THIRTEENTH ANNUAL INTERNATIONAL MARITIME LAW ARBITRATION MOOT COMPETITION 2012

UNIVERSITY OF QUEENSLAND AUSTRALIA

IN THE MATTER OF AN ARBITRATION HELD AT BRISBANE

MEMORANDUM FOR THE RESPONDENT

ON BEHALF OF: Lira Steamship Company  
Level 4  
West Circle  
Peseta  

AGAINST: Markka Trading Company  
10 Crow Street  
Schilling  

RESPONDENT CLAIMANT

TEAM NO. 13

MITCHELL BEEBE  
BIANCA KABEL  
KATHERINE STODULKA  
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Summary of Arguments

Lira Steamship Company (‘Respondent’) is being sued by Markka Trading Company (‘Claimant’) for damage to the Claimant’s berth. The Respondent rejects any liability for negligence. Even if the Respondent is liable, it may limit its liability to USD$28 million. Further, the Respondent counter-claims that it is entitled to General Average for damage to the Drachma’s propeller shaft, incurred while validly deviating to Guilder. The Respondent appears conditionally before this Tribunal. It disputes the Tribunal’s constitution on the basis of Mr Silvio Papandreou’s appointment, and does not consider the Tribunal to have jurisdiction to consider all the issues arising.

Summary of Facts

1. The Claimant contracted with the Respondent to use the Respondent’s vessel, the MV Drachma (‘Drachma’) by Charterparty dated 30 November 2010 (‘Charterparty’). The Charterparty required the Respondent to transport 15,000mt of bagged Ammonium Nitrate to Schilling.
2. Loading was completed at Escudo on 25 December 2010 and the vessel proceeded to Schilling. On 3 January 2011, extreme weather conditions commenced at Schilling, including high levels of rainfall and localised flooding. At 0900 hours on 11 January 2011 the Port of Schilling was closed. Subsequently, by letter dated 11 January 2011, the Respondent notified the Claimant of an event of force majeure and of its intention to sail to the Port of Guilder to discharge the Claimant’s cargo.
3. By letter dated 12 January 2011, the Claimant rejected the Respondent’s notice of force majeure. The Claimant directed the Respondent to wait at least 30 days at Schilling until the event of force majeure passed.
4. On 30 January 2011, the Drachma departed Schilling and began sailing to Guilder. During its voyage, the propeller shaft was damaged and the vessel could not continue under its own power. The Respondent engaged the Koruna Salvage and Tug Company, which towed the vessel to Koruna for repairs. On 31 January 2011, the Respondent claimed General Average.
5. The Drachma arrived at Guilder on 25 February 2011. At 2003 hours, Harbour Control informed the Master of the Drachma that Guilder was a compulsory pilotage port. The Master manoeuvred the Drachma into port to berth and the Claimant’s berth was damaged. The Guilder Maritime Inspection
Services estimated the damage to be USD$40 million, reported that the *Drachma* had failed to comply with directions from the Harbour Master and found that the *Drachma* was travelling at excessive speed. Investigations also revealed that the alarm on the Harbour Master’s auto-tracking system was muted. For that reason, the duty controller was unaware that the *Drachma* had moved from its position until after the collision occurred.

6. By letter dated 1 March 2011, the Claimant sought USD$47.75 million from the Respondent for losses associated with the *Drachma*’s deviation to Guilder and damage to the berth.

7. The Respondent denied liability by way of email dated 10 March 2011 and sought payment of General Average.

8. By letter dated 30 June 2011, the Claimant referred the dispute to arbitration, appointing Mr Silvio Papandreou as its arbitrator. The Respondent by letter dated 1 July 2011, reserved its rights concerning the jurisdiction of any arbitral panel, denied all liability, and appointed Mr Jose Mengel to the panel.

ARGUMENTS PRESENTED

A. JURISDICTIONAL ISSUES

1. **THE TRIBUNAL IS NOT VALIDLY CONSTITUTED AND DOES NOT HAVE JURISDICTION TO DETERMINE THESE PROCEEDINGS.**

1.1 The Tribunal has the power to rule on its own jurisdiction.

1 Generally, the power to determine jurisdiction is derived from art 16 of the UNCITRAL Model Law on International Commercial Arbitration,\(^1\) as adopted in s 16(1) *International Arbitration Act 1974* (Cth).\(^2\)

2 This Tribunal is empowered to determine jurisdiction by rule 15 of the Maritime Law Association of Australia and New Zealand (MLAANZ) Arbitration Rules. This rule states that a Tribunal constituted

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\(^2\) *International Arbitration Act 1974* (Cth), sch 3.
under the Arbitration Rules shall exercise the jurisdiction and have all the powers set out in both the
*International Arbitration Act 1974* (Cth) and the *Commercial Arbitration Act 1990* (Qld).

3 The Tribunal does not have the necessary jurisdiction for three reasons.

### 1.2 First, the Tribunal is not validly constituted given the appointment of Mr Silvio Papandreou as an arbitrator by the Claimant.

4 The appointment of an arbitrator may be challenged if the arbitrator does not possess the qualifications agreed to by the parties.³ Under cl 36(c) of the Charterparty, the arbitrators shall be recognised by the MLAANZ as having ‘expertise in shipping or maritime matters’. Furthermore, the MLAANZ ‘Policy to Join Panel of Arbitrators’ outlines the preferred qualifications of arbitrators. In addition to an interest in maritime affairs, it is preferred that arbitrators are either accredited as an arbitrator by the Institute of Arbitrators and Mediators Australia, or the Institute of Arbitrators New Zealand, or a similar body elsewhere, or otherwise possess no less than ten years admission to practise law with relevant experience.⁴

5 Mr Silvio Papandreou is not appropriately qualified for appointment to this Tribunal. There is no evidence to indicate that Mr Papandreou satisfies the preferred requirements in the Policy. He neither holds relevant accreditation nor possesses appropriate legal experience. In any event, Mr Papandreou is not appropriately qualified to make the complex determinations of law and fact that arise out of the issues presently before the Tribunal. In particular, his apparent experience in maritime matters is drawn from being a Prime Minister of a large ship owning nation.⁵ While this demonstrates an interest in maritime affairs, it is neither sufficient nor relevant experience for valid appointment to the Tribunal. The Claimant should appoint an alternative arbitrator with relevant experience.⁶

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1.3 Secondly, not all matters before the Tribunal are capable of settlement by arbitration.\(^7\)

The determination of the limitation of liability under the *Limitation of Liability for Maritime Claims Act 1989* (Cth) (‘*Limitation Act*’) involves consideration of a complex statutory regime. It is appropriate that disputes concerning limitation are dealt with by courts.\(^8\) In this case, considerations of limitation of liability regarding the *Limitation Act* do not simply involve resolving a contractual dispute between the parties. Rather, the determination of the Claimant’s right to make a claim against the Limitation Fund is considered under statute and therefore exists independently of, and separately to, any written agreement between the parties.\(^9\) There should be no presumption in favour of arbitrability, particularly in the case of statutory rights.\(^10\)

Furthermore, public policy considerations give rise to a legitimate public interest in having the limitation of liability issue determined within the national court system.\(^11\)

1.4 Thirdly, the determination of the limitation of liability claim is not a matter ‘arising out of or in connection with’ the agreement between the parties.

Determination of liability under the *Limitation Act* is not a matter, under cl 36(a), ‘arising out of or in connection with’ the Charterparty.\(^12\) Particularly, this determination involves a consideration of whether the Claimant is entitled to claim against a fund established by the Respondent under Commonwealth legislation. The performance of this task is akin to the exercise of judicial power as the determination must occur in accordance with the *Limitation Act*.\(^13\) Additionally, this right is distinctly independent of the Charterparty. In the main, the Claimant asserts that it is entitled to USD$47.5 million in damages arising from the negligence of the Master of the *Drachma*. This claim

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\(^7\) *International Arbitration Act 1974* (Cth), s 7(2)(b).

\(^8\) *Admiralty Act 1988* (Cth), s 25.


\(^12\) *Hi-Fert Pty Ltd v Kuikiang Maritime Carriers* (1998) 90 FCR 1; *Ethiopian Oilseed v Rio del Mar Foods Inc* [1990] 1 Lloyd’s Rep 86; *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466.

must occur in accordance with the Civil Liability Act 2003 (Qld) and under common law tort. There is no claim in contract.\textsuperscript{14}

Furthermore, while the phrase ‘arising out of or in connection with’ should not narrowly be construed,\textsuperscript{15} the phrases ‘arising out of’ and ‘arising in connection with’ are virtually synonymous and neither should be considered to be broader in scope than the other.\textsuperscript{16}

\textbf{1.5 The parties should not be compelled to submit to arbitration.}

Given the Tribunal is not the appropriate body for determination of this matter, to avoid multiplicity of proceedings and the related risk of inconsistent concurrent findings, the parties should not be compelled to submit to arbitration.\textsuperscript{17} This proceeding should be stayed.\textsuperscript{18} Alternatively, the issue regarding the Limitation Act should be considered separately by a court.

\textbf{1.6 If the Tribunal has jurisdiction, then the General Average claim is capable of settlement by arbitration.}

Clause 27 states that all General Average claims are to be determined in accordance with the York-Antwerp Rules 1994 as amended, and are to be settled in Tolar. However, this Tribunal is empowered to determine the General Average claim by cl 36 of the Charterparty.\textsuperscript{19} On a practical construction of the agreement, where the existence of a claim in General Average is uncontroversial, the allocation of costs and apportionment of expenses should be settled in Tolar. However, where the validity of a General Average claim is disputed by the parties, this matter constitutes a ‘dispute arising out of or in connection with’ the Charterparty and must be referred to arbitration in Brisbane.\textsuperscript{20}

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\textsuperscript{14} ALL Ergan Pharmaceuticals Inc v Bausch & Lomb Inc (1985) 7 ATPR 40-636.
\textsuperscript{15} Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd (1996) 39 NSWLR 160, 165 (Gleeson CJ).
\textsuperscript{16} Ethiopian Oilseeds v Rio del Mar Foods Inc [1990] 1 Lloyd’s Rep 86.
\textsuperscript{17} Savcor Pty Ltd v State of NSW (2001) 52 NSWLR 587; Paharpur Cooling Towers Ltd v Paramount (WA) Ltd [2008] WASCA 110.
\textsuperscript{18} UNCITRAL Model Law on International Commercial Arbitration, art 16(1).
\end{flushright}
B. ENTITLEMENT TO GENERAL AVERAGE

2. THE RESPONDENT WAS ENTITLED TO DEVIATE FROM SCHILLING. 21

2.1 A valid Force Majeure Event arose on 11 January 2011 due to the closure of the Port of Schilling.

12 The closure of the Port of Schilling on 11 January 2011 was due to ‘flooding in the local area’ and ‘inclement weather conditions’. 22 By reason of the closure, the Respondent was unable to deliver the Claimant’s cargo. This situation falls within at least three categories of Force Majeure Event as defined in cl 25 of the Charterparty, specifically paras 25(b), (d) and (e). Each paragraph must be construed by reference to its words, having regard to the nature and general terms of the contract. 23

13 Regarding para (b), there has been a Force Majeure Event due to ‘flooding’ at Schilling resulting in the closure of the port. 24

14 Alternatively, if there is no para (b) event, then there is a Force Majeure Event under para (d), due to the ‘hindrance...in...discharging of products’ resulting from the closure of the Port of Schilling. 25

15 In the further alternative, even if paras (b) or (d) do not apply, then there is a Force Majeure Event under para (e). The closure of the Port of Schilling is a cause ‘beyond the control of’ the Respondent. 26 Importantly, para (e) should be construed more broadly than paras (b) or (d). 27 Paragraph (e) is broad in scope and encompasses the closure of a port due to bad weather. The principle of *ejusdem generis* should not limit the interpretation of ‘any other cause’ to the expressly listed examples in paras (b) and (d). 28 An application of *ejusdem generis* in the circumstances would

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21 Yara Nipro Pty Ltd v Interfert Australia Pty Ltd [2009] QSC 314, [51] (McMurdo J); Hoecheong Products Co Ltd v Cargill Hong Kong Ltd [1995] 1 WLR 404, 409 (Mustill LJ).


25 Tsakiroglou & Co Ltd v Noblee & Thorl Gmbh [1958] 2 Lloyd’s Rep 515, 525 (Diplock J, as he then was).


28 Mattinson v Multiplo Incubators [1977] 1 NSWLR 368, 374 (Mahoney J); Deputy Commissioner of Taxation v Clark [2003] NSWCA 91, [127] (Spigelman J); Qazi v Qazi [1980] AC 744, 807, 808 (Diplock LJ).
result in para (e) having an unreasonably limited and restricted role. This would not result in a commercially practical outcome, as the phrase ‘whether or not the nature of (sic) character specifically enumerated above’ demonstrates an intention by the parties to avoid a narrow construction of para (e).

2.2 The Respondent was ‘prevented’ from delivering the cargo to Schilling ‘by reason of’ the Force Majeure Event.

16 Under cl 25, any delay must be caused ‘by reason of’ the relevant Force Majeure Event. There is a requirement of causation between the event and the inability to perform. Plainly, the closure of the Port of Schilling, being the Force Majeure Event made it impossible for the Respondent to deliver the Claimant’s cargo to perform the Charterparty. This is distinguishable from PJ van der Zijden Wildhandel NV v Tucker & Cross Ltd and Yara Nipro Pty Ltd v Interfert Australia Pty Ltd, in which cases performance was not impossible.

2.3 A valid notice of force majeure was provided to the Claimant on 11 January 2011.

17 The provision of notice is usually a condition precedent to the operation of a force majeure clause. Here, in order to gain the benefit of cl 25, the Respondent must demonstrate that it provided the Claimant ‘prompt written notice’.

29 ‘ut res magis valeat quam pereat’.
35 Yara Nipro Pty Ltd v Interfert Australia Pty Ltd [2009] QSC 314, [57]-[58] (McMurdo J); Yara Nipro Pty Ltd v Interfert Australia Pty Ltd [2010] QCA 128, [33] (Fraser JA).
The notice provided by the Respondent on 11 January 2011 via email satisfies the requirements of cl 25(i), being ‘prompt written notice’.\(^{38}\) This letter via email stated that the reason for force majeure was the closure of the Port of Schilling.\(^{39}\) The order to close the Port of Schilling was made by the Harbour Master on 11 January 2011.\(^{40}\) While Schilling began to experience ‘extreme weather conditions’ on 1 January 2011, it was not until 11 January 2011 that a Force Majeure Event arose and delivery at Schilling became impossible.\(^{41}\) Therefore, the notice provided on 11 January 2011 was ‘prompt written notice’ in accordance with cl 25(i), being notice provided without delay on the same day that the Force Majeure Event arose.\(^{42}\)

2.4 The Respondent accepts that there was no imminent threat to ‘life or property’ and was not at liberty to deviate under that aspect of cl 25.

2.5 The Respondent was not required to wait for 30 days prior to deviating to Guilder.

The determination of whether or not the Respondent was required to wait for 30 days involves a construction of cl 25(i) and (ii). When construing the terms of a written commercial contract, it is essential to give effect to the objective intention of the parties.\(^{43}\) A plain and ordinary meaning must be provided within the four corners of the document,\(^{44}\) unless there is ambiguity.\(^{45}\) There is no ambiguity in cl 25.

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\(^{37}\) AGL Sales (Qld) Pty Ltd v Dawson Sales Pty Ltd [2009] QCA 262, [34]-[38] (Muir JA), [94]-[113] (Chesterman JA); Hyundai Merchant Marine Co Ltd v Dartbrook Coal (Sales) Pty Ltd (2006) 236 ALR 115; SHV Gas Supply & Trading SAS v Naftomar Shipping & Trading Co Ltd Inc (The Azur Gaz) [2006] 1 Lloyd’s Rep 163, 170 ([135]) (Clarke J).

\(^{38}\) Hyundai Merchant Marine Co Ltd v Dartbrook Coal (Sales) Pty Ltd (2006) 236 ALR 115; AGL Sales (Qld) Pty Ltd v Dawson Sales Pty Ltd [2009] QCA 262, [34]-[38] (Muir JA), [94]-[113] (Chesterman JA); Hyundai Merchant Marine Co Ltd v Dartbrook Coal (Sales) Pty Ltd (2006) 236 ALR 115; SHV Gas Supply & Trading SAS v Naftomar Shipping & Trading Co Ltd Inc (The Azur Gaz) [2006] 1 Lloyd’s Rep 163, 170 ([135]) (Clarke J).


\(^{40}\) Ibid.

\(^{41}\) Ibid.

\(^{42}\) AGL Sales (Qld) Pty Ltd v Dawson Sales Pty Ltd [2009] QCA 262, [94]-[113] (Chesterman JA).


\(^{44}\) Sydney City Council v West (1965) 114 CLR 481.

\(^{45}\) Codelfa Constructions v State Rail Authority of NSW (1982) 149 CLR 337, 352 (Mason J).
20 Under cl 25(i), the Respondent is required to ‘take all reasonable steps to minimise any delay so caused’ by the Force Majeure Event. Under cl 25(ii), if deliveries are ‘suspended for more than 30 days’, then the shipment may ‘be cancelled at the option of either party’.

21 The Claimant contends that cl 25(ii) required the Respondent, in the circumstances, to remain at Schilling during the port closure and not to deviate to Guilder.\(^{46}\)

22 The Respondent disputes such a construction of cl 25. Properly construed, cl 25 did not require the Respondent to wait for 30 days prior to deviation. This construction is supported by three reasons.

23 First, cl 25(ii) does not relate to the entitlement of the Respondent to deviate and is therefore not relevant in the circumstances. Rather, this sub-paragraph provides an option to cancel delivery of the cargo where ‘deliveries are suspended for more than 30 days’. Where a Force Majeure Event continues for more than 30 days, then, in the 15 days following the expiration of the 30 day period, either party may elect to cancel the shipment.

24 Secondly, the requirement to ‘take all reasonable steps’ is consistent with Australian and international authority on the obligation of parties during an event of force majeure.\(^{47}\) Clause 25(ii) should be read in light of cl 25(i), which provides a prescriptive requirement that, if there are ‘reasonable steps’ available during the Force Majeure Event, then the ‘affected party’ must not just wait for the Force Majeure Event to pass. Instead, the affected party (the Respondent) must act positively in the interests of the non-affected party (the Claimant), to ‘minimise any delay’ caused by the Force Majeure Event.\(^{48}\)

25 Thirdly, adopting the construction of cl 25 suggested by the Claimant would result in an uncommercial outcome. In particular, if the construction of cl 25(i) proposed by the Claimant in its letter of 12 January 2011 was adopted and the Drachma was required to wait for a period of 30 days prior to any deviation, this would result in a situation where cl 25(i) would have no role. It would be a


\(^{48}\) Emeraldian Ltd Partnership v Wellmix Shipping Ltd (The Vine) [2011] 1 Lloyd’s Rep 301, 309 (Teale J); Channel Island Ferries Ltd v Sealink UK Ltd [1987] 1 Lloyd’s Rep 559, 576 (Hurst J).
commercially unreasonable outcome if the Respondent was required to wait, during an event of force majeure, in the vain hope that the event would pass within 30 days.

26 The situation envisaged by cl 25(ii) did not occur in the current circumstances. There were ‘reasonable steps’ available to the Drachma to facilitate the expeditious delivery of the Claimant’s cargo. This involved deviation to Guilder, a deviation that was necessarily justified by the proper construction of cl 25.

27 Finally, it is irrelevant that the period prior to cancellation being available under cl 25(ii) was increased from 15 to 30 days during the pre-contractual negotiations. Clause 25(ii) was not enlivened in the circumstances as ‘reasonable steps’ were available to the Drachma.

2.6 Deviation to Guilder was a ‘reasonable step to minimise any delay’ associated with the closure of the Port of Schilling.

28 During a Force Majeure Event, the Respondent is contractually obligated under cl 25(ii) to take ‘all reasonable steps to minimise any delay’.

29 Based on the information available to the Drachma at the date of deviation, it was reasonable to depart Schilling and proceed to Guilder. The question of whether the deviation to Guilder was a ‘reasonable step’ must be determined on the basis of the contemporaneous information possessed by the Drachma. At the point of deviation on 30 January 2011, there was no information that was either in the possession of the Drachma, or that could have been realistically obtained, to indicate when the port was going to open. By 30 January 2011 the port had been closed for 19 days.\footnote{Facts, p 45: Letter of 11 January 2011.} Further, at this date, over 27 days had passed since the ‘inclement weather’ began.\footnote{Facts; p 44: The Schilling Daily on 11 January 2011.} The extended period of poor weather gave rise to a reasonable expectation that the Port of Schilling may have remained closed for much longer. Further, a substantial ‘backlog of ships’ was anchored off Schilling.\footnote{Facts, p 48: The Schilling Daily on 1 February 2011.} Therefore, even once the port had reopened there would be additional delays. In order to minimise the delay associated
with the potentially indefinite closure of the Port of Schilling and inevitable additional delays on reopening, the decision to deviate to Guilder was reasonable.

Further, it was not unreasonable to deviate to Guilder even where the proposed berth could be considered unsafe. It is a duty of the charterer of a ship to nominate a safe berth.\textsuperscript{52} If that duty is breached there is a risk that there could be damage to the vessel or could otherwise cause delay. The closure of the Port of Schilling meant the berth became ‘unsafe’ as it was impossible for the \textit{Drachma} to use.\textsuperscript{53} After the notice on 11 January 2011 the Claimant should have taken steps to nominate a safe berth at Guilder or another alternative port. An analogy can be drawn with the obligation of a charterer under a time charterparty to nominate a second safe berth in the circumstances where the first berth becomes unsafe.\textsuperscript{54} Because no such nomination occurred, it was reasonable for the Respondent to nominate a berth at Guilder.\textsuperscript{55} The Respondent accepts there was no obligation on the Claimant in its letter of 12 January 2011 to inform the Respondent that the berth at Guilder was not licensed to accept hazardous cargo.\textsuperscript{56} However, by 31 January 2011, when it was clear that following repairs the \textit{Drachma} would continue to Guilder, the Claimant should either have notified the Respondent that the berth was not appropriate for the delivery of Ammonium Nitrate or nominated an alternative safe berth.\textsuperscript{57} The \textit{Drachma} could not have reached, used, and returned from the berth at Guilder without being exposed to danger that was unavoidable by good navigation and seamanship.\textsuperscript{58}

Therefore, deviation should not be considered unreasonable where the Claimant was in a position

\textsuperscript{52} Emeraldian Ltd Partnership v Wellmix Shipping Ltd (The Vine) [2011] 1 Lloyd’s Rep 301, 311 (Teale J). See generally, Julian Cooke et al, Voyage Charters (Informa Law, 3\textsuperscript{rd} ed, 2007) ch 5.


\textsuperscript{55} Duncan v Koster (The Teutonia) (1872) LR 4 PC 171; Aktieselkabet Oliverbank v Danske Svovlsyre Fabrick (The Springbank) [1919] 2 KB 162.


\textsuperscript{57} International Convention for the Safety of Life at Sea, opened for signature 2 June 1960, 536 UNTS 7794 (entered into force 17 June 1960).

\textsuperscript{58} Leeds Shipping Co Ltd v Société Francaise Bunge (The Eastern City) [1958] 2 Lloyd’s Rep 127, 131 (Sellers LJ).
either to inform the Respondent of the berth’s licensing restrictions or to identify an alternative berth at Guilder.

31 Finally, whether the deviation to Guilder was reasonable does not turn on the instruction by the Claimant in its letter of 12 January 2011 that the Respondent remain at Schilling. In light of the surrounding circumstances, including the uncertainty regarding when the Port of Schilling would reopen, such a direction was unreasonable. In any event, the letter of 12 January 2011 did not amount to a waiver by the Claimant of the Respondent’s duties to comply with cl 25(i) as the letter disputed that force majeure had validly been declared. With this in mind, it was reasonable for the Respondent to proceed to Guilder to facilitate expeditious delivery of the Claimant’s cargo and avoid any risk of cl 25(i) being enforced by the Claimant at a later date.

2.7 In the alternative, if the deviation was unreasonable, the Claimant nonetheless affirmed the decision to deviate and the Charterparty has continued to govern the relationship between the parties.

32 If the Tribunal accepts that the deviation to Guilder was unreasonable, then this action is a repudiation of the Charterparty. However, by itself, repudiation does not result in the termination of the contract. Rather, the contract is voidable de futuro at the election of the Claimant who may either rescind or affirm the contract. Until the contract is rescinded, it remains binding.

33 There are two requirements to establish election. First, there must be a representation by the Claimant, either by express words or conduct, to the Respondent in a manner which is ‘unequivocal,

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60 Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India (The Kanchenjunga) [1990] 1 Lloyd's Rep 391.
61 Hain Steamship Co. v Tate and Lyle [1936] 2 All ER 597.
definite, clear, cogent and complete’. The representation must demonstrate an unequivocal intention that the contract either binds the parties, or that it is rescinded. Secondly, the party providing the representation must have some awareness of the facts giving rise to the election. The second requirement is not controversial and is clearly established by the letter of 11 January 2011, given notice was provided to the Claimant that the Respondent was going to deviate to Guilder.

The Claimant has provided an unequivocal representation to affirm the contract. This is clear from three pieces of evidence which can be taken either separately or in their entirety.

First, the Claimant’s letter dated 12 January 2011. Specifically, the statement ‘should you...unlawfully deviate...we will seek all costs and losses’ is consistent with treating the deviation as a breach of contract rather than an event occasioning rescission. If the Claimant considered deviation to be an event where it would rescind the contract, it would be reasonable that the letter would read, ‘should you...unlawfully deviate...we will consider this contract to be at an end and will seek all costs and losses’. Further, in this letter, the Claimant denies that a Force Majeure Event has arisen and additionally provides instructions that the Respondent remains at Schilling. Taken as a whole, this letter is consistent with continuing contractual obligations.

Secondly, the letter dated 1 March 2011 evinces a ‘clear and unequivocal’ belief by the Claimant that it considers the contract ‘on foot’. Relevantly, the Claimant states that, ‘[i]n addition to these losses, we have incurred costs of USD$250,000 in road transport for the cargo on board the Drachma from Guilder to Schilling, the location where, pursuant to the charterparty, you were required to deliver the cargo’. The acknowledgment of the role of the Charterparty, even following deviation, demonstrates that the Claimant did not intend for the Charterparty to cease to govern the relationship between the parties.

66 McCormick v National Motor Insurance (1934) 40 Comm Cas 76, 93 (Slessor LJ).
68 Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India (The Kanchenjunga) [1990] 1 Lloyd’s Rep 391, 398, 399 (Goff LJ).
Thirdly, and most importantly, the Claimant’s absolute silence between the Respondent’s letters of 31 January and 1 March 2011 amounts to an unequivocal representation. Over this period the Claimant failed, first, to provide any reply to the Respondent’s letter of 31 January 2011 regarding the towage and repairs of the Drachma and the Claimant’s liability in General Average and, secondly, to make any comment regarding the continued intention to deviate to Guilder following repair at Koruna.

Taken together with the letters of 12 January and 1 March 2011, the unreasonable delay by the Claimant constituted a ‘clear and unequivocal’ representation that it has waived its rights and thereby affirmed the contract. The Claimant gave up its right to accept the repudiation and treat the contract as at an end. As Lord Goff stated in Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India (The Kanchenjunga), the Claimant ‘...has in the end to make his election...if he does not do so, the time may come when the law takes the decision out of his hands...holding him to have elected not to exercise the right...’.

It would be an entirely uncommercial and unreasonable result if the Claimant’s silence regarding substantial commercial events impacting on the liabilities of both parties amounted to a ‘clear and unequivocal’ act rescinding the contract. Between 31 January and 25 February 2011, the Drachma was acting in the interests of the Claimant to ensure the Ammonium Nitrate was delivered as fast as possible to Guilder. This was achieved by incurring substantial repair costs which benefited the Claimant in part by ensuring delivery of its cargo.

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74 United States Shipping Board v JJ Masters & Co (1922) 10 Lloyd’s Rep 573.

75 Mardoff Peach v Attica Sea Carriers (The Laconia) [1977] AC 850; China Trade Corporation v Evlogia (The Mihalios Xilas) [1979] 1 WLR 1018, 1036 (Lord Salmon).

76 [1990] 1 Lloyd’s Rep 391, 398 (Goff LJ).
3. **THERE IS A VALID GENERAL AVERAGE CLAIM UNDER THE CHARTERPARTY.**

3.1 The Respondent is able to rely on cl 27 of the Charterparty to claim a contribution in General Average.

40 If the Tribunal finds that the Respondent was entitled to deviate to Guilder pursuant to the Force Majeure Event, or that the Claimant is found subsequently to have affirmed the deviation, then the Charterparty binds the parties. Consequently, cl 27 entitles the Respondent to claim a General Average contribution for towage and repair costs necessarily incurred by the *Drachma* as it sailed from Schilling to Guilder.\(^{77}\)

41 The Respondent accepts that by the operation of Rule C of the York-Antwerp Rules 1994, it is unable to claim a contribution for the *Drachma’s* lost revenue during the repair period as any ‘expense incurred by reason of delay, whether on the voyage or subsequently, and any indirect loss whatsoever, shall not be admitted as General Average’.\(^{78}\)

42 However, expenditure incurred for towage, berth costs at Koruna and repairs to the *Drachma’s* propeller shaft all give rise to an entitlement for contribution in General Average as these expenses were in direct consequence of a ‘General Average act’.\(^{79}\) An analogy can be drawn to the case of *Vlassopoulos v British and Foreign Marine Insurance Co.*\(^{80}\) In that case, the propeller blades of the ship were damaged and it was thereby rendered unfit to encounter the ordinary perils of the sea. Accordingly she put into port for inspection and repairs. Towage in and out of port, mooring expenses, port charges, and repairs were found to have been ‘General Average acts’ under Rules X (Expenses at Port of Refuge) and XIV (Temporary Repairs) of the York-Antwerp Rules 1994.

43 According to Rule A of the York-Antwerp Rules 1994, there is a ‘General Average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common

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\(^{77}\) Facts, p 47: Letter dated 31 January 2011. The *Drachma* left anchorage at Schilling on 30 January 2011. During the voyage from Schilling to Guilder, the propeller shaft of the *Drachma* was damaged such that the vessel could not continue under its own power. The vessel was towed to Koruna for repairs. The *Drachma* was being repaired as at 31 January 2011 and arrived at the Port of Guilder on 25 February 2011. The exact date that repairs to the *Drachma* were completed is unknown.

\(^{78}\) York-Antwerp Rules 1994, Rule C.

\(^{79}\) York-Antwerp Rules 1994, Rule A.

\(^{80}\) [1929] 1 KB 187.
maritime adventure’. The four conditions set out in Rule A are satisfied and thus, the Respondent is entitled to a General Average adjustment.

First, as the Respondent was transporting the Claimant’s goods by sea, the parties were clearly engaged in a joint enterprise appropriately described as a ‘common maritime adventure’. The Drachma, and by extension, the Claimant’s cargo on board, constituted the common property involved in this maritime adventure.

Secondly, the expenditure incurred in relation to towing and repairing the Drachma was extraordinary. It is ‘out of the ordinary’ for a ship’s propeller shaft to sustain damage during a voyage. There is nothing to indicate that the Respondent failed to fulfil its obligation to provide a seaworthy ship at the commencement of the voyage, and consequently the towage and repair costs were ‘out of the ordinary’. This is evident from the fact that the Drachma’s propeller shaft did not ‘fail’, a term which may indicate a defect in the vessel, but rather was damaged. Simply because a propeller shaft is damaged, does not mean that there has been a breach of a warranty of seaworthiness. Towage and repair costs therefore constitute expenditure beyond what was envisaged under the Charterparty and consequently the Claimant cannot expect the Respondent to bear these extraordinary expenses alone.

Thirdly, the expenditure was intentionally and reasonably incurred by the Respondent. The Respondent deliberately engaged the Koruna Salvage and Tug Company. Moreover, there was no ‘practicable alternative’ available other than to organise the towage and repair of the Drachma because the ship was unable to continue under its own steam. In the circumstances, the General Average act was reasonable.

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81 York-Antwerp Rules 1994, Rule A.
82 Trade Green Shipping Inc v Securitas Bremer Allgemeine Verischerungs AG (The Trade Green) [2000] 2 Lloyd’s Rep 451; Whitecross Wire & Iron Co Ltd v Savill (1882) 8 QBD 653, 662 (Brett LJ).
87 Marida Ltd v Oswal Steel (The Bijela) [1993] 1 Lloyd’s Rep 411.
Fourthly, by engaging the Koruna Salvage and Tug Company to tow the *Drachma* to a ‘port of refuge’ for repairs, the Respondent not only ensured the safety and viability of the vessel, but also, by extension, the safety of the Claimant’s cargo. Damage to the propeller shaft threatened the *Drachma*’s ability to complete the voyage and imperilled the vessel’s operations, which necessarily placed the cargo at risk. The Respondent’s actions were therefore vital to maintain common safety and prevent harm not only to the ship itself, but also to the Claimant’s cargo. Towage, berthing and repair costs were therefore incurred ‘for the purpose of preserving from peril’ the property involved in the common maritime adventure.

Specifically, the Respondent is entitled to a contribution for towage and berthing costs pursuant to Rule X ‘Expenses at Port of Refuge’, and contribution for repair costs under Rule XIV ‘Temporary Repairs’, as the repairs effected during the voyage at Koruna enabled the ‘adventure to be completed’.

3.2 A claim for contribution in General Average is not precluded even if the expenditure was incurred negligently.

There is no evidence to suggest that damage sustained by the *Drachma* en route to Guilder was caused by any negligence or wrongdoing on the part of the Respondent. Furthermore, there was no causal connection between the deviation and the repair expenses as such a loss is too remote to be foreseeable. However, even if the Tribunal finds that the event which gave rise to the expenditure may have been ‘due to the fault of one of the parties to the adventure’, rights to ‘contribution in General Average shall not be affected’. Rule D of the York-Antwerp Rules 1994 makes it

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90 York-Antwerp Rules 1994, Rule X.
92 York-Antwerp Rules 1994, Rule A.
93 Vlassopoulos v British and Foreign Marine Insurance Co (Makis) [1929] 1 KB 187.
94 Plummer v Wildman (1815) 3 M&S 482; Atwood v Sellar & Co (1880) 5 QBD 286; Svendsen v Wallace Bros (1884) 13 QBD 69, 87, 88 (Bowen LJ).
95 York-Antwerp Rules 1994, Rule X.
96 Marida Ltd v Oswal Steel (The Bijela) [1992] 1 Lloyd’s Rep 636.
97 York-Antwerp Rules 1994, Rule XIV.
98 York-Antwerp Rules 1994, Rule XIV.
100 Ibid; Facts, p 53; Letter dated 10 March 2011.
101 York-Antwerp Rules 1994, Rule D.
102 York-Antwerp Rules 1994, Rule D.
abundantly clear that when a General Average situation exists, the expenditure incurred shall be the
subject of an adjustment even though the General Average situation would not have arisen but for the

50 Where the Tribunal applies the laws of Tolar\footnote{Facts, p 60: Tolar is a city state which has adopted the laws of New York.} in determining the General Average claim, the adjustment will be made ‘in accordance with the law and practice of the United States of America’\footnote{Facts, p 36: Charterparty, cl 27.}. The Respondent will therefore be entitled to rely on the New Jason Clause in cl 27 to claim contribution for ‘losses or expenses of a General Average nature’ resulting from ‘any cause whatsoever, whether due to negligence or not’\footnote{Facts, p 36: Charterparty, cl 27.}. Therefore, even if the Tribunal finds that the General Average act of towing the \textit{Drachma} to Koruna for repairs was undertaken negligently or caused by the Respondent’s fault, this will not preclude a General Average adjustment.

\section*{C. COLLISION ISSUES}

4. **THE RESPONDENT IS NOT LIABLE FOR THE COLLISION WITH THE BERTH AT GUILDER.**

4.1 The Respondent accepts that it owed the Claimant a duty to take care when transporting the
Claimant’s cargo and approaching the Claimant’s berth at Guilder.

51 The scope of the duty requires that the Respondent exercise the degree of care and skill of a
reasonably competent shipowner and crew. It is for the party alleging negligence to prove the breach
of this duty\footnote{\textit{Heranger v Diamond} [1939] AC 94.} and a mere breach of the regulations to avoid collisions at sea will not be sufficient to
give rise to a breach of duty by the Respondent.\footnote{\textit{Navigation Act 1912} (Cth), s 263.}
While the Respondent did not take on a pilot, there was no breach of the duty owed to the Claimant as the Respondent behaved in accordance with the standard expected of a prudent shipowner who was not presented with a reasonable offer of pilotage.\footnote{109}

In \textit{Jenkin v Godwin},\footnote{110} the master of \textit{The Ignition} was successful in demonstrating that his unpiloted navigation into a port of compulsory pilotage was not unreasonable because the offer of pilotage was inadequate.\footnote{111} Similarly, there was no reasonable offer of pilotage provided to the Respondent when it arrived at Guilder on 25 February 2011.\footnote{112}

An offer by a pilot must be clearly communicated in relation to the particular movement of the ship.\footnote{113} However, Harbour Control’s response to the \textit{Drachma}’s request for entry into the Port of Guilder was insufficient to indicate when exactly a pilot would be dispatched.\footnote{114} Although the Harbour Master maintained that a pilot would be with the \textit{Drachma} ‘shortly’, upon learning that the Respondent’s need to proceed to berth was urgent, Harbour Control did not alter or clarify this timeframe. The Harbour Master’s unchanged and equivocal statement was insufficient to constitute the ‘clear communication’\footnote{115} required. By repeating only that a pilot would be sent ‘shortly’ the Respondent was left in a situation of evident ambiguity without any clear timeframe for pilotage and no indication of how long the delay to enter the port would be.

In the circumstances, entering the port unpiloted was a manifestation of the Respondent’s prudent desire to mitigate further delay to discharging the Claimant’s cargo and it was thus not a breach of duty for the Respondent to enter the Port of Guilder unpiloted.

\textbf{4.2 Alternatively, if the Respondent by entering the port unpiloted is found to have breached its duty to take care, a \textit{novus actus interveniens} nonetheless relieves the Respondent from liability.}

\begin{footnotes}
\item[110] Ibid.
\item[111] Ibid.
\item[112] Ibid.
\item[113] Facts, p 49: Transcript of Radio Communications.
\item[114] \textit{Babbs v Press} [1971] 2 Lloyd’s Rep 383.
\item[115] \textit{Jenkin v Godwin (The Ignition)} [1983] 1 Lloyd’s Rep 382.
\item[116] \textit{Babbs v Press} [1971] 2 Lloyd’s Rep 383.
\end{footnotes}
56 Had the Harbour Master’s auto-tracking system been functioning correctly, the duty controller would have become aware when the *Drachma* moved from its position at outer anchorage. Harbour Control could then have taken steps to prevent the *Drachma* from colliding with the Claimant’s berth. For this reason, the Respondent’s breach was not the pure cause of the damage.

57 An analogy can be drawn with the case of *The Fritz Thyssen*\(^{116}\) where two ships collided. The master of one of the ships, the *Mitera Marigo* (‘MM’) refused the assistance of a tug despite suffering serious damage as a result of the collision with the *Fritz Thysson* (‘FT’). The MM sunk a few hours later and it was held that the negligence of the master had broken the chain of causation so that the actions of the FT were not the pure cause of the sinking. The omission of the MM’s master to accept salvage assistance was held to be a reckless gamble to which the MM’s loss was attributable. Similarly in the present case, the Harbour Master’s failure to ensure that the auto-tracking alarm system was operating correctly constituted an act of intervening negligence to which the Claimant’s loss was partially attributable and broke the chain of causation between the *Drachma*’s lack of pilot and the collision. Ultimately, had the alarm system not been muted, Harbour Control would have taken steps to prevent the *Drachma* from colliding with the Claimant’s berth.

**D. LIMITATION OF LIABILITY**

5. **THE RESPONDENT IS ENTITLED TO LIMIT ITS LIABILITY.**

5.1 In the alternative, if the Respondent is liable in negligence to the Claimant, it may limit its liability pursuant to the *Convention on the Limitation of Liability for Maritime Claims* (‘*Limitation Convention*’).\(^{117}\)

58 The Respondent has constituted a Limitation Fund to limit its liability to USD$28 million.\(^{118}\)

59 A correct interpretation of the *Limitation Convention* entitles the Respondent to limit its liability for all claims arising out of its failure to take care when entering the Port of Guilder. The Claimant

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\(^{116}\) [1956] 2 Lloyd’s Rep 74.


submits in its letter of 1 March 2011 that it should be compensated by the Respondent for the following losses: costs incurred to transport the cargo from Guilder to Schilling; damage to the berth; loss of use of the berth; and, claims by other port users with whom the Claimant has contracted out the use of its berth.\textsuperscript{119} Each head of damage falls within the scope of the \textit{Limitation Convention}.\textsuperscript{120}

60 First, under art 2.1(b), the cost of transporting cargo from Guilder to Schilling falls within the \textit{Limitation Convention} as it constitutes ‘loss resulting from delay in the carriage by sea of cargo’.\textsuperscript{121} By virtue of the closure of the port, delivery of the Claimant’s cargo was impossible when the Respondent arrived at Schilling. The cost to transport cargo from Guilder to Schilling would not have been incurred without this initial postponement. Consequently, the Claimant incurred ‘loss resulting from delay’.

61 Secondly, under art 2.1(a), compensation for physical damage to the berth is a claim in respect of ‘damage to property’\textsuperscript{122} occurring in direct connection with the operation of the \textit{Drachma}.\textsuperscript{123}

62 Thirdly, under art 2.1(a), the Claimant’s loss of the use of its berth is loss that is ‘consequential’\textsuperscript{124} upon the ‘damage to property’ arising from the Respondent’s collision with the berth.\textsuperscript{125}

63 Finally, pursuant to the correct interpretation of the phrase ‘consequential loss’ in art 2.1(a), costs incurred by the Claimant arising out of third party claims can also be construed as ‘consequential’ losses resulting from ‘damage to property’ occurring in direct connection with the operation of the ship.\textsuperscript{126} It is irrelevant whether this damage is characterised as pure economic loss because pure economic loss\textsuperscript{127} is encompassed by the \textit{Limitation Convention}. This construction is supported by three reasons.

\textsuperscript{119} Facts, p 51: Letter of 1 March 2011.
\textsuperscript{120} Qenos Pty Ltd \textit{v} The Ship “APL Sydney” [2009] FCA 1090.
\textsuperscript{123} Caspian Basin Specialised Emergency Salvage Administration \textit{v} Bouygues Offshore SA (No.4) [1997] 2 Lloyd’s Rep 507.
\textsuperscript{126} Ibid, art 2.1(a).
First, in light of the Limitation Convention’s object and purpose, the term ‘consequential loss’ encompasses the concept of pure economic loss. Support for this conclusion can be drawn from the travaux préparatoires of the Limitation Convention. For example, at page 60 of the travaux préparatoires, the phrase ‘loss in consequence’ was deemed to include ‘loss of profit’. The type of liability that can be limited should not be construed narrowly to the exclusion of this claim, because the intention of the Limitation Convention was to extend the right to limit, not to restrict it.

Secondly, the specific wording of the Limitation Convention in contrast to provisions in the earlier 1957 International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships suggests that limitation should now be available in respect of a much broader range of claims. Comparing the current text, where a party is entitled to limit ‘claims, whatever the basis of liability may be’ with the 1957 Convention, where claims only arose from a list of specified ‘occurrences’, demonstrates the expansion that the drafters intended. As Rix J explained in Caspian Basin Specialised Emergency Salvage Administration v Bouygues Offshore SA (No. 4), it is the nature of the claim for financial relief that is important, not the legal basis for the claim or the way in which it is pleaded.

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131 Ibid, p 60.


Thirdly, this interpretation of the term ‘consequential loss’ is supported by recent Australian case law.

In *Environmental Systems v Peerless Holdings*[^137] the meaning of ‘consequential loss’ was clarified to include lost profits and other expenses incurred due to the breach and pure economic loss.

The words of the *Limitation Convention* were also interpreted in this way in *Qenos Pty Limited v Ship APL Sydney* (‘APL Sydney’).[^138] In that case, a consequential loss claim in contract was subject to a Limitation Fund. The Federal Court of Australia found that consequential loss claims in contract were covered by art 2.1(a) of the *Limitation Convention*, even if a party has not suffered any direct ‘loss of or damage to property’. Ultimately, for this Tribunal to conclude that the Claimant’s economic losses should not fall within the scope of the Respondent’s Limitation Fund, it must be satisfied that the decision in *APL Sydney* was based on an incorrect interpretation of the *Limitation Convention*.

Where damages for loss of use of the berth may not be limited pursuant to art 2.1(a), Finkelstein J in the *APL Sydney* indicated that art 2.1(c) may apply. In that case it was held that the phrase ‘infringement of rights other than contractual rights’[^139] would also extend beyond statutory or proprietary rights and include claims in tort for pure economic loss. Therefore, upon the correct construction of arts 2.1(a) or 2.1(c), the Respondent is entitled to limit its liability for claims arising out of loss of use of the berth at Guilder even though this loss may be characterised as economic loss.

### 5.2 Policy considerations entitle the Respondent to limit its liability for all claims.

The strong and unambiguous language of the *Limitation Convention* provides for a ‘virtually unbreakable system of liability’.[^140] Historically, limitation of shipowners’ liability for maritime claims has been designed to facilitate trade and encourage shipowners to stay in business by insuring against liability to third parties which would otherwise be uninsurable.[^141] In *The Garden City*,[^142] Staughton J (as he then was) expressed the rationale for shipowners’ limitation of liability as being that

[^140]: *Strong Wise Ltd v Esso Australia Resources* (2010) 267 ALR 259, 272 ([43]-[44]) (Rares J).
‘shipowners should be encouraged to insure against liability, and limitation makes it easier for them to do so’.\textsuperscript{143} If the liability of shipowners is unlimited, there would be no guarantee for the payment of claims, therefore the system of limitation ensures that victims are protected even if their claims are not fully met.

Moreover, without limitation, freight and fuel prices would not be competitive, insurance would be scarce and the movement of goods would be slower or more difficult.\textsuperscript{144} Ultimately, limitation of liability is not just a matter of justice but of public policy which has its origin in history and its justification in convenience.\textsuperscript{145}

6. **IF THE RESPONDENT MAY NOT LIMIT ITS LIABILITY, THE CLAIMANT MAY NOT RECOVER FOR PURE ECONOMIC LOSS.**

6.1 Alternatively, if the Respondent may not limit its liability for the Claimant’s pure economic loss, the Claimant is still not entitled to recover.

A duty of care to avoid pure economic loss will not be owed to a party who could and should have taken steps to protect themselves from such loss and who, in this sense, was not vulnerable.\textsuperscript{146} The Claimant is not a party unable to protect itself by reason of ‘ignorance, or social, political or economic constraints’,\textsuperscript{147} and therefore was neither ‘powerless’ nor ‘especially vulnerable’ to the kind of loss incurred.

As a large commercial company, the Claimant was perfectly capable of protecting itself from the type of harm suffered by obtaining contractual warranties in the Charterparty to determine liability in the event of loss of this kind\textsuperscript{148} and therefore should be precluded from recovery for pure economic loss.\textsuperscript{149}

\textsuperscript{143} [1982] 2 Lloyd’s Rep 382, 398.
\textsuperscript{145} Alexander Towing Co v Millet (The Bramley Moore) [1964] P 200 (Denning LJ); Lord Mustill, “Ships are different – or are they?” [1993] *LMCLQ* 490; David Steel QC, “Ships are different – the case for limitation of liability” [1995] *LMCLQ* 77.
\textsuperscript{146} Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 216 CLR 515.
\textsuperscript{147} Perre v Apand (1999) 198 CLR 180; Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 216 CLR 515.
\textsuperscript{149} Perre v Apand (1999) 198 CLR 180.
PRAYER FOR RELIEF

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

DECLARE that it does not have jurisdiction to hear the disputes arising out of the Charterparty;

Alternatively,

DECLARE that it does not have jurisdiction to hear the dispute regarding limitation under Limitation of Liability for Maritime Claims Act 1989 (Cth).

Further,

ADJUDGE that the Claimant is liable to the Respondent in General Average for:

1. Towage costs from Koruna Salvage and Tug Company of USD$900,000.00;
2. Repairs to the propeller shaft from Koruna Ship Repairs of USD$2,000,000.00; and
3. Berth costs at Koruna of USD$500,000.

Further,

ADJUDGE that the Respondent is not liable for damage to the Claimant’s berth at Guilder;

Alternatively,

ADJUDGE that the Respondent is liable for damage to the Claimant’s berth at Guilder but is entitled to limit its liability under Limitation of Liability for Maritime Claims Act 1989 (Cth) to USD$28,000,000.00.