TWENTY-THIRD INTERNATIONAL MARITIME LAW
ARBITRATION MOOT 2024

NATIONAL LAW SCHOOL OF INDIA UNIVERSITY

MEMORANDUM FOR RESPONDENT

ON BEHALF OF

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

RESPONDENT

AGAINST

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

CLAIMANT

TEAM CODE D

Rishab Devaiah Ittira • Nidhi Agrawal • Kartik Kalra

TWENTY-THIRD INTERNATIONAL MARITIME LAW
ARBITRATION MOOT 2024

MEMORANDUM FOR RESPONDENT

ON BEHALF OF	AGAINST
Veggies of Earth Banking Ltd. 18 Gardens Road Tuen Mun Hong Kong SAR	Tomahawk Maritime S.A. Represented By: Ms. Hong Rou 40-00 Good Ideas Nook Singapore 564738
RESPONDENT	**CLAIMANT**

TEAM CODE D

TABLE OF CONTENTS

INDEX OF ABBREVIATIONS

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

INDEX OF AUTHORITIES

I. TREATIES, CONVENTIONS AND RULES

II. COMMENTARIES AND ARTICLES

Cited as	Full citation	Para/s
	Comparative Analysis : A Handbook Beck 2021	
Baughen	Simon Baughen, 'One Breach, One Remedy: The Eternal Bliss in the Court of Appeal' *Journal of International Maritime Law,* Vol. 28, Issue 5, 2022, pp. 286-289	¶¶29
Berger	Klaus Peter Berger 'Re-examining the Arbitration Clause: Applicable Law Consensus or Confusion', Albert Van Den Berg (Ed.) *International Arbitration 2006: Back to Basics?* Kluwer, 2007	¶8
Bernardini	Piero Bernardini *Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Clause* 158th Ed., 1999	¶8
Born	Gary Born *International Commercial Arbitration* 3rd Ed., Kluwer Law International, 2020	¶¶5,8, 10,11, 12,14
Chan	Darius Chan and Jim Yang Teo, 'Ascertaining the proper law of an arbitration	¶16

Cited as	Full citation	Para/s
	agreement: The artificiality of inferring intention when there is none' Journal of International Arbitration, Volume 37, Issue 5, pp. 635-648	
Chitty	Prof. Hugh Beale *Chitty on Contracts* 32nd Ed, Sweet and Maxwell, 2016	¶25
Cooke	Julian Cooke *Voyage Charters* 4th Ed, Routledge, 2014	¶¶31, 48
Cordero-Moss	Giuditta Cordero-Moss, 'The Role of the Lex Arbitri' CL Lim (Ed.) *The Cambridge Companion to International Arbitration* Cambridge University Press, 2021	¶12
Fernández	Jonatan Echebarria Fernández *Jurisdiction and Arbitration Agreements in Contracts for the Carriage of Goods by Sea: Limitations on Party Autonomy* 1st Ed, Routledge, 2021	¶2

Cited as	Full citation	Para/s
Fouchard	Emmanuel Gaillard and John Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (1st edition, Kluwer Law International 1999).	¶2
Gramont	Arif Hyder Ali and others *The International Arbitration Rulebook: A Guide to Arbitral Regimes* Kluwer Law International2019	¶5
Jones	Doug Jones, 'Choosing the law or rules of law to govern the substantive rights of the parties' Singapore Academy of Law Journal, Volume 26, 2014	¶7
Kaufmann-Kohler	Gabrielle Kaufmann-Kohler, 'Globalization of Arbitral Procedure' *Vanderbilt Law Review,* Volume 36, 2021	¶12
Lew	Julian Lew 'The Law Applicable to the Form and Substance of the Arbitration Clause' Albert van den Berg (Ed.) *Improving the Efficiency of Arbitration*	¶8

Cited as	Full citation	Para/s
	Agreements and Awards: 40 Years of Application of the New York Convention (1998) ICCA Congress Series, Vol 9	
Mitchell	Catherine Mitchell, *Interpretation of Contracts* 2nd Ed, Routledge, 2019	¶45
Niranjan	Niranjan V. and Ian Glick, 'Choosing the Law Governing the Arbitration Agreement' Neil Kaplan and Michael Moser (Eds), *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles* Kluwer Law International, 2018	¶¶5, 15, 16
Schofield	John Schofield *Laytime and Demurrage* 8th Ed, Routledge, 2021	¶21
Schwab	Schwab & Walter, 'Schiedsgerichtsbarkeit', 7. Aufl., 2005, Kap. 6, Rdnr. 10; Albers in *Baumbach, Lauterbach, Albers & Hartmann*, ZPO, 64. Aufl., München 2006, §	¶12

Cited as	Full citation	Para/s
	1059, Rdnr. 2.	
Scrutton	Thomas Edward Scrutton *Charterparties and Bills of Lading* 23rd Ed, Sweet & Maxwell, 2016	¶48
Todd	Paul Todd, *Bills of Lading and Bankers' Documentary Credits* 4th Ed, Routledge, 1990	¶45
Van Den Berg	AJ van den Berg *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* Kluwer Law and Taxation, 1981	¶8
Wagner	Gerhard Wagner, *Prozessverträge: Privatautonomie im Verfahrensrecht* Mohr Siebeck, 1998	¶12
Wolff	Reinmar Wolff (Ed.), *New York Convention: Article-by-Article Commentary* 2nd Ed, Beck/Hart Publishing 2019	¶14

III. CASES

Cited as	Full citation	Para/s
	Trading Pte Ltd, Intervening (The "Maersk Princess") [2022] SGHC 242	
Midlink	Midlink Development Pte Ltd v. The Stansfield Group Pte Ltd (SGHC), [2004] SGHC 182	¶47
Motis Exports	Motis Exports v. Dampskibsselskabet AF 1912 Aktieselskab, [1999] 1 Lloyd's Rep 837	¶41
Mur Shipping	Mur Shipping BV v. RTI Ltd, [2022] EWHC 467 (Comm)	
Naviera	Naviera Amazonica Peruana SA v. Compania Internacional de Seguros del Peru, [1988] 1 Lloyd's Rep 116	¶3
Nazir Ali	Nazir Ali v. Petroleum Company of Trinidad and Tobago, [2017] UKPC 2	¶25
Nettleship	British Columbia Saw Mill Co Ltd v. Nettleship (1868) LR 3 CP 508.	¶¶27, 39
Nissho Iwai	Nissho Iwai Corp. v. MV Joy Sea, 2002 A.M.C. 1305, 1311 (E.D. La.)	¶11
Oceanografia	Greatship (India) Ltd v. Oceanografia SA De CV (The "Greatship Dhriti"), [2012] Ewhc 3468 (Comm)	¶26

Cited as	Full citation	Para/s
Oljefabriker	Monarch S.S. Co v. Karlshamns Oljefabriker, (1946) 80 Ll.L.Rep. 151	¶31
Petrasol BV	Petrasol BV v. Stolt Spur Inc., decision dated 28 September 1995 XXII YBCA 1997	¶12
Petrochemical	Petrochemical Industries Co (Ksc) v. Dow Chemical Co., [2012] EWHC 2739 (Comm)	¶39
Philips Electronique	Philips Electronique Grand Public SA v. British Sky Broadcasting Ltd (CA), [1994] Lexis Citation 1709	¶25
Pride Shipping	Pride Shipping v. Chung Hua Pulp, [1991] 1 Lloyd's Rep. 126	¶2
Process	Process and Industrial Developments v. The Federation of Nigeria, [2019] EWHC 2241 (Comm.)	¶3
Shagang	Shagang South-Asia (Hong Kong) Trading Co Ltd v. Daewoo Logistics, [2015] 1 Lloyd's Rep 504	¶3
Shashoua	Roger Shashoua v. Mukesh Sharma, [2009] EWHC (Comm.) 957	¶¶4, 5
Siboti	Siboti KIS v. BP France S.A. [2003] EWHC1278 (Comm)	¶35

Cited as	Full citation	Para/s
The Houda	Kuwait Petroleum Corporation v. I & D Oil Carriers Ltd. (The "Houda") [1994] 2 Lloyd's Rep 541	¶41
The Luna	The "Luna" and Another Appeal [2021] SGHC 84	¶¶47, 48, 49, 52, 54
The Polar	Herculito Maritime Ltd and others v. Gunvor International Bv And Others (The "Polar"), [2024] UKSC 2	¶23
The Rafaela S	JI Macwilliam Co Inc v. Mediterranean Shipping Co SA (The "Rafaela S"), [2005] UKHL 11	¶47
The Sienna	Unicredit Bank AG v. EURONAV NV, [2023] EWCA Civ 471	¶¶43, 48, 51
The Sienna 2022	Unicredit Bank AG v. EURONAV NV [2022] EWHC 957 (Comm)	¶¶43, 46
The Star Quest	The Star Quest and others, [2017] Lloyd's Rep Plus 50	¶41
Thyssen	Thyssen Canada Ltd v. Mariana Maritima SA, [2000] 3 FC 398, (Canadian Fed. Ct. App.)	¶10
Toomey	J. Toomey Motors Ltd. v. Chevrolet UK Ltd., [2017] EWHC 276 (Comm)	¶26

LIST OF DATES

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

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

STATEMENT OF FACTS

CLAIMANT chartered MVN to Yu Shipping Ltd. on 1 September 2023 to carry 16,999.01 MT of palm oil from Bintulu, Malaysia to Busan, South Korea. MVN arrived at Busan, South Korea on 20 September 2023 to deliver the said cargo. RESPONDENT was unable to complete cargo operations within laytime, and MVN was present at Busan, South Korea till 8 October 2023. Demurrage is payable for the same.

In order to enable CLAIMANT's follow-on fixture and the demurrage that accrued on Charterers, RESPONDENT communicated to Charterers that they may "do as [they] deem fit", an instruction to warehouse the cargo to enable the vessel's departure. CLAIMANT, however, misdelivered the cargo without RESPONDENT's presentation of B/L, causing RESPONDENT a loss of $4,249,752.50.

Cl. 76, CRC states that arbitration shall be in Guangzhou, with three arbitrators and *SCMA Rules* applicable. Since a Chinese-based arbitration cannot be administered by a foreign arbitral commission, RESPONDENT objected to the initiation of the said arbitration through its Statement of Response to CLAIMANT's Notice of Arbitration dated 5 January 2024.

SUMMARY OF ARGUMENTS

ISSUE [1]

RESPONDENT submits that this Tribunal does not have jurisdiction to hear the dispute owing to the arbitration agreement's invalidity. The arbitral seat is China, and clauses similar to *Cl. 76, CRC* have been read as designating the arbitral seat. There is no contrary indicia to shift this presumption. Applying the NYC conflict-of-law rules, Chinese law governs the arbitration agreement, causing its invalidity.

ISSUE [2]

CLAIMANT's $3,650,000 claim for unliquidated damages must be rejected. CLAIMANT has not satisfied standards in *Eternal Bliss* and *The Bonde*. No obligation to enable MVN's follow-on fixture can be implied on RESPONDENT. CP does not contain a clause limiting the scope of demurrage, and "contrary indications" are, thus, absent. CLAIMANT's losses from its follow-on fixture were not caused by RESPONDENT, since weather conditions broke the causal chain. They are too remote, and RESPONDENT assumed no responsibility for them.

ISSUE [3]

RESPONDENT is entitled to $4,249,752.50 owing to CLAIMANT's misdelivery. RESPONDENT holds title to sue, since B/L evinces a contract of carriage and a document of title. Alternatively, RESPONDENT's refusal to grant a trust receipt evidences refusal to authorize delivery. RESPONDENT's communication to Chtrs. to "do as [they] deem fit" did not enable Chtrs. to make delivery. RESPONDENT, therefore, was not "aware" of delivery. RESPONDENT aimed to use B/L as security over cargo and intended to rely on it for delivery, safeguarding itself against non-receipt of the B/L

ARGUMENTS ADVANCED

[1] THE ARBITRAL TRIBUNAL DOES NOT HAVE JURISDICTION

1. RESPONDENT submits that the Arbitral Tribunal does not have jurisdiction, as, *first*, the arbitral seat is China **[1.1]**; *second*, in applying choice-of-law rules recognised under the NYC, the law governing the arbitration agreement is Chinese law, and the arbitration agreement is invalid thereunder **[1.2]**; and *third*, the validation principle's application in favour of English law as the law governing the arbitration agreement is impermissible **[1.3]**.

[1.1] THE SEAT OF ARBITRATION IS CHINA

2. Parties are free to choose their seat of arbitration [*Fouchard*, Part II §1(b)(3)]. RESPONDENT submits that Parties have made a clear choice of the arbitral seat in *Cl. 76, CRC*, which states that *"[a]rbitration, if any, to be in Guangzhou*". Given the specific identification of the "Law and Arbitration Clause" in *Cl. 1, CoC*, it stands incorporated thereunder [*The Good Luck* ¶15; *Pride Shipping,* p. 131; Fernández, p. 59], expressing Parties' intention to designate China as the arbitral seat.
3. The usage of the term *arbitration* in *Cl. 76, CRC* conveys a definitive intention to anchor the entirety of the arbitration to the location mentioned, and cannot be construed as merely making an indication as to the location of arbitral proceedings [*Process,* ¶85]. Furthermore, given the legal significance of the seat, when there is only one geographical location specified in an arbitration agreement, it must be construed as parties' designation of a seat [*BNA*, ¶65]. This has been upheld in a line of common law authority that dealt with similarly worded clauses [*Naviera*, ¶119; *Keppel Fels*, ¶31; *Shagang*, ¶38]. In *Shagang,* the Queen's Bench Division held that "the use of the phrase *'to be held in Hong Kong'* ordinarily carried with it an implied choice of Hong Kong as the seat of arbitration…" [*BNA* ¶67; S*hagang* ¶20]. The reference to the "holding" of arbitration in a geographical location

is frequently used to designate an arbitral seat [*Joseph*, ¶6.40; *BNA*, ¶¶67-69]. Further, when parties refer to a geographical location without specifying its purpose, "in general, courts and arbitral institutions interpret such references as specifying the arbitral seat…" [*Joseph*, ¶6.40; *BNA* ¶68]. In the absence of significant contrary indicia, this reference must be construed as a designation of the arbitral seat [*BNA* ¶67].

4. CLAIMANT may contend that the mention of Guangzhou is a reference to the venue of arbitration. However, if there is a geographic indication of the venue without contrary indicia, the venue is equivalent to the seat [*Shashoua,* ¶34]. Further, where supranational rules are applicable, the venue may be read to mean the arbitral seat [*Shashoua,* ¶34].
5. RESPONDENT submits that there is no contrary indicia that shifts Guangzhou's designation as the seat. *Cl. 76, CRC,* which provides for a single geographical location for holding the entire 'arbitration', reflects Parties' choice of the arbitral seat. The reference to Guangzhou has the effect of designating China as the seat of arbitration [*BNA,* ¶¶91-93]. If the Tribunal were to hold otherwise, it would militate against the foundation of commercial arbitration, which is party intent [*Born*, §4.04]. Further, a supranational body of rules – the *SCMA Rules* – governs the arbitration, necessitating the designation of Guangzhou as the arbitral seat [*Shashoua*, ¶34]. Furthermore, RESPONDENT submits that a reading of *Cl. 24, CRC* evinces that Chtrs. may release B/L in Shanghai, making China a key location in the contract, another indication that Parties intended for China to be the arbitral seat [*Gramont*, §2.02]. The possible invalidity of the arbitration agreement under Chinese law is insufficient contrary indicia, as the Singapore Court of Appeal in *BNA* – dealing with this specific question – held that it must be shown that "parties were, at the very least, aware that the choice of proper law of the arbitration agreement could have an impact upon the validity of the arbitration agreement" [*BNA* ¶90; Niranjan §9.06]. There is no evidence demonstrating either party's awareness of the invalidating effect of the choice of Chinese

law. Thus, there is no contrary indicia to shift the presumption that China is the seat of arbitration.

6. Therefore, *R. 32, SCMA Rules,* which provides for a default seat in the absence of parties' choice, does not apply, since Parties have chosen China as the arbitral seat.

[1.2] THE TRIBUNAL MUST APPLY THE CONFLICT-OF-LAW RULES RECOGNIZED UNDER NYC

7. *R. 31, SCMA Rules* provides that the tribunal shall apply the law that it considers applicable, adopting the *voie directe* framework. However, even within the *voie directe* framework, tribunals apply conflict-of-law rules in the determination of the governing law. This is done to arrive at a reasoned decision [*Jones*, p. 914].

8. Given the multiplicity of competing approaches in determining the applicable governing law [*Born*, §4.04; *Berger* p. 302; *Bernadini,* p. 199], it is submitted that this Tribunal must apply the rule under *Art. V(1)(a), NYC*. As all suggested seats are parties to the NYC, the choice-of-law approach thereunder must be applied. This approach foregrounds party intention, is applicable at the stage of determining the arbitration agreement's validity, and is derivable from a combined reading of *Art. II* with *Art. V, NYC* [*Enka*, ¶130; *Van Den Berg*, p. 126]. *Art. V(1)(a), NYC,* which is the prescribed choice-of-law rule, contains a three-stage enquiry. *First*, the applicable law is considered to be parties' express choice. *Second*, in the absence of an express choice, an implied choice is determined and applied [*Born,* §4.04; *Lew,* p. 142; *Kabab-ji,* ¶11]. *Third*, failing this, the rule prescribes the default application of the law of the seat [*Born*, §4.04(b)].

9. It is submitted that Chinese law shall govern the arbitration agreement because, *first*, no express choice of law was made **[1.2.1]**; *second,* there is an implied choice of Chinese law **[1.2.2]** and *finally*, the default rule favours Chinese law as the law applicable to the arbitration agreement **[1.2.3]**.

[1.2.1] No Express Choice was Made by Parties

10. *Cl. 76, CRC* refers only to the substantive law of the contract and does not constitute an express choice of the governing law of the arbitration agreement. Express choice of law clauses specifically mentions, in no uncertain terms, the law that applies to the arbitration agreement [*Thyssen* ¶22; *Born,* §4.02]. Since *Cl. 76, CRC* is silent on an express choice, it does not meet this standard. Thus, this clause cannot be construed as an express choice of law applicable to the arbitration agreement.

[1.2.2] There is an Implied Choice of Chinese Law

11. The law of the arbitral seat is Parties' implied choice of law governing the arbitration agreement [*Kababji Fr*; *Nissho Iwai,* p.1311]. RESPONDENT submits that this implied choice is justified by a large line of judicial decisions and commentary [*Hamlyn* ¶202; *Bangladesh Chem* ¶392; *FirstLink* ¶15; *Born*, §4.04]. CLAIMANT may submit that the choice of the arbitral seat is an implied choice of the law governing the arbitration agreement by contending that Singaporean law governs the arbitration agreement. Therefore, both Parties contend that there is an implied choice of law in favour of the law of the seat.

12. The choice of the seat indirectly affects a choice of the law governing the arbitral procedure [*Kaufmann-Kohler*, p. 1319]. The procedural aspects addressed by the *lex arbitri* or law of the seat are also addressed by the arbitration agreement [*Cordero-Moss*, p. 98; *Schwab*, Chapter 7, §37; *Wagner*, p. 578]. RESPONDENT submits that an intimate connection exists between the law of the seat and the arbitration agreement [*Petrasol BV; Thai-Lao*, ¶122*; Born*, §4.04]. Commercial parties reasonably expect all aspects of arbitral procedure to be governed by a unified legal system [*Born*, §.4.04]. Parties, by expressly choosing China as the arbitral seat, have chosen Chinese law to govern all aspects of arbitral proceedings. Thus, the arbitration agreement – the primary procedural contract in this dispute – must

also be governed by the same law. This is to avoid complexities involved in having different laws applicable to the enforcement procedure and substantive validity of the arbitration agreement [*Born*, §.4.04].

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

[1.2.3] In the Absence of Implied Choice, Default Rule Points to Chinese Law

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

[1.3] ENGLISH LAW DOES NOT GOVERN THE ARBITRATION AGREEMENT

15. CLAIMANT may contend that even if the arbitral seat is China, the law of the B/L governs the arbitration. This submission necessarily hinges on the application of the validation principle, given CLAIMANT's primary submission is that the law of the arbitral seat is the law applicable to the arbitration agreement [*FoR*, p. 39]. The contention that parties always intend to enter into a valid arbitration agreement, and that the law governing the arbitration must be the one that preserves its validity, is flawed. This is because it is the legal system determined by choice-of-law rules that decides validity, not party fiat [*Niranjan*, §.9.03]. In *BNA*, the Singapore Court of Appeal – in addressing an analogous situation – held that parties must be aware of the implications of the governing law to justify the validation principle's application [*BNA*, ¶90].

16. RESPONDENT submits that the application of the validation principle to shift the governing law from Chinese law to English law is impermissible, since it entails a disregard of the operation of choice-of-law rules. Furthermore, CLAIMANT's application of the validation principle necessarily treats it as the sole factor that shifts the governing law from the law of the seat to that of the underlying contract. This is impermissible, for even judicial decisions adopting this principle treat it merely as a factor relevant in the identification of the applicable law, not determinative of it [*Niranjan* §9.08; *Sulamerica* ¶61]. There is no evidence to show that Parties were aware of the invalidating effects of the choice of the governing law. Applying the validation principle would constitute judicial construction of party intent, foregoing actual party intent discernible from the arbitration agreement's terms [*Chan*, p. 643]. Therefore, the application of the validation principle to shift the governing law of the arbitration agreement from Chinese law to English law is impermissible. Thus, the law governing the arbitration agreement is Chinese law.

CONCLUSION

17. *Art. 10, PRC Arbitration Law* provides that an arbitration agreement "*shall contain*" a reference to an arbitration commission. However, the SCMA is not a valid arbitration commission under *Art*. 16 of the PRC Arbitration Law. Therefore, the arbitration agreement is invalid under the governing law, i.e., Chinese law, and the Tribunal does not have jurisdiction.

---

[2] CLAIMANT IS NOT ENTITLED TO UNLIQUIDATED DAMAGES FOR LOSSES FROM ITS FOLLOW-ON FIXTURE

18. While RESPONDENT submits that this Tribunal does not have jurisdiction to hear the present dispute, in case it comes to a contrary finding, it must reject CLAIMANT's $3,650,000 claim for losses from its follow-on fixture. This sum is unrecoverable from RESPONDENT since, *first*, CLAIMANT has failed to satisfy the standards in *Eternal Bliss* and *The Bonde* **[2.1]**;

and *second*, CLAIMANT's losses were not *caused* by RESPONDENT, are too *remote* in law **[2.2]**.

[2.1] CLAIMANT'S LOSSES ARE LIQUIDATED BY DEMURRAGE

19. Based on the Court of Appeal's holding in *Eternal Bliss*, as well as its affirmation of *The Bonde*, CLAIMANT must satisfy three conditions to claim non-demurrage damages. *First*, CLAIMANT's loss should be distinct from the vessel's loss of use. *Second*, CLAIMANT's loss should stem from the breach of an additional and/or independent obligation (to the completion of cargo operations). *Third*, if the laytime-based obligation is the only one breached, an expressly drafted clause containing "contrary indications" suggesting that demurrage did *not* liquidate all losses arising therefrom must exist. Thus, there should either be two breaches, or if there is a single breach, "contrary indications" confining demurrage must exist [*Eternal Bliss*, ¶59; *The Bonde*, p. 142].
20. RESPONDENT submits that RESPONDENT does not satisfy the above test, as, *first*, CLAIMANT's losses are identical to the vessel's loss of use **[2.1.1]**; *second*, RESPONDENT had no obligation "additional" to the completing operations in laytime **[2.1.2]**; and *third*, there is no expressly drafted clause containing "contrary indications" **[2.1.3]**.

[2.1.1] CLAIMANT's Loss is Identical to Vessel's "Loss of Use"

21. It is well-established that "loss of use" concerns the loss of prospective freight (or hire) earnings arising from delays in cargo operations [*Eternal Bliss*, ¶54; *Suisse*, p. 541; *Schofield*, §6.76]. CLAIMANT's loss, which is $5,000/day over two years, is the hire that it could have made through the vessel's use. Its loss, therefore, is its lost hire [*FoR*, p. 10].

[2.1.2] CLAIMANT's Loss Does Not Stem From "Additional Obligation's" Breach

22. CLAIMANT may submit that its losses from the follow-on fixture arise from RESPONDENT's breach of an implied term to "complete cargo operations to enable MVN's follow-on

fixture". RESPONDENT requests the Tribunal to reject this submission, as, *first*, *Cl. 38* – this implied term's main source – is not incorporated in B/L **[2.1.2.1]**; *second*, this "additional obligation" cannot be implied **[2.1.2.2]**; and *third*, CLAIMANT's losses do not stem from its breach **[2.1.2.3]**.

[2.1.2.1] *Cl. 38, CRC is* not incorporated in B/L

23. General words, such as those contained in *Cl. 1, CoC*, incorporate CP provisions "germane" to the shipment, carriage and delivery of the goods [*The Polar,* ¶¶76-87]. Obligations connected to distinct voyages – those preceding (or succeeding) the instant voyage – are not incorporated [*The Fjord Wind*, ¶8]. *Cl. 38, CRC* does not govern the mode or manner of delivery, whose contents and obligations are provided distinctly under *Cl. E, Main Terms, CP.* Further, since it contains information of a subsequent and distinct voyage, not the instant voyage, it is unincorporated.

[2.1.2.2] RESPONDENT's "Additional Obligation" Cannot be Implied

24. CLAIMANT may submit that RESPONDENT's "additional obligation" derives from three sources. *First*, *Cl. 38, CRC,* which contains information of CLAIMANT's follow-on fixture. *Second*, *Cl. 43, CRC,* which distinguishes between "demurrage" and liabilities arising from "delays in discharging". *Third*, *B/L terms,* which distinguish between "*demurrage"* and "*all other monies due"*. CLAIMANT's submission to imply this "additional obligation" must be rejected, as it does not satisfy the "business necessity" test **[2.1.2.2.1]**. Nevertheless, RESPONDENT fulfilled this additional obligation **[2.1.2.2.2]**.

[2.1.2.2.1] *"Additional obligation" Does Not Satisfy "Business Necessity" Test*

25. CLAIMANT may submit that this "additional obligation" must be implied based on "business necessity". To show business necessity, the contract must lack "commercial or practical coherence" without the implied term [*M&S*, ¶21; *Nazir Ali*, ¶7]. Parties must be shown to have agreed to a single contractual solution to the eventuality that has occurred, and mere

foresight over it is insufficient [*Philips Electronique*, p. 5]. When an express term governs parties' obligations, a term inconsistent therewith cannot be implied [*Chitty*, §14-012]. For a term to be implied through the obviousness test, an officious bystander must regard the term too obvious to stipulate [*M&S*, ¶16].

26. RESPONDENT submits that the instant term can be implied neither through "business necessity", nor the "obviousness" test. *First*, RESPONDENT and CLAIMANT's contract possesses ample "commercial or practical coherence" without this term. A party suffering a financial disadvantage cannot imply a novel term masquerading as an implied term [*Toomey*, ¶91]. *Second*, CLAIMANT's sources for the implied term, at best, indicate the *eventuality* of CLAIMANT's fixture's cancellation. A single contractual solution is absent. *Third*, another express term, contained in *Cl. E, Main Terms, CP* read with *Cl. 11, Part II, CP* already mandates the timely completion of cargo operations, which coincides with the timeline to complete cargo operations to enable MVN's follow-on fixture. Given the implied term's conflict with this express term, it cannot be implied. *Fourth*, while it may be possible that this additional obligation is implied, it is simultaneously possible it is not. Since *Cl. 38, CRC* read with *Cl. 43, CRC* does not contain a definitive timeline for completing cargo operations, it may serve merely as an additional reminder for completing cargo operations within laytime, i.e., a reminder for fulfilling the obligation already specified under *Cl. E, Main Terms, CP*. It is inessential to read a novel timeline into *Cl. 38, CRC*, since its silence may be intentional. There is no principle against surplusage in construing CPs [*The Target*, ¶177]. The mere possibility of an implied term is irrelevant, the standard to be satisfied is "necessity" [*M&S*, ¶21; *Oceanografia*, ¶41].

27. Further, this term cannot be implied through the "obviousness" test. *First*, a term requiring immense creativity to craft, based on multiple provisions of CP and B/L, cannot – for that very reason – be considered obvious. *Second*, it would be unreasonable to construe

RESPONDENT as agreeing to a term – *as a matter of obviousness* – that imposes a disproportionate penalty based on a failure to timely complete cargo operations. RESPONDENT would not enter into an obligation to complete cargo operations, taking liability for its possible cancellation, while entering into *no* negotiation over its contents [*Achilleas*, ¶13; *Nettleship*, p. 508]. *Third*, Chtrs. have also refrained from agreeing to CLAIMANT's formulation of this term, pointing to its non-obviousness [*FoR*, p. 9].

[2.1.2.2.2] *Irrespective, RESPONDENT fulfilled this additional obligation*

28. RESPONDENT acted diligently to enable MVN's fulfilment of its follow-on fixture by enabling Chtrs. to make the vessel fit for setting sail. RESPONDENT communicated to Chtrs. on 3 October 2023 – in connection with emptying the vessel to enable it to set sail – that they must "*do as [they] deem fit*" to enable MVN's timely arrival at Kaohsiung. As argued below, this must be considered a direction to Chtrs. to encourage CLAIMANT to exercise its rights under *Cl. 29, Part II, CP* to "warehouse the cargo" till delivery is obtained [¶46]. RESPONDENT, therefore, fulfilled this obligation by enabling MVN to depart Busan timely.

[2.1.2.3] CP Contains no "Contrary Indications"

29. *Eternal Bliss* mandates the presence of an expressly drafted clause limiting the kinds of damages liquidated by demurrage to enable additional damages' recovery [*Eternal Bliss*, ¶59, *Baughen*, p. 289]. There is no such clause in CP. *Cl. 11, Part II, CP* does not specify the losses that demurrage does not liquidate. Demurrage, therefore, liquidates all laytime-based losses.

[2.2] CLAIMANT'S $3,650,000 UNLIQUIDATED DAMAGES CLAIM MUST FAIL

30. CLAIMANT's $3,650,000 unliquidated damages claim arising from losses from its follow-on fixture must fail, since, *first*, its losses were not caused by RESPONDENT **[2.2.1]**; and *second*, its losses are too remote **[2.2.2]**.

[2.2.1.] RESPONDENT Did Not Cause CLAIMANT'S Losses

31. A commonsensical assessment of the relationship between the breach and CLAIMANT's losses, including through the "but for" enquiry, must be done to determine causation. Even if RESPONDENT's breach is one *among* the relevant causes, a causal link is present [*Financial Conduct*, ¶181; *Allianz Insurance*, ¶19; *Cooke* §21.41]. To show a break in the causal chain, CLAIMANT's acts should "obliterate" RESPONDENT's wrongdoing [*Borealis*, ¶44]. For intervening events to break the causal chain, they must be outside parties' reasonable anticipation [*Oljefabriker*, p. 148].

32. RESPONDENT's direction to Chtrs. dated 3 October 2023, encouraging CLAIMANT to exercise its rights under *Cl. 29, Part II, CP,* made the prevention of the follow-on fixture its prerogative. CLAIMANT could have, in order to fulfil its follow-on fixture, exercised its rights under *Cl. 29, Part II, CP*, making the vessel fit to depart by warehousing the cargo. Since RESPONDENT's direction concerning the use of *Cl. 29, Part II, CP* was not heeded to, CLAIMANT'S lost fixture is its own doing. CLAIMANT's acts causing its own loss have the effect of "obliterating" the effects of RESPONDENT's breach.

33. RESPONDENT's direction to Chtrs. to enable warehousing were issued on 3 October 2023, providing CLAIMANT sufficient time to travel to Kaohsiung after completing discharge. On 16 October 2023, MVN was 300nm from Kaohsiung, and took eight days to travel this distance. This was because of the adverse weather conditions it encountered on its way to Kaohsiung, preventing it from arriving timely [*FoR*, p. 9]. Intervening weather conditions could not be reasonably anticipated by RESPONDENT, and were unlikely in their occurrence. CLAIMANT itself has vouched for their unexpected nature, citing them as an "unfortunate" occurrence [*FoR*, p. 9]. They have, therefore, the effect of breaking the causal chain.

[2.2.2] CLAIMANT's Losses Are Too Remote

34. CLAIMANT's losses are not remote if they arise within *Baxendale's* first limb, i.e., through imputed knowledge, or within its second limb, i.e., through express communication of CLAIMANT's special circumstances [*Global Water,* ¶¶33-4]. CLAIMANT's losses are too remote since, *first*, *Cl. 38, CRC* is not incorporated, and its losses are unrecoverable within the first limb **[2.2.2.1]**; and *second*, RESPONDENT did not assume responsibility for CLAIMANT's lost fixture **[2.2.2.2]**.

[2.2.2.1] CLAIMANT's Losses Did Not Arise Naturally in the Usual Course of Things

35. Notice of CP terms does not bind a B/L holder, they must be specifically incorporated. CP's terms, not parties' intentions, are incorporated [*Siboti*, ¶24; *Varenna*, p. 596]. Since extraneous notice, i.e. *knowledge* of CP terms does not bind a B/L holder, the only relevant form of RESPONDENT's knowledge is that which arises through incorporated terms. Since *Cl. 38, CRC* is not incorporated, knowledge of its contents cannot be imputed. Accordingly, damages under *Baxendale's* second limb cannot be claimed.

36. In the absence of RESPONDENT's knowledge of CLAIMANT's special circumstances, only the losses occurring naturally in the ordinary course of things are recoverable. These are the losses that a reasonable person would contemplate as a "serious possibility", as a "not unlikely" result of breach at the time of contracting [*The Heron II*, p. 388; *Global Water*, ¶32]. A follow-on fixture's loss, however, is too unlikely, rare and specific an occurrence to contemplate when contracting. Reasonable parties would not account for its distant and remote possibility. Such a specific commercial situation would occur in highly rare cases – one for which a specific question of RESPONDENT's "assumption of responsibility" has to be asked [*Achilleas*, ¶89].

[2.2.2.2] RESPONDENT did not "Assume Responsibility" for CLAIMANT's Lost Fixture

37. *The Sylvia* enables an enquiry into RESPONDENT's "assumption of responsibility" when an unquantifiable, unpredictable, uncontrollable or disproportionate liability is being imposed, or where clear evidence of the liability being contrary to market understandings exists [¶22]. In *The Achilleas*, the House of Lords, based on this enquiry, found that a charterer does not – in the absence of communication of the vessel's special circumstances – assume responsibility for the owner's lost follow-on fixture due to a delay in the vessel's redelivery [¶22].

38. RESPONDENT assumed no responsibility for CLAIMANT's lost fixture. *First, the lost fixture's liability is unquantifiable.* RESPONDENT could have no knowledge of its extent at the time of entering into B/L. The lost fixture could have been for a month, a year, or a decade – it would be unquantifiable. *Second, its liability is unpredictable.* Given the absence of RESPONDENT's knowledge of CLAIMANT's circumstances and the number of intervening events that could cause its lost fixture, its liability is unpredictable. *Third, its liability is uncontrollable.* RESPONDENT could not have prevented CLAIMANT'S lost fixture. At maximum, it could encourage warehousing under *Cl. 29, Part II, CP*, which it did. *Fourth, the lost fixture's liability is disproportionate.* CLAIMANT seeks to impose a liability of $3,650,000 for laytime-related delays, a disproportionate liability for the breach of an obligation for which demurrage at $1,500/hour is payable. *Third, the lost fixture's liability is contrary to market expectations. Eternal Bliss* seeks to alter market expectations by making demurrage the only recoverable sum for laytime-related delays [¶57]. CLAIMANT's unliquidated damages' claim conflicts these market expectations.

39. Even if *Cl. 38, CRC* is considered incorporated, it was not "brought home" to RESPONDENT such that it appears to accept responsibility for losses connected to its occurrence (*Nettleship*, p. 509). *The Achilleas'* enquiry is undertaken within *Baxendale's* second limb

[*Petrochemical*, ¶¶5, 21; *Anson*, p. 549]. As argued above, RESPONDENT did not assume responsibility for losses from the follow-on fixture.

CONCLUSION

40. Thus, CLAIMANT's $3,650,000 unliquidated damages claim must fail, given its non-satisfaction of *Eternal Bliss*, the absence of RESPONDENT's causation, and the remoteness of CLAIMANT's losses.

---

[3] CLAIMANT IS LIABLE FOR CARGO MISDELIVERY

41. CLAIMANT is liable for misdelivery. CLAIMANT may argue that discharge without B/L's presentation was lawful under *Cl. 57, CRC*, which enables delivery under LoI without B/L's presentation. Irrespective of whether *Cl. 57, CRC* is incorporated in B/L, it is well-established that an LoI's use to discharge without B/L's presentation constitutes breach of B/L holder's contractual rights, creating liability for conversion [*Motis Exports*, p. 840; *The Houda*, p. 550]. *Prima facie*, CLAIMANT breached its duty of delivery, since RESPONDENT remained B/L's lawful holder on the date of discharge, i.e., 4 October 2023 [*The Star Quest*, ¶4]. Further, *Cl. 57, CRC's* incorporation does not entitle CLAIMANT to accept LoI-II for effecting a lawful delivery [*The Sormovisky*, p. 272]. Under §2*, COGSA*, a lawful B/L holder possesses title to sue for possession over cargo "by virtue of a transaction…in pursuance of any contractual or other arrangements". Accordingly, RESPONDENT submits that it holds title to sue under §2, *COGSA*, since B/L has contractual force and evidences possessory rights.

42. Due to CLAIMANT's delivery of cargo without B/L's presentation, RESPONDENT submits that it committed misdelivery, since, *first*, RESPONDENT did not authorize delivery **[3.1]**; *second*, RESPONDENT has title to sue since B/L is a contract of carriage and/or a document of title **[3.2]**; and *third*, RESPONDENT incurred losses as it intended to use B/L as security over cargo.

[3.1] RESPONDENT DID NOT AUTHORIZE DISCHARGE OR CAUSE ITS OWN LOSS

43. In *The Sienna*, Popplewell, J. held that when a bank was aware that cargo would be delivered without B/L's presentation and allowed it implicitly, it could not claim losses arising from misdelivery [*The Sienna*, ¶105; *The Sienna 2022*, ¶¶74, 121]. The "defence of consent" standard prohibits a B/L holder issuing (or presumed to have issued) delivery instructions to a shipowner to subsequently allege misdelivery if the shipowner had acted on them [*STI Orchard*, ¶70; *The Cherry*, ¶27].

44. RESPONDENT submits that "defence of consent" is inapplicable, as, *first*, RESPONDENT did not approve of delivery implicitly **[3.1.1]**; and *second*, RESPONDENT was unaware that cargo would be delivered without B/L's presentation **[3.1.2]**.

[3.1.1] RESPONDENT Did not Implicitly Approve Delivery

45. CLAIMANT may argue that Respondent's communication to Chtrs. dated 3 October 2023, stating "*[i]f you are afraid of the demurrage accruing, you must do as you deem fit as Charterers and we will not interfere as long as the loan is repaid*" [*FoR*, p. 46], as constituting an implicit authorization of delivery. RESPONDENT submits that this Tribunal must reject this argument, since a holistic interpretation of this communication, in line with "business commonsense", unequivocally indicates Respondent's *refusal* to authorize delivery. It is well-established that contractual terms, including communications, must be construed holistically, not selectively [*Prenn*, §1383-4; *Antaios*, p. 201; *Mitchell*, p. 51]. Further, they must align with "business commonsense" [*Antaios*, p. 201; *Mitchell*, p. 53]. In the instant case, RESPONDENT consistently refused to authorize delivery, given Chtrs.' deteriorating financial condition [*FoR*, p. 46]. This refusal enabled RESPONDENT to continue holding security over cargo. This is pertinent, since it was known to RESPONDENT that Chtrs. had sold cargo to GR, evidenced by Chtrs.' email at 3:47 P.M [*FoR*, p. 47]. However, in order to prevent Chtrs.' losses, RESPONDENT authorised them to exercise their

rights, provided their actions did not conflict with RESPONDENT's prior refusals to grant a trust receipt, which were issued by virtue of its status as B/L holder. RESPONDENT refused to provide a trust receipt to Chtrs., since this would have allowed Chtrs. to make delivery immediately [*FoR*, p. 46]. This is because of a trust receipt's nature, which renders the buyer *the trustee* and the bank *the beneficiary*. B/L remains in the bank's possession, which would also hold cargo's constructive possession. Such possession continues even after the buyer obtains cargo from the shipowner. Thus, the bank has a proprietary claim to proceeds realised from the sale of cargo [*Todd*, §6.39]. The trust receipt, therefore, would enable Chtrs. to deliver, but to mandatorily use its proceeds *only* to pay RESPONDENT. RESPONDENT, however, was aware that it may not receive these proceeds, given Chtrs.' weak financial condition. Aware of the consequences of granting a trust receipt, RESPONDENT did not issue one, thereby forbidding delivery. RESPONDENT, in reiterating this refusal, stated that Chtrs. may do *"as [they] deem fit"* [*FoR*, p. 46]. RESPONDENT submits, therefore, that this communication must be construed holistically – in light of RESPONDENT's consistent refusals to grant trust receipt – as *not* authorising delivery.

[3.1.2] <u>RESPONDENT was Unaware of Delivery</u>

46. In order to prevent Chtrs.' losses and enable CLAIMANT'S follow-on fixture, RESPONDENT allowed Chtrs. to *"do as [they] deem fit"*. As established above, this did not constitute authorisation of delivery. CLAIMANT'S sole recourse compatible with RESPONDENT's rights as B/L holder, as well as a holistic construction of the above communication, was the invocation of *Cl 29, Part II, CP*, i.e., to warehouse the cargo. This would have allowed RESPONDENT to exercise security over cargo while preventing accrual of demurrage, as well as enabling CLAIMANT to fulfil its follow-on fixture. Since RESPONDENT's communication had no nexus with delivery and its refusals to issue a trust receipt evince its lack of foresight

and knowledge concerning it, RESPONDENT cannot be said to have been "aware" of delivery [*The Sienna 2022*, ¶¶74, 121].

[3.2] B/L IS A CONTRACT OF CARRIAGE AND/OR A DOCUMENT OF TITLE

47. RESPONDENT submits that B/L is a contract of carriage or a document of title. As established, the modern B/L serves three main functions: (a) a receipt by the carrier, acknowledging the shipment of goods on a vessel for carriage to a particular destination; (b) a memorandum of the terms of the contract of carriage; and (c) a document of title to cargo [*The Rafaela*, ¶38]. The consequence of (b) and (c) is to allow CLAIMANT or RESPONDENT to intend delivery pursuant to B/L's presentation. A factual enquiry must be undertaken to determine whether RESPONDENT intended B/L to be a contract of carriage and/or a document of title [*The Luna*, ¶49]. This factual enquiry into a contract's construction involves an enquiry into parties' pre and post-contract conduct, alongside their intentions [*Midlink*, ¶52]. RESPONDENT submits that the instant B/L was a contract of carriage and/or a document of title, since, *first*, its terms make this conclusion inevitable **[3.2.1]**; and *second*, cargo's possession remained with RESPONDENT **[3.2.2]**.

[3.2.1] B/L Terms Evince a Contract of Carriage and/or Document of Title

48. B/L, *prima facie,* is a contract of carriage and/or a document of title [*Scrutton*, p. 99; *Sewell*, p. 105; *Aikens*, §7.32]. Instant B/L contains all general features of a traditional B/L, including being issued in triplicate, reflecting particulars of cargo, containing usual clauses and exceptions, as well as containing common expressions [*The Sienna*, ¶68; *Cooke*, §18.10]. Further, *B/L Terms* – in stating to signify a "contract of carriage evidenced by this Bill of Lading…" – signify B/L's status as a contract of carriage. A contract should be interpreted literally, unless absurdities arise [*Arnold*, ¶17]. *B/L terms'* literal interpretation, therefore, signifies a contract of carriage. Further, unlike *The Luna* where parties intentionally omitted an arrival destination that precluded their B/L's designation as a

contract for carriage, the instant B/L explicitly provides for Busan as the destination [*The Luna*, ¶63; *FoR,* p. 4]. This signifies that B/L was intended for *carriage* from one port to another. It has been held that a B/L, in the hands of a third-party, continues to contain a contract of carriage and/or a document of title [*Scrutton*, §6-013; *Leduc*, p. 479]. In *The Sienna*, Popplewell, J. noted that a B/L indorsed to a third-party from charterers would "spring up" a contract [*The Sienna*, ¶82]. RESPONDENT – not being charterers – held B/L in the traditional capacity of a contract of carriage and/or a document of title.

[3.2.2] <u>Possession of Cargo Remained with RESPONDENT</u>

49. In *The Luna*, the Singapore Court of Appeal held that a bank extending credit to charterer-buyers for the purchase of cargo would be prohibited from regaining delivered cargo from buyers' possession if it authorised such delivery [¶49]. It held that a B/L would not constitute a document of title if cargo's possession had passed to buyers without its presentation [¶¶49-50]. In the instant case, according to email correspondence on 3 October 2023, 3:47 P.M., RESPONDENT was aware that cargo had been sold to GR [*FoR*, p. 46]. RESPONDENT, however, did not allow Chtrs. to take possession of the cargo, refusing to grant a trust receipt [*FoR*, p. 46]. Rather, it granted Chtrs. a trust receipt loan, which would convert into a trust receipt only on receiving B/L from Seller and LC from GR [*FoR*, p. 46]. RESPONDENT, therefore, prevented losing possession by asking for the above documents, disallowing a trust receipt. RESPONDENT foresaw that the issuance of a trust receipt would enable immediate delivery by Chtrs. As a consequence, any attempt to regain possession or demand delivery based on B/L would have become futile, since cargo would have been delivered by then.

50. In *Maersk Princess*, possession of goods had already been transferred to buyers before a bank could finance the cargo purchase. Irrespective, the bank agreed to finance it. The Singapore High Court held that the bank could not have relied on B/L for delivery when

possession had already passed to buyers [¶58]. As opposed to this, RESPONDENT safeguarded its rights over cargo not only by disallowing delivery, but also by ensuring that it held cargo's constructive possession through B/L. It is clear, therefore, that RESPONDENT treated B/L as a document of title and/or a contract of carriage.

[3.3] RESPONDENT AIMED TO HOLD B/L AS SECURITY

51. Causation requires RESPONDENT to show that on a balance of probabilities, in the event of delivery by CLAIMANT, it would have enforced its security over the cargo to protect its credit. Otherwise, the breach would not be an effective cause of loss, as the failure to recoup its credit would have occurred irrespective of CLAIMANT's misdelivery [*The Sienna*, ¶103]. For this enquiry, implications of CLAIMANT's refusal to deliver without B/L's production on RESPONDENT's security over cargo must be assessed. If RESPONDENT would not have waived its security interest, and delivery was made by CLAIMANT, causation is established. If, on the other hand, RESPONDENT would have waived its security interest, causation is not established. RESPONDENT submits that causation is established, since it would not have waived its security interest, and would have held B/L as security, as, *first*, RESPONDENT intended to rely on B/L for delivery **[3.3.1]**; and *second*, RESPONDENT safeguarded its security over cargo against non-receipt of B/L from Seller **[3.3.2]**.

[3.3.1] RESPONDENT Intended to Rely on B/L for Delivery

52. In *The Luna*, charterer-buyers were granted a thirty-day credit period by a finance facility (the B/L holder) that allowed delivery. In light of this financial arrangement, it was held that the sale and delivery of cargo by charterer-buyers was not contingent on B/L's presentation. The payment was required not under the B/L but on the presentation of commercial invoices [*The Luna*, ¶43]. In the instant case, however, the trust receipt's refusal disallowed Chtrs. to make delivery, whose only recourse was warehousing. This ensured that delivery would be made when B/L would be presented, only once parties'

financial documents had been furnished. Further, unlike *The Luna* where the discharge was underway and credit would be due only after delivery, there was no such financial arrangement between RESPONDENT and Chtrs. [*The Luna*, ¶49]. The financial arrangement of extending a loan did not specify a time period for repayment of the trust receipt loan by Chtrs. However, RESPONDENT made the delivery contingent on either the payment being made or receiving the financial documents from the parties. Hence, RESPONDENT ensured that B/L would be utilised for delivery.

53. Further, if Chtrs. were permitted to deliver cargo during the credit period while B/L remained with RESPONDENT, it would conflict with RESPONDENT's consistent refusals to allow Chtrs. possession. Thus, it is clear that RESPONDENT sought to use B/L as security.

[3.3.2] <u>RESPONDENT Safeguarded Against Non-Receipt of B/L from Seller</u>

54. As evidenced by email correspondence on 3 October 2023, 4:02 PM, RESPONDENT did not receive B/L before making the payment under the LC to Seller [*FoR*, p. 46]. Seller was to indorse B/L to the bank before the Seller could be paid, with the exception of a LoI [*FoR*, p. 44]. Seller, instead, provided LoI-I due to its inability to transfer B/L on time which was accepted by RESPONDENT [*FoR*, p. 44]. In *Maersk Princess,* a similar situation arose, where a bank paid a seller without B/L's possession, which, in turn, indemnified the bank. It was held that the bank did not aim to use B/L as security. The LoI in *Maersk Princess* was identical to the one provided to RESPONDENT by the seller [*FoR*, p. 45; *Maersk Princes*, ¶57]. CLAIMANT may argue that this highlights RESPONDENT's intention to not use B/L as security. However, unlike the *Maersk Princess*, RESPONDENT disallowed delivery by not only disallowing a trust receipt, but also by ensuring that B/L was received before the trust receipt could be granted. Its logical corollary is that B/L was to be used as security until the payment could be made by charterer-buyers. This highlights that RESPONDENT did not only focus on receiving payment from the buyers, but also on exercising its contractual rights

over cargo, unlike in *The Luna*. In that case, in a similar situation, the bank did not prevent delivery without B/L presentation. It was held that the bank's conduct revealed its intention to focus only on payment from the buyers, and not on exercising their security over cargo [*The Luna*, ¶55].

55. RESPONDENT's actions demonstrate a clear intent to maintain security over cargo through stringent adherence to B/L terms. By refusing to allow delivery without B/L and LC, RESPONDENT prioritized its security interests over immediate payment. These acts firmly establish that RESPONDENT aimed to enforce its rights and security under B/L, effectively mitigating any unauthorized release of the cargo.

CONCLUSION

56. RESPONDENT is the lawful owner of the B/L, which is a contract of carriage and/or document of title. The Tribunal must award RESPONDENT's $4,249,752.50 losses for misdelivery, since it has not authorised delivery and aimed to hold the B/L as security.

PRAYER FOR RELIEF

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

1. This Tribunal does not have jurisdiction to hear the present dispute.
2. RESPONDENT is not liable for CLAIMANT's lost fixture, and its $3,650,000 unliquidated damages claim must be rejected.
3. CLAIMANT is liable for misdelivering cargo without the presentation of B/L, entitling RESPONDENT to a sum of $4,249,752.50.