24th ANNUAL INTERNATIONAL MARITIME LAW ARBITRATION MOOT

In the matter of arbitration held in Singapore

UNIVERSITAS INDONESIA

Veritas, Probitas, Iustitia | Est. 1849

MEMORANDUM FOR RESPONDENT

ON BEHALF OF	**AGAINST**
Tomahawk Maritime S.A.	**Veggies of Earth Banking Ltd.**
Trust Company Complex	Room 1818, 18/F Farmers Building
Ajeltake Road, Ajeltake Island	18 Gardens Road
Majuro, Marshall Island	Tuen Mun
Panama	Hong Kong SAR
(CLAIMANT)	**(RESPONDENT)**

TEAM Y

COUNSEL

Indry Septiarani | James Austin Gunawan | Priskila Saur N. Br. N. | Regita Eka Maritza

24th ANNUAL INTERNATIONAL MARITIME LAW ARBITRATION MOOT

In the matter of arbitration held in Guangzhou

MEMORANDUM FOR RESPONDENT

ON BEHALF OF

Tomahawk Maritime S.A.

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Ajeltake Road, Ajeltake Island

Majuro, Marshall Island

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(CLAIMANT)

AGAINST

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Hong Kong SAR

(RESPONDENT)

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LIST OF ABBREVIATIONS

	Abbreviation	Term
	¶	Paragraph
	¶¶	Paragraphs
	§	Section
A	Arbitration Agreement	Clause 78 containing agreement to enter arbitration in the event of conflict
B	B/L	Bill of Lading No. COW-001A dated 4 September 2023
C	Cargo	16,999.01 MT cargo of crude palm oil
	Charterer	Yu Shipping Ltd
	COGSA 1992	The United Kingdom's the Carriage of Goods by Sea Act 1992
	Claimant	Tomahawk Maritime S.A.
F	L/C	Letter of Credit
L	Laytime Provision	Clause E Part I Voyage Charter Party
	LOI	Letter of Indemnity
M	Moot Problem	"International Maritime Law Arbitration Moot 2024 Moot Problem" (26 December 2023), https://www.swansea.ac.uk/media/IMLAM-2024-Moot-Problem.pdf.
N	NoR	Notice of Readiness
O	Original Parties to the VCP	The Charterer and the Claimant
P	Parties	Tomahawk Maritime S.A. (Claimant) and Veggies of

		Earth Banking Ltd. (Respondent)
	PRC	The People's Republic of China
R	Respondent	Veggies of Earth Banking Ltd
	Rider Clauses	Rider Clauses referenced by the VCP
S	SCMA	Singapore Chamber of Maritime Arbitration
	Shipper	Goods Oil Sdn Bhd
U	Ultimate Buyer	Gileum Refinery Co Ltd
V	VCP	Voyage Charter Party dated 1 September 2023
	Vessel	Vessel MT "NIUYANG"

SUMMARY OF FACTS

[1] Tomahawk Maritime S.A ("**Claimant**") is a company registered and existing under the laws of Panama. Claimant is the owner of the vessel MT "NIUYANG" ("**Vessel**").[1] Veggies of Earth Banking Ltd. ("**Respondent**") is a financial institution registered and existing under the laws of Hong Kong.[2]

[2] On 1 September 2023, the Claimant entered a Voyage Charterparty ("**VCP**") with Yu Shipping Ltd ("**Charterer**") for the utilisation of Vessel to transport a 16,999.01 MT cargo of crude palm oil ("**Cargo**") from Bintulu, Malaysia, to Busan, South Korea. This VCP is set out in an amended VEGOILVOY form accompanied by a set of rider clauses which also contain their agreement to enter arbitration in the event of conflict ("**Arbitration Agreement**").[3]

[3] The Respondent financed the Cargo on behalf of the Charterers as the purchaser of the Cargo. This payment is to be made by a Letter of Credit ("**L/C**"). Pursuant to the loan given, the Respondent seeks to serve the Cargo as a security.

[4] The Vessel arrived at Busan on 20 September 2023 and the Notice of Readiness ("**NoR**") was issued on the same day.[4] However, there are no shipping documents, or a Letter of Indemnity ("**LOI**") given to the Respondent, whilst the L/C was payable against the presentation of such document. The Respondent only received the Bill of Lading ("**B/L**") and LOI from Goods Oil Sdn Bhd ("**Shipper**") on 3 October 2023 and remained in the continuous possession of the B/L ever since.[5]

[5] The Vessel then departed from Busan to Kaohsiung on 8 October 2023.[6] Unfortunately, due to adverse wind and sea conditions, the Vessel's progress to Kaohsiung was hampered. This situation led to the lower employment rate of the Vessel to USD 30,000 per day, from the initial USD 35,000 per day.[7] The Claimant subsequently initiated the arbitration process by sending a Notice of Arbitration to the Respondent. In return, the Respondent submits that the Tribunal does not have the jurisdiction over the present dispute and the Claimant is liable for a misdelivery.

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[1] "International Maritime Law Arbitration Moot 2024 Moot Problem" (26 December 2023), https://www.swansea.ac.uk/media/IMLAM-2024-Moot-Problem.pdf, accessed 15 January 2024 ("**Moot Problem**"), p. 7: Statement of Claim. ¶1.
[2] Moot Problem, p. 7: Statement of Claim, ¶2.
[3] Moot Problem, p. 7: Statement of Claim, ¶4.
[4] Moot Problem, p. 8: Statement of Claim, ¶9.
[5] Moot Problem, p. 37: Statement of Defence and Counterclaim, ¶16.
[6] Moot Problem, p. 9: Statement of Claim, ¶15.
[7] Moot Problem, p. 9: Statement of Claim, ¶14.

SUBMISSIONS ON PROCEDURAL MATTERS

SUBMISSION I: THE TRIBUNAL DOES NOT HAS THE JURISDICTION TO HEAR THE DISPUTE

[1] Clause 78 VCP regulates that English Law should apply to the VCP, but fails to nominate the governing law of the Arbitration Agreement.[8] The governing law of an arbitration agreement is used to assess its validity.[9] In the absence of a specific choice, the law of the main contract prevails.[10] Therefore, this Tribunal should use English Law to determine the seat of arbitration, since English Law governs the VCP and matters concerning its interpretation must align with it.[11]

[2] The Respondent argues that the seat of arbitration should be Guangzhou, as agreed by the Parties, and consequently, the Arbitration Agreement should be governed by The People's Republic of China ("**PRC**") Law, due to the designation of Guangzhou as the seat.[12] Furthermore, the Respondent contends that under PRC Law the arbitration clause is invalid, rendering this Tribunal without jurisdiction over the current dispute.[13] Additionally, the Respondent asserts that English Law should govern the merits of the case.

[3] According to Rule 30.1 Singapore Chamber of Maritime Arbitration ("**SCMA**") Rules, an arbitral tribunal has the authority to determine its jurisdiction.[14] This jurisdiction can be contested by the parties under Rule 8.8 SCMA Rules.[15] The Respondent hereby invokes the right to challenge this Tribunal's jurisdiction over the current case on the grounds that **(I)** there is no valid arbitration agreement and (**II**) English Law should be applied to the merits of the case.

I. This Tribunal does not have jurisdiction as there is no valid arbitration agreement

[4] Jurisdiction in arbitration refers to the tribunal's authority to resolve the dispute at hand. In the context of international commercial arbitration, this authority originates from the parties' consent which is

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[8] Moot Problem, p. 28: Annex B (Tomahawk Maritime Rider Clauses), ¶78.
[9] *Channel Tunnel v Balfour Beatty*, ¶672; *Kabab-Ji SAL v Kout Food Group*, ¶26; *Enka Insaat v Chubb*, ¶128.
[10] *Process & Industrial Developments Ltd v Nigeria*, ¶45; *Svenska Petroleum Exploration AB v Lithuania (No.2)*, ¶¶76 – 77; *Arsanovia Ltd v Cruz City*, ¶¶1 – 3.
[11] Moot Problem, p. 5: Response to Notice of Arbitration, ¶2.
[12] Moot Problem, pp. 35 – 36: Statement of Defence and Counterclaim, ¶¶4 – 5.
[13] Moot Problem, p. 36: Statement of Defence and Counterclaim, ¶¶6 – 8.
[14] SCMA Rules, Rule 30.1
[15] SCMA Rules, Rule 8.8

manifested in a valid arbitration agreement that signifies the parties' intent to engage in arbitration.[16] Consequently, in the absence of a valid arbitration agreement, the tribunal lacks jurisdiction.

[5] The Respondent submits that this Tribunal should find no jurisdiction in the present case as (**A**) the seat of arbitration is in Guangzhou, hence, (**B**) the governing law of the Arbitration Agreement is PRC Law, and (**C**) according to PRC Law, the Arbitration Agreement is invalid.

A. The seat of arbitration is in Guangzhou

[6] Seat of arbitration refers to the legal jurisdiction chosen by the parties involved or appointed by the arbitral institution, which can significantly influence the role of national courts, and the overall conduct of the arbitration.[17] In this instance, the Respondent asserts that (**i**) the incorporation of SCMA Rules does not automatically set Singapore as the seat of arbitration and (**ii**) the seat of arbitration is determined by the intended location of the arbitration hearings.

i. The incorporation of SCMA Rules does not automatically set Singapore as the seat of arbitration

[7] The Claimant contends that Singapore should be the seat of arbitration, with the strongest basis being the application of the SCMA Rules in the Arbitration Agreement.[18] No clause in the SCMA Rules regulates that the appointment of it would automatically import Singapore as the seat of arbitration. The Respondent argues that even with the application of SCMA Rules, there are no restrictions preventing parties from selecting Guangzhou as the agreed seat of arbitration. This is evidenced by Clause 32.1 SCMA Rules which allow for the possibility of the seat to be other than Singapore if the parties have mutually agreed.

[8] One strong indication that the parties would want to incorporate all clauses under institutional rules is through adopting the model clause provided by the arbitration institution. SCMA offers an arbitration model clause explicitly stating that disputes are to be resolved through arbitration seated in Singapore in accordance with SCMA Rules.[19] While the adoption of a model clause is not obligatory as implied by

[16] *Elektrim v Vivendi*, ¶67; Redfern & Hunter, ¶¶1.58 – 1.59; Born (2009), Part I.
[17] *Union of India v McDonnell Douglas*, pp. 50 – 51; *Sulamerica Cia Nacional v Enesa*, ¶29; *Channel Tunnel v Balfour Beatty,* pp. 357- 358; Born (2009), §11.03.
[18] Moot Problem, p. 39: Statement of Reply and Defence to Counterclaim, ¶4.
[19] SCMA Rules, SCMA Model Clauses.

its name, opting for it serves as a clear indication of the parties' intention to incorporate the rules into their arbitration process, providing guidance for interpretation.

[9] When an institution provides a model clause, parties are generally expected to adopt it if they intend for the arbitration to be strictly governed by certain rules.[20] Several cases have also illustrated instances where parties have chosen to incorporate their agreed institution model clause.[21]

[10] The current arbitration agreement does not mirror or adopt the model clause which specifically refers to Singapore.[22] Instead, not only that the parties did not adopt the SCMA Rules' model clause, but the Parties also expressly picked another place, i.e., Guangzhou. Therefore, the seat of arbitration is not strictly Singapore as per Clause 32.1 SCMA Rules but must be determined based on the Parties' agreement which led to the appointment of Guangzhou as the seat of arbitration.

ii. The seat of arbitration is determined by the intended location of the arbitration hearings

[11] In this matter, we submit that Guangzhou here should also be deemed as the seat of arbitration as (**a**) designation of the place where the arbitration award is made means the designation of seat, (**b**) the appointment of Guangzhou would ordinarily carry an implied choice of Guangzhou as the seat, and (**c**) Guangzhou proves inconvenient when solely considered as a place.

a. Designation of the place where the arbitration award is made means the designation of seat

[12] The Respondent asserts that this Tribunal should revert to the legal concept of the seat, suggesting that naming a seat implies the selection of a specific authority to oversee and administer the arbitration proceedings.[23] The implication is that when parties agree to conduct all arbitration hearings, including the making of the award, in one location, it should be interpreted as their intention to establish that location as the seat of arbitration.

[13] This approach was found in the case of *Enercon GmbH v Enercon (India) Ltd*, where the arbitration agreement regulates that the venue of the arbitration proceedings shall be London and the Indian Arbitration Act shall apply. Mr Justice Eder highlights that the parties had selected London as the place

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[20] *Jurong Engineering v Black & Veatch*, ¶11; *Cable & Wireless v IBM*, p. 1325; Born (2021-1), §1.07[B][3].

[21] *NWA v FSY*, ¶9; *BNP Paribas v Open Joint Stock Company Russian Machines*, ¶4; *Ivanishvili v Credit Suisse Trust*, ¶19; *BTY v BUA,* ¶20; *Eco Spark*, ¶¶9 – 10.

[22] Moot Problem, p. 36: Statement of Defence and Counterclaim, ¶5.

[23] *Braes of Doune v Alfred McAlpine*, ¶15; *Naviera Amazonica*, pp. 119–120; *Shashoua v Sharma*, ¶23.

to carry out the entire arbitration process including the award issuance. Consequently, London was designated as the seat of arbitration, affirming that the location chosen for award issuance is tantamount to designating the arbitration seat.[24]

[14] In the present case, the Parties have not designated any location other than Guangzhou for conducting the arbitration.[25] It follows that all proceedings, including the issuance of the award, are to occur in Guangzhou. Therefore, Guangzhou should be considered the seat of arbitration, as it is the place where the award will be made.

b. The appointment of Guangzhou would ordinarily carry an implied choice of Guangzhou as the seat

[15] The Respondent contends, this Tribunal should see Guangzhou as the seat of arbitration as there is nothing contrary in the agreement that states otherwise or there are no *significant contrary indicia*.

[16] In the case of *Shagang v Daewoo Logistic*, Hamblen J held that an arbitration clause stipulating that "*the arbitration is 'to be held in Hong Kong'*" would ordinarily carry an implied choice that Hong Kong is the seat of the arbitration unless there is a significant indication in contrary to it.[26]

[17] In the present case, the appointment of Guangzhou would ordinarily indicate the implied choice of the seat of arbitration. The strongest indication that would indicate otherwise is the appointment of SCMA Rules to be applied and incorporate Singapore as the seat of arbitration. Nonetheless, the Respondent has previously submitted that the appointment of such rules does not automatically appoint Singapore as the seat, on top of that Rule 32.1 SCMA Rules allows the party to choose the seat to be other than Singapore. Consequently, Guangzhou would ordinarily carry implied choice as the seat as there are no other significant indications that indicate otherwise.

c. Guangzhou proves inconvenient when solely considered as a place

[18] While convenience is a crucial factor in determining the place of arbitration, the selection of the seat of arbitration may not necessarily align with convenience. In this matter, Respondent submits that the

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[24] *Enercon GmbH v Enercon (India) Ltd*, ¶63; *C v D*, ¶37; *Minister of Finance (Inc) v International Petroleum*, ¶37.
[25] Moot Problem, p. 36: Statement of Defence and Counterclaim, ¶5.
[26] *Shagang v Daewoo Logistic*, ¶37.

appointment of Guangzhou by the Parties would only be explicable if it is intended to be used as the seat of arbitration.

[19] The case of *Enercon GmbH v Enercon (India) Ltd* held that when the appointment of a place of arbitration is deemed as inconvenient, its designation then would have some other function for it to be explicable. A place of arbitration is inconvenient when (i) the object of the dispute does not relate to the appointed place of arbitration; (ii) neither party comes from the said appointed place; and (iii) the evidence provided would likely be in a country other than the appointed place.[27] This principle was exemplified by Cooke J in *Shashoua v Sharma* where the arbitration agreement specified London as the venue of the arbitration despite the shareholder agreement being governed by Indian law. Consequently, London was deemed the seat of arbitration rather than India as London's selection would have been inconvenient unless established as the arbitration seat.[28]

[20] Applying this reasoning to the present case, Guangzhou is not a convenient geographical venue for disputes concerning the transport of Cargo from Malaysia to South Korea between a Panama and Hong Kong company,[29] where the related party is mostly located in South Korea and possibly to some extent in Taiwan.[30] Therefore, with such inconvenience, Guangzhou would not merely be chosen as the hearing place of arbitration. Thus, this Tribunal should then infer that Guangzhou has been appointed by the Parties as the seat of arbitration in the present case.

B. As Guangzhou is the seat, the governing law of the Arbitration Agreement is PRC Law

[21] As established in *Enka Insaat v Chubb,*[31] *Sulamerica Cia Nacional v Enesa,*[32] *and A v B,*[33] the arbitration agreement will be governed by the law of the designated seat of arbitration if they have not specified a choice-of-law to govern it. This suggests the parties' intent for the seat's law to govern all aspects of the arbitration agreement, including its formal validity and challenge to an arbitral award.[34]

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[27] *Enercon GmbH v Enercon (India) Ltd*, ¶¶62 – 63.
[28] *Shashoua v Sharma*, ¶27; *Process & Industrial Developments v Nigeria.*, ¶87.
[29] Moot Problem, p. 7: Statement of Claim, ¶¶1 – 2.
[30] Moot Problem, p. 7: Statement of Claim, ¶5.
[31] *Enka Insaat v Chubb,* ¶121.
[32] *Sulamerica Cia Nacional v Enesa*, ¶29.
[33] *A v B*, ¶111.
[34] *C v D*, ¶27; *Minister of Finance (Inc) v International Petroleum*, ¶36.

[22] In the present case, the Arbitration Agreement did not expressly contain any choice of law to govern it.[35] Consequently, this Tribunal must apply the law of the seat of arbitration to determine the arbitration agreement's validity.

C. According to PRC Law, the Arbitration Agreement is invalid.

[23] The Respondent contends that this Tribunal should find that there are no valid arbitration agreements under the PRC Law as (**i**) the Arbitration Agreement did not fulfill the requirement under Clause 16 PRC Arbitration Law as it did not contain an arbitration commission. Shall this Tribunal find that it still appoints SCMA as the arbitration commission, (**ii**) in any event, the Arbitration Agreement is not valid as the SCMA is not an arbitration commission under Clause 10 PRC Arbitration Law.

i. The Arbitration Agreement did not fulfill the requirement under Clause 16 PRC Arbitration Law as it did not contain an arbitration commission

[24] Clause 16 PRC Arbitration Law requires an arbitration agreement to appoint an arbitration commission to be considered valid. The Respondent submits that Clause 78 VCP is invalid as the Arbitration Agreement merely contains rules and did not appoint any arbitration commission.[36]

[25] While the arbitration commission and its rules are two closely linked elements in arbitration, each serves a different role. An arbitration commission is a body whose purpose is to administer and supervise the conduct of arbitration and to provide the rules by which the arbitration will be conducted.[37]

[26] The absence of a designated arbitration commission was reflected in *Zublin International GmbH and Wuxi Woke General Engineering Rubber Co*., where the arbitration agreement's failure to specify the Arbitration Commission, opting instead for the application of the institution rules alone, rendered the clause invalid.[38]

[27] In the present case, the Arbitration Agreement did not contain any arbitral commission but only chose SCMA Rules to be applied.[39] The choice of the rule itself does not automatically come with the appointment of the said arbitration commission. Consequently, this Tribunal should find that there is no

[35] Moot Problem, p. 36: Statement of Defence and Counterclaim, ¶5.
[36] Moot Problem, p. 28: Annex B (Tomahawk Maritime Rider Clauses), ¶78.
[37] *Bovis Lend v Jay-Tech Marine & Projects*, ¶18; Born (2009), §1.04[E][3]; Born (2021-2), Chapter 3.
[38] *Züblin International GmbH and Wuxi Woke General Engineering Rubber Co*., Ltd, p. 4.
[39] Moot Problem, p. 28: Annex B (Tomahawk Maritime Rider Clauses), ¶78.

arbitration commission as it did not fulfill the requirement of Clause 16 PRC Arbitration Law making it invalid. Hence, this Tribunal did not have jurisdiction over the present dispute.

ii. In any event, the Arbitration Agreement is not valid as the SCMA is not an arbitration commission under Clause 10 of PRC Arbitration Law

[28] In the event that this Tribunal decides that the SCMA Rules equals the appointment of SCMA as an arbitration commission, we submit that the Arbitration Agreement would still be invalid as it is not an arbitration commission under Clause 10 PRC Arbitration Law.

[29] PRC Arbitration possesses a strict regime towards foreign arbitration institutions as evidenced under Clause 10 PRC Arbitration Law which requires the arbitration commission to be registered under the central government. This also has been provided in the case of *Shenhua Coal Trading Co. v Marinic Shipping Company*, in which the court found that the definition of "arbitration commission" under the PRC Arbitration Law did not apply to foreign arbitration commissions.[40]

[30] In this matter, SCMA is a foreign arbitration commission as they are not registered under the central government of the PRC. Consequently, this Tribunal should find that SCMA is not an arbitration commission under the PRC Arbitration Law making the Arbitration Clause invalid. In this matter, this Tribunal should find no jurisdiction over the present dispute.

II. English Law should be applied to the merits of the case

[31] The Respondent argues that although the validity of the Arbitration Agreement is determined by PRC Law, this Tribunal should apply English Law to the merits of the case because the Parties have designated English Law to govern the Charterparty.

[32] Rule 31 SCMA Rules titled "Applicable Law," states that the tribunal shall apply the law designated by the parties as applicable to the substance of the dispute.[41] The SCMA also provides an applicable law model clause as follows: "*This contract is governed by the laws of [Singapore].*"[42] This indicates that under the SCMA Rules, the applicable law refers to the law governing the contract and thus applies to the merits or substance of the dispute.

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[40] *Shenhua Coal Trading Co. v Marinic Shipping Company.*
[41] SCMA Rules, Rule 31.
[42] SCMA Rules, SCMA Model Clauses.

[33] In the present case, the Charterparty is governed by English Law.[43] Therefore, this Tribunal should regard English Law as the agreed applicable law for the merits, as selected by the Parties.

SUBMISSION ON THE MERITS OF THE DISPUTE

SUBMISSION II: The Claimant is not entitled to claim for the loss of its next fixture's profits

[34] The Claimant is not entitled to claim for the loss of its next fixture's profits as (**I**) the implied term to discharge and take the delivery of the Cargo within a reasonable time does not exist and (**II**) the Respondent is not liable for the payment of demurrage and the consequential damages.

I. The implied term to discharge and take the delivery of the Cargo within a reasonable time does not exist

[35] Laytime is an express provision under a voyage charter party that regulates the permitted time to complete loading and unloading operations.[44] Failure to conduct such operations will lead to the payment for demurrage to the shipowner.[45] The Claimant argues that the Respondent is liable for demurrage and damages in the amount of USD 4,249,752.50 because the Respondent has allegedly breached an "implied term" to take the Cargo within a reasonable time.[46]

[36] In contrast, the Respondent submits that (**A**) the implied term does not exist as Clause E Part I VCP[47] ("**Laytime Provision**") already governs the period to take the delivery of the Cargo and (**B**) alternatively, the implied term does not apply in the event that it exists.

A. The implied term does not exist as the Laytime Provision already regulates the timeframe to take the delivery of the Cargo

[37] The VCP provides that the Cargo must be discharged within 96 (ninety-six) hours since a NoR is tendered.[48] As the timeframe for the discharge and to take the delivery of the Cargo has been expressly written, the Respondent submits that the implied term to discharge and take the delivery of the Cargo within a reasonable time does not exist.

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[43] Moot Problem, p. 28, ¶78: Tomahawk Maritime Rider Clauses.
[44] *ERG Raffinerie Mediterranee v Chevron USA*, ¶18, Schofield, ¶4.18; Wilson, p. 51.
[45] *Islamic Republic of Iran Shipping Lines v Ierax Shipping Co*, p. 6.
[46] Moot Problem, p. 10: Statement of Claim, ¶20.
[47] Moot Problem, p. 12: Statement of Claim, Annex A (VCP)
[48] Moot Problem, p. 14: Statement of Claim, Annex A (VCP)

[38] As established in *The Kriti Rex*, an implied term to take the delivery of a cargo within a reasonable time only exists when there is no express (i.e. laytime) provision concerning the period to take such delivery.[49] Hence, the absence of an express agreement on a particular matter serves as the foundation for asserting the presence of an implied term.[50]

[39] In the present case, the existence of an express term for the timeframe to discharge and take the delivery of the Cargo is evident by Laytime Provision which states that the total hours for the laytime is 96 (ninety-six) hours.[51] Hence, the Tribunal does not need to imply a term for the Respondent to take the delivery of the Cargo within a reasonable time. Conclusively, the implied term to take the Cargo within a reasonable time does not exist as the express term regulating the period to discharge and take the delivery of the Cargo is already present in the VCP.

B. Alternatively, the implied term does not apply in the contract in the event that it exists

[40] In the event that the Tribunal deems that the implied term exists despite the presence of the express term, the Respondent submits that the implied term shall not automatically apply as there are requirements that are not met. The judge in *The Reborn*[52] applied two requirements that need to be alternatively fulfilled in determining whether an implied term for the charterer to nominate a safe berth for the ship exists. First, the implied term has to give the business efficacy of the contract.[53] Second, the term has to fulfill the officious bystander test.[54]

[41] To this end, the Respondent submits that the implied term does not exist as (**i**) it does not satisfy the business efficacy of the contract and (**ii**) it does not fulfill the "*officious bystander*" test.

i. The implication does not satisfy the business efficacy of the contract

[42] The Respondent submits that the implied term does not meet the business efficacy test as its absence will not cause a lack of commercial coherence or contradict to the presumed intention of the Parties.

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[49] *The Kriti Rex,* p. 190-191; *Fowler v Knoop*, p. 304; *The Spiros C*, ¶21.
[50] Foxton, Art. 175; *The APJ Priti,* ¶42*; The Reborn*, ¶18 *Yoo Design Services Ltd v Iliv Realty Pte Ltd,* ¶39; *Louis Dreyfus,* 39 *& Co v Lauro*, p. 121.
[51] Moot Problem, p. 12: Statement of Claim, Annex A (VCP).
[52] *The Reborn,* ¶43.
[53] *The Reborn,* ¶12; *The Moorcock,* ¶68; *Greenhouse v Paysafe Financial Services Ltd*; *Yoo Design Services Ltd v Iliv Realty Pte Ltd*; *Attorney General of Belize v Belize Telecommunications Ltd.*, p. 25; *Reigate v Union Manufacturing*, p. 605.
[54] *The Reborn*, ¶12; *The Moorcock*, ¶68; *Greenhouse v Paysafe Financial Services Ltd*; *Attorney General of Belize v Belize Telecommunications Ltd.*, p. 25.

[43] In *Greenhouse v Paysafe Financial Services,* a term can only be implied if it is necessary to give business efficacy to the contract. Business sense and efficacy indicate that the parties have the need to include a clause to make the contract effective in achieving its commercial purpose.[55]

[44] As established in *The Moorcock*,[56] *Mark Spencer v BNP Paribas*,[57] and *Yoo Design Services Ltd v Iliv Realty Pte Ltd,*[58] an implied term must satisfy two requirements to provide business efficacy. First, the contract's practical and commercial coherence will be affected by the absence of the implied term.[59] Second, the implied term aligns with the presumed intentions of the parties.[60]

[45] To this end, the Respondent submits that the implied term does not satisfy the business efficacy test as (**a**) the absence of the implied term will not result in a lack of commercial and practical coherence and (**b**) the implied term does not align with the presumed intention of the Charterer and the Claimant ("**Original Parties to the VCP**").

a. The absence of the implied term will not result in a lack of commercial and practical coherence of the contract

[46] The contract remains commercially and practically coherent without the implied term as the Laytime Provision already specifies the timeframe for taking delivery of the Cargo.

[47] An implied term provides business efficacy when the contract would lack commercial or practical coherence without it.[61] There is no need to include the implied term when the absence of such a term would still make the contract work perfectly well in the sense that both parties can perform their express obligation.[62]

[48] In the present dispute, the implied term does not apply as the Laytime Provision already provides business efficacy to the Parties as it governs the permitted time allowed for loading and discharging the Cargo. Therefore, the Claimant's contention that an implied term to take reasonable time exists due to

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[55] *Greenhouse v Paysafe Financial Services Ltd,* ¶12.
[56] *The Moorcock*, ¶68.
[57] *Greenhouse v Paysafe Financial Services Ltd,* ¶12.
[58] *Yoo Design Services Ltd v Iliv Realty Pte Ltd,* ¶51.
[59] *Marks and Spencer Plc v BNP Paribas Securities Services*, ¶21; *Yoo Design Services Ltd v Iliv Realty Pte Ltd*, ¶54; *Liverpool City v Irwin,* p. 253; *Greenhouse v. Financial Services Ltd,*, ¶12; *Reigate v Union Manufacturing Co*, p. 605; *The Reborn*, ¶23.
[60] *The Reborn*, ¶23; *The Moorcock*, ¶68; *Marks and Spencer Plc v BNP Paribas Securities Services,* ¶66; *Yoo Design Services Limited v Iliv Reality Pte Ltd*, ¶54.
[61] *The Moorcock*, ¶68; *Yoo Design Services Ltd v Iliv Realty Pte Ltd,* ¶51; *Marks and Spencer Plc v BNP Paribas Securities Services Trust Co Ltd*, ¶21; *Liverpool City v Irwin,* p. 253; *Greenhouse v Financial Services Ltd,* ¶12; *Reigate v Union Manufacturing Co Ltd*, p. 605; *The Reborn*, ¶23.
[62] *Ibid.*

the existence of Clause 38 Rider Clauses referenced by the VCP ("**Rider Clauses**") concerning the Claimant's next employment does not provide a business efficacy as the VCP will still be able to function effectively.[63] Hence, the absence of the implied term will not result in a lack of commercial and practical coherence in the contract as the laytime provision already governs the reasonable time to take the delivery of the Cargo.

b. The implied term does not apply as the presumed intention of the Original Parties to the VCP is reflected in the Laytime Provision

[49] The Respondent argues that the implied term does not exist as the presumed intention of the Original Parties to the VCP is to have the Laytime Provision as the specific period in taking the delivery of the Cargo.

[50] Lord Bowen in *The Moorcock* observed that an implied term exists when it aligns with the presumed intention of the parties evidenced by its function to give the contract an efficacy that the parties to the contract must have intended.[64] Lord Carnwath in *Mark & Spencer* then emphasized that such presumed intention can be established by looking at the objective evidence available rather than imposing the parties' own idea on what the contract should be.[65] The objective evidence should be based on the words written in the contract rather than the intentions the parties attempt to convey through the wording.[66]

[51] Presently, the presumed intention of the Original Parties to the VCP is ensuring that the VCP will be able to complete the carriage of the Cargo within the timeframe agreed by them. In the VCP, the Parties have specifically regulated that the duration for the laytime is 96 (ninety-six) hours.[67] As this provision exists, any other terms governing the timeframe may not align with the presumed intention of the Original Parties to the VCP given that they had specifically regulated such timeframe. Therefore, the implied term does not align with the presumed intention of the Original Parties to the VCP.

ii. The implied term does not fulfill the "*officious bystander*" test

[52] The implied term which obliges the Respondent to take the Cargo within the reasonable time does not

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[63] Moot Problem, p. 25: Statement of Claim, Annex B (Rider Clauses).
[64] *The Moorcock,* ¶68.
[65] *Mark and Spencer Plc v BNP Paribas*, ¶67.
[66] *Ibid,* ¶667; Corbin, p.161.
[67] Moot Problem, p. 12: Statement of Claim, Annex A (VCP).

fulfill the officious bystander test as any reasonable person understands that the Laytime Provision functions to govern the period of taking delivery of the Cargo.

[53] The officious bystander is fulfilled when a term is so obvious that any reasonable person who is involved in the contract will understand its existence. Moreover, the implied term will pass the officious bystander test if the term is so clear that it goes without saying, and it must be evident that not only a term is to be indicated, but also exactly how that term can be expressed clearly. This is demonstrated by the fact that a party will agree to such implied terms if another party to the contract hypothetically suggests that the implied term should be adopted as an obligation in the contract.[68]

[54] In the present case, the implied term is not obvious as a reasonable person in the shoes of the parties to the VCP would not find the implied term as the provision which regulates the reasonable timeframe in taking the delivery of the Cargo as they will immediately find the Laytime Provision as the period to take the delivery of the Cargo. Because of this, the implied term is not obvious.

[55] In conclusion, the Respondent submits that there is no implied obligation for the Respondent to discharge and take the delivery of the Cargo within a reasonable time as the implied term does not fulfill both the business efficacy and officious bystander tests.

II. The Respondent is not liable for the payment of demurrage and the consequential damages

[56] The Claimant contends that the Respondent is liable for the payment of the demurrage and the consequential damages arising due to the breach of the alleged implied term.[69] However, the Respondent objects to the Claimant's claim since (**A**) the party who is liable for the payment of demurrage is the Charterer and (**B**) the Respondent is not liable for the consequential damages as the amount of demurrage already covers the damages for the breach of contract even if it is liable for the payment of demurrage.

A. The party responsible for the payment of demurrage is the Charterer

[57] The Respondent asserts that the party who is liable for the payment of demurrage is the Charterer as it is the party who failed to fulfill its obligation to take the discharge and delivery of the Cargo within the

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[68] *Attorney General of Belize v Belize Telecommunications Ltd.*, p. 25; *Shirlaw v Southern Foundries,* p. 227*; Mark and Spencer Plc v BNP Paribas,* ¶23; *Anglo-Saxon Petroleum Co v Adamastos Shipping C*o, p. 174; *Kason kek-Gardner ltd v Process Compenent Ltd,* p. 54; *The Reborn*, ¶23.

[69] Moot Problem, p. 24, Annex B: Statement of Claim.

laytime provision. Even though Clause 27 Rider Clauses states that the Respondent may be held liable for the payment of demurrage, that clause will only be applicable if it is attributable to the Respondent.

[58] A laytime provision in a charterparty serves as a contractual term that will impose a strict obligation to load or discharge and take the delivery of the cargo within that time frame.[70] Lord Diplock in *The Johanna Oldendorf* adopted that contractual duties in the context of the charterparty under the agreement are treated as absolute.[71] Consequently, any party relevant to a contract of carriage has an obligation to ensure that anything that he warranted to do, is done.[72] They only cannot be held liable if it was the result of the default of another party.[73]

[59] Presently, the Claimant lost its future fixture's profit due to the default of the Charterer in sending the VCP to the Respondent one day prior to the scheduled departure from Busan.[74] The Charterer had never informed the duration of the laytime. Other than that, it only mentioned Clause 38 Rider Clauses relating to the Claimant's next employment clause on 29 September 2023 by sending a copy of the VCP.[75] Thus, the Respondent did not know that the Claimant had been in a fixed-time charter party with another party.

[60] Had the Charterer informed the Respondent regarding the Claimant's future employment much earlier, the Respondent would have discussed possible measures to ensure that the delivery of the Cargo would not hinder the Claimant's schedule in meeting its next fixture. Hence, the only party who should bear the cost of demurrage should be the Charterer regardless of Clause 27 Rider Clauses which states that the consignee and the receivers of the Cargo may be responsible for the payment of the demurrage.[76] In conclusion, the Charterer should be the only party held liable for the payment of demurrage given that the cause of the Claimant's loss is the Charterer's default in ensuring that the Cargo has been discharged within the Laytime Provision.

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[70] *Budget v Binnington*, ¶40; Foxton, Art. 176; Wilson, p. 74; Gay, p. 72.
[71] *The Johanna Oldendrof,* pp. 556-557.
[72] *Ibid,* p. 556.
[73] *Ibid,* p. 557.
[74] Moot Problem, p. 47: Statement of Reply and Defence to Counterclaim, Annex A (Correspondences between the Charterer and the Respondent prior to the discharge and delivery of the Cargo).
[75] *Ibid*.
[76] Moot Problem, p. 24, Statement of Claim, Annex B (Rider Clauses).

B. Even if the Respondent is liable for the demurrage, the Claimant's claim is limited to the payment of demurrage as the consequential loss has been covered by the demurrage

[61] The Claimant contends that the Respondent is liable for the consequential damages flowing directly from the breach of laytime due to the magnitude of the Claimant's next employment loss.[77] Nevertheless, the Claimant is only entitled to the payment of demurrage as (**i**) the demurrage rate already covers the loss contended by the Claimant and (**ii**) the only breach that occurred is the breach of the Laytime Provision.

i. The demurrage rate already covers the loss contended by the Claimant

[62] The payment of demurrage already covers the damages for the breach of laytime provisions as the demurrage is a liquidated damage that covers possible losses which may occur when a breach of the Laytime Provision occurs. Such an amount sufficiently covers the Claimant's loss.

[63] Demurrage is a sum agreed by the charterer to be paid as liquidated damages for delay beyond a stipulated or reasonable time for loading or unloading, generally referred to as the lay days or laytime.[78] Liquidated damages are an exact pre-established sum to be paid as compensation if one party fails to fulfill the specific contractual obligations.[79] They can provide compensation for losses that are difficult to measure with any degree of accuracy.[80]

[64] The insertion of liquidated damages in a contract enables parties to precisely ascertain their liabilities and prevent the other party from paying excessive damages.[81] In a charter party, the amount of demurrage written is liquidated damages which specifies the agreed sum which will compensate the losses a shipowner suffered from another party's breach of laytime.[82] Sargent LJ in *The Eternal Bliss* further concluded that a loss of earning occurred during the detention of a vessel will be sufficiently covered by the payment of demurrage.[83]

[65] In the present case, Clause G Part I VCP already stipulates the amount of demurrage in the amount of

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[77] Moot Problem, p. 10, ¶20: Statement of Claim.
[78] Foxton, Art. 170; *The Eternal Bliss*, ¶1.
[79] *The Eternal Bliss*, ¶17; *Chandris v Isbrandtsen-Moller Co Inc*, p. 249; *Suisse Atlantique v NV Rotterdamsche Kolen Centrale*, p. 542.
[80] *The Eternal Bliss*, ¶53.
[81] *Ibid.*
[82] *The Lips*, p. 315, *The Eternal Bliss*, ¶52, *Navico AG v Vrontados Naftiki Etairia*, p .383, *Suisse Atlantique v NV Rotterdamsche Kolen Centrale*, p. 533, *Islamic Republic of Iran Shipping Lines v Ierax Shipping Co*, p. 87.
[83] *The Eternal Bliss*, ¶28; *Navico AG v Vrontados Naftiki Etairia*, p. 383.

USD 1,500 per hour.[84] This rate is the amount that the Original Parties to the VCP agreed to cover any losses arising due to the breach of laytime provision including the Claimant's loss of earning. The understanding that the demurrage intended to cover loss of the Claimant's earnings is shared by the Charterer evidenced by its email reply to the Claimant. It stated that the payment of demurrage is already compensated for the damages flowing from the delay.[85]

[66] Conclusively, the payment of demurrage already covers the damages flowing from the delay since the demurrage represents the stipulated damages outlined within the contract.

ii. The only breach that occurred is the breach of the Laytime Provision

[67] A party can only recover consequential damages in addition to demurrage when it is proven that an additional breach aside from the laytime occurs.[86] The Respondent argues that there is no breach of a which occurred aside from the breach of the Laytime Provision. Because of this, the Claimant cannot recover the loss from its future fixture profits.

[68] If a shipowner seeks to recover damages in addition to demurrage arising from the delay, it must prove a breach of a separate and distinct obligation. In disputes relating to damages in addition to demurrage, most cases including *Suisse Atlantique v NV Rotterdamsche Kolen Centrale,*[87] *Navico AG v Vrotados Naftiki Etairia Pe,*[88] *The Bonde,*[89] and *The Eternal Bliss,*[90] provide that there are two requirements which must be cumulatively fulfilled in order to recover damages in addition to demurrage: (i) a breach of an obligation different from the breach of laytime provision and (ii) the consequential loss must be distinct from the loss incurred during the detention of the vessel. This must be fulfilled regardless of the discrepancy between the amount of demurrage and the consequential damages.[91]

[69] In the present dispute, there is no breach of separate obligation other than the Laytime Provision because the implied term to discharge and take the delivery of the Cargo within a reasonable time does not exist. Even though the loss suffered by the Claimant may be distinct from the loss covered by the demurrage,

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[84] Moot Problem, p. 13: Statement of Claim, Annex A (VCP).
[85] Moot Problem, p. 9, Statement of Claim, ¶13.
[86] *Suisse Atlantique v NV Rotterdamsche Kolen Centrale*, p. 549; *Navico AG v Vrontados Naftiki Etairia,* p. 383; *The Bonde,* p. 144; *The Eternal Bliss,* ¶52.
[87] *Suisse Atlantique v NV Rotterdamsche Kolen Centrale*, p. 549.
[88] *Navico AG v Vrontados Naftiki Etairia,* p. 383.
[89] *The Bonde,* p. 144.
[90] *The Eternal Bliss,* ¶52.
[91] *Suisse Atlantique v NV Rotterdamsche Kolen Centrale*, p. 565.

the unfulfillment of one of the standards to recover damages in addition to demurrage will make the Claimant not entitled for the consequential damages as it must be cumulatively fulfilled. Additionally, the Claimant cannot rely on the magnitude of loss suffered by the Respondent to recover the damages.[92]

[70] Because of this, the only breach which occurred is the breach of laytime. Consequently, the Claimant's claim is only limited to the payment of demurrage since the Respondent did not breach any separate obligation aside from the laytime provisions.

SUBMISSION III: The Claimant is liable for the misdelivery of the Cargo

[71] The Claimant committed a misdelivery of the Cargo to a third party who is not entitled to such a delivery leading to its right for compensation in the amount of USD 4,249,752.50.[93] The Respondent can pursue this claim as (**I**) the Respondent has the title to sue as it is the lawful holder of the B/L pursuant to Section 5(2) of the United Kingdom's the Carriage of Goods by the Sea Act 1992 ("**COGSA 1992**"). Furthermore, (**II**) the Respondent did not consent to the delivery of the Cargo without the production of the B/L and (**III**) the Claimant has misdelivered the Cargo. Consequently, (**IV**) the Respondent is entitled to claim damages resulting from the misdelivery of the Cargo.

I. The Respondent has the title to sue as they are the lawful holder of the B/L pursuant to Section 5(2) COGSA 1992

[72] A party can pursue a misdelivery claim if it has the title to sue the carrier. A title to sue is a beneficial and necessary right. It gives the ability to sue the carrier if the goods are lost, damaged, and/or misdelivered.[94] The party can obtain these rights once it becomes a lawful holder of B/L under Section 5(2) COGSA 1992.[95] To be held as a lawful holder of the B/L under Section 5(2) COGSA 1992, the party has to become the holder of the B/L in good faith.[96]

[73] To this end, the Respondent submits that it is the lawful holder of the B/L as (**A**) the Respondent is the holder of the B/L and (**B**) the Respondent obtained the B/L in good faith.

[92] Moot Problem, p. 40: Statement of Defence and Counterclaim, ¶10.
[93] Moot Problem, p. 37: Statement of Defence and Counterclaim, ¶¶18–19.
[94] COGSA 1992, §2(1); *Foxton,* Art. 8; *The Pace (No 2)*, ¶7.
[95] COGSA 1992, §2(1); *Foxton,* Art. 8; *The Pace (No 2)*, ¶7; *East West Corporation v DKBS 1912 and Akts Svendborg Utaniko Ltd v P&O Nedlloyd B.V*, ¶19, *The Erin Schulte,* ¶21.
[96] COGSA 1992, §5(2).

A. The Respondent is the holder of the B/L

[74] The Respondent is the lawful holder of the B/L as the Respondent was in the actual possession of the B/L and identified as a consignee in the B/L.[97]

[75] Section 5(2) COGSA 1992 stipulates that a holder of a bill of lading either has actual possession of the bill, be identified as a consignee in the bill, endorsee of the order bill, and/or a person possessing the bill through a transaction.[98]

[76] In the present case, the Respondent received the physical document of the B/L on 3 October 2023 and the Respondent is the contractual party named as a consignee in the B/L.[99] Consequently, as the Respondent was in the actual possession of the B/L and identified as a consignee in the B/L, the Respondent is the holder of the B/L.

B. The Respondent obtained the B/L in good faith

[77] The Claimant contends that the Respondent did not act in good faith as the Respondent did not view the Cargo as security for its loan to the Charterer.[100] Nonetheless, the Respondent asserts that it obtained the B/L in good faith through proper means because it views the Cargo as a security for the Charterer's loan.

[78] The concept of good faith in Section 5(2) COGSA 1992 should be interpreted as 'honest conduct.'[101] *STI Orchard* demonstrates the standard of good faith in the context of obtaining a bill.[102] In that case, the judge determined whether the good faith standard was fulfilled by assessing whether a bank that financed the purchase of cargo had obtained the bill through proper means.[103] This proper means is fulfilled when a bank who financed a purchase of cargo viewed the cargo as a security for its charterer who acted as its customer.[104] Later, the judge deemed that the bank did not act in good faith as the bank sought possession of the bill only after it was aware of the charterer's financial collapse and granted a trust receipt to the charterer, indicating that the bank will permit the customer to obtain the bill and sell

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[97] Moot Problem, p. 30: Statement of Claim, Annex C (B/L).
[98] COGSA 1992, §5(2); *Glyn Mills Currie & Co v The East and West India Dock Company,* p. 611.
[99] Moot Problem, p. 30: Statement of Claim, Annex C (B/L); p. 37: Statement of Defence and Counterclaim, ¶16.
[100] Moot Problem, p. 40: Statement of Claim, ¶13.
[101] *The Aegean Sea,* ¶60.
[102] *STI Orchard*, ¶59.
[103] *Ibid,* ¶ 60; *Uco Bank v Golden Shore Transportation Pte Ltd*, ¶¶39–40.
[104] *STI Orchard*, ¶54.

the goods on behalf of the bank.[105]

[79] Those circumstances are materially different from the case at hand. The Respondent obtained the B/L through endorsement and a transaction facilitated by an L/C as the Respondent purchased the Cargo on behalf of the Charterer.[106] Because of this, the Respondent became a pledgee of the Cargo by viewing the B/L as its security, which was evident by obtaining and endorsing it in their favor before the discharge of the Cargo occurred and prior to the liquidation of the Charterer.[107] In addition, the Respondent did not grant any trust receipt to Charterer.[108]

[80] As the Respondent acted in good faith to obtain the B/L into their possession, the Respondent is not merely a holder but also the lawful holder of the B/L. Thus, the Respondent has the title to sue for the misdelivery of the Cargo.

II. The Respondent did not consent to the delivery of the Cargo

[81] A party who consented to a delivery of the Cargo without production of a bill of lading cannot complain when a misdelivery occurs.[109] The Claimant may attempt to argue that the Respondent consented to the delivery of the Cargo without the production of the B/L through sending an email to the Charterer allowing it to conduct any steps to prevent the occurrence of the demurrage.[110] Other than that, the Claimant argues that the Respondent had allegedly accepted the Shipper's presentation of a letter of indemnity stating that the Respondent agreed to make payment of the Cargo without the presentation of the B/L.[111]

[82] However, the Respondent did not consent to such delivery because (**A**) the Respondent did not expressly authorize the delivery of the Cargo to Gileum Refinery Co Ltd ("**Ultimate Buyer**"), (**B**) the Respondent did not implicitly authorize the delivery of the Cargo to the Ultimate Buyer, and as (**C)** the Respondent did not acquiesce to the delivery without the presentation of the B/L.

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[105] *Ibid,* ¶¶58–60.
[106] Moot Problem, p. 37: Statement of Defence and Counterclaim, ¶15.
[107] Moot Problem, p. 37: Statement of Defence and Counterclaim, ¶16.
[108] Moot Problem, p. 46: Statement of Reply and Defence to Counterclaim, Annex A (Correspondences between the Charterer and the Respondent prior to the discharge and delivery of the Cargo).
[109] *STI Orchard,* ¶70; *The Cherry,* ¶27.
[110] *Ibid.*
[111] Moot Problem, p. 46: Statement of Reply and Defence to Counterclaim, ¶13.

A. The Respondent did not expressly authorize the delivery of the Cargo to the Ultimate Buyer

[83] The Respondent did not provide any explicit and specific written instruction to discharge and deliver the Cargo without the presentation of the B/L. Therefore, the Respondent did not expressly authorize the delivery to the third party.

[84] In *STI Orchard*, the court provided approaches to prove whether a bank that is a consignee consented to the delivery without the presentation of the B/L.[112] One of the approaches is to give express consent in the form of written instructions to the shipowner to release the goods without production of the B/L.[113] An example of written instruction that serves as compelling evidence for express consent is countersigned by the relevant bank or another reliable third party.[114] In practice, the payment would proceed against the presentation of the commercial invoice and seller's letter of indemnity in a format acceptable to the buyer and countersigned by a bank if the original shipping document was not available when payment became due to the contract provided.[115]

[85] In the present case, the Claimant released the Cargo against an LOI issued by the Charterer.[116] However, the LOI to release the Cargo without the presentation of the B/L was not countersigned by the Respondent.[117] Further, there is no evidence of written authority to discharge and deliver the Cargo against LOI from the Respondent. Consequently, the Respondent did not expressly authorize the delivery to the third party as the Respondent did not provide any written instruction to discharge and deliver the Cargo without the presentation of the B/L.

B. The Respondent did not implicitly authorize the delivery of the Cargo to the Ultimate Buyer

[86] In order for an implied authorization to exist, there should be an express authorization given by the principal to its agent.[118] The Respondent did not implicitly authorize the delivery of the Cargo to the third party as the Respondent's message is not an express authorization to deliver the Cargo to the Ultimate Buyer.

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[112] *STI Orchard*, ¶70.
[113] *Ibid,* ¶70.
[114] *Euro-asian Oil SA v Abilo ltd and Credit Suisse,* ¶¶298–300.
[115] *Ibid*.
[116] Moot Problem, p. 9: Statement of Claim, ¶14.
[117] Moot Problem, p. 9: Annex D Statement of Counterclaim, ¶13.
[118] *The Amity,* ¶36.

[87] When a principal provides an express authorization to an agent, the agent may receive an implied authority to carry out the tasks provided by its principal.[119] This implied authority should be concluded by the agent's own understanding of what actions should it take to ensure that it may perform its task that is being given through express authorization from its principal.[120]

[88] Presently, the Respondent did not implicitly authorize the Charterer to deliver the Cargo to the Ultimate Buyer. Even though the Respondent expressly stated in its email to the Charterer dated 3 October 2023 that it may take actions to prevent the occurrence of demurrage, this does not mean that it authorized the action to deliver the Cargo to the Ultimate Buyer due to two reasons.

[89] Firstly, the Respondent is a bank that financed the purchase of the Cargo. It would be unclear why the bank would give up the security of the goods by consenting to the delivery of the goods to a third party before the loan is honored.[121] Secondly, the Respondent clearly rejected the request of the Charterer to receive a trust receipt which allows the Charterer to sell the Cargo to a third party.[122]

[90] In conclusion, the Respondent did not implicitly authorize the delivery of the Cargo to the Ultimate Buyer. The authority is limited to ensure no demurrage would occur.

C. The Respondent did not acquiesce to the delivery without the presentation of the B/L

[91] The Respondent did not acquiesce to the delivery of the Cargo without the presentation of the B/L since the Respondent was unaware of the LOI issued to discharge and deliver the Cargo to the third party.

[92] In *STI Orchard*,[123] both courts aimed to establish whether or not the bank acquiesced to the delivery against the presentation of the LOI. To determine this, the court held that acquiescence is a lack of action or inactivity that suggests a consensual act.[124] Nevertheless, the court decided that acquiescence through inactivity would be invalid if the party was unaware of such activity or conduct.[125]

[93] In the present case, the Respondent was not aware of such delivery nor had any information on the delivery of the Cargo. There was no evidence indicating that the Respondent had ever received an LOI

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[119] *Ibid.*
[120] *Ibid.*
[121] *The Stone Gemini,* p. 264; *BNP Paribas v Bandung Shipping,* ¶60.
[122] Moot Problem, p. 46: Statement of Reply and Defence to Counterclaim, Annex A (Correspondences between the Charterer and the Respondent prior to the discharge and delivery of the Cargo).
[123] *STI Orchard, ¶70*; *The Neptra Premier,* ¶38.
[124] *Ibid.*
[125] *Ibid.*

from the Charterer or any proposal to use an LOI in substitution for the presentation of the B/L. Therefore, the Respondent did not take any action to prevent the discharge and delivery of the Cargo against the LOI as the Respondent was not aware of the LOI being issued to discharge and deliver the Cargo without the presentation of the B/L.

[94] Consequently, as the cause of inactivity against the discharge and delivery of the Cargo is due to the Respondent's lack of awareness regarding the LOI being issued, the Respondent did not acquiesce to the delivery of the Cargo to the Ultimate Buyer without the presentation of the Cargo.

III. The Claimant has misdelivered the Cargo

[95] As the Respondent has the title to sue, the Tribunal must determine whether the misdelivery occurred. The misdelivery of the Cargo occurred as (**A**) the Claimant delivered the Cargo to the party who is not entitled to the Cargo and (**B**) the delivery of the Cargo occurs without the production of the B/L. Nevertheless, even if the Claimant relied on Clause 57 of Rider Clause to justify their act to discharge and deliver the Cargo upon LOI without the production of the B/L, (**C**) the LOI provided by the Charterer to the Claimant for delivering the Cargo is unlawful. Furthermore, (**D**) the Claimant could have taken other steps before instantly complying with the Charterer's orders.

A. The Claimant delivered the Cargo to the party who is not entitled to the Cargo

[96] The Ultimate Buyer did not meet the requirements as the holder pursuant to Section 5(2) COGSA 1992.[126] Therefore, the Claimant delivered the Cargo to the party who is not entitled for the Cargo.

[97] One of the parties who is entitled to receive a cargo is a lawful holder of the B/L in accordance with Section 5(2) COGSA 1992.[127] However, Section 5(3) COGSA 1992 permits the original holder of B/L to substitute a different party as the name consignee by an endorsement. Therefore, the next holder of will be regarded as an endorsee of the B/L.[128]

[98] In the present dispute, the Claimant delivered the Cargo to the Ultimate Buyer.[129] However, the Ultimate Buyer is not the lawful holder of the B/L, consignee named by an endorsement. Moreover, the Ultimate

[126] COGSA 1992, §5(2).
[127] *Ibid.*
[128] COGSA 1992, §5(3).
[129] Moot Problem, p. 37: Statement of Defence and Counterclaim, ¶18.

Buyer is not the endorsee of the B/L since the Ultimate Buyer has not delivered an export letter of credit to the Respondent.[130] Because of this, the Claimant delivered the Cargo to the party who is not entitled to the Cargo as the Ultimate Buyer is not the party who may receive the Cargo pursuant to COGSA 1992. Therefore, a misdelivery occurred.

B. The delivery of the Cargo occurs without the production of the B/L

[99] A cargo must be delivered with the presentation of a bill of lading.[131] The Claimant has breached the contract under the B/L by delivering the Cargo against an LOI without the production of the B/L.[132]

[100] When a carrier misdelivers a Cargo without the B/L, they usually hand it over to a third party who is not entitled to the delivery.[133] As a result, most misdelivery cases established that a carrier who delivers the cargo without being presented with the B/L will have a significant risk of being held accountable for the losses suffered by the lawful holder of the B/L.[134]

[101] In this case, the Claimant admitted that they misdelivered the cargo without the presentation of the B/L.[135] Consequently, the claimant violated the terms of the carriage contract when they released the cargo before the presentation of the B/L. As the Claimant discharged and delivered the Cargo without the production of the B/L, the Claimant is proven to breach the contract under the B/L.

C. The LOI provided by the Charterer to the Claimant for delivering the Cargo is unlawful

[102] The delivery of the Cargo based on the LOI provided by the Charterer to the Claimant is unlawful since the LOI mentioned a party who is not entitled to the delivery of the Cargo.

[103] In *The Houda*, the court held that the owner does not need to comply with a letter of indemnity to deliver a cargo without B/L from the charterer if such instruction is unlawful.[136] There are three circumstances which would make an LOI unlawful: (i) when such orders are not lawful and/or not permitted by the charterparty; (ii) whether such order is consistent with the obligation of the master and the owner with

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[130] Moot Problem, p. 46: Statement of Reply and Defence to Counterclaim, Annex A (Correspondences between the Charterer and the Respondent prior to the discharge and delivery of the Cargo).

[131] *Motis Export Ltd v Dampskilbsselskapet AF,* p. 215; *Sze Hai Tong Bank Ltd v Rambler Cycle Co. Ltd,* p. 586; *The Star Quest,* ¶ 4. *The Sagona*, p. 305, *The Houda,* p. 556.

[132] Moot Problem, p. 9, ¶14: Statement of Claim.

[133] *Barclays Bank Ltd. v. Commissioners of Customs and Excise*, p. 89.

[134] *Motis Export Ltd v Dampskilbsselskapet AF,* p. 215, *Sze Hai Tong Bank Ltd v Rambler Cycle Co. Ltd,* p. 586, *The Star Quest,* ¶4. *The Sagona*, p. 305, *The Houda,* p. 556.

[135] Moot problem, p. 37: Statement of Reply and Defence to Counterclaim, ¶18.

[136] *The Houda.* p. 553.

regard to the safety of the ship; and (iii) whether such orders were consistent with the owner's obligation to the owners of the cargo and those entitled to the delivery.[137]

[104] In the present case, the LOI issued by the Charterer is unlawful due to two reasons. Firstly, the recipient in the LOI is not the party who is entitled to receive the Cargo.[138] Secondly, the LOI issued by the Charterer instructed the Claimant to both discharge and deliver without B/L even though Clause 57 Rider Clauses stated that the Claimant can only discharge the Cargo without the presentation of B/L. [139] Ultimately, the LOI issued by the Charterer is unlawful.

D. The Claimant could have taken other steps before instantly complying with the Charterer's orders

[105] The LOI issued by the Charterer to the Claimant is unlawful as it instructed the Claimant to deliver the Cargo to a party not entitled to it.[140] The Claimant has the option to not immediately follow such an instruction but rather delay such a delivery until they are certain that the LOI is lawful. Because of this, the Respondent submits that the Claimant should have taken other steps prior to delivering the Cargo to the Ultimate Buyer.

[106] As established in *The Houda*, the master of a vessel may delay in complying with an order to deliver the cargo to a party when it has doubts that the letter of indemnity is lawful. It may delay the compliance until it is certain that the order is lawful.[141] During the delay, the master may conduct verification through asking the charterer who actively engages with the recipient.[142]

[107] However, the Claimant instantly complied with the Charterer's order to discharge and deliver the Cargo with a LOI without attempting to verify whether the recipient in the LOI is entitled to the delivery of the Cargo.[143] The Claimant could have verified the identity of the consignee to the Charterer especially when the B/L identified the Respondent as a consignee. Conclusively, the Claimant could have verified the lawfulness of the LOI to the Charterer.

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[137] *Ibid*, pp. 548-549.
[138] Moot Problem, p. 30: Statement of Claim, Annex C (B/L).
[139] Moot Problem, p. 21: Statement of Claim, Annex B (Rider Clauses).
[140] *The Sagona,* p. 205.
[141] *The Houda*, p. 558.
[142] *The Houda,* p. 548. *The Teutonia*, p. 179; *Midwest Shipping Co. v. D.I. Henry,* p. 379; *The Bremen Max,* ¶35.
[143] Moot Problem, p. 9: Statement of Claim, ¶¶13&14.

IV. Consequently, The Respondent is entitled to claim damages resulting from the misdelivery of the Cargo

[108] The Respondent is entitled for damages from the Claimant as the loss suffered by the Respondent stems from the Claimant's misdelivery. Moreover, the Respondent did not consent to such a delivery.

[109] A party can be entitled to claim damages for the misdelivery of the cargo when they can enforce its security over the Cargo, otherwise, if the bank cannot enforce its security against the cargo to recover its loan, the breach was not an effective cause of loss.[144]

[110] In the present case, the loss suffered by the Respondent ultimately happened due to the misdelivery conducted by the Claimant. The Claimant did this when the Respondent still enforced its security against the Cargo which may be used to recover the Charterer's loan. As such, the Respondent is entitled to claim damages resulting from the misdelivery of the Cargo in the amount of USD 4.249.752,50 or in the alternative requests the Tribunal to assess the damages given.[145]

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[144] *Unicredit Bank AG v Euronav NV*, ¶103.
[145] Moot Problem, p. 37: Statement of Defence and Counterclaim, ¶19.

PRAYERS FOR RELIEF

For the reasons submitted above, the Respondent respectfully requests this Tribunal to

DECLARE that:

I. The Tribunal does not have jurisdiction over the present dispute.

II. The Claimant is not entitled to claim for the loss of its next fixture's profits; and

III. The Claimant is liable for the misdelivery of the Cargo.

Further

ADJUDGE that the Respondent is not liable to the Claimant for:

I. Pay the amount of losses of its future fixture's profits pursuant to the Claimant's claim, namely the USD 3,650,000 alleged breach of the VCP; and

II. Interest; and

III. Cost.

Further

ADJUDGE that the Claimant is liable to the Respondent for:

I. Pay the amount of damages, namely USD 4,249,752.50 for the misdelivery of the Cargo or in the alternative for the Tribunal to assess the value of the Cargo.