INTERNATIONAL MARITIME LAW ARBITRATION MOOT, 2024

SYMBIOSIS LAW SCHOOL, PUNE

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TEAM: ARCHITA ANISH, DIVYANG SALVI, ISHU SHARMA, JAYATI BHATIA, AND SHREYAS MENON

IN THE MATTER OF INTERNATIONAL ARBITRATION

IN THE MATTER OF SCMA ARBITRATION UNDER THE SCMA RULES (4TH EDITION)

AND

IN THE MATTER BETWEEN:

TOMAHAWK MARITIME S.A. CLAIMANT

versus

VEGGIES OF EARTH BANKING LTD. RESPONDENT

MEMORIAL *for* RESPONDENT

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ABBREVIATIONS

Art.	Article
B/L	Bill of Lading
Cl.	Clause
CP	Voyage Charterparty
COGSA	United Kingdom's Carriage of Goods by Sea Act, 1992
Edn.	Edition
FOB	Free on Board Basis
Hon'ble	Honourable
HR/ HVR/ Rules	Hague and Hague-Visby Rules
LC	Letter of Credit
Lloyd's Rep	Lloyd's Law Reports
LOI	Letter of Indemnity
Para.	Paragraph
PRC	People's Republic of China
VOE	Veggies of Earth Banking Ltd.
SCMA	Singapore Chamber of Maritime Arbitration
SCMA Rules	Singapore Chamber of Maritime Arbitration Rules (4th Edition)
SOC	Statement of Claim
SOD	Statement of Defence and Counterclaim
SOR	Statement of Reply and Defence to Counterclaim
Vessel	MT Niuyang

LIST OF DEFINITONS

The definitions listed below have been consistently used throughout the memorial unless specified otherwise with respect to its context.

B/L	Bill of Lading dated 04.09.2023 (B/L No. COW-001A)
Cargo	16,999 MT of Edible Palm Oil
Charterer	Yu Shipping Ltd.
Claimant	Tomahawk Maritime S.A. (Shipowners)
CP	Voyage Charterparty executed between the Claimant and the Respondent dated 01.09.2023
COGSA	United Kingdom's Carriage of Goods by Sea Act, 1992
Notice of Arbitration	The Notice of Arbitration issued by the Tomahawk Maritime S.A. (Claimants) to the Veggies of Earth Banking Ltd. (Respondent) dated 22.12.2023.
Respondent	Veggies of Earth Banking Ltd.
Rider Clause	Tomahawk Maritime Rider Clauses
SCMA	Singapore Chamber of Maritime Arbitration
SCMA Rules	Singapore Chamber of Maritime Arbitration Rules (4th Edition)
SOC	Statement of Claim dated 19.01.2024
SOD	Statement of Defence and Counterclaim dated 16.02.2024
SOR	Statement of Reply and Defence to Counterclaim dated 01.03.2024
Vessel	MT Niuyang

STATEMENT OF FACTS

1. The legal dispute between Tomahawk Maritime S.A. and Veggies of Earth Banking Ltd involves a Voyage Charterparty dated 01.09.2023 ("CP") and the subsequent issuance of a Bill of Lading for the transportation of 16,999 MT Palm Oil from Bintulu, Malaysia, to Busan, South Korea.
2. The CP was executed between the Claimant as shipowners and Yu Shipping Ltd as Voyage Charterers for the vessel Mt. 'Niuyang.' Simultaneously, the Respondent entered into a negotiable BL agreement with the Shippers, Good Oil Sdn Bhd, which incorporates the terms of the CP, for acquiring the Cargo on an FOB basis.
3. The Vessel successfully took the Cargo from Bintulu, Malaysia, and reached Busan, South Korea, on 20.09.2023. However, at Busan, the Vessel's delay in discharge impacted its subsequent commitment at Kaohsiung, which had a strict laycan of 1-14 October 2023, leading to contractual breaches and losses suffered by the Claimants. The Claimant, therefore, claimed damages for the losses sustained because of the breach of the CP by the Respondents.
4. The Respondent used a Letter of Credit to finance the cargo on behalf of the Voyage Charterers and treated the cargo as collateral. However, when the Claimants chose to deliver the cargo against a Letter of Indemnity rather than the usual practice of the B/L, there is a misdelivery claim made by the Respondent against the Claimant as the Respondents were the lawful holder of the BL which makes them the only party to take lawful delivery of the goods.
5. To resolve the arising disputes, the Claimants have served the Respondents with a Notice of Arbitration on 22.12.2023, pursuant to the arbitration clause provided for in the CP and the B/L, following the SCMA Rules. However, the Respondent reserves the right to object to such jurisdiction.

ISSUES RAISED

I.

WHETHER THE ARBITRATION CLAUSE AND THE ARBITRATION COMMENCED BY THE CLAIMANTS THEREUNDER IS VALID?

II.

WHETHER THE CLAIMANT IS ENTITLED TO THE DAMAGES IN ADDITION TO DEMURRAGE?

III.

WHETHER THE RESPONDENT IS ENTITLED TO DELIVERY OF THE CARGO OR TO CLAIM DAMAGE FOR MIS DELIVERY?

ARGUMENTS ADVANCED

1. THE ARBITRATION CLAUSE IS VALID AND THE LAW GOVERNING THE ARBITRATION AGREEMENT IS PRC LAW.

1. By virtue of Rule 30 (30.1(a)) of the Singapore Chamber of Maritime Arbitration Rule (4th edn.), the *Kompetenz-Kompetenz* principle of arbitration has been encapsulated.[1] It is provided here that the Arbitration Tribunal so constituted may decide on its substantive jurisdiction or competence to rule on an issue before it. The Respondent humbly submit that the Tribunal so constituted lacks jurisdiction to be deciding on the issues at hand because [**1.1**] There exists a valid contract between the Claimant and Respondent.; which has been [**1.2**] incorporated into the Bill of Lading. However, [**1.3**] The main contract and the arbitration agreement are separable. Lastly, [**1.4**] the law governing the arbitration agreement is Chinese Arbitration Law.

1.1. EXISTENCE OF A VALID CONTRACT LAW GOVERNING THE ARBITRATION AGREEMENT IS ENGLISH LAW

2. The arbitration agreement that exists between the parties by virtue of which the present arbitration has been initiated, is in the backdrop of the founding contract from where it stems. Moreover, the Respondents iterate their acceptance of the applicability of English law to the Charterparty, however, challenge the arbitration clause alone-.

1.1.1. B/L EVIDENCING A CONTRACT OF CARRIAGE

[1] Singapore Chamber of Maritime Arbitration Rules, R 30(a).

3. Fulfilling one of the primary functions of a B/L, it evidences the contract of carriage[2] between the Claimant and the Respondent and is therefore to be construed using contractual construction. Under the COGSA, the endorsee becomes the lawful holder of a B/L thereby acquiring contractual rights that arise thereunder[3]; one such right being the right to sue[4] and make claims against.
4. Correlating the above position of law to our facts, we see that while the contract of sale is on an FOB Basis executed between the shipper (Good Oils Sdn Bhd) and the Carrier (Yu Shipping); the Respondent's- Veggies of Earth Bank- are the Consignees as mentioned on the B/L since they are the financiers of the carrier. This endorsement becomes a valid contract between the Claimant and the Respondent, reflected by Clause 76 of the Charterparty.

1.1.2. RIDER CLAUSES SUPERSEDE THE CLAUSES OF THE CHARTERPARTY

5. It is a settled principle of law that greater weight must be attached to terms which the particular contracting parties have chosen to include in the contract to pre-printed terms[5]. Extrapolating this, where there is a contradiction between the standard printed terms vis-à-vis a typed clause; the latter will prevail[6].
6. Turning to our factual matrix, a first clause is the one contained under Clause 31 of Part II of the Voyage Charterparty[7] concluded between the Claimant and Yu Shipping Ltd. titled "Arbitration", and a second; under Clause 76 of the Tomahawk Maritime Rider Clauses[8] titled "Law and Arbitration." Applying the law to these facts requires us to uphold the

[2] National Jaya (Pte) Ltd v Hong Tat Marine Shipping Pte Ltd [1978–1979] SLR 416 at 419.
[3] Carriage of Goods by Sea Act 1992, Sec 5(2)(b)
[4] Richard Aikens Et al, Bills of Lading (2nd Ed., Routledge 2016).
[5] Glynn v Margetson & Co [1893] AC 351.
[6] United British SS Co. v. Minister of Food [1959] 1 Lloyd's Rep. 11
[7] Tanker Voyage Charter Party, Factsheet, p. 12.
[8] Tomahawk Maritime Rider Clauses, Factsheet, p. 28

validity of the latter clause, signifying the validity and superseding nature of the arbitration clause contained in the Rider Clauses, therefore the Charterparty.

1.2. SUBSEQUENT STAGES OF VALID INCORPORATION OF THE ARBITRATION CLAUSE

7. Per S. 6 of the English Arbitration Act of 1996, it would be an "*arbitration agreement"* if the reference to such a clause makes the arbitration clause part of the agreement[9]. While the legislation does not expressly provide for a standard form of such incorporation, ample jurisprudence exists in this regard.

1.2.1. EXPRESS INCORPORATION AS PROVIDED

8. Incorporation into the B/L is provided for on the overleaf of the B/L titled Conditions of Carriage expressly stating *"All terms and conditions, liberties and exceptions…. Including the* ***Law and Arbitration Clause*** *are herewith incorporated."*[10] Therefore, the Respondents humbly accept and submit that there exists an express and valid reference to the arbitration clause fulfilling a pre-requisite of incorporation.

1.2.2. ETYMOLOGY FACILITATING SUCH INCORPORATION

9. A second aspect looked into is the very wording of the arbitration clause being incorporated. It must be one that is conducive to being read into or construed with the B/L. Referring to Clause 31 of Part II of the CP (the Rider Clauses) which deals with Arbitration provides *"Any dispute arising…. **of this Charter Party** shall be…."*[11] As covered above, it is this

[9] Arbitration Act, 1996, c. 23, § 6 (Eng.).
[10] Moot Problem, Statement of Claim, Annexure C, Page 31,Point 1.
[11] Moot problem, Statement of Claim, Annexure A, Page 19, Point 31

arbitration clause that was later amended and substituted by way of Clause 76 of the Tomahawk Maritime Rider Clauses that changed only the seat and law of arbitration to be availed of.

10. In the *Portsmouth*[12] Case, the question that concerned valid incorporation was whether such incorporation would be *"embarrassing and ambiguous"* due to a possible narrow interpretation of "*this Charter."* However, the Courts answered in the negative, akin to the present case. Where the intention of the parties to arbitrate upon disputes can be clearly discernible, case laws provide the scope to "*manipulate or adapt part of the wording of the clause in order to give effect to that intention."*[13]

11. Since, both the conditions required for valid incorporation of the arbitration clause have been met, it is submitted that the arbitration clause has been validly incorporated into the B/L and constitutes an agreement to arbitrate.

1.3. THE LAW GOVERNING THE SEAT DOES NOT GOVERN THE ARBITRATION AGREEMENT

12. It has been upheld by many courts that while there are various approaches to decide on which law applies as the one governing the arbitration agreement of which the law of the seat is one, the Respondent submit that the same is not the case at hand.

1.3.1. THE CONTRACT AND THE ARBITRATION AGREEMENT ARE SEPARABLE

[12] *Thomas & Co. Ltd. v. Portsea Steamship Co. Ltd*. ("The Portsmouth") [1912] AC 1, [10] (Robson, J.)
[13] The "Rena K" [1978] 1 Lloyd"s Rep. 545, [551] (Brandon, J.); *Pride Shipping Corp. v Chung Hwa Pulp Corp* (The "Oinoussin Pride") [1991] 1 Lloyd"s Rep. 126.

13. The doctrine of separability, a legal fiction, protects the arbitration agreement from any defects of the main contract[14], to the extent that it even survives the termination of the main contract[15]. While *Article V(1)(d) of the New York Convention*[16] provides for party autonomy in an international arbitration agreement, arbitration agreements being contractual, proves the essence that parties are at liberty to subject the arbitration agreement to a law of their choice. This is an essential provision in alignment with important cornerstones of arbitration i.e consent and party autonomy. To cite scholar Gary Born, all jurisdictions favourable to arbitration accept the separability presumption to some extent, whether from common or civil law.[17].

14. Propounded by the House of Lords in the *Heyman*[18] case, separability has implications when determining the choice of law of the arbitration agreement[19]. Therefore, the doctrine of separability provides for considering the principal contract and the alternate dispute resolution clause it contains as distinct individual fractions[20]. A similar position concerning separability of an arbitration agreement from a contract can be seen in Article 16(1) of Model Law[21] [Model Law, Art. 16(1)] and in Art. 23 of the PCA Rules[22], which goes to the extent

[14] *Redfern And Hunter on International Arbitration* § 2.101 (Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter eds., 2015) [hereinafter "Redfern & Hunter"]; *David St John Sutton, Judith Gill, Matthew Gearing, Angeline Welsh, Kate Davies & Francis Russell, Russel On Arbitration* § 2–007 (24th ed. 2015) ("An arbitration agreement specifies the means whereby some or all disputes under the contract in which it is contained are to be resolved. It is however separate from the underlying contracts."); Gary B. Born, *International Commercial Arbitration 535-538*, § 3.01. *(2nd ed, 2014)*

[15] Redfern & Hunter § 2.101; David Joseph, *Jurisdiction And Arbitration Agreements And Their Enforcement* § 4.36 (3d ed. 2015) ("An arbitration agreement is a separate and distinct agreement from the substantive contract and is not ordinarily impeached or rendered void if the substantive contract is discharged, frustrated, repudiated, rescinded, avoided or found to be void.").

[16] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V (1)(d), June 10, 1958, 330 U.N.T.S. 38, (*effective* July. 13, 1960). [hereinafter "UNCITRAL"]

[17] Gary B Born, I*nternational Commercial Arbitration* (Kluwer Law International, 2nd Edn, 2014), Section 3.02.

[18] Heyman v. Darwins [1942] 1 All ER 337 (HL)

[19] Sulamérica Cia Nacional de Seguros SA v. Enesa Engenharia SA (2012) EWCA Civ 638

[20] Fili Shipping Co. Ltd. and others v. Premium Nafta Products Ltd. and Others, (2007) UKHL 40

[21] (UNCITRAL)supra at 16 [P.O. 1, p.43 §3].

[22] Permanent Court of Arbitration Rules 2012, Art. 23; P Hamilton, HC Requena, L van Scheltinga, and B Shifman (eds), *The Permanent Court of Arbitration: International Arbitration and Dispute Resolution, Summaries of Awards, Settlement Agreements and Reports* (Kluwer Law International 1999).

of stating that a Tribunal's decision rendering a contract invalid shall not render the arbitration agreement invalid since both are separate entities [PCA Rules, Art. 23].

1.3.2. CONTRACTUAL INTERPRETATION TO UPHOLD VALIDITY RATHER THAN RENDER IT INEFFECTIVE

15. A subset standing in law to be considered is the Validation Principle which may be employed by arbitrators to give effect to the separability of an arbitration agreement.[23] An English case law substantiating the practice of the choice of law for the contract being normally applicable to an arbitration clause in the contract was summarised by Colman J in ***Sonatrach Petroleum Corpn (BVI) v Ferrell International Ltd***[24]**.** This approach has been adopted even in cases where a seat of arbitration was decided upon as one in a different jurisdiction[25].

16. As asserted above, the Respondents humbly submit to the Tribunal that the main contract and the arbitration agreement are two mutually exclusive documents. By way of the doctrine of separability, the Respondents accept the applicability of English Law as the governing law for the substantive issues that arise out of the Charterparty. However, the arbitration agreement contained in Clause 76 of the Rider Clauses is not bound by the same. The applicable law governing the arbitration agreement must be determined in consonance with the various approaches developed over time, none of which, necessitates English Law to be it.

[23] *Enka Insaat Ve Sanayi AS v OOO "Insurance Company Chubb" & Ors* [2020] UKSC 38 (Enka)- "verba ita sunt intelligenda ut res magis valeat quam pereat" (the "ut res magis principle").
[24] Sonatrach Petroleum Corpn (BVI) v Ferrell International Ltd [2002] 1 All ER (Comm) 627 at para 32
[25] *Union of India v McDonnell Douglas Corpn* [1993] 2 Lloyd's Rep 48, 49-50 ; *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania* [2005] EWHC 2437 (Comm); [2006] 1 All ER (Comm) 731, paras 76-77.

1.4. THE LAW GOVERNING THE ARBITRATION AGREEMENT IS CHINESE ARBITRATION LAW

17. It is submitted by the Respondents that it is PRC arbitration law that must govern the arbitration agreement. This is sought to be asserted by virtue of the three-pronged test of inquiry that has been previously laid down in the case of BCY v. BCZ[26], and later approved in *Enka*[27].

1.4.1. EXPRESS CHOICE OF THE PARTIES

18. An essential to be followed at the start of this inquiry is the hierarchical approach to be followed in this regard. The first aspect to be considered is the express choice of law mentioned in the arbitration clause. It is the express choice, followed by the implied one, subsequent to which the real and close connection further bifurcated into *law of the contract* or *law of the seat of the arbitral tribunal*. However, there have been instances post the aforementioned judgement, wherein Courts have directly resorted to the examination of an implied choice, followed by the closest and most real connection test such as in the *Arsanovia*[28] case. This is elaborated upon below. It is humbly submitted by the Respondents that a bare perusal of the valid arbitration clause provides no categorically consented choice of law to govern the arbitration.

[26] *BCY v BCZ* [2016] SLR 357, [40] (Steven Chong J) ('*BCY*'), applying *Sulamérica Cia Nacional de Seguros SA and others v Enesa Engelharia SA* [2013] 1 WLR 102, [9] ('*Sulamérica*').
[27] *supra* at 23.
[28] Arsanovia Ltd. and oRd. v. Cruz City 1 Mauritius Holdings [2012] EWHC 3702 (Comm.)

1.4.2. IMPLIED REFERENCE TO BE CONSTRUED

19. Pursuant to the hierarchy, when considering the implied reference that must be construed, the law of the seat or the law governing the contract may be applied. Having ruled out the latter, the Respondents seek to justify PRC Law by virtue of Guangzhou being deemed as the Seat.

1.4.2.1. Application of the Law of the Seat

20. Cases such as ***Enka***[29] prioritise the law of the seat over the law of the governing contract. While there is a clear distinction between the seat and location of arbitration, in the absence of an express choice, there is a requirement to treat the place as the seat[30]. Moreover, the Courts have also stated that such would be the construction unless expressly indicated by the parties that venue is not the seat of arbitration.

1.4.2.2. Real and Close Connection Test

21. Provided for under the common law rules, the law governing the arbitration agreement will be the system of law most closely connected to the arbitration agreement, in case the explicit and implicit reference is unsatisfied[31].
22. In ***C v. D***[32]**,** the Court of Appeal likewise expressed the view that law governing the arbitration agreement not on the basis of implied choice, but on the basis that there was no choice of law for the arbitration agreement so that it was necessary to identify the law with which it was most closely connected. Longmore LJ considered this to be the law of the place where the parties had chosen to arbitrate rather than the law of the insurance contract.

[29] *supra* at 23.
[30] *Roger Shashoua v. Mukesh Sharma* 2009 EWHC 957 (Comm) : (2009) 2 Lloyd's Rep 376.
[31] Kabab-Ji SAL v. Kout Food Group, (2020) EWCA (Civ) 6 ; 2021 UKSC 48.
[32] C v D [2007] EWCA Civ 1282; [2008] Bus LR 843

23. Applying this position of law to the facts, we see that Guangzhou was certainly intended to be the venue of the arbitration. Therefore, it is the PRC Arbitration Law that must be applicable as the *lex arbitri* and the substantive law.

2. THE CLAIMANT IS ENTITLED TO GET DAMAGES IN ADDITION TO DEMURRAGE

24. The Claimants are not entitled to damages in addition to demurrage. The above contention is sought to be proved in three-fold arguments: ***(2.1)*** Effects of Specific Incorporation will only hold the charterers liable; ***(2.2)*** Claimants' claims are only confined to Demurrage; and ***(2.3)*** The instant case falls under exceptional circumstances of the Achilleas.

2.1 EFFECTS OF SPECIFIC INCORPORATION WILL ONLY HOLD THE CHARTERERS LIABLE

25. Demurrage is recoverable primarily from the charterer, but it may be recovered from the bill of lading holder, provided that the terms of the charterparty are incorporated into the bill of lading. It is pertinent to mention that the demurrage clause should be so worded as to encompass the liability of the charterer to the bill of lading holder. In the case of the ***Miramar***[33], the Hon'ble House of Lords refused to manipulate the wording of a charterparty demurrage clause incorporated into the bill of lading by words of general incorporation. The charterparty clause referred to an obligation on the 'charterer' to pay demurrage and was given its literal meaning. Its incorporation into the bill of lading was not meaningless, even though it referred to the obligations of a third party, the charterer. The bill of lading holder was, therefore, not liable for demurrage.
26. Essentially, the bill of lading holder could not be held responsible for fulfilling obligations that were clearly outlined for another party, the charterer, in the charterparty[34]. The position may be different where the demurrage clause in the charter does not specify who is to pay demurrage but, instead, provides simply for 'demurrage to be paid.' In which case, the holder of the bill of lading will be liable.

[33] *The Miramar*, [1984] AC 676
[34] Moot Problem, Statement of Claim, Annexure A, Page16, Point 11.

27. However, in the present case before us, the wordings of the demurrage clause in the charterparty have a specific incorporation, which only imposes obligation on the 'Charterers'[35] as was the case in the Miramar and therefore, no obligation could be extended to the bill of lading holder. The ruling of the Miramar was further strengthened in the ***Spiros C***[36] case., *wherein specific worded demurrage provision only relating to 'charterer' could impose no liability on the bill of lading holder* in light of the above arguments, it is rather difficult to see why the demurrage clause which is specifically worded to the 'charterers' should be extended to the bill of lading holder in the present case.

2.2 CLAIMANTS' CLAIMS ARE ONLY CONFINED TO DEMURRAGE

28. Once the laytime or laydays expire, the vessel will go on demurrage until the completion of loading or discharge, as the case may be. Demurrage is primarily due from the charterer, but recovery can also be made from the bill of lading holder, provided that the bill of lading incorporates the terms of the charterparty and the demurrage clause is worded so as to encompass the liability of a bill of lading holder. The shipowner's remedy against either the charterer or the bill of lading holder is limited to a claim of demurrage, even if the delay is so serious as to entitle it to repudiate the charter[37]. If the shipowner elects to keep the contract, the shipowner is still bound by the terms of the demurrage clause, and the position remains the same even if the breach is willful and deliberate.[38]

29. In the present case before us, the adage 'once on demurrage, always on demurrage' will still hold true as the parties have included a demurrage clause, so there is no need to infer

[35] Moot Problem, Statement of Claim, Annexure A, Page16, Point 11
[36] *The Spiros C*, [2000] 2 Lloyd's Rep 550, CA.
[37] *Ethel Radcliffe SS Co v. Barnet*, (1926) 24 LIL Rep 277, 279
[38] *Suisse Atlantique Societe d Armement Maritime v. NV Rotterdamsche Kolen Centrale*, [1967] 1 AC 361, HL.

damages in addition to demurrage. Furthermore, in the ***Heron II***[39] *c*ase., it was a point of discussion that the parties have the opportunity to anticipate certain breaches and can estimate in advance the damage that they will cause. This enables the parties to negotiate contractual terms to cover such a situation However, in the present case no additional or other clauses have been incorporated to cover damages suffered by the claimant in their following fixture, and therefore, their claim should only be limited to demurrage.

2.3 EXCEPTION OF THE ACHILLEAS

30. In the case of ***Achilleas***[40], Lord Hoffman, in his view, posed a fundamental question to be answered; "Is the loss the "kind" or "type" for which the contract-breaker ought fairly to be taken to have accepted responsibility?" Lord Hoffman found the answer to be negative, as in his view, "the charterer cannot be regarded as having assumed the risk of the owner's loss of profit on the following charter." In the present case before us, it is rather evident that the Respondents have also not undertaken any liability for the claimants' loss in its next fixture. As the parties were already aware of the follow-on-fixture[41], any responsibility if undertaken by the Respondent would have been met with a clause holding the Respondent liable for the vessel's loss of hire rate, and even after such contemplation if no clause or clauses are incorporated therein then it would be unreasonable to hold the Respondent liable for the same.
31. Furthermore, Lord Roger's findings that the parties would not have reasonably contemplated that an overrun of nine days would "in the ordinary course of things"[42] cause the owners the kind of loss claimed are very well applicable to us. An overrun of just 7 days after the 30th

[39] *Heron II*, [1969] AC 350, HL.
[40] *The Achilleas*, [2008] UKHL 48.
[41] Moot Problem, Statement of Claim, Annexure B, Page 25, Point 38.
[42] *supra* at 8.

of September[43] would not have been contemplated by the parties that it would result in a kind of loss claimed by the claimants. Therefore, the Respondent is entitled to get damages in addition to demurrage.

[43] Moot Problem, Statement of Claim, Page 9, Para 14.

3. THE RESPONDENT IS ENTITLED TO DELIVERY OF THE CARGO OR TO CLAIM DAMAGE FOR MIS DELIVERY

32. The Respondent is entitled to delivery of the cargo and has claimed damages for misdelivery because **(3.1)** The Claimant has failed to abide by the presentation rules; **(3.2)** Respondent has locus standi under COGSA to bring the present claim; **(3.3)** The Respondent has a Limited Liability Based on Knowledge of Received Documents and Compliance Standards.

3.1 THE CLAIMANT HAS FAILED TO ABIDE BY THE PRESENTATION RULE

33. Respondent's primary submission is that the when a bill of lading has been issued, the legal holder is the only person entitled to the delivery of the goods from the carrier, and, the carrier is obliged to deliver the goods to the holder against the presentation of this original bill of lading.[44] The function of a bill of lading as a document of title and the presentation rule go hand in hand. The Bill of Lading carries with it a right to possession of the cargo. It confers the necessary protection on the purchaser of the goods by ensuring that the carrier will only tender the cargo entrusted to it to a legitimate party holding the document of title.[45]

a. It is humbly reiterated that Bill of lading No. COW-001A has mentioned the Respondent by name as Consignee and no further endorsement has been given by the Respondent[46]. Hence the Claimant was obligated to deliver the goods to the Respondent.

[44] *Antariska Logistics PTE Ltd. C McTrans Cargo (s) PTE Ltd*.. [2013] 1 Lloyd's Report 117, [60], (High Court of Singapore)
[45] *Carlberg v Wemyss* 1915 SC 616 at 624
[46] Moot Problem, Statement of Claim, Annexure C, Page 30.

34. The commercial importance of the Bill of Lading arises from the right it gives to possession of the cargo it represents, which necessarily requires that the carrier must verify and tender the cargo to the lawful holder of the bill of lading alone.[47]

35. The Claimant failed to verify whether the notifying party which is Gileum Refinery Co. Ltd. was the lawful holder of the bill of lading.[48] By failing to do so the Claimant not only jeopardized the Respondent claim to the goods but also breached one of the essential purposes of the Bill of Lading.

36. Under the contract contained in or evidenced by the bill of lading, the carrier's obligation is to deliver the cargo to the party who presents the bill of lading on discharge and to deliver to no other party. In The Ines, Clarke J held that even a delivery to the party entitled to possession would amount to a breach of contract if that party did not obtain delivery by presenting the bill of lading[49]

37. The Court of Appeal in The Houda stated this obligation in absolute terms.[50] The absolute nature of the obligation was further confirmed, in the ***Motis*** case,[51] where the carrier remained liable notwithstanding that it had delivered against production of a document that appeared to be an original bill of lading but was in fact a skillful forgery. Liability in contract is strict and it is no defense for the carrier to argue that it had reasonable grounds to believe that it had delivered to such a party. Mere notice or access to documents containing contractually agreed exceptions to the presentation rule will be insufficient to stop a bank from relying on the function of the bill of lading as a document of title.

[47] Debattista C, Bills of Lading in Export Trade , 3rd edition (London: Tottel Publishing, 2008) at 68
[48] *supra* at 14.
[49] *MB Pyramid Sound NV v Briese Schiffahrts GMBH and Co KG MS ''Sina'' and Latvian Shipping Association Ltd (The Ines)* [1995] 2 Lloyd's Rep 144.
[50] *The Houda* [1994] 2 Lloyd's Rep. 541, p. 553,
[51] *Motis Exports Ltd. v. Dampskibsselskabet AF 1912* [1999] 1 Lloyd's Rep. 837

38. It has been agreed by both the parties that the Claimant delivered the cargo on a letter of Indemnity.[52] Thus, since the Claimant has failed to deliver the goods on presentation of the Bill of lading, they have breached the presentation rule.

3.2 THE RESPONDENT HAS LOCUS STANDI UNDER COGSA TO BRING THE PRESENT CLAIM

39. The Respondent is the contractual carrier and has locus under COGSA to bring the present claim against the Claimant on the basis of the Bill of Lading by virtue of: **(3.2.1)** s.2(1)(a) COGSA[53], or alternatively **(3.2.2)** s.2(2)(a) COGSA[54].

3.2.1 THE RESPONDENT IS VESTED WITH RIGHTS OF SUIT UNDER S.2(1)(A) COGSA

40. Under s.2(1)(a) COGSA, a lawful holder of a bill of lading is vested with all rights of suit under the contract of carriage as if he had been a party to that contract. Given that the Bill of Lading is **(3.2.1.1)** a "to order bill" and **(3.2.1.2)** the Respondent is a lawful holder and is **(3.2.1.3)** entitled to claim damages for misdelivery against the Respondent.

3.2.1.1 The bill of lading is a "to order" bill

41. The Bill of Lading is a "to Order" bill given that it identifies the consignee whose order it is.[55] Where the words 'to order' are added together with the name of a consignee, the bill can be endorsed by the named consignee.[56]The Bill of Lading is thus a document of title vis-à-vis the Cargo, and the Respondent is contractually bound to only deliver the Cargo to the

[52] Moot Problem, Statement of Reply and Defence to Counterclaim, Annexure A, Email dtd - 03.10.2023, Page 47.
[53] Carriage of Goods by Sea Act 1992, § 2(1) [U.K.]
[54] *ibid.*
[55] *supra* at 14.
[56] Simon Baughen, Shipping Law, Glossary, "*Order bill of lading"* xvii (Routledge 2012)

holder of the Bill, of Lading ("the Presentation Rule")[57]. The Respondent did not in fact do so, and released the Cargo to without a B/L.[58]

3.2.1.2 The Respondent is the lawful holder of the bill of lading as a pledgee

42. The Respondent is the lawful holder of the Bill of Lading under s.5(2)(b) COGSA as a pledgee. In exchange for the Respondent's issuance of the L/C in favour of Yu Shipping to finance the purchase of the Cargo,[59] Yu Shipping pledged the Bill of Lading and the Cargo to the Respondent to secure the Respondent's payment obligations ("**the Pledge**").[60]

43. Under s.5(2)(b) COGSA, a "lawful holder" of a bearer bill is "a person with possession of the bill as a result of endorsement any other transfer of the bill. The Pledge was perfected on or before 3rd October 2023 when the Respondent received the Bill of Lading:[61]

(a) It was the common understanding between the Respondent and Yu Shipping that the Respondent should receive the Bill of Lading as security for its payment obligations. In particular, Yu Shipping was aware that the purchase was to be financed by a letter of credit as it was expressly stipulated in the order confirmation;[62]

(b) Yu Shipping agreed to the Respondent's Standard Terms in applying for the L/C. It agreed to pledge the Bill of Lading and the Cargo as security by acknowledging the Respondent's right of possession, or that they have been duly attorned to the Respondent; and

[57] *Carver on Bills of Lading*, [6-008]; *Sze Hai Tong Bank v Rambler Cycle Co* [1959] Lloyd's Rep. 114, 120 (Lord Denning); *Barclays Bank Ltd v Commissioners of Customs and Excise* [1963] 1 Lloyd's Rep. 81, 88 (Diplock LJ) ('Barclays'); *The "Houda"* [1994] 2 Lloyd's Rep. 541, 551-552 (Neill LJ) and 553 (Leggatt LJ); *Oversea-Chinese Banking Corporation Ltd v Owner and/or Demise Charterer of The Vessel "STI Orchard" [2023]* 1 Lloyd's Rep. 22, [1] and [72] ("STI Orchard").

[58] Moot Problem, Statement of Claim, Page 9, Para. 14

[59] Moot Problem, Statement of Reply and Defence to Counterclaim, Annexure A, Page 43, Para 3.

[60] Moot Problem, Statement of Defense and Counterclaim, Page 37, Para. 15.

[61] *ibid* Para. 16.

[62] *supra* at 27.

(c) On or before 3rd October, Yu Shipping had actual possession of the Bill of Lading. Pursuant to the L/C, it transferred the Bill of Lading to the Respondent on 3rd October 2023.[63]

44. Therefore, upon receiving the Bill of Lading from Yu Shipping, the Respondent became the lawful holder as a pledgee under s.5(2(b) COGSA. As the lawful holder, the Respondent is entitled to delivery of the Cargo, and the Claimant was correspondingly obliged to deliver the Cargo to the Respondent.

3.2.1.3 The bill of lading is not spent, and the Respondent is entitled to damages

45. Notwithstanding the fact that the Respondent became the holder of the Bill of Lading after the Cargo was released, the Respondent remains entitled to claim damages against the Claimant because the Bill of Lading is not spent as the Cargo was misdelivered to persons who were not entitled to delivery.

46. A bill of lading becomes "spent"[64] and ceases to be a document of title when delivery is properly effected to the holder, so that the carrier has fulfilled its obligations under the Bill of Lading contract.[65] Where the goods were misdelivered to a party not entitled to delivery, the bill of lading is not spent and the holder retains the right to sue the carrier for misdelivery.[66] This is so even if the goods were discharged against a letter of indemnity to an authorised receiver of the goods[67] or where a person becomes the holder of a bill of lading

[63] Moot Problem, Statement of Reply and Defence to Counterclaim, Annexure A, Email dtd 03.10.2023, Page No. 46.

[64] Simon Baughen, Shipping Law, Glossary, "*Spent Bill of Lading*" xvii (Routledge 2012)

[65] Guenter Treitel and Francis Reynolds, *Carver on Bills of Lading* (Sweet & Maxwell, 5th ed, 2022); *Sze Hai Tong Bank v Rambler Cycle Co* [1959] Lloyd's Rep. 114, 120 (Lord Denning); *Barclays Bank Ltd v Commissioners of Customs and Excise* [1963] 1 Lloyd's Rep. 81, 88 (Diplock LJ) ('*Barclays*'); *The "Houda"* [1994] 2 Lloyd's Rep. 541, 551-552 (Neill LJ) and 553 (Leggatt LJ); *Oversea-Chinese Banking Corporation Ltd v Owner and/or Demise Charterer of The Vessel "STI Orchard"* [2023] 1 Lloyd's Rep. 22, [1] and [72] ("*STI Orchard*").

[66] *East West Corp (*CA), [19] (Mance LJ); *The "Erin Schulte*" [2015] 1 Lloyd's Rep. 97 (CA), [53] and [56] (Moore-Bick LJ); *The "Yue You 902*", [58]-[74] (Pang Khang Chau JC)

[67] *The "Future Express"* [1992] 2 Lloyd's Rep. 79, 99-100 (Judge Diamond QC)

after the goods were released.[68] Furthermore, the Respondent is entitled to sue for breaches of contract committed at a time prior to when the Respondent became the lawful holder.[69]

47. Given that the Cargo was released by the Claimant without requiring the Bill of Lading, Therefore, it is not spent and the contractual right to possession of the Cargo under the Bill of Lading remains intact. Hence, on becoming the lawful holder of the Bill of Lading on 3rd October 2023, the Respondent[70] is entitled to bring a claim for misdelivery against the Claimant.

3.2.2 ALTERNATIVELY, THE RESPONDENT OBTAINED RIGHTS OF SUIT UNDER S.2(2)(A) COGSA

48. Should the Tribunal find that the Bill of Lading was spent when the Cargo was released, the Respondent is alternatively vested with the rights of suit by virtue of s.2(2)(a) COGSA.

49. Under s.2(2)(a) COGSA, a person may acquire rights of suit even if the bill of lading no longer gave a right to possession of the goods against the carrier if the person became the holder "*by virtue of a transaction effected in pursuance of any contractual or other arrangements"* made before the time when the right to possession ceased to attach to the bill. "*Contractual or other arrangement"* simply means the reason or arrangement behind the transfer of the bill of lading.[71]

50. Under s.5(2)(c) COGSA, where the Bill of Lading is spent and no longer gave a right against the carrier to possession of the goods, the Respondent is still the lawful holder of the Bill of Lading as the transferee of the Bill of Lading. The relevant "transaction" for the purpose of

[68] *The "Erin Schulte",* [56] (Moore-Bick LJ).
[69] *BNP Paribas v Bandung Shipping Pte Ltd* (Shweta International Pte Ltd) [2003] SGHC ('BNP Paribas')
[70] Moot Problem, Statement of Defence and Counterclaim, Page 37, Point 16.
[71] *Carver on Bills of Lading*, [5-067]; Primetrade AG v Ythan Ltd [2006] 1 Lloyd's Rep. 457 (The "Ythan) [84] (Aikens J); *The "Erin Schulte*", [56] (Moore-Bick LJ).

s.5(2)(c) COGSA for the Respondent to become the lawful holder took place on 3rd October 2023, when Yu Shipping directly transferred the Bill of Lading to the Respondent.[72]

51. Here, the relevant "*contractual or other arrangement*" is the financing arrangements under the L/C.[73] In exchange for financing Yu Shipping's purchase of the Cargo from Good Oil , the Respondent was to receive the Bill of Lading as security.[74] These arrangements were entered into before the Cargo was released on 14th August 2023.[75] As such, the Respondent obtained possession of the Bills of Lading from Good Oil pursuant to a "*transaction effected in pursuance of any contractual or other arrangements*" made before the Bill of Lading became spent. Accordingly, the rights of suit have been transferred to the Respondent under s.2(2)(a) COGSA.

3.3 THE RESPONDENT HAS A LIMITED LIABILITY BASED ON KNOWLEDGE OF RECEIVED DOCUMENTS AND COMPLIANCE STANDARDS

52. The Respondent asserts that (**1.3.1)** it tried to protect its interests by following the rule of Strict Compliance. (**1.3.2**) *Secondly*, the Respondent did not have a requirement of knowledge of received documents and (**1.3.3**) *Thirdly*, the LOI has not been formed in accordance of the P&I Club Advisory.

3.3.1 PROTECTING THE INTERESTS OF THE BANK THROUGH THE RULE OF STRICT COMPLIANCE

53. Banks play a crucial role in facilitating trade transactions through the letters of credit. Thus, the bank has to ensure that payment for the trade transaction is correctly made against the

[72] *Primetrade AG v Ythan Ltd [2006] 1 Lloyd's Rep. 457* [66] (Aikens J); Treitel, Guenter and Francis Reynolds, *Carver on Bills of Lading*, [5-067].
[73] *BNP Paribas*, [31] (Belinda Ang Saw Ean J); *The Yue You 902*, [94]-[96] (Pang Khang Chau JC).
[74] *The "Erin Schulte*", [56] (Moore-Bick LJ).
[75] Moot Problem, Statement of reply and Defence to Counterclaim, Annexure A, Page 43.

documents requested in the letter of credit.[76] In the present case, the Respondent is included as a party to the contract as a consignee in the bill of lading.[77] This designation converts the bank into a pledgee of the financed goods thus it entitles the bank to enforce the security represented by the pledge of the goods if the finance or trade transactions do not run smoothly.

54. It is a well-known principle of trade finance, particularly where the vehicle is a letter of credit that banks financing international trade transactions deal with documents and not with goods.[78] They are required to pay against the documents, which the buyer has asked the seller to channel through the letter of credit.[79] Any verification of documents by a bank will be limited to the documents' apparent good order.[80] Therefore, banks will take reasonable measures to confirm that the documents seem to meet the requirements. It's crucial that the documents presented match exactly what was stipulated in the letter of credit, leaving no margin for discrepancies. This principle, known as strict compliance, serves to safeguard both buyers and banks.[81]

55. Therefore, in order to abide by these standards, the Respondents could not go ahead with any further instructions including the trust receipt unless and until the required documents are not presented against the Letter of Credit. Hence the Respondent could not proceed with any action from September 20, 2023 until 3:18 PM on October 3, 2023.[82]

[76] *Equitable Trust Company of New York v Dawson Partners Ltd* (1927) 27 Lloyd's Rep 49
[77] *supra* at 14.
[78] Felipe Arizon & David Semark, Maritime Letters of Indemnity 11 (Routledge 2014).
[79] *Ibid*
[80] *Ibid*
[81] *Moralice (London) Ltd v E D & F Man*, [1954] 2 Lloyd's Rep 526
[82] Moot Problem, Statement of Reply and Defence to Counterclaim, Annexure A, Email dtd - 20.10.2023, Page 49.

3.3.2 BANK'S REQUIREMENT OF KNOWLEDGE OF RECEIVED DOCUMENTS

56. Requiring banks to thoroughly examine contractual documents for potential risks each time they finance a trade would significantly delay transactions and necessitate highly skilled staff capable of discerning from the face of the shipping and sale documents whether a risk exists that the bank might be taken to have waived or limited the function of the bill of lading as a document of title, by requesting and, or, accepting such documents.[83] This would increase the risk and cost of bank involvement in trade finance. However, while banks primarily focus on the value of financed goods to mitigate payment risks, accordingly, the mere advance knowledge by a bank of the charter party and sale contract terms is not sufficient for that bank to lose its security interest in the goods, represented by any pledge to it of the bill of lading.[84]

57. In the case of ***The Stone Gemini***, the Federal Court of New South Wales addressed whether a bank could succeed in a conversion claim against the carrier. The defendant argued that the bank's knowledge of a letter of indemnity being used to release the cargo in Qingdao, China, constituted an estoppel by conduct, thus invalidating the bank's conversion claim. However, Tamberlin J ruled that the evidence presented was insufficient to prove the bank's consent to the cargo release without the bill of lading. The case affirmed the bank's possessory title as a pledgee, granting it the right to bring a conversion action against the shipowners. The judge held that the bank, unaware of the letter of indemnity, retained special property in the goods. Additionally, the incorporation of a clause from the charterparty into the bill of lading did not preclude the bank from pursuing a conversion claim against the shipowners.[85]

[83] Felipe Arizon & David Semark, Maritime Letters of Indemnity 87 (Routledge 2014).
[84] *Ibid*
[85] *The Stone Gemini* [1999] 2 Lloyd's Rep. 255, p. 267, col. 1 (Australia).

58. Similarly, in light of the above arguments the fact that the Respondents received the Charterparty on September 29, 2023 (which contained a clause for discharge without Bill of Lading) (9 days after the ship arrived at the port of Busan) does not and should not lead to a presumption that the Respondent was able to understand full details of the Charterparty in the stipulated time when the Charterparty issued the Letter of Indemnity on October 3, 2023. ''[86]

3.3.2 ***LETTER OF INDEMNITY NOT IN ACCORDANCE WITH P&I CLUB ADVISORY***

59. It is a trite practice for P&I clubs to caution members regarding delivering cargo without the Bill of Lading. A standard provision concerning the non-production of non-negotiable bills of lading stipulates that "*the Association will not cover liabilities, costs, or expenses arising from the delivery of cargo under such documents without their production, where such production is required by the express terms of that document or the law to which that document, or the contract of carriage contained in or evidenced by it, is subject, except where the Owner is required by any other law to which the carrier is subject to deliver, or relinquish custody or control of, the cargo, without production of such document.*"[87] The carrier is entitled, and potentially obligated, to reject instructions from parties like shippers, receivers, agents, or charterers to release cargo without presenting bills of lading.[88] If such instructions are followed, the shipper faces legal action from the rightful owner for breaching the contract or committing conversion.[89]

60. In many cases, the shipowner agrees in the Charterparty to deliver the cargo in exchange for a letter of indemnity from the charterers, protecting them from liabilities arising from

[86] Moot Problem, Statement of Reply and Defence to Counterclaim, Annexure A, Email dtd - 29.09.2023 ,Page 47.
[87] Felipe Arizon & David Semark, Maritime Letters of Indemnity 144 (Routledge 2014).
[88] *Betts & Drewe v. Gibbins* (1834) Ad. & E. 57*; Dugdale v. Lovering* (1875) L.R. 10 C.P. 196; *Strathlorne S.S. Co. v. Andrew Weir* (1935) 50 Ll.L.Rep. 186; *The Sagona* [1984] 1 Lloyd's Rep. 194; *The Nogar Marin* [1988] 1 Lloyd's Rep. 412.
[89] *Ibid*

following such instructions[90]When considering accepting a letter of indemnity, the reliability and financial strength of the issuing party are crucial factors. Without assurance of the issuer's trustworthiness and creditworthiness, the indemnity provides little real guarantee.[91]

61. The Respondent argues that they could not proceed with the instructions in light of Yu-Shipping's financial situation.[92] Similarly had the Claimant undertaken due diligence they would have also discovered the Charterers financial crisis.

62. Nevertheless, a LOI does not absolve an Owner from compliance with the presentation rule, even when a clause permitting delivery against an LOI is incorporated by reference into the contract of carriage evidenced by the bill of lading.[93]The carrier remains responsible to the holder of the bill of lading for any misdelivery, subject only to his right to claim reimbursement from the issuer of the LOI. The liability of an owner who misdelivers and is sued for conversion is likely to be the full value of the cargo[94] together with interest and costs. Therefore, irrespective of the fact that the goods were delivered through an LOI the Claimant[95] will still be liable for the damages caused to the Respondent who was the lawful holder of the Bill of Lading. Hence, in accordance with the above contentions the Respondent is entitled to a claim of mis delivery.

[90] *The Sormovskiy 3068* [1994] 2 Lloyd's Rep. 266, p. 274, col. 2
[91] *The Jag Dhir and Jag Shakti* [1986] 1 Lloyd's Rep. 1
[92] Moot Problem, Statement of Reply and Defence to Counterclaim, Annexure A, Email dtd - 03.10.2023 Page 46.
[93] *The Sormovskiy 3068* [1994] 2 Lloyd's Rep. 266, p. 274, col. 2. The same stance has been taken by several Commonwealth courts see *The Dolphina* [2012] 1 Lloyd's Rep. 304, p. 330, cols. 1 and 2, (Singapore), and *BNP Paribas (Suisse) S.A. v. Smarta Navigation Ltd Civil Appeal* 1359/2003/1 dd 03/02/2012 (Malta), Times of Malta , 25th April 2012, *The Stone Gemini* [1999] 2 Lloyd's Rep. 255, p. 267, col. 1 (Australia).
[94] *supra* at 44
[95] Moot Problem, Statement of Reply and Defence to Counterclaim, Annexure A, Email dtd0 03.10.2023, Page 47..

PRAYER FOR RELIEF

IN LIGHT OF THE ABOVE SUBMISSIONS, THE RESPONDENT HUMBLY PRAYS BEFORE THE HON'BLE TRIBUNAL TO FIND THAT:

I. The Tribunal does not have the jurisdiction to hear the disputes.

II. In the alternative where the Tribunal finds that it does have jurisdiction, it may award the Respondent: -

a. A sum of $3,399,820 (USD) for mis-delivery and;

b. Interests and costs and/or

c. Such other award(s) as the Tribunal deems fit in light of the above circumstances.