maritime S.A. and Yu Shipping Ltd
Charterer	Yu Shipping Ltd
CLAIMANT	Tomahawk Maritime S.A.
Discharge LOI	Letter of Indemnity issued by Yu Shipping Ltd to CLAIMANT on 3 October 2023
L/C	Letter of Credit issued by RESPONDENT to finance Yu Shipping's purchase of the Cargo in favour of Good Oil Sdn Bhd
Payment LOI	Letter of Indemnity issued by Good Oil Sdn Bhd to RESPONDENT on 3 October 2023
Record	Moot Scenario released 26 December 2023
RESPONDENT	Veggies of Earth Banking Ltd
Rider Clauses	Tomahawk Maritime Rider Clauses
SCMA	Singapore Chamber of Maritime Arbitration
Vessel	MV "NIUYANG"

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STATEMENT OF FACTS

1. On 14 August 2023, Yu Shipping Ltd (**Yu Shipping,** the **Charterer**) purchased 16,999.01 MT of crude palm oil (**Cargo**) from Good Oil Sdn Bhd (**Good Oil,** the **Shipper**). As part of a trade finance facility, Veggies of Earth Banking Ltd (**RESPONDENT**) financed the Cargo on behalf of Yu Shipping through a Letter of Credit (**L/C**), payable against shipping documents or a Letter of Indemnity. On 1 September 2023, Yu Shipping, as buyer of the Cargo and Charterer, entered into a voyage charterparty VEGOILVOY (**Charterparty**) with Tomahawk Maritime S.A (**CLAIMANT**) to carry the Cargo from Bintulu, Malaysia to Busan, South Korea in the MV 'NIUYANG' (**Vessel**).
2. The Charterparty and the Tomahawk Maritime Rider Clauses (**Rider Clauses**) were incorporated into the Tanker Bill of Lading NO. COW-001A (**B/L**) dated 4 September 2023, which named RESPONDENT as the consignee. Clause (E) of the B/L provided a fixed laytime of 96 hours, after which demurrage was payable.
3. CLAIMANT and Yu Shipping agreed that the carriage of Cargo to Busan would be completed by 30 September 2023 so that the Vessel would arrive in Kaohsiung, Taiwan in time for a subsequent time charter (**Next Employment**).
4. The Vessel arrived in Busan on 20 September 2023, ten days in advance of the agreed time for completion of the voyage. RESPONDENT was informed of the Vessel's arrival that same day, when Yu Shipping applied for a trust receipt loan. On 29 September 2023, RESPONDENT was reminded twice of the Vessel's subsequent employment and made aware that the Vessel must depart Busan by 7 October 2023 at latest to arrive in Kaohsiung on time.
5. Email correspondence on 3 October 2023 between RESPONDENT and Yu Shipping evidences that a Letter of Indemnity (**Payment LOI**) was received by RESPONDENT that day, and RESPONDENT paid Good Oil, as seller of the Cargo, against the Payment LOI pursuant to the terms of the L/C. However, RESPONDENT did not issue the requested trust receipt.

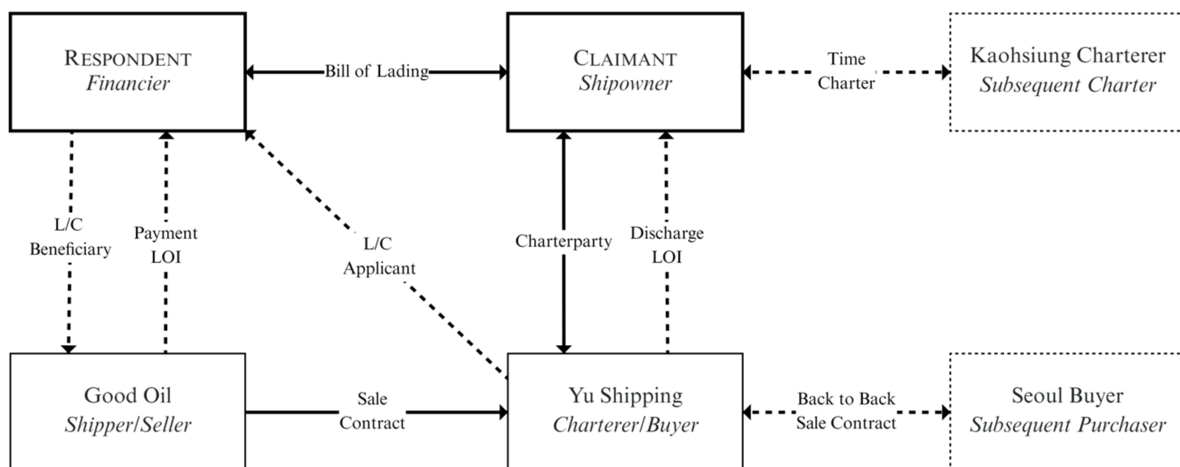
6. RESPONDENT became the lawful holder of the B/L on 3 October 2023, and has remained in continuous possession of the B/L since.

7. On 4 October 2023, and following email correspondence between Yu Shipping and RESPONDENT, CLAIMANT discharged the Cargo pursuant to a Letter of Indemnity issued by Yu Shipping (**Discharge LOI**). Discharge of the Cargo was completed on 2348LT on 7 October 2023, and the Vessel departed Busan at 0241LT on 8 October 2023.

8. The Vessel's voyage from Busan to Kaohsiung was prolonged by adverse wind and sea conditions, though it remained approximately 300 nautical miles from Kaohsiung on 16 October 2023, when the charterers for the Vessel's next fixture sought to cancel the Next Emploment. CLAIMANT later reinstated this employment, but only at a lower rate of hire of USD 30,000 per day.

9. On 15 November 2023, CLAIMANT issued a demand to Yu Shipping claiming USD 3,650,000 as compensation for the cancellation of the Charterparty. By this time, Yu Shipping had entered into liquidation, and this demand was considered by Yu Shipping's interim liquidators. On 29 November 2023, RESPONDENT wrote to CLAIMANT claiming to be the holder of the B/L. On 22 December 2023, CLAIMANT issued a Notice of Arbitration to RESPONDENT, thereby instituting these proceedings.

Figure 1: Diagram of Contractual Relationships



JURISDICTION

10. In accordance with the doctrine of *kompetenz-kompetenz*, the Tribunal can determine the extent of its own jurisdiction.[1] The question of jurisdiction in this Arbitration depends on the validity of the arbitration agreement between the parties, which is determined by the law of the arbitration agreement.[2] The law of the forum, being Singapore law, is the relevant law for determining the law of the arbitration agreement.[3]

11. The agreement is set out at Clause 76 of the Rider Clauses (**Arbitration Agreement**), which is incorporated into the B/L by Clause 1 of the '*Conditions of Carriage*' and Clause (H) the Charterparty.[4] It provides for:[5]

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

12. The Tribunal has jurisdiction to determine the issues in this proceeding on the basis that Chinese law is not the law of the Arbitration Agreement, and accordingly, the Arbitration Agreement is valid. *First*, and to the extent that the law of the seat is the law governing the Arbitration Agreement, Singapore law is its governing law (**I**). *Second*, and in the alternative, CLAIMANT submits that by selecting English law as the governing law of the B/L, the parties

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[1] Nigel Blackaby et al, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th ed, 2015), 322, 345; *Dallah Real Estate and Tourism Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763, 830 [84] (Lord Collins of Mapesbury JSC); *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] 1 WLR 1889, 1902 (Lord Mance JSC); *UNCITRAL Model Law on International Commercial Arbitration*, Art 16(1); *SCMA Arbitration Rules 2022* r 30.1.
[2] *Anupam Mittal v Westbridge Ventures II Investment Holdings Enka Insaat Ve Sanayi* [2023] SGCA 1, [53] (Judith Prakash JCA) ('*Anupam*'); *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] 2 Lloyd's Rep 449, 477 [136]–[138] (Lord Hamblen and Lord Leggatt JJSC) ('*Enka v Chubb*'); *UNCITRAL Model Law on International Commercial Arbitration*, Art 34(2)(a)(i); Gary B Born, 'The Law Governing International Arbitration Agreements: An International Perspective', (2014) 26 *Singapore Academy of Law Journal* 814, 816.
[3] *Anupam* (n 2) [43] (Judith Prakash JCA); *Enka v Chubb* (n 2) 457–8 [31]–[33] (Lord Hamblen and Lord Leggatt JJSC); Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 3rd edition, 2021) 644; Klaus Peter Berger, 'Re-Examining the Arbitration Agreement, Applicable Law Consensus or Confusion?' in Albert Jan van den Berg (ed), *ICCA Congress Series Vol 13* (Kluwer Law International, 2006) 301, 316–7.
[4] *Record* 31 cl 1 (B/L).
[5] *Record* 28 cl 76 (Rider Clauses).

impliedly designated English law as the law of the Arbitration Agreement (**II**). In either case, CLAIMANT submits that the Tribunal should, where possible, select a law to govern the Arbitration Agreement which will validate the parties' common intention to arbitrate (**III**). Therefore, Chinese law is irrelevant to the Arbitration Agreement's validity and RESPONDENT's objection to jurisdiction cannot be sustained.

I. THE LAW OF THE ARBITRATION AGREEMENT IS SINGAPORE LAW

13. RESPONDENT's primary objection to the Tribunal's jurisdiction is that Chinese law, as the law of the seat, invalidates the Arbitration Agreement. CLAIMANT submits that this objection is unfounded. Insofar as the governing law of the Arbitration Agreement is the law of the seat, the arbitral seat is Singapore on proper construction of Clause 76.

14. *First*, there is no express designation of a seat in Clause 76. The words '*in Guangzhou'* reference the venue of the Arbitration, and the word '*in*' does not expressly designate Guangzhou as the arbitral seat.[6] The seat, being the jurisdiction whose national law constitutes the *lex arbitri*,[7] is distinct from an arbitration's venue.[8] Guangzhou likely represents a location of convenience,[9] given the geographical proximity of China to the parties' business operations.

15. *Second*, the SCMA Rules provide that the seat of an arbitration 'shall be Singapore unless otherwise agreed by the parties'.[10] By opting for arbitration under SCMA Rules without an explicit specification of the arbitral seat, the parties must be taken to have agreed to the seat

[6] *PT Garuda Indonesia v Birgen Air* [2002] SGCA 12, [23]–[24] (Chao Hick Tin JA and Tan Lee Meng J); *Naviera Amazonica Peruana SA v Compania International de Seguros del Peru* [1988] 1 Lloyd's Rep 116, 120 (Kerr LJ) ('*Naviera*').
[7] *Shagang South-Asia (Hong Kong) Trading Co Ltd v Daewoo Logistics* [2015] 1 Lloyd's Rep 504, 509–10 [29]–[33] (Hamblen J); Adrian Briggs et al, *Dicey, Morris & Collins on The Conflict of Laws* (Sweet & Maxwell, 16th ed, 2023) 884 [16-033].
[8] *Enercon GMBH v Enercon (India Ltd)* [2012] 1 Lloyd's Rep 519, 537 [62] (Eder J); *Shashoua v Sharma* [2009] 2 Lloyd's Rep 376, 380 [26] (Cooke J).
[9] *Naviera* (n 6) 120 (Kerr LJ); *Salini Costruttori S.P.A. v The Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority* (International Court of Arbitration, Case No 10623/AER/ACS, 7 December 2001) [100]; Matthias Schrerer, 'The Place or 'Seat' of Arbitration – Some Remarks on the Award in ICC Arbitration n° 10'623' (2003) 1 *ASA Bulletin* 112, 112.
[10] *SCMA Arbitration Rules 2022* r 32.1.

which is fixed in accordance with these rules.[11] This is a clear manifestation of the parties' intention to have their disputes resolved according to the procedural laws of Singapore.[12]

16. Thus, to the extent that the Tribunal accepts RESPONDENT's contention that the governing law of the Arbitration Agreement is the law of the seat, the law of the Arbitration Agreement is Singapore law. Accordingly, the Arbitration Agreement is valid, given it meets the substantive requirements under Singapore law.[13]

II. ALTERNATIVELY, ENGLISH LAW, AS THE PROPER LAW OF THE B/L, GOVERNS THE ARBITRATION AGREEMENT

17. Under Singapore law, the test for determining the law governing an arbitration agreement is *first*, whether the parties made an express choice of law; *second*, whether the parties made an implied choice of law; and *third*, if neither can be discerned, which system of law has its closest and most real connection with the arbitration agreement.[14] CLAIMANT submits that in the absence of an express choice of law, English law as the governing law of the B/L, is an implied choice of the law governing the Arbitration Agreement.

18. *First*, the balance of authority in Singapore law is that the implied choice of law of an arbitration agreement is the proper law of the contract.[15] Here, the parties have explicitly designated '*English law to apply to the CP*'.[16] Where the governing law and law of the seat are distinct, the Tribunal should found its inquiry on a natural interpretation of the governing law clause, namely that it was intended to extend to the Arbitration Agreement.[17] It is a reasonable

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[11] *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56, [27]–[29] (Belinda Ang Saw Ean J).
[12] *BNA v BNB* [2019] SGHC 142, [110] (Vinodh Coomaraswamy J); *BNA v BNB* [2020] 1 Lloyd's Rep 55, 65 [67]–[69] (Steven Chong JA) ('*BNA v BNB*').
[13] *International Arbitration Act 1994* (Singapore) pt 2 s 2A(3), s 2A(8).
[14] *Anupam* (n 2) [62] (Judith Prakash JCA); *BCY v BCZ* [2017] 2 Lloyd's Rep 583, 589–90 [40] (Steven Chong J) ('*BCY*').
[15] *Anupam* (n 2) [67] (Judith Prakash JCA); *BCY* (n 14) 591 [49] (Steven Chong J); *Sul America Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] 1 Lloyd's Rep 671, 679 [26] (Moore-Bick LJ) ('*Sul America*'); *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2013] 1 Lloyd's Rep 235, 244 [21] (Smith J).
[16] *Record* 28 cl 76 (Rider Clauses).
[17] *Enka v Chubb* (n 2) 460 [43]–[44] (Lord Hamblen and Lord Leggatt JJSC); Nigel Blackaby et al, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th ed, 2015) [3.12].

presumption that businesspeople will resolve their disputes according to a single system of law, particularly where the bifurcation of their agreement would be without good reason.[18]

19. RESPONDENT cannot rely on cases in which the law of the arbitration agreement was found to be the seat. The proposition in *Firstlink*,[19] that the law of the seat is an arbitration agreement's governing law, has been expressly disapproved.[20] RESPONDENT also cannot rely on *BNA v BNB*, as in that case both the proper law of the contract and the law of the seat were Chinese law.[21]

20. *Second*, this implied choice stands even if the Arbitration Agreement designated Guangzhou as the arbitral seat.[22] The selection of a contract's governing law as the law of the arbitration agreement, despite the existence of a differing seat, provides a degree of certainty, consistency and authenticity to the law surrounding international arbitration.[23] The presumption should only be set aside if choosing the proper law of the contract would invalidate the agreement, which is precisely what would occur if the Tribunal accepted RESPONDENT's submissions.[24]

III. THE TRIBUNAL SHOULD SEEK TO VALIDATE THE ARBITRATION AGREEMENT

21. In the face of competing constructional choices about the Arbitration Agreement's governing law, CLAIMANT submits that the Tribunal should give effect to the parties' intention to arbitrate.[25] Assuming RESPONDENT's contentions about Chinese law are correct, Chinese law would overrule the parties' intention to arbitrate. Accordingly, the Tribunal should prefer a commercially logical and practical construction that gives effect to this intention.[26]

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[18] *Kahler v Midland Bank Ltd* [1950] AC 24, 42 (Lord MacDermott); Lord Collins of Mapesbury et al, *Dicey, Morris & Collins on the Conflict of Laws* (Sweet & Maxwell, 16th ed, 2023) 1808 [32-044]; *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1981] 2 Lloyd's Rep 446, 456 (Mustill J).
[19] *FirstLink Investments Corporation Ltd v GT Payment Pte Ltd* [2014] SGHCR 12.
[20] *BCY* (n 14) 591 [50] (Steven Chong J); *Anupam* (n 2) [62] (Judith Prakash JCA).
[21] *BNA v BNB* (n 12) 70 [104] (Steven Chong JA).
[22] *Enka v Chubb* (n 2) 483 [170(vi)] (Lord Hamblen and Lord Legatt JJSC).
[23] Ibid 462 [53]–[54] (Lord Hamblen and Lord Leggatt JJSC).
[24] *BCY* (n 14) 595 [74] (Steven Chong J); *Sul America* (n 15) 680 [32] (Moore-Bick LJ).
[25] *Fiona Trust v Privalov* [2007] 1 Lloyd's Rep 254, 256 [6] (Lord Hoffmann); *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] SGCA 24, [30] (Chan Sek Keong CJ); Emmanuel Gaillard and John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) 258.
[26] *Law Debenture Trust Corporation Plc v Elektrim Finance BV* [2005] 2 Lloyd's Rep 755, 766 [39] (Mann J).

22. Moreover, this aligns with the public policy of any court in which either party may seek to enforce the arbitral award. The 'validation principle', recognised under Singapore, English, and Chinese law, prioritises giving effect to the parties' common intention to arbitrate.[27]

ARGUMENTS ON THE MERITS OF THE CLAIM

IV. CLAIMANT IS ENTITLED TO RECOVER UNLIQUIDATED DAMAGES FOR DELAYED DISCHARGE

23. CLAIMANT is entitled to unliquidated damages to compensate for RESPONDENT's delayed discharge of the Cargo, which resulted in CLAIMANT having to accept a discounted rate of hire for the Next Employment. This loss (the **negotiated discount**), amounting to USD 3,650,000, represents the difference between the initial and negotiated rate of hire.[28]

24. RESPONDENT admits that it breached the laytime provision but asserts that it is liable only for demurrage.[29] However, the Tribunal should award CLAIMANT unliquidated damages for its consequential loss resulting from breach of the fixed laytime, being the negotiated discount (**A**). Alternatively, RESPONDENT breached an implied obligation to take delivery in a reasonable time, which is separate and distinct from the fixed laytime provision (**B**). In either case, RESPONDENT's breach was an effective cause of CLAIMANT's loss (**C**). Further, the loss represented by the negotiated discount was not too remote from RESPONDENT's breaches (**D**).

A. RESPONDENT IS LIABLE FOR INDIRECT AND CONSEQUENTIAL LOSS FROM BREACH OF LAYTIME

25. CLAIMANT contends that Clause 11 '*DEMURRAGE*' of the Charterparty (**Demurrage Clause**),[30] on proper construction, confines demurrage narrowly to cover only direct losses arising from RESPONDENT's breach of the 96-hour laytime provided for by Clause (E) of the

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[27] *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2022] 1 Lloyd's Rep 24, 34 [49] (Lord Hamblen and Lord Leggatt JJSC); *BCY* (n 14) 595 [74] (Steven Chong J); *Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Judicial Review of Arbitration Cases*, Supreme People's Court of the People's Republic of China, No. 22, 26 December 2017; Gary Born, *International Commercial Arbitration* (Kluwer Law International, 3rd ed, 2021) 92–3.
[28] *Record* 9 [15] (Statement of Claim), 10 [20] (Statement of Claim).
[29] *Record* 37 [14] (Statement of Defence and Counterclaim).
[30] *Record* 16 cl 11 (Charterparty).

Charterparty.[31] RESPONDENT is liable under Clause (E) as if it were a party to the contract of carriage *ab initio*, as it has asserted a claim for misdelivery under the contract of carriage against CLAIMANT in respect of the Cargo the subject of the B/L.[32]

26. The Demurrage Clause provides:

> *Charterer shall pay demurrage per running hour and pro ram for a part thereof at the rate stipulated in Part I for all the time that loading and discharging and used laytime as elsewhere herein provided exceeds die* [sic] *allowed laytime herein specified…*

27. On its proper construction, the Demurrage Clause does not liquidate indirect and consequential loss, such as CLAIMANT's negotiated discount, for three reasons.[33]

28. *First*, the Demurrage Clause plainly indicates that it only captures such '*time*' as is spent '*loading and discharging*' and as '*laytime*'. This denotes that demurrage was intended to only be referable to the time that the Vessel was detained and the resulting loss of use. Thus, the Demurrage Clause will not capture CLAIMANT's loss, which occurred well after the Vessel had completed discharge, and was indirect and unrelated to loss of use. CLAIMANT's submission is consistent with decisions in which courts have been prepared to award unliquidated damages for loss that flows indirectly or consequentially from detention of a vessel.[34]

29. *Second*, the narrow construction of the Demurrage Clause is supported by other provisions of the contract of carriage. Specifically, Clause 38 '*Next Employment*' of the Rider Clauses

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[31] *Record* 12 cl (E) (Charterparty); *K Line PTE v Priminds Shipping (HK) Co Ltd* ('*The Eternal Bliss*') [2022] 1 Lloyd's Rep 12, 21 [53] (Males LJ); *Aktieselskabet Reidar v Arcos Ltd* (1926) 25 Ll L Rep 513, 516 (Atkin LJ) ('*Reidar*').

[32] *Carriage of Goods by Sea Act 1992* (UK), s 3(1).

[33] Bernard Funston and Eugene Meehan, *Carver on Charterparties* (Sweet & Maxwell Ltd, 1st ed, 2017) 540; *Reardon Smith Line Ltd v Hansen-Tangen* ('*The Diana Prosperity*') [1976] 2 Lloyd's Rep 621, 624–5 (Lord Wilberforce); *Total Transport Corporation v Amoco Trading Co* ('*The Altus*') [1985] 1 Lloyd's Rep 423, 435–6 (Webster J).

[34] *The Altus* (n 33) 435–6 (Webster J); *Adelfamar S.A. v Silos E Mangimi Martini S.p.A.* ('*The Adelfa*') [1988] 2 Lloyd's Rep 466, 472 (Evans J); *Chandris v Isbrandtsen-Moller Co Inc* ('*The Eugenia Chandris*') (1950) 83 Ll L Rep 385, 397–8 (Devlin J); *Reidar* (n 31) 516 (Bankes LJ), 516 (Atkin LJ).

expressly contemplates a type of loss that would arise indirectly from delay that is separate and distinct from the loss sought to be liquidated by demurrage.[35] The clause stipulates:

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

30. Laycan is a recognised term, denoting the date after which a charter can be cancelled if a vessel has not by then arrived.[36] The parties would not have included Clause 38 if they sought to have all consequences arising from failure to observe this laycan to be liquidated by demurrage.

31. *Third*, the disparity between the rate of demurrage and the negotiated discount suggests that demurrage was agreed upon prospectively to account only for the Vessel's expected loss of use and not the wholesale cancellation of the Next Employment. While the B/L does not reveal the basis on which demurrage was calculated, the Demurrage Clause provides for a daily rate of USD 36,000, which is disproportionate to the total loss suffered by CLAIMANT over the two-year period in which it accepts a lesser rate of hire. RESPONDENT's wide construction of demurrage is uncommercial, as it would entail demurrage being disproportionate to the loss intended to be liquidated, which would not crystallise until the discounted rate for the substitute follow-on fixture was agreed upon.[37]

32. RESPONDENT has admitted to breach of the fixed laytime.[38] Provided CLAIMANT establishes causation (**C**) and remoteness (**D**), it is entitled to compensation for the negotiated discount, as it is a consequential and indirect loss that is not liquidated by the Demurrage Clause.

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[35] *Record* 25 cl 38 (Rider Clauses).
[36] *Erg Raffinerie Mediterranee S.P.A v Chevron Usa Inc* ('*The Luxmar*') [2007] 2 Lloyd's Rep 542, 546 [16] (Longmore LJ).
[37] *Reardon Smith Line Ltd v Hansen-Tangen* ('*The Diana Prosperity*') [1976] 2 Lloyd's Rep 621, 624–5 (Lord Wilberforce).
[38] *Record* 37 [12] (Statement of Defence and Counterclaim).

B. ALTERNATIVELY, RESPONDENT BREACHED AN IMPLIED OBLIGATION TO PROCURE DISCHARGE WITHIN A REASONABLE TIME

33. In the alternative to breach of the fixed laytime in the B/L, CLAIMANT is entitled to unliquidated damages for breach of an implied term in the B/L to procure discharge within a reasonable time. This is because breach of such an implied obligation would be separate and distinct from laytime, and would entitle CLAIMANT to unliquidated damages in addition to demurrage.[39]

34. CLAIMANT submits that there is a term implied in fact into the B/L that RESPONDENT will procure discharge of the Cargo from the Vessel in a reasonable time (**i**). By failing to procure discharge by the latest date that would allow the Vessel to meet the laycan of the Next Employment, RESPONDENT breached the implied term (**ii**).

(i) There is an implied obligation that RESPONDENT will procure discharge within a reasonable time

35. CLAIMANT submits that an obligation under the contract of carriage to procure discharge of the Cargo within a reasonable time is implied in fact into the B/L (**Implied Term**). Such an obligation is borne by RESPONDENT as the consignee of the Cargo, and is necessary to give effect to the intention of the contracting parties.[40] This is because it satisfies the five requisite conditions for an implication in fact.[41]

36. *First*, the Implied Term is reasonable and equitable, in that it does not impose an obligation upon RESPONDENT that is unduly onerous or detrimental.[42] On the contrary, it is consistent with

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[39] *The Eternal Bliss* (n 31) 21–3 [52]–[59] (Males LJ); *Suisse Atlantique Societe d'Armement Maritime S.A. v Rotterdamsche Kolen Centrale* [1966] 1 Lloyd's Rep 529, 542 (Viscount Dilhorne), 565–6 (Lord Wilberforce); *Richco International Ltd v Alfred C Toepfer International GmbH* ('*The Bonde*') [1991] 1 Lloyd's Rep 136, 142 (Potter J); *The Luxmar* (n 36) 547 [24] (Longmore LJ); *Triton Navigation Ltd v Vitol SA* ('*The Nikmary*') [2003] 1 Lloyd's Rep 151, 161 (Moore-Bick J).

[40] *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 283 (Lord Simon of Glaisdale) ('*BP Refinery*'); *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742, 754–5 [21] (Lord Neuberger of Abbotsbury PSC) ('*Marks & Spencer*'); *Ali v Petroleum Company of Trinidad and Tobago* [2017] ICR 531, 534–5 [7] (Lord Hughes JSC) ('*Ali*').

[41] *BP Refinery* (n 40) 283 (Lord Simon of Glaisdale).

[42] Ibid.

the agreed allocation of risk between the parties to the B/L.[43] RESPONDENT, as the lawful holder of the B/L, was the only party that could lawfully take delivery of the Cargo and accordingly, had the most control over when discharge of the Cargo would begin.[44] This obligation is also consistent with RESPONDENT's joint liability for demurrage.[45] While liability for demurrage does not immediately equate to liability for discharge,[46] the obligation for RESPONDENT to pay demurrage is a clear indication that the parties intended for it to bear risks of delay, including under the Implied Term.

37. *Second*, the Implied Term has a clear basis in commercial necessity, in that such a term must be implied specifically in the absence of any provisions within the B/L detailing a discharge procedure.[47] Most notably, there is no express provision for stowage facilities, meaning that without cooperation from the cargo interests, discharge cannot take place.[48] CLAIMANT could not deliver the Cargo to itself and required some party to present the B/L and take delivery.[49]

38. While it is often a charterer's cooperation that is required, it would be uncommercial to impose the discharge obligation on the Charterer and not RESPONDENT. This is because, at all material times, the B/L was indorsed to RESPONDENT's order and all parties knew that RESPONDENT would eventually become the lawful holder of the B/L.[50] CLAIMANT was therefore uniquely reliant on RESPONDENT to either procure the discharge itself or permit the Charterer to do so.

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[43] *Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc* ('*The Jordan II*') [2005] 1 Lloyd's Rep 57, 61–2 [11]–[14] (Lord Steyn).
[44] *E L Oldendorff & Co GmbH v Tradax Export SA* ('*The Johanna Oldendorff*') [1974] AC 479, 556 (Lord Diplock).
[45] *Record*, 16 cl 11 (Charterparty) and 24 cl 27 (Rider Clauses).
[46] Cf *Sea Master Shipping Inc v Arab Bank (Switzerland) Ltd and another* ('*The Sea Master*') [2021] 1 Lloyd's Rep 500, 507 [32] (Judge Pelling QC).
[47] *South Australia Asset Management Corpn v York Montague Ltd* [1996] 3 All ER 365, 371 (Lord Hoffmann); *The Sea Master* (n 46) 505 [14] (Judge Pelling QC); *Marks & Spencer* (n 40) 754–5 [21] (Lord Neuberger of Abbotsbury PSC); *Ali* (n 40) 535–6 [7] (Lord Hughes).
[48] David Foxton et al, *Scrutton on Charterparties and Bills of Lading* (Sweet & Maxwell, 24th ed, 2020) [9-145]; cf *The Sea Master* (n 46) 508 [38] (Judge Pelling QC).
[49] *Record* 30–1 (B/L), 46–9 (Email Correspondence).
[50] *Record*, 8 [8] (Statement of Claim), see also 30–1 (B/L).

Given RESPONDENT received the benefits of an exclusive right to delivery of the Cargo,[51] it is necessary to impose on it a corollary obligation to procure discharge.[52]

39. *Third*, the term is so obvious it goes without saying.[53] The party with the ownership and accompanying benefits of the Cargo ought to make reasonable efforts to procure discharge within a reasonable time. Here, that party was RESPONDENT, as set out at [37]–[38] above.

40. *Fourth*, the term is capable of clear expression – it is an obligation resting on RESPONDENT to procure discharge of the Cargo from the Vessel within a reasonable time.

41. *Fifth*, the Implied Term does not contradict any express terms of the B/L and in fact complements the Next Employment clause.[54] The effect of not implying a term for discharge within a reasonable time would undermine the existence and commercial rationale of the Next Employment clause, which signified the Vessel's limitations and the need for the Cargo to be discharged in time for the Vessel to make the trip to Kaohsiung.

(ii) RESPONDENT breached the Implied Term by failing to procure discharge within a reasonable time

42. CLAIMANT submits that what was a reasonable time in these circumstances, taking into account the terms of the B/L and the reasonable efforts required to effect delivery,[55] was for RESPONDENT to procure discharge and take delivery of the Cargo by a time that allowed the Vessel to leave the discharge port before 7 October 2023. This is for four reasons.

43. *First*, 7 October 2023 was the final date the Vessel could depart to ensure it complied with the laycan obligation of the Vessel under the subsequent employment.[56] 7 October 2023 is the

[51] *Barclays Bank Ltd v Customs and Excise Commissioners* [1963] 1 Lloyd's Rep 81, 88 (Diplock LJ); *Kuwait Petroleum Corpn v I & D Carriers Ltd* ('*The Houda*') [1994] 2 Lloyd's Rep 541, 550 (Neill LJ).
[52] *Tradigrain SA v King Diamond Shipping SA* ('*The Spiros C*') [2000] 2 Lloyd's Rep 319, 333 [64], 335 [75] (Rix LJ, Brooke and Henry LJJ agreeing).
[53] *BP Refinery* (n 40) 283 (Lord Simon of Glaisdale).
[54] Ibid; *Marks & Spencer* (n 40) 757 [28] (Lord Neuberger of Abbotsbury PSC).
[55] *Pantland Hick v Raymond* [1893] AC 22, 35–6 (Lord Ashbourne); *Postlethwaite v Freeland* (1880) 5 App Cas 599, 608 (Lord Selborne LC).
[56] *Record*, 8 [11] (Statement of Claim), 43, 47.

appropriate date, insofar as a reasonable time for performance is assessed with reference to the surrounding circumstances and with the benefit of hindsight.[57]

44. *Second*, CLAIMANT's submission on a reasonable time mirrors the definition of a 'reasonable period' relating to an obligation of utmost despatch in a voyage charter. In that context, a reasonable period is the latest date a vessel must begin its approach voyage to allow it to arrive at the loading port.[58] By analogy, a reasonable period to discharge the Cargo should be the latest date that the Vessel must leave to meet the Next Employment.

45. *Third,* RESPONDENT is in breach of the Implied Term as it did not procure discharge in time for the Vessel to be able to depart from the discharge port on 7 October 2023. Despite being the only party able to procure discharge (as set out at [37]–[38]), RESPONDENT did nothing in relation to the Cargo between 20 September 2023, when the Notice of Readiness was tendered,[59] and 3 October 2023, when it finally authorised discharge.[60] RESPONDENT failed to take any action during these 13 days even though it was given repeated reminders between 20 and 28 September 2023 to begin discharge, and was informed of the need for the Vessel to leave the discharge port by 7 October 2023.[61]

46. *Fourth,* it is no excuse for inaction that RESPONDENT was waiting to receive a copy of the B/L, which eventually occurred on 3 October 2023. This is because, in circumstances where RESPONDENT knew that the B/L had been consigned to it and that it would become the lawful holder of the B/L in the immediate future,[62] it could have sought delivery under the LOI provisions of the Charterparty (of which it had a copy).[63]

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[57] *Urban 1 (Blonk Street) Ltd v Ayres* [2014] 1 WLR 756, 769 [49] (Etherton C); *Peregrine Systems Ltd v Steria Ltd* [2005] EWCA Civ 239, [15] (Maurice Kay LJ); *Astea (UK) Ltd v Time Group Ltd* [2003] EWHC 725 (TCC), [144] (Seymour J).
[58] *CSSA Chartering and Shipping Services SA v Mitsui OSK Lines* ('*The Pacific Voyager*') [2019] 1 Lloyd's Rep 370, 371 [1] (Longmore LJ).
[59] *Record* 8 [9] (Statement of Claim).
[60] *Record* 9 [13]–[14] (Statement of Claim).
[61] *Record* 8 [11] (Statement of Claim), 43 (Email Correspondence), 47 (Email Correspondence).
[62] *Record* 46 (Email Correspondence).
[63] *Record* 47 (Email Correspondence).

47. RESPONDENT's inaction led to delay of the commencement of discharge to 3 October 2023. With discharge operations taking four days and ending at 2348LT on 7 October 2023, this left no time at all for the Vessel to sail from the discharge port on 7 October 2023. Hence, it failed to procure discharge within a reasonable time under the Implied Term.

C. RESPONDENT'S ACT WAS AN EFFECTIVE CAUSE OF CLAIMANT'S LOSS

48. CLAIMANT does not need to prove that its loss would not have occurred 'but for' RESPONDENT's breach where there are several concurrent causes.[64] Instead, CLAIMANT submits that RESPONDENT's breach of either the express laytime provision or the Implied Term was an effective cause of its loss, as assessed by reference to common sense and experience.[65] This is for three reasons.

49. *First,* without RESPONDENT's breach, CLAIMANT would not have suffered the relevant loss. RESPONDENT's delay in procuring discharge delayed the Vessel's departure from the discharge port, and put it in a position where it was unlikely to meet the laycan of the Next Employment.[66] CLAIMANT and the Charterer estimated that the journey between Busan and Kaohsiung would take seven days,[67] meaning that had the Vessel departed during the laytime period, or within a reasonable time thereafter, CLAIMANT would likely have made the Next Employment.

50. *Second,* RESPONDENT is unable to rely on the adverse weather impacting the voyage to break the chain of causation between its failure to discharge the Cargo and the cancellation of CLAIMANT's Next Employment . The fact that there may be multiple causes of the loss has no bearing on whether RESPONDENT's breach was an effective cause, unless the weather events

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[64] *Martlet Homes Ltd v Mulalley & Co Ltd (No 2)* (2022) 203 ConLR 125, 187 [284]–[285] (Davies J) ('*Martlet v Mulalley*'); *Financial Conduct Authority v Arch Insurance UK Ltd* [2021] 2 All ER (Comm) 779, 823–4 [181]–[182] (Lord Hamblen and Lord Leggatt JJSC) ('*FCA v Arch Insurance*').

[65] *Martlet v Mulalley* (n 64) 187 [280] (Davies J); *County Ltd v Girozentrale Securities* [1996] 3 All ER 834, 858 (Hobhouse LJ); *Admiralty Comrs v SS Valeria* [1922] 2 AC 242, 248 (Lord Dunedin); *Smith, Hogg & Co Ltd v Black Sea & Baltic General Insurance Company Ltd* [1940] 67 Lloyd's Rep 253, 258 (Lord Wright).

[66] *Monarch Steamship Co Ltd v Karlshamns Oljefabriker* (A/B) [1949] AC 196, 212 (Lord Porter) ('*Monarch Steamship*').

[67] *Record* 8 [11] (Statement of Claim).

are of such severity as to 'obliterate [RESPONDENT's] wrongdoing'.[68] Weather may constitute a *novus actus interveniens* in extreme circumstances, for example where the vessel suffers significant damage.[69] By contrast, the Vessel was only approximately 300 nautical miles away from Kaohsiung as of 16 October 2023. RESPONDENT admits that its progress was merely 'hampered' by adverse wind and sea conditions.[70] Therefore, the initial delay caused by RESPONDENT's breach was merely exacerbated, and not 'obliterated', by the adverse weather.[71]

51. *Third*, there is no indication that such weather events are atypical or unforeseeable or that the Vessel was halted altogether.[72] Indeed, the Rider Clauses expressly contemplate the possibility for weather events to delay or hamper the Vessel's operations, for example during berthing for loading and discharge.[73] The provision for adverse weather shows that it was a sufficiently likely event within the minds of the parties.[74]

52. Therefore, RESPONDENT's breach remains an effective cause of CLAIMANT's loss as it played a material role in procuring the loss. This is sufficient for CLAIMANT to succeed on causation.[75]

D. CLAIMANT'S LOSS WAS NOT TOO REMOTE

53. CLAIMANT's loss is not too remote from RESPONDENT's breach,[76] on the basis that: *first*, its loss was objectively within 'the ordinary course of things' (**i**);[77] and *second*, was within

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[68] *ST Shipping and Transport Pte Ltd v Space Shipping Ltd* ('*The CV Stealth*') *(No 2)* [2018] 1 Lloyd's Rep 276, 281 [30] (Popplewell J); *Borealis AB v Geogas Trading SA* [2011] 1 Lloyd's Rep 482, 488 [44] (Gross LJ) ('*Borealis*'); *Sealion Shipping Ltd v Valiant Insurance* ('*The Toisa Pisces*') [2013] 1 Lloyd's Rep 108, 113 [25] (Gross LJ); *Great Elephant Corporation v Trafigura Beheer BV* ('*The Crudesky*') [2014] 1 Lloyd's Rep 1, 13 [45] (Longmore LJ); *Carlos Soto Sau SA v AP Moller-Maersk AS* ('*The SFL Hawk*') [2015] 1 Lloyd's Rep 537, 544 [33] (Eder J).
[69] *Monarch Steamship* (n 66) 233–4 (Lord du Parcq).
[70] *Record* 36 [10] (Statement of Defence and Counterclaim).
[71] *Borealis* (n 68) 488 [47] (Gross LJ).
[72] *Whistler International Ltd v Kawasaki Kisen Kaisha Ltd* ('*The Hill Harmony*') [2001] 1 AC 638, 653 (Lord Hobhouse of Woodborough); *Torvald Klaveness A/S v Arni Maritime Corp* ('*The Gregos*') [1995] 1 Lloyd's Rep 1, 4 (Lord Mustill).
[73] *Record* 23 cl 23 (Rider Clauses).
[74] Ibid.
[75] *The CV Stealth* (n 68) 281 [30] (Popplewell J); Jane Stapleton, 'Unnecessary and Insufficient Factual Causes' (2023) *Journal of Tort Law* 1, 9–10; *FCA v Arch Insurance* (n 64), 821 [172], 823–4 [181]–[182] (Lord Hamblen and Lord Leggatt JJSC).
[76] *Hadley v Baxendale* (1854) 9 Ex 341, 354–5 (Alderson B) ('*Hadley v Baxendale*').
[77] *Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd* ('*The Sylvia*') [2010] 2 Lloyd's Rep 81, 88 [61] (Hamblen J); *Hadley v Baxendale* (n 76) 354–5 (Alderson B).

RESPONDENT's reasonable contemplation as at the date of contract,[78] as a 'serious possibility' (**ii**).[79] *Third*, and in any event, CLAIMANT submits that RESPONDENT assumed responsibility for CLAIMANT's loss under the principles propounded in *The Achilleas* (**iii**).[80]

(i) CLAIMANT'S loss is within the first limb of *Hadley v Baxendale*

54. CLAIMANT's loss is not too remote under the first limb of *Hadley v Baxendale*, as reasonable parties would have contemplated that a failure to procure discharge would cause the loss of a follow-on fixture 'in the ordinary course of things'.[81] A loss will be considered a 'serious possibility' from a breach where the degree of probability is 'considerably less than an even chance but nevertheless not very unusual and easily foreseeable'.[82] Importantly here, RESPONDENT had actual knowledge of the Next Employment, by virtue of Clause 38 of the Rider Clauses. Notwithstanding that express knowledge, the relevant loss was within the reasonable contemplation of RESPONDENT for four reasons.

55. *First*, it is within the ordinary course of things that shipowners are expected to keep their assets in continuous employment and a breach that causes delay will result in the shipowner missing the date for a subsequent fixture.[83] It is accepted that a 'cargo ship is expensive to finance and expensive to run'.[84] In turn, a 'shipowner must keep it earning with the minimum of gaps between employment'.[85] In circumstances where the Vessel was to accrue demurrage costs of

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[78] *Martlet v Mulalley* (n 64) 187 [281] (Davies J); *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 1 All ER 997, 1003 (Asquith LJ).
[79] *Martlet v Mulalley* (n 64) 196 [316] (Davies J); *Orchard Plaza Management Co Ltd v Balfour Beatty Regional Construction Ltd* [2022] EWHC 1490 (TCC), [43]–[44] (Morris J) ('*Orchard Plaza*'); *Attorney General of the Virgin Islands v Global Water Associates Ltd* [2021] AC 23, 36 [32]–[35] (Lord Hodge) ('*Global Water Associates*'); *The Sylvia* (n 77) 88 [61] (Hamblen J); *Hadley v Baxendale* (n 76) 354–5 (Alderson B).
[80] *Rhine Shipping DMCC v Vitol SA* ('*The Dijilah*') [2024] 1 All ER (Comm) 245, 292 [200] (Simon Birt KC); *The Sylvia* (n 77) 86 [47] (Hamblen J); *Supershield Ltd v Siemens Building Technologies FE Ltd* [2010] 1 Lloyd's Rep 349, 355–6 [43] (Toulson LJ) ('*Supershield*').
[81] *Martlet v Mulalley* (n 64) 195 [314] (Davies J); *Transfield Shipping Inc v Mercator Shipping Inc* ('*The Achilleas*') [2009] AC 61, 81 [60] (Lord Rodger of Earlsferry); *Hadley v Baxendale* (n 76) 341 (Alderson B).
[82] *Martlet v Mulalley* (n 64) 196 [316] (Davies J); *Orchard Plaza* (n 79) [43]–[44] (Morris J); *Global Water Associates* (n 79) 36 [32]–[35] (Lord Hodge); *C Czarnikow Ltd v Koufos* [1969] 1 AC 350, 382G–383A (Lord Reid).
[83] *The Achilleas* (n 81) 72–3 [30] (Lord Hope of Craighead).
[84] *The Hill Harmony* (n 72) 416 (Lord Hobhouse of Woodborough); *The Gregos* (n 72) 4 (Lord Mustill).
[85] Ibid.

USD 36,000 per day, it would be consistent with the commercial expectations of the parties that CLAIMANT would seek to minimise the time for which the Vessel went unchartered.

56. *Second*, the fact that there was a tight margin between the initial charter and the subsequent employment is not unusual. Rather, the financial pressures felt by shipowners, as set out at [55], 'encourage the planning and performance of voyages to the tightest of margins'.[86] Therefore, it would not be difficult to conclude that the parties 'must have had it in contemplation when they entered into the contract' that the loss of a fixture from failure to discharge in time might occur.[87]

57. *Third*, CLAIMANT's claim is analogous to *The Sylvia,* where the loss of a sub-fixture due to a delay in meeting a laycan caused by a breach of the head charterparty was squarely 'within the first limb of *Baxendale*'.[88] The fact that *The Sylvia* concerned the loss of a sub-fixture as opposed to a follow-on charter does not assist RESPONDENT, as the Court generalised that 'one would expect it to be well within reasonable contemplation… that delay of significance in arriving or being ready to load at the designated load port may result in the loss of a fixture'.[89]

58. *Fourth*, CLAIMANT's loss was of a type which is within RESPONDENT's reasonable contemplation.[90] As noted in *The Sylvia*, the loss of a fixture will frequently result in an owner earning a discounted rate of hire compared to the position when their vessel is fixed in advance.[91] It is only necessary that the type, and not the magnitude, of loss be in reasonable contemplation.[92] Therefore, RESPONDENT cannot claim that CLAIMANT's loss is unusual because of market considerations.

[86] Ibid.
[87] *The Achilleas* (n 81) 72–3 [30] (Lord Hope of Craighead).
[88] *The Sylvia* (n 77) 88 [61] (Hamblen J).
[89] Ibid 88 [63] (Hamblen J).
[90] Ibid 89 [66] (Hamblen J).
[91] Ibid 89 [66]–[67] (Hamblen J).
[92] *Martlet v Mulalley* (n 64) 198 [320] (Davies J); *Wellesley Partners LLP v Withers LLP* (2015) 163 ConLR 53, 78–9 [69] (Floyd LJ); *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791 (CA), 813D–E (Scarman LJ); *The Achilleas* (n 81) 70 [21] (Lord Hoffman).

(ii) Further or in the alternative, CLAIMANT's loss is within the second limb of *Hadley v Baxendale*

59. Alternatively, the loss of a follow-on fixture was, in the circumstances known by both parties at formation, within RESPONDENT's reasonable contemplation.[93] Prior to contract formation on 3 October 2023 when RESPONDENT became the lawful holder of the B/L,[94] the circumstances of the Next Employment were brought to RESPONDENT's awareness in three respects.

60. *First*, RESPONDENT was acutely aware of the follow-on fixture, given the existence of an express '*Next Employment*' clause in the Charterparty, which it received on 29 September 2023.[95] RESPONDENT would reasonably have contemplated that delay which resulted in CLAIMANT breaching the '*strict laycan 1–14 October 2023*' would cause CLAIMANT's loss.[96]

61. *Second*, even if RESPONDENT's knowledge cannot be inferred through the clear terms of the Charterparty, RESPONDENT was 'aware of the Vessel's limitations' by 29 September 2023, a fact that it admits to in its pleadings.[97]

62. *Third*, RESPONDENT also received repeated notice on 29 September 2023 that the Vessel had to leave Busan imminently. The Charterers provided multiple reminders that 'the vessel… [had] to fulfil a subsequent employment at Kaohsiung' and that Respondent needed to process the shipping documents 'urgently as vessel need[ed] to leave port by 7 October 2023'.[98]

63. In *The Achilleas*, a factually similar scenario, Lord Rodger of Earlsferry noted that had the shipowners drawn the existence of the follow-on charter to the charterer's attention, the relevant loss would have been within reasonable contemplation and therefore recoverable under the second limb of *Hadley v Baxendale*.[99] Where such notice has been extensively

[93] *Martlet v Mulalley* (n 64) 195 [314] (Davies J); *The Achilleas* (n 81) 81 [60] (Lord Rodger of Earlsferry); *Hadley v Baxendale* (n 76) 354–5 (Alderson B).
[94] *Record* 37 [16] (Statement of Defence and Counterclaim).
[95] *Record* 8 [11] (Statement of Claim); 25 cl 38 (Rider Clauses).
[96] *Record* 25 cl 38 (Rider Clauses).
[97] *Record* 8 [11] (Statement of Claim), 36 [10] (Statement of Defence and Counterclaim).
[98] *Record* 47 (Email Correspondence).
[99] *The Achilleas* (n 81) 80 [59] (Lord Rodger of Earlsferry).

provided, RESPONDENT must have had special knowledge of the sort of damage likely to be suffered as a result of its delay.

(iii) RESPONDENT assumed responsibility for the loss

64. RESPONDENT cannot rely on *The Achilleas* to suggest that the orthodox test is inadequate. CLAIMANT submits that the surrounding circumstances demonstrate that RESPONDENT could reasonably be regarded as assuming responsibility for CLAIMANT's loss for three reasons.[100]

65. *First*, the fact that CLAIMANT's loss falls within the orthodox remoteness test (as at [54]–[63]) is *prima facie* evidence that RESPONDENT assumed responsibility for CLAIMANT's loss.[101] Accordingly, departure from the orthodox remoteness test must be done so cautiously.[102]

66. *Second*, the principle in *The Achilleas* is confined to cases which are 'unusual',[103] 'relatively rare',[104] and require 'evidence and factual findings',[105] none of which arise in this case. Unlike *The Achilleas*, where the charterer had 'no knowledge of or control over the duration of any follow-on fixture',[106] RESPONDENT not only knew of the existence of a follow-on fixture, but specifically knew CLAIMANT's loss was limited to a period of two years. This allays any concerns that the 'various possible lengths' of follow-on charters would make RESPONDENT's potential liability 'disproportionate and commercially unacceptable'.[107]

67. *Third*, RESPONDENT cannot rely on any general market expectation that it did not assume responsibility for CLAIMANT's loss. Rather, CLAIMANT, as a shipowner who has lost a subsequent fixture due to RESPONDENT's breach is entitled to damages corresponding to the

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[100] *Rhine Shipping DMCC v Vitol SA* ('*The Dijilah*') [2024] 1 All ER (Comm) 245, 296 [211] (Simon Birt KC); *Supershield* (n 80) 355–6 [43] (Toulson LJ); *Louis Dreyfus Commodities Suisse SA v MT Maritime Management BV* ('*The MTM Hong Kong*') [2016] 1 Lloyd's Rep 197, 206 [52] (Males J); *The Achilleas* (n 81) 66–7 [9] (Lord Hoffman).
[101] *Supershield* (n 80) 355–6 [43] (Toulson LJ).
[102] Hugh Beale (ed), *Chitty on Contracts* (Sweet & Maxwell, 34th ed, 2022) [29–151].
[103] *The Achilleas* (n 81) 67–8 [11] (Lord Hoffman).
[104] *The Sylvia* (n 77) 85 [40] (Hamblen J).
[105] *The MTM Hong Kong* (n 100) 207 [55] (Males J).
[106] *The Achilleas* (n 81) 72 [29] (Lord Hope of Craighead).
[107] *The Sylvia* (n 77) 90 [73] (Hamblen J).

difference between the profit from the broken charterparty and the profit under the substitute charter'.[108] This is the calculation of quantum for which CLAIMANT contends.[109]

68. Therefore, RESPONDENT breached an obligation to procure discharge of the Cargo from the Vessel within the agreed laytime, or within a reasonable time thereafter. This breach was an effective cause of CLAIMANT's loss, and such loss was not too remote.

ARGUMENTS ON THE MERITS OF THE CROSS-CLAIM

V. CLAIMANT'S BREACH DID NOT CAUSE RESPONDENT'S LOSS

69. The existence of a contractual obligation to discharge against a Letter of Indemnity does not affect a claim of misdelivery.[110] CLAIMANT breached its obligation to deliver the Cargo to the lawful holder of the B/L, notwithstanding Clause 57 of the Charterparty, by making delivery in reliance on the LOI from Yu Shipping (**Discharge LOI**).[111]

70. However, CLAIMANT submits that RESPONDENT cannot discharge its onus of showing that CLAIMANT's breach was the effective cause of its loss, as it was RESPONDENT's own conduct that led to its lack of enforceable security over the Cargo.[112]

71. Damages are measured by reference to the position in which RESPONDENT would have been had CLAIMANT's breach not occurred.[113] The onus is on RESPONDENT to show that it would not have suffered the same loss in any event. RESPONDENT cannot show both that it looked to the B/L as security for its loan, and that were it not for the misdelivery, it would have exercised its

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[108] *The MTM Hong Kong* (n 100) 206 [46]–[50] (Males J); *Maestro Bulk Ltd v Cosco Bulk Carrier Co Ltd* ('*The Great Creation*') [2015] 1 Lloyd's Rep 315, 324 [57] (Cooke J); *The Sylvia* (n 77) 89 [68] (Hamblen J); Julian Cooke et al, *Voyage Charters* (Informa Law, 4th ed, 2014) 654–5 [21.95]–[21.97].
[109] *Record* 10 [20] (Statement of Claim).
[110] *Unicredit Bank AG v Euronav NV* ('*The Sienna*') [2024] 1 Lloyd's Rep 177, 186 [45] (Popplewell LJ, Asplin and Falk LJJ agreeing); *The Houda* (n 51) 552–3 (Neill LJ), 556 (Millett LJ); *Gatoil International Inc v Tradax Petroleum Ltd* ('*The Rio Sun*') [1985] 1 Lloyd's Rep 350, 361 (Bingham J); *Motis Exports v Dampskibsselskabet AF 1912* [2000] 1 Lloyd's Rep 211, 216 [19] (Rix J).
[111] *Record* 37 (Statement of Defence and Counterclaim) [18].
[112] *The Sienna* (n 110) 196 [103] (Popplewell LJ, Asplin and Falk LJJ agreeing).
[113] Ibid 196–7 [104] (Popplewell LJ, Asplin and Falk LJJ agreeing).

right over this security to recoup its lending. This inquiry is undertaken by reference to the precise financing and security arrangements between the relevant parties.[114]

72. There are two reasons why RESPONDENT did not look to the Cargo as security, and the Tribunal should find the causative inquiry in favour of CLAIMANT. *First*, it was the financing arrangement conducted by RESPONDENT through the L/C that placed RESPONDENT in a position where the Cargo was not available to it as security (**A**). *Second*, RESPONDENT's conduct in failing to take delivery is inconsistent with looking to the Cargo as security (**B**). Therefore, RESPONDENT would not have exercised its security over the Cargo and its failure to 'recoup the lending' would have occurred independently of CLAIMANT's breach.[115]

A. RESPONDENT'S FINANCING ARRANGEMENT WAS THE EFFECTIVE CAUSE OF ITS OWN LOSS

73. RESPONDENT issued a L/C to Good Oil on behalf of Yu Shipping in order to finance the Cargo. The terms of RESPONDENT's L/C are indicative of the fact that RESPONDENT did not see the B/L as security for two reasons.

74. *First*, the fact that the L/C issued by RESPONDENT was payable against a Payment LOI, and was in fact paid against Good Oil's Payment LOI, strongly militates against RESPONDENT's claim that it looked to the Cargo as security. The consequence of this L/C is that RESPONDENT was bound to pay Good Oil under the L/C against a Payment LOI, regardless of whether the B/L eventually came into its possession.[116] This is true irrespective of the fact that the Payment LOI's security would cease once the B/L came into RESPONDENT's possession.

75. Importantly, the fact that RESPONDENT structured the L/C so that payment could be made against the Payment LOI, rather than the B/L, is uncommon.[117] Here, RESPONDENT has

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[114] *Standard Chartered Bank (Singapore) Ltd v Maersk Tankers Singapore Pte Ltd* ('*The Maersk Princess*') [2023] 1 Lloyd's Rep 508, 515 [48] (Ang Cheng Hock J); *Oversea-Chinese Banking Corporation Ltd v Owner and/or Demise Charterer of the vessel 'STI Orchard' Winson Oil Trading Pte Ltd (Intervening)* ('*STI Orchard*') [2023] 1 Lloyd's Rep 22, 32 [54] (Navin Anand AR).

[115] *The Sienna* (n 110) 196 [103] (Popplewell LJ, Asplin and Falk LJJ agreeing).

[116] *Trafigura Beheer BV v Kookmin Bank Co* [2005] EWHC 2350 (Comm), [31] (Cooke J).

[117] Felipe Arizon and David Semark, *Maritime Letters of Indemnity* (Informa Law, 2014) 7.51.

deliberately accepted a lesser degree of security,[118] and was willing to finance the cargo without the documentary guarantee of a B/L. Banks in a trade finance arrangement traditionally deal with documentary security.[119] As a documentary letter of credit, the documents against which the L/C was payable are indicative of what RESPONDENT valued as security for its payment. It is therefore RESPONDENT's responsibility to issue letters of credit on terms which provide it with satisfactory security, and in failing to do so caused its own loss.

76. *Second,* CLAIMANT submits that RESPONDENT's omission to grant a trust receipt is not sufficient for RESPONDENT to discharge its evidentiary burden. As the party who raises the misdelivery claim, it is RESPONDENT that bears the legal and evidential onus of showing that CLAIMANT caused its loss. While RESPONDENT's hypothetical granting of a trust receipt could indicate its reliance on sale proceeds as security,[120] it does not logically follow that RESPONDENT's refusal of a trust receipt to CLAIMANT necessarily indicates its reliance on the Cargo as security. The Tribunal should therefore give little weight to the refusal of a trust receipt in RESPONDENT's assertion that it looked to the Cargo as security, especially in light of RESPONDENT's consistent conduct to the contrary.

B. RESPONDENT'S CONDUCT IS INCONSISTENT WITH VIEWING THE CARGO AS SECURITY

77. RESPONDENT was the consignee of the B/L and therefore entitled to constructive possession of the Cargo.[121] However, RESPONDENT remained passive and did not make any inquiries into the status of the Cargo during transit or upon its arrival. Therefore, RESPONDENT's conduct is inconsistent with the view that it would have enforced its security for four reasons.

78. *First*, RESPONDENT should have taken delivery of the Cargo because it was inevitable that the Cargo would not remain indefinitely on the Vessel. The existence of a subsequent voyage was

[118] Paul Todd, *Bills of Lading and Banker's Documentary Credits* (Routledge Informa Law, 4th ed, 2007) 3.8.
[119] *ICC Uniform Customs and Practice for Documentary Credits (UCP 600)* arts 5, 14(a), 34.
[120] *STI Orchard* (n 114) 32 [54] (Navin Anand AR).
[121] *Record* 37 [16]–[17] (Statement of Defence and Counterclaim).

common knowledge between the parties,[122] before which the Cargo would have to be discharged, regardless of whether or not the B/L had arrived. In the absence of any specified storage facility, RESPONDENT knew that the Cargo would have to be delivered. Nonetheless, RESPONDENT did not take any steps to ensure that the Cargo would still be available to it once it received the B/L, which is inconsistent with viewing the Cargo as security.

79. *Second*, RESPONDENT was informed of the Vessel's arrival at Busan on 20 September 2023, and was later made aware that the Charterer would be taking delivery of the Cargo against the Discharge LOI.[123] On the day that the Discharge LOI was issued, Yu Shipping made it clear in ongoing email correspondence with RESPONDENT that the Cargo had arrived and had to be discharged.[124] It became the parties' shared knowledge that the Cargo would inevitably be discharged without the original B/L. It was readily open to RESPONDENT to suggest that the Cargo be delivered to RESPONDENT (or its agent) against a letter of indemnity, rather than a third party, given that RESPONDENT had a copy of the Charterparty and knew of the provision permitting discharge against a letter of indemnity.[125] This conduct is inconsistent with RESPONDENT looking to the Cargo as security, as a bank relying on cargo as security would have taken at least minimal steps to preserve its constructive possession over it.

80. *Third*, the B/L was consigned to RESPONDENT on 6 September 2023,[126] and it entered into its possession on 3 October 2023,[127] the same day that the Cargo was delivered to Yu Shipping.[128] It was not until 29 November 2023 that RESPONDENT informed CLAIMANT that it was the lawful holder of the B/L.[129] This delay of almost two months, in which RESPONDENT did not make any inquiries into the Cargo, is contrary to the actions of a reasonable commercial party, which

[122] *Record* 25 cl 38 (Rider Clauses).
[123] *Record* 40 [12] (Statement of Reply and Defence to Counterclaim).
[124] *Record* 46–9 (Email Correspondence).
[125] *Record* 40 [7] (Statement of Reply and Defence to Counterclaim), 47 (Email Correspondence).
[126] *Record* 8 [8] (Statement of Claim).
[127] *Record* 37 [16] (Statement of Defence and Counterclaim).
[128] *Record* 9 [13] (Statement of Claim), 33–4 (Discharge LOI).
[129] *Record* 10 [17] (Statement of Claim).

would have sought to recoup its lending in a more immediate manner. This is especially true given that the Cargo had already been sold to Korean buyers.[130] Rather, RESPONDENT sought to exercise its rights over the Cargo only once Yu Shipping went into liquidation,[131] when reliance on Yu Shipping's sale proceeds became impossible and RESPONDENT's acceptance of the Payment LOI left it with no further security. This conduct supports an inference by the Tribunal that RESPONDENT did not view the Cargo as security at any point of the transaction.

81. *Fourth,* RESPONDENT's words were likely the reason why Yu Shipping discharged against a letter of indemnity to a third party. Instead of taking delivery of the Cargo, RESPONDENT said:[132]

> *If you are afraid of the demurrage accruing, you must do as you deem fit as Charterers and we will not interfere as long as the loan is repaid.*

Here, RESPONDENT expressly confers Yu Shipping with discretion to do '*as you deem fit*'. The statement was the conclusion of a series of email responses in which both parties were made aware of the urgent need for discharge. Further, discharge against letters of indemnity is common within the bulk shipping trade, in which bills of lading often arrive at the destination after the cargo itself.[133]

82. In these circumstances, RESPONDENT's email would be understood by a reasonable commercial party as a recognition of and consent to discharge against a letter of indemnity. RESPONDENT's email either caused Yu Shipping to procure the misdelivery or generally informs the view that it would not have insisted on relying on the Cargo to recoup its lending, and would have allowed discharge to a third party. Regardless, RESPONDENT would have suffered the same loss in the counterfactual, and is therefore not entitled to damages.[134]

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[130] *Record* 47 (Email Correspondence).
[131] *Record* 10 [16 (Statement of Claim).
[132] *Record* 46 (Email Correspondence).
[133] *The Sienna* (n 110) 181 [7] (Popplewell LJ, Asplin and Falk LJJ agreeing).
[134] Ibid 197 [108] (Popplewell LJ, Asplin and Falk LJJ agreeing).

REQUEST FOR RELIEF

For the reasons set out above, RESPONDENT requests that the Tribunal:

a) declare that the Tribunal does have jurisdiction to determine CLAIMANT's claim;

b) declare that CLAIMANT is entitled to unliquidated damages for breach of the express laytime provision;

c) declare that there exists an implied term to discharge within a reasonable time and that this was breached;

d) declare that CLAIMANT's conduct did not cause RESPONDENT's loss;

e) award CLAIMANT the remedies sought at [20] of its Statement of Claim;

f) declare that RESPONDENT is not entitled to the remedies sought at [19] of its Statement of Defence and Counterclaim;

g) award CLAIMANT any other remedies as the Tribunal deems fit; and

h) award CLAIMANT the costs of this Arbitration pursuant to s 21 of the *Arbitration Act 1994* (Singapore).