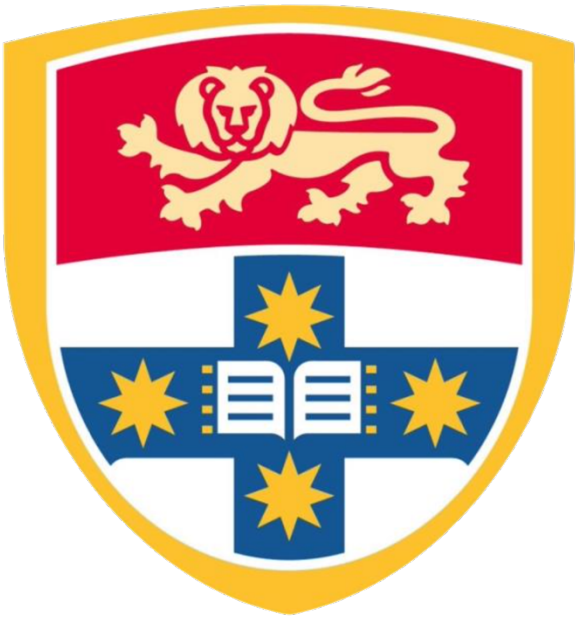
TWENTY-FIRST ANNUAL

INTERNATIONAL MARITIME LAW ARBITRATION MOOT

2024

MEMORANDUM FOR RESPONDENT



THE UNIVERSITY OF SYDNEY

TEAM T

ON BEHALF OF:	**AGAINST:**
VEGGIES OF EARTH BANKING LTD	TOMAHAWK MARITIME S.A.
RESPONDENT	**CLAIMANT**

COUNSEL

Angela Xue Catherine Nguyen Edward Goodman Noam Antonir

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS

Arbitration	Present arbitration between *Tomahawk Maritime S.A. v Veggies of Earth Banking Ltd*
B/L(s)	Bill(s) of Lading No. COW-001A
Cargo	Shipment of 16,999.01 MT of Crude Palm Oil (Edible Grade)
Charterparty	Charterparty between Tomahawk Maritime S.A. and Yu Shipping Ltd
CLAIMANT	Tomahawk Maritime S.A.
Discharge LOI	Letter of Indemnity issued by Yu Shipping Ltd to CLAIMANT on 3 October 2023
L/C	Letter of Credit issued by RESPONDENT to finance Yu Shipping's purchase of the Cargo in favour of Good Oil Sdn Bhd
Payment LOI	Letter of Indemnity issued by Good Oil Sdn Bhd to RESPONDENT on 3 October 2023
Record	Moot Scenario released 26 December 2023
RESPONDENT	Veggies of Earth Banking Ltd
Rider Clauses	Tomahawk Maritime Rider Clauses
SCMA	Singapore Chamber of Maritime Arbitration
Shipper	Yu Shipping Ltd
Vessel	MV "NIUYANG"

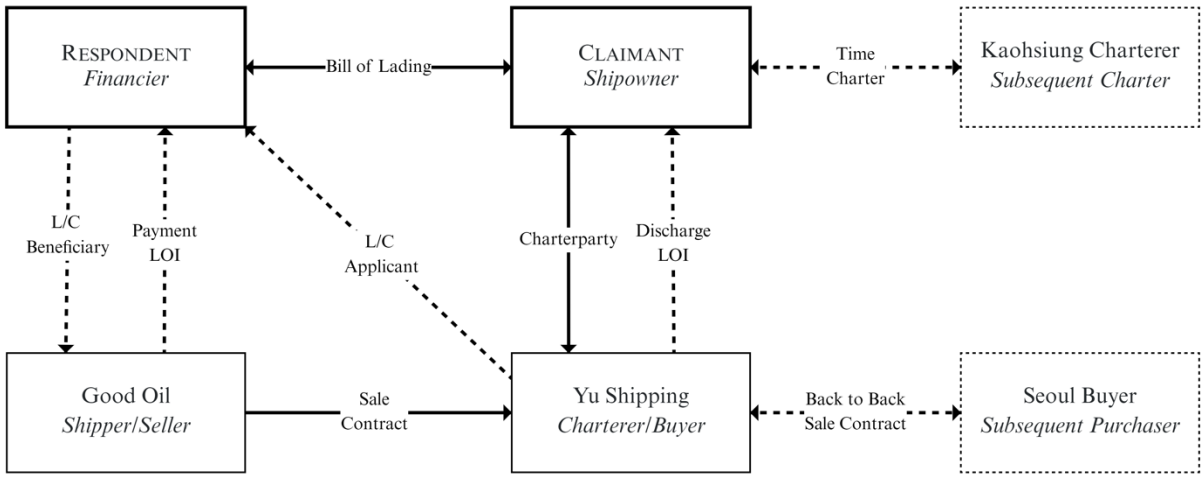
LIST OF AUTHORITIES

STATEMENT OF FACTS

1. On 14 August 2023, Yu Shipping Ltd (**Yu Shipping,** the **Charterer**) purchased 16,999.01 MT of crude palm oil (**Cargo**) from Good Oil Sdn Bhd (**Good Oil,** the **Shipper**). As part of a trade finance facility, Veggies of Earth Banking Ltd (**RESPONDENT**) financed the Cargo on behalf of Yu Shipping through a Letter of Credit (**L/C**), payable against shipping documents or a Letter of Indemnity. On 1 September 2023, Yu Shipping, as buyer of the Cargo and Charterer, entered into a voyage charterparty VEGOILVOY (**Charterparty**) with Tomahawk Maritime S.A. (**CLAIMANT**) to carry the Cargo from Bintulu, Malaysia to Busan, South Korea in the MV "NIUYANG" (**Vessel**).
2. The Charterparty and the Tomahawk Maritime Rider Clauses (**Rider Clauses**) were incorporated into the Tanker Bill of Lading NO. COW-001A (**B/L**) dated 4 September 2023, which named RESPONDENT as the consignee. Clause (E) of the B/L provided a fixed laytime of 96 hours, after which demurrage was payable.
3. The Vessel arrived in Busan on 20 September 2023. RESPONDENT was informed of its arrival on 1 October 2023. RESPONDENT later understood from its communications with Yu Shipping that the Vessel needed to depart Busan by 7 October 2023 to meet its subsequent time charter at Kaohsiung (**Next Employment**).
4. Upon the Vessel's arrival, Yu Shipping applied for a trust receipt loan from RESPONDENT. This would have allowed Yu Shipping to use the B/L consigned to RESPONDENT to sell the Cargo and repay that loan with the sale proceeds. RESPONDENT refused to process this trust receipt until Good Oil, as seller of the Cargo, had issued a Payment Letter of Indemnity (**Payment LOI**). After conducting a review of Yu Shipping's financial situation, RESPONDENT later expressly declined to grant a trust receipt. At no point before this discharge did RESPONDENT hold the B/L in its possession.

5. On 4 October 2023, CLAIMANT commenced discharge of the Cargo to an agent of Yu Shipping without presentation of the B/L, relying on a Letter of Indemnity issued by Yu Shipping.
6. The Vessel departed Busan at 0241LT on 8 October 2023. Its voyage was hampered by adverse wind and sea conditions and was approximately 300 nautical miles from Kaohsiung on 16 October 2023. The charterers under the Next Employment initially cancelled the time charter, but CLAIMANT was able to reinstate this employment at a lower rate of USD 30,000 per day.
7. On 15 November 2023, CLAIMANT issued a demand to Yu Shipping claiming USD 3,650,000 as compensation for the cancellation of the Next Employment. On 29 November 2023, RESPONDENT demanded delivery of the Cargo from CLAIMANT as the lawful holder and consignee of the B/L. At this date, Yu Shipping had entered into liquidation and RESPONDENT sought to exercise its right over the Cargo. Given that the Cargo was delivered to a third party, RESPONDENT was deprived of this right.
8. On 22 December 2023, CLAIMANT issued a Notice of Arbitration to RESPONDENT, thereby instituting these proceedings.

Figure 1: Diagram of Contractual Relationships



JURISDICTION

9. The doctrine of *kompetenz-kompetenz* means that the Tribunal can determine the existence and extent of its own jurisdiction.[1]

10. Clause 76 of the Rider Clauses (the **Purported Arbitration Agreement**) provides:[2]

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

11. RESPONDENT submits that the Tribunal should find that it has no jurisdiction to hear the present dispute, given the Purported Arbitration Agreement is invalid under Chinese law, which is its governing law. This is because Guangzhou represents both the venue and the seat of the purported arbitration (**I**). Accordingly, the law governing the Purported Arbitration Agreement is Chinese law, as the law of the seat (**II**). Under Chinese law, the Purported Arbitration Agreement is invalid, as it fails to conform to the necessary statutory requirements (**III**). In any event, the Purported Arbitration Agreement should be found invalid on the basis that it is contrary to the public policy of the law of the arbitral seat, to whose supervisory jurisdiction the parties have submitted (**IV**).

I. THE SEAT OF THE ARBITRATION IS THE PRC

12. The Purported Arbitration Agreement stipulates that the purported arbitration shall be '*in Guangzhou*'. This represents a designation of the seat for three reasons.

13. *First*, on their plain and natural meaning, the words '*in Guangzhou*' indicate that the parties intended for Guangzhou to be the seat of any arbitration.[3] RESPONDENT's construction accords

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[1] Nigel Blackaby et al, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th ed, 2015), 322, 345; *Dallah Real Estate and Tourism Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763, 830 [84] (Lord Collins of Mapesbury JSC) ('*Dallah*'); *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] 1 WLR 1889, 1902 (Lord Mance); *UNCITRAL Model Law on International Commercial Arbitration*, art 16(1); *SCMA Arbitration Rules 2022* r 30.1.

[2] *Record* 28 cl 76 (Rider Clauses).

[3] *BNA v BNB* [2020] 1 Lloyd's Rep 55, 64–5 [65] (Steven Chong JCA) ('*BNA v BNB*'); *Shagang South Asia (Hong Kong) Trading Co Ltd v Daewoo Logistics* [2015] 1 Lloyd's Rep 504, 510 [35]–[39] (Hamblen J); *Enercon GMBH and another v Enercon (India) Ltd* [2012] 1 Lloyd's Rep 519, 534 [56] (Eder J); *Shashoua v Sharma* [2009] 2 Lloyd's Rep 376, 380 [26] (Cooke J) ('*Shashoua*'); David Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (Sweet & Maxwell, 3rd ed, 2015) [6.40].

with the decision of *BNA v BNB*, where the Singapore Court of Appeal found that, on its natural meaning, the phrase 'arbitration in Shanghai' specified Shanghai as the arbitral seat.[4]

14. *Second*, Guangzhou is the only geographical anchor for the purported arbitration. The sole nomination of Guangzhou without any other designated location reflects the intention of the parties for Guangzhou to have legal significance for the purported arbitration.[5] The Tribunal should give effect to this intention by finding that Guangzhou is the arbitral seat.

15. *Third*, RESPONDENT's construction of Clause 76 reflects a commercially sensible approach that is consistent with the practice of specifying cities and not countries as arbitral seats, which is also reflected in the model clauses of different arbitral institutions.[6] CLAIMANT's construction of Clause 76 requires the Tribunal to find that the parties did not nominate an arbitral seat, despite the clear words to the contrary.[7] Much like the findings in *BNA v BNB*, the default SCMA-stipulated seat of Singapore is irrelevant where the parties have expressly nominated a seat.[8]

II. CHINESE LAW IS THE LAW GOVERNING THE ARBITRATION AGREEMENT

16. The test for determining the law governing an arbitration agreement is *first*, whether the parties made an express choice of law; *second*, whether the parties made an implied choice of law; and *third*, if neither can be discerned, which system of law has its closest and most real connection with the arbitration agreement.[9] RESPONDENT submits that no express nor implied

[4] *BNA v BNB* (n 3) 64 [64] (Steven Chong JCA); *Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru* [1988] 1 Lloyd's Rep 116, 119 (Kerr LJ).
[5] *BNA v BNB* (n 3) 63–4 [56]–[61] (Steven Chong JCA); *Shashoua* (n 3) 380 (Cooke J).
[6] *BNA v BNB* (n 3) 69 [92]–[93] (Steven Chong JCA); Australian Maritime and Transport Arbitration Commission, *Arbitration Rules 2016*, r 15.1; Vancouver Maritime Arbitrators Association, *Arbitration Rules 2016*, r 38; The London Court of International Arbitration, *Arbitration Rules 2020*, art 16.2; Society Of Maritime Arbitrators, *Arbitration Rules 2022*, s 7; China Maritime Arbitration Commission, *Arbitration Rules*, art 7.
[7] *Process & Industrial Developments Ltd v The Federal Republic of Nigeria* [2019] 2 Lloyd's Rep 361, 375–6 [85] (Butcher J).
[8] cf *SCMA Arbitration Rules 2022* r 32.1; *BNA v BNB* (n 3) 64 [64]–[65] (Steven Chong JCA).
[9] *Anupam Mittal v Westbridge Ventures II Investment Holdings Enka Insaat Ve Sanayi* [2023] SGCA 1, [62] (Prakash JCA) ('*Anupam*'); *BCY v BCZ* [2016] 2 Lloyd's Rep 583, 368 [40] (Steven Chong J) ('*BCY v BCZ*'); *Cie Tunisienne de Navigation SA v Cie d'Armement Maritime SA* [1971] AC 572, 603 (Lord Diplock); King Fung Tsang and Weijie Lin, 'So Far Yet So Close: Comparing Governing Laws in Arbitration Agreements under English and Chinese Laws' (2023) 56(2) *Vanderbilt Journal of Transnational Law* 483, 503–7.

choice of law is outlined within Clause 76, and accordingly, Chinese law is the system with which the Purported Arbitration Agreement has its closest and most real connection. This is for three reasons.

17. *First*, there is no express choice of law governing the Purported Arbitration Agreement.[10]

18. *Second*, the presumption that the implied choice of law of the arbitration agreement is that of the proper law of the contract is displaced here.[11] There is no clear implied choice of law where there are several legal systems that could be interpreted as the parties' intended governing law for the Purported Arbitration Agreement.[12] Particularly, the various references to the English, Chinese, and Singaporean legal systems indicate that the parties did not direct their minds to the question of the law applicable to the arbitration agreement.

19. *Third*, where the parties have chosen an arbitral seat, the law with the closest and most real connection will 'generally be the law of the seat'.[13] This is particularly relevant where the parties have deliberately chosen to arbitrate '*in Guangzhou*', thereby intentionally creating a close and material connection between that legal jurisdiction and their arbitration.[14]

20. Accordingly, the law of the Purported Arbitration Agreement is Chinese law.

III. THE ARBITRATION AGREEMENT IS INVALID UNDER CHINESE LAW

21. Under Chinese law, Clause 76 is an invalid arbitration agreement. Article 16 of the *Arbitration Law of the People's Republic of China*[15] requires that all valid arbitration agreements must explicitly specify the 'Arbitration Commission' responsible for the management of any

[10] *Sul America Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] 1 Lloyd's Rep 671, 679 [26] (Moore-Bick LJ); *BCY v BCZ* (n 9) 594 [65] (Steven Chong J); *Anupam* (n 9) [70] (Judith Prakash JCA); *C v D* [2008] 1 Lloyd's Rep 239, 246 [23] (Longmore LJ) ('*C v D*').
[11] *Fiona Trust v Privalov* [2008] 1 Lloyd's Rep 254, 257 [17] (Lord Hoffman); *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] 1 Lloyd's Rep 455, 460 (Ralph Gibson LJ).
[12] *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] 2 Lloyd's Rep 339, 483 [170(v)–(vi)] (Lord Hamblen and Lord Leggatt JJSC) ('*Enka*').
[13] *Enka* (n 12) 483 [170(viii)] (Lord Hamblen and Lord Leggatt JJSC).
[14] *C v D* (n 10) 247 [26] (Longmore LJ); *Black Clawson International Ltd v Papierwerke Waldhof Aschaffenburg AG* [1981] 2 Lloyd's Rep 446, 483 (Mustill J); *Union of India v McDonnell Douglas Corporation* [1993] 2 Lloyd's Rep 48, 50 (Saville J).
[15] *Arbitration Law of the People's Republic of China 1994* (People's Republic of China) President of the People's Republic of China, Order No 34, 31 August 1994.

disputes.[16] The SCMA is not an 'Arbitration Commission' within the meaning of Article 10, given that it is not a registered arbitral institution within the PRC.[17] It is therefore 'null and void' under Chinese law.[18]

IV. THE TRIBUNAL SHOULD NOT VALIDATE THE ARBITRATION AGREEMENT AS IT IS CONTRARY TO THE LAW OF THE SEAT

22. It would be both futile and contrary to public policy for the Tribunal to allow the parties to arbitrate where the Purported Arbitration Agreement is contrary to the law of the seat. This is for three reasons.

23. *First*, the seat of the arbitration is the legal location in which the Purported Arbitration Agreement is to be performed.[19] By agreeing to a seat of arbitration, parties submit themselves to the supervisory jurisdiction of the courts of that place. Courts of the seat are responsible for providing remedies relating to the existence or scope of the arbitrators' jurisdiction, and have the jurisdiction to grant an injunction restraining proceedings brought in breach of an arbitration agreement.[20] Here, where the parties have selected Guangzhou as the seat of the purported arbitration, it would be entirely self-defeating for a party to seek supervision and procedural remedies in a court which would not recognise the validity of the Purported Arbitration Agreement.[21]

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[16] Ibid art 16.
[17] Ibid art 10.
[18] Ibid art 18.
[19] *Enka* (n 12) 474 [121] (Lord Hamblen JSC); *C v D* (n 10) 247–8 [29]–[34] (Longmore LJ); *Minister of Finance v International Petroleum Investment Co* [2020] 1 Lloyd's Rep 93, 100–2 [36]–[49] (Vos C); Lord Collins of Mapesbury et al, *Dicey*, *Morris & Collins on The Conflict of Laws* (Sweet & Maxwell, 16th ed, 2023) 884 [16-034].
[20] *UniCredit Bank GmbH v RusChemAlliance LLC* [2024] 1 Lloyd's Rep 350, 365 [88] (Males LJ, Lewis and Bean LJJ agreeing); *Nori Holdings Ltd v Public Joint-Stock Company Bank Otkritie Financial Corporation* [2018] 2 Lloyd's Rep 80, 85 [28] (Males J); *Aggeliki Charis Compania Maritima SA v Pagnan SpA* ('*The Angelic Grace*') [1995] 1 Lloyd's Rep 87, 96 (Millett LJ).
[21] *Carpatsky Petroleum Corporation v PJSC Ukrnafta* [2020] 1 Lloyd's Rep 566, 577 [65] (Butcher J) ('*Carpatsky*').

24. *Second*, China as the seat, is the most likely jurisdiction in which enforcement of the arbitral award will be sought.[22] As a signatory to the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*,[23] any Chinese court can potentially refuse enforcement of the award by reason of the fact that the Purported Arbitration Agreement was invalid under its governing law (which as discussed at [1620] is Chinese law).[24] Alternatively, the Purported Arbitration Agreement may be invalidated on the basis it is contrary to the public policy of the PRC.[25]

25. *Third*, while CLAIMANT may submit that the 'validation principle' binds the Tribunal to uphold the Purported Arbitration Agreement, to permit an arbitration to proceed and an award to be made in violation of the laws of the seat would risk inconsistent curial findings. Chinese courts would likely find the Purported Arbitration Agreement invalid, even if the courts of Singapore or the United Kingdom would not do so.[26]

26. The Tribunal does not bear the responsibility to ensure that the parties' purported intention to arbitrate is 'given effect at all costs'.[27]

ARGUMENTS ON THE MERITS OF THE CLAIM

V. CLAIMANT IS NOT ENTITLED TO DAMAGES IN ADDITION TO DEMURRAGE

27. While RESPONDENT breached the Vessel's fixed laytime provision and is liable for demurrage,[28] CLAIMANT is not entitled to recover unliquidated damages in addition to demurrage. Here, there is no indication that the demurrage clause in the Charterparty intended to depart from the general principle that it compensates all damages arising from the breach of

[22] *Anupam* (n 9) [75] (Judith Prakash JCA); *Dallah* (n 1) 777 [29] (Lord Mance JSC).
[23] *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 10 June 1958) ('*New York Convention*'); *Circular of Supreme People's Court on Implementing Convention on the Recognition and Enforcement of Foreign Arbitral Awards Entered by China 1986* (People's Republic of China) National People's Congress, 2 December 1986.
[24] *New York Convention* (n 23) art V(1)(a).
[25] Ibid art V(2)(b).
[26] *Carpatsky* (n 21) 577 [65] (Butcher J); *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] 1 Lloyd's Rep 269, 273–4 (Lord Hodson).
[27] *Anupam* (n 9) [55] (Judith Prakash JCA); *BNA v BNB* (n 3) 70 [104] (Steven Chong JCA).
[28] *Record* 12 cl (E) (Charterparty).

laytime (**A**). Hence, the loss of USD 3,650,000 claimed by CLAIMANT resulting from the breach of laytime (**CLAIMANT's loss**) is compensated for by demurrage,[29] even if it is characterised as indirect or consequential (**B**). Furthermore, there is no basis for implying a separate obligation upon RESPONDENT to discharge the Cargo within a reasonable time (**C**). Without establishing a breach on the part of RESPONDENT of a separate and distinct obligation to laytime under the B/L, no liability for unliquidated damages can arise.

A. DEMURRAGE COMPENSATES CLAIMANT FOR ALL LOSS ARISING FROM BREACH OF LAYTIME

28. Clause 11 '*DEMURRAGE*' of the Charterparty (**Demurrage Clause**) provides:[30]

> *Charterer shall pay demurrage per running hour and pro ram for a part thereof at the rate stipulated in Part I for all the time that loading and discharging and used laytime as elsewhere herein provided exceeds die* [sic] *allowed laytime herein specified…*

29. Absent a contraindication in the contract, it is presumptively true that demurrage serves to liquidate the whole of the damages arising from a failure to complete cargo operations within the laytime and not merely some of them.[31] This includes loss arising from a failure to meet the Vessel's Next Employment, where such failure arose as a result of delayed discharge. CLAIMANT cannot demonstrate anything in the B/L and Charterparty that would rebut this presumption, and therefore the Demurrage Clause should liquidate CLAIMANT's loss for three reasons.

30. *First*, demurrage does not merely function as a liquidation of prospective earnings, but compensates the whole of the damages arising from RESPONDENT'S failure to complete cargo

[29] *Record* 10 [20] (Statement of Claim).
[30] *Record* 16 cl 11 (Charterparty).
[31] *K Line PTE v Priminds Shipping (HK) Co Ltd* ('*The Eternal Bliss*') [2022] 1 Lloyd's Rep 12, 21–3 [52]–[59] (Males LJ); *Suisse Atlantique Societe d'Armement Maritime S.A. v Rotterdamsche Kolen Centrale* [1967] 1 AC 361, 390 (Viscount Dilhorne), 536 (Lord Wilberforce); *Richco International Ltd v Alfred C Toepfer International GmbH* ('*The Bonde*') [1991] 1 Lloyd's Rep 136, 142 (Potter J); *Erg Raffinerie Mediterranee S.P.A v Chevron Usa Inc* ('*The Luxmar*') [2007] 2 Lloyd's Rep 542, 547 [24] (Longmore LJ); *Triton Navigation Ltd v Vitol SA* ('*The Nikmary*') [2003] 1 Lloyd's Rep 151, 161 (Moore-Bick J).

operations within the laytime.[32] CLAIMANT'S characterisation of its loss as 'consequential' does not take it any further – the very mischief that demurrage aims to remedy is the breach of a laytime provision and all consequences flowing from it.[33]

31. *Second,* CLAIMANT's attempt to recover unliquidated damages is contrary to the commercial purpose of the Demurrage Clause, which provides 'valuable certainty and avoids dispute'.[34] Demurrage clauses are ordinarily negotiated as a prospective measure of loss arising from detention of a vessel, allowing the parties to be certain as to their future liability.[35] CLAIMANT's position deprives both parties of the benefit of certainty conferred by demurrage.

32. *Third*, allowing CLAIMANT to recover unliquidated damages for the failure to meet the Vessel's Next Employment is inconsistent with the risk allocation contemplated by the B/L and Charterparty. Clause 38 '*Next Employment'* of the Rider Clauses indicates that both parties had knowledge of the Next Employment at the time of contracting,[36] thus that such knowledge was part of the basis on which demurrage was negotiated. Where the Charterparty expressly contemplates the particular risk of not meeting the Next Employment arising from breach of laytime, this is a strong indication that the parties did intend for it to be covered by demurrage. Construing Clause 38 as consistent with the Demurrage Clause gives the contract a harmonious commercial operation.[37]

33. In sum, to expose RESPONDENT to liability for unliquidated damages for CLAIMANT missing its Next Employment would require reading in limitations on the Demurrage Clause that are nonexistent. CLAIMANT cannot, with hindsight, draw an artificial distinction between the types

[32] *The Eternal Bliss* (n 31) 21 [52] (Males LJ).
[33] Ibid 22 [54]–[55] (Males LJ); *The Nikmary* (n 31) 161 (Moore-Bick J); *Dias Compania Naviera SA v Louis Dreyfus Corporation* ('*The Dias*') [1978] 1 Lloyd's Rep 325, 328 (Lord Diplock).
[34] *The Eternal Bliss* (n 31) 21 [53] (Males LJ).
[35] Ibid 22 [54] (Males LJ).
[36] *Record* 25 cl 38 (Rider Clauses).
[37] *Tidebrook Maritime Corporation v Vitol SA* ('*The Front Commander*') [2006] 2 Lloyd's Rep 251, 261 [69]–[71] (Rix LJ, Scott Baker and Buxton LJJ agreeing); *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 898 (Lord Goff); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381–2 [69]–[71] (McHugh, Gummow, Kirby and Hayne JJ); *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522, 529 [16] (Gleeson CJ, McHugh, Gummow and Kirby JJ).

of losses flowing from breach of the laytime and the types of losses liquidated by demurrage. The Tribunal should find that CLAIMANT is limited to a claim in demurrage only.

B. THERE IS NO IMPLIED OBLIGATION TO PROCURE DISCHARGE WITHIN A REASONABLE TIME

34. As CLAIMANT is restricted to a claim in demurrage for breach of laytime, it seeks to imply a term that RESPONDENT was obliged to procure discharge of the Cargo within a reasonable time. This term should not be implied – it is not necessary to give business efficacy to the contract, nor is it necessary to make the contract commercially and practically coherent.[38] On the contrary, the implication of such a term would contradict the existing contractual scheme. This is for five reasons.

35. *First*, an implied term for discharge is not necessary given the express laytime provision. The obligation to complete discharge within a reasonable time is only been implied where the contract itself is silent as to the allowed time for discharge,[39] consistent with the requirement of necessity in implying terms.[40] Here, there is an express obligation detailed by Clause (E) of the B/L, which provides a fixed laytime of 96 hours.[41] The Tribunal should therefore not imply a term providing for a 'reasonable time' to procure discharge where the contract already provides for an express timeframe for discharge. Further, as set out at [28]–[33], the Demurrage Clause already liquidates all damages flowing from the loss of the Next Employment and assigns liability accordingly.

36. *Second,* whatever CLAIMANT submits would constitute a 'reasonable time' would be inconsistent with the 96 hour express laytime.[42] Even if CLAIMANT wishes to contend that a

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[38] *Sea Master Shipping Inc v Arab Bank (Switzerland) Ltd and another* ('*The Sea Master*') [2021] 1 Lloyd's Rep 500, 505 [14] (Judge Pelling QC); *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 283 (Lord Simon of Glaisdale); *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742, 754–5 [21] (Lord Neuberger of Abbotsbury PSC) ('*Marks & Spencer*'); *Ali v Petroleum Company of Trinidad and Tobago* [2017] ICR 531, 534–5 [7] (Lord Hughes JSC) ('*Ali*').
[39] *Postlethwaite v Freeland* (1880) 5 App Cas 599, 608 (Lord Selborne LC).
[40] *The Sea Master* (n 38) 505 [14] (Judge Pelling QC); *Marks & Spencer* (n 38) 754–5 [21] (Lord Neuberger of Abbotsbury PSC); *Ali* (n 38) 535–6 [7] (Lord Hughes).
[41] *Record* 12 cl (E) (Charterparty).
[42] *Marks & Spencer* (n 38) 757 [28] (Lord Neuberger of Abbotsbury PSC); *The Sea Master* (n 38) 504 [13] (Judge Pelling QC).

'reasonable time' to complete discharge mirrored the 96 hours provided for by the Charterparty, an implied term would be wholly otiose.

37. *Third*, CLAIMANT's proposed implied term is contrary to the structure of this voyage charter.[43] At common law, responsibility for discharge of cargo, in the absence of an agreement allocating such responsibility, rests on the shipowner.[44] However, the parties here have contemplated that they may, by express agreement, deviate from the ordinary structure of the voyage charter in some circumstances.[45] For example, RESPONDENT's liability for demurrage is only the result of Clause 27 of the Rider Clauses, as demurrage is otherwise ordinarily an issue between the charterers and the shipowners.[46] Given that the parties saw fit to expressly include terms imposing additional responsibilities on RESPONDENT, similarly clear words should be necessary before the Tribunal seeks to make RESPONDENT liable for an obligation which would be contrary to widely accepted custom.[47]

38. *Fourth*, an implied term to take discharge is inconsistent with the general fact that bills of lading often do not reach the port before the Cargo itself. This is precisely what occurred here – RESPONDENT did not receive the B/L until after a 'reasonable time' had elapsed. The B/L was necessary for RESPONDENT to take delivery, and it would be uncommercial to impose upon RESPONDENT an obligation that may require it to procure discharge of the Cargo in breach of the presentation rule.[48]

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[43] *The Sea Master* (n 38) 508 [37] (Judge Pelling QC); *Tradigrain SA v King Diamond Shipping SA* ('*The Spiros C*') [2000] 2 Lloyd's Rep 319, 335–6 [79] (Rix LJ, Brooke and Henry LJJ agreeing).
[44] *The Sea Master* (n 38) 508 [37] (Judge Pelling QC); *Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc* ('*The Jordan II*') [2005] 1 Lloyd's Rep 57, 61 [11] (Lord Steyn).
[45] *E L Oldendorff & Co GmbH v Tradax Export SA* ('*The Johanna Oldendorff*') [1974] AC 479, 556 (Lord Diplock).
[46] David Foxton et al, *Scrutton on Charterparties* (Sweet & Maxwell, 24th ed, 2020) [15-001], [15-006]; *The Spiros C* (n 43) 333 [65]–[66] (Rix LJ, Brooke and Henry LJJ agreeing); *Record* 24 cl 27 (Rider Clauses).
[47] *The Sea Master* (n 38) 507 [32] (Judge Pelling QC); *MacDonald Dickens & Macklin v Costello* [2012] QB 244, 251 [23] (Etherton LJ, Patten and Pill LJJ agreeing).
[48] *Barclays Bank Ltd v Customs and Excise Commissioners* [1963] 1 Lloyd's Rep 81, 88 (Diplock LJ) ('*Barclays Bank*'); *Kuwait Petroleum Corporation v I&D Oil Carriers Ltd* ('*The Houda*') [1994] 2 Lloyd's Rep 541, 550 (Neill LJ).

39. *Fifth*, it is in the interests of commercial certainty to give effect only to the express provisions of the B/L, without imposing a further, implied obligation on lawful holders of the B/L. The ability for parties to rely wholly on the accuracy of statements on the face of a bill of lading is important because it is a negotiable instrument.[49] It is commercially unjust to allow CLAIMANT to rely on an unnecessary implied term that departs from the fixed laytime term for the purpose of claiming general damages, given that losses from a breach of laytime are already adequately compensated by demurrage (as set out at [28]–[33]).

40. Therefore, no implied term of the kind contended for by CLAIMANT arises in the B/L.

C. RESPONDENT'S OMISSION WAS NOT AN EFFECTIVE CAUSE OF CLAIMANT'S LOSS

41. RESPONDENT's primary position is that CLAIMANT is restricted to demurrage for breach of laytime and that no implied obligation to procure discharge in a reasonable time exists. However, RESPONDENT submits that any failure to procure discharge was not an effective cause of CLAIMANT's loss.[50] Any causal link between RESPONDENT's breach and CLAIMANT's loss was severed by the adverse weather hampering the Vessel for two reasons.

42. *First*, RESPONDENT's purported breach was relatively ineffective in its contribution to the operating causal mechanism of CLAIMANT's loss.[51] The Vessel had to 'leave port by 7 October 2023' to meet the subsequent laycan obligation in Kaoshiung by 14 October 2023.[52] The Vessel departed from Busan at 0214LT on 8 October 2023. Therefore, prior to any subsequent intervening act, the Vessel had only been delayed by 2 hours and 14 minutes.

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[49] *The Spiros C* (n 43) 328 [36] (Rix LJ, Brooke and Henry LJJ agreeing); *Golden Strait Corporation v Nippon Yusen Kubishka Kaisha* ('*The Golden Victory*') [2007] 2 Lloyd's Rep 164, 172 [23] (Lord Bingham of Cornhill); *Homburg Houtimport BV v Agrosin Private Ltd* ('*The Starsin*') [2003] 1 Lloyd's Rep 571, 577 [13] (Lord Bingham of Cornhill); *The Jordan II* (n 44) 62–3 [16] (Lord Steyn).

[50] *Martlet Homes Ltd v Mulalley & Co Ltd (No 2)* (2022) 203 ConLR 125, 187–8 [284]–[287] (Davies J) ('*Martlet v Mulalley*'); *Financial Conduct Authority v Arch Insurance UK Ltd* [2021] AC 649, 720 [172], 722–3 [181]–[182] (Lord Hamblen and Lord Leggatt JJSC) ('*Arch Insurance*').

[51] Jane Stapleton, 'Unnecessary and Insufficient Factual Causes' (2023) *Journal of Tort Law* 1, 9–10; *Arch Insurance* (n 50) 720 [172], 722–3 [181]–[182] (Lord Hamblen and Lord Leggatt JJSC).

[52] *Record* 8 [11] (Statement of Claim).

43. *Second*, and despite RESPONDENT's relatively small delay in discharging the Cargo, the Vessel was still 300 nautical miles away from Kaoshiung on 16 October 2023, having already missed its subsequent laycan by two days. The magnitude of this delay can only be explained by the adverse wind and sea conditions hampering the Vessel, which constituted a new and independent cause obliterating the causal connection between RESPONDENT's breach and CLAIMANT's loss.[53]

D. CLAIMANT'S LOSS IS TOO REMOTE FROM RESPONDENT'S BREACH

44. Even if RESPONDENT is causally responsible for CLAIMANT's loss, such loss is too remote for two reasons. *First*, CLAIMANT's loss is too remote from RESPONDENT's breach under either limb of the orthodox test in *Hadley v Baxendale* (**i**).[54] *Second*, and in any case, RESPONDENT did not assume responsibility for CLAIMANT's loss under the principles propounded by the House of Lords in *The Achilleas* (**ii**).[55]

(i) CLAIMANT's loss is too remote under *Hadley v Baxendale*

45. CLAIMANT's loss is too remote under the orthodox remoteness test in *Hadley v Baxendale,* both limbs of which turn entirely on RESPONDENT's degree of knowledge of the relevant loss.[56] RESPONDENT did not have the type of loss suffered by CLAIMANT fairly and reasonably within its contemplation, as at the date of the contract, as a probable result of its breach for two reasons.[57]

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[53] *Borealis AB v Geogas Trading SA* [2011] 1 Lloyd's Rep 482, [47] (Gross LJ).
[54] *Hadley v Baxendale* (1854) 9 Ex 341, 354–5 (Alderson B) ('*Hadley v Baxendale*'); *Martlet v Mullaley* (n 50) 196 [316] (Davies J); *Orchard Plaza Management Co Ltd v Balfour Beatty Regional Construction Ltd* [2022] EWHC 1490 (TCC), [43]–[44] (Morris J); *Attorney General of the Virgin Islands v Global Water Associates Ltd* [2021] AC 23, 36 [32]–[35] (Lord Hodge) ('*Global Water Associates*'); *Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd* ('*The Sylvia*') [2010] 2 Lloyd's Rep 81, 88 [61] (Hamblen J).
[55] *Rhine Shipping DMCC v Vitol SA* ('*The Dijilah*') [2024] 1 All ER (Comm) 245, 292 [200] (Simon Birt KC); *The Sylvia* (n 54) 86 [47] (Hamblen J); *Supershield Ltd v Siemens Building Technologies FE Ltd* [2010] 1 Lloyd's Rep 349, 355–6 [43] (Toulson LJ); *Transfield Shipping Inc v Mercator Shipping Inc* ('*The Achilleas*') [2009] AC 61, 71 [24]–[26] (Lord Hoffman).
[56] *Hadley v Baxendale* (n 54) 354–5 (Alderson B).
[57] *Stinnes v Halcoussis* ('*The Yanxilas*') [1982] 2 Lloyd's Rep 445, 454 (Bingham J).

46. *First*, the type of loss suffered by CLAIMANT, being the loss of hire under a time charter, is particularly unusual and cannot be considered 'easily foreseeable'.[58] This is true even where RESPONDENT may have had general and unspecific knowledge of the follow-on charter. At no point was RESPONDENT made aware that the follow-on charter was a time charter. It is particularly unusual and unforeseeable that CLAIMANT would reconfigure its business model and enter into a radically different commercial transaction with variances in scope, duration, and degree of potential liability.[59]

47. *Second*, it was not within the parties' reasonable contemplation as a 'serious possibility' that a delay of 2 hours and 14 minutes would give rise to CLAIMANT's loss.[60] CLAIMANT's loss was not the 'ordinary consequence' of RESPONDENT's marginal delay. Indeed, a loss of such magnitude arising from such a delay is only explicable because of the adverse weather event and the swift turnaround between subsequent fixtures scheduled by CLAIMANT.[61] These events, in combination, are sufficiently unusual so as to place CLAIMANT's loss outside RESPONDENT's reasonable contemplation.

(ii) RESPONDENT did not assume responsibility for CLAIMANT's loss

48. Even if CLAIMANT'S loss was within RESPONDENT'S reasonable contemplation, RESPONDENT should not be held liable. The context and surrounding circumstances show that RESPONDENT cannot reasonably be regarded as having assumed responsibility for such loss.[62] This is for three reasons.

[58] *C Czarnikow Ltd v Koufos* [1969] 1 AC 350, 382G–383A (Lord Reid).
[59] Evi Plomaritau, 'A Review of Shipowner's & Charterer's Obligations in Various Types of Charter' (2014) 4 *Journal of Shipping and Ocean Engineering* 307, 310–17.
[60] *Global Water Associates* (n 54) 35–6 [27]–[35] (Lord Hodge).
[61] *The Sylvia* (n 54) [77] (Hamblen J); *The Achilleas* (n 55) 81 [60] (Lord Rodger of Earlsferry).
[62] *The Dijilah* (n 55), 291–2 [198] (Simon Birt KC); *Louis Dreyfus Commodities Suisse SA v MT Maritime Management BV* ('*The MTM Hong Kong*') [2016] 1 Lloyd's Rep 197, 206–7 [52]–[55]; *The Achilleas* (n 55) 66–7 [9] (Lord Hoffman); *Martlet v Mullaley* (n 50) 197 [320] (Davies J); *Wellesley Partners LLP v Withers LLP* (2015) 163 ConLR 53, 78–9 [69] (Floyd LJ).

49. *First*, RESPONDENT cannot be reasonably regarded as having assumed responsibility for unliquidated losses which were 'unquantifiable' and 'unpredictable' at the time of contract formation.[63] RESPONDENT did not have sufficient information to enable it to assess the full extent of liability referrable to the loss of a follow-on charter because it was unaware of the material terms of the charter, most notably the type of charter or rate of hire. It is insufficient for RESPONDENT to know 'in general and on open-ended terms' that there is to be a follow-on fixture, particularly where the follow-on charter represents such a drastic change in CLAIMANT's business (as set out at [46]).[64]

50. *Second*, it would be entirely inconsistent with RESPONDENT's bargain to hold it liable for CLAIMANT's substantial, unliquidated loss. RESPONDENT did not bargain for or receive consideration to bear such risks.[65] Indeed, RESPONDENT only inherented this liability under the *Carriage of Goods by Sea Act 1992*.[66] To the extent that RESPONDENT bore any risks of loss arising, its liability was capped by the demurrage provision which serves to liquidate the whole of the damage arising from a failure to complete cargo operations within the laytime (as set out at [28]–[33]). For the Tribunal to make RESPONDENT liable for CLAIMANT's loss would ultimately give CLAIMANT 'an advantage which [it] has not paid for'.[67]

51. *Third*, it is consistent with commercial practice to find that RESPONDENT, as an intermediary financier, who holds the B/L as security, did not assume responsibility for CLAIMANT's loss.[68] RESPONDENT, whose role was to merely facilitate the transaction, cannot reasonably be

[63] *The Sylvia* (n 54) 85 [40]–[41] (Hamblen J); *Borealis AB v Geogas Trading SA* [2011] 1 Lloyd's Rep 482, 488 [48] (Gross LJ).
[64] *The Achilleas* (n 55) 74–5 [36] (Lord Hope of Craighead).
[65] Ibid 278 [13] (Lord Hoffman); *British Columbia and Vancouver's Island Spar, Lumber and Saw-Mill Co Ltd v Nettleship* (1868) LR 3 CP 499, 508 (Wiles J).
[66] *Carriage of Goods by Sea Act 1992* (UK), s 3(1).
[67] *The Achilleas* (n 55) 68 [13] (Lord Hoffman); *British Columbia and Vancouver's Island Spar, Lumber and Saw-Mill Co Ltd v Nettleship* (1868) LR 3 CP 499, 508 (Wiles J).
[68] The Law Commission and The Scottish Law Commission, *Right of Suits in Respect of Carriage of Goods by Sea* (Law Commission No. 130, March 1991) 32–3 [3.15]–[3.20].

regarded as having assumed liability for loss of a subsequent fixture which it had little capacity to control.

52. Therefore, RESPONDENT cannot be reasonably regarded as having assumed responsibility for CLAIMANT's for loss beyond that which was liquidated by demurrage.

53. Although RESPONDENT concedes that it breached Clause E, it maintains that any losses flowing from such a breach are liquidated by the Demurrage Clause. In the alternative, no implied obligation ought to be imposed on RESPONDENT and, in any event, RESPONDENT was not an effective cause of CLAIMANT's loss, and such loss is too remote.

ARGUMENTS ON THE MERITS OF THE COUNTERCLAIM

VI. CLAIMANT BREACHED ITS OBLIGATIONS TO DELIVER ONLY TO THE LAWFUL HOLDER OF THE B/L

54. RESPONDENT has remained the lawful holder of the B/L since 3 October 2023, and is accordingly entitled to delivery of the Cargo.[69] CLAIMANT's misdelivery of the Cargo to Yu Shipping without presentation of the B/L is a breach of the 'essence' of the contract of carriage, namely the duty of a shipowner to deliver cargo only upon presentation of the bill of lading.[70]

55. CLAIMANT cannot rely on Clause 57 of the Rider Clauses to absolve it of liability. It is no answer to a claim in misdelivery to discharge cargo against a letter of indemnity, even if the shipowner is obliged by the Charterparty to deliver the goods without production of the B/L.[71]

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[69] *Record* 28; *Unicredit Bank AG v Euronav NV* ('*The Sienna*') [2024] 1 Lloyd's Rep 177, 186 [45] (Popplewell LJ, Asplin and Falk LJJ agreeing); *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* ('*The SS Glengarry*') [1959] AC 576 (PC), 586–9 (Lord Denning); *The Houda* (n 48) 550 (Neill LJ).

[70] *Motis Exports v Dampskibsselskabet AF 1912 Aktieselskab* [1999] 1 Lloyd's Rep 837, 841 (Rix J); *Erichsen v Barkworth* (1858) 3 H & N 894, 899 (Crompton J); *Trafigura Beheer BV and another v Mediterranean Shipping Company SA* ('*The MSC Amsterdam*') [2007] 2 Lloyd's Rep 622, 629 (Longmore LJ); *Standard Chartered Bank v Dorchester LNG (2) Ltd* ('*The Erin Schulte*') [2015] 1 Lloyd's Rep 97, 102 (Moore-Bick LJ).

[71] *SA Sucre Export v Northern River Shipping Ltd* ('*The Sormovskiy 3068*') [1994] 2 Lloyd's Rep 266, 274 (Clarke J); *BNP Paribus v Bandung Shipping Pte Ltd* [2003] 3 SLR(R) 611, [65]–[69] (Belinda Ang Saw Ean J) ('*BNP Paribas*'); *The "Yue You 902" and another matter* [2019] 2 Lloyd's Rep 617, 632 [69] (Pang Khang Chau JC) ('*Yue You*').

Indeed, the very premise of a letter of indemnity is that the carrier will be liable to the lawful holder of the B/L, but will be held harmless from the consequences by its indemnity.[72]

VII. RESPONDENT IS ENTITLED TO SUBSTANTIAL DAMAGES FOR CLAIMANT'S BREACH

56. RESPONDENT's primary contention is that CLAIMANT's breach was the effective cause of RESPONDENT's loss. RESPONDENT lost its ability to assert its security interest over the Cargo as a result of the misdelivery to Yu Shipping, and therefore could not recover the loan amount (**RESPONDENT's loss**). As RESPONDENT's misdelivery claim arises solely in contract, damages are measured by reference to the position in which RESPONDENT would have been had CLAIMANT's breach not occurred.[73] RESPONDENT submits that it is entitled to substantial damages because CLAIMANT's breach was an effective cause of its loss (**A**) and it did not cause its own loss, as it looked to the Cargo as security to recoup its lending (**B**).

A. CLAIMANT'S BREACH WAS THE EFFECTIVE CAUSE OF RESPONDENT'S LOSS

57. CLAIMANT's breach was the effective cause of RESPONDENT's loss, by reference to 'ordinary common sense and experience'.[74] This is because CLAIMANT delivered the Cargo without the B/L to a third party, absent which RESPONDENT would have retained its constructive possession of the Cargo, and could have exercised the right to delivery or possession of the Cargo in the event of non-payment. RESPONDENT can show that it would not have suffered the same loss in any event, given that it looked to the B/L, and more broadly, the Cargo, as security for its loan.[75] Accordingly, it could have sold the goods itself to recoup the value of its loan.

B. RESPONDENT DID NOT CAUSE ITS OWN LOSS

58. RESPONDENT can demonstrate that it both looked to the B/L as security for its loan, and that it would have exercised its right over this security. RESPONDENT's acceptance of the payment

[72] *The Stone Gemini* [1999] 2 Lloyd's Rep 255, 266 (Tamberlin J).
[73] *The Sienna* (n 69) 196–7 [104] (Popplewell LJ, Asplin and Falk LJJ agreeing).
[74] Ibid 196 [103] (Popplewell LJ, Asplin and Falk LJJ agreeing); *Martlet v Mullaley* (n 50) 186 [280] (Davies J)
[75] *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, 33 [56] (Navin Anand AR) ('*STI Orchard*').

letter of indemnity ('**Payment LOI**'), when read in its surrounding circumstances, does not represent an abandonment of its security interest over the Cargo (**i**). RESPONDENT's inactivity in relation to discharge did not mean it relinquished its security over the Cargo (**ii**).

59. As causation is an inherently factual inquiry, CLAIMANT cannot therefore demonstrate that RESPONDENT was responsible for its own loss by reference to the particulars of its allegation.[76] Further, even by reference to the decided cases, CLAIMANT's assertion cannot succeed, given that the relevant authorities are inherently distinguishable.[77]

(i) RESPONDENT did not forgo its security in the Cargo by accepting a Payment LOI

60. RESPONDENT's submission is that as consignee of the B/L, it always sought to maintain its rights over the Cargo. Despite the existence of the Payment LOI, the context and surrounding circumstances of the transaction indicate that there was no intention for RESPONDENT to forgo its security in the Cargo. This is for four reasons.

61. *First*, the terms of the Payment LOI are time-limited and do not substitute for the rights that RESPONDENT would inevitably obtain as consignee of the B/L.[78] Importantly, the seller 'irrevocably' agreed to provide RESPONDENT with the B/L directly after it came 'into [Seller's] possession'.[79] Therefore, the Payment LOI was not, as CLAIMANT suggests, a substitute form of security intended to facilitate delivery of the Cargo to the Charterer. Instead, the Payment LOI provided RESPONDENT with a temporary indemnity as against the Seller, which was only exercisable if the B/L was never provided.

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[76] cf *Record* 41 [14] (Statement of Reply and Defence to Counterclaim).
[77] cf *The Sienna* (n 69); cf *UniCredit Bank AG v Glencore Singapore Pte Ltd* [2023] SGCA 41 ('*Unicredit v Glencore*'); cf *Standard Chartered Bank (Singapore) Ltd v Maersk Tankers Singapore Pte Ltd Winson Oil Trading Pte Ltd, intervening* ('*The Maersk Princess*') [2023] 1 Lloyd's Rep 508; cf *STI Orchard* (n 75).
[78] *Unicredit v Glencore* (n 77) [55] (Belinda Ang Saw Ean JCA); cf *STI Orchard* (n 75) 25 [12] (Navin Anand AR).
[79] *Record* 45 (Payment LOI).

62. *Second*, the Payment LOI is addressed to RESPONDENT, ensuring that the rights conferred under the document were provided to it.[80] RESPONDENT's position here is therefore different to that of the bank in *Unicredit v Glencore*, which accepted a letter of indemnity addressed to the purchaser of cargo, rather than itself.[81] This meant that it had 'accepted the risk' that came with such an indemnity and could derive no security from the bills of lading, which were to be delivered to the seller.[82] It was expressly conceded in that case that had the letter of indemnity been addressed to the financing bank, as it has been here, the security provided by its content, in the absence of the bills of lading would have been 'directed at and promised to' the bank.[83]
63. *Third*, from 4 September 2023 (the date of the B/L's issue), the B/L was expressly consigned to RESPONDENT's order. As such, RESPONDENT, when it inevitably came into possession of the B/L under the terms of the Payment LOI and L/C, would have constructive possession of the Cargo.[84] RESPONDENT has ensured that it has a strong proprietary interest in the Cargo. This is unlike *STI Orchard*, where a pledge of the bills of lading was ineffective to provide the bank with the necessary security over the goods, as the documents had not been indorsed to the bank's order. Accordingly, its right to sell the goods in the event of Yu Shipping's default was never prejudiced, regardless of its acceptance of the Payment LOI.[85]
64. Indeed these steps were taken pre-emptively by RESPONDENT and were not conducted as a means to 'perfect its security' after being made aware of Yu Shipping's financial difficulties.[86] Both at the time that RESPONDENT chose to finance the purchase of the Cargo under the Payment LOI and when it explicitly requested presentation of the B/L, the Cargo remained in

[80] *Trafigura Beheer BV v Kookmin Bank Co* [2005] EWHC 2350 (Comm), [33] (Cooke J); *UniCredit v Glencore* (n 77) [55] (Belinda Ang Saw Ean JCA).
[81] *Unicredit v Glencore* (n 77) [55] (Belinda Ang Saw Ean JCA); cf *Record* 45 (Payment LOI).
[82] Ibid.
[83] Ibid [57] (Belinda Ang Saw Ean JCA).
[84] Peter Ellinger and Dora Neo, *The Law and Practice of Documentary Letters of Credit* (Hart Publishing, 2010) 108.
[85] Richard Aikens et al, *Bills of Lading* (Routledge, 3rd ed, 2021) 246–7 [8.35]; *ING Bank NV v The Demise Charterer of the Ship or Vessel* ('*The Navig8 Ametrine*') [2022] 1 Lloyd's Rep Plus 83, [5] (Justin Yeo AR).
[86] cf *STI Orchard* (n 75) 33 [58] (Navin Anand AR).

CLAIMANT's possession and therefore, the B/L remained available as the 'keys to the warehouse'.[87]

65. *Fourth*, treating acceptance of the Payment LOI as inconsistent with the maintenance of security over the Cargo would produce a commercially undesirable result. Within the context of the liquid bulk trade, the presentation of letters of indemnity under a letter of credit is a relatively common phenomenon, given that shipments will often reach ports before the bill of lading is available.[88] If financing banks, concerned that they were forfeiting their security interests, refrained from accepting letters of indemnity, the result would be delays in payment that would jeopardise the efficacy of international sale contracts.

(ii) RESPONDENT's conduct is consistent with the maintenance of security over the Cargo

66. CLAIMANT contends that RESPONDENT's inactivity is representative of an abandonment of its security over the Cargo and an acceptance of discharge against a letter of indemnity. This proposition is mistaken for four reasons.

67. *First*, RESPONDENT consistently viewed the Cargo as its primary form of security, and did not accept any lesser form of security. This was evident in its refusal to provide a trust receipt loan to Yu Shipping, having expressly stated that a trust receipt would not be granted following the 'latest review of Yu Maritime's [sic] financials'.[89] A trust receipt would have allowed RESPONDENT to release the B/L to Yu Shipping to allow it to take delivery of the Cargo, with RESPONDENT'S security instead being in the sale proceeds held on trust.[90] Here, RESPONDENT's refusal to issue a trust receipt underscores its desire to maintain its security interest over the

[87] *The Maersk Princess* (n 77) 515–6 [51] (Hock J).
[88] *STI Orchard* (n 75) 25 [12] (Navin Anand AR); *Trafigura Maritime Logistics Pte Ltd v Clearlake Shipping Pte Ltd Clearlake Chartering USA Inc and Another v Petroleo Brasileiro SA* ('*The Miracle Hope*') *(No 4)* [2023] 2 Lloyd's Rep 610, 614 [12] (Judge Pelling KC); *Euro-Asian Oil SA v Abilo (UK)* [2019] 1 Lloyd's Rep 444, 449–50 [28]–[36] (Simon LJ); Baris Soyer and Andrew Tettenborn, *International Trade and Carriage of Goods* (Routledge Informa Law, 2017) [8.4].
[89] *Record* 46 (Email Correspondence).
[90] *STI Orchard* (n 75) 32 [56] (Navin Anand AR); Michael Collett, 'Illusory Security of Banks in Trade Finance' (2023) 38(8) *Journal of International Banking and Finance Law* 531, 533; Michael Bridge, *Benjamin's Sale of Goods* (Sweet & Maxwell, 11th ed, 2021) [18-504].

Cargo, as opposed to the proceeds of sale or any other lesser form of security.[91] Indeed, even if RESPONDENT had provided Yu Shipping with the trust receipt, courts have rejected the view that a trust receipt, absent something else, constitutes an abandonment of the bank's security interest.[92]

68. *Second*, RESPONDENT's declaration to the Charterer that it should 'do as you deem fit as Charterers and we will not interfere as long as the loan is repaid' cannot be seen as a declaration of consent to the Cargo being discharged by a letter of indemnity.[93] This statement is contingent upon one crucial event – the repayment of the loan. It demonstrates RESPONDENT's commitment to assert its proprietary rights over the Cargo should payment not be forthcoming. CLAIMANT's submission that the declaration demonstrates the sale proceeds to be RESPONDENT's only security is commercially unviable, as a financing bank will inevitably attempt to secure its lending through multiple financial avenues.[94]

69. *Third*, the Tribunal must reject CLAIMANT's submission that RESPONDENT's failure to take delivery of the Cargo is evidence of its failure to maintain its security. RESPONDENT received the B/L no earlier than 4:02 PM on 3 October 2023.[95] CLAIMANT admits that the Cargo was discharged at 06:30 AM on 4 October 2023, meaning that RESPONDENT had, at most, 14 hours to take delivery.[96] Indeed, any expectation that RESPONDENT would attempt to take delivery of the Cargo prior to becoming lawful holder of the B/L would require it to invoke a Letter of Indemnity, which may have prejudiced its rights if it never received the B/L.[97]

70. Fundamentally, CLAIMANT's cannot show how RESPONDENT would go about facilitating the discharge of the Cargo in the absence of the B/L. An expectation that RESPONDENT would

[91] cf *STI Orchard* (n 75) 36 [74]–[75] (Navin Anand AR).
[92] *BNP Paribus* (n 71) [59] (Belinda Ang Saw Ean J); *Yue You* (n 71) 637 [121]–[122] (Pang Khang Chau JC).
[93] *Record* 46 (Email Correspondence).
[94] Stephenson Harwood, *Shipping Finance* (Euromoney, 3rd ed, 2006) 30–2; Collett KC (n 92) 531.
[95] *Record* 46 (Email Correspondence).
[96] *Record* 9 [14] (Statement of Claim).
[97] Richard Aikens et al, *Bills of Lading* (Routledge, 3rd ed, 2021) 251–3 [8.48]–[8.49]; *Yue You* (n 71) 637 [122] (Pang Khang Chau JC); cf *STI Orchard* (n 75) 36, [74] (Navin Anand AR).

actively endeavour to take delivery of the Cargo is not only uncommercial from RESPONDENT'S point of view, but would require CLAIMANT to engage in the very action for which it is currently being sued by RESPONDENT.

71. *Fourth*, and in any event, RESPONDENT always looked to the B/L as security for its loan to protect itself against the risk of the Cargo's misdelivery or dissipation. Indeed, part of the security which RESPONDENT received as consignee of the B/L was the valuable cause of action against CLAIMANT as contractual carrier under the contract of carriage.[98] Therefore, any contention that RESPONDENT relinquished its security under the B/L is inconsistent with its preservation of this right of suit.

72. Throughout the entirety of the dealings between RESPONDENT, Yu Shipping and CLAIMANT, it is crucial to note that RESPONDENT consistently upheld its security interest in the Cargo without acting in any way that would undermine the preservation of that interest. CLAIMANT is incorrect to assert that RESPONDENT did not view the Cargo as security and was therefore responsible for its own loss. Thus, the effective cause of RESPONDENT's loss was not its own financial arrangements, but rather solely the actions of CLAIMANT in misdelivering the Cargo.

VIII. RESPONDENT'S DAMAGES AMOUNT TO EITHER THE INVOICE VALUE OR MARKET VALUE OF THE CARGO

73. Given CLAIMANT's misdelivery of the Cargo, RESPONDENT is entitled to damages in the sum of USD 4,249,752.50, representing the invoice value of the Cargo (**A**). Alternatively, CLAIMANT is entitled to damages representing the market value of the Cargo (**B**).

A. RESPONDENT IS ENTITLED TO THE INVOICE VALUE OF THE CARGO

74. RESPONDENT is entitled to the recovery of damages to compensate its expenses incurred in reliance of the contract, 'which have been rendered futile as a result of [CLAIMANT's] breach'.[99]

[98] *The Houda* (n 48) 556 (Millett LJ); *Barclays Bank* (n 48) 89 (Lord Diplock).
[99] *Anglia Television v Reed* [1972] 1 QB 60, 64 (Lord Denning MR, Phillimore and Megaw LJJ); Julian Cooke et al, *Voyage Charters* (Routledge, 5th ed, 2022) [21.3]–[21.4].

The recovery of these reliance damages is not barred by common law, given CLAIMANT cannot prove that the contract's proper performance would have resulted in RESPONDENT suffering a loss to its net financial position.[100] RESPONDENT's wasted expenditure amounts to USD 4,249,752.50, representing the Cargo's invoice value.

B. IN THE ALTERNATIVE, RESPONDENT IS ENTITLED TO THE CARGO'S MARKET VALUE

75. Alternatively, RESPONDENT is entitled to the market value of 16,999.01 MT of palm oil within Busan, as at October 2023.[101]

[100] *CCC Films v Impact Quadrant Films* [1985] 1 QB 16, 32–3 (Hutchinson J); *Omak Maritime Ltd v Mamola Challenger Shipping Co* [2011] 1 Lloyd's Rep 47, 53 [34] (Teare J); *Yam Seng Pte Ltd v International Trade Corporation* [2013] 1 Lloyd's Rep 526, 552 [186] (Leggatt J).
[101] *Carriage of Goods by Sea Act 1971* (UK) sch, art IV(5)(b) (incorporating *The Hague Rules as amended by the Brussels Protocol 1968*).

REQUEST FOR RELIEF

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

a) declare that the Tribunal does not have jurisdiction to determine CLAIMANT's claim; or alternatively

b) declare that CLAIMANT is not entitled to unliquidated damages for breach of the express laytime provision;

c) declare that there exists no implied term to discharge within a reasonable time;

d) declare that CLAIMANT breached its contractual duty to only deliver the Cargo to RESPONDENT;

e) declare that CLAIMANT's conduct caused RESPONDENT's loss;

f) award RESPONDENT the remedies sought at [19] of its Statement of Defence and Counterclaim;

g) award RESPONDENT any other remedies that the Tribunal deems fit; and

h) award RESPONDENT the costs of this Arbitration.