23rd INTERNATIONAL MARITIME LAW ARBITRATION MOOT

July 2024

香 港 大 學

THE UNIVERSITY OF HONG KONG

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

Tomahawk Maritime S.A. (Claimant)

---v---

Veggies of Earth Banking Ltd (Respondent)

MEMORANDUM ON BEHALF OF

VEGGIES OF EARTH BANKING LTD (RESPONDENT)

COUNSEL

Ms LOONG Tin Yiu, ALEXA

Ms POON Sze Ching, FLORENCE

Mr TSUI Zealot, KENNETH

Mr WONG Tsz Shing OSCAR

TEAM F

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LIST OF ABBREVIATIONS

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

Hague–Visby Rules	International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (1924), as amended by the Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (1968).
LC	The letter of credit issued by the Respondent to Good Oil under the Facility Agreement.
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)
Next Employment	The Claimant's employment subsequent to the voyage from Bintulu to Busan, with strict laycan 1–14 October 2023 at Kaohsiung.
Notice of Arbitration	The Notice of Arbitration issued by Beefeater Solicitors LLP (solicitors for the Claimant) to the Respondent dated 22 December 2023.
Payment LOI	The letter of indemnity issued by Good Oil to the Respondent for making payment for the Cargo without being presented with the B/L.
PRC	The People's Republic of China
Procedural Order No. 1	Procedural Order No.1 issued by the Tribunal dated 29 February 2024.
Reply	The Statement of Reply and Defence to Counterclaim filed by Beefeater Solicitors LLP dated 1 March 2024.
Respondent	Veggies of Earth Banking Ltd.

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

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5.	G Born, *International Commercial Arbitration* (Kluwer Law International, 3rd ed, 2024) ("*Born on International Commercial Arbitration*")	16, 17, 33
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7.	W Craig, W Park & J Paulsson, *International Chamber of Commerce Arbitration* (Oceana Publications, 3rd ed, 2000)	17

STATEMENT OF FACTS

1. The present dispute arises out of the B/L no. COW-001A dated 4 September 2023 for the Cargo, which was signed and issued by agent(s) of the Claimant.

2. The Charterer purchased the Cargo from Good Oil under a sale contract, which required payment to be made with a letter of credit. Under the Facility Agreement between the Charterer and the Respondent, the Respondent issued the LC to Good Oil. The Claimant chartered the Vessel to the Charterer for carriage of the Cargo according to the C/P terms, which were expressly incorporated into the B/L, from Bintulu to Busan. The C/P provided, among other things, that "*Vessel's next employment is at Kaohsiung with strict laycan 1-14 October 2023"*.

3. On 3 October 2023, the Respondent made payment under the LC on behalf of the Charterer to Good Oil. Nevertheless, the Claimant accepted the Discharge LOI issued by the Charterer, commenced discharge, and released the Cargo to the Charterer without requiring the Charterer to present the B/L.

4. The Vessel left Busan on 8 October 2023, but its progress to Kaohsiung was hampered due to adverse wind and sea conditions. As a result, the Next Employment was cancelled.

5. The Claimant issued the Notice of Arbitration against the Respondent on 22 December 2023.

ARGUMENTATION

I. THE SCMA TRIBUNAL HAS NO JURISDICTION TO HEAR THE CASE

6. The Tribunal has no jurisdiction to hear the present dispute because: (A) The arbitration clause in Rider Clause 76 is validly incorporated into the C/P; (B) Parties have impliedly chosen PRC law to govern the arbitration agreement as (C) the parties intended the arbitration to be seated in Guangzhou and not Singapore. (D) The arbitration agreement is thus invalid under PRC Arbitration Law.

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

7. The Respondent does not dispute that irrespective of the putative applicable law, Rider Clause 76 has been incorporated into the B/L because: (i) The C/P expressly incorporates the Rider Clauses; and (ii) The B/L expressly incorporates the C/P terms.

8. Firstly, the C/P in the amended VEGOILVOY form expressly inserts the phrase "*See Rider Clauses*" by way of "*Special provisions*" in Section H of Part I. These are clear and specific words that incorporate all the Rider Clauses, including Rider Clause 76 (law and arbitration clause), into the C/P.

9. Rider Clause 47 provides that main terms followed by the Rider Clauses shall apply if conflicting. Therefore, Rider Clause 76 prevails over the standard arbitration clause in C/P Clause 31 (arbitration clause).

10. Secondly, the B/L has incorporated Rider Clause 76 in the C/P. Clause 1 of the Conditions of Carriage attached to the B/L provides that all terms and conditions of the charter party, "*including the Law and Arbitration Clause*", are incorporated. Rider Clause 76 is the only clause in the C/P entitled Law and Arbitration. The specific reference to the arbitration clause validly incorporates it into the B/L.[1]

[1] *TW Thomas & Co Ltd v Portsea Steamship Co Ltd* [1912] AC 1, 6 (HL) (Lord Atkinson).

B. Parties have impliedly chosen PRC law to govern the arbitration agreement

11. The current arbitration agreement is provided in Rider Clause 76 which states that, "General Average and Arbitration, if any, to be held in Guangzhou with… SCMA Rules. English law to apply to the CP".[2]

12. In this case, the seat of the arbitration is disputed. When the seat is disputed, the law governing the substantive validity of the arbitration agreement should apply to resolve the dispute.[3] This is because parties' agreement on the arbitral seat is part of the arbitration agreement.

13. In determining which law governs the arbitration agreement, the Tribunal should cumulatively apply the conflict-of-law rules of all interested states.[4] The cumulative approach is particularly apt for international commercial arbitration because arbitrators can infuse an international element into the proceedings by assuring both parties that the issue is not determined by the narrow application of the system of a single State.[5] Practically, this approach also insulates against a challenge to the Tribunal's award in annulment on recognition proceedings based on an alleged failure to apply the proper conflict-of-law rules or substantive law.[6]

14. English law, Singapore law and PRC law are all potentially relevant choice-of-law rules. The Singaporean choice-of-law framework is set out in the three-limb approach in *BCY v BCZ*[7], which was subsequently affirmed in the English decision of *Enka*[8] and Singaporean decision

[2] Moot Problem, p 28.
[3] G Born, *International Commercial Arbitration* (Kluwer Law International, 3rd ed, 2024) ('*Born on International Commercial Arbitration*') [14.05].
[4] *Born on International Commercial Arbitration* [19.03][D][3][d].
[5] W Craig, W Park & J Paulsson, *International Chamber of Commerce Arbitration* (Oceana Publications, 3rd ed, 2000) [17.02].
[6] *Born on International Commercial Arbitration* [19.03][D][3][d].
[7] *BCY v BZY* [2016] SGHC 249 [2017] 3 SLR 357 [40] (SGHC) (Steven Chong J, applying the English decision of *Sulamérica Cia Nacional de Seguros SA and others v Enesa Engelharia SA* [2012] EWCA Civ 638 [2013] 1 WLR 102 [9] (Moore–Bick LJ).
[8] *Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb"* [2020] UKSC 38 [2020] 1 WLR 4117 [170] (UKSC) (Lord Hamblen and Lord Leggatt JJSC).

of *BNA v BNB*.[9] Hence, Singapore and English choice-of-law frameworks are treated as one and the same and will be discussed together. On proper analysis, (1) the *BCY*/*Enka* framework selects PRC law as the governing law of the arbitration agreement and (2) PRC choice-of-law rules also select PRC law as the governing law of the arbitration agreement.

15. Under the *BCY*/*Enka* framework, the Tribunal should consider: (1) the express choice of the proper law governing the arbitration agreement, (2) the implied choice of the proper law governing the arbitration agreement, and (3) the system of law with the closest and most real connection with the arbitration agreement.[10]

16. For (1), parties have not made any express choice of law governing the arbitration agreement in Rider Clause 76. An express choice of law of arbitration would only be found "where there is explicit language stating so in no uncertain terms".[11] Merely specifying that a contract shall be governed under a particular law is insufficient to constitute an express choice of the proper law of arbitration.[12] Here, the specific provision in Rider Clause 76 for English law "*to apply to the CP*" is only a choice for English law to govern the C/P (and by virtue of incorporation, the B/L), but not the arbitration agreement.

17. For (2), the Tribunal should interpret the contract as a whole applying the ordinary English rules of contractual interpretation to determine whether parties have agreed on a choice of law to govern the arbitration agreement as a matter of necessary implication or inference from other terms of the contract and the surrounding circumstances.[13] The starting point in determining the implied choice is presumed to be the law of the substantive contract where the

[9] *BNA v BNB and another* [2019] SGCA 84 [2020] 1 SLR 456 [44]–[48] (SGCA) (Steven Chong JA).
[10] *BCY v BZY* [40], *BNA v BNB* [44]–[48], *Enka* [170].
[11] *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] 1 SLR 349 [66] (SGCA) (Judith Prakash JCA); *Unicredit Bank GmbH v Ruschemalliance LLC* [2024] EWCA Civ 64 [54]–[56] (EWCA) (where the clause "This Bond and all non–contractual or other obligations arising out of or in connection with it shall be construed under and governed by English law" is not enough to amount to express choice of law governing the arbitration agreement).
[12] *BNA v BNB* [59].
[13] *Enka* [34]–[35].

arbitration agreement was integrated into and formed part of the substantive contract.[14] However, (i) this presumption that English law applies is rebutted by the parties' choice of Guangzhou as the seat of arbitration and PRC law as the curial law (the "overlap argument");[15] and (ii) the validation principle should not operate in view of the term of the arbitration agreement.[16]

(i) The Overlap argument

18. When the chosen curial law which governs the arbitration process also contains provisions/rules which govern the arbitration agreement, and the chosen curial law cannot readily be separated into boxes labelled "substantive arbitration law" and "procedural arbitration law", then parties, by choosing the law of the seat, will be taken to have also chosen it as the substantive law applying to the arbitration agreement. "*The overlap between the scope of the curial law and that of the [arbitration agreement] law strongly suggests that they should be the same*." ("[170(vi)] exception").[17]

19. Valid examples of such national arbitration law include the Swedish Arbitration Act and the Arbitration (Scotland) Act 2010, while French arbitration law and English Arbitration Act 1996 fall short of the [170(vi)] exception. The status of PRC arbitration law is akin to that of Sweden and Scotland and not to that of France or England.

20. Section 48 of the Swedish Arbitration Act provides that, in the absence of agreement on a choice of law to govern an arbitration agreement with an international connection, the arbitration agreement shall be governed by the law of the country in which, by virtue of the agreement, the arbitration proceedings have taken place or will take place.[18] Section 6 of the Arbitration (Scotland) Act 2010 provides that, where parties agree for the arbitration to be

[14] *BNA v BNB* [47]; *Enka* [170(iv)].
[15] *Enka* [65]–[72]; [94].
[16] *Enka* [103]; [109].
[17] *Enka* [65]–[66]; [170(vi)].
[18] *Enka* [70].

seated in Scotland, and the arbitration agreement did not specify the law which is to govern it, then, unless parties otherwise agree, the arbitration agreement is to be governed by Scots law.[19]

21. Article 16 of the SPC Interpretation[20] provides for a choice-of-law clause to a similar effect.[21] It provides that "[t]he examination of the effectiveness of an agreement for arbitration … shall be governed by the laws agreed upon between the parties concerned; if the parties concerned did not agree upon the applicable laws but have agreed upon the place of arbitration, the laws of the place … shall apply …". "[L]aws agreed upon between the parties" do not refer to the law applicable to the underlying contract and PRC court does not consider implied choice.[22] Since parties have not provided for the law to apply to the arbitration agreement, the law of the seat (i.e. PRC law) applies.

22. French arbitration law does not fall under the [170(vi)] exception because under French arbitration law, existence and effectiveness of arbitration agreements should be assessed based on the common intention of the parties without any reference to state law. Hence, choice of French law as the curial law does not *ipso facto* mean that French law is to govern the arbitration agreement.[23] English Arbitration Act 1996 also falls short of the exception because section 4(5) of the 1996 Act envisages application of a foreign law to the arbitration agreement even when an English seat is chosen.[24]

23. Other provisions in the PRC Arbitration Law are also so closely intertwined on the substance and process of arbitration that it is natural to regard a choice of PRC law as the curial law as

[19] *Enka* [71].
[20] Interpretation of the SPC Concerning Some Issues on Application of the Arbitration Law 2006 ('SPC Interpretation').
[21] SPC interpretations has the force of law: see A HY Chen, *An Introduction to the Chinese Legal System* (LexisNexis, 5th ed, 2019), pp 141–142; 150–151; Article 5 of SPC's Provisions on Judicial Interpretation Work (2007); NPC Standing Committee's Resolution on Strengthening the Work of Interpretation of Laws (1981). The exception identified in *Enka* [170(vi)] is not confined to statutory or other legislative provisions: see *UniCredit v RusChemAlliance* [59].
[22]最高人民法院关于山东省高级人民法院就蓝海生态农业有限公司与金鹰水产(香港)有限公司申请确认仲裁协议效力一案请示的复函 (2018 年 3 月 26 日（2018）最高法民他 25 号).
[23] *UniCredit v RusChemAlliance* [61]–[63].
[24] *Enka* [75].

an implied choice of it being the substantive law governing the arbitration agreement. For example, Article 16 requires a valid arbitration agreement to stipulate matters for arbitration, while Article 18 allows parties to reach supplementary agreement when the stipulation is unclear or absent. When PRC curial law requires a clear stipulation as to matters for arbitration, parties could not have intended English rules on contractual interpretation to apply to determine whether there is a clear stipulation, and when there is no clear stipulation, to then apply PRC law to make a supplementary agreement. Similarly, Article 17 provides that an arbitration agreement should be null and void when one party coerced the other party into concluding the arbitration agreement. Parties could not have intended one issue of consent (i.e. whether parties are *ad idem*) to be determined by English law, while another issue of consent (i.e. whether consent is vitiated by coercion) to be determined by PRC law. Parties can fairly be taken to have been aware of the content of legislation specifically concerned with law of arbitration in their chosen seat.[25]

24. As such, PRC arbitration law falls under the [170(vi)] exception in *Enka*. Due to the content of the PRC arbitration law, choice of Guangzhou as the seat and PRC law as the curial law is an implied choice of PRC law as the substantive law of the arbitration agreement.[26] This also corresponds with (c) in the *BCY/Enka* framework, under which the law of the seat is, as a general rule, the law most closely connected with the arbitration.[27]

(ii) Validation principle does not apply

25. The validation principle states that an interpretation which upholds the validity of a transaction is to be preferred to one which would render it invalid.[28] Under PRC law the arbitration agreement is invalid,[29] while under English law the arbitration agreement is valid.

[25] *Unicredit v RusChemAlliance* [59].
[26] *Enka* [94].
[27] *Enka* [120]; *Sulamérica* [32].
[28] *Enka* [95].
[29] Article 16 of the Arbitration Law of the People's Republic of China; D&CC para 6, Moot Problem p 36.

It might be argued that, applying the validation principle, parties should be taken to have intended English law to govern the arbitration agreement so as to uphold its validity.[30]

26. However, such application of the validation principle will be extending the principle beyond its proper scope.[31] The validation principle is a principle of contractual interpretation and not a presumption of valid agreement. There is no evidence that parties were aware that the arbitration agreement would be rendered invalid by PRC law when they entered into the same.

27. All in all, parties have impliedly chosen PRC law to govern the arbitration agreement because the presumption that the governing law of the substantive contract (i.e. English law) also applies to govern the arbitration agreement is rebutted by the parties' choice of Guangzhou as the seat of arbitration and PRC law as the curial law. The validation principle does not operate in this case.

28. As stated in paragraph 21, Article 16 of the SPC Interpretation is a choice-of-law rule which provides that the law of the seat applies absent express agreement on the law governing the arbitration agreement. Parties did not expressly provide for the law applicable to the arbitration agreement and hence PRC law (as the law of the seat) applies.

29. To conclude, the choice-of-law analysis under the *BCY/Enka* framework or PRC law results in PRC law being the applicable law to the arbitration agreement. Hence, there is a "false" conflict and the Tribunal needs not decide which choice-of-law rules to adopt. However, if the Tribunal decides that English law should apply under the *BCY/Enka* framework, thereby producing a "true" conflict, the Tribunal should apply the arbitral seat's conflict-of-law rules (i.e. PRC conflict-of-law rules)[32] because: (i) doctrinally an arbitral tribunal is bound by the

[30] *Sulamerica*, upheld in *Enka* [103].
[31] *Kabab–Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48 [2022] 2 All ER 911 [51] (UKSC) (Lord Hamblen and Lord Leggatt).
[32] Parties' agreement on the arbitral seat is presumed to be valid, hence, the putative arbitral seat is Guangzhou: see *Born on International Commercial Arbitration* [14.05], which states that presumptive validity of arbitration agreement under the New York Convention applies with full force to agreements on arbitral seat.

"procedural" law of the arbitral seat, which includes the seat's choice-of-law rules;[33] and (ii) it is the simplest, most neutral, most predictable and most equitable choice-of-law rule.[34] International arbitral tribunals have applied conflict-of-law rules of the seat.[35] Following the PRC conflict-of-law rules, the Tribunal should conclude that PRC law applies to govern the arbitration agreement.

C. Guangzhou is the seat of the arbitration

30. Since PRC law is the law governing the arbitration agreement, the location of the seat should be determined in accordance with PRC law. Under PRC law, "arbitration in [a location]" means that the location is the seat of the arbitration.[36]

31. Alternatively, even if Singapore or English law applies to determine the seat, the seat is also in Guangzhou. The phrase "arbitration in [a location]" has been consistently held to be a reference to the location as the seat of the arbitration, and not merely as its physical venue where hearings and meetings should be conducted.[37] The natural meaning of such a phrase is that the location is the seat of the arbitration because the choice of a seat has a far greater legal significance than the choice of a venue. When only one geographical location is nominated, it is most natural to construe it as a reference to the parties' choice of a seat. Clear words or

[33] *Born on International Commercial Arbitration* [19.03][B][1]. In the words of the late Professor Mann, "[t]he law of the arbitration tribunal's seat initially governs the whole of the tribunal's life and work. *In particular, it governs … the rules of the conflict of laws to be followed by* [the arbitrators].".

[34] *Born on International Commercial Arbitration* [19.03][E], p.18. Professor Gary Born is of the view that, parties' agreement on arbitral seat impliedly carries with it the acceptance of procedural law of the arbitral seat, which ordinarily extends to choice–of–law rules. Also, arbitral seat's choice–of–law rules are presumptively neutral and objectively satisfactory to parties.

[35] *Final Award in ICC Case No 5460*, XIII YB Comm Arb 104 (1988), where the tribunal declared that "[t]he place of this arbitration is London, on any question of choice of law I must therefore apply the relevant rules of the private international law of England."; *Interim Award in SCC Case Nos 80/1998 & 81/1998*, 2002:2 Stockholm Arb Rep 45, 50, where the tribunal said that, "[t]he application of the Swedish conflict of law rules … is mandatory for courts, but not for arbitrators. However, the use of Swedish conflict of law rules is normally recommended provided that Sweden, as the place of arbitration, has been selected by the parties".

[36] Case No 2 in Model Maritime Trial Cases across the Country in 2022 Published by the Supreme People's Court (东莞市蓝海食品国际贸易有限公司与香港长宁航贸有限公司航次租船合同纠纷管辖异议案).

[37] *BNA v BNB* [65]–[69]; *Shagang South–Asia (Hong Kong) Trading Co Ltd v Daewoo Logistics* [2015] 1 Lloyd's Rep 504 ("Arbitration: Arbitration to be held in Hong Kong. English Law to the applied."); *ABB Lummus Global Ltd v Keppel Fels Ltd* [1999] 2 Lloyd's Rep 24 (QB) ("arbitration in London"); *Naviera Amazonica Peruana SA v Compania International de Seguros del Perus* [1988] 1 Lloyd's Rep 116 ("arbitration in London").

significant contrary indicia are necessary to establish that some other seat has been agreed. The provision that some other law is to apply to the main contract is insufficient.[38] Neither will nomination of a city as opposed to a law district constitute a contrary indication.[39] The fact that Guangzhou will also be the place for general average will not alter the analysis because as a general rule, clauses which specify the place of general average have the effect that the adjustment of the general average will be governed by the law and practice of the specified place.[40]

32. Rule 32 of the SCMA Rules merely provides that the seat should be in Singapore when parties have not otherwise agreed. By reasons of the above, since parties have clearly agreed Guangzhou to be the seat, Rule 32 does not apply and Guangzhou is the seat of the arbitration.

33. The fact that the law of the chosen seat, i.e. PRC law, will invalidate the arbitration agreement does not point to Guangzhou being a mere venue as there is no evidence that the parties were aware of such an invalidating effect at the time of entering into the arbitration agreement.[41]

D. Arbitration Agreement is invalid under PRC law

34. There is no dispute between the parties as to the contents or interpretations of Chinese law.[42] Under PRC law, SCMA is not an arbitration commission within Clause 10 of the PRC Arbitration Law as it is a foreign arbitration institution and not an arbitration commission established under the relevant level of government. Hence, an essential feature required to constitute a valid arbitration agreement, i.e. the selection of an arbitration commission by the parties, is missing.[43]

[38] *BNA v BNB* [67].
[39] *BNA v BNB* [92] and [93].
[40] D J Wilson & J H S Cooke, *Lowndes & Rudolf General Average and York–Antwerp Rules* (Sweet & Maxwell, 12th ed, 1997) [30.21]; [30.24].
[41] *BNA v BNB* [90].
[42] Procedural Order No.1, [1](v).
[43] Moot Problem p 36 (D&CC [6]-[8]).

35. To conclude, as the seat of the arbitration is Guangzhou, the Tribunal should apply the law of the seat (i.e. PRC law) to determine the validity of the arbitration agreement. As the arbitration agreement in Rider Clause 76 is invalid under PRC law, the Tribunal has no jurisdiction to hear the present case

E. Governing law for the substantive dispute

36. If the Tribunal finds that it has jurisdiction to hear the present dispute, the Respondent accepts English law to be the governing law by virtue of Rider Clause 76 being incorporated into the B/L and relevant provisions in COGSA would be considered below.[44]

II. CLAIMANT'S MAIN CLAIMS

A. The Respondent is liable for demurrage

37. The Respondent accepts that the C/P has been incorporated into the B/L, and in particular Rider Clause 27 provides that in addition to the Charterers, the consignee and receivers of the Cargo are also liable for demurrage. As the 96-hour laytime stipulated in C/P Clause E ended long before the discharge of the Cargo was completed, the Respondent is liable for demurrage.

38. Laytime commenced at 1443 LT on 20 September 2023 and ended on 24 September 2023 at 1443 LT. Discharge was only completed on 7 October 2023 at 2348 LT, which was 321 hours and 5 minutes late, i.e. 13 days, 9 hours, 5 minutes.

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

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

B. Breach of alleged implied term to take delivery in reasonable time

[44] *Primetrade AG v Ythan Ltd* [2005] EWHC 2399 (Comm) [2006] 1 All ER 367 (UK Comm) (Aikens J).

40. The Respondent is not liable for any breach of the alleged implied term to take delivery in reasonable time: (1) No such term should be implied into the carriage contract; (2) The Respondent did not breach any such implied term; and (3) The Respondent is not liable for any loss.

(1) No implied term to take delivery in reasonable time

41. Terms will be implied into a contract only if (i) to do so is to give effect to what was so obvious that it goes without saying or to do so is necessary to give the contract business efficacy; (ii) such terms are terms that notional reasonable people, in the position of the parties at the time of contracting, would have agreed; (iii) such terms are fair and that the parties would, in any event, have agreed; and (iv) the terms must be capable of clear expression and does not contradict express terms of the contract.[45]

42. It should not be implied into the contract of carriage that the consignee will take delivery of the Cargo from the Vessel in a reasonable time because: (i) The implied term contradicts express terms of the carriage; (ii) it is not necessary to give business efficacy to the carriage contract to imply the term; and (iii) the implied term is not capable of clear expression.

(i) Implied term contradicts express terms of carriage contract

43. The implied term is inconsistent with various express provisions in the B/L. It is trite that (i) laytime is the time permitted for the charterer to use for discharging; and (ii) the failure to discharge within the permitted laytime constitutes breach of contract, which the charterer will be liable for demurrage.[46] Here, C/P Clause E expressly provides for 96 hours as the permitted laytime for discharging operations. It follows that to imply a term requiring the consignee to

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

[46] *Islamic Republic of Iran Shipping Lines v Ierax Shipping Co.* (The "*Forum Craftsman*") [1991] 1 Lloyd's Rep 81, 87 (EWQB) (Hobhouse J); *Maragaronis v Peabody* [1965] 2 QB 430 (EWQB).

take delivery *within a reasonable time* would be to imply a wider term that contradicts the express term of the contract of carriage.[47]

44. Further, in the absence of any contrary indication in a charterparty, demurrage generally liquidates the whole of the damages arising from the charterer's failure to discharge within the permitted laytime.[48] Here, the B/L and the C/P do not contain any contrary indication. The provision for the Next Employment in Rider Clause 57 is not such a contrary indication.[49] While it does not expressly provide for the consequence of a breach, it must be read in the context of the whole C/P and the B/L which are contracts negotiated on an arm's length basis and contain express provisions on laytime and demurrage. The rate of demurrage must be taken to be a reasonable estimation by the parties of the losses the Claimant would suffer as a result of the failure to discharge within the permitted laytime, having taken into account the likelihood of delay in each step of discharge and delivery and the extent of possible losses.[50] The implied term contended for does not cover any risk that is not already covered by demurrage.

45. It is a long-established rule that to recover damages in addition to demurrage for loading/discharge exceeding laytime, the claimant is required to demonstrate that such additional loss is not only different in character from loss of use but stems from breach of an additional and/or independent obligation.[51] The additional loss claimed by the Claimant relates to the loss of use of the Vessel for the next fixture stemming from the delay. As the character of the additional loss is the same as demurrage, the Claimant could not establish a

[47] *Sea Master Shipping Inc v Arab Bank (Switzerland) Ltd and another (The "Sea Master*") [2021] 1 Lloyd's Rep 500 [2020] EWHC 2030 (Comm) [33] (EWHC) (HHJ Pelling QC).
[48] *K Line Pte Ltd v Priminds Shipping (HK) Co Ltd* ("*The Eternal Bliss*") [2021] EWCA Civ 1712 [2022] Bus LR 67 [52] (EWCA) (Males LJ).
[49] *Sea Master* [21].
[50] *Chandris v Isbrandtsen–Moller* (1949) 83 LI L Rep 385 [1951] 1 KB 240, 249 (EWKB)(Devlin J); *Suisse Atlantique Societe D'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1965] 1 Lloyd's Rep 533, 538 cl 2 (EWCA) (Sellers LJ).
[51] Richco International Ltd v Alfred C Toerfer International GmbH ("The Bonde") [1991] 1 Lloyd's Rep 136, 42 cl 1 (EWQB) (Potter J).

breach of independent obligation. It is therefore inappropriate to allow damages in addition to demurrage.

(ii) Implied term does not give business efficacy to carriage contract

46. The carriage contract as evidenced in the B/L is workable without the implied term.

47. Firstly, it is generally in the commercial interest of a consignee to take delivery of the cargo as soon as possible; there is no necessity to imply a term to take delivery within reasonable time.

48. Secondly, if a consignee fails to take delivery of the cargo, it is established under common law that the master of the vessel may discharge the cargo into storage and claim against the consignee for any such expenses properly incurred.[52] There is no reason why the Claimant here could not have discharged the Cargo into storage.

49. That the Claimant fails to meet the Next Employment and suffered substantial loss per se does not mean that the carriage contract is unworkable. It is a leap for the Claimant to assert that the express provision for Next Employment in Rider Clause 57 necessitates the implication of a term to take delivery of the Cargo within a reasonable time. Whether the Vessel was able to meet the Next Employment depended on numerous factors, only one of which was the time it took for the consignee to take delivery. It was unlikely that the Charterer as the charterer or the Respondent as the consignee would assume absolute responsibility and warrant that the Vessel would be able to meet the Next Employment. It was also unlikely that they have agreed to bear the potentially substantial liability for missing the Next Employment. In any event, the consignee had already agreed to pay demurrage. In other words, it is not so obvious that it goes without saying that the consignee would have agreed to take delivery within a reasonable time.

[52] *Sea Master* [40]; *Sang Stong Hamoon Jonoub Co Ltd v Baoyue Shipping Co Ltd (The "Bao Yue")* [2016] 1 Lloyd's Rep 320 [2015] EWHC 2288 (Comm) [40] (EWHC) (Males J); *Procter, Garrett, Marston v Oakwin SS Co* [1926] 1 KB 244 (EWCA) (Bankes LJ); *Australian United SN Co v Hiskens* (1914) 18 CLR 646 (HCA) (Griffith CJ).

(iii) Implied term is too wide

50. The B/L, with various terms incorporated from the C/P, already contains various provisions relating to discharge of cargo. For example, the expenses of discharge, and steam for discharging would be borne by the Vessel.[53] Further, the Charterer is obliged to (i) take delivery;[54] (ii) provide hoses;[55] (iii) arrange stevedores;[56] and (iv) designate and procure discharge by naming the discharging berth.[57] The Charterer also have the right to instruct (i) the Vessel to commingle cargo;[58] (ii) on matters related to STS and double banking for discharge.[59] This shows that the Charterer has the power and obligation in relation to discharge. If the Respondent was responsible for taking delivery within a reasonable time, then the provisions, which prescribed the Charterer and the Respondent with duties, would not be necessary. The provisions and C/P Clause E would also make no sense if the Respondent was responsible for a wider obligation of discharge or taking delivery within a reasonable time.[60]

51. The above analysis is reinforced by *Sea Master*,[61] where the English Commercial Court refused to imply a term requiring the bank, which financed the cargo under the contract of carriage, or the receiver to take delivery of the cargo within a reasonable time and/or to take all necessary steps to enable the cargo to be discharged and delivered within a reasonable time on the grounds, among other things, that there were no express provisions in the B/L that displaced the common law assumption that responsibility for discharge rested with the shipowner.

[53] C/P Clause 7, Moot Problem p 15.
[54] C/P Clause 7(a) ("where delivery of the cargo shall be taken by the Charterer or consignee"), Moot Problem p 15.
[55] C/P Clause 7(b), Moot Problem p 15.
[56] C/P Clause 7(c), Moot Problem p 15.
[57] C/P Clause 6(a), Moot Problem p 14.
[58] Rider Clause 30, Moot Problem p 24.
[59] Rider Clause 34, Moot Problem p 24.
[60] *Sea Master* [24]–[25]).
[61] [2021] 1 Lloyd's Rep 500 [2020] EWHC 2030 (Comm).

52. Furthermore, the Claimant is not able to identify what act or omission might constitute a breach of the implied term other than those already covered in the express terms. C/P Clauses 6 and 7 have already covered the discharging obligations of the Charterer and the Respondent. There is no necessity for implying a much wider and generally expressed term in these circumstances.[62]

53. To conclude, there is no necessity to imply a wide, generally expressed and unqualified term contended for by the owner in this case because (a) to the extent the Respondent was under an obligation to take delivery, that has already been provided for by a narrowly expressed term focused exclusively on that assumed obligation;[63] (b) the obligation of taking delivery and discharge, and the division of work are expressly indicated in the provisions; (c) the contract of carriage contains a demurrage regime that renders the charterer liable to pay demurrage for "*… all time that loading and discharging and used laytime as elsewhere herein provided exceeds die allowed laytime herein specified…*" and to that extent that it applies there is no necessity to imply terms imposing similar obligation on the Respondent and especially when such an implied term would be too wide and inconsistent with what had been expressly agreed;[64] (d) the general law already provides for a solution where the receiver does not accept delivery; and (e) the contract of carriage does not lack commercial coherence without the implied term.[65]

(2) The Respondent did not breach the alleged implied term

54. The Respondent did not breach the alleged implied term to take delivery within a reasonable time.

[62] Sea Master [43].
[63] The Respondent is only responsible to take delivery within the permitted laytime, which is contrary to the wider term of '*within a reasonable time*': see C/P Clauses E and 7(a), Moot Problem pp 12; 15.
[64] C/P Clause 11, Moot Problem p 16.
[65] Sea Master [41].

55. Firstly, although the Charterer informed the Respondent on 20 September 2023 that the Vessel had arrived at Busan, as submitted below at [83]-[86], the Respondent had been acting reasonably in insisting on receiving the relevant documents under the LC and refusing to grant a trust receipt.

56. Secondly, any reasonable time to take delivery should only begin to run when the Respondent became entitled to take delivery. The Respondent could only take delivery after it became the holder of the B/L on 3 October 2023.[66] There is no evidence that the Respondent could have obtained the B/L earlier. In other words, it was beyond the Respondent's control when it became the holder of the B/L. The Respondent cannot be held responsible for events beyond its control.[67] The Respondent had not invoked C/P Clause 57 to take delivery due to the Charterer's financial condition.

(3) Damages not contemplated by the Respondent

57. It is trite that no loss may be recovered by way of damages if it is too remote a consequence of the breach. The loss has to be reasonably contemplated by the parties when the contract was formed.[68] A claimant will not be allowed to recover losses that were unlikely to occur in the usual course of things if the defendant cannot reasonably be regarded as having assumed responsibility for losses of the particular kind suffered.[69]

58. The Respondent did not have specific knowledge about the next fixture.

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[66] *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep 439; see also Rider Clause 57, Moot Problem p 28; D&CC, para 15, Moot Problem p 37.

[67] Rider Clause 43, Moot Problem p 28, 'it is mutually agreed that neither party shall be responsible or liable for any loss or damages (including demurrage or other liquidated damages) or delays in discharging…or any other hindrance or cause happening beyond the parties' control and not arising from the fault or either party'; *Chitty on Contracts* [27–006]; [27–076–27–078];[27–082]; cf In *Monarch SS Co Ltd v Karlshamns Oljefabriker (A/B)* [1949] AC 196, the defendant's ship should have reached its destination in July 1939 but was delayed to September 1939 due to the defendant's breach of contract. The ship was later ordered by the British Admiralty to unload at another port due to the war. The House of Lord ruled that the incurred expenses could be recovered from the defendants as a reasonable businessmen, knowing the possibility of war, would have foreseen that a delay might lead to risk that the vessel to be diverted by the admiralty.

[68] *Hadley v Baxendale* (1854) 156 ER 145 (1854) 9 ExCh 342, 354; Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949] 2 KB 528 (EWCA).

[69] *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48 [2009] 1 AC 61 [6] (HL) (Baronness Hale); *C Czarnikow Ltd v Koufos (The Heron II)* [1967] 2 Lloyd's Rep 457 [1969] 1 AC 350, 382–383 (HL) (Lord Reid).

59. Firstly, while the C/P was incorporated in the B/L, the Respondent only received the C/P on 29 October 2023;[70] and only became the lawful holder of the B/L on 3 October 2023.[71] The Respondent would not have knowledge about the content of the B/L before it was delivered to the Respondent by the Shipper. In other words, the Respondent did not have specific knowledge and consequently could not have reasonably contemplated the next fixture at the time the contract was formed.

60. Secondly, the Charterer only informed the Respondent about the next fixture on 29 September 2023.[72] It was the first time when the Respondent was formally notified about the next fixture. Nonetheless, this was after the carriage contract was formed.

61. In these circumstances, the Respondent would not have reasonably contemplated or cannot be said to have assumed the responsibility for any loss arising from late discharge as it did not have knowledge about the Vessel's next fixture at the time of the contract was formed.

(4) The Respondent did not cause the additional damages

62. Loss is not recoverable as damages unless it is caused by the breach of contract. The breach of contract must have been the dominant or effective cause of the loss.[73]

63. The loss of Next Employment was not caused by the breach of the Respondent but by the adverse wind and sea condition which hampered the Vessel's progress to the Next Employment. In other words, the adverse wind and sea condition broke the chain of causation between any breach by the Respondent and any loss that the Claimant suffers.[74]

C. Quantum for consequential loss

64. In any event, the consequential loss is as follows:

[70] Moot Problem p 47 (email dated 29 September 2023 at 12:17pm).
[71] D&CC, para 15, Moot Problem p 37.
[72] Moot Problem p 47 (email dated 29 September 2023 at 12:17pm).
[73] *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co* [1990] QB 665 [1989] 2 All ER 952, 1021–2022.
[74] *Monarch SS Co Ltd v Karlshamns Oljefabriker (A/B)* [1949] AC 196, 215 (HL) (Lord Porter); *Chitty on Contracts, 35th ed* [30–084]; Andrew Burrows QC, "*Remedies for Torts, Breach of Contract, and Equitable Wrongs*", (Oxford University Press, 4th ed, 2019).

USD $5,000 x 365 x 2 = USD $3,650,000

III. STANDING

65. The Respondent has title to claim from the Claimant because: (A) the B/L is an "owner's bill" (i.e. a carriage of contract between the Respondent as the carrier); and (B) the Claimant could be sued on the B/L under s.2(1) of COGSA.

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

66. The question whether a bill is an owner's or a charterer's bill is one of construction of the bill of lading.[75] It depends on: (1) the way in which the bill is signed; (2) the authority of the signer; and (3) other terms of the bill and charterparty.[76]

67. The B/L here is an owner's bill because it was purported to be signed on behalf of the Master who is an agent of the Claimant as the shipowner.[77] The C/P is a voyage charterparty and not a demise charterparty because (i) the preamble of the C/P stated that the Vessel shall receive from the Charterer the Cargo at the port of loading for delivery to the port of discharge;[78] (ii) the owner was obligated to issue the B/L to shippers by virtue of Rider Clause 24;[79] and (iii) agents working at load and discharge ports are owner's agents (by virtue of Rider Clause 4, owners should appoint charterer's nominated agents at load and discharge ports, and these agents should be employed, instructed, paid by, and be responsible by the owner)[80]. This analysis is reinforced by the fact that the Charterer signed the Discharge LOI to request the Claimant as the shipowner to commence discharge.[81]

B. The Claimant could be sued on the B/L under COGSA

[75] *The Berkshire* [1974] 1 Lloyd's Rep 185, 187 (EWKB) (Brandon J).
[76] Carver on Bills of Lading, 5th ed [4–037].
[77] *The Berkshire*; *Baumwoll Manufactur Von Carl Scheibler v Furness* [1893] AC 8 (UKHL).
[78] Moot problem, p 12.
[79] Moot problem, p 23.
[80] Moot problem, p 21.
[81] SOC para 13, Moot problem, p 9.

68. As submitted above, by virtue of Rider Clause 76, English law governs the contract of carriage under the B/L. COGSA applies in the present case; there is no dispute that the B/L is a bill of lading[82] which is capable of transfer by delivery.[83]

69. COGSA s.2(1) transfers to and vests all rights of suit under the contract of carriage to the holder of the B/L. In this case, the Respondent became the lawful holder of the B/L on 3 October 2023[84] and thereby obtained a contractual right[85] to sue the Claimant.

IV. THE MISDELIVERY COUNTERCLAIM

70. The Respondent claims that: (A) the Claimant was in breach of the B/L for releasing the Cargo to the Charterer without the presentation of the B/L by the Charterer; and (B) the claimant's breach caused the Respondent's loss.

A. The Claimant breached the B/L by releasing Cargo without presentation of the B/L

(1) The Claimant's breach

71. The Claimant breached its obligation under the B/L to deliver the Cargo to the Respondent, or to the order of the Respondent. It is trite that the delivery of cargo to the consignee is a contractual obligation, not an incident of the bill as a document of title; the contract is to deliver to the person entitled under the bill of lading on production of the bill (the "presentation rule").[86] The Claimant is clearly in breach of the B/L by commencing discharge and releasing the Cargo to the Charterer, and not the Respondent, upon the Charterer's presentation of the Discharge LOI and not the B/L.

[82] COGSA s 1(1).
[83] COGSA s 1(2) (a).
[84] D&CC para 16, Moot problem, p 37.
[85] *Unicredit Bank AG v Euronav NV* [2023] EWCA Civ 471 [2024] 1 All ER 36 (Comm) [45] (EWCA) (Popplewell LJ).
[86] *Unicredit; Glyn Mills Currie & Co v The East and West India Dock Co* [1882] 8 WLUK 4, (1882) 7 App Cas 591; *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] 6 WLUK 90 [1959] AC 576.

72. It is irrelevant that the Claimant was simultaneously obliged under the C/P to deliver without production of the B/L on the Charterer's request, since the Claimant has assumed the risk of having "contractual obligations to different parties with conflict".[87]

(2) The Exclusion Clause is incapable of excluding the Claimant from liability

73. Clause 2(c) of the B/L ("the Exclusion Clause") reads, "*The carrier shall in no case be responsible for loss of or damage to the cargo, howsoever arising prior to loading into and after discharge from the Vessel…*"[88] It is submitted that on the proper construction of the Exclusion Clause, it is insufficient to relieve the Claimant from liability for misdelivery.

74. First, the Claimant cannot exclude the liability for breach of its contractual obligation. It is trite that a shipowner delivering goods without requesting for the presentation of a bill "does so at his own peril".[89] An exemption clause written in extreme width and with unreasonable effect must also be limited and modified by an implied limitation.[90]

75. Here, the Exclusion Clause limits the Claimant's liabilities only to those which arise when the Cargo was on board the Vessel. Taking the Exclusion Clause to the extreme, the Claimant would be absolved from any liability even if it burns the Cargo after discharge.

76. Second, it runs counter to the B/L's main object if the Claimant can rely on the Exclusion Clause to absolve its liability. The object in all mercantile transactions is certainty.[91] The main object and intent of the contract contained in or evidenced by the B/L is the carriage of the Cargo from Bintulu to Busan. One of the functions of a bills of lading is to contain or evidence the contract of carriage between the carrier and the lawful holder. This was said to be the "primary office and purpose" of a bill of lading by Lord Selbourne LC in *Glyn Mills*

[87] *Unicredit* [45].
[88] Moot problem, p 31.
[89] *Glyn Mills Currie, 610; Sze Hai Tong, 586; Kuwait Petroleum Corpn v I & D Oil Carriers Ltd* ('*The Houda')* [1994] 7 WLUK 266 [1994] 2 Lloyd's Rep 541, 552–553; 556–557 (EWCA) (Neill LJ); *Metis Exports Ltd v Dampskibsselskabet Af 1912 Aktieselskab* [1999] 1 Lloyd's Rep 837, 840 (EWQB) (Rix J); [2000] 1 Lloyd's Rep 211 [19] (EWCA) (Stuart-smith LJ); *Unicredit* [45] (Popplewell LJ).
[90] *Sze Hai Tong*, 587 (Lord Denning).
[91] *Homburg Houtimport BV and Others v Agrosin Private Ltd and Another (the "Starsin")* [2003] UKHL 12 [2004] 1 AC 715, 738 (UKHL) (Lord Bingham of Cornhill), citing *Vallejo v Wheeler* (1774) 1 Cowp 143, 153 (EWHC).

Currie;[92] its effect is to entitle the lawful holder, who would otherwise not be a party to the original contract of carriage, all rights of suit against the carrier.

77. The parties to a bill of lading would therefore expect the bill to provide contractual remedies in case of breach, especially the Respondent, since the B/L was issued by the Claimant and written on the Claimant's standard terms.

B. The Claimant's breach is an effective cause of the Respondent's loss

78. The Claimant's breach caused the Respondent's loss because: (1) the Respondent looked to the B/L as security for the loan advanced to the Charterer under the Facility Agreement; (2) the Respondent did not consent to discharge against the Discharge LOI; and therefore (3) the Respondent would not have suffered the loss if the Claimant did not breach the B/L.

(1) The Respondent looked to the B/L as security

79. When assessing whether the shipowner's misdelivery is an effective cause to the bank's loss, applying the counterfactual inquiry in in *Unicredit Bank AG v Euronav NV*, the court will generally assess whether the bank looks to the B/L as security so as to ensure its enforcement of such security in the event of the borrower defaulting in payment[93] and what would have happened to the bank's security interest had the owners initially refused to discharge without production of the bill.[94]

80. First, as a matter of general principle, the Claimant bears a high burden to establish that the Respondent consented, acquiesced, or waived its rights in relation to the Claimant's misdelivery. The Respondent is entitled to rely on the presentation rule and expected the

[92] *Glyn Mills Currie*, 596 (Lord Selbourne LC).
[93] *Unicredit* [103] (Popplewell LJ); *Fimbank Plc v Discover Investment Corp ("The Nika")* [2020] 2 WLUK 49 [2021] 1 Lloyd's Rep 109 (EWKB); *The "Yue You 902" and another matter* [2020] SGHCR 3 [2020] 3 SLR 573 (SGHC); *Oversea–Chinese Banking Corp Ltd v Owner and/or Demise Charterer of the vessel ("STI Orchard")* [2022] SGHCR 6 (SGHC); *Standard Chartered Bank (Singapore Limited) v Maersk Tankers Singapore Ptd Ltd* [2022] SGHC 242 (SGHC).
[94] *ibid* [103].

Claimant to only deliver against the presentation of the B/L. It is difficult to see why the Respondent would voluntarily prejudice its own security.[95]

81. Secondly, the Respondent clearly looked to the B/L and the Cargo as security. While the Respondent paid Good Oil upon the Payment LOI and not the B/L, unlike *STI Orchard* where the bill of lading there was consigned to the buyer's order, the B/L here was consigned to the Respondent's order. The Cargo should thus be delivered to the Respondent or to its order. Further, Good Oil also warranted under Clause (V) of the Payment LOI that title in the Cargo had been passed to the Respondent free of all liens, charges or encumbrances.

82. This is further evidenced by the Respondent's repeated refusal to grant a trust receipt loan. the Charterer repeatedly asked the Respondent to grant a trust receipt by an email dated 20 September 2023 at 4:43pm and a further email dated 29 September 2023 at 9:14pm.[96] the Charterer further urged the Respondent to process urgently by an email dated 29 September 2023 at 12:17pm and again applied for trust receipt on 3 October 2023 at 3:47pm. By an email dated 3 October 2023 at 4:02pm, The Respondent clearly refused to grant trust receipt, citing concern of the Charterer's financial conditions. [97] This clearly indicated that the Respondent was keen to retain the title to the Cargo and looked to the B/L and the Cargo as security for repayment. This was reinforced by the Respondent's insistence not to grant trust receipt "*until export LC from Korean buyers lodged with [the Respondent] and [the B/L] are received from Good Oil*".[98] The Respondent intended to possess the B/L as collateral in case the Korean buyer default in payment. The Respondent further insisted on this decision in an email dated 3 October 2023 at 4:42pm.[99] That the Respondent would book the payment as trust receipt for the time being was irrelevant.

[95] *STI Orchard* [72].
[96] Moot problem, p 47 – 49.
[97] Moot problem, p 47.
[98] Moot problem, p 46 (Email dated 3 October 2023 at 4:02pm).
[99] Moot problem, p 46.

(2) The Respondent did not consent to discharge against the Discharge LOI

83. Even if the Respondent previously received a copy of the C/P and was aware of the terms therein, the Respondent could not have consented to discharge against the Discharge LOI. The Respondent had never consented to the Charterer invoking Rider Clause 57 to allow for the Cargo to be discharged upon the Discharge LOI. The Respondent's statement to the Charterer that it "*must do as you deem fit as Charterers and we will not interfere as long as the loan is repaid*" must be read in the context of the Respondent's email dated 3 October 2023 at 4:42pm as a whole. The context suggested no more than an acknowledgement of the Charterer's liability to pay demurrage as charterers under the C/P. Further, as mentioned above, the Respondent clearly indicated in the same email its intention to look to the B/L and the Cargo as security when it insisted on its decision not to grant a trust receipt. Discharge could have commenced if the Charterer repaid the loan as requested. The Charterer invoked Rider Clauses 57 on 3 October 1:37pm, without any prior approval from the Respondent. The 4:42pm email from the Respondent could not be taken as consent.

84. Further, the Respondent was not aware that the Charterer actually invoked Rider Clause 57 to discharge the Cargo against the Discharge LOI or that the Cargo was delivered to the Charterer. This is materially different from *Unicredit*, where it was found that the Bank was aware of the developments of the shipment, and had implicitly approved discharge without the bill.[100] The Respondent did not acquiesce in the Claimant's breach of the presentation rule.

85. By reason of the matters above, but for the Claimant releasing the Cargo against the LOI instead of the production of the B/L, the Respondent would have been able to enforce its security against the B/L. Alternatively, the Respondent would have obtained a letter of credit from the Korean buyers, thereby recovering the LC loan. The Claimant's breach was thus the effective cause of the Respondent's loss.

[100] *Unicredit* [34]; [103] – [107].

V. PRAYER FOR RELIEF

86. For the reasons set out above, the Respondent is seeking the following orders and declarations:

(1) A declaration that the Claimant's claims be dismissed in full;

(2) A declaration that the Respondent is entitled to damages amounting to USD 4,249,752.50; or to the value of the Cargo to be assessed; and

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