

**SCMA MOCK ARBITRATION 2022
MOOT PROBLEM**

(Crafted by Prakaash Silvam, Partner, Oon & Bazul LLP)

1. Hook Shipping Inc (“**Hook**”), an entity registered in Marshall Islands, is the registered owner of the MV “Polar” (the “**Vessel**”), a 155,000 DWT bulk carrier.
2. By way of a time charterparty dated 20 June 2021 (the “**Charterparty**”), the Vessel was chartered out on a 15-month charter to Fan Gu Shipping, an entity registered in China. Subsequently, Fan Gu Shipping entered into a voyage charterparty dated 10 September 2021 (the “**Voyage Charterparty**”) with Powan Trading Ltd (“**Powan**”, a company incorporated in the Republic of India) for the carriage of 150,000 MT of coal from Kakinada, India to Ningbo, China. The Voyage Charterparty contained the following arbitration clause:

"Clause 65: Any and all disputes arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration seated in Singapore in accordance with the Arbitration Rules of the Singapore Chamber of Maritime Arbitration ("SCMA Rules") current at the commencement of the arbitration, which rules are deemed to be incorporated by reference in this clause"

3. Other relevant terms of the Voyage Charterparty include:

"Clause 13: Load rate: 25,000 metric tons per weather working day including Saturdays, Sundays and public holidays.

Clause 14: Discharge rate: 25,000 MT PD PWWD Saturday and Sunday included, statutory port and national holidays included.

*NOR at load and discharge ports WWWW ATDN SHINC with 12 hours TT USC.
NOR to be tendered ATDN SHINC, WIPON, WIBON, WICCON, WIFPON.*

Clause 15: Laytime non-reversible between load port and discharge port.

Clause 16: Subject to any other provision to the contrary, demurrage payable at USD 15,250 per day pro rata, dispatch half demurrage working time saved both ends.

Clause 34 – Force Majeure

- 1) *Unless otherwise agreed in the contract between the parties expressly or impliedly, where a party to a contract fails to perform one or more of its contractual duties, the consequences set out in paragraphs 4 to 9 of this Clause will follow if and to the extent that that party proves:*
 - a. *That its failure to perform was caused by an impediment beyond its reasonable control; and*
 - b. *That it could not reasonably have been expected to have taken the occurrence of the impediment into account at the time of the conclusion of the contract; and*
 - c. *That it could not reasonably have avoided or overcome the effects of the impediment.*
- 2) *Where a contracting party fails to perform one or more of its contractual duties because of default by a third party whom it has engaged to perform the whole or part of the contract, the consequences set out in paragraphs 4 to 9 of this Clause will only apply to the contracting party:*
 - a. *If and to the extent that the contracting party establishes the requirements set out in paragraph 1 of this Clause; and*
 - b. *If and to the extent that the contracting party proves that the same requirements apply to the third party.*
- 3) *In the absence of proof to the contrary and unless otherwise agreed in the contract between the parties expressly or impliedly, a party invoking this Clause shall be presumed to have established the conditions described in paragraph 1[a] and [b] of this Clause in case of the occurrence of one or more of the following impediments:*
 - a. *War (whether declared or not), armed conflict or the serious threat of the same (including but not limited to hostile attack, blockade, military embargo), hostilities, invasion, act of a foreign enemy, extensive military mobilisation;*
 - b. *Civil war, riot rebellion and revolution, military or usurped power, insurrection, civil commotion or disorder, mob violence, act of civil disobedience;*
 - c. *Act of terrorism, sabotage or piracy;*
 - d. *Act of authority whether lawful or unlawful, compliance with any law or governmental order, rule, regulation or direction, curfew restriction, expropriation, compulsory acquisition, seizure of works, requisition, nationalisation;*
 - e. *Act of God, natural disaster such as but not limited to violent storm, cyclone, typhoon, hurricane, tornado, blizzard, earthquake, volcanic activity, landslide, tidal wave, tsunami, flood, damage or destruction by lightning, drought;*

- f. *Explosion, fire, destruction of machines, equipment, factories and of any kind of installation, prolonged break-down of transport, telecommunication or electric current;*
 - g. *General labour disturbance such as but not limited to boycott, strike and lock-out, go-slow, occupation of factories and premises.*
 - 4) *A party successfully invoking this Clause is, subject to paragraph 6 below, relieved from its duty to perform its obligations under the contract from the time at which the impediment causes the failure to perform if notice thereof is given without delay or, if notice thereof is not given without delay, from the time at which notice thereof reaches the other party.*
 - 5) *A party successfully invoking this Clause is, subject to paragraph 6 below, relieved from any liability in damages or any other contractual remedy for breach of contract from the time indicated in paragraph 4.*
 - 6) *Where the effect of the impediment or event invoked is temporary, the consequences set out under paragraphs 4 and 5 above shall apply only insofar, to the extent that and as long as the impediment or the listed event invoked impedes performance by the party invoking this Clause of its contractual duties. Where this paragraph applies, the party invoking this Clause is under an obligation to notify the other party as soon as the impediment or listed event ceases to impede performance of its contractual obligations.*
 - 7) *A party invoking this Clause is under an obligation to take all reasonable means to limit the effect of the impediment or event invoked upon performance of its contractual duties.*
 - 8) *Where the duration of the impediment invoked under paragraph 1 of this Clause or of the listed event invoked under paragraph 3 of this Clause has the effect of substantially depriving either or both of the contracting parties of what they were reasonably entitled to expect under the contract, either party has the right to terminate the contract by notification within a reasonable period to the other party.*
 - 9) *Where paragraph 8 above applies and where either contracting party has, by reason of anything done by another contracting party in the performance of the contract, derived a benefit before the termination of the contract, the party deriving such a benefit shall be under a duty to pay to the other party a sum of money equivalent to the value of such benefit.*
- 4. On 15 September 2021, at 22:00 hours (LT), the Vessel arrived at the Port of Kakinada, and tendered its Notice of Readiness on 15 September 2021 at 22:30 hours (LT).

5. Sometime on 3 September 2021, the Indian health authorities reported the outbreak of a new, previously undetected variant of the SARS-CoV-2 virus circulating in Indonesia that was rampaging through its health system, causing its healthcare system to become severely overstretched. It was reported that the new variant was looking to be more infectious and deadly than previous variants, with severe cases requiring hospitalisation doubling every 2 days.
6. On 13 September 2021, the World Health Organisation's Technical Advisory Group on Virus Evolution declared the outbreak in India a Variant of Concern, and codenamed the variant the "Sigma Variant". With its healthcare system coming under increasing pressures by the Sigma Variant, the Indian government declared a nationwide lockdown on the same day and imposed severe restrictions on people leaving their homes, with the exception of workers in essential services. It was expressly provided in the governmental notice that port services nationwide would continue to function as per normal, save where safe distancing measures could not be adhered to.
7. On 14 September 2021, having been informed by the local agents on the likelihood of delay to the Vessel at the Port of Kakinada, a representative from Powan, Mr. Sanjay, spoke to a representative from Fan Gu Shipping, Mr. Li Rui, at 15:45 hours (LT) on the situation. The contents of the call are heavily disputed. Mr. Sanjay's account of the conversation was that it was to inform Fan Gu Shipping of the situation on the ground in Kakinada, and to put Fan Gu Shipping on notice that Powan was invoking the force majeure clause in the Charterparty. On the other hand, Mr. Li Rui's account of the conversation was that Mr. Sanjay informed him of the public health crisis in India, but that it was not expected to affect the port services and that the Vessel's loading operations would proceed as per normal.
8. The Vessel was finally called to berth on 11 October 2021 at 15:00 hours (LT). Loading of the cargo commenced on 12 October 2021, and was completed only on 12 November 2021 at 10:00 hours (LT) due to the lack of manpower on the ground. The Vessel thereafter left the Port of Kakinada on 12 November 2021.
9. A dispute has since arisen between Fan Gu Shipping and Powan in respect of the demurrage payable at the Port of Kakinada. Parties have agreed for the following issues to be determined by the Tribunal at the arbitration:
 - (a) Whether the force majeure clause in the Voyage Charterparty can apply to the demurrage provisions in the Voyage Charterparty;
 - (b) Whether the events that transpired at the Port of Kakinada fall within the force majeure clause; and

- (c) Whether notice of the force majeure was validly given by virtue of the telephone conversation between Mr. Sanjay and Mr. Li Rui.
10. The Tribunal has decided to hear the issue in 9(a) above as a preliminary question of law, in accordance with the SCMA Arbitration Rules, with a hearing to be fixed for the taking of evidence in respect of issues (b) and (c).