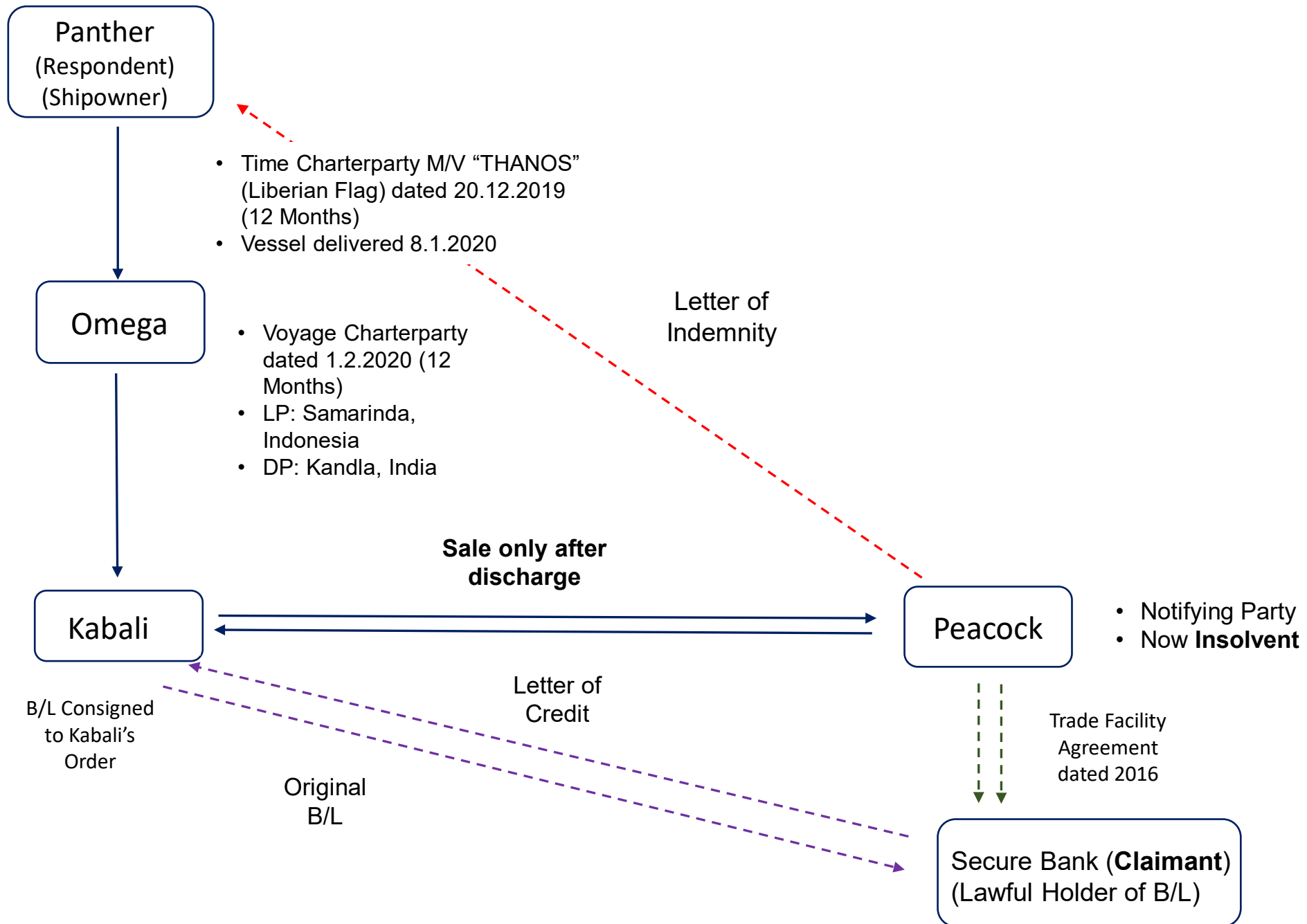
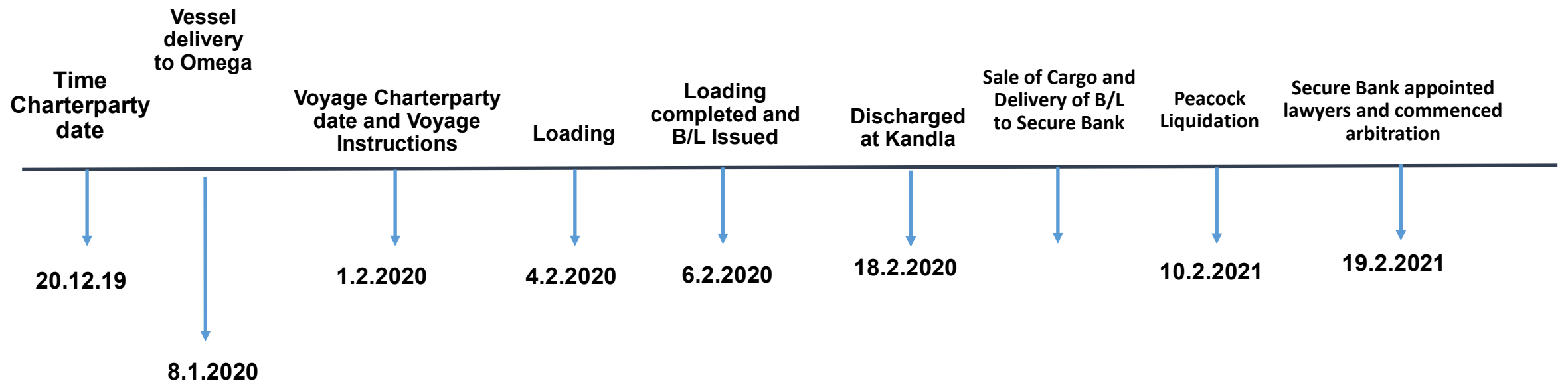


# SCMA-SAL Mock Arbitration: Tribunal's Introduction to Participants











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ASIAN EXPERTISE · GLOBAL REACH

# RESPONDENT'S CASE

SCMA-SAL MOCK ARBITRATION 2021  
COUNSEL FOR RESPONDENT  
MR PRAKAASH SILVAM





OUTLINE

00

PROCEDURAL OBJECTION  
BY PANTHER

01

PRELIMINARY ISSUE:  
THE TIME BAR ISSUE

02

PRELIMINARY ISSUE:  
THE SPENT BL ISSUE

03

*OUTLINE*



## Procedural Objection by Panther

Respondent Panther submits that the determination of the preliminary issues should **not** proceed virtually:



### RULE 22

#### 22. Juridical Seat of Arbitration

- 22.1. Unless otherwise agreed by the parties, the juridical seat of arbitration shall be Singapore. Where the seat of the arbitration is Singapore, the law of the arbitration under these Rules shall be Singapore law and the Act.
- 22.2. An Award made under these Rules shall be deemed to be made in the juridical seat of arbitration.
- 22.3. Regardless of the seat of the arbitration, all physical hearings and meetings of the arbitration shall be held in Singapore save where parties agree otherwise or where the Tribunal directs.



## Procedural Objection by Panther

- The SCMA Rules does not otherwise provide for hearings to be conducted virtually.
- While the Respondent accepts that a determination of the preliminary issues does not require the attendance of any witnesses for cross-examination, the Respondent humbly submits that the SCMA Rules **do not confer on the Tribunal the power to conduct any hearings virtually** and asks that the Tribunal consider convening a physical hearing for determination of the preliminary issues.



## *TWO PRELIMINARY ISSUES*

### TIME BAR ISSUE

Whether Secure Bank's misdelivery claim against Panther under the bill of lading is time-barred because the arbitration proceedings were not commenced within the 1-year time limit pursuant to Article III Rule 6 of the Hague-Visby Rules.

### SPENT BL ISSUE

Whether Secure Bank has rights of suit under the bill of lading given that they only received the bill of lading after the cargo had been discharged.





## THE TIME BAR ISSUE

Art III, Rule 6 of the Hague-Visby Rules provides that any claim will have to be brought one year from the time that the cargo was delivered :

6. Unless notice of loss or damage and the general nature of such loss or damage be <sup>24</sup> given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading.

The notice in writing need not be given if the state of the goods has, at the time of their <sup>25</sup> receipt, been the subject of joint survey or inspection.

Subject to paragraph 6bis the carrier and the ship shall in any event be discharged from <sup>26</sup> all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period, may however, be extended if the parties so agree after the cause of action has arisen.

In the case of any actual or apprehended loss or damage the carrier and the re- <sup>27</sup> ceiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

6 bis. An action for indemnity against a third person may be brought even after the <sup>28</sup>



## THE TIME BAR ISSUE

In this case, the BL incorporates the Hague-Visby Rules by operation of the Clause Paramount printed on the reverse side of the BL.

### General Paramount Clause.

(a) The Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading, dated Brussels the 25<sup>th</sup> August 1924 as enacted in the country of shipment shall apply to this contract. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply, but in respect of shipments to which no such enactments are compulsorily applicable, the terms of the said convention shall apply.

(b) *Trades where Hague-Visby Rules apply.*

In trades where the International Brussels Convention 1924 as amended by the Protocol signed at Brussels on February 23<sup>rd</sup> 1968-the Hague-Visby Rules-apply compulsorily, the provisions of the respective legislation shall apply to this Bill of Lading."



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# THE TIME BAR ISSUE





## *THE TIME BAR ISSUE – THE ALHANI*

- The position under the Hague Rules and Hague-Visby Rules was considered in the English High Court decision of **The Alhani [2018] 2 Lloyd's Law Report 563.**
- That case involved cargo which was discharged through a **ship-to-ship transfer** into another vessel without production of the bill of lading.
- The charterparty contained an exclusive jurisdiction clause referring disputes to the English High Court, and it was an express term that the **Hague Rules will apply.**
- Proceedings were commenced in Tunisia within 4 months from the date of discharge but were ultimately dismissed. The claimants filed the English court proceedings some 6 years after the date of discharge. The English High Court held that **the time bar would apply to the misdelivery claim** in that case as the **very act of misdelivery to a third party (i.e. the ship-to-ship transfer) was also the means by which the cargo was discharged from the vessel.**
- The English High Court in the The Alhani [2018] 2 Lloyd's Law Report 563, decided that the time-bar under Art III, rule 6 applied and that the claim would be time-barred.



## THE TIME BAR ISSUE

### HAGUE RULES

"In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered."

### HAGUE-VISBY RULES

"Subject to paragraph 6*bis* the carrier and the ship shall in any event be discharged from all liability **whatsoever in respect of the goods**, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period may, however, be extended if the parties so agree after the cause of action has arisen."





## THE TIME BAR ISSUE

In *The Alhani*, the English High Court made the following comments in relation to the distinction between the application of Art III Rule 6 of the Hague Rules and the Hague-Visby Rules to misdelivery claims:

*"The words "all liability" are equally wide. In a contractual provision clearly modelled on the Hague Rules, Lord Wilberforce in The New York Star [1980] 1 Lloyd's Rep 317 at page 322 col 1 described the words as "general" and "all-embracing". Taken together, the words "in any event" and "all liability in respect of loss or damage" are clearly wide enough to encompass liability for delivering the goods to someone not entitled to take delivery of the same.*

*In The Captain Gregos (Pg. 315, Col. 2), albeit when considering Art III Rule 6 in the Hague-Visby Rules, with the addition of the word "whatsoever", Bingham LJ stressed the words "in any event" and "all liability" when finding that the time bar applied to theft of the cargo by the shipowner, stating that he "[could] not see how any draftsman could use more emphatic language" being "even more emphatic than the language Lord Wilberforce considered 'all-embracing' in The New York Star" (ie that of the Hague Rules)."*



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# THE SPENT BL ISSUE





## *THE SPENT BL ISSUE*

Whether Secure Bank has rights of suit under the bill of lading given that it only received the bill of lading after the cargo had been discharged:

- In this case, the cargo was sold from Kabali to Peacock **after** the cargo was discharged from the Vessel on 18 February 2020.
- The bill of lading also passed to Secure Bank under the L/C opened **after** the discharge of the cargo.
- Secure Bank will not be able to rely on either the sale contract or the L/C to argue that they are the lawful holders of the bill of lading pursuant to section 2 of the Bills of Lading Act ("**BLA**").



## *THE SPENT BL ISSUE*

S 2(2) of the Bills of Lading Act provides:

### **Rights under shipping documents**

#### **2.—**

(2) Where, when a person becomes the lawful holder of a bill of lading, **possession of the bill no longer gives a right (as against the carrier) to possession of the goods** to which the bill relates, that person shall not have any rights transferred to him by virtue of subsection (1) unless he becomes the holder of the bill —

- (a) by virtue of a transaction effected in pursuance of any contractual or other arrangements made before the time when such a right to possession ceased to attach to possession of the bill; or
- (b) as a result of the rejection to that person by another person of goods or documents delivered to the other person in pursuance of any such arrangements.



## *THE SPENT BL ISSUE*

*Aikens, Lord, Bools, Bolding, Toh, Bills of Lading, 3rd Edition, 2020 at [9.58]:*

*"Such a contractual right to possession will also cease on delivery of the goods, even if it is to the wrong person, as although this would give rise to a right in damages against the carrier and a right to possession as against the person in possession, there is no right to possession as against the carrier ... What is required is a right of possession as against the carrier and not that the holder has better title to the goods than the carrier."*

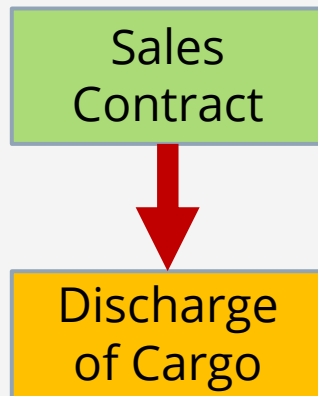




## *Distinguishing THE YUE YOU 902*

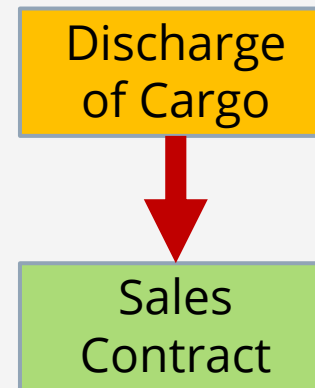
### THE YUE YOU 902

*The YUE YOU* concerned a sales contract entered into **prior to the discharge of the cargo.**



### PRESENT CASE

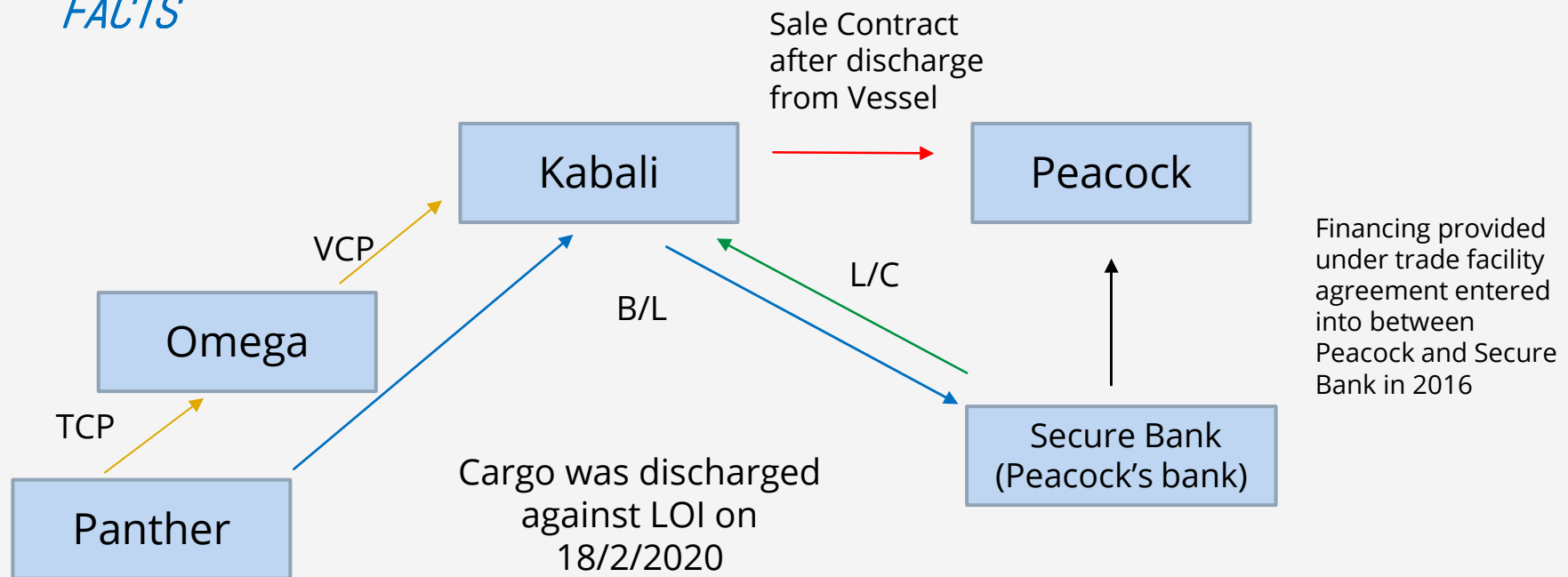
In the present case, the sales contract was entered into **post – discharge.**





## SCMA-SAL MOCK ARBITRATION 2021

### *FACTS*





# SCMA-SAL Mock Arbitration: Secure Bank's Skeletal Submissions





# Contents

## 01 / Preliminary Issue 1

Is the Bank's claim time-barred pursuant to Article III Rule 6 of the HVR?

## 02 / Preliminary Issue 2:

Whether the Bank has any rights of suits given that they only received the BLs after the cargo was discharged?



# Preliminary Objection to Virtual Hearing

1. The Tribunal constituted under the SCMA Rules has the power to hold a virtual hearing;
  - *“it shall be for the Tribunal to decide the arbitration procedure, including all procedural and evidential matters”*: See Rule 25.2 of the SCMA Rules:
  - The Tribunal has the *“widest discretion allowed... to ensure the just, expeditious, economical and final determination of the dispute”*: See Rule 25.1 of the SCMA Rules.
2. No prejudice to the Owners and it is just and expeditious for the virtual hearing to proceed.





# Preliminary Issue 1: Whether the Bank's misdelivery claim is time barred?



# Preliminary Issue 1: Time Bar

## Article III Rule 6 of the HVR:

- *Subject to paragraph 6bis the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, **unless suit is brought within one year of their delivery** or of the date when they should have been delivered. This period, may however, be extended if the parties so agree after the cause of action has arisen.*

The trigger point is the *date of delivery* and not the date of *discharge*.

# Preliminary Issue 1: Time Bar

## What is “*delivery*”?

Teare J explained the distinction between discharge and delivery in *The Bremen Max* [2009] 1 Lloyd's Rep 81 at [32]:

- *But discharge and delivery are different concepts. Discharge is the movement of the cargo from the ship ‘over the ship’s rail’ ashore. Delivery is the transfer of possession of the cargo to a person ashore. Discharge and delivery may occur simultaneously but they need not do so. A cargo may be discharged ashore into a warehouse and only delivered at a later date.*

# Preliminary Issue 1: Time Bar

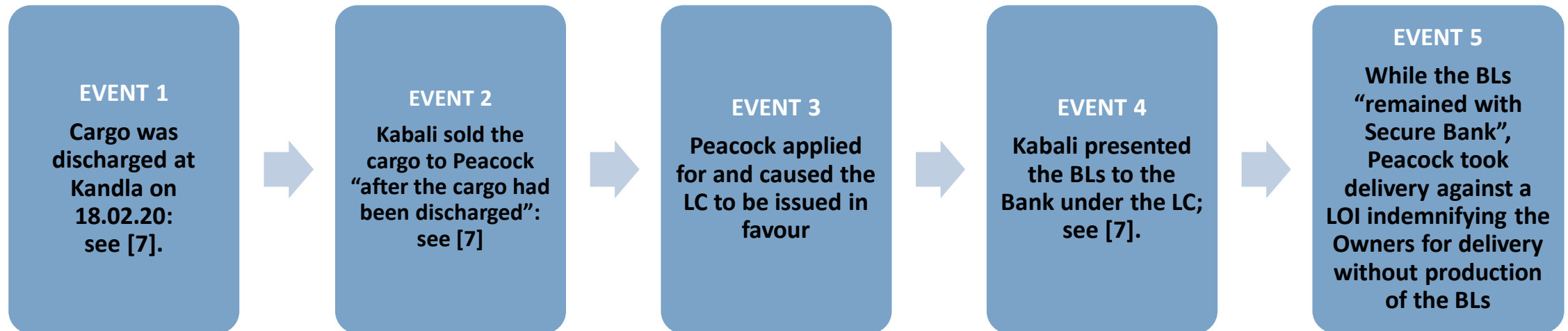
## What is “*delivery*”?

- Delivery occurs when *“the goods are so completely under the control of the consignee that he may do what he likes with them”, or when they are “placed under the absolute dominion and control of the consignees”*.

See Cooke, J. & ors, Voyage Charters

# Preliminary Issue 1: Time Bar

**Delivery *necessarily* took place only sometime after the cargo was discharged:**



**Refer to [7] of the agreed statement of facts**



# Preliminary Issue 2 : Whether the Bank has rights of suit under the Bills of Lading?



# Preliminary Issue 2: Rights of Suit

1. The timing of the receipt of the BLs is irrelevant if the BLs are not spent in the first place.
2. The BLs are not spent as the cargo was never delivered to the party that is lawfully entitled to receive it.
3. Even if the BLs are allegedly spent, the Bank has title to sue in any event because it had become a holder under s2(2)(a) of the BLA “*by virtue of a transaction effected in pursuance of any contractual or other arrangements*” before the BLs are allegedly spent.



# Preliminary Issue 2: Rights of Suit

## The Bills of Lading Act

2.—(1) Subject to the following provisions of this section, a person who *becomes* —

(a) the lawful holder of a bill of lading;

...

shall (*by virtue of becoming the holder of the bill* or, as the case may be, the person to whom delivery is to be made) have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract.



# Preliminary Issue 2: Rights of Suit

## The Bills of Lading Act

**2(2) Where, when a person becomes the lawful holder of a bill of lading, possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates, that person shall not have any rights transferred to him by virtue of subsection (1) unless he becomes the holder of the bill —**

**(a) by virtue of a transaction effected in pursuance of any contractual or other arrangements made before the time when such a right to possession ceased to attach to possession of the bill;**



# Preliminary Issue 2: Rights of Suit

## The Bills of Lading Act

2(2) Where, *when a person becomes the lawful holder of a bill of lading*, ***possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates***, that person shall not have any rights transferred to him by virtue of subsection...

- This section ought to be interpreted as covering the situation where a bill of lading would be regarded as spent at common law : YUE YOU at [48].

# Preliminary Issue 2: Rights of Suit

## When is a BL spent at common law?

- “the bill of lading remains in force at least so long as complete delivery of possession of the goods has not been made to some person having a right to claim them under it.” See *Barber v Meyerstein* (1874) LR 4 HL 317. (emphasis added)
- “30 I also find that the cargo was delivered between the months of May and June 2000 to persons who were not entitled to possession so much so that [the holder] is not a holder of spent bills of lading...The contract of carriage generally continues and the bill of lading remains effective, until the goods are delivered to the person entitled under the bill of lading...” See *BNP Paribas v Bandung Shipping Pte Ltd* [2003] 3 SLR (R) 611.
- Delivery to a person not entitled does not cause a bill of lading to be spent: YUE YOU at [58]

# Preliminary Issue 2: Rights of Suit

The BL was obtained “*by virtue of a transaction effected in pursuance of any contractual or other arrangements*” before the BL is allegedly spent.

- The relevant transaction pursuant to which the Bank came into possession of the BL was the grant of the LC financing which was made pursuant to the trade facility agreement between the Bank and Peacock sometime in 2016, way before the BL is allegedly spent.
- See Yue You at [92] – [94]

# Thank you

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# **Baltic Exchange's involvement in supporting dispute resolutions**


**Dmitry Pismenny, Associate Director, Escrow Service**

18 March 2021





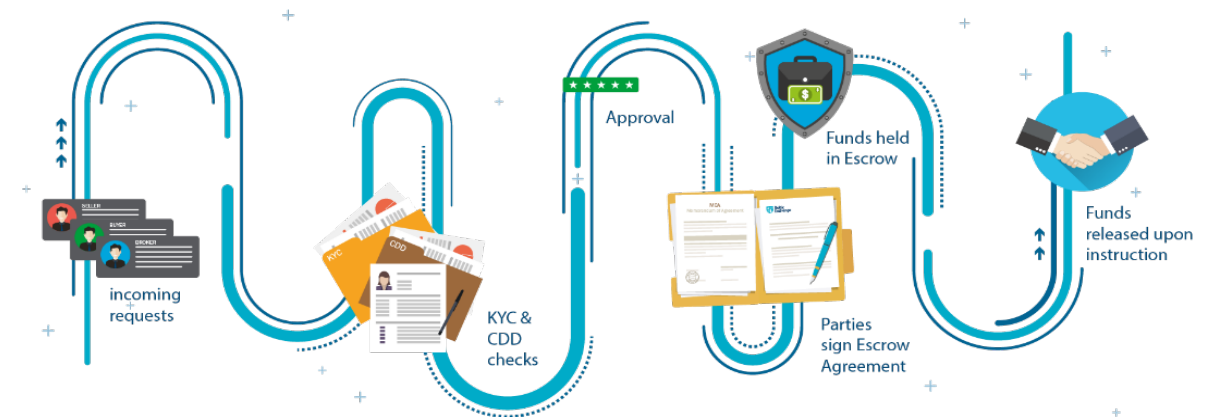
Escrow service



Dispute resolution  
& debt collection

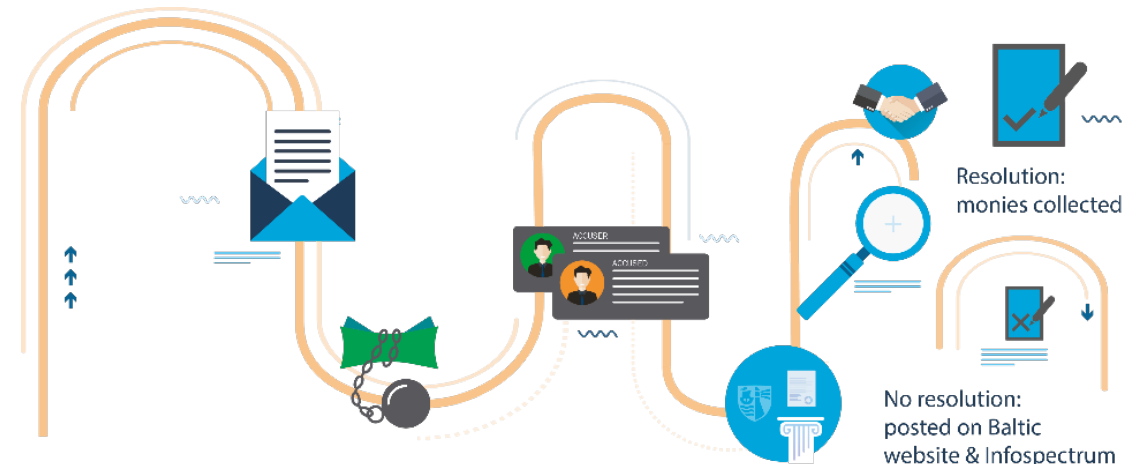
The Baltic provides an independent, secure and efficient escrow service for major transactions

- Commercial transactions
  - Ship sale & purchase
  - Security payments for chartering
  - Tailor-made commercial escrow requirements
- Dispute resolutions - disputed funds, court and tribunal nominated sums
  - Gives comfort that the funds are held by a neutral party with no conflict of interest
  - Funds only released according to agreed terms
  - Avoids commercial delays



The Baltic offers a **free and unlimited** dispute resolution resource for members experiencing late payments and commercial disputes

- Facilitates smooth trade and adoption of commercial standards
- Swift tool for holding defaulting counterparts to account, resolving disputes and recovering debts
- Members can now extend this service to support their non-member clients with debt recovery: a fee of **15% recovered, capped at £15,000** (or join membership)





# Our word **our bond**

Dmitry Pismenny, Associate Director, Escrow Service

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Mobile: +65 9435 6650





SINGAPORE  
ACADEMY  
OF LAW



18 March 2021 | 3.30 - 5.30 pm SGT

## SCMA-SAL Mock Arbitration [Webinar]

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**Jeffrey Blum**

Baltic Expert Witness Association (BEWA)



An introduction to **BEWA**

**Baltic Expert Witness Association**

**Jeffrey Blum FCIArb FICS ~ BEWA Chairman**



**Baltic Expert Witness**  
A Baltic Exchange Association

<https://balticexpertwitness.com/>

[bewa@balticexchange.com](mailto:bewa@balticexchange.com)

**BEWA** : **THE** *global* home of maritime Expert Witnesses

**BEWA** : not London-centric or UK-centric but global

**BEWA** : Baltic Exchange ethics, Baltic Code (“Our Word Our Bond”)

**BEWA** : members are vetted / not necessarily (yet) BEx members

**BEWA** : since 2008 (“Panel”); revived 2016; doubled EW members since 2019

**BEWA** : members have different skills: commercial, technical, legal, sea-going

**BEWA** : mentoring ~ aspiring EWs receive guidance from experienced EWs,  
also with seminars / workshops 5x p.a.

## **Preparation for giving evidence starts on instruction**

- Check on expertise required – declare any gaps in your expertise
- Conflict – always best to mention any possible conflict, however tenuous, with the Parties, Arbitration Panel, Solicitors on all sides
- Check your availability for key dates – Reports, Join Expert Meetings, Hearing.
- Possible location of hearing. Virtual ? Familiar with jurisdiction there ?
- Understand any Terms and Conditions – yours and theirs
- Make sure you have Professional Indemnity Insurance
- Useful to know where they heard about you

### **Instructions must be comprehensive and clear**

- Duty of Expert Witness is to address only those specific points instructed to address
- Instructions may need to be revisited during progress of case at early stage – EWs should not be afraid to make suggestions
- Remember what the instructions are – may be asked to comment later on issues outside your original instructions. If from own instructing solicitors, instructions may need to be amended. When in Joint Expert Meeting or in cross examination, can say “not instructed on this point” and take advice from instructing solicitors whether to expand instructions
- EW’s role is not to argue a case one way or the other, nor to offer legal advice. Only offer advice within the scope of your appointed expertise.



- Send EW Draft to instructing solicitors for their comments and those of client
- Do not let them put words into your report if you do not agree / have not seen evidence.
- Easy for lawyers / tribunal / judge to see when a report has been written by solicitors  
> immediately affects your report's and your own credibility > reputation
- However, do take comments into account, create second draft, show to instructing solicitors and client, then finalise, sign and date.
- Most usual is for EW reports from each side to be exchanged on same day.

- EWs have legal duty to arbitration panel or judge, **NOT** to appointing party
- Virtual EW participation : cameras (in front and behind / mirrors) to prove no coaching, no mobile phone, no additional laptop/tablet, no additional notes other than Joint Experts Meeting agreed notes

Thank you for this opportunity to share some aspects of how Expert Witnesses are becoming increasingly necessary in various methods of Dispute Resolution