IN THE MATTER OF AN ARBITRATION HELD AT BRISBANE

MEMORANDUM FOR THE RESPONDENT

ON BEHALF OF: Markka Trading Company
10 Crow Street
Schilling

CLAIMANT

AGAINST: Lira Steamship Company
Level 4, West Circle
Peoeta

RESPONDENT

TEAM NUMBER 14

Tim Alexander, Michelle Cowan, Emma Higgins and Lianna Martins
INTERNATIONAL MARITIME LAW ARBITRATION MOOT 2012

MEMORANDUM FOR THE RESPONDENT

TEAM NUMBER 14
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<td><em>Convention on the Limitation of Liability for Maritime Claims</em> 1976</td>
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CASES

Anderson, Anderson & Co v Owners of the San Roman [1873] 5 LRPC 301

Australian Costal Shipping v Green [1971] 1 QB 456

B & S Contracts and Design Ltd v Victor Green Publications Ltd [1984] ICR 419


Blythe & Co v Richards Turpin & Co (1916) 114 LT 753

Channel Island Ferries Ltd v Sealink UK Ltd [1988] 1 Lloyd’s Rep 323

Chellew v Royal Commission on the Sugar Supply [1921] 6 LI L Rep 584

Chidbundid v Minister for Immigration [2012] FMCA 59

Colonial Mutual Ltd Assurance Society Ltd v Procedurers & Citizens Co-operative Assurance Co of Australia Ltd (1931) 46 CLR 41

Comandate Marine Corp v Pan Australia Shipping Pty Ltd (2006) 157 FCR 45

Corry v Coulthard; Corfu Navigation Co v Mobil Shipping Co Ltd [1991] 2 Lloyd’s Rep 515

Enterra Pty Ltd and Others v Adi Ltd [2002] NSWSC 700

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High Seas Venture Limited Partnership v Sinom (Hong Kong) Limited [2008] 1 Lloyd’s Rep 504

Holman v FT Everard & Sons Ltd (The Jack Wharton) [1986] 2 Lloyd’s Rep 382

Hong Guan & Co Ltd v R Jumabhoy & Sons Ltd [1960] AC 684

Hyundai Merchant Marine Co Ltd v Dartbrook Coal (Sales) Pty Ltd [2006] FCA 1324

Joseph Watson v Fireman Funds Insurance Co. [1922] 2 KB 355

Killarney Investments Pty Ltd v Macedonian Community of WA (Inc) [2007] WASCA 180
Marida v Oswal Steel (The Bijela) [1992] 1 Lloyd’s Rep 636

McDermid v Nash Dredging & Reclamation Co Ltd [1986] 2 Lloyd’s Rep 24

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NMFM Property Pty Ltd v Citibank Ltd (2000) 186 ALR 442

Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR 451

Pan Australia Shipping Pty Ltd v The Ship ‘Commandate’ (No. 2) [2006] FCA 1112

Permanent Trustee Australia Ltd v Valeondis [2009] SASC 375


Qenos Pty Limited v Ship “APL Sydney” (2009) 187 FCR 282

Rahcassi Shipping Co SA v Blue Star Line Ltd [1969] 1 QB 173

Re WE Clouston & Co (Ltd) and Corry (1904) 23 NZLR 597

Societe Nouvelle d’Armement v Spillers & Bakers [1917] 1 KB 865

Strong Wise Limited v Esso Australian Resources Pty Ltd [2010] FCA 240

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Sweeney v Boylan Nominees Pty Ltd (2006) 226 CLR 161

Tenants (Lancashire) Ltd v CS Wilson & Co Ltd [1917] 1 KB 208

The Gratitudine 3 Ch Rob 240

The Lady Gwendolen [1965] 1 Lloyd’s Rep 335

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Tronson v Dent (1853) 8 Moo PCC 419

Union of India v EB Abby’s Rederi AS (‘The Evje’) [1975] AC 797

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Vlassopoulos v British and Foreign Marine Insurance Company (The Makis) [1929] 1 KB 187

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Electronic Transactions Act 1999 (Cth)

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TREATIES

Convention on the Limitation of Liability for Maritime Claims 1976

RULES

International Maritime Dangerous Goods Code 2008

MLAANZ Policy to Join Panel of Arbitrators, Maritime Law Association of Australia and New Zealand

York-Antwerp Rules 1994

SECONDARY MATERIALS

Baughen, Stephen Shipping Law (Cavendish, 2nd ed, 2001)


Jackson, D C Enforcement of Maritime Claims (LLP, 3rd ed, 2000)

C. **STATEMENT OF FACTS**

1. The Claimant is engaged in trade, and operates from Schilling and owns the Berth. The Respondent operates from Peseta, is engaged in the business of shipping cargo, operates from Peseta and owns the Vessel.

2. In November 2010, the Claimant and Respondent negotiated a contract of carriage from Escudo to Schilling. On 16 November 2010, the Claimant agreed to the terms proposed by the Respondent, save that all reference to 14 days in Clause 25(e)(ii) be changed to 30 days.

3. On 30 November 2010, the Claimant entered into the Charterparty with the Respondent to ship 15,000mt of Ammonium Nitrate from Escudo to Schilling. Clause 36 of the Charterparty provided “any disputes arising out of or in connection with” the Charterparty be resolved by arbitration in Brisbane according to the MLAANZ Arbitration Rules.

4. On 25 December 2010, the Vessel completed loading and proceeded to Schilling. On 3 January 2011, Schilling began to endure extreme weather conditions and at 9:00am on 11 January 2011, Schilling was closed until further notice due to inclement weather conditions.

5. On 11 January 2011, the Respondent wrote to the Claimant giving notice of a Force Majeure Event pursuant to Clause 25 of the Charterparty and of its intention to direct the Master of the Vessel to proceed to the Berth. On 12 January 2011, the Claimant wrote to the Respondent advising that its declaration of a Force Majeure Event was invalid and expressly directed the Respondent to remain at Schilling for the port to re-open and not to deviate to Guilder.

6. On 30 January 2011, the Vessel left anchorage at Schilling and proceeded to Guilder. While proceeding to Guilder, the Vessel’s propeller shaft was damaged, such that it could
not continue under its own power. The Vessel was drifting and the Respondent engaged the services of Koruna Salvage and Tow Company to tow the Vessel to the Port of Koruna to be repaired. On 31 January 2011, the Respondent sent a letter to the Claimant declaring general average in relation to this event.

7. On 25 February 2011, the Vessel attempted to enter the Port of Guilder, which is a compulsory pilotage area. Guilder Harbour Control ordered the Vessel to wait for a pilot. The Vessel advised that it had to proceed to berth immediately in readiness for a further voyage beginning on 26 February 2011. Despite being ordered that pilotage was not negotiable, the Vessel proceeded to enter the port without a pilot. The Vessel struck the Berth and caused significant damage to the Berth and associated port infrastructure.

8. On 26 February 2011, the GMIS prepared a report stating the Vessel had approached the Berth at too high a speed and was unable to slow and turn as necessary. Consequently the Vessel had struck the Berth and caused damage to the Berth and associated port infrastructure.

9. On 1 March 2011, the Claimant wrote to the Respondent denying liability in relation to the Respondent’s claim for general average, giving notice of the losses resulting from the Vessel’s deviation and damage to the Berth, and requesting payment of those losses. On 10 March 2011, the Respondent wrote to the Claimant denying liability for those losses and requested payment in relation to the general average incident.

10. On 30 June 2011, the Claimant informed the Respondent that it was referring its claim to arbitration and that it appointed Mr Silvio Papandreou, a former Prime Minister of a large ship-owning nation, as an arbitrator. On 1 July 2011, the Respondent appointed Mr Jose Mengel, LMAA arbitrator for the past 20 years and former Master on a Cape Size vessel, as an arbitrator.
D. QUESTIONS PRESENTED

1. Whether the arbitral panel have jurisdiction to hear this dispute.

2. Whether the Respondent can rely upon Clause 25 to excuse its unjustified deviation.

3. Whether the Respondent is liable for the damage done to the Berth.

4. Whether the Respondent is entitled to limit its liability under the LLMC.

5. Whether the Claimant is liable to make a general average contribution.

E. ARGUMENTS PRESENTED

1. THE ARBITRAL PANEL DOES NOT HAVE JURISDICTION TO HEAR THE MATTER AS IT IS NOT PROPERLY CONSTITUTED IN ACCORDANCE WITH THE CHARTERPARTY

[1] Under the Charterparty each party is required to appoint one arbitrator, and a third arbitrator is to be chosen by the two arbitrators nominated by the parties. The Charterparty requires that the arbitrators be recognised by MLAANZ “as having expertise in shipping or maritime matters.” The appointed arbitrators must possess this qualification in order for the panel to be properly constituted and therefore have jurisdiction to hear the matter.

[2] The Respondent submits that Mr Papandreou has neither the relevant qualifications nor the appropriate level of experience, and thus the Arbitral Panel does not have jurisdiction to hear the dispute.

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1 Charterparty clause 36 (c) (Procedural Order No 2, 17).
2 Charterparty clause 36 (c) (Procedural Order No 2, 17).
1.1 Mr Papandreou is not recognised by the MLAANZ

[3] A person with practical knowledge on the subject of arbitration may be unsuitable because he lacks knowledge or experience as an arbitrator.4

[4] There is no evidence that Mr Papandreou is recognised by the MLAANZ as having expertise in any capacity, either as an arbitrator or in shipping and maritime matters. Further, such expertise or recognition cannot be inferred to Mr Papandreou on the basis of his performance of the duties as Prime Minister.5

[5] An applicant for admission to MLAANZ should demonstrate that he or she is a person of standing in the maritime community, with an interest in maritime affairs.6

[6] MLAANZ maintains a policy of preferring arbitrators who are:

- accredited as an arbitrator by the Institute of Arbitrator and Mediators Australia or the Institute of Arbitrators New Zealand or a similar body elsewhere; or

- have no less than ten years experience practicing law with relevant experience.7

Mr Papandreou’s service as Prime Minister of a large ship-owning nation does not of itself demonstrate standing in the maritime community, nor an interest in maritime affairs.

[7] There is no evidence that Mr Papandreou is accredited as an arbitrator, nor that he has relevant experience as a legal practitioner for any period of time.8 Furthermore, it cannot be implied that his experience as a Prime Minister would establish his accreditation in either of these areas.9

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4 Re WE Clouston & Co (Ltd) and Corry (1904) 23 NZLR 597; Redfern A, Hunter M, Blackaby N, & Partasides C Law and Practice of International Commercial Arbitration (Sweet & Maxwell, 4th ed, 2004) 234, 4-47.
5 Ibid.
7 Ibid.
8 Moot Problem 54.
9 Enterra Pty Ltd and Others v Adi Ltd [2002] NSWSC 700.
The Respondent submits that MLAANZ is therefore unlikely to recognise Mr Papandreou as an arbitrator. As a consequence, Mr Papandreou does not satisfy clause 36(c) of the Charterparty.

1.2 Alternatively, Mr Papandreou does not have expertise in shipping or maritime matters

The Claimant submits that, should the panel determine that the MLAANZ criterion does not need to be satisfied, clause 36 of the Charterparty still requires the appointed arbitrators to have sufficient expertise in shipping or maritime matters.10

Mr Papanderou does not have such expertise. The only qualification advanced in his favour is being the Prime Minister of a large ship-owning nation. A Prime Minister is someone who provides political leadership for the party, provides direction and leadership for the Government, and acts as the chief spokesperson for the Government in both the Parliament and the community.11 There is no requirement that a Prime Minister have experience as a skilled and practicing arbitrator to fulfil the requirements of the role as Prime Minister.

In Rahcassi Shipping Co SA v Blue Star Line Ltd it was established that the terms of the arbitration clause must prevail regardless of the knowledge of the person. Consequently, any nominated arbitrators must meet the criteria specified in the given contractual clause.12 Similarly, while Mr Papanderou may be an expert in politics, the requirement is to have expertise in shipping or maritime matters as a practicing arbitrator. There is no evidence to suggest that Mr Papanderou has the requisite expertise.

10 Charterparty, clause 36 (c) (Procedural Order No 2,17).
11 Commonwealth of Britain Bill 1991(UK), T, Benn.
The Respondent submits that Mr Papanderou does not satisfy the requirements of clause 36 (c) of the Charterparty.\(^1\)

2 THE RESPONDENT DID NOT BREACH THE CHARTERPARTY BY DEVIATING TO THE PORT OF GUILDER.

The Respondent agrees that by changing the discharge port to the Port of Guilder, it deviated. This deviation was permitted under Clause 25 the Charterparty. The Charterparty was not rescinded by the Claimant.

2.1 The deviation by the Respondent to the Port of Guilder was justified under Clause 25 of the Charterparty as a Force Majeure Event

The Respondent will be excused from liability for its deviation if it can show that:

- clause 25 is engaged; and

- the Respondent followed the procedure required should a Force Majeure Event occur.\(^2\)

(a) Clause 25 is engaged

Clause 25 is engaged where:

- there is a Force Majeure Event; and

- the Force Majeure Event delayed, interrupted or prevented the Respondent from performing its obligations.\(^3\)

\(^{13}\) Rah cassi Shipping Co SA v Blue Star Line Ltd [1969] 1 QB 173.

\(^{14}\) Charterparty Clause 25 (Procedural Order No 2, 11-13); Channel Island Ferries Ltd v Sealink UK Ltd [1988] 1 Lloyd’s Rep 323.
(i) *The closure of the Port of Schilling constitutes a Force Majeure Event which was beyond the control of the Respondent under clause 25 (e)*

[16] Clause 25 (e) of the Charterparty provides a Force Majeure Event means, “any other cause whether or not the nature of character specifically enumerated above which is beyond the control of such party”.[16]

[17] The closure of the Port of Schilling was beyond the control of either party.[17] In *Czarnikow Ltd v Centrala Hanlu Zagraniczneg Rolimpex*[18] it was held that where there is an intervening government action that inhibits the performance of the contract, it will amount to a Force Majeure Event.[19]

[18] The closure of the Port of Schilling by the lawful port authority amounted to a Force Majeure Event which could not be attributed to the Respondent or Claimant.

(ii) *The events delayed performance of the contract*

[19] The Respondent must show the Force Majeure Event has prevented, interrupted, or delayed performance of the Charterparty.[20] The Respondent must demonstrate they were hindered from carrying out the contract by reason of a legal or physical impossibility, rather than proving that performance had become more onerous or unprofitable.[21] The heavy rainfall and flooding in local areas resulted in the closure of the Port of Schilling, preventing the Vessel from...
discharging at the nominated berth. The Respondent was delayed from the performance of its obligations under the Charterparty. Clause 25 is therefore engaged.

(b) The Respondent followed the procedure required in the event of a Force Majeure Event

(i) The Respondent has provided prompt written notice

20 The Charterparty provides that the party declaring a Force Majeure Event must give the other party prompt written notice and provide the reason for the delay.22 On the same day that the Port of Schilling was closed the Respondent provided the Claimant with written notice of a Force Majeure Event via electronic message.23 The notice was prompt and explained the cause of the delay.24

(ii) The Respondent has taken reasonable steps to mitigate the delay

21 The Charterparty specifically provides that the party declaring a force majeure event shall take all reasonable steps to minimise any delay.25 The Respondent must show that there were no reasonable steps that could have been taken to avoid or mitigate the events or its consequences.26 The Respondent undertook the deviation to mitigate the loss flowing from the closure of the Port. Deviation was reasonable in the circumstances as it appeared the Port would be closed until further notice27 and the Respondent had waited for 19 days. The

22 Charterparty Clause 25 (i) (Procedural Order No 2, 13).
23 Electronic Transactions Act 1999 (Cth) ss 8, 9; Chidbundid v Minister for Immigration [2012] FMCA 59; Moot Problem 45.
24 Moot Problem 45.
25 Charterparty Clause 25 (i) (Procedural Order No 2, 13).
27 Moot Problem 44.
Respondent was aware that road transport of the goods was available at the Port of Guilder. On this basis the deviation to the Port of Guilder was a reasonable step to mitigate the delay.

(iii) The Respondent was not required to wait 30 days or a reasonable period of time before acting inconsistently with its obligations

[22] The Claimant has asserted that Clause 25 (ii) of the Charterparty requires the Respondent to wait a reasonable period of time (or, alternatively, 30 days) before taking any steps inconsistent with its contractual obligations. The Respondent submits that this is not a correct interpretation of clause 25 (ii).

[23] The clause makes no reference to any waiting period before steps inconsistent with contractual obligations can be taken. The operation of Clause 25 (ii) is reserved for situations where a period of 30 days has passed and one party desires to terminate the contract. The clause outlines the desire for the parties’ obligations to resume as soon as practicable. In deviating to the Port of Guilder, the Respondent resumed its obligation to deliver the cargo as soon as practicable. The Respondent was aware that the Claimant had a berth at Guilder and that road transport would be available from Guilder to Schilling. It therefore resumed its obligation to furnish the Claimant with its goods as soon as practicable after the Force Majeure Event.

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28 Moot Problem 52.
29 Moot Facts 46.
30 Charterparty Clause 25 (Procedural Order No 2, 13).
31 Moot Problem 45.
32 Moot Problem 52.
2.2 In the alternative, the deviation was justified for the purpose of saving life or property

[24] The Respondent is entitled to deviate for the purpose of saving life or property, and will not be liable for such deviation. The Vessel was at liberty to deviate in order to ensure the safety of the vessel and its cargo. Dangers to the vessel may result from natural causes, such as storms. Where the dangers arise from natural causes they must be reasonably permanent, in that it cannot be merely inconvenient or occasional interruptions.

[25] At the time of the deviation it was unclear how long the severe weather would continue, indeed any presumption of customary knowledge by the Master would have been negated by the freak nature of the weather. It was not viable for the Vessel to wait at the Port, in dangerous weather conditions, while transporting a dangerous substance.

[26] The Respondent submits it would be dangerous to the ship for it to remain around Schilling or proceed into port, where severe wet weather conditions persisted, while carrying ammonium nitrate. It is recognised that ammonium nitrate must be protected from weather when stored outside and must be kept dry as the risk of explosions increased when the product becomes wet. The need to keep this cargo dry is acknowledged by the parties, by the imposition of an obligation on the Respondent to keep the cargo dry. Therefore, the Respondent was permitted to avoid this danger to the property by deviating from the usual course.

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33 Charterparty Clause 25 (Procedural Order No 2, 12).
36 Hand v Baynes (1839) 4 Warton 204.
39 Charterparty Clause 21 (Procedural Order No 2, 10).
2.3 *The deviation to the Port of Guilder did not amount to a rescission of the contract*

[27] The Respondent submits the Charterparty was not rescinded at the time of deviation. Whilst the right to rescind may have arisen, there was no intention to rescind and any breach by the Respondent was waived by the Claimant.

(a) **The Claimant did not have a right to rescind the Charterparty**

[28] It is acknowledged that the right to rescind the Charterparty will arise where there is a breach which goes to the root of the contract. The breach by deviation, in this case did not amount to a breach going to the root of the contract.

[29] The purpose of a Charterparty is to carry out the voyage specified. In circumstances where the discharge port is unavailable, it is reasonable to execute the contract by attending another discharge port. The root of the contract here is the delivery and discharge of the goods at a suitable port. In this case the Port of Guilder was thought to be a suitable alternative discharge port. The right to repudiate does not arise in these circumstances.

(b) **Alternatively, the Claimant did not express an intention to rescind the Charterparty**

[30] In the event that the right to rescind arose, the Claimant did not demonstrate an intention to rescind the Charterparty. In order to exercise rescission, the Claimant must have plainly shown an intention to rescind the Charterparty. The Respondent asserts that the Claimant’s plain

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40 *Hain Steamship Co Ltd v Tate & Lyle Ltd* [1936] 2 All ER 597 (Lord Atkin).
42 Charterparty Clause 25 (Procedural Order No 2, 3).
43 *Hain Steamship Co Ltd v Tate & Lyle Ltd* [1936] 2 All ER 597 (Lord Atkin).
intention was to attempt to force performance by the Respondent at the original discharge port.\textsuperscript{44} The Respondent submits this is not sufficient to indicate an intention to rescind.

(c) Further and alternatively, the Claimant has waived its right to rescission

\textsuperscript{31} A party is entitled to waive a breach of contract and continue to perform its obligations.\textsuperscript{45} In doing so, that party loses its right to rescission.\textsuperscript{46} There must be acts that plainly show that the Claimant intends to treat the contract as still binding.\textsuperscript{47}

\textsuperscript{32} On 12 January 2011, the Claimant indicated its preference to continue with performance of the contract as opposed to rescinding it.\textsuperscript{48} The intention of the Claimant was to waive the breach and continue under the Charterparty as specified.

3 THE RESPONDENT IS NOT LIABLE FOR THE DAMAGE CAUSED TO THE CLAIMANT’S BERTH AT THE PORT OF GUILDER

3.1 The arbitral panel does not have jurisdiction to hear a claim for negligence relating to the damage to the Berth

\textsuperscript{33} The arbitral panel has jurisdiction to hear disputes which “arise out of or in connection with” the Charterparty.\textsuperscript{49} The Respondent submits that a claim in negligence for the damage done to the Berth does not arise out of or in connection with the Charterparty.

\textsuperscript{44} Moot Problem 46.
\textsuperscript{45} \textit{Hain Steamship Co Ltd v Tate & Lyle Ltd} [1936] 2 All ER 597, 602 (Lord Atkin); \textit{Killarney Investments Pty Ltd v Macedonian Community of WA (Inc)} [2007] WASCA 180.
\textsuperscript{46} \textit{Hain Steamship Co Ltd v Tate & Lyle Ltd} [1936] 2 All ER 597, 602 (Lord Atkin).
\textsuperscript{47} Ibid.
\textsuperscript{48} Moot Problem 46.
\textsuperscript{49} Charterparty Clause 36 (a) (Procedural Order No 2, 17).
The meaning and scope of an arbitration clause must be determined by what a reasonable person in the position of the parties would have understood it to mean, having regard to the text, surrounding circumstances, purpose and object of the transaction.\(^{50}\)

The dispute over the crash at the Port of Guilder does not \textit{arise} out of the Charterparty. The Charterparty does not deal with liability for collision into berths or provide a cause of action upon which the Claimant can rely.

Further, the dispute is not \textit{connected} with the Charterparty. There is no provision which contemplates the use of the Berth, the Claimant’s rights as a berth owner, or the Respondent’s obligations to the owners of berths it docks at. The mere fact that the Claimant owned a berth that was used should not allow them to avail themselves of the advantages of the arbitration clause, where such a claim would otherwise fall outside the scope of the arbitration clause.

The Charterparty is solely concerned with the relationship between a Charterer and Shipowner and any claim outside this relationship has no connection to the Charterparty. Indeed, if the berth owner was another unrelated entity there would be no question they could not have their claim brought under the arbitration clause. The Respondent submits this would also be the case where the berth was owner by a parent company, which also happened to own the Claimant.

The arbitral panel has no jurisdiction to hear a claim relating to damage to the Claimant’s berth at the Port of Guilder.

\begin{displayquote}
\textit{3.2 The Respondent is not liable for the acts of the master of the Vessel}
\end{displayquote}

The master is generally the agent of the shipowners.\(^{51}\) However, a relationship of agency and principal does not make the principal liable for the tortious acts of the agent.\(^{52}\) An agent may

\begin{footnotesize}
\footnotetext{50}{Comandate Marine Corp v Pan Australia Shipping Pty Ltd (2006) 157 FCR 45, 87 (Allsop J); Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR 451, [22].}
\end{footnotesize}
bind a principal in liability for representations made in the course of pre-contractual relations and other negotiations the agent is given authority to carry out. However, this does not extend to torts such as negligence. As such, the Respondent is not liable for the master’s negligence in crashing the Vessel into the Berth.

4 THE LIABILITY OF THE RESPONDENT IS LIMITED PURSUANT TO THE LLMC

The LLMC is given effect in Australian law through the *Limitation of Liability for Maritime Claims Act 1989* (Cth). The Respondent submits that their liability is limited pursuant to Article 2.1(a) and (c) of the LLMC for following claims made by the Claimant:

- damage to the berth,
- loss of use of the berth, and
- claims by other port users who have a contract with Markka for the use of the berth.

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56 Moot Problem 51.
4.1 Damage to the Berth

[41] Article 2.1 (a) provides that any claims in respect of damage to property are subject to the LLMC, provided it occurred in direct connection with the operation of the ship.\(^{57}\) The damage to the Berth was damage to property, and it directly resulted from the operation of the Vessel. Therefore, any liability of the Respondent in respect of the damage to the Berth should be limited pursuant to the LLMC.

4.2 Loss of use of the Berth

[42] The Claimant seeks damages for the loss of use of the Berth.\(^{58}\) Article 2.1 (a) of the LLMC provides that a shipowner may limit their liability in regards to claims for consequential loss resulting from damage to property.\(^{59}\) The Claimant lost the use of the Berth because it was damaged. It was therefore consequential loss falling within Article 2.1 (a) of the LLMC. The Respondent may limit their liability in respect of this claim.

4.3 Claims by other port users

[43] A shipowner may limit their liability in regards to any claims by third parties for breach of contract pursuant to the LLMC Article 2.1 (a). In the *APL Sydney*, the anchor of a drifting vessel caused damage to a submarine pipeline.\(^{60}\) The court held that the shipowner was entitled to limit their liability pursuant to the LLMC Article 2.1 (a) in regards to claims by third parties.\(^{61}\) The Claimant has particularised damages from claims it asserts will be made by port


\(^{58}\) Moot Problem 56.


users with whom it has contracted. These constitute claims by third parties for consequential loss and accordingly the Respondent is entitled to limit its liability for this damage.

4.4 The Respondent’s limitation of liability is not excluded by virtue of Article 4 of the LLMC

[44] A shipowner will not be deprived of their right to limit their liability under the LLMC, save for exceptional circumstances. The right to limitation has been recognised as being “virtually unbreakable”. Article 4 of the LLMC provides that a shipowner cannot limit their liability if “the loss resulted from his personal act or omission, committed with the intent to cause such loss or recklessly and with knowledge that such loss would probably result.” The burden of proof rests with the Claimant to show that the damage was a result of a personal act or omission by the Respondent.

(a) The damage was not a result of a personal act by the Respondent

[45] The acts of a master do not constitute a personal act of the shipowner without evidence of the seniority of the master’s position in the shipowner’s company. This can be contrasted with The Lady Gwendolen where the master’s dangerous command of the ship was insufficient to constitute a personal act of the shipowner. Rather, it was the inaction of the managing director and the traffic manager which amounted to a personal omission by the shipowner.

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67 Ibid.
because they were sufficiently high in the company’s hierarchy.\(^\text{68}\) As a result the right to limitation was lost.\(^\text{69}\) There was no evidence that anyone other than the master made the decision to proceed to the Berth without pilotage nor that the master has a sufficiently high position within the Respondent’s company.

(b) **The Respondent did not intend the loss nor was it reckless as to the consequences**

\[\text{[46]}\]

The Claimant must establish that the Respondent either intended the loss or was reckless as to the consequences of their act.\(^\text{70}\) There is no evidence the Respondent had knowledge of the actions of the master in regards to berthing the vessel. The Respondent knew that the master’s actions would cause the damage to the Berth and the associated losses. Accordingly, the Respondent may limit their liability under the LLMC.

5 **THE RESPONDENT IS ENTITLED TO A GENERAL AVERAGE CONTRIBUTION FROM THE CLAIMANT**

5.1 **The Arbitral Panel has Jurisdiction to deal with the General Average Claim**

\[\text{[47]}\]

Clause 27 provides “all claims for General Average to be settled in Tolar”.\(^\text{71}\) However, clause 36 provides “any dispute arising out of or in connection with this contract ... shall be referred to arbitration in Brisbane”.\(^\text{72}\)

\[\text{[48]}\]

Despite the statement in clause 27, the arbitral panel has jurisdiction to deal with the disputed claim for general average. A disputed claim for general average contribution involves matters

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\(^{68}\) *The Lady Gwendolen* [1965] 1 Lloyd’s Rep 335; Stephen Baughen, *Shipping Law* (Cavendish, 2\(^{\text{nd}}\) ed, 2001) 425.

\(^{69}\) *The Lady Gwendolen* [1965] 1 Lloyd’s Rep 335.

\(^{70}\) *Meridian Global Funds v Securities Commission* [1995] 3 All ER 918.

\(^{71}\) Procedural Order No 2, 14.

\(^{72}\) Procedural Order No 2, 16.
and questions arising out of the Charterparty because the claim related to events during its
d operation.\textsuperscript{73} The general average claim arises out of a broken propeller shaft, which occurred
while the Vessel was delivering the cargo.\textsuperscript{74} It occurred during the operation of the
Charterparty and thus is a dispute arising out of the Charterparty.

\textbf{5.2 The York-Antwerp Rules 1994 apply to the general average claim}

Clause 27 of the Charterparty provides that “all claims for General Average to be settled … in
accordance with the York-Antwerp Rules 1994 as amended, modified or subsequent version
thereof for the time being in force”.\textsuperscript{75} Since the adoption of the York-Antwerp Rules 1994, the
York-Antwerp Rules 2004 have been created. However, the York-Antwerp Rules 2004 are not
an amendment, modification or subsequent version of the York-Antwerp Rules 1994.\textsuperscript{76} As
such, references to “York-Antwerp Rules 1994 or any subsequent modification thereof” in a
Charterparty, such as in clause 27 of this Charterparty,\textsuperscript{77} means that the York-Antwerp Rules
1994 remain applicable.\textsuperscript{78} Therefore, the Respondent’s general average claim must be decided
according to the York-Antwerp Rules 1994.

\textsuperscript{73} Union of India v EB Abby’s Rederi AS (‘The Evje’) [1975] AC 797 [807H-808B] (Lord Morris of Borth-y-
Gest), 804E (Lord Reid), 816C (Lord Simon of Glaisdale). Cited with approval in Pan Australia Shipping Pty Ltd
v The Ship ‘Commandate’ (No. 2) [2006] FCA 1112 [106].
\textsuperscript{74} Moot Problem 47.
\textsuperscript{75} Procedural Order No 2, 14.
\textsuperscript{76} J H S Cooke and RR Cornah, Lowndes and Rudolf: The Law of General Average and the York-Antwerp Rules
(Sweet & Maxwell, 13\textsuperscript{th} ed, 2008) 64.
\textsuperscript{77} Procedural Order No 2, 14.
\textsuperscript{78} J H S Cooke and RR Cornah, Lowndes and Rudolf: The Law of General Average and the York-Antwerp Rules
(Sweet & Maxwell, 13\textsuperscript{th} ed, 2008) 65.
5.3 The expenditure of the Respondent was a general average act

[50] A general average act is defined as any extra-ordinary sacrifice or expenditure which is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure.79

[51] There were three general average acts of the Respondent:

- towage costs from Koruna Salvage and Tug Company.
- repairs to the propeller shaft from Koruna Ship Repairs.
- berth costs at Koruna.80

(a) A general average act can be brought under the numbered rules without reference to the elements of a general average act

[52] The Rule of Interpretation81 means that if the facts support a claim in general average under the numbered rules, then there does not need to be a general average act within the meaning of Rule A of the York-Antwerp Rules 1994.82 Therefore, it is only necessary for the Respondent to establish that a general average act exists under one of the numbered rules for their claim to be allowed.

79 York-Antwerp Rules 1994, r A.
(b) The general average acts of the Respondent were intentionally and reasonable incurred

Regardless of whether a claim is made under the numbered or lettered rules, a general average act must be intentionally and reasonable incurred.\(^\text{83}\)

(i) The acts were intentional

An intentional act means a voluntary one and is used to distinguish such loss from that which is accidental in origin.\(^\text{84}\) Thus, even if the act which places a vessel in peril is accidental, the resultant acts to save the vessel from this position remain intentional acts. Therefore, even though the damage to the Vessel’s propeller shaft appears to be accidental, the acts of incurring towage costs, repairing the propeller shafts and incurring berth costs at a port of refuge are all intentional acts to relieve the Vessel from drifting.

(ii) The acts were reasonable

The general average acts must be reasonably done.\(^\text{85}\) “Reasonably done” requires both the act itself,\(^\text{86}\) and the expenditure required for performance of the act,\(^\text{87}\) to be reasonable. In this case the expenditure on towage was reasonable, given that the vessel was unable to move under its own power because of the damaged propeller shaft.\(^\text{88}\) Further, it should be inferred that the amount of expenditure incurred was reasonable, especially in the absence of any objection by the Claimants despite having the opportunity to do so via correspondence.

\(^{83}\) York-Antwerp Rules 1994, Rule Paramount.
\(^{87}\) Australian Costal Shipping v Green [1971] 1 QB 456; The Gratitudine 3 Ch Rob 240.
\(^{88}\) Moot Problem 47.
(c) **The towage costs incurred by the Respondent are allowable as general average**

under Rule VI

[56] Expenditure incurred by the parties to the adventure in the nature of salvage, whether under contract or otherwise, shall be allowed in general average provided that the salvage operations were carried out for the purpose of preserving from peril the property involved in the common maritime adventure.  

(i) **The towage costs are expenditure in the nature of salvage**

[57] The first requirement is that the expenditure be in the nature of salvage, whether under contract or otherwise.  

Salvage can refer to an act performed when rescuing a vessel in distress and the payment due for performing this act. Thus, expenditure in the nature of salvage can include the payment made to a company for the act of rescuing a vessel in distress.  

While it is not specifically known whether the Vessel was in distress, it was drifting and unable to continue under its own power and thus it was deemed necessary to engage the services of a salvage company. Therefore, such costs represent expenditure in the nature of salvage and the Respondent is entitled to a general average contribution in respect of it.

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89 *York-Antwerp Rules 1994*, Rule VI.


92 Ibid.

93 Moot Problem 47.
(ii) **The towage was incurred by the parties to the adventure**

The Respondent, who is a party to the adventure, incurred the expenditure on towage and salvage operations.\(^{94}\)

(iii) **The salvage operations were carried out for the purpose of preserving from peril the property involved in the common maritime adventure**

The general average act must be done at a time of peril.\(^{95}\) The peril must be real and substantial,\(^{96}\) however it need not be immediate.\(^{97}\) Therefore, even if the vessel is not in any actual danger at the time the act is done, an action is still justified if it was done to avoid potential danger later in the voyage.\(^{98}\)

In this instance the damage to the propeller shaft caused imminent peril to the Vessel and its cargo.\(^{99}\) The Vessel was drifting and unable to continue under her own power.\(^{100}\) Because of this immovability the Vessel was subject to real and substantial danger.

It is further necessary for the general average act to be done as part of a common maritime adventure,\(^{101}\) to save the whole adventure.\(^{102}\) In this instance the general average expenditure was made for the common safety of the whole adventure. But for the expenditure, the cargo would not have been delivered.

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\(^{94}\) Moot Problem 47, 53.


\(^{96}\) *Joseph Watson v Fireman Funds Insurance Co.* [1922] 2 KB 355.

\(^{97}\) *Vlassopoulos v British and Foreign Marine Insurance Company (The Makis)* [1929] 1 KB 187.

\(^{98}\) Ibid.

\(^{99}\) Moot Problem 47.

\(^{100}\) Ibid.

\(^{101}\) York Antwerp Rules 1994, r A, r VI.

\(^{102}\) *Chellew v Royal Commission on the Sugar Supply* [1921] 6 Ll L Rep 584.
(d) The berth costs at Koruna are allowable as general average under Rule XI

[61] When a vessel has entered or been detained in any port or place in consequence of an accident which renders that necessary for the common safety, or to enable damage to the ship caused by accident to be repaired, if the repairs were necessary for the safe prosecution of the voyage, port charges incurred in the extra period of detention shall be admitted as general average.¹⁰³

(i) The Vessel entered a port

[62] The vessel must pull into a port of refuge from the sea.¹⁰⁴ The Vessel entered the Port of Koruna from outside that port.¹⁰⁵

(ii) The Vessel entered the Port of Koruna in consequence of accident

[63] Accident involves an element of suddenness and unforeseeability.¹⁰⁶ The damage to the propeller shaft appears to have occurred suddenly, with no prospect of it being foreseen by any party¹⁰⁷ and as such it was an accident.

(iii) The Vessel entered the Port of Koruna to enable the damage to the ship caused by accident to be repaired

[64] The Vessel entered Koruna for the purpose of repairing the damage to its propeller shaft.¹⁰⁸

¹⁰³ York-Antwerp Rules 1994, r XI (b).
¹⁰⁵ Moot Facts, 47.
¹⁰⁷ Moot Problem 53.
¹⁰⁸ Moot Problem 47, 58.
(iv) *The entry into the Port of Koruna was necessary for the safe prosecution of the voyage*

[65] As discussed above,\textsuperscript{109} the act of salvage was necessary for the common safety of the adventure because the vessel was drifting. The use of the expression “safe prosecution of voyage” is intended to extend the term “common safety” such that a general average act will still occur despite a vessel having been towed to a port of refuge and thus the common safety of the voyage is no longer at risk.\textsuperscript{110}

(v) *The Respondent claims port charges*

[66] The term “port charges” includes any charges which the vessel would ordinarily incur as a necessary consequence of entering or staying at the relevant port,\textsuperscript{111} including port dues.\textsuperscript{112} This includes costs associated with berth at the Port of Koruna.

[67] Therefore, the berth costs at Koruna satisfy the requirements of Rule XI and this expenditure is allowable as general average.

\textsuperscript{109} Points of Argument 5.3 (c) (iii).
\textsuperscript{112} J H S Cooke and RR Cornah, Lowndes and Rudolf: The Law of General Average and the York-Antwerp Rules (Sweet & Maxwell, 13\textsuperscript{th} ed, 2008) 392.
F. PRAYER FOR RELIEF

For all the reasons submitted above, the Respondent respectfully requests this arbitral panel to:

DECLARE that this arbitral panel does not have jurisdiction to hear these proceedings; and

in the alternative

ADJUDGE that the Respondent is not liable to the Claimant for the following amounts claimed:

a) Cost of road transport from Guilder to Schilling of US$250,000

b) Damage to the Berth of US$35,000,000

c) Loss of use of the Berth of US$5,000,000

d) Claims by other port users with whom the Claimant has contracted for use of the Berth of US$7,500,000; and

in the alternative

DECLARE that any liability of the Respondent is limited to US$28,000,000

further

ADJUDGE that the Claimant is liable to the Respondent for the following amounts claimed:

a) Towage costs from Koruna Salvage & Tug Company of US$900,000

b) Repairs to the propeller shaft from Koruna Ship Repairs of US$2,000,000

c) Berth costs at Koruna of US$500,000

d) Lost revenue for the Vessel of US$400,000.