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<td>Arbitration Act 1996 (Constantinopolis)</td>
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<td>Amended HVR</td>
<td>The Hague-Visby Rules as modified by Schedule 1A of the Carriage of Goods by Sea Act 1991 (Constantinopolis)</td>
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<td>Bliss Hotel Chain Inc</td>
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<td>Bill of Lading</td>
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<td>FF</td>
<td>Fwd Faster</td>
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<td>Immortal Carpets</td>
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STATEMENT OF FACTS

1. On 7 March 2005 BHC contracted with the Claimant to design and outfit a new hotel in Atlantis, Constantinopolis. The Claimant arranged with IC as part of this contract to weave the carpets for the new hotel on 21 June 2006. The carpets were ready for collection on 15 December 2006.


3. On 29 December 2006 FF contacted and arranged with the Respondent to transport the carpets. The Respondent confirmed the shipping order with FF on 2 January 2007.

4. The Respondent contracted with MT to collect the carpets from Ram, Athenia, and transport them to the port in Olivander, Athenia, on 4 January 2007.

5. Mr Taylor, MT’s driver, arrived at the port in Olivander at 3.00 am on 9 January 2007 and the Respondent’s terminal was closed. Mr Taylor went to sleep and on waking at 6.00 am the container with the carpets had disappeared.

6. MT filed a police report on 11 January 2007 reporting the theft of the carpets from the port in Olivander, Athenia.

QUESTIONS PRESENTED

Preliminary Question

7. Does the Tribunal have jurisdiction to hear the dispute in Constantinopolis under the law of Athenia?
 Claims

8. Is the Respondent liable to the Claimant in bailment?

9. Is the Respondent liable to the Claimant for damages in bailment for:
   a. the loss of the carpets; and
   b. the payment for breach of the agency agreement?

10. Is the Respondent liable to the Claimant for damages under the B/L?

 JURISDICTION

 Introduction

11. The Claimant contends that clause 24 of FF’s standard terms at page 7 of the DB
       binds the Respondent for the following reasons:

       a. Clause 24 applies to the resolution of disputes between the Claimant
          and the Respondent arising out of their bailment relationship. Clause
          24 has direct effect as an incident of the bailment relationship between
          the Claimant and the Respondent.

       b. Clause 24 is broad enough to cover the resolution of disputes relating
          to the Respondent’s breach of its bailment obligations to the Claimant.

       c. Clause 24 meets the writing requirements of section 5 of the AA.

       d. The Respondent is merely challenging the scope of clause 24, rather
          than its validity. The Respondent has admitted the validity of clause 24
          in its preliminary submissions at page 28 of the DB.

12. In the alternative, clause 24 can be enforced against the Respondent on a
    consensual basis. The Respondent is bound by clause 24 “through” its sub-
    bailment relationship with FF, a party to the arbitration agreement contained in
    the clause.
13. Clause 26 of the Respondent’s B/L at page 17 of the DB does not bind the Claimant. In the alternative, if the Tribunal finds that clause 26 does bind the Claimant, the Tribunal nevertheless has jurisdiction to hear the claim in Constantinopolis for the following reasons:

   a. Clause 26.1 of the Respondent’s B/L, which provides for the exclusive jurisdiction of the English courts, has no effect by virtue of the application of section 11(2) of COGSA.

   b. Clause 26.2 of the Respondent’s B/L contains a valid submission to arbitration. However, the requirement that the arbitration be heard in Athenia is of no effect by virtue of the application of section 11(3) of COGSA.

   c. In order to give effect to the parties’ intention to use arbitration as an effective means of dispute resolution, the Tribunal should therefore hear this arbitration in Constantinopolis.

Clause 24 of FF’s Standard Terms Binds the Respondent

   Clause 24 applies as an incident of the bailment relationship between the Claimant and the Respondent

14. While contract has provided the traditional foundation for arbitration, significant developments in modern law and commercial practice mean that this is no longer necessarily the case. The traditional consensual foundation of arbitration has already been supplemented through agency, operation of law, assignment, or novation. Globalisation has brought about increasingly complex multi-party international trade arrangements. To maintain a coherent system of international
trade arrangements, therefore, arbitration clauses are increasingly required to determine third party rights and obligations.¹

15. The landmark decision of the Privy Council in *KH Enterprise v Pioneer Container* ("*The Pioneer Container*")² raises the issue of whether an arbitration clause can bind bailees and sub-bailees directly, as an incident of their bailment relationships with the bailor, and independently of any consensual basis. In *The Pioneer Container* Lord Goff held that a bailor could rely directly on the protection of an exclusive jurisdiction clause in the terms of the sub-bailment. Lord Goff’s reasoning would seem to be equally applicable to arbitration clauses in the bailment context. Both exclusive jurisdiction clauses and arbitration clauses give rise to mutual obligations to submit disputes to the relevant court or tribunal, rather than a unilateral obligation.³

16. Further, it is a necessary corollary of the decision in *The Pioneer Container* that a bailor can successfully rely on the terms of the head bailment against a sub-bailee, provided the sub-bailee can reasonably be regarded to have consented to such terms.⁴

17. In this case, by voluntarily assuming responsibility for carriage of the carpets as quasi-sub-bailee, the Respondent can reasonably be regarded to have assented to the terms of the head bailment, including the arbitration clause contained in clause 24 of FF’s standard terms. Clause 24 can hardly be said to be “so unusual or so unreasonable that [it] could not reasonably be understood to fall within [the


² *KH Enterprise v Pioneer Container* [1994] 2 AC 324 (PC).


⁴ *The Pioneer Container*, above n 2, 345-346; *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, 729. The only reason this argument did not succeed in *The Mahkutai* was that the clause fell outside the ambit of the relevant Himalaya clause: Ambrose, above n 1, 416 at n 6.
Respondent’s] consent”. As the Respondent’s B/L also contains a submission to arbitration in clause 26.2, clause 24 should have been anticipated.

18. This trend acknowledging bailment and sub-bailment as an independent foundation of arbitration has received both judicial and academic recognition. The Tribunal should give full effect to the legal rights and commercial expectations of all the parties in the chain of bailments in this case by enforcing clause 24 of FF’s standard terms as a direct incident of the bailment relationship between the Claimant and the Respondent.

19. The bailment model alone can comprehensively resolve the issues raised by the complex matrix of legal relationships in this case. This is the only model that can adequately explain and give effect to all the parties’ expectations, rights, and obligations. It is also far more in tune with the realities of the commercial transactions involved in international carriage of goods. An inflexible application of the narrow doctrine of privity of contract would undermine the utility of the entire concept of sub-bailment on terms.

20. Enforcing clause 24 of FF’s standard terms against the Respondent as a direct incident of the sub-bailment relationship is also efficient. All the parties to the chain of bailments, “as reasonable businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal”. The application of clause 24 of FF’s standard terms to all disputes arising out of the bailment and sub-bailment relationships in this case is the only mechanism for ensuring efficient resolution

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5 The Pioneer Container, above n 2, 346.
7 Ambrose, above n 1, 416.
8 Fiona Trust & Holding Corp v Privalov [2008] 1 Lloyd’s Rep 254 (HL), at paragraph 13. A similar point was made by Lord Goff in The Pioneer Container, above n 2, 347 where he held that it was reasonable to apply the exclusive jurisdiction clause on the grounds of commercial expectations, convenience, and efficiency.
of all disputes in a single tribunal. Otherwise, the Claimant is faced with the unenviable prospect of being forced to litigate in up to three different jurisdictions to recover against all the relevant parties.

21. Furthermore, the application of the traditional consensual model in this case would produce injustice. To insist on a consensual basis for the application of an arbitration clause in cases of unauthorised bailment and sub-bailment on terms would deprive the bailor of the protection of arbitration. It is in precisely such cases that the bailor needs the protection of the arbitration clause in the head bailment against unauthorised bailees and sub-bailees.

**Clause 24 covers the Respondent’s breach of bailment**

22. The wording of clause 24 of the FF’s standard terms is broad enough to cover the issue at hand. International commerce demands a liberal approach to interpretation of arbitration clauses.\(^9\) The liability of the Respondent to the Claimant for breach of bailment is clearly an issue “arising from the performance” of carriage by the Respondent on FF’s standard terms. The wording of clause 24, with its emphasis on *performance*, does not support a narrower construction limiting arbitration exclusively to causes of action based on contract.

**Clause 24 meets the writing requirements of section 5 of the AA**

23. Clause 24 of FF’s standard terms is an agreement in writing between the Claimant and FF as defined by section 5 of the AA.

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\(^9\) *Union of India v E B Aaby’s Rederi AS (The Evje)* [1975] AC 797, 814, 817 (HL); *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* 2006 FCAFC 192, at paragraphs 164-187; *Fiona Trust*, above n 8, at paragraphs 8, 12.
24. The formal requirements contained in section 5 of the AA constitute a minimum threshold for the enforcement of arbitration agreements. Section 5 of the AA provides:

“(2) There is an agreement in writing –

a. if the agreement is made in writing (whether or not it is signed by the parties),

b. if the agreement is made by exchange of communications in writing, or

c. if the agreement is evidenced in writing.

...

(6) References in this part to anything being written or in writing include its being recorded by any means.”

25. FF’s standard terms were referred to in its letter to the Claimant dated 29 December 2006 at page 4 of the DB. In that letter, FF directed the Claimant to FF’s website where those terms could be accessed. Section 5(6) of the AA operates to include situations where terms are recorded electronically on a website. It is abundantly clear, therefore, that FF’s standard terms, including clause 24, constitute written evidence of an arbitration agreement within the definition of section 5(2)(c) of the AA.

**Respondent is challenging the scope of clause 24, not its validity**

26. The Respondent has not impeached the validity of the arbitration agreement between the Claimant and FF contained in clause 24 of FF’s standard terms. As a result, the Tribunal has both jurisdiction and competence to hear this dispute.
27. A strong version of the doctrine of separability is now widely accepted in English case law\(^{10}\) and is given statutory effect by section 7 of the AA. In essence, the doctrine of separability recognises that an arbitration agreement is a separate and collateral agreement, and is itself the source of an arbitrator’s jurisdiction.\(^{11}\) In this vein, Lord Hope of Craighead observed in *Fiona Trust* that:\(^{12}\)

“The doctrine of separability requires direct impeachment of the arbitration agreement before it can be set aside. This is an exacting test. The argument must be based on facts which are specific to the arbitration agreement. Allegations that are parasitical to a challenge to the validity to [sic] the main agreement will not do.”

28. By analogy, if the Tribunal accepts that the relationship between the Claimant and FF amounts to an unauthorised quasi-bailment on terms, which terms include clause 24 of FF’s standard terms, and if the Tribunal further accepts that the relationship between the Claimant and the Respondent amounts to a quasi-sub-bailment on terms, the arbitration clause cannot be impeached by indirect arguments about privity of contract or privity of bailment.

29. In paragraph 1 of its preliminary submissions, the Respondent sought to challenge the scope, not the validity, of the arbitration agreement between the Claimant and FF contained in clause 24 of FF’s standard terms. In particular, the Respondent’s preliminary submissions focussed solely on the issue of whether the Respondent is a “party to the arbitration agreement in the contract between” FF and the Claimant. The Respondent’s preliminary submissions do not deny that a valid arbitration agreement is in existence between FF and the Claimant. The Respondent is therefore precluded from denying the validity of the

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\(^{10}\) *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] QB 701.

\(^{11}\) Ibid, 711.

\(^{12}\) *Fiona Trust*, above n 8, at paragraph 35.
arbitration agreement contained in clause 24 of FF’s standard terms in these proceedings, either by virtue of section 5(5) of the AA or by operation of the doctrine of estoppel.

30. In consequence, the validity of the arbitration agreement between the Claimant and FF remains unchallenged. Therefore, the Tribunal has jurisdiction to hear this dispute. Moreover, the Tribunal has competence to determine both the validity and scope of the arbitration agreement between the Claimant and FF.

Clause 24 can be Enforced Against the Respondent on a Consensual Basis

31. In the alternative, if the Tribunal finds that clause 24 does not apply as an incident of the sub-bailment relationship between the Claimant and the Respondent, the Claimant submits that clause 24 nonetheless binds the Respondent. This is because there is a valid arbitration agreement between the Claimant and FF, and the Claimant’s bailment claim is brought against the Respondent through FF, which is a party to the arbitration agreement.

32. Section 82(2) of the AA allows third parties who are not otherwise privy to an arbitration agreement to compel arbitration “under or through” another party to that arbitration agreement. Thus, section 82(2) of the AA provides that “a party to an arbitration agreement include[s] any person claiming under or through a party to the agreement”.

33. The same conceptual mechanism of extending rights and liabilities under an arbitration agreement to a third party claiming “under or through” a party to an arbitration agreement should apply by analogy in sub-bailment situations. This will allow the bailor (a party to the arbitration agreement) to claim against the
sub-bailee (a third party) “through” its bailment relationship with the bailee (a party to the arbitration agreement).

34. Broadly speaking, the legal effect of sub-bailment in such circumstances is to replace the bailee’s performance obligations with the sub-bailee’s performance obligations. This is particularly so where, as in this case, the sub-bailee is aware that it is performing the obligations contained in the head bailment for the bailor’s benefit.

35. To apply the arbitration clause only to disputes arising under the head bailment, but not to disputes arising under the sub-bailment, would generate anomalies and subvert the efficacy of the chain of bailments. Such an approach would also ignore the reality that, where the sub-bailee is the actual carrier of the goods, disputes are far more likely to arise under the sub-bailment than under the head bailment. In practice the arbitration clause in the head bailment will only be fully effective if it covers both the bailment and sub-bailment relationships, and it should therefore be extended to the latter.

36. Finally, as argued above in paragraphs 19-21, a refusal to accept that the scope of the arbitration agreement includes the sub-bailment relationship would thwart the bailor’s legal rights and reasonable commercial expectations to have all disputes arising under all sub-bailment relationships resolved in the same tribunal under the same arbitration clause.13

37. In the present case, the Respondent’s performance of its carriage obligations is so closely related to the performance of the substantive obligations of the head bailment between the Claimant and FF that the Respondent should logically

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13 Fiona Trust, above n 8, at paragraph 13.
occupy the same legal position as FF in respect of clause 24. Accordingly, the Respondent should be bound by that agreement.

**Clause 26 of the Respondent’s B/L does not Bind the Claimant**

38. The exclusive jurisdiction and arbitration clauses contained in clause 26 of the Respondent’s B/L do not bind the Claimant.

39. The Claimant was never a party to the Respondent’s B/L. As will be argued below at paragraphs 76-78, in negotiating the contract of carriage with the Respondent, FF was acting as a principal carrier rather than as an agent for the Claimant. As such, while clause 26 may be binding on FF as a party to the contract of carriage that is partly evidenced by the terms of the Respondent’s B/L, it does not bind the Claimant.

40. The Claimant did not otherwise consent to, or have knowledge of, the terms of clause 26 of the Respondent’s B/L. Nor can it be argued that the terms of clause 26 can be imposed on the Claimant by the operation of the Himalaya clause contained in clause 4.2 of the Respondent’s B/L. That Himalaya clause refers expressly to clause 26, but could only operate to extend the benefit of clause 26 to the Respondent’s servants, agents or sub-contractors (in this case MT). The Himalaya clause does not have the effect of imposing clause 26 of the Respondent’s B/L on the Claimant or BHC.14

41. In addition, clause 4.2 of the Respondent’s B/L provides that all servants, agents and sub-contractors of the Respondent “shall have the benefit of all Terms and Conditions of whatsoever nature herein contained or otherwise benefiting the [Respondent]”. Even if the Claimant could be regarded as coming within the

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14 See *The Mahkutai*, above n 3; *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2004] 1 AC 715 (HL).
definition of servants, agents and sub-contractors of the Respondent, which is not
admitted, the extension of the exclusive foreign jurisdiction clause contained in
clause 26 of the Respondent’s B/L via the operation of the Himalaya clause
contained in clause 4.2 would amount to the imposition of a burden on the
Claimant rather than the extension of a benefit.

42. The general approach to exclusive foreign jurisdiction clauses is to regard them
as binding the parties to the relevant contract unless there is good reason why
they should not be enforced. 15 However, this approach is inappropriate here. The
Claimant was not a party to the Respondent’s B/L, and did not authorise bailment
of the carpets to FF, or sub-bailment to the Respondent. In these circumstances,
the normal policy concerns about upholding the sanctity of exclusive jurisdiction
agreements do not apply.

43. The correct approach was laid down by Lord Goff in *The Pioneer Container*,
where he held that the bailor cannot be regarded as having consented to sub-
bailment terms “which are so unusual or so unreasonable that they could not
reasonably be understood to fall within [the bailor’s] consent”. 16 Lord Goff
further held that the exclusive jurisdiction clause in the sub-bailment terms was
not unusual or unreasonable, because it lead to a practical and convenient result,
and because it accorded with the normal commercial understanding of the parties.
He thought that the incorporation of an exclusive jurisdiction clause: 17

“will generally lead to a conclusion which is eminently sensible in the
context of the carriage of goods by sea, especially in a container ship,
in so far as it is productive of an ordered and sensible resolution of
disputes in a single jurisdiction, so avoiding wasted expenditure in

16 *The Pioneer Container*, above n 2, 346.
17 Ibid, 347.
legal costs and an undesirable disharmony of differing consequences where claims are resolved in different jurisdictions.”

44. This case is distinguishable from *The Pioneer Container* for the following three reasons:

   a. The claim concerns domestic road carriage of goods in Athenia rather than international carriage of goods by sea. In the context of liability for loss of goods carried by road within a single jurisdiction, one would not expect to be compelled to litigate in a third jurisdiction (here the United Kingdom). While exclusive foreign jurisdiction clauses may be common in B/Ls governing international carriage of goods by sea, they are highly unusual in the context of domestic road carriage.

   b. The effect of the exclusive jurisdiction clause is also unreasonable. Given that the parties are all domiciled in Athenia or Constantinopolis, and the matter has no connection with the United Kingdom, it is unreasonable for the Respondent to insist that the claim be litigated in the United Kingdom. This would afford the Respondent an unmerited tactical advantage that is inconsistent with the parties’ expectations in the context of domestic road carriage.

   c. The proviso in Lord Goff’s test in *The Pioneer Container* is that an exclusive foreign jurisdiction clause in the sub-bailment terms will only be enforced against the bailor in so far as it produces an efficient, comprehensive, and uniform settlement of all relevant disputes in a single jurisdiction. Requiring the Claimant to submit to litigation in the United Kingdom in respect of its claim against the Respondent will not
achieve this result, because it cannot resolve outstanding claims against FF or MT.

*The Tribunal nevertheless has jurisdiction to hear the claim in Constantinopolis*

45. In the alternative, even if the Tribunal decides that clause 26 of the Respondent’s B/L at page 17 of the DB does bind the Claimant, the Claimant submits that the Tribunal nevertheless has jurisdiction to hear the claim in Constantinopolis.

46. The exclusive foreign jurisdiction clause contained in clause 26.1 of the Respondent’s B/L has no effect. Section 11(2) of COGSA provides as follows:

“(2) An agreement (whether made in Constantinopolis or elsewhere) has no effect so far as it purports to:

(a) preclude or limit the effect of subsection (1) in respect of a bill of lading or a document mentioned in that subsection; or

(b) preclude or limit the jurisdiction of a court of Constantinopolis in respect of a bill of lading or a document mentioned in subsection (1); or

(c) preclude or limit the jurisdiction of a court of Constantinopolis in respect of:

(i) a sea carriage document relating to the carriage of goods from any place outside Constantinopolis to any place in Constantinopolis; or

(ii) a non-negotiable document of a kind mentioned in subparagraph 10(1)(b)(iii) relating to such a carriage of goods.”
47. The effect of section 11(2) of COGSA is to render ineffective the requirement in clause 26.1 that all disputes arising under the Respondent’s B/L are to be litigated in the United Kingdom. Section 11(2) of COGSA is mandatorily applicable to this matter regardless of the choice of English law in clause 26.1 of the Respondent’s B/L.18

48. Section 11(3) of COGSA provides as follows:

“An agreement, or a provision of an agreement, that provides for the resolution of a dispute by arbitration is not made ineffective by subsection (2) (despite the fact that it may preclude or limit the jurisdiction of a court) if, under the agreement or provision, the arbitration must be conducted in Constantinopolis.”

49. The combined effect of sections 11(2) and (3) of COGSA is to invalidate the arbitration agreement in clause 26.2 of the Respondent’s B/L. Requiring the arbitration to be heard in Athenia would have the effect of precluding or limiting the jurisdiction of the courts of Constantinopolis.19 It therefore is of no effect.

50. In the alternative, if the Tribunal decides that the choice of Athenia as the seat of arbitration is severable from the rest of clause 26.2 of the Respondent’s B/L, the Claimant submits that clause 26.2 also evidences a general willingness on the part of the Respondent to submit to arbitration “any claim or dispute [sic: presumably, disputed] issues relating to the breach of the contract of carriage under this bill of lading”. This general willingness to submit disputes to arbitration does not in itself contravene section 11 of COGSA, provided the arbitration is heard in

18 See eg Brazin Ltd v Transarea China Ltd [2007] FCA 610, where the Court held that section 11 of the Carriage of Goods by Sea Act (Cth), which is in identical terms to section 11 of COGSA, “plainly avoids” exclusive jurisdiction clauses, even where a B/L is governed by foreign law (in this case, Chinese law). See also Compagnie des Messageries Maritimes v Wilson (1954) 94 CLR 577 (HCA); Kim Meller Imports Pty Ltd v Eurolevant SpA (1986) 7 NSWLR 269; Furness Withy (Australia) Pty Ltd v Metal Distributors (UK) Ltd (The Amazonia) [1990] 1 Lloyd’s Rep 236.

19 Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (1998) 159 ALR 142.
Constantinopolis, where it would be subject to the supervisory and supportive role of the courts of Constantinopolis.20

51. The predominant purpose of clause 26.2 of the Respondent’s B/L is to facilitate the submission of disputes to arbitration on LMAA terms, making the seat of arbitration largely irrelevant. By ruling that it has jurisdiction to hear the dispute in Constantinopolis the Tribunal would be giving effect to this predominant purpose of submitting to arbitration on LMAA terms.

52. Clause 26.2 of the Respondent’s B/L is sufficiently broad to cover the matter at hand and should be interpreted liberally.21 The loss of the carpets is a “claim or dispute[d] issue relating to the breach of the contract of carriage under this bill of lading”. Although the Claimant’s cause of action against the Respondent is based on liability in bailment, the loss of the carpets by MT equally amounts to a breach of the Respondent’s contractual obligations towards FF under clause 6.2 of the Respondent’s B/L. Hence, the matter at hand is a claim or issue relating to, as well as arising from, a breach of the contract of carriage evidenced by the Respondent’s B/L.22

53. In paragraph 2 of its preliminary submissions, the Respondent argued that FF acted as an agent for the Claimant in entering into the contract of carriage partly evidenced by the terms of the Respondent’s B/L. It will be argued below at paragraphs 76-78 that this is incorrect. FF acted as a principal carrier (rather than as an agent) vis-à-vis the Claimant in voluntarily assuming responsibility for the carpets. There was never a contractual relationship between the Claimant and FF,

20 See the majority judgment of the New South Wales Court of Appeal in Bulk Chartering & Consultants Australia Pty Ltd v T & T Metal Trading Pty Ltd (The Krasnogrosk) (1993) 114 ALR 189.
21 Comandate, above n 9, para 165.
22 Overseas Union Insurance Ltd v AA Mutual International Insurance Co Ltd [1988] 2 Lloyd’s Rep 63, 67: arbitration clauses referring to claims “in relation to” contracts “show an intention to refer to some wider class or classes of disputes”. 
as is evidenced by the Claimant’s letter to FF of 10 January 2007: refer to page 18 of the DB. The Claimant did not assent to, or authorise, carriage of the goods by FF, the Respondent, or MT. If the Claimant can be said to have assented to the assumption of responsibility for the goods on any terms, it can only be said to have done so exclusively on FF’s standard terms.

54. The Respondent further argues at paragraph 3 of its preliminary submissions that the “arbitration clause in section [sic] 26.2 of the Bill of Lading does not cover theft of the goods”. With respect, the Claimant has difficulty understanding this submission, as the Respondent’s B/L makes no reference to theft. While clause 13(b) of FF’s standard terms purports to exclude liability for loss of goods caused by theft, the clause expressly applies only to liability in contract or tort. It is therefore irrelevant to the scope of the Respondent’s liability in bailment.

55. In the alternative, even if the Tribunal finds that clause 13(b) of FF’s standard terms does apply to the Respondent’s liability in bailment, the burden of proof is nonetheless on the Respondent to prove that theft was the cause of the loss of the carpets. The Respondent cannot discharge this burden. Although the relevant police report of 11 January 2007 at page 20 of the DB refers to the incident as “theft”, the facts establish that MT’s negligence contributed significantly to the loss of the goods.

GOVERNING LAW OF THE BAILMENT RELATIONSHIPS

56. There is scant authority on which law governs transnational bailment relationships. Where the bailment arises out of contract, the proper law of that contract may govern some, but not necessarily all, incidents of the resulting bailment. So, for example, an issue as to the legality of performance of the
bailment obligation may be governed by the law of the place of performance (the
*lex loci solutionis*), and the proprietary rights of the bailor may be governed by
the law of the place of the goods (the *lex situs*).

57. The bailment and sub-bailment relationships between the Claimant and FF, the
Claimant and the Respondent, and the Claimant and MT, are all governed by
Athenian law for one or more of the following reasons:

   a. The proper law of the bailments is Athenian law because all relevant
   parties (other than the Claimant) are domiciled in Athenia, the carpets
   were manufactured in Athenia, and the characteristic performance
   obligation of the bailments (the voluntary assumption of responsibility
   for the carpets) took place in Athenia;

   b. The *lex situs* of the goods at all relevant times was Athenian law; and

   c. The law of the place where the breach of bailment occurred is
   Athenian law.

58. In the alternative, should the Tribunal decide that the law of Constantinopolis
brates the bailment and sub-bailment relationships between the Claimant and
FF, the Claimant and the Respondent, and the Claimant and MT, there are no
material differences between the laws of Athenia and Constantinopolis, as both
countries follow relevant English legal precedents: refer to page 30 of the DB.

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23 *Kahler v Midland Bank Ltd* [1950] AC 24 (HL). See also *Zivnostenska Banka National Corp v
*Frankman* [1950] AC 57 (HL); A Phang and T Sing “On Himalaya Clauses, Bailments, Choice of Law
and Jurisdiction – Recent Privy Council Perspectives from The Mahkutai” (1996) 10 JCL 212.


25 Either by analogy to the *lex loci delicti* or a flexible exception governing transnational torts; see
TITLE TO SUE

59. The Claimant has title to sue on the following grounds:

   a. BHC was the owner and bailor of the carpets at the time they were lost.
   b. BHC has assigned all its rights of recovery to the Claimant.

BHC is the Owner and Bailor of the Carpets

60. BHC was the owner and bailor of the carpets at the time they were lost, and is therefore entitled to sue in bailment for their loss.

61. The Athenian legal system has the closest and most real connection to the contract of sale, so Athenian law governs the passing of property in the carpets.26

62. SOGA codifies the common law position that property in goods does not pass until those goods are specific, and everything has been done which, according to the intention of the parties to the bargain, is necessary to transfer property in them.27

63. The contract of sale between IC and BHC was concluded on an “ex works” basis, in the sense that IC was required to weave the carpets, stuff them into containers, and have them ready for collection at its factory. As a consequence, performance of the sales contract took place at IC’s factory in Athenia.

64. Where there is a contract for the sale of future goods by description, and goods of that description in a deliverable state are unconditionally appropriated to the contract, property in the goods thereupon passes to the buyer.28 In this case the seller, IC, unconditionally appropriated the goods with the assent of the buyer, BHC.

26 See sections 17-19 of SOGA.
27 Wait v Baker (1848) 2 Ex 1, 9; 154 ER 380, 384.
28 Karlshamns Olje Fabriker v Eastport Navigation [1981] 2 Lloyd’s Rep 679: In order to determine when property passed in a contract for the sale of unascertained or future goods, section 18, rule 5(1) of SOGA must be examined.
65. There is no evidence on the facts that the carpets were not in a deliverable state and did not comply with the contract of sale. The weaving was complete, they had been stuffed into containers, and nothing substantial\(^{29}\) remained to be done by the seller in order to put the carpets into a state in which BHC would have had to accept them.\(^{30}\)

66. The point at which goods are unconditionally appropriated to a sales contract is a matter for agreement between the parties. The parties’ intention can be inferred from the terms of the contract, their conduct, and the circumstances of the case.\(^{31}\)

67. In this case, the parties intended the carpets to be unconditionally appropriated to the sales contract when they were stuffed into the containers and were thus “ready for collection”. The fact that the Claimant was to be responsible for arranging collection from IC’s factory indicates the parties’ intention that IC’s contractual responsibilities would end when the goods were ready to be collected. That this was the parties’ intention is further supported by the reference to making the wall hangings “ready for collection” in IC’s letter to the Claimant dated 9 January 2007 at page 19 of the DB. The carpets were therefore unconditionally appropriated to the sales contract on being stuffed into the containers on or prior to 15 December 2006.

68. The Claimant assented to this appropriation, either implicitly in advance by providing the authority to weave the branded carpets,\(^{32}\) or after IC notified the Claimant that the carpets were ready for collection on 15 December 2006. The

\(^{29}\) *Hinde v Waterhouse* (1806) 7 East 558; 103 ER 216 an unfulfilled minor duty will not prevent property from passing.

\(^{30}\) Cf *Philip Head & Sons Ltd v Showfronts Ltd* [1970] 1 Lloyd’s Rep 140, where the carpets were not in a deliverable state because they still had to be installed by the seller. Here the seller is not required to do anything further to the carpets.


\(^{32}\) *Aldridge v Johnson* (1857) 7 E & B 885, 899, 900; 119 ER 1476, 1481, 1482.
Claimant’s assent to the appropriation is evidenced by its letter to FF dated 21 December 2006 at page 3 of the DB.

69. Property passes when the parties intend it to pass.33 Here there was no retention of title clause in the sales contract.34 There is nothing to suggest that IC intended to retain ownership of the carpets after delivery at its factory. On the contrary, the sales agreement provided for the goods to be collected prior to the full purchase price being paid. The fact that BHC only paid the balance of the price on 6 February 2007 does not, therefore, preclude an earlier passing of property in the carpets. Indeed, the payment of the balance of the price by BHC on 6 February 2007 is consistent with the Claimant’s submission that BHC is the owner of the goods.35

BHC Assigned its Rights to the Claimant

70. At all relevant times the Claimant was acting as an agent of BHC. This is evidenced by the following facts:

   a. IC’s confirmation of the Claimant’s order dated 21 June 2006 at page 2 of the DB makes clear that in ordering the carpets from IC the Claimant specified that the carpets were to bear the BHC “symbol, colours and design”.

   b. The Claimant expressly stated in its letter of 21 December 2006 at page 3 of the DB that:

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33 SOGA, section 17.
34 Cf Re Bond Worth Ltd [1980] Ch 228.
35 Mucklow v Mangles (1808) 1 Taunt 318; 127 ER 856; payment of the price is not the point determinative of the sale; Reid v Macbeth & Gray [1904] AC 223 (HL); Sir James Laing & Sons v Barclay, Curle & Co [1908] AC 35 (HL); In Re Blythe Shipbuilding [1926] Ch 494: payment by instalments, while not determinative of appropriation, is evidence of it.
i. BHC, rather than the Claimant, “will be importing” the carpets from Athenia;

ii. The Claimant had been “engaged by” BHC to fit out its new hotel; and

iii. BHC had requested the sourcing of the carpets from Athenia.

71. BHC transferred its title to sue to the Claimant. In *Trendtex Trading v Credit Suisse*,36 the House of Lords held that a transfer of title to sue would be valid where the transferee could show “a genuine commercial interest in taking the assignment and enforcing it for his own benefit”.37

72. In this case the Claimant has settled a breach of agency claim brought against it by BHC. That claim resulted directly from the Respondent’s breach of its bailment obligations. In consideration for the Claimant’s settlement of its breach of agency claim, BHC transferred its rights of suit to the Claimant.

73. The extent to which a transfer of title to sue must be for the transferee’s own benefit was discussed in *The Kelo*.38 In that case, it was not clear whether the agents had brought the arbitration proceedings for their own benefit, or for that of their principal. Staunton J observed that there were many possible types of “genuine commercial interest” in taking and enforcing a claim beyond the mere enjoyment of pecuniary reward. He said:39

> “It made good sense commercially that, as part of their duties, [the agents] should deal with claims against the ship and, if they wished to do so, deal with those claims in their own name. This was not officious interference in

37 Ibid, 703 per Lord Roskill.
39 Ibid, 89-90.
the disputes of others which were no concern of theirs. It was a legitimate part of their business activity.”

74. The terms of the settlement agreement with BHC provide that the Claimant will reimburse BHC to the extent that its claim succeeds. Nonetheless, the Claimant has another genuine commercial interest in taking transfer of BHC’s rights of recovery. The Claimant has a strong commercial interest in maintaining its working business relationship with BHC, an important client. This is evidenced by its willingness to pursue BHC’s rights of recovery against the Respondent. In broader terms, the nature of the Claimant’s work as a commercial agent for BHC legitimately includes the bringing of actions on their behalf.

RESPONDENT’S LIABILITY IN BAILMENT

Chain of Bailments

75. The Respondent is liable for the loss of the carpets due to breach of its bailment obligations. This is based on the following arguments:

   a. In assuming responsibility for the carpets, FF acted as a quasi-bailee for reward.

   b. FF sub-contracted actual carriage of the carpets to the Respondent. The Respondent is therefore a quasi-sub-bailee for reward.

   c. As such, the Respondent owes the claimant a duty of care in bailment.

   d. The Respondent further sub-contracted carriage of the carpets from IC’s factory to the cargo terminal at the port of Olivander in Athenia to MT.
e. In carrying the carpets MT was acting as either the agent or servant of the Respondent. As such, the Respondent is liable for MT’s acts or omissions.

f. In the alternative, if MT was acting as an independent sub-contractor, this amounts to a further sub-sub-bailment on terms. On either analysis, the Respondent is liable for MT’s breach of its duty of care in bailment towards the Claimant.

g. The extent of the Respondent’s liability in bailment is determined by FF’s standard terms referred to in FF’s letter to the Claimant on 29 December 2006 at page 4 of the DB.
Bailment to FF

**FF was a principal carrier, not an agent**

76. Whether a freight forwarder has contracted as a principal carrier or an agent is a question of fact. All the circumstances of the case have to be considered.\(^\text{40}\) The following circumstances may indicate that a person or company is a carrier rather than an agent, although this list is not exhaustive:

a. the “carrier” is in the habit of invoicing the client for an “all in” charge for the carriage;\(^\text{41}\)
b. the forwarder does not usually tell its client of the arrangements made on its behalf;\(^\text{42}\)
c. the forwarder uses standard trading conditions, which contemplate potential liability as bailee or carrier;\(^\text{43}\)
d. the forwarder provides multimodal or “door-to-door” carriage of goods.\(^\text{44}\)

77. It is clear on the evidence that FF was acting as a principal carrier. The following factors evidence this submission:

a. FF quoted an “all in” price of US$2500 on 29 December 2006 for shipment of the carpets: refer to page 5 of the DB.
b. FF reserved the right to enter into arrangements for the transport of goods under clause 5 of its standard terms: refer to page 6 of the DB.

\(^{40}\) M Davies and A Dickey *Shipping Law* (3rd ed, Thompson Lawbook Co, Pyrmont, 2004) p 276; *Hair & Skin Trading Co Ltd v Norman Air Freight Carriers* [1974] 1 Lloyd’s Rep 443, 445: this is “a matter of impression”.


\(^{42}\) *Electronska v Transped* [1986] 1 Lloyd’s Rep 49.

\(^{43}\) Ibid.

\(^{44}\) *Comalco Aluminium Ltd v Mogal Freight Services Pty Ltd* (1993) 113 ALR 677.
c. Although FF indicated in clause 4 of its standard terms, at page 6 of the DB, that it was not a “common carrier”, this was in the context of making it clear that it reserved the right not to act as a carrier for specific customers.

d. FF limits its potential liability under clause 13 of its standard terms at page 6 of the DB in situations where the goods are in its own possession or that of a third party employed for the transport of the goods. In effect, FF contemplates its possible liability as a bailee or carrier of the goods.

e. FF has undertaken to arrange “door-to-door” carriage of the carpets.

f. Although FF nominated the Claimant as the consignor and consignee of the carpets in its email to the Respondent dated 29 December 2006 at page 8 of the DB, the Claimant did not authorise FF to do so. The nomination of the Claimant as consignor and consignee is not determinative of the issue of whether FF was acting as a principal carrier.45

g. Although FF did not take possession of the carpets or carry them itself, this does not preclude FF from being regarded as a principal carrier.46

78. It is therefore clear that FF was acting as a principal carrier in its dealings with the Respondent, and not as an agent of the Claimant.

**Authorisation of bailment and sub-bailment is not required**

79. While neither the Claimant nor BHC consented to, or authorised, bailment of the carpets to FF, this does not preclude the establishment of a bailment relationship

46 *Heilbrunn v Lightwood Plc* [2007] FCA 1518 (3 October 2007), paragraph 53.
between the Claimant and FF.\textsuperscript{47} The core legal test for the existence of a bailment relationship is the voluntary assumption of responsibility \textit{by the bailee} for the goods of another. If this is determinative in cases where the bailor consents to such bailment, it should, a fortiori, be determinative in cases of unauthorised bailment.\textsuperscript{48} Therefore, the Claimant’s lack of assent or authorisation did not preclude the establishment of a bailment or quasi-bailment relationship between the Respondent and FF.\textsuperscript{49}

\textit{Possession of the goods is not required}

80. FF did not take physical possession of the carpets. Regardless, it owed a duty of care in bailment to the Claimant. Even where a bailee or sub-bailee does not take physical possession of the goods prior to transferring them down the bailment chain, it is liable in quasi-bailment and is under the same duty as a direct bailee.\textsuperscript{50}

81. The leading modern authorities on bailment without possession are \textit{Westrac Equipment Pty Ltd v Owners of the Ship “Assets Venture”}\textsuperscript{51} and \textit{Lukoil-Kalingradmorneft Plc v Tata Ltd (No 2)}.\textsuperscript{52} In the former case, the Federal Court of Australia held that a freight forwarder without possession of the goods is a quasi-bailee and therefore owes the same duty to the bailor as an actual bailee or sub-bailee. In the latter case, the English High Court confirmed that the principles set out in \textit{The Pioneer Container} apply to bailment and quasi-bailment alike.

\begin{itemize}
\item \textsuperscript{47} \textit{The Pioneer Container}, above n 2, 341-342.
\item \textsuperscript{49} \textit{The Pioneer Container}, above n 2, 341-342; \textit{W D & H O Wills (Australia) Limited v State Rail Authority of New South Wales} [1998] NSWSC 81 (3 April 1998).
\item \textsuperscript{51} \textit{Westrac Equipment}, above n 50, 285-286 (FC). See too \textit{Westpac Bank}, above n 50.
\item \textsuperscript{52} \textit{Lukoil-Kalingradmorneft}, above n 50.
\end{itemize}
82. In *Matthew Short & Associates Pty Ltd v Riviera Marine (International) Pty Ltd*, however, the New South Wales Court of Appeal held that a freight forwarder was not liable in bailment, because it failed to take physical possession of the goods. This decision is incorrect, and should not be followed for these reasons:

a. Relevant authorities on the possession issue, including *Spectra International Plc v Hayesoak Ltd* and *The Pioneer Container*, were not referred to in *Matthew Short*.

b. As argued above in paragraphs 76-78, FF was acting as a principal carrier rather than an agent, whereas in *Matthew Short* the freight forwarder was an agent.

c. In *Matthew Short* the freight forwarder’s role was limited to procuring another party to arrange preliminary carriage. In this case, however, although FF indicated in its letter of 29 December 2006 at page 4 of the DB that it would sub-contract part of the actual carriage of the carpets, it undertook to the Claimant to oversee the entire carriage process, and held itself out as providing “an effective door to door service”.

d. As Davies and Dickey correctly point out in their analysis of *Matthew Short* “it seems capricious for the bailee’s rights to depend on the relatively fortuitous circumstance whether the intermediary ever took possession of the goods”.

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53 [2001] NSWCA 281 (“*Matthew Short*”).
54 [1997] 1 Lloyd’s Rep 153 (“*Spectra*”). In *Spectra* it was held that a freight forwarder is responsible as a bailee where it makes arrangements to place goods in a warehouse or arrange onward delivery.
56 Davies and Dickey, above n 40, 275.
83. In the alternative, if the Tribunal finds that *Matthew Short* is applicable and that the doctrine of bailment on terms does not apply to FF, the Respondent is liable for breach of bailment in any event, because MT took possession of the carpets for, and under instructions from, the Respondent.

**Sub-Bailment to the Respondent**

*Introduction*

84. FF made arrangements with the Respondent on 29 December 2006 to transport the carpets: refer to page 8 of the DB. The legal effect of this quasi-sub-bailment was that the Respondent owes the Claimant the same duty of care in bailment that FF owes the Claimant.\(^{57}\)

85. The scope of the Respondent’s liability is delimited by FF’s standard terms at pages 6-7 of the DB. However, the limitation of liability provision in clause 13 of FF’s standard terms is ineffective in limiting the Claimant’s cause of action in bailment, as the clause expressly states that it excludes liability only “in contract or in tort”.

86. Equally, clause 23 of FF’s standard terms, which purports to extend the benefit of any limitation of liability provision in FF’s standard terms to FF’s servants, employees, or agents, is irrelevant because it only purports to limit claims brought in tort.

*Possession of the goods is not required*

87. If MT was acting as the Respondent’s agent or servant in collecting the carpets from IC’s factory, the carpets were in the Respondent’s constructive possession

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\(^{57}\) *The Pioneer Container*, above n 2, 336-337.
when they disappeared. In this case the relationship between the Claimant and the Respondent is one of sub-bailment with possession.

88. In the alternative, if MT was acting as an independent sub-contractor in collecting the carpets from IC’s factory, it is conceded that the carpets were not in the Respondent’s possession when they disappeared. However, this does not affect the Respondent’s liability in quasi-sub-bailment. The arguments made above in paragraphs 80-83 apply mutatis mutandis to the quasi-sub-bailment relationship between the Claimant and the Respondent.

*Sub-bailee’s awareness of the bailor is not required*

89. In the context of establishing the Respondent’s status as sub-bailee, it is a matter of some controversy whether the Respondent is required to have knowledge of the Claimant’s interest in the carpets. Although there is support for the proposition that a bailee or sub-bailee must have knowledge of the bailor’s interest in the goods, this is by no means settled. The better view, consistent with tort principles, is that the focus should be on voluntary assumption of responsibility for the goods by the bailee or sub-bailee.

90. However, even if knowledge of the bailor’s interest in the goods is a prerequisite to liability in bailment, it is clearly satisfied here. This is evidenced by the email dated 29 December 2006 at page 8 of the DB from FF to the Respondent naming the Claimant as consignor, consignee and notify party in respect of the carpets. This must have signalled to the Respondent that a party other than FF had an interest in the goods.

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58 *The Pioneer Container*, above n 2, 342; *Morris*, above n 4, 731-737; *W D & H O Wills*, above n 49.
60 *Westrac Equipment*, above n 50.
Claimant did not consent to the terms of the respondent’s B/L

91. *The Pioneer Container* and other modern authorities on sub-bailment have confirmed that the terms of the sub-bailment will only bind the bailor to the extent that these terms have been expressly, impliedly or ostensibly consented to. Where the bailor has not consented, it is not bound.

92. Although it is conceded that clause 5 of FF’s standard terms at page 6 of the DB contemplates sub-bailment in general terms, the Claimant nonetheless cannot be taken to have consented to any specific terms in the Respondent’s B/L “which are so unusual or so unreasonable that they could not reasonably be understood to fall within such consent”.

93. As argued above at paragraphs 43-44, the exclusive foreign jurisdiction clause contained in clause 26.1 of the Respondent’s B/L is unusual and unreasonable in the context of this case.

94. The limitation and exclusion of liability provisions contained in clause 6 of the Respondent’s B/L at pages 12-13 of the DB are equally unusual and unreasonable. Even if the Claimant may be taken to have impliedly consented to the normal incidents of international carriage of goods, this did not include agreeing to limit the carrier’s liability for domestic road carriage of goods within Athenia.

95. Athenia has neither a large shipping industry nor a specialised carriage of goods regime. As such, the Claimant could not have expected, and did not expect, that

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63 *The Pioneer Container*, above n 2, 347 (as per Lord Goff); *Carrington Slipways Pty Ltd v Pacific Austral Pty Ltd* Unreported, Supreme Court of New South Wales, Rogers CJ (2 February 1989); affirmed on appeal (1991) 24 NSWLR 745.
domestic road carriage in Athenia would be subject to a limited liability regime such as that provided for in clause 6.1(c) of the Respondent’s B/L. While such a limited liability regime may be regarded as a term “usually current in the trade” of international carriage of goods by sea, it is far from common in the context of domestic carriage of goods.

96. Further, the Claimant has no experience or expertise in matters of international trade. Rather, the Claimant expressly relied upon the knowledge of FF, and is ignorant of which terms are, or might be, usual in transnational transport of goods. FF did not issue a B/L to the Claimant, and FF’s brief standard terms gave the Claimant no inkling of the highly detailed and obscure provisions of the Respondent’s B/L. It cannot reasonably be said that the Claimant had impliedly consented to the unfamiliar and onerous terms in the Respondent’s B/L.

Sub-Sub-Bailment to MT

97. The Respondent engaged MT to collect the carpets from IC’s factory and deliver them to its container terminal at Olivander, Athenia. In doing so, MT was acting as the Respondent’s agent or servant. Therefore, the Respondent is liable for MT’s breach of bailment. In the alternative, if MT was acting as an independent sub-contractor, this amounts to a further sub-sub-bailment on terms. In any event, the Respondent is liable for MT’s breach of bailment.

98. On either scenario, it was ultimately the Respondent’s duty to take all reasonable precautions in carrying the goods. The fact that the Respondent delegated

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64 Morris, above n 4, 730.
65 Cf Singer Co (UK) Ltd v Tees & Hartlepool Port Authority (1988) 2 Lloyd’s Rep 164, where the terms of the head bailment and sub-bailment were more or less congruent.
66 Westrac Equipment, above n 50; Carrington Slipways, above n 64; Westpac Bank, above n 50.
67 Morris, above n 4, 729.
performance of the domestic road carriage leg in Athenia to MT does not exonerate the Respondent from liability.\textsuperscript{69}

\textbf{Damages for Breach of Bailment}

99. As bailment is a sui generis obligation, the generally accepted position is that the damages to be awarded for breach of bailment are not strictly based on either of the traditional tort or contract measures of damages. The common law principle of reliance-based damages tends to be applied to breaches of bailment,\textsuperscript{70} provided that the loss or damage is not too remote.\textsuperscript{71}

100. The first claim for damages of US$144,000 for the loss of the carpets flows directly from the Respondent’s breach of bailment. The cost of replacing goods is always reasonably foreseeable where a bailee or sub-bailee fails to deliver a consignment.

101. The second claim for damages of US$50,000 for the settlement of BHC’s breach of agency claim is a consequential loss resulting directly from the disappearance of the goods. Consequential losses are not excluded under FF’s standard terms. Unlike the Claimant, the Respondent is experienced in international transport and trade, and would have been aware that the goods it carried were highly likely to be subject to multiple third-party contractual and proprietary interests. The Respondent could not reasonably have assumed that the Claimant was the purchaser or end-user of the carpets, simply because the Claimant was identified


\textsuperscript{70} Building & Civil Engineering Holidays Scheme Management Ltd v Post Office [1966] 1 QB 247, 261, 262, 265.

\textsuperscript{71} The Argentino (1888) 13 PD 191, 196, 200.
as consignee. It was entirely foreseeable that the Respondent’s breach of bailment would result in third parties seeking to recover against the Claimant.

102. The Respondent is thus liable to pay full damages of US$194,000, plus costs and interest.

ALTERNATIVE ARGUMENT: RESPONDENT’S LIABILITY UNDER THE B/L

103. In the alternative, even if the Tribunal finds that the terms of the Respondent’s B/L are relevant to the determination of the Respondent’s liability as sub-bailee, those terms do not relieve the Respondent of liability for the loss of the carpets.

104. Clause 6 of the B/L regulates the carrier’s responsibility for multimodal transport, such as was envisaged in this case. Clause 6.3 of the B/L provides that the carrier shall not be liable for loss or damage arising prior to loading onto the vessel where a place of receipt or place of delivery is not named on the reverse of the B/L. However, here the terms of the Respondent’s B/L were incorporated into the carriage contract between FF and the Respondent, which was concluded by an exchange of emails on 29 December 2006 and 2 January 2007 at pages 8-10 of the DB. No B/L was ever completed or issued in respect of this consignment of goods. Clause 6.3 of the Respondent’s B/L must therefore be interpreted in the light of the extrinsic evidence of the parties’ intentions contained in the exchange of emails.72 This includes reference both to the place of receipt and the place of delivery of the goods.

105. Clause 6.2 of the B/L governs the responsibility of the carrier where the moment of loss or damage is known, as it is in this case. The only potentially relevant provisions are 6.2(a) and 6.2(e).

72 SS Ardennes (Cargo Owners) v SS Ardennes (Owners) [1951] 1 KB 55.
106. Clause 6.2(a) provides that the carrier’s responsibility will be determined by the mandatory provisions of any international Convention or national law which would have applied “if the Merchant had made a separate and direct contract with the Carrier in respect of the particular stage of the Carriage during which the loss or damage occurred…”. The only potentially applicable international Convention or national law is the Amended HVR, as given domestic effect by COGSA.

107. The Claimant’s position is that the Amended HVR was not mandatorily applicable to the goods at the time they disappeared.

108. Article 10, paragraph 2 of the Amended HVR specifies that:

“these Rules apply to the carriage of goods by sea from ports outside Constantinopolis to ports in Constantinopolis, unless one of the Conventions mentioned in paragraph 3 (or a modification of such a Convention by the law of a contracting State) applies, by agreement or by law, to the carriage, or otherwise has effect in relation to the carriage”.

109. The proviso in Article 10, paragraph 2 is not relevant here as no international carriage of goods by sea Convention or modification applies in Athenia: see page 30 of the DB.

110. Article 1, paragraph 6 of the Amended HVR defines the limits of a port or wharf outside Constantinopolis as being “the limits fixed by any local law (including any terminal area used for cargo handling that has a common boundary with the area within those limits).”

111. The port area as gazetted under Athenian law does not include the parking area where the container of carpets disappeared: refer to the police report and diagram
at pages 20 and 31 of the DB respectively. Further, although the parking area has a common boundary with the port area as gazetted, the parking area is not a “terminal area used for cargo handling” as required by Article 1, paragraph 6 of the Amended HVR.

112. The Oxford English Dictionary defines “cargo” as “[t]he freight or lading of a ship, a ship-load”, and “handling” as “[t]he action of touching, feeling, or grasping with the hand; management with the hand, wielding, manipulation; laying hands on; treatment in which the hands are effectively (or roughly) used”. It is therefore clear that the parking area at Olivander does not come within the ordinary meaning of the term “cargo handling”.

113. This dictionary definition is also consistent with Australian authority. In Moody & Co Pty Ltd v Export Development Grants Board73 the court considered whether goods were received for “export at the port of Brisbane”. The court canvassed a large amount of material regarding what constitutes a port area. The court considered that the port would include not only the wharf but also areas:74

“adjacent to the wharf from which the goods will be loaded, such areas being those which are devoted to the handling and trans-shipment of goods and their storage, given that such storage is for the purpose of holding them in the course of and for the purpose of the process of shipment”.

114. The key finding in this case was that the port area did not extend to any areas where cargo was not being handled.

115. In the current case, only Terminal A is included in the extended definition of “port” in Article 1, paragraph 6 of the Amended HVR. This interpretation is

74 Ibid, 183.
supported by the fact that Terminal A is separated from the rest of the Terminal Space by a gate that clearly demarcates the area reserved for “cargo handling”. In the alternative, even if storage of cargo is included in the extended definition of “port”, this would include only the storage sheds in the Terminal Space, but not the parking area.

116. In summary, the port of Olivander as defined by the Amended HVR extends only to the red area in the following diagram. As a consequence, the Amended HVR did not mandatorily apply to the carpets in the parking area, and clause 6.2(a) of the Respondent’s B/L is therefore inapplicable.
If clause 6.2(e) of the B/L applies, which is not admitted, the Claimant submits that the Respondent is liable for the loss of the carpets in accordance with the contracts of carriage or tariffs negotiated with MT, “the inland carrier in whose custody the loss or damage occurred”. In the alternative, in the absence of such contracts or tariffs, the Respondent is nonetheless liable under clause 6.1(c) of the B/L to the extent of 2 SDR per kilo of the gross weight of the lost carpets. This amounts to 32,640 SDR, or US$53,469.24 on the current rate of conversion.

**PRAYER FOR RELIEF**

For the reasons outlined above, the Claimant requests that the Tribunal:

Declare that it has jurisdiction to hear the dispute; and

Adjudge that the Respondent is liable for breach of bailment, and require the Respondent to compensate the Claimant in the amount of US$194,000.

And therefore,

Award the plaintiff the following:

(a) Damages amounting to US$194,000;

(b) Interest; and

(c) Costs.