INTERNATIONAL MARITIME LAW ARBITRATION MOOT 2024

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

MEMORANDUM FOR THE RESPONDENT

(Team A)

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

COUNSEL

Jerome TAN Jun Wei • JIN Haofeng • TEO Zi Yang

MEMORANDUM FOR THE RESPONDENT

(Team A)

I. LIST OF AUTHORITIES

A. Legislation and Conventions

Carriage of Goods by Sea Act 1992 (UK)

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

UNCITRAL Model Law on International Commercial Arbitration

B. Institutional Rules

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

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

C. Cases

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

BNP Paribas v Bandung Shipping Pte Ltd [2003] 3 SLR(R) 611

Educational Corporation v Kenneth J Feld (1994) XX YB. Comm Arb 745

Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb [2020] UKSC 38

Judgment of 28 September 2022, Kabab-Ji SAL v. Kout Food Group, Case No. 20-20.260

Kabab-Ji SAL v Kout Food Group [2021] UKSC 48

Maximov v OJSC Novolipetsky Metallurgichesky Kombinat [2017] EWHC 1911 (Comm)

Petrasol BV v Stolt Spur Inc XXII YB Comm Arb 762

Sale Continuation Ltd v Austin Taylor & Co Ltd [1968] 2 QB 849

Shagang South-Asia (HK) Trading Co Ltd v Daewoo Logistics [2015] 1 Lloyd's Rep 504

Suisse Atlantique Societe d'Armement Maritime SA v NV Rotterdamsche Kolen

Centrale [1965] 1 Lloyd's Rep 166 (QBD)

Suisse Atlantique Societe d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale [1965] 1 Lloyd's Rep 533 (CA);

Suisse Atlantique Societe d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale [1966] 1 Lloyd's Rep 529 (HL)

Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd [1959] AC 576

The Eternal Bliss [2020] EWHC 2373 (Comm)

The Eternal Bliss [2022] 1 Lloyd's Rep 12

The Nika [2021] 1 Lloyd's Rep 109

The Polar [2024] 1 Lloyd's Rep 85

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

The Sienna [2022] EWHC 957 (Comm)

The Sienna [2023] EWCA Civ 471

The Spiros C [2000] 2 Lloyd's Rep 319

The Stone Gemini [1999] 2 Lloyd's Rep 255

The Yue You 902 [2019] 2 Lloyd's Rep 617

D. Arbitral Awards

Award in ICC Case No. 12073 (2008) XXXIII YB Comm Arb 63

Interim Award in ICC Case No. 11333 (2006) XXXI YB Comm Arb 117

E. Secondary Authorities

Aikens et al., *Bills of Lading* (3rd edn, Informa Law from Routledge 2021)

Gary Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International, 2020)

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

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

Law Commission of England and Wales, *Review of the Arbitration Act 1996: Final report and Bill* (Law Com No 413, 2023)

Robert Gay, "Damages in addition to demurrage" (2004) LMCLQ 72

II. STATEMENT OF FACTS

A. The Parties

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

B. Facts Leading to the Present Dispute

2. The Respondent is the financier of a cargo of 16,999.01 MT of palm oil carried on board the Vessel from Bintulu Malaysia, to Busan, South Korea (the "**Cargo**"). On 1 September 2023, the Respondent's customer, Yu Shipping Ltd (the "**Charterer**"), entered into a voyage charterparty with the Claimant for the carriage of the Cargo pursuant to a FOB sale agreement (the "**Charterparty**").

3. The Charterer purchased the Cargo with a loan under a letter of credit (the "**LC**") issued by the Respondent. Under the LC, the Respondent paid the purchase price on behalf of the Charterer and looked to the Cargo as security for the repayment under the LC.

4. The Cargo arrived at Busan onboard the Vessel on 20 September 2023. On 29 September 2023, the Respondent received an email from the Charterer applying for a trust receipt. In that email, the Respondent was informed by the Charterer for the first time that the Vessel would need to leave Busan by 30 September

2023 to fulfil a subsequent employment at Kaohsiung (the "**Kaohsiung Fixture**"). In another email sent by the Charterer on the same day, the Respondent was further informed that the Vessel had to leave by 7 October 2023 instead. A copy of the Charterparty was attached in the second email.

5. Despite the repeated chasers from the Charterer, the Respondent refused to grant the trust receipt due to the Respondent's latest review of the Charterer's financials. Eventually, the Respondent sent the Charterer an email on 3 October 2023 at 4.42pm stating, inter alia, "If you are afraid of the demurrage accruing, you must do as you deem fit as Charterers and we will not interfere as long as the loan is repaid."

6. On 4 October 2023 at 0630 Local Time ("**LT**"), the Claimant started the discharge of the Cargo from the Vessel against a letter of indemnity from the Charterer without presentation of the Bill of Lading (the "**Misdelivery**"). The discharge was completed on 7 October 2023 at 2348LT.

7. On 3 October 2023, the Respondent became the holder of the Bill of Lading No. COW-001A (the "**Bill of Lading**") after receiving it from Good Oil Sdn Bdn (the "**Shipper**"). The Respondent is the named consignee under the Bill of Lading.

8. To this date, the Respondent has not received the repayment from the Charterer under the LC. The Charterer is currently in liquidation.

C. The Claims

9. Clause 76 of the Tomahawk Maritime Rider Clauses (the "**Rider Clauses**") provides:

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

10. Purporting to rely on Clause 76, the Claimant served a Notice of Arbitration on the Respondent on 22 December 2023, and is claiming for USD 3,650,000, being the discount in the rate of hire for the subsequent Kaohsiung fixture over 2 years. The Respondent avers that this Tribunal has no jurisdiction due to the invalidity of the purported arbitration agreement between the Parties. Without prejudice to the Respondent's jurisdictional challenge, the Respondent avers that the Claimant's claim for losses is limited to demurrage only. The Respondent has also counterclaimed for the Misdelivery of the Cargo to the Charterer.

III. THIS TRIBUNAL DOES NOT HAVE JURISDICTION OVER THE DISPUTE BECAUSE THE ARBITRATION AGREEMENT IS INVALID

11. Where the law of the People's Republic of China (the "**PRC**") applies, the arbitration agreement ("**AA**") would be invalid because it fails to include an "Arbitration Commission" as defined in Clause 10 of the PRC's Arbitration Law (Statement of Defence and Counterclaim ("**D&CC**"), Moot Problem p 36, at [7]-[8]). The selection of an Arbitration Commission is an essential feature of an arbitration agreement under Clause 16 of the PRC's Arbitration Law, without which an arbitration agreement would be invalid ("**Arbitration Commission Requirement**").

12. In this case, PRC law should render the AA invalid because it is the law governing the AA. In the absence of a valid AA, the Tribunal cannot have jurisdiction over the dispute.

A. The Tribunal has a discretion on how to determine the law governing the AA

13. Preliminarily, the Tribunal is not bound to apply any particular conflict of law rule to determine the law governing the AA. As the present arbitral proceedings are transnational in nature, the Tribunal "do[es] not have a lex fori in the manner of a national court judge" (*Award in ICC Case No. 12073* (2008) XXXIII YB Comm Arb 63 [24]; see also *Interim Award in ICC Case No. 11333* (2006) XXXI YB Comm Arb. 117, 120).

14. Instead, the Respondent submits that it would be most appropriate for the Tribunal to apply the law of the seat as the law governing the AA. In this case, Guangzou is the seat, and so PRC law should apply.

B. Guangzhou should be the seat of arbitration

15. Guangzhou is the only geographic location provided in the AA. When an arbitration agreement refers to a single geographic location without clearly specifying its purpose, courts and tribunals generally interpret the chosen location as specifying the arbitral seat (Gary Born, International Commercial Arbitration (3rd edn, Kluwer Law International, 2020), para 14.04(A); *Shagang South-Asia (HK) Trading Co Ltd v Daewoo Logistics* [2015] 1 Lloyd's Rep 504 [38] (EWHC); *BNA v BNB* [2020] 1 Lloyd's Rep 55 ("*BNA v BNB*") [65]-[69] (SGCA)).

16. Since "Guangzhou" is the only geographic location that was expressly referred to in the AA, the most natural interpretation is that the Parties have agreed for Guangzhou to be the arbitral seat.

17. Furthermore, the seat of the arbitration should not be Singapore as such a finding would be inconsistent with Singapore law. In the analogous case of *BNA v BNB*, the Singapore Court of Appeal (the "**SGCA**") refused to recognise Singapore as the seat of arbitration under a similarly worded arbitration clause which provided (see at [57]):

> *"[…] If such negotiations fail, it is agreed by both parties that such*

disputes shall be finally submitted to the Singapore International Arbitration Centre (SIAC) for arbitration in Shanghai, which will be conducted in accordance with its Arbitration Rules."

18. The SGCA held that the natural meaning of "arbitration in Shanghai" was that Shanghai was the seat of the arbitration (*BNA v BNB* [69]). This finding was not displaced by facts such as:

    (a) the presence of Rule 18.1 of the Singapore International Arbitration Centre Rules (5th edn, 2013) (the "**SIAC Rules**"), which provides that the default seat would be Singapore in the absence of parties' express provision (*BNA v BNB* [86])*;* or

    (b) the potential invalidating effect of choosing the Shanghai as the seat of arbitration, as this would only be relevant if the parties were "aware that the choice of proper law of the arbitration agreement could have an impact upon the validity of the arbitration agreement" (*BNA v BNB* [90]).

19. In the present case, Clause 76 of the Rider Clauses (Annex B to the Statement of Claim ("**SOC**")**,** Moot Problem p 24) and Rule 32.1 of the Singapore Chamber of Maritime Arbitration Rules (4th edn, 2022) mirror the arbitration clause and Rule 18.1 of the SIAC Rules in *BNA v BNB* respectively. Moreover, both cases also concerned the potential invalidating effects of the Arbitration Commission Requirement. Given that there is also no indication that any of the parties were aware of the invalidating effect of PRC law on the AA, the

Singapore Courts (if asked to exercise its supervisory jurisdiction) would arrive at a similar conclusion to *BNA v BNB* and find that Guangzhou is the seat.

20. As Guangzhou is the seat of arbitration, the law of the seat is PRC law, and PRC law should apply for the following reasons.

C. Applying the law of the seat best reflects the implied intention of the Parties

21. In the absence of any express choice of the law governing the AA, applying the law of the seat would best reflect the implied intention of the Parties under the AA. Given the autonomous character of this arbitration, it should be presumed that commercial parties intend that all aspects of the arbitration, including the validity of the arbitration agreement and procedural rules of the arbitration, are decided by the same law (*Petrasol BV v Stolt Spur Inc* XXII YB Comm Arb 762, 765 (Rotterdam Arrondissementsrechtbank); *Educational Corporation v Kenneth J Feld* (1994) XX YB. Comm Arb 745, 747 (Tokyo High Court)).

i. Applying the law governing the Charterparty would create a serious risk that the arbitral award would be subsequently set aside by the PRC Courts

22. The seat court has supervisory jurisdiction over the conduct of the arbitration, and is generally treated as having the competent authority to set aside the arbitral award under both Art V(1)(e) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the "**New York Convention**")

and Art 34(1) of the UNCITRAL Model Law on International Commercial Arbitration (the "**Model Law**"). In practice, the fact that an award has been set aside by the seat court would generally be respected by a court of enforcement (see *Maximov v OJSC Novolipetsky Metallurgichesky Kombinat* [2017] EWHC 1911 (Comm)). This justifies why more weight should be given to the law of the seat when ascertaining the law governing the AA.

23. The Respondent is aware of a line of jurisprudence that supports the view that the law chosen by the Parties to govern the main contract should also be treated as the law impliedly chosen by the Parties to govern the AA. The UK Supreme Court's ("**UKSC**") decision in *Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb ("Enka v Chubb")* [2020] UKSC 38 is now the leading authority that has endorsed this view.

24. However, as recently illustrated by the Kabab-Ji Saga, this approach is complex and fails to adequately respect the seat court's supervisory jurisdiction, which could in practice lead to conflicting results at the post-award stage. In *Kabab-Ji SAL v Kout Food Group* [2021] UKSC 48, the UKSC, applying *Enka v Chubb*, held that the parties' choice of English law provision in the main contract extended to the arbitration clause, and the arbitration was thus invalid as the losing party (Kout Food) was not a party to the arbitration under English law. However, more recently, the French Cour de Cassation (the seat court), in disagreement with the UKSC, upheld the validity of the arbitration agreement by applying the law of the seat (i.e. French law) and refused to set aside the

award. (*Judgment of 28 September 2022, Kabab-Ji SAL v. Kout Food Group*, Case No. 20-20.260 (French Cour de Cassation Civ 1). This caused a bizarre result in that the arbitral award was subject to two different fates in two different jurisdictions.

25. Additionally, the Law Commission of England and Wales has recognised the problematic nature of *Enka v Chubb*. In the proposed Arbitration Bill, a new s 6A was added, which provides that an arbitration agreement will be governed by the law of the seat in the absence of any express choice. The new section s 6A will reverse the legally complex approach established in *Enka v Chubb* and will provide a default rule that has "the virtues of simplicity and certainty" (Law Commission of England and Wales, *Review of the Arbitration Act 1996: Final report and Bill* (Law Com No 413, 2023) para 12.74).

26. In the present case, if the Tribunal applies the law chosen by the Parties to govern the Charterparty, i.e., English law, there would be a serious risk that any subsequently issued award may be liable to be set aside by PRC Court, and consequently rendered unenforceable. The Tribunal should follow industry trends moving away from the position in *Enka v Chubb* and apply the law of the seat as the best reflection of the Parties' intentions as to the law governing the AA. Accordingly, PRC law should be applied, and the Tribunal should declare the AA invalid.

ii. Conclusion

27. For the reasons stated above, the Tribunal should hold that the AA is invalid under PRC law for failing to comply with the Arbitration Commission Requirement, and consequently deny jurisdiction to hear the Parties' dispute.

IV. IN THE ALTERNATIVE, IF THE TRIBUNAL FINDS THAT IT HAS JURISDICTION, THE CLAIMANT'S RECOVERABLE LOSSES ARE LIMITED TO DEMURRAGE ONLY

28. Demurrage liquidates "the whole of the damages arising from a charterer's breach of charter in failing to complete cargo operations within the laytime" (*The Eternal Bliss* [2022] 1 Lloyd's Rep 12 [52] (EWCA) ("*The Eternal Bliss (CA)*")). Thus, damages in addition to demurrage can only be claimed where two requirements are satisfied:

    (a) there must be a breach of a "separate obligation" apart from the obligation to discharge the Cargo within laytime (*The Eternal Bliss (CA)* [52]); and

    (b) the breach must result in "consequences extend[ing] beyond the detention of [the] vessel" (John Schofield, *Laytime and Demurrage* (8th edn, Informa Law from Routledge 2022) para 6.46; *The Eternal Bliss* [2020] EWHC 2373 (Comm) [61]).

29. Neither requirement is satisfied in this case.

A. The Respondent did not breach a separate obligation

30. The Claimant argues that there is an implied term that the "receivers and/or consignees of the Cargo would procure the discharge of the Cargo within a reasonable time" (Statement of Reply and Defence to Counterclaim ("**R&DCC**")**,** Moot Problem p 40, at [8]).

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

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

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

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

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

32. No term should be implied for the following reasons. First, the obligation to discharge the Cargo under the Bill of Lading contract is already governed by the laytime and demurrage regime:

    (a) Under Clause E of the Charterparty (Annex A to the SOC, Moot

Problem p 12), the Charterer is under an obligation to discharge the Cargo within 96 hours (the "**Laytime Obligation**") (Annex A to the SOC, Moot Problem p 14, Clause 5(a)). The Claimant accepts that the Respondent is also under the Laytime Obligation by virtue of its incorporation into the Bill of Lading (SOC, Moot Problem p 10, at [17]).

(b) Under Clause G of the Charterparty (Annex A to the SOC, Moot Problem p 13), damages arising from a breach of the Laytime Obligation are liquidated at a rate of USD 1500 per hour (the "**Demurrage**").

(c) Clause 27 of the Rider Clauses (Annex B to the SOC, Moot Problem p 24) expressly provides for the receivers and the consignee (being the Respondent) to be "responsible and liable" for the payment of the Demurrage.

33. Since the Demurrage liquidates "the whole of the damages" arising from a breach of laytime (see [28] above), it is neither necessary nor required for commercial coherence to imply a term that creates liabilities beyond what the parties have already provided for (*The Sea Master*, [38]-[39]; see [32] above). Here, the implied term also contradicts the express terms of the Bill of Lading contract because it seeks to impose a reasonable time obligation, in addition to the agreed laytime between the parties (see generally, *The Spiros C* [2000] 2 Lloyd's Rep 319 (EWCA) [79] in the context of implying liability on the shipper for discharge).

34. Second, to the extent that the Claimant relies on Clause 38 of the Rider Clauses as supporting the implication of any term (SOC, Moot Problem p 7, at [6]), it is simply too equivocal to impose any obligation on the Charterer (much less the consignee or receiver) to be responsible for the Vessel meeting its subsequent employment. If the Claimant already had in mind that the cooperation of the Charterer, consignee or receiver, was essential to ensuring that the Vessel could meet the Kaohsiung Fixture, it was open to the Claimant to expressly provide so in either the Charterparty or the Bill of Lading. Their failure to do so sharply contrasts with the laytime and demurrage obligations which have been specifically imposed on the consignee and receivers (see [32] above). Accordingly, the implied term is not so obvious that it goes without saying.

35. Third, if the Claimant seeks to rely on Clause 38 it would run into considerable difficulties with incorporation. This is because the Respondent's obligations vis-à-vis the Claimant are solely governed by the Bill of Lading contract. As the Bill of Lading only uses general words of incorporation (see Annex C to the SOC, Moot Problem pp 30-31), only terms which are "which directly relate to shipment, carriage and delivery of the cargo, or the payment of freight" will be incorporated (*The Polar* [2024] 1 Lloyd's Rep 85 ("*The Polar*") [83] (UKSC)). Given that Clause 38 merely describes the future employment of the Vessel, which is a matter "after the completion of discharge", it is not germane to the Bill of Lading contract and will not be incorporated (*The Polar* [84]). Consequently, no implied term can arise if Clause 38 is absent from the Bill of Lading contract.

36. For the same reasons, a Bill of Lading holder would not have had notice of Clause 38, and so it would not be fair, nor would the Respondent have agreed to be bound by a term founded on Clause 38.

B. There was no separate loss suffered by the Claimant which had not already been liquidated by Demurrage

37. The Claimant argues that the demurrage provisions do not liquidate the consequential losses arising from the loss of the Kaohsiung Fixture (the "**Consequential Losses**") **(**R&DCC, Moot Problem p 40, at [9]). This is untenable for the following reasons.

38. First, it is uncontroversial that the word "demurrage" is meant to liquidate, at minimum, a "loss of prospective freight earnings" (*The Eternal Bliss (CA)* [54]). The Consequential Losses are of the same type – a loss of subsequent freight - and will thus be liquidated by the demurrage regime. The Consequential Losses are not transformed into a different type of loss simply because "the periods involved are longer or the amounts are larger" (Robert Gay, "Damages in addition to demurrage" (2004) LMCLQ 72, 81 discussing *Suisse Atlantique Societe d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1965] 1 Lloyd's Rep 166 (QBD); [1965] 1 Lloyd's Rep 533 (CA); [1966] 1 Lloyd's Rep 529 (HL)).

39. Second, the Claimant's narrow construction is inconsistent with the purpose of liquidated damages, which are used to "avoid the risk of under-compensation,

where the rules on remoteness of damage might not cover consequential ... loss[es]" (*Chitty on Contracts*, para 30-207). The Claimant was aware of the Kaohsiung Fixture and the possibility of suffering the Consequential Losses at the time it entered into the Charterparty. Despite this, the Claimant failed to ensure that the demurrage rate adequately accounted for the Consequential Losses. The Tribunal should not now allow the Claimant to avoid the consequences arising from its own omission.

V. THE CLAIMANT IS LIABLE FOR THE MISDELIVERY

40. It is trite that the Claimant, as the shipowner under the Bill of Lading contract, was under an obligation to deliver the Cargo only against presentation of the Bill of Lading (*Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] AC 576, 586 (UKPC)). The Respondent has the title to sue the Claimant for the Misdelivery because it is the "lawful holder" of the Bill of Lading under s 2(1)(a) of the Carriage of Goods by Sea Act 1992 (UK).

41. The Claimant denies liability on the basis that the Respondent has caused its own loss (R&DCC, Moot Problem p 41, at [14]). Preliminarily, there is no issue of the Respondent's consent to delivery without production of the Bill of Lading because at no point did the Respondent communicate directly with the Claimant (Aikens et al., *Bills of Lading* (3rd edn, Informa Law from Routledge 2021) ("*Bills of Lading*") para 5,49; *The Yue You 902* [2019] 2 Lloyd's Rep 617 (*"The Yue You 902*") [122] (SGHC)). The only possible defences available to the

Claimant are that the Respondent:

(a) authorised the Charterer to accept delivery (as its agent or otherwise); or

(b) would have consented to the Misdelivery if it had been requested to do so by the Claimant.

42. Neither defence is made out on the facts.

A. The Respondent did not authorise the Charterer to take delivery without production of the Bill of Lading

43. There was no prior contractual arrangement between the Respondent and the Charterer which contemplates that the Charterer would take the delivery of the Cargo as the Respondent's agent (cf. *The Nika* [2021] 1 Lloyd's Rep 109 (EWHC)).

44. Instead, the Claimant's case on authorisation will likely hang on the Respondent's email where the Respondent said the Charterer "must do as you deem fit … and we will not interfere as long as the loan is repaid" (Annex A to the R&DCC, Moot Problem p 46, Email from the Respondent on 3 October 2023 at 4.42pm) (the "**Final Email**"). No part of the Final Email explicitly states the Respondent's authorisation to the Charterer to take delivery without production of the Bill of Lading. For the Claimant to make out its case, it would have to rely on an inference based on the Final Email, which is too unclear on the facts to amount to authorisation.

45. The fact that there was no authorisation is also consistent with:

    (a) the Respondent's entire communications with the Charterer; and

    (b) the commercial context of the financial arrangements under the LC.

i. The Respondent's entire communications reveal no intention to authorise the taking of delivery

46. The Respondent sent the following communications in the immediate period preceding the Final Email:

    (a) On 29 September, the Respondent said that it "will process trust receipt loan once the documents are presented against LC" (Annex A to the R&DCC, Moot Problem pp 47-48, Email from the Respondent on 29 September 2023 at 9.58am).

    (b) On 3rd October, 40 mins before the Final Email, the Respondent told the Charterer: "Due to latest review of Yu Maritime's financials we are unable to grant trust receipt for release of goods until … Bill of Lading are received" (Annex A to the R&DCC, Moot Problem p 46, Email from the Respondent on 3 October 2023 at 4.02pm).

47. In fact, the Final Email itself begins by stating that "we cannot accommodate [the Charterer's] request [to grant trust receipt] and our decision stands" (Annex A to the R&DCC, Moot Problem p 46, Email from the Respondent on 3 October 2023 at 4.42pm).

48. At all material times, the Respondent refused to authorise the Charterer to take delivery of the Cargo unless and until the Bill of Lading came into the Respondent's possession. The Respondent maintained its position in the face of repeated requests by the Charterer. Read in this context, the Final Email clearly cannot constitute an authorisation of the Charterer to take delivery of the Cargo without presentation of the Bill of Lading.

ii. The Respondent's financial arrangements reveal no intention to authorise delivery

49. The Respondent could not have authorised the Claimant to take delivery because it looked to the Bill of Lading as security and it "is difficult to see why [a bank] would give [its security] up by consenting to delivery of the goods to a third party before the loan is discharged" (*Bills of Lading* para 8.48, citing inter alia *BNP Paribas v Bandung Shipping Pte Ltd* [2003] 3 SLR(R) 611 ("*BNP Paribas*"), 625). The following facts indicate that the Respondent looked to the Bill of Lading as security.

50. First, the Bill of Lading was issued to the Respondent as the named consignee or to its order (Annex C to the SOC, Moot Problem p 30). In doing so, the subsequent possession of the Bill of Lading could convey on the Respondent the possessory title of a pledgee against the Charterer as the pledgor (*Sale Continuation Ltd v Austin Taylor & Co Ltd* [1968] 2 QB 849, 861). If the Charterer did not discharge its liability under the LC, the Respondent would have the usual right of a pledgee to sell the Cargo as if it were the owner.

51. Second, Clause 57 of the Rider Clauses (Annex B to the SOC, Moot Problem p 28, Clause 57) allows the Claimant to discharge against the presentation of a letter of indemnity (the "**LOI Clause**"). This however does not imply an authorisation to the Charterer to take delivery of the Cargo without production of the Bill of Lading. Even if the Respondent had been aware of the LOI Clause, the Parties clearly contemplated that the Claimant would become "liable to the holder of the bill of lading" (*The Yue You 902* [84], citing *BNP Paribas*). The LOI Clause cannot be deemed as an authority from the bill of lading holder to the "shipowner to deliver the cargo to whoever produces a letter of indemnity" (*The Stone Gemini* [1999] 2 Lloyd's Rep 255 (FCA) [51]).

52. This commercial context colours the interpretation of the Final Email. The Respondent could not have authorised the Charterer to take delivery of the Cargo without production of the Bill of Lading because in so doing the Respondent would have given up its security, an act so uncommercial as to be improbable.

B. A causation defence also fails because the Respondent would not have consented to the Misdelivery if the Claimant had requested it to do so

53. The Claimant may also argue that that the Respondent's position would have been no different because it would "in any event, have permitted discharge without production of the [Bill of Lading]" upon request by the Claimant (*The Sienna* [2023] EWCA Civ 471 ("*The Sienna (CA)*") [107]). This was termed the "**Negative Causation Defence**" in *The Sienna (CA)* at [104].

54. The Negative Causation Defence is not made out because in the event of performance by the Claimant, the Respondent "would have enforced its security against the Cargo so as to recoup its lending" on the balance of probabilities (*The Sienna (CA)* [103]). This may be seen from how the Respondent was unwilling to give up its security interest notwithstanding pressure from the Charterer (see [46]-[48] above).

55. Furthermore, the Negative Causation Defence in *The Sienna (CA)* was only made out because of the unique financial arrangements that had been made by the bank. This resulted in the trial judge making the particular finding of fact that the bank would have agreed to discharge (if pressed by the Owners) because they believed that "they were wholly or largely secured in other ways" (*The Sienna (CA)* [115], discussing *The Sienna* [2022] EWHC 957 (Comm) ("*The Sienna (HC)*") [120]). In particular, the trial judge observed that the bank:

    (a) "had no specific concerns" about its customer's default (*The Sienna (HC)* [120](i));

    (b) had the "the benefit of an assignment of [a trade credit insurance] policy and thus believed that it was insured as to 90% against credit risk" as well as a "10% cash margin which covered the remaining credit risk" (*The Sienna (HC)* [120](ii)); and

    (c) by 4 May 2020, had received invoices from sub-buyers whom they deemed acceptable (*The Sienna (HC)* [120](iii)). This was presumably just shortly after the actual date of discharge, which was around 26 April to 2 May (*The Sienna (HC)* [10]).

56. These facts make *The Sienna* a unique case, leading the English Court of Appeal to comment that it is "by no means clear that similar findings of fact could be made in most other cases" (*The Sienna (CA)* [115]). Indeed, none of the same circumstances are present here. The facts of this case are instead the complete opposite to those which led the trial judge in *The Sienna (HC)* to find the way she did:

    (a) The Respondent harboured doubts as to the Charterer's financial position. It was unwilling to grant the requested trust receipt "[d]ue to [its] latest review of Yu Maritime's financials" (Annex A to the R&DCC, Moot Problem p 46, Email from the Respondent on 3 October 2023 at 4.02pm);

    (b) There is no indication that the Respondent was otherwise secured or believed that it was secured other than via the Bill of Lading, which it relied on for security (see [49]-[52] above); and

    (c) The Respondent had not yet received the "export LC from [the] Korean [sub-]buyers" and was hesitant to release the goods until such receipt (Annex A to the R&DCC, Moot Problem p 46, Email from the Respondent on 3 October 2023 at 4.02pm).

57. It would have been incredible for the Respondent to give up its security given that: (i) it had it already had concerns about the Charterer's financial health; and (ii) it did not appear to possess any other form of security. Accordingly, even if the Claimant had refused to deliver the Cargo without the Bill of Lading, the Respondent would still have maintained its position and refused to give its consent.

58. In conclusion, the Claimant failed to protect its position and should now bear the consequences of the Charterer's insolvency. The Claimant should not be allowed to escape its bad bargain by subverting well-established commercial arrangements to make the Respondent the insurer of its losses.

VI. Prayer for Relief

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

(a) **find** that it has no jurisdiction over all claims in the present dispute;

(b) **declare** that the Claimant's losses are limited to a claim in demurrage only; and

(c) **award** the Respondent substantial damages for Misdelivery of the Cargo.