INTERNATIONAL MARITIME LAW ARBITRATION MOOT 2024

UNIVERSIDAD CARLOS III DE MADRID

TEAM O

MEMORANDUM OF THE RESPONDENT

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

COUNSEL

Ana Rodríguez Lucía Amarelo Paloma Azcona Sara Dólera Thalia Jimenez

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS

PCR	People's Republic of China
Claimant	Tomahawk Maritime S.A.
Respondent	Veggies of Earth Banking Ltd.
Vessel	MT "NIUYANG" (IMO No. 392817)
Charterparty/ Charter	Charterparty between Tomahawk Maritime S.A. and Yu Shipping Ltd.
Charterer	Yu Shipping Ltd.
Shipper	Good Oil Sdn Bhd.
Buyer	Gileum Refinery Co. Ltd.
Loading Port	Bintulu.
Destination Port	Busan.
B/L	Bill of Lading No. COW-001A.
Cargo	16,999.01 MT cargo of crude palm oil.
Rider clauses	Tomahawk Maritime Rider Clauses.
Owner	Tomahawk Maritime S.A.

Discharge LOI	Discharge letter of indemnity issued by Yu Shipping Ltd to Tomahawk Maritime S.A. on 3 October 2023.
Payment LOI	Payment Letter of Indemnity issued by Good Oils SDN BHD to Veggies of Earth Banking LTD for account of Yu Shipping LTD on 3 October 2023.
SCMA	The Singapore Chamber of Maritime Arbitration.
L/C	Letter of Credit issued by Veggies of Earth Banking Ltd. to Yu Shipping Ltd. in order to purchase the Cargo.

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STATEMENT OF FACTS

1. CLAIMANT is Tomahawk Maritime S.A., a company registered under the laws of Panama and owner of the vessel *MT "NIUYANG"* (the "**Vessel**"), and RESPONDENT is Veggies of Earth Banking Ltd., a company registered under the laws of Hong Kong.

2. On 1 September 2023, the CLAIMANT entered into a Voyage Charterparty ("**Charterparty**") with Yu Shipping Ltd (the "**Charterer**") to employ the vessel to carry a cargo of palm oil from Bintulu, Malaysia, to Busan, South Korea.

3. The RESPONDENT corresponded with the financier of the Cargo, bought by Yu Shipping Ltd by a letter of credit issued by the RESPONDENT, therefore advancing funds to the Charterer for payment of the priced and looked to the Cargo as security for the Loan.

4. The Charterer was informed upon negotiations on the Charterparty's terms that there was a second fixture intended for the Vessel belonging to the CLAIMANT and that it was to be delivered within the laycan of 1-14 October 2023 to the port of Kaohsiung, establishing an agreement that stated that the carriage to Busan would be completed by 30 September 2023 in order to follow up with the timeframe established by the CLAIMANT to honour the other compromises of the Vessel.

5. Following the Charterparty's agreement, the Vessel arrived in Bintulu on 3 September 2023 at Bintulu, and the loading of the Cargo finished on 6 September 2023. That same day the Vessel departed Bintulu and the Bill of Lading COW-001A (the "**B/L**") was issued and consigned to the RESPONDENT.

6. The arrival of the Vessel was produced at Busan on 20 September 2023, Notice of Readiness tendered and accepted that same day, however, no berthing and discharge instructions were received.

7. Repeated communications on the final days of September 2023 between the Charterers and the CLAIMANTS took place, establishing the importance of the discharge before 7 October 2023 at the latest in order to allow the Vessel to follow up with the laycan terms and conditions of its next fixture's Charterparty and that all parties were aware of the limitations of the Vessel and that a copy of the Charterparty was issued and delivered to the RESPONDENT.

8. On 3 October 2023, the CLAIMANT sent a message to the Charterers stating that compensation for losses and damages would be asked for in the case that the Vessel did not meet the laycan of

its next fixture, given that the Charterers of said compromise had stated the possibility of cancelling the fixture if the terms of the charterparty were not followed as stated.

9. It was also on 3 October 2023 when the RESPONDENT became the lawful holder of the Bill of Lading when the Shipper delivered the whole set of the original Bill of Lading.

10. The Charterers refused to agree with the statement, given that any delay should be covered by demurrage and therefore asked for the option to discharge and deliver the Cargo using a Letter of Indemnity as stated in the Charterparty. This discharge took place between 4-7 October 2023, and the Vessel departed at 0214 on October 2023.

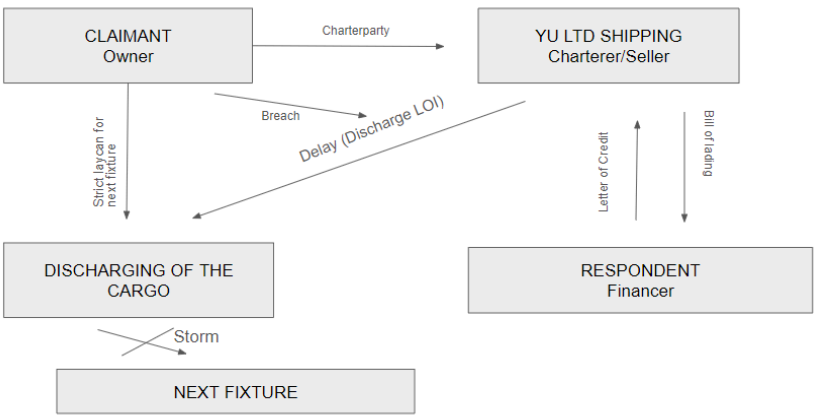
11. However, due to bad weather conditions, the Vessel's next fixture was cancelled on 16 October 2023. After negotiations, the CLAIMANT reinstated the employment of the Vessel at a lower hire rate.

12. On 15 November 2023, the Claimant issued a demand for the value of USD 3,650,000 as compensation for the cancellation of the fixture, and on 22 November 2023, a communication of Carry On Advisory Services LLP that the RESPONDENT was not made aware of, was received stating that the Charterers were going through a liquidation process and the demand was being considered.

13. The RESPONDENT then issued a communication on 29 November 2023 as the lawful holder of sail Bill of Lading. As such, the RESPONDENT is the party entitled to delivery-up of the Cargo after the presentation of the Bill of Lading to the CLAIMANT. This clearly expresses the obligation to not deliver the Cargo except the case just mentioned. Given that the CLAIMANT admitted to the delivery of the Cargo against a Letter of Indemnity, this constitutes a breach of its obligations, causing a loss and/or damage of USD 4,249,752.50 to the RESPONDENT.

14. The RESPONDENT received the notice of the commencement of arbitration proceedings on 22 December 2023.

Figure 1: Outline of Contractual Relationships



JURISDICTION

I. THE ARBITRATION CLAUSE IS INVALID UNDER PCR LAW, CONSEQUENTLY, THE ARBITRAL TRIBUNAL LACKS JURISDICTION TO HEAR THE CASE.

15. In this section we will demonstrate that the Arbitral Tribunal lacks jurisdiction to rule on the present dispute, taking into account that: (i) the seat of the arbitration is Guangzhou; (ii) the applicable law is the Chinese Procedural Law ("CPL"); (iii) The Singapore Chamber of Maritime Arbitration ("SCMA") does not qualify as an Arbitral Commission.

A. THE SEAT OF THE ARBITRATION IS GUANGZHOU

16. To determine the place of the arbitration, it is essential to refer to the will of the parties. In this regard, the purported arbitration clause supposedly incorporated into the Bill of Lading provides that arbitration: "*if any, to be in Guangzhou*"[1].

17. As it can be seen, the will of the parties is to fix the seat of the arbitration in Guangzhou and so they explicitly refer to it under the Law and Arbitration Clause. It is unequivocal that parties to the arbitration clause wish for a Chinese-based arbitration seat.

18. And it is the Singapore Court of Appeal in the case *BNA vs. BNB* (2019)[2] which confirmed that the phrase "arbitration in Shanghai" does not refer to where the hearings are to take place but to where the seat of the arbitration was to be fixed. In addition to this, it must be pointed out that the Court of Appeal made this finding notwithstanding the fact that the arbitration agreement would, according to BNA, be invalid under PRC law, that is, a similar situation to the present. This decision highlights that, while the Singapore courts are known to maintain a pro-arbitration approach, there are limits to it, leading to the conclusion that Singapore courts do not give effect to parties' intentions to arbitrate at all costs.

[1] *Moot Scenario, page 28*
[2] *BNA v. BNB and other [2009]* SGCA 84

19. In conclusion, the parties to the arbitration agreement did not just opt for arbitration; they specifically selected a method, a venue, and entrusted a particular arbitration institution with the process. These choices must be respected through interpretation, wherein the words of the arbitration agreement are given their plain meaning unless there are clear signs suggesting otherwise, that is the seat of the arbitration is to be Guangzhou as no other indicator points to another direction. If, after this interpretation, it becomes evident that the arbitration agreement is impractical, the parties must accept the outcome of their decision.

B. THE LAW APPLICABLE TO THE ARBITRATION IS THE LAW OF THE PEOPLE´S REPUBLIC OF CHINA (“PRC”)

20. Despite CLAIMANT´s efforts to assert that the law governing the agreement to arbitrate is not that of the seat, but that of the governing law, and bases such argument on the idea of homogeneity of the systems of laws and the theory of the closest and most real connection, it is crystal clear that this reasoning is rather custom-made.
21. The principle that reigns as to the proper law of the arbitration agreement is the express choice of law. That is, when the parties make a true express choice of the law of the agreement to arbitrate, effect will be given to that choice and irrespective of an express choice of law for the host contract. Under the arbitration clause in dispute, no express choice of the law of the arbitration agreement is made.
22. Failure to provide for an express choice of governing law for the arbitration agreement gives rise to subsequent tests to determine the applicable law. The first of the two refers to the implied choice of law inferred from "powerful factors" like the terms of the agreement to arbitrate itself. The second of the two, refers to the closest and most real connection test which prevails in the event there is no express or implied choice of law to govern the arbitration agreement. This test is to be applied under the present clause.

23. In *SulAmérica*[3] the dispute resolution clauses in two insurance policies were of high complexity. Each of the contracts included a clause stipulating London arbitration, alongside clauses specifying Brazilian law and jurisdiction. When insurers-initiated arbitration in London, the insured sought relief from Brazilian courts, aiming to halt arbitration and affirm the applicability of Brazilian jurisdiction clauses. Subsequently, insurers petitioned the London Commercial Court for an "anti-suit" injunction, preventing the insured from pursuing the Brazilian proceedings. The insured argued in the Brazilian courts that, under Brazilian law, their consent to arbitration was a prerequisite, rendering the arbitration invalid. Cooke J determined that despite the Brazilian law clause in the policy, the arbitration constituted a distinct contract governed by its own law. He reasoned that this law was not implicitly chosen as Brazilian law due to its governance of the insurance policy. Instead, employing the "closest connection" test, Cookie emphasised the party's selection of England as the seat.
24. Following Cooke J´s ruling in *SulAmérica,* Hamblen J (at the time) issued a judgement on the identical matter in *Abuja International Hotels Ltd v. Meridien SAS* [4]. He arrived at the same conclusion as Cooke J, nearly mirroring the rationale by employing the "closest connection" test and designating English law due to England being the arbitration seat, despite the underlying agreement being governed by Nigerian law.
25. In the case of *Habas Sinai v. Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Co Ltd*[5]*,* Hamblen J followed the same rationale set forth in *SulAmérica*, determining that the applicable law to an arbitration agreement (where the host contract lacked an expressively chosen governing law) was English law, due to it being the law of the arbitration seat.
26. The reasoning in favour of the seat theory is simple, and can be summarised on the basis put forward by Longmore LJ in his obiter comments and that reads as follows: *"The reasoning is*

[3] Arbitration under the conditions and laws of London" was held to be an express agreement on the governing law in *Naviera Amazónica Peruana, S.L. vs. Compañía Internacional de Seguros de Perú* [1988] 1 Lloyd's Rep. 116 at 119.
[4] *Abuja International Hotels Ltd v Meridien SAS* [2012] 1 Lloyd's Rep. 461 at [21] – [22].
[5] *Habas Sinai v Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Co Ltd* [2014] 1 Lloyd's Rep 479 at [101].

that an agreement to arbitrate will normally have a closer and more real connection with the place where the parties have chosen to arbitrate than with the place of the law of the underlying contract (...)".

27. Another argument in favour of the seat theory is that of consistency. Longmore LJ´s ratio in *C v. D*[6] was that *"by choosing London as the seat of the arbitration, the parties must be taken to have agreed that proceedings on the award should be only those permitted by English law"* and *"the choice of seat for the arbitration must be a choice of forum for remedies seeking to attack the award".*

28. Thus, except in exceptional circumstances and in the absence of explicit choice, there is a strong argument favouring an implied choice that the governing law of the arbitration agreement aligns with that of the arbitration seat. The significance of the seat choice should be elevated to an implied choice in most cases. If this implied choice does not hold, then it is adequate to override other indicators favouring the host theory, leading to the absence of an implied choice. It is widely acknowledged now that, under the third criterion of "closest" and "most substantial connection" the "seat" theory typically prevails. If that third test has all but merged with the second test of implied choice, it is consistent, at the very least, for them to yield the same outcome.

29. In conclusion, it seems evident that in the absence of an express or implied choice, the "seat" theory prevails and that judges concur that the arbitration agreement is most closely and substantially connected to the seat rather than to the host contract. Therefore, despite the party's express choice of English law for the host contract, this choice can not be extended to the arbitration agreement itself, which is an autonomous contract and therefore ruled by its own governing law, and specially, where there are, as a matter of construction, contrary indications revealed by the parties unequivocal will to have a Chinese-based arbitration, which should prevail over the main contract governing law.

[6] *C v D* [2007] EWCA Civ 1282 at [26].

C. THE ARBITRATION AGREEMENT IS NOT VALID UNDER PRC ARBITRATION LAW

30. In December 2005, the Supreme People's Court ("SPC") issued its "Judicial Review" addressing various aspects of foreign commercial and maritime arbitration. This review encapsulated previous Judicial Interpretations while also confirming and expanding upon them. Additionally, on 8th September 2006, the SPC further elaborated on these interpretations with its "Judicial Interpretations on Several Issues Relating to the Application of the Arbitration Law", commonly referred to as the "SPC Interpretations 2006".
31. The SPC contains a very insightful article on the law applicable to the question of the validity of the arbitration clause, that states that the validity of foreign-related arbitration agreements is governed by the law agreed upon by the parties. In cases where no specific law is agreed upon but the place of arbitration is, the law of that place applies.
32. Thus, as the seat of the arbitration is Guangzhou, the law applicable to determine the validity of the arbitration clause is PRC law. And, therefore, according to article 16 of the Arbitral Law, an arbitration agreement must contain the following elements: (i) an expression of the parties´intention to submit their disputes to arbitration; (ii) a description of the matters subject to arbitration; (iii) a designated arbitration commission
33. In 2004, in the landmark case of the *Züblin* case, an arbitration clause specifying "Arbitration: ICC Rules, Shanghai shall apply" was deemed invalid by the SPC due to its failure to designate an arbitration institution required by Article 16 of the PRC Arbitration law. Due to this fact, the Chinese local court refused to enforce the corresponding ICC award. This decision set a precedent that reverberated through the Chinese judiciary, leading to similar rulings in subsequent decisions.
34. It was not until 2013, that the SPC resolved the confusion and addressed the question of whether a foreign arbitration institution can administer China-seated arbitration cases, which in turn,

depends on whether the foreign arbitration institution falls within the scope of "designated arbitration commission" within the wording and meaning of Articles 16 and 18 of the PRC Arbitration Law[7].

35. In *Shenhua Coal* case, the SPC concluded that the term "arbitration commission" in Article 20 of the PRC Arbitration law referred only to Chinese arbitration institutions, and hence excluded foreign arbitration institutions[8].

36. The SPC rejected the "Kompetenz-Kompetenz" principle by disregarding a London arbitral tribunal's jurisdiction decision, stating it wasn't binding on Chinese courts. They argued that "foreign arbitration institutions" didn't fit the definition of "arbitration commission" in Article 20 of the PRC Arbitration Law. Consequently, Chinese courts were deemed responsible for resolving challenges to agreements involving foreign arbitration institutions. Additionally, the SPC's interpretation of "arbitration commission" in Article 20 suggests that foreign arbitration institutions are excluded from administering arbitrations seated in China, as per Article 16 of the PRC Arbitration Law.

37. In this case, the mention of "SCMA rules" in the arbitration clause doesn't fulfill the requirement of Article 16 of the PRC Arbitration Law because it doesn't refer to an "arbitration commission." Even if interpreted as a reference to the SCMA institution, it's ineligible to administer China-seated arbitrations under Article 16. Therefore, any decision by SCMA asserting jurisdiction wouldn't bind Chinese courts, despite its claim under "Kompetenz-Kompetenz."

[7] Hee, Theng Fong. "Arbitration in China and Singapore", SAL Practitioner 28, Singapore Academy of Law [December 12, 2019] at [11].
[8] Reply of the SPC to *the Request for Instructions on Issues concerning the Case of the Shenhua Coal Trading Co. v Marinic Shipping Company for Confirmation of an Arbitration Clause* [2013] Min Si Ta Zi No 4), dated February 4, 2013 ("Shenhua Coal").

II. THERE IS NO ARBITRATION AGREEMENT BETWEEN THE PARTIES. CONSEQUENTLY, THE ARBITRAL TRIBUNAL LACKS JURISDICTION TO HEAR THE CASE

38. The cornerstone of contemporary international arbitration lies in the concept of party autonomy. This principle permeates every aspect of the arbitral proceedings, notably shining in the parties mutual agreement to arbitrate, also known as the arbitration agreement. This agreement signifies the partie´s commitment to resolve any disputes or disagreements through arbitration[9].

39. As Professor Van den Berg explains, *"clearly, arbitration cannot exist without its foundational element, the arbitration agreement"*[10]. Hence, making it evident that the parties have indeed agreed to settle their dispute through arbitration is crucial. This agreement is indispensable; without it, arbitration cannot be considered valid. Therefore, the arbitration agreement serves as a dual purpose: (i) it establishes the obligation to arbitrate; and (ii) serves as a primary source of authority for the arbitral tribunal.

40. In this section, it is to be demonstrated that THE RESPONDENT is not a party to this arbitration, taking into consideration that; (i) the arbitration agreement was not incorporated by the Bill of Lading; (ii) the doctrine of incorporation by reference can not be invoked for the requirements are not met.

A. THE ARBITRATION AGREEMENT WAS NOT INCORPORATED BY THE BILL OF LADING

41. It is clear that the relationship between CLAIMANT and RESPONDENT is extracontractual. CLAIMANT entered a voyage charter Party for the employment of the vessels of their property, RESPONDENT was not a party to. On the contrary, RESPONDENT signed a Bill of Lading to

[9] Professor Born in Born, G., [2014] at [72], explains that "an international arbitration agreement is similar in some respects to a forum selection clause, in that it provides a contractual choice of a dispute resolution forum."
[10] Van den Berg,A., [1981] at [144-45]

which CLAIMANT was not a party to. Thus, there is no contractual relationship between CLAIMANT and RESPONDENT, let alone one that contains an arbitration agreement.

42. An arbitration agreement cannot be extended to a legal entity that is not a party to an underlying contractual relationship if not under the theory of incorporation by reference.

43. First, in essence, incorporation by reference addresses the question of whether an arbitration clause found in general or standard terms, or in a separate document or contract (whether between the same parties or not) apart from the main contract agreed upon by the original parties, is binding on those parties to be brought into the same arbitration proceedings. That is, in the absence of an independent contract between the signatory and the non-signatory that expressly includes the arbitration agreement by reference, the non-signatory cannot be obliged to arbitrate unless the arbitration clause itself is worded broadly enough to cover disputes involving non-signatories.

44. In the PRC, which as stated before, is the governing law to the arbitration agreement, the law permits the inclusion of an arbitration agreement by reference to another contract, provided that the terms were easily accessible to the parties and the arbitration clause was clearly stated in the referenced contract. However, in cases involving two contracts and three parties, such as charter party and bill of lading disputes, Chinese courts consistently demand the explicit consent of the third party who did not sign the relevant charter party.

45. In the case of *Beijing Ailisheng Import & Export Co. Ltd. v. Songa Shipholding Pte. Ltd. & Solar Shipping & Trading S.A.*[11], the consignee, Beijing Yisheng sued Songa Shipholding and Solar Shipping for cargo damage. Songa Shipholding argued that the dispute should be arbitrated in London or New York under the SHELLVOY 84 arbitration clause in the bill of lading. However, the Supreme People's Court ruled that this clause was unilateral and couldn't bind the bill of lading holder, so the Wuhan Maritime Court retained jurisdiction.

[11] *Beijing (China) Ailisheng Import & Export Co. Ltd. v. Songa Shipholding Pte. Ltd. & Solar Shipping & Trading S.A.Min Si Ta Zi* No 14, [SPC ruling, 29 september 2007]

46. Similarly, in the case of *Shenzhen Branch of Chinese People Property Insurance Int'l v. Guangzhou Shipping Company*[12], the express consent of the third party was also deemed necessary. In this instance, the Shenzhen Branch of Chinese People Property Insurance Int'l, acting on behalf of the receivers, initiated legal proceedings against Guangzhou Shipping Company, the owner of the vessel M/V Liang Shanv. 41, regarding damage to a consignment of fishmeal after a voyage from Peru to Guangzhou. The respondent objected to the jurisdiction of the Court, invoking an arbitration clause incorporated in the bill of lading. The SPC ruled that unless the insurer expressly accepted the arbitration clause or entered into a new arbitration agreement with the owner after the dispute arose, the clause included in the bill of lading could not be binding since the insurer was not party to the negotiation and conclusion of the arbitration agreement.In numerous other cases, the SPC has maintained that without an explicit indication on the face of a bill of lading, the arbitration clause in a charter party cannot be automatically integrated into the bill of lading.
47. All in all, consent given by RESPONDENT to the the Bill of Lading terms is not to be extended to the arbitration clause contained in the Charterparty, as the arbitration provision within a Charterparty cannot be automatically extended to Bill of Lading; explicit consent would have been necessary for such integration.

III. THE OBJECTIONS TO THE ARBITRAL TRIBUNAL JURISDICTION IS COMPATIBLE WITH THE RIGHT TO RAISE A COUNTERCLAIM

48. It is to pointed out that filing a counterclaim without renewing the objection to jurisdiction does not waive the RESPONDENT's objection to jurisdiction.
49. The Italian Supreme Court consolidated case law, raising a counterclaim does not involve an objection to the Court's jurisdiction[13]. Common law jurisdictions have taken the same approach as civil law jurisdictions, as illustrated by a very straightforward case from the Ohio courts, who

[12] *Shenzhen Branch of Chinese People Property Insurance Int'l v. Guangzhou Shipping Company* Min Ta Zi No 29 [SPC ruling, 29 september 2007]
[13] Italian Supreme Court, I Civil Chamber, decision No. 12684 of 30 May 2007, n.12684.

defended that "a defendant does not waive jurisdictional defects by defending on the merits after an objection to jurisdiction (...). To hold otherwise would impose upon the defendant the unfair choice of either defending on the merits and thereby waiving the "valuable right" to contest jurisdiction, or relying on this exception to jurisdiction at the risk of losing his defence on the merits."[14]. This is precisely what is being done to RESPONDENT by not recognising its right to assert a counterclaim based on the same facts.

ARGUMENTS ON THE MERITS OF THE CLAIM

50. RESPONDENT submits it cannot be held directly liable for CLAIMANT's losses (I) and that in any case demurrage covers said losses (II). Furthermore, RESPONDENT contends that it is not responsible for any damage given that it is not answerable for CLAIMANT's lack of diligence (IV). Lastly, RESPONDENT contends that CLAIMANT incurred in a misdelivery (V).

IV. RESPONDENT IS NOT DIRECTLY LIABLE FOR CLAIMANT´S LOSSES

51. When a Bill of Lading is held by a third party, whether as a shipper, consignee, or endorsee, it typically represents a distinct contract between the carrier and the holder[15]. In the present case, CLAIMANT contends that RESPONDENT as the B/L holder is directly liable for not discharging the Cargo within the laytime permitted under the terms of the Charterparty (Clause E) as they are incorporated into the Bill of Lading.
52. However, to consider that the charterparty terms have been indeed incorporated into and take effect as terms of a Bill of Lading contract, two questions must be answered. First, whether the wording of the Bill of Lading is wide enough to incorporate the complete or part of the charterparty and second, if the incorporated parts must be rejected as being inapplicable[16].
53. The responsibility for discharge rests with the owners of the vessel in the absence of a

[14] *Ohio Electric Ry. Co. v. United States Express Co.,* 105 Ohio St. 331, 137 N.E. 1 (1922); Glass v. McCullough Transfer Co., 159 Ohio St. 505, 115 N.E. (2d) 78 (1953). There is a conflict in the decisions in other states on this question. See 93 A.L.R. 1302 (1934), 107 A.L.R. 1102 (1937). 34 CORN. L. Q. 230 (1948) suggests that the majority and more modern view is that the defendant may defend on the merits without waiving his jurisdictional objections.
[15] *Cooke, J., Young, T., Ashcroft, M., Taylor, A., Kimball, J., Martowski, D., ... & Sturley, M. (2022). Voyage charters. Informa Law from Routledge.*
[16] *Miramar Shipping v. Holborn Oil (The Miramar) [1984] A.C. 676*

contractual provision to the contrary[17] and clear language is needed to oust that general rule. In this dispute, it is challenging to regard Clause E of the Charterparty as an obligation within the Bill of Lading contract.

54. Nevertheless, even if a broad interpretation was made, incorporating the entire charterparty and rider clauses, it must be assessed whether holding Bill of Lading holders directly liable for breaches in the laycan period of a subsequent employment is sensible.

55. A clause should be incorporated even if there is a need to manipulate the words to fit the Bill of Lading when it is a subject which directly pertains to the subject-matter of the Bill of Lading such as the shipment, carriage, and delivery of the goods[18]. Consequently, CLAIMANT's next employment and the existence of a cancellation date cannot be considered as directly germane to the Bill of Lading contract as it does not relate to the goods or voyage in question.

56. In conclusion, RESPONDENT cannot be held directly liable for the Vessel's inability to meet the laycan period established under a subsequent employment.

V. RESPONDENT IS NOT RESPONSIBLE FOR THE DAMAGE AS CONSIGNEE

57. RESPONDENT is not responsible for the damage, even if considered a breach of a separate obligation not covered by demurrage on the grounds that (A) he did not assume any liability under the Charterparty contract and therefore cannot be obliged to respond for any damage. Furthermore, (B) the damage was a direct loss stemming from an unusual occurrence, the storm, not subject to control of the parties and breaking the causation link.

A. RESPONDENT DID NOT ASSUME LIABILITY FOR THE LOSS OF PROFIT

58. Notwithstanding, the precedent argument, and therefore the fact that any possible further damages in relation to the supposed extension or delay in the departure of the Vessel ought to be included in the demurrage clause, any attempt of CLAIMANT to place RESPONDENT as liable for any different kind of loss shall not succeed.

[17] *Jindal iron and steel co. ltd. and others v.islamic solidarity shipping co. jordan inc(The "jordan ii") [2004] ukhl 49*
[18] *Annefield, The (C.A.) [1971] 1 Lloyd's Rep. 1; [1971] P. 168.*

59. If the question of whether a given type of loss is one for which a party assumed contractual responsibility involves the interpretation of the contract as a whole against its commercial background, clear examination of the contract and the subsequent circumstances and interpretation of it by the parties is indeed needed. The specific loss now demanded by CLAIMANT was not contemplated by the contracting parties as being likely to occur in the ordinary course of things as a result of the breach at the time of signature.
60. *First*, the loss of profit on the subsequent fixture was not a loss that arose naturally from the breach of the contract, that is the exceeded laytime used. Contrary to this, the loss of the specific subsequent fixture was an unusual loss, on the grounds that parties did not reasonably foresee it when contracting.
61. Was the type of loss dealt here with within the reasonable contemplation of the parties when contracting? A reasonable man in the position of the Charterer would not have understood so in the present case. When including a general and abstract, a mere informative clause like clause 38 of the rider clauses, no reasonable businessman would have understood that he was assuming the burden of the total costs of the subsequent two years fixture.
62. The view which the parties take of the responsibilities and risks they are undertaking determines the other terms of the contract and particularly the price to be paid. CLAIMANT cannot offer a Vessel which is burdened under a normal price and expect to recover all damages arising from a small breach of just one day. It would not be proper. Anyone asked to assume a large and unpredictable risk will require some premium in exchange.
63. This idea is further reinforced by the fact that the Charterers indeed denied their further responsibility and made it very clear to the owners that "*they did not agree with Owners' position and remind Owners that any delay is already compensated by demurrage"* in response to the CLAIMANT's attempt to transfer all losses and damages incurred in the event of cancellation of the next fixture[19].

[19] *MOOT Scenario page 9.*

64. *Second*, an assumption of a liability can only arise on the basis of an acquisition of a previous information by the party assuming such an obligation[20]. RESPONDENT was only informed about the subsequent fixture on the 29th September, by then, the contract was already negotiated and signed.

65. *As a result*, RESPONDENT merely assumed, at maximum and accepting the doubtful proposition that the Rider Clauses are applicable to him, an obligation regarding the payment of demurrage[21]. To accept the idea that RESPONDENT assumed a further obligation means that he should have been informed about it, not on general and open-ended terms, but rather in a proper manner that would have enabled him to assess the extent of any liability. Therefore, CLAIMANT cannot try to impose on him an implied obligation he was not informed about[22].

66. *Lastly*, if the loss of profit of subsequent fixtures was indeed contemplated by the parties when contracting, why would two informed and specialised businessmen in the practice not have included a provision to cover the damages flowing from the cancellation of the subsequent fixture?

67. The parties explicitly negotiated and agreed on a demurrage rate (and even the parties responsible and time for the claim), but they did not do so with the specific subsequent charterparty. Therefore, the CLAIMANT cannot now attempt to enlarge the scope of responsibility of RESPONDENT given that he was able to do so at the right time for it; when the contract was negotiated.

B. THE STORM BROKE THE CAUSALITY

68. The damage may be deemed "too remote a consequence" or not a consequence at all, even if it was reasonably foreseeable as a result of the breach, in which case the damages claim is

[20] Robert Goff J in *Satef-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA (The Pegase) (1981)* referring to the two limbs of Hadley v Baxendale, established that *the courts do not really place each situation under one or the other rules of the case but rather decide each case on the basis of the relevant knowledge of the defendant.*
[21] *MOOT Scenario page 24*
[22] *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas) [2008] UKHL 48*

denied[23].

69. Although the two-hour delay in the departure of the Vessel according to CLAIMANT's orders may have provided the opportunity for the delay in the arrival to Kaohsiung of the Vessel, it is not the effective cause[24]. The true, effective and most proximate cause for the cancellation were the adverse wind and sea conditions in the trip that hampered the progress of the Vessel[25].

70. Furthermore, CLAIMANT had the possibility to allege something in the moment of the departure of the Vessel. Had he said something, one could be sure that he did not believe the Vessel would arrive on time to Kaohsiung. Therefore, given that he expressed no concern he cannot now try to burden the RESPONDENT with the weight of a cause that escapes the control of any of the parties, like the perils of the sea are.

VI. DEMURRAGE COVERS THE LOSSES

71. Alternatively, and in case RESPONDENT is considered to be liable for the loss regarding the breakage of the subsequent laycan, the amount payable should only be that of the demurrage given it is the sole breach of the charterparty(A). Additionally, such compensation is to be paid by the Charterers and not by RESPONDENT(B).

A. FAILURE TO PROVE A DIFFERENT BREACH OF THE CHARTERPARTY

72. To understand if the demurrage clause indeed covers the damages being claimed, one must first ask himself what is that the clause contained in the Charterparty really liquidates.

73. In the absence of any contrary indication in a particular charterparty, demurrage liquidates the whole of damages arising from a charterer's breach of charter in failing to complete cargo operations within the laytime and not merely some of them. Accordingly, if a shipowner seeks to recover damages in addition to demurrage arising from delay, it must prove a breach of a separate obligation[26].

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[23] *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas) [2008] UKHL 48*
[24] *Satef-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA (The Pegase) (1981);Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas) [2008] UKHL 48*
[25] *MOOT Scenario page 9*
[26] *K Line Pte Ltd v Priminds Shipping (HK) Co Ltd (The Eternal Bliss) [2020] EWHC 2373 (Comm); Richco International Ltd. v. Alfred C. Toepfer International G.m.b.H (The "Bonde")[1991] 1 Lloyd's Rep. 136*

74. In the present case, CLAIMANT has not been able to prove any different breach than that of the exceeded laytime and delay in the discharge of the cargo[27]. As so, CLAIMANT bases its statement of claim in the *"Respondent's failure to procure the discharge and/or take delivery of the cargo within the timeframe provided under the Bill of Lading (the laytime), causing the Vessel to lose its next employment at Kaohsiung"*[28]. Since the obligation of RESPONDENT to ensure the Vessel's next employment in Kaohsiung is in no way existent, a breach of this obligation cannot be raised by CLAIMANT.
75. Additionally, the main purpose of the demurrage clause is not to quantify the response to the damages caused merely, but to provide certainty and assurance to commercial parties[29]. As such, the demurrage rate is the result of a negotiation between the parties in which the loss of prospective freight earnings is likely to be one factor, but it is by no means the only factor.
76. Both parties, the Charterer and the Owner, were well aware of the Vessel's next employment. So much in fact, that they included such circumstance in the Rider Clauses, amending the original VEGOILVOY form of the Charterparty[30]. The same could have been done with the demurrage clause, excluding the damages for the loss of the subsequent fixture, but they did not do so.
77. Therefore, trying to exclude damages from the demurrage clause means depriving it of its main purpose. The goal of a liquidated damages clause is to provide certainty, prevent disagreements over the amount of unliquidated damages, and give the parties early visibility so they are not at the mercy of the whims of the court system or arbitration process. This goal could not be met if damages can be taken in and out of the content of the clause by the sole decision of one party, which would create doubt and disagreement over whether the losses were different from those covered by the demurrage clause.

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[27] Cooke on *Voyage Charters (4th edition 2014)* also acknowledges the varying reasoning of the members of the court in Reidar v. Arcos and interprets Mocatta J and the Court of Appeal in Suisse Atlantique as having taken the view that *"in order to recover damages in addition to demurrage, it is necessary to show a separate breach, as held by Potter J. in the bonde"*.
[28] *MOOT scenario page 10 par 20.*
[29] *Cssa Chartering and Shipping Services SA v Mitsui Osk Lines Ltd (The "Pacific Voyager)*[2017] EWHC 2579 (Comm); *K Line Pte Ltd v Priminds Shipping (HK) Co Ltd (The Eternal Bliss) [2020] EWHC 2373 (Comm)*
[30] *MOOT Scenario page 25*

78. Had CLAIMANT raised the demurrage rate, taking into account the damages he is now pretending to claim, the price paid or the possibility of making business with the Charterer may not have been identical as they finally were[31]. Therefore, he cannot benefit now alleging further damages not covered by the demurrage clause when it was in its scope of action to negotiate the amount covered by it.

79. CLAIMANT's initial claim was brought against the Charterers[32]. It is only due to their insolvency that CLAIMANT initiated their demurrage claim against RESPONDENT, tacitly placing the Charterer's as the breaching party for the loss of the subsequent fixture and therefore, responsible for the payment of damages.

B. CHARTERERS HAVE TO PAY FOR DEMURRAGE UNDER THE CHARTERPARTY

80. The term *"demurrage"* is explicitly defined in Scrutton Charter-parties as follows: *"a sum agreed by the charterer to be paid as liquidated damages for delay beyond a stipulated or reasonable time for loading or unloading."* From this definition, it is evident that demurrage constitutes an obligation typically born by the charterer. This idea has also been present in case law since the XIXth century[33].

81. The demurrage provisions outlined in the Charterparty[34] clearly designate the Charterers as the party responsible for paying demurrage. Even if it is determined that demurrage pertains to the delivery of goods and is thus incorporated to the Bill of lading, this does not alter the fact that the Charterers solely bear the responsibility for payment[35].

82. In the present case, the possibility of manipulating the term *"Charterer"* to hold Bill of Lading

[31] As described by Lord Hoffman in the *"Achilleas": "the view which the parties take of the responsibilities and risks they are undertaking will determine the other terms of the contract and in particular the price to be paid. Anyone asked to assume a large and unpredictable risk will require some premium in exchange. A rule of law which imposes liability upon a party for a risk which he reasonably thought was excluded gives the other party something for nothing".* Additionally, Willes J in *British Columbia Saw Mill Co Ltd v Nettleship: "I am disposed to take the narrow view that one of two contracting parties ought not to be allowed to obtain an advantage which he has not paid for".*

[32] *MOOT Scenario page 10*

[33] *Postlethwaite v Freeland (1880) 5 App Cas 599, at p. 608 per Lord Selbourne LC.*

[34] *MOOT Scenario page 16*

[35] *Annefield, The (C.A.) [1971] 1 Lloyd's Rep. 1; [1971]*

holders accountable for demurrage shall be dismissed, based on two primary reasons.

83. *First*, the clause explicitly utilised the term *"Charterer"* initially, but subsequently referred to *"the Charterer, supplier, shipper, or consignee of the cargo"*. Thus, a clear distinction exists between *"Charterer"* and *"consignee of the cargo."* [36]

84. *Second,* other terms incorporated in the contract do not need such wording manipulation to fit as an obligation for the Bill of Lading holder. Examples include the Jason Clause or the Lien Clause, both of which are significant matters between shipowner and Bill of Lading holders. This line of reasoning has been consistently upheld in more contemporary case law, such as *The Sea Master*[37].

85. *All in all*, altering *"Charterer"* to *"Consignee of the cargo"* would contravene the parties' intentions. The intent of the parties to the Bill of Lading contract was not to subject the B/L holder to demurrage liability but rather to hold the Charterers exclusively liable, and thus we must adhere to the natural and ordinary meaning of the words used.

86. Additionally, while clause 27 of the Rider Clauses[38] clearly states the consignee and receiver of the cargo liability for the payment of the demurrage, this is not applicable to RESPONDENT in the present case. Basically, only the person who makes an agreement is bound by it[39]. Since RESPONDENT did not negotiate, accept or sign the Rider Clauses and, definitely, has not benefited from the delivery of the cargo to it, as it will later be addressed through the misdelivery counterclaim, it is in no way reasonable that it should be obliged to pay for the demurrage provision.

VII. CLAIMANT INCURRED IN A MISDELIVERY

87. CLAIMANT breached its main obligation by incurring in a misdelivery (A) and that delivery against a Discharge LOI still constitutes misdelivery (B). Furthermore, RESPONDENT never

[36] *Miramar Shipping v. Holborn Oil (The Miramar) [1984] A.C. 676*
[37] *Sea master shipping inc v. arab bank (switzerland) ltd and another (the "sea master") [2020] ewhc 2030 (comm)*
[38] *MOOT Scenario page 24*
[39] *Shipbroking and Chartering Practice, ch.9 page 282*

accepted this breach (C) since it regarded the B/L and the Cargo as security (D) and this misdelivery caused RESPONDENT loss (E).

A. CLAIMANT BREACHED ITS MAIN OBLIGATION

88. The term *"misdelivery"* is defined as *"delivery of cargo by the carrier to the wrong consignee"*[40]. A fundamental obligation under the contract contained in or evidenced by the Bill of Lading is to deliver the cargo only against presentation of an original Bill of Lading[41]. Consequently, when CLAIMANT delivered the cargo to the Charterers without production of the B/L, they incurred in a misdelivery as they delivered to the wrong consignee.

89. The presentation rule is upheld rigorously in legal precedents[42]. As such, even 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. This strict adherence to the rule is essential for the Bill of Lading to function as a document of title, thereby providing security in international transactions. Should the shipowner choose to relinquish possession without proper presentation, they do so at their own risk.

90. It is also widely acknowledged that when delivery occurs to a party lacking immediate possession rights to the goods, the Bill of Lading retains its status as a document of title[43]. Consequently, RESPONDENT, as the lawful holder, is still entitled to sue as it had the right to possession of the Cargo at the time of their misdelivery. This is because RESPONDENT came into possession of the B/L the 3rd of October, the same day of the misdelivery.

B. DELIVERY AGAINST LOI IS A BREACH OF CONTRACT

91. Contrary to what CLAIMANT is trying to argue, delivery against a Letter of Indemnity does not absolve the obligation to deliver solely upon the presentation of an original Bill of Lading.

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[40] Brodie, P. (2013). *Dictionary of shipping terms. Informa Law from Routledge.*

[41] Baughen, S. J. (2011). Misdelivery claims under bills of lading and international conventions for the carriage of goods by sea. In The carriage of goods by sea under the Rotterdam Rules (pp. 163-190). Lloyd's List Law.

[42] *M B Pyramid Sound NV v Briese Schiffahrts GmbH and Co KG (The Ines) [1995] 2 Lloyd's Rep 144*; *Kuwait Petroleum Corporation v I & D Oil Carriers Ltd (The Houda) [1994] 2 Lloyd's Rep 541*; *Motis Exports Ltd v Dampskibsselskabet AF 1912 A/S (No 1) [1999] 1 Lloyd's Rep 837 (QB); [2000] 1 Lloyd's Rep 211 (CA); Barclays Bank Ltd v Commissioners of Customs and Excise[1963] 1 Lloyd's Rep 81*

[43] *Barclays Bank Ltd. v. Commissioners of Customs & Excise, [1963] 1 Lloyd's Rep. 81.*

Consequently, delivery of the Cargo without production of the B/L is still a breach of the contract of carriage, and misdelivery[44].

92. The issuance and acceptance of a Discharge Letter of Indemnity primarily indicate the shipowner's acknowledgment of the potential risk of being held accountable for wrongful discharge of cargo in the event of payment-related complications. As the carrier knows and expects that he may be sued for misdelivery, he should not be spared from the consequences of his actions[45].

93. In light of these principles, it is imperative to analyse the relevance of Clause 57 of the Rider Clauses. Contrary to any implication that this clause absolves the party from a breach of contract, it is elucidated by Clarke J in *"The Sormovskiy 3068"* when referring to a similar clause that its main objective is to ensure the discharge in case the Bill of Lading was not available, without serving as a protection to the owners for misdelivery[46].

94. Accordingly, Clause 57[47] cannot on a proper consideration provide a defence to wrongful discharge of the cargo by RESPONDENT against an Discharge LOI.

C. RESPONDENT DID NOT TACITLY ACCEPT MISDELIVERY

95. It is also difficult to follow CLAIMANT's train of thought when arguing that RESPONDENT consented the delivery to be made without the presentation of the B/L. The fact that the underlying carriage is of a short duration or that the underlying goods would be delivered against a Letter of Indemnity may be known to a bank, but such knowledge does not amount to consent to delivery without production of Bills of Lading[48].

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[44] *BNP Paribas v Bandung Shipping Pte Ltd (Shweta International Pte Ltd and Another, Third Parties) [2003] SGHC 111.*

[45] *Aikens, R., Goldby, M., QC, R. L., QC, M. B., Bolding, M., & SC, K. S. T. (2020). Bills of lading. Informa Law from Routledge.*

[46] *SA Sucre Export v Northern River Shipping Ltd (The Sormovskiy 3068) [1994] 2 Lloyd's Rep 266, 274.*

[47] *MOOT Scenario page 28*

[48] Following Aikens in *"Bills of lading"* the defence of consent or acquiescence is generally difficult to establish. *For one thing, insofar as banks regard the underlying goods they finance as their security, it is difficult to see why they would give that up by consenting to delivery of the goods to a third party before the loan is discharged. This is particularly so if an issuing bank requires the bills of lading to be specially endorsed in its favour under the terms of the credit or executes a pledge over the bills of lading and underlying goods as is the case. Aikens, R., Goldby, M., QC, R. L., QC, M. B., Bolding, M., & SC, K. S. T. (2020). Bills of lading. Informa Law from Routledge.*

96. In light of legal precedents such as *The Maynegrain*, *The Future Express*, and *Galbraith Pembroke & Co.*[49], it holds true that parties who explicitly agree to waive or bypass the presentation rule in their contracts pertaining to transportation, finance, or sale of goods assume significant risks. However, despite this, in such instances, the courts did not rule against the banks due to their access to contractual documents wherein the presentation rule was waived, as such circumstances do not constitute grounds for estoppel[50].
97. RESPONDENT is thus entitled to rely on the Carrier's contractual promise to deliver against production of a B/L and to expect that a Carrier who risks a claim for breach of that promise to demand a Letter of Indemnity to protect itself.
98. Furthermore, the defence of consent becomes even less persuasive if the delivery without Bills of Lading presentation occurred before the bank obtained possession of the Bills of Lading, as this would imply consent on the bank's part prior to acquiring rights under the Bills of Lading[51].
99. Consequently, in the absence of direct communication between RESPONDENT and the CLAIMANT at the time of delivery, it becomes challenging to envision how RESPONDENT could have instructed or authorised the preceding delivery without B/L presentation or against a Discharge LOI.

D. RESPONDENT VIEWED THE CARGO AS SECURITY

100. First and foremost, it is imperative to emphasise that RESPONDENT currently holds the B/L through the completion of an endorsement by delivery and in good faith, in accordance with sections 2(1)(a) and 5(2)(b) of the Carriage of Goods by Sea Act (COGSA) 1992. In the alternative that RESPONDENT became the holder of the B/L after misdelivery had already occurred given that these events occurred in the same day, 3rd of October, RESPONDENT submits that this would not change this line of argument as per section 2(2)(a) of COGSA,

[49] *Maynegrain P/L v Compañia Bank [1984] 1 NSWLR 258, The Future Express [1992] 2 Lloyd's Rep 79, Galbraith Pembroke & Co. Ltd v H Harrison Ltd (1927) 28 Ll.L.Rep. 333.*
[50] *Arizona, F., & Semark, D. (2014). Maritime letters of indemnity. Informa Law from Routledge.*
[51] *Oversea-Chinese Banking Corporation Ltd v Owner and/or Demise Charterer of the Vessel "STI Orchard"; Winson Oil Trading Pte Ltd (Intervening) [2023] 1 Lloyd's Rep 22*

whereby the rights of suit are still vested in the lawful holder by virtue of a previous transaction that preceded that misdelivery, as is the financing arrangements and the L/C[52].

101. First, it should be noted that the B/L remain unspent, as a Bill of Lading is only considered spent upon the delivery to the person entitled to the goods[53]. Consequently, the B/L retains its status as the representation of the goods until it is united with the cargo[54].

102. Regarding the endorsement, there is no difficulty in asserting its occurrence, as per the criteria outlined in *The Erin Schulte*, which involves *"the voluntary and unconditional transfer of possession by the holder to the indorsee and an unconditional acceptance by the indorsee"*[55].

103. However, CLAIMANT has contended that RESPONDENT did not view the Cargo as security and thus would not be acting in good faith consequently negating lawful holder status of the B/L. The term *"good faith"* as defined in section 5(2) of COGSA 1992 pertains to honest conduct[56] and excludes situations where possession is obtained unlawfully or through improper means[57]. This argument does not align with the present dispute as established in present law case[58].

104. Firstly, for a pledge to be valid, the Bills of Lading must confer constructive possession of the goods, necessitating that the bills be made out to the bank's order or endorsed in blank[59]. In contrast to *The STI Orchard*, the bills in the current dispute are clearly addressed to RESPONDENT.

105. Secondly, the contention that the grant of a trust receipt loan indicates a lack of regard for the B/L as security does not apply here. RESPONDENT repeatedly refused the Buyers from

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[52] *Yue You 902, The (SGHC) [2019] SGHC 106; [2019] 2 Lloyd's Rep 617; [2020] 3 SLR 573*
[53] *Yue You 902, The (SGHC) [2019] SGHC 106; [2019] 2 Lloyd's Rep 617; [2020] 3 SLR 573*
[54] *Barber v Meyerstein (1870) LR 4 HL 317; "To hold that a Bill of Lading becomes spent when goods are delivered against an indemnity would greatly detract from the value of bills of lading as documents of title to goods, would diminish their value to bankers and other persons who have to rely on them for security and would facilitate fraud" (The Future Express [1992] 2 Lloyd's Rep 79, p. 99).*
[55] *Standard Chartered Bank v Dorchester LNG (2) Ltd (The Erin Schulte) (CA) [2014] EWCA Civ 1382; [2015] 1 Lloyd's Rep 97*
[56] *Aegean Sea Traders Corporation v Repsol Petroleo SA (The Aegean Sea) [1998] 2 Lloyd's Rep 39*
[57] *UCO Bank v Golden Shore Transportation Pte Ltd [2006] 1 SLR(R) 1*
[58] *Oversea-Chinese Banking Corporation Ltd v Owner and/or Demise Charterer of the Vessel "STI Orchard"; Winson Oil Trading Pte Ltd (Intervening) [2023] 1 Lloyd's Rep 22*
[59] *Ellinger, E. P., Neo, D., Yeo, T. M., Toh, K. S., & Teo, I. (2010). The Law and Practice of Documentary Letters of Credit.*

obtaining a trust receipt loan. Consequently, it is evident that RESPONDENT considered the B/L as security, thereby establishing their status as the lawful holder of the B/L.

E. MISDELIVERY DID CAUSE RESPONDENT LOSS

106. The legal landscape regarding the application of the causation test is intricate and subject to varying interpretations[60]. Recent cases, notably *The Nika* and *The Sienna*, suggest that courts should assess whether the misdelivery constitutes the effective or proximate cause of the ensuing loss.

107. According to this perspective, if RESPONDENT would have authorised Cargo discharge without insisting on B/L presentation in any event, then the misdelivery may not be deemed the decisive cause of the loss. RESPONDENT contends that despite the L/C permitting discharge upon presentation of a Discharge LOI, this does not necessarily imply a blanket authorization for discharge without a B/L in all circumstances. Thus, the loss suffered by RESPONDENT stems from the misdelivery.

108. The courts, in diverging from the presentation rule, determined that the circumstances surrounding the financing arrangements of the cargo and the issuance of the Bill of Lading indicated that the holder of the Bill of Lading had assumed the risk of misdelivery, thereby absolving the carrier of liability, something which does not occur in the present case.

109. For example, in *The Sienna*, trial evidence demonstrated that the financing agreement between the claimant bank and its clients inherently implied that the financed cargo would be discharged without the production of the Bill of Lading, as the bank acknowledged that the Bill of Lading would not be available until discharge[61].

110. Similarly, in *The Nika*, upon scrutinising the financing arrangements between the claimant and its client, the court concluded that both parties had always intended for the cargo to be discharged without the production of Bills of Lading and stored in a bonded warehouse until

[60] *Professor Francis D Rose, "Misdelivery claims no longer a defenceless case for carriers". Lloyd's Maritime and Commercial Law Quarterly.*
[61] *UniCredit Bank AG v Euronav NV (The Sienna) [2022] 2 Lloyd's Rep 467*

payment was received from the client's buyers. Consequently, the breakdown in arrangements ashore constituted the effective cause of loss, as the claimant fell victim to fraud unrelated to the shipowner[62].

111. Moreover, in *The Maersk Princess* case the court deemed the agreement by which the claimant bank agreed to finance the cargo after it had already been delivered to the client's storage bank without the presentation of the Bill of Lading as unusual, suggesting that the claimant could not have intended to rely on the Bills of Lading as security[63].

112. *In conclusion*, RESPONDENT contends that the facts of this case considerably differ from those expressed above as it is not proven nor true that RESPONDENT would allow discharge of the Cargo be done in any event without presentation of the B/L. As a consequence, the discharge of the Cargo without presentation of the Bill of Lading by CLAIMANT caused a damage to RESPONDENT.

REQUEST FOR RELIEF

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

a) declare the tribunal lacks jurisdiction on grounds on the invalidity of the arbitration clause and the non-existence of an arbitration agreement;
b) Declare that RESPONDENT is not part of this arbitration;
c) declare RESPONDENT is not liable for the CLAIMANT losses;
d) declare RESPONDENT is not liable for the payment of demurrage which covers the losses; and
e) declare that CLAIMANT is responsible for the payment of the loss occurred to RESPONDENT on the grounds of its misdelivery.

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[62] *Fimbank plc v Discover Investment Corporation (The Nika) (QBD (Comm Ct)) [2020] EWHC 254 (Comm); [2021] 1 Lloyd's Rep 109.*
[63] *Standard Chartered bank (singapore) ltd v Maersk Tankers Singapore pte ltd Winson oil trading pte ltd, intervening (the "Maersk Princess")[2022] sghc 242; Trafigura Beheer BV v Mediterranean Shipping Co SA (The MSC Amsterdam) [2007] 2 Lloyd's Rep 622*