INTERNATIONAL MARITIME LAW

ARBITRATION MOOT COMPETITION

SINGAPORE

YEAR 2011

MEMORANDUM FOR THE CLAIMANT

TEAM 14
TWELFTH ANNUAL INTERNATIONAL MARITIME LAW
ARBITRATION MOOT COMPETITION
2011

NATIONAL LAW SCHOOL OF INDIA UNIVERSITY
India – Team 14

IN THE MATTER OF AN ARBITRATION HELD IN SINGAPORE
NO. AR/SING/18/10
(Under the AMTAC Arbitration Rules)

MEMORANDUM FOR THE CLAIMANT

On behalf of:
Blue Sky Holding Inc.,
Level 22, 80 Greater South Street,
Panama City,
Panama.

Against:
Neuland Petroleum Refinery Company Ltd.,
48 King Street,
Makai City,
Neuland.

CLAIMANT

TEAM
ANKITA GODBOLE • ARCHIT DHIR • VATSALA SAHAY • VRINDA BHANDARI

RESPONDENT
# TABLE OF CONTENTS

**LIST OF ABBREVIATIONS** ___________________________________________ III
**INDEX OF AUTHORITIES** _____________________________________________ IV
**STATEMENT OF FACTS** ______________________________________________ 1
**ISSUES** ____________________________________________________________ 3
**WRITTEN SUBMISSIONS** _______________________________________________ 4
1. **THE ARBITRAL TRIBUNAL HAS JURISDICTION TO HEAR THIS MATTER.** _______________ 4
   1.1 **The B/L provisions are binding on the Respondent.** ___________________________ 4
   1.2. **An arbitration agreement has been validly incorporated into the 11 July 2005 B/L.** __4
      1.2.1. The Arbitration Clause has not been Incorporated by Reference to another Contract. __ 5
      1.2.2. The incorporation fulfils single contracts incorporation standards. _______________ 5
2. **THE RESPONDENT HAS BREACHED ITS CONTRACT OF CARRIAGE WITH THE CLAIMANT.** __ 8
   2.1. **The Respondent had a contractual duty to discharge in common law.** ___________ 8
   2.2. **It is an implied term of the contract that the Respondent’s responsibility towards the care of cargo extended to providing safe discharge equipment.** ____________ 9
   2.3. **The Respondent breached its contract of carriage with the Claimant.** __________ 10
3. **The Respondent is liable under the tort of negligence for the total constructive loss of the vessel the Alpha Star.** _______________________________ 11
   3.1. **The arbitral tribunal can decide a tortious claim.** _______________________________ 11
      3.1.1. The language of the arbitration clause in the B/L permits the consideration of a tortious claim. ____________ 11
      3.1.2. There is sufficient nexus between the tortious and contractual claim. __________ 11
   3.2. **The Respondent is liable for the tort of negligence.** ________________________ 12
      3.2.1. The Respondent owed a duty of care to the Claimant to safely discharge cargo ____ 12
      3.2.2. The breach of the duty caused the Claimant’s loss. ___________________________ 13
      3.2.3. The actions of the terminal employee and the crew member do not constitute a ‘nova causa interveniens’. ________________________________________________ 15
4. **The Counterclaim filed by the Respondent is not admissible.** _________________ 16
   4.1. **The Counterclaim is time barred under Article III, Rule 6(3) of the Rules.** _______ 16
      4.1.1. ‘Suit’ includes arbitration proceedings. ________________________________ 16
      4.1.2. Delivery took place on 27 July 2005. ________________________________ 17
   4.2. **Arguendo, the Claimant is not liable for loss of cargo.** ______________________ 18
      4.2.1. The negligence of the Respondent caused the loss of the Cargo. ______________ 18
      4.2.2. The Alpha Star was not unseaworthy. _________________________________ 18
      4.2.3. Arguendo, Alpha Star’s unseaworthiness was not the cause of the loss of cargo. ___ 20
      4.2.4. The Claimant has discharged its obligation under Article III, Rule 2 of the Rules. __ 20
      4.2.5. The Claimant’s liability is wholly exonerated under Article IV, Rule 2(b) of the Rules. ________________________________ 21
5. **Heads of Damages.** ________________________________________________ 21
   **PRAYER** ___________________________________________________________ 25
### LIST OF ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>§</td>
<td>Section</td>
</tr>
<tr>
<td>¶/para</td>
<td>Paragraph</td>
</tr>
<tr>
<td>AMTAC</td>
<td>Australian Maritime and Transport Arbitration Commission</td>
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<tr>
<td>B/L</td>
<td>Bill of Lading</td>
</tr>
<tr>
<td>COGSA</td>
<td>Carriage of Goods by Sea Act, 1992</td>
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<tr>
<td>ESD</td>
<td>Emergency Shut Down systems</td>
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<td>i.e.</td>
<td>That is</td>
</tr>
<tr>
<td>IBA</td>
<td>International Bar Association</td>
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<td>IFIC</td>
<td>Independent Fire Investigation Consultants</td>
</tr>
<tr>
<td>ISGOTT</td>
<td>International Safety Guide for Oil Tankers and Terminals</td>
</tr>
<tr>
<td>ISM Code</td>
<td>International Safety Management Code</td>
</tr>
<tr>
<td>LPG</td>
<td>Liquefied Petroleum Gas</td>
</tr>
<tr>
<td>Problem</td>
<td>IMLAM Moot Problem, 2011</td>
</tr>
<tr>
<td>r/w</td>
<td>Read with</td>
</tr>
<tr>
<td>Rules/HVR</td>
<td>Hague Visby Rules</td>
</tr>
<tr>
<td>SOLAS</td>
<td>International Convention for the Safety of Life at Sea, 1974</td>
</tr>
<tr>
<td>YBCA</td>
<td>Yearbook Commercial Arbitration</td>
</tr>
</tbody>
</table>
### INDEX OF AUTHORITIES

#### A. CASE LAW

#### CANADA


#### UNITED KINGDOM

1. *7E Communications Ltd v. Vertex Antennentechnik GmbH* [2007] 1 WLR 2175…………6
10. *Astro Vencedor Compania Naviera SA of Panama v. Mabangaft GmbH (The Damianos)* [1971] 2 All ER 1301……………………………………………………………………………………………11
12. *B. Sunley & Co Ltd v. Cunard White Star Ltd* [1940] 1 KB 740……………………24
15. *Ballantyne & Co. v. Paton & Hendry* 1912 SC 246………………………………….8
19. *Booth Steamship Company Ltd v. Cargo Fleet Iron Company* [1916] 2 KB 570…………8
20. *British Columbia etc., Saw Mill Co Ltd v. Nettleship* (1868) LR 3 CP 499…………….24
25. Davies v. Mann (1842) 10 M&W 546
33. Gee v. Lancs & Yorks Railway (1860) 6 H&N 211
34. Grant v. Australian Knitting Mills Ltd [1936] AC 85
37. Hadley v. Baxendale (1854) 9 Exch 341
41. Heskell v. Continental Express Ltd [1950] 1 All ER 1033
43. Horne v. Midland Railway (1873) LR 8 CP 131
44. In Re An Arbitration between Polemis and Another and Furness, Withy and Company, Limited [1921] 3 KB 560
45. Jackson v. Royal Bank of Scotland [1949] 2 KB 528
47. Jindal Iron and Steel Co Limited and Others v. Islamic Solidarity Shipping Company Jordan Inc.(The Jordan II) [2004] UKHL 49
48. Koufos v. Czarnikow (C) Ltd (The Heron II) (1969) 1 AC 350
49. Kuwait Airways Corp. v. Iraqi Airways Co (Nos 4 and 5) [2002] UKHL 19
52. Marsh v. Joseph [1897] 1 Ch 213
54. Mediterranean Salvage & Towage Ltd v. Seamar Trading & Commerce Inc (The Reborn) [2010] 1 All ER (Comm) 1
56. M’Kew v. Holland, Hannen, Cubitts (Scotland) Ltd 1970 SC (HL) 20
57. Modern Building Wales Ltd v Limmer & Trinidad Co Ltd [1975] 1 WLR 1281
58. Monarch SS Co Ltd v. Karlshamns Oliefabriker (A/B) [1949] AC 196
59. Mowbray v. Merryweather [1895] 2 QB 640
passim
63. Peterson v. Freebody & Co. [1895] 2 QB 294
64. Photo Production Ltd v. Securior Transport Ltd [1980] AC 827
66. Priest v. Last [1903] 2 KB 148
68. Reigate v. Union Manufacturing Co (Ramsbottom) Limited [1918] 1 KB 592
70. Richard Holdon Ltd v. Bostok & Co Ltd (1902) 18 TLR 317
73. Dampskip Selskab Svendborg v. London Midland and Scottish Railway Co. [1930] 1 KB 83
74. Siboti K/S v. BP France SA [2003] EWHC 1278 (Comm) ................................................................. 5
75. Skips A/S Nordheim v. Syrian Petroleum Co. Ltd. (The Varenna) [1983] 2 Lloyd’s Rep 592 .............................................................................................................. 5, 7
77. Spencer v. Wincanton Holdings Ltd. [Wincanton Logistics Ltd.] [2009] EWCA Civ 1404 ............................................................................................................................... 15
78. Stansbie v. Troman [1948] 2 KB 48 ................................................................................................. 15
80. Supershield Ltd. v. Siemens Building Technologies FE Ltd. [2010] EWCA Civ 7 ................... 22
81. Sylvia Shipping Co. Ltd. v Progress Bulk Carriers Ltd. [2010] EWHC 542 (Comm).............. 22, 23
82. The Amer Energy [2009] 1 Lloyd’s Rep 293 .................................................................................. 23
83. The Amstelot [1963] 2 Lloyd’s Rep 40 ......................................................................................... 18
84. The Annefield [1971] 1 Lloyd’s Rep 1 ............................................................................................... 5, 7
85. The Argentino (1889) 14 AC 519 (HL) ......................................................................................... 22
86. The Arpad (1934) P. 189 (CA) ....................................................................................................... 22
87. The Canadian Transporter 43 Lloyd’s List Law Rep 409 (CA 1932) ....................................... 22
88. The Ert Stefanie [1989] 1 Lloyd’s Rep 349 .................................................................................. 21
89. The Europa [1908] P. 84 .................................................................................................................. 20
91. The Jaederen [1892] P. 351 (Probate Divorce and Admiralty Division) ...................................... 8
92. The Kapitan Sakharov [2000] 2 Lloyd’s Rep 225 ...................................................................... 18
94. The Marion [1984] 1 AC 563 ....................................................................................................... 19
95. The Merak [1964] 2 Lloyd’s Rep 527 ......................................................................................... 16
96. The Oropesa [1943] P. 32 .............................................................................................................. 15
98. The Playa Larga and Marble Islands [1983] 2 Lloyd’s Rep 171 ................................................. 11
100. The Seki Rolette [1998] 2 Lloyd’s Rep 638 .............................................................................. 17
102. The Toledo [1995] 1 Lloyd’s Rep 40 ........................................................................................... 18
104. Tracomin SA v. Sudan Oil Seed Co [1983] 1 Lloyd’s Rep 560 .................................................. 6

106. *TW Thomas & Co v. Portsea Co Ltd* [1912] AC 1……………………………………………………………………………………………………………………………..7


108. *Wroth v. Tyler* [1973] 1 All ER 897………………………………………………………………………………………………………………………………………………………………22


**UNITED STATES OF AMERICA**

1. *Cuomou v. United States* 107 F.3d 290 (5th Cir. 1997)……………………………………………………………………………………………………………………13


8. *Son Shipping Co v. DeFosse & Tanhge* 199 F 2d 687 (1952)………………………………………………………………………………………………………………………………………………16


**EUROPEAN UNION**


4. *Tradax Export SA (Panama) v. Amoco Iran Oil Company (US)* XI YBCA 53 (1986).5, 6, 7

**HONG KONG**


B. **STATUTES**

1. AMTAC Arbitration Rules.

12th INTERNATIONAL MARITIME LAW ARBITRATION MOOT 2011 | TEAM 14

C. TREATISES
4. Emmanuel Gaillard and John Savage (eds), FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (1999).

D. ARTICLES

STATEMENT OF FACTS

THE PARTIES

Blue Sky Holdings Inc. (the ‘Claimant’) is a company incorporated under the laws of the Republic of Panama and is the owner of the Alpha Star. Neuland Petroleum Refinery Co. (the ‘Respondent’) is a company incorporated under the laws of Neuland and is an oil importer.

THE SALE CONTRACT

In April 2005, the Respondent invited tender applications for the supply and delivery of 53,000 metric tonnes of LPG mixture. Far East Maritime Petroleum Transport Co. (the ‘Charterer’ or ‘Shipper’) together with Brit Petroleum submitted the successful bid and was awarded the tender on 27 April 2005. The Charterer and the Respondent share a long standing business relationship, the former being a regular supplier of gas cargoes to the latter.

THE TIME CHARTER PARTY

The Claimant and Charterer entered into a time charter party substantially on the SHELLTIME 4 format for the vessel Alpha Star on 10 January 2005. During the currency of this charter party and pursuant to the sale contract, the Charterers ordered the Alpha Star to load consignments of LPG mixture on inter alia 11 July 2005 for discharge at Makai Port, Neuland.

THE SHIPMENTS

Eight shipments of LPG were carried against B/L on the Charterer’s standard form. The dispute arose with respect to the fifth shipment made on 11 July 2005. The B/L incorporated the standard form arbitration clause on its reverse side about which the Respondent was aware. The Respondent was the endorsee and holder of the 11 July 2005 B/L. The cargo was discharged on 27 July 2005. The Ship/shore safety checklists were completed before discharge.

THE INCIDENT

Shortly after the discharge operations commenced, an initial small cloud of white gas was seen to escape from the vessel’s rail side of the manifold reducer. A terminal employee and a crew
member were in attendance at the manifold. While the crew member moved away on seeing the gas cloud, the terminal employee approached the leaking reducer with a spanner. As he bent over, a non-intrinsically safe metal cased torch fell from his overall pocket. The torch struck the manifold drip tray just as a large cloud of pressurized gas escaped. This was followed by an orange flame and an explosion. The _Alpha Star_ was rendered a total constructive loss as a result of the ensuing fire and both terminal employee and crew member died due to the same.

**THE CLAIMS**

The Claimants commenced arbitration proceedings on 15 August 2010 against the Respondent claiming damages for breach of their contractual duty to exercise reasonable care in supplying and maintaining a suitable manifold reducer for discharge operations, which combined with the negligence of the terminal employee, caused the fire that destroyed the _Alpha Star_.

The Respondents have denied all allegations put forth by the Claimant. They have counterclaimed seeking damages against the Claimant for breach of contractual duty to deliver cargo specified in the 11 July 2005 B/L.
ISSUES

In light of the Preliminary Submissions made by the Claimant, the following issues arise for consideration before the Arbitral Tribunal:

I. WHETHER THE ARBITRAL TRIBUNAL HAS JURISDICTION TO TRY THE DISPUTE BETWEEN THE CLAIMANT AND RESPONDENT.

II. WHETHER THE RESPONDENT IS LIABLE UNDER CONTRACT FOR THE TOTAL CONSTRUCTIVE LOSS OF THE ALPHA STAR.

III. WHETHER THE RESPONDENT IS LIABLE UNDER THE TORT OF NEGLIGENCE FOR THE TOTAL CONSTRUCTIVE LOSS OF THE ALPHA STAR.

IV. WHETHER THE CLAIMANT IS LIABLE UNDER THE CONTRACT OF CARRIAGE FAILURE TO DELIVER CARGO DESCRIBED ON THE B/L DATED 11 JULY 2005.

V. WHETHER THE CLAIMANT IS ENTITLED TO THE RELIEFS SOUGHT.
WRITTEN SUBMISSIONS

1. THE ARBITRAL TRIBUNAL HAS JURISDICTION TO HEAR THIS MATTER.

1. The arbitral tribunal has jurisdiction to hear this matter as first, the provisions incorporated in the B/L are binding on the claimant and secondly, the arbitration agreement has been validly incorporated by reference into the 11 July 2005 B/L.

1.1 **THE B/L PROVISIONS ARE BINDING ON THE RESPONDENT.**

2. The lawful holder of the B/L has the title to sue and be sued if the B/L had been transferred to him as a result of a contractual or other transaction made before the B/L ceased to function as a document of title.\(^1\) In the instant case, the Respondent has taken delivery of the goods and the incident of fire took place after the commencement of the discharging operation.\(^2\) The B/L identifies the Respondent as the receiver of the cargo and the latter has signed the B/L as an indorsee through the intermediate bank.\(^3\) Therefore, there is a transfer of rights and liabilities to the Respondent. Hence any obligations contained in the B/L are binding on the Respondent.

1.2 **THE ARBITRATION CLAUSE HAS BEEN VALIDLY INCORPORATED INTO THE 11 JULY 2005 B/L.**

3. A reference to a document containing an arbitration clause constitutes a valid arbitration agreement if the clause is made a part of the contract.\(^4\) This includes incorporation by reference in a bill of lading.\(^5\) It is submitted that an arbitration agreement has been validly incorporated into the B/L for the 11 July 2005 shipment.

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\(^1\) Section 2(1)(a), COGSA 1992; Section 3, COGSA 1992.

\(^2\) Problem, at 81.

\(^3\) Problem, at 56.


\(^5\) Section 2, Singapore Act.
1.2.1. **The Arbitration Clause Has not been Incorporated by Reference to Another Contract.**

4. An arbitration clause can be incorporated into a contract by reference to another contract (such as the incorporation of an arbitration clause into the B/L by referring to the charter party agreement) or to another document containing the relevant term(s).⁶ A stricter burden exists in order to prove the former.⁷ The rationale for this is the recognized distinction between referencing a standard form agreement or a separate document of whose terms both parties are privy to and reference to another contract, to which one of the parties is not privy to.⁸ The B/L does not incorporate any clause of the charterparty.⁹ It incorporates clauses present on the reverse side of the B/L. The Respondent is a party to the contract of carriage evidenced by the B/L. Therefore the B/L does not incorporate clauses present in another contract. The higher standard for incorporation is not applicable here.

1.2.2. **The Incorporation Fulfils Single Contracts Incorporation Standards.**

5. When parties share a long business relationship or when trade usage is shown, a greater degree of familiarity can be imputed to each party.¹⁰ Hence a reference by A in an agreement with B to terms contained in past agreements with B or to standard terms requires relaxed incorporation standards; a general reference to standard terms and conditions is held to be

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⁶See Masood Ahmed, *Supra* note 4, at 413.
⁹See Problem, Claimant’s Submission, ¶ 6 r/w Respondent’s Submissions, ¶ 7.
sufficient and in consonance with commercial practice.11 Further, a party’s conduct can “provide a basis for deeming such (formal) requirements satisfied in appropriate cases” and estop it from denying the existence of the arbitration clause.12 Such broad interpretation of form requirements is in tune with the pro-arbitration approach adopted by the drafters of the New York Convention.13 In light of such judicial opinion, it is submitted that the facts of the present case support a conclusion that the arbitration clause was validly incorporated.

6. First, the Respondent has admitted that Clauses 1 to 5 were the standard terms present in a standard Far East bill of lading.14 Therefore the reference was made to standard terms and conditions, used for all similar transshipments, and not to another contract to which the Respondent was not privy.

7. Second, the Respondent shares a long standing business relationship with the Charterer. This includes contracts for the supply of gas by FEMPTC.15 The 11 July 2005 shipment was similar to the many shipments that had been carried out earlier between the Charterer and the Respondent. In this, like the earlier shipments, the Charterer was the supplier of the gas and the Respondent was the receiver. It is reasonable to assume that the Respondent is familiar with

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12 Gary B. Born, INTERNATIONAL COMMERCIAL ARBITRATION 597 (2009).


14 Problem, Respondent’s Submissions, ¶ 6.

15 Problem, Claimant’s Submission, ¶ 8 r/w Respondent’s Submission, ¶¶ 7, 9.
the form of the standard Far East bills of lading and thus that it was aware of what Clauses 1 to 5 referred to.

8. Third, in the 11 July B/L, it has been mentioned that Clauses 1 to 5 have been incorporated under the heading “INCORPORATION”. When the objecting party is a seasoned businessmen and where reference has been made to standard terms and conditions, a statement that the “terms and conditions” are incorporated would also have been valid. However here, the reference, mentioned below the heading “INCORPORATION”, has been made to 5 particular Clauses, and not to general terms. The fifth clause is the arbitration clause. The form of reference is thus specific enough to make the incorporation valid. In fact, in single contract cases, an arbitration clause is binding even on a party unaware of it and the underlying ignorance is “irrelevant”.

9. It is also relevant to note that the Respondent did not question the validity of the incorporation till 29 August 2010 and took delivery of all eight shipments. In fact, the bill of lading for the eighth shipment contained the arbitration clause on its reverse; yet the Respondent took delivery without questioning the presence of the arbitration clause. The continued endorsement of all the bills of lading gave the Claimant the “right to believe in good faith” that the Respondent approved of the form and content of the bill. This conduct coupled with the

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17See Problem at 43, 46, 49, 52, 55, 61 and 64.

18Problem, at 65.

19Andrew Tweeddale and Keren Tweeddale, Supra note 8, at 656; The Athena; Modern Building Wales Ltd v Limmer & Trinidad Co Ltd [1975] 1 WLR 1281.

20The St. Raphael; The Athena.

21Problem, Respondent’s Submission, ¶ 9.

22Problem, Page 65.

23Problem, Claimant’s Submission ¶ 21 r/w Respondent’s Submission, ¶ 9.

24See Mediterranean Shipping Co.; VerolmeBotlek BV v. Lee C. Moore Corp., XXI YBCA 824, 827 (1996); In re Transrol Nevegacao SA 782 F. Supp. 848, 851 (SDNY 1992); China Nanhai Oil; Gary B. Born, Supra note 12, at 592; Rolf Trittmann and Inka Hanefeld, “Part II – Commentary on the German Arbitration Law, Chapter
long standing business relationship the Respondent enjoyed with Charterer and its commercial experience in this trade, estopps the Respondent from asserting that the agreement to arbitrate did not exist simply because the formal requirement of affixing the clauses to the reverse of the bill of lading was not fulfilled.

10. Consequently, in light of the above submissions, it is shown that the 11 July 2005 B/L is a standard FEMPTC B/L. The effect of the incorporation has been such as to make Clauses 1 to 5, particularly the arbitration clause, part of the 11 July bill of lading. Therefore the arbitral tribunal has jurisdiction to hear this matter.

2. THE RESPONDENT HAS BREACHED ITS CONTRACT OF CARRIAGE WITH THE CLAIMANT.

2.1. The Respondent had a contractual duty to discharge in common law.

11. In common law, the carrier is said to have fulfilled its contractual duty when it has “reached a point where the consignee or the person taking delivery is bound to do something…”25 The carrier performs the principal part of its contractual obligation when it puts the goods over the rail of the ship26 and is deemed to have discharged the goods when they are put in a position enabling the consignee to take delivery thereof.27 Therefore, the activity of discharging is not to be performed only by the carrier, the consignee also has a duty of taking delivery of the cargo. Each party has to “act within his own department” and the activity of discharge is only complete when both parties act simultaneously.28

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28Ibid.
12. In the instant case, the Claimant’s contractual duty extended to providing a seaworthy vessel and appropriate cargo structures, fittings and pipe works.\textsuperscript{29} However, oil discharge operations require equipment to be provided both from the ship and the shore for completion.\textsuperscript{30} The Respondent’s duty to take delivery of the cargo thus included the responsibility to provide safe shore-end discharge equipment. Hence, if any damage to the cargo or the vessel is attributable to faulty shore-end equipment, the Respondent will be in breach of its contractual duty to discharge.

2.2. \textbf{IT IS AN IMPLIED TERM OF THE CONTRACT THAT THE RESPONDENT’S RESPONSIBILITY TOWARDS THE CARE OF CARGO EXTENDED TO PROVIDING SAFE DISCHARGE EQUIPMENT.}

13. A term can be implied in a contract if first, it is necessary to give business efficacy to the contract; secondly, it is obvious and “it goes without saying”; thirdly, it does not contradict any express terms of the contract and fourthly, it is reasonable and equitable.\textsuperscript{31}

14. Discharge operations are jointly conducted by the ship and the shore with equipment and personnel from both sides participating.\textsuperscript{32} Given the joint responsibility shared for discharge operations, it is submitted that it was obvious, reasonable, equitable and efficacious that the Respondent had the responsibility of providing the appropriate shore side discharge equipment. This would include supplying and maintaining a suitable manifold reducer and ensuring that it was in a proper condition prior to it being fitted to the vessel the Alpha Star.

\textsuperscript{29}Problem, Neupetrol Tender/2/2005 ¶ 3 clause I, p. 5 r/w FEMPTC Commercial Offer, clause 2.7, p. 11.
\textsuperscript{30}ISGOTT (INTERNATIONAL SAFETY GUIDE FOR OIL TANKERS AND TERMINALS) GUIDELINES 5TH EDITION, ¶ 22.4.2.2 – 22.6 (2006) (“ISGOTT”).
\textsuperscript{32}ISGOTT, Supra note 30, at ¶ 26.3.1.
2.3. **THE RESPONDENT BREACHED ITS CONTRACT OF CARRIAGE WITH THE CLAIMANT.**

15. The IFIC Report is relevant, admissible and should be accorded due probative value while being assessed by the Tribunal. In the present case, no rupture, damage or leak was found in or from any of the vessel’s cargo structures, pipes and other fittings. The gas leak was from the forward end of the reducer, which forms a part of the shore-side discharge equipment. All the equipment on the vessel was secure and consequently the Claimant has fulfilled its contractual duty of care towards the cargo. However, grooving was found at the forward end of the reducer, which had been supplied by the Respondent. Given the high risk involved in oil discharge operations, it is necessary to provide secure equipment so as to avoid any leaks and spills and thus, the Respondent had a duty to provide secure equipment for discharge. Consequently, the Respondent has breached its duty under the contract of carriage with the Claimant to ensure safe discharge of cargo, by supplying a defective reducer.

16. Furthermore, it is submitted that the grooving was the cause of the fire. It is evident that a high pressure liquid will escape into an area of low pressure through the orifices as a gas. The grooving on the manifold provided such an opportunity for the LPG to escape while under high pressure. Although the terminal employee’s actions purportedly ignited the fire, LPG mixed with air in the right proportions is inflammable and so the gas leak owing to the deficient reducer was in itself very dangerous. Given the leak, the terminal employee’s actions were not the only circumstances under which the fire could have occurred. Hence, the damage to the cargo and the vessel is attributable to the Respondent’s breach of its contract of carriage by it failing to provide a suitable reducer.

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35 Problem, IFIC Report, at 91.
36 Problem, IFIC Report, at 91.
37 Problem, IFIC Report, at 91.
38 ISGOTT, Supra note 30, at ¶¶ 1.1 – 1.1.1.
3. THE RESPONDENT IS LIABLE UNDER THE TORT OF NEGLIGENCE FOR THE TOTAL CONSTRUCTIVE LOSS OF THE VESSEL THE ALPHA STAR.

3.1. THE ARBITRAL TRIBUNAL CAN DECIDE A TORTIOUS CLAIM.

17. An Arbitral Tribunal is competent to decide a tortious claim if, first, the arbitration clause is so worded and secondly, if there is sufficient nexus between the contractual and tortious claim.

3.1.1. THE LANGUAGE OF THE ARBITRATION CLAUSE IN THE B/L PERMITS THE CONSIDERATION OF A TORTIOUS CLAIM.

18. It is well established that an arbitration clause in a contract employing the terms “arising out of” or “in relation to” while referring to the subject matter of arbitration is wide enough to cover a tortious claim.\(^{39}\) In the present case, the arbitration clause incorporated in the 11 July 2005 B/L clearly states that “all differences and disputes arising out of this B/L shall be decided by Arbitration...”\(^{40}\) It is submitted that this phrase evidences the intent of the contracting parties to give a wide ambit to the arbitration clause, inasmuch as it can cover cases of torts that arise in connection with a contractual dispute.

3.1.2. THERE IS SUFFICIENT NEXUS BETWEEN THE TORTIOUS AND CONTRACTUAL CLAIM.

19. There is sufficient nexus between a tortious and contractual claim if, in an agreement to arbitrate one would necessarily involve a consideration of the other.\(^ {41}\) The resolution of the dispute in the instant case involves determining whether the Respondent failed to take reasonable care as required under the contract. Such a determination will inevitably lead to considering whether the tort of negligence has been committed or not. This is because failure to take reasonable care is one of the essential elements of proving negligence. Therefore there is a sufficient nexus between the tort and contractual claims to grant the Tribunal jurisdiction.

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\(^{40}\) Problem, at 98.

3.2. **The Respondent is liable for the tort of negligence.**

20. It is submitted that the Respondent breached his duty of care to the Claimant\(^{42}\) and that this negligence caused the total constructive loss of the Claimant’s vessel the *Alpha Star*.

3.2.1. **The Respondent owed a duty of care to the Claimant to safely discharge cargo**

21. The test for determining the existence of a duty of care as laid down in *Caparo Industries v. Dickman*\(^{43}\) stipulates that the damage should be reasonably foreseeable; that there must be a close proximate relationship between the parties and finally, the law must consider it fair, just and reasonable that such a duty be imposed.

3.2.1.1. **The Respondent owed a duty of care to supply a suitable manifold reducer**

22. Discharge operations in case of oil cargo are jointly conducted by the ship and shore and responsibility to provide men and equipment is divided between the two. Thus, equipment for discharge has to be provided by the shore as well.\(^{44}\) In the present case, the Respondent provided the manifold reducer and the entire discharge operation was controlled by the terminal.\(^{45}\) The Respondent was aware of the high levels of risk involved in oil cargo discharge operations. Therefore, he was under a duty not only to provide a suitable and fit manifold reducer, but also to maintain it in the same condition during the course of the discharge operation.

3.2.1.2. **The Respondent breached his duty to take reasonable care in supplying and maintaining the manifold reducer**

23. The Respondent must exercise reasonable care in the supply and maintenance of the manifold reducer.\(^{46}\) Industry standards and trade practices elaborated in the ISM Code and ISGOTT

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\(^{42}\)Problem, Claimant’s Submissions, ¶ 22.

\(^{43}\) *Caparo Industries v. Dickman* [1990] 2 AC 605.

\(^{44}\)ISGOTT, *Supra* note 30, at ¶ 26.3.1.

\(^{45}\)Problem, at 89.

\(^{46}\)Christopher Walton (ed.), *Charlesworth and Percy on Negligence* 461, 462, (2010); *Blyth v. Birmingham Waterworks* (1856) 11 Ex. 781, 784 per Alderson B.
Guidelines can be used as a yardstick for assessing ‘reasonable conduct’ as they lay down best practices employed in the shipping industry, specifically by oil tankers and the terminals they serve. Reasonable care would require compliance with these standards. They stipulate that all the equipment must be suitable and checked so that it does not present a risk of spillage or oil leaks during discharge operations. In the present case, the manifold reducer had grooving on its 8 inch face while all other equipment was in order. Therefore, it is submitted that by providing a faulty reducer, the Respondent failed to exercise reasonable care.

### 3.2.2. **The breach of the duty caused the Claimant’s loss.**

24. In order to impute liability on the defendant for the loss suffered by the plaintiff, it must be shown first on balance of probabilities that the breach of duty caused the plaintiff’s loss and secondly that the loss was within the defendant’s scope of liability.

#### 3.2.2.1. **The actions of the Respondent caused the Claimant’s loss.**

25. The test for determining cause in fact is the “but for test”, i.e. but for the acts of the defendant, the plaintiff would not have suffered any injury. This test acts as a preliminary filter to determine whether or not the defendant’s acts should be excluded from the conspectus of events which contributed towards the plaintiff’s loss. It is only necessary to ascertain that the defendants act was a cause of the loss and not whether it was the sole or primary cause.

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49 Rodriguez, Supra note 47, at 1600; Thomas J. Schoenbaum, Supra note 47; Cuomou v. United States 107 F.3d 290, 295 (5th Cir. 1997); Melerine v. Avondale Shipyards, Inc. 659 F.2d 706, 708, 710-12 (5th Cir. 1981); Richmond Marine Panama v. United States 350 F. Supp. 1210, 1218-19 (SDNY 1972).

50 ISGOTT, Supra note 30.

51 Problem, at 91.

52 W.V.H. Rogers (ed.), WINFIELD AND JOWICZ ON TORT 311 (2010); CHARLESWORTH AND PERCY, Supra note 46, at 413.


In the instant case, the Respondent supplied a manifold reducer with grooving on its 8 inch face. This implies that the connection with the manifold was not air tight and the escape of the cargo from a high pressure to a low pressure zone was imminent and unavoidable. On mixing with the surrounding air, LPG becomes highly inflammable. It is thus submitted that, but for the Respondent’s negligence in supplying a faulty reducer, the loss would not have transpired.

3.2.2.2. The loss suffered as a result of the Respondent’s negligence fell within its scope of liability.

26. The Respondent’s scope of liability extends to all those losses which are a reasonably foreseeable consequence of its breach.\textsuperscript{55} The test is whether a reasonable man, in the defendant’s position and having the defendant’s knowledge could have foreseen the damage. If there is a substantial chance or risk of a particular event happening, then the defendant must take all necessary steps to eliminate that risk.\textsuperscript{56}

27. Risk of fire in oil discharge operations is a known fact and hence, a recognised substantial risk. It is for the very purpose of mitigating this risk that safety precautions are stipulated by trade usage and practice. Consequently, it is necessary to ensure that all the equipment employed in discharge operations is secure to prevent any risk of leakage. In the instant case, it was reasonably foreseeable that defective machinery for discharge operations would increase the risk of highly inflammable LPG escaping. Fire is a recognised risk and consequence of LPG leakage. Therefore, it is submitted that the damage due to fire was reasonably foreseeable in the circumstances and given the Respondent’s knowledge, thus falls within its scope of liability. Thus, the breach of the duty caused the loss.


\textsuperscript{56}Wagon Mound I.
3.2.3. **THE ACTIONS OF THE TERMINAL EMPLOYEE AND THE CREW MEMBER DO NOT CONSTITUTE A**

‘NOVA CAUSA INTERVENIENS’.

28. The Respondent may argue that the acts of the terminal employee and the crew member constitute a *nova causa interveniens*, thus exonerating it of liability for the tort of negligence. Nevertheless, in order to break the chain of causation between the breach and the loss, the *nova causa interveniens* must be wholly extraneous and unreasonable. Moreover, it must be outside the Respondent’s control.\(^{57}\) If the intervening event is reasonably foreseeable, it will not break the chain of causation.\(^{58}\) Furthermore, where the defendant has a duty to guard against certain consequences and the act which was to be guarded against occurs, resulting in loss, there is no *nova causa interveniens*.\(^{59}\)

3.2.3.1. **The acts of the terminal employee do not break the chain of causation.**

29. It is submitted that the acts of the terminal employee do not exonerate the Respondent of its liability as they do not break the chain of causation, being neither unreasonable nor wholly extraneous. It is reasonable for the terminal employee to approach a point of leakage on the vessel with the purpose of fixing it. Since the terminal did not follow ISGOTT, no policy or regulation prevented the terminal employee from carrying non-intrinsically safe objects. Furthermore, the shore personnel were supposed to be instructed on fire fighting procedures by the terminal representative, i.e. the Respondent. This evidences the control exercised by the Respondent in terms of how these personnel would have acted in a fire emergency and consequently, the actions of the terminal employee were not wholly extraneous.\(^{60}\) It was the Respondent’s duty to guard against leakage leading to the risk of fire. It failed to discharge the same and thus the acts of the terminal employee do not constitute an intervening cause.

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60 ISGOTT, *Supra* note 30, at ¶ 26.3.2; Problem, at 73.
3.2.3.2. The actions of the crew member do not constitute an intervening cause.

30. It is submitted that the Claimant has not contributed to its own loss and therefore the damages payable by the Respondent should not be accordingly reduced.\(^{61}\) It is well established that if the negligence perpetrated by the pursuer becomes *functus officio*, i.e. it ceases to be an operating factor, then the responsibility to take reasonable care rests on the defendant and there is no case of contributory negligence.\(^{62}\) Arguendo there was negligence by the crew member, it is submitted that it had become *functus officio* by virtue of the actions of the terminal employee, which were the primary cause of fire.

4. THE COUNTERCLAIM FILED BY THE RESPONDENT IS NOT ADMISSIBLE.

4.1. The Counterclaim is time barred under Article III, Rule 6(3) of the Rules.

31. The claim for cargo damage is governed by the Hague-Visby Rules.\(^{63}\) Under Article III, Rule 6, ¶ 3 of the Rules, the *suit* must be brought within one year of the delivery of cargo. It is submitted that a counterclaim in an arbitration proceeding is included within the meaning of ‘*suit*’ and is barred as it has been brought beyond the stipulated period of ‘one year from the date of delivery’.

4.1.1. ‘Suit’ includes arbitration proceedings.

32. It has been held that the words “*suit* is brought within one year” should be construed to mean “*proceedings* should be commenced within one year”.\(^{64}\) Consequently, the counterclaim falls within the ambit of Article III, Rule 6(3) and the one year bar applies to arbitration claims.

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\(^{62}\)Davies *v.* Mann (1842) 10 M&W 546; Davies *v.* Swan Motor Co. (Swansea) LD [1949] 2 KB 291.

\(^{63}\)The Hague and Hague Visby Rules are interchangeable as far as the issue of liability is concerned. See *Papera Traders Co. Limited & Others v. Hyundai Merchant Marine Co. Ltd., The Keihin Co. Ltd. (The Eurasian Dream)* [2002] EWHC 118 (Comm) (“The Eurasian Dream”).

4.1.2. **Delivery took place on 27 July 2005.**

33. *Delivery* and *discharge* are to be construed differently.\(^{65}\) The period of limitation begins to run when the cargo has been delivered or from the date on which it should have been delivered.\(^{66}\) The term *delivery* has not been defined under the Rules. Nonetheless, in case of liquid cargos, delivery is said to take place when the cargo passes the vessel’s hose connections and enters the receiver’s hoses.\(^{67}\)

34. In the present case, delivery took place when the LPG passed the manifold flange connection of the *Alpha Star*.\(^{68}\) This took place on 27 July 2005 and the period of limitation should be calculated from this day. The time period for filing a suit is exactly one year from the date of delivery, and is construed strictly since it is intended to achieve finality.\(^{69}\) The counter-claim was filed on 29 August 2010\(^{70}\) resulting in the Claimant being “discharged from all liability whatsoever in respect of the goods”.

35. Additionally, it is submitted that the claim made by the Respondent is in the nature of a counterclaim and not a defence of equitable set off. In any event, equitable set off is also barred under the HVR.\(^{71}\)

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\(^{65}\)Article III, Rule 2 and Article III, Rule 8 of the Hague/Hague-Visby Rules.


\(^{68}\)Problem, at 13, Sale Contract Clause 8.


\(^{70}\)Problem, at 103.

4.2. **Arguendo, the Claimant is not liable for loss of cargo.**

4.2.1. *The negligence of the Respondent caused the loss of the cargo.*

36. It has already been proved that the cargo was lost due to the fire caused by the negligence of the Respondent. The fire was the actual cause of the loss and thus the Claimant is not *prima facie* liable for loss of cargo received in good order but out turned in short or bad order.

4.2.2. *The Alpha Star was not seaworthy.*

37. The Claimant (carrier) has an obligation under Article III, Rule 1 of the HVR to exercise *due diligence* to provide a *seaworthy* vessel before and at the beginning of the voyage. Seaworthiness requires the ship to have that degree of fitness which an ordinary and careful owner would require his vessel to have at the commencement of her voyage, having regard to all the probable circumstances of it. A vessel will be unseaworthy if it is not properly manned with a competent crew. It is submitted that the Claimant has exercised due diligence to properly man and equip the vessel.

4.2.2.1. *The Claimant carrier has exercised due diligence to make the vessel seaworthy.*

38. The exercise of due diligence is an inescapable personal obligation and requires the exercise of reasonable skill and care. It is submitted that the ISM Code and ISGOTT guidelines are relevant criteria to determine the exercise of due diligence and seaworthiness. The duty to exercise due diligence can be delegated to managers and officers if the carrier is a corporation, but even in such cases, the responsibility will still be imputed to the carrier.

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72 Memorandum for the Claimant, Submission 3.
75 Article III, Rule 1(b) of the Rules.
76 Scrutton, *Supra* note 73 at 387.
39. In the instant case, the duty of managing the vessel was delegated to Trident Overseas Inc. (“Trident”), the Claimant’s technical managers. It is submitted that the *Alpha Star* was seaworthy because *firstly*, Trident followed internationally accepted best practices and *secondly*, the crew member was not incompetent.

### 4.2.2.2. Trident followed best practices delineated by ISGOTT for determining discharge procedures.

40. In the instant case, the vessel is ISM certified. This entails conformity with internationally accepted standards of marine tonnage and requires the maintenance of documents with procedures to ensure safe operations of vessels, including the reporting of emergencies.\(^8^0\) Prior to discharge, Trident employed ship/shore safety checklists in conformity with the requirements under ISGOTT.\(^8^1\) This implies that the crew would have been instructed on the manner of discharge and all the procedures to be followed in emergencies.

### 4.2.2.3. The crew member was not incompetent.

41. The crew will be competent if they are properly instructed as to the systems and procedures in place on the vessel so as to ensure the proper discharge of their duties.\(^8^2\) Incompetence is a question of fact. It is different from negligence and merely one mistake on the part of one of the crew members does not give rise to an inference of incompetence.\(^8^3\) The Respondent may argue that the crew member stationed at the manifold was incompetent due to his omitting to, *inter alia*, activate the ESD on observing the leak. Even assuming that the crew member’s actions were deficient, it does not raise an inference of incompetence.

42. It is submitted that the omission in question is merely the negligent act of an otherwise competent crew member as opposed to negligence by an *incompetent* crew member. In any event, there is insufficient evidence to establish conclusively or otherwise that the crew was

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\(^8^0\) Rodriguez, *supra* note 47, at 1596.

\(^8^1\) ISGOTT, *Supra* note 30, at ¶ 26.3.3.

\(^8^2\) Tetley, *Supra* note 66, at 161; *The Marion* [1984] 1 AC 563, 575; *The Makedonia* [1962] 1 Lloyd's Law Rep 316, 335; *The Eurasian Dream*, at 737.

\(^8^3\) *The Star Sea* [1995] 1 Lloyd's Rep 651, 658; *The Eurasian Dream*. 
incompetent. Therefore, it is submitted that Trident has exercised due diligence on behalf of the Claimant and consequently the Alpha Star is not unseaworthy.

4.2.3. **ARGUENDO. ALPHA STAR’S UNSEAWORTHINESS WAS NOT THE CAUSE OF THE LOSS OF CARGO.**

43. It must be shown that the unseaworthiness *caused* the loss of the cargo.\(^{84}\) It is submitted that the actual loss of the cargo was due to the fire set off by the deficient reducer and the negligent acts of terminal employee and not the alleged unseaworthiness of the vessel.\(^{85}\)

4.2.4. **THE CLAIMANT HAS DISCHARGED ITS OBLIGATION UNDER ARTICLE III, RULE 2 OF THE HVR.**

44. The Claimant has an obligation under Article III, Rule 2 of the HVR to “properly and carefully… discharge the cargo.” The extent of the carrier’s liability under this Rule depends upon the type of cargo.\(^{86}\) Proper discharge entails adopting a sound system in light of all the knowledge which the Carrier has about the cargo.\(^{87}\) It is not merely taking care, but also acting competently, keeping in mind contemporary industry standards.\(^{88}\) It is submitted that the carrier has properly and carefully discharged cargo.

45. The ship/shore safety checklists complying with industry standards were completed satisfactorily, as required by Trident. They were in fact not even mandated by the terminal. This clearly evidences that all steps were taken to ensure that the entire discharge operation would be safe. As per the IFIC Report there was no defect in the equipment of the vessel and the Claimant discharged its obligations of bringing the cargo till the vessel’s rail.\(^{89}\) The Respondent was at fault in providing a defective reducer. Therefore, the Claimant has discharged his obligation under Article III, Rule 2.


\(^{85}\)Memorandum for the Claimant, Submissions 2 and 3.


\(^{89}\)Problem, at 91.
4.2.5. **The Claimant’s liability is wholly exonerated under Article IV, Rule 2(b) of the HVR.**

46. The Claimant is entitled to the exceptions under Article IV of the Rules, once it has proved the exercise of due diligence. The carrier is exonerated from any liability if it can prove the application of the enumerated exceptions to the loss of goods. In the instant case, as proved above, the loss was due to fire and hence the carrier is exonerated under Article IV, Rule 2(b) of the Rules. Moreover, this loss was not caused as a result of the actual fault or privity of the carrier. The burden of proving actual fault or privity lies on the Respondent and the actual fault or privity must be of the carrier or managers of the vessel and not its servants or agents.

47. The Respondent may allege that Trident did not discharge its duty of properly instructing the crew in safety procedures, that their fault caused the fire and consequently the Claimant cannot except his liability. However, it is submitted that Trident fully discharged its obligations in the present case. Furthermore, even in the event that there was any negligence at all, it was that of a crew member, and cannot be imputed to the Claimant.

5. **HEADS OF DAMAGES**

5.1. **The Claimant is entitled to damages in respect of actual losses suffered.**

48. The Claimant has suffered actual losses in relation to the destruction of the *Alpha Star*. These are jurisprudentially established claims and have arisen as a result of the breach of the contract by the Respondent. Therefore, the Respondent shall be liable for all losses that were within the reasonable contemplation of the parties at the time the contract was concluded, as a

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93Memorandum for the Claimant, Submission 4.2.2.2., ¶ 39.
94Problem, at 92-93; Problem, Preliminary Submission of the Claimant, at 101.
not unlikely result of the breach.\(^6\) In the absence of special circumstances requiring actual knowledge,\(^7\) volatile market conditions\(^8\) and when the loss is predictable and quantifiable,\(^9\) mere knowledge of the “probable and natural” losses is sufficient.\(^10\) Here, the Respondent need not specifically assume responsibility for the kind of loss and the Claimant is entitled to recover its full loss regardless of the extent of loss ultimately incurred.\(^11\) In the instant case, the actual losses, which consist of loss of vessel and loss of use of vessel, are clearly within the contemplation of the parties as a natural and probable consequence of breaching the duty to take care during discharge. Therefore the Claimant is entitled to recover damages in respect of these losses from the Respondents.

5.2. **The Claimant is Entitled to Indemnity in Respect of Contingent Losses.**

49. As proved above, the Respondent’s negligence coupled with the negligent actions of a terminal employee caused the explosion on board the *Alpha Star*. Thus, the Respondent will be liable for any damages that are caused by its breach of duty and are a reasonably foreseeable consequence of its actions.\(^12\) Claims raised by the families of the deceased caused by a breach of contract are also to be assessed on the low threshold of tortious ‘reasonable foreseeability and reasonable user’ principles.\(^13\) The Claimant can recover all such reasonable costs and

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\(^{7}\) Hadley.


\(^{13}\) *Grant v. Australian Knitting Mills Ltd* [1936] AC 85; *Jackson v. Watson* [1909] 2 KB 193; *Priest v. Last* [1903] 2 KB 148.
damages paid by it to third parties and those incurred in mitigating the consequences of the
Respondent’s breach of duty\(^{104}\) and these amounts are recoverable even before they are
actually discharged by payment.\(^{105}\) Since it was the actions of the Respondent that caused
the loss and these losses are a reasonably foreseeable consequence of the breach of duty, the
Claimant is entitled to be indemnified by the Respondent against the aforementioned possible
claims.

5.3. **THE CLAIMANT IS NOT LIABLE TO PAY DAMAGES FOR THE LOSS OF CARGO.**

50. The Respondent has filed a counter-claim for the loss of cargo, loss of profits and costs
incurred for breach of forward contracts of sale. The general test of reasonable contemplation
enunciated in *Hadley* and modified by *Heron II* does not apply where its application leads to
unquantifiable, unpredictable or disproportionate liability with respect to types of losses within
contemplation.\(^{106}\) In such cases, as per *The Achilleas*, the party claiming damages has to show
that the party in breach assumed the responsibility for these extended damages, irrespective of
whether they were not unlikely to occur.\(^{107}\)

51. In the instant case, the Claimant has no control over the sale agreements entered into by the
importer, the Respondent, with various sellers for the 4,491.334 metric tons of LPG. In fact,
carriers “commonly know less than a seller about the purposes for which the buyer or
consignee needs the goods”\(^{108}\) and this absolves it from liability for the plaintiff’s loss of

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\(^{104}\)Chitty, Supra note 95, at 1645 and Hugh Beale (ed.), CHITTY ON CONTRACTS, VOLUME II 1610 (2008); Richard
Holdon Ltd v. Bostok & Co Ltd (1902) 18 TLR 317; Heskell v. Continental Express Ltd [1950] 1 All ER 1033,
1046; Gebruder Metelmann GmbH v. NBR (London) Ltd [1984] 1 Lloyd’s Rep 614, 634; Bacon v. Cooper
(Metals) Ltd. [1982] 1 All ER 397; Mowbray v. Merryweather [1895] 2 QB 640.


\(^{106}\)Hamblen J. in Sylvia Shipping Co. Ltd. v Progress Bulk Carriers Ltd. [2010] EWHC 542 (Comm); Flauz J. in

\(^{107}\)The Achilleas; Gary Richard Coveney, “Damages for Late Delivery under Time Charters: Certainty at

\(^{108}\)Heskell v. Continental Express Ltd [1950] 1 All ER 1033, 1049; Andre et Cie SA v. J. H. Vantol [1952] 2
profits. Specifically, the Claimant has neither knowledge of any forward contracts of sale entered into by the Respondent, nor whether the Respondent was planning on selling the LPG immediately or later at higher prices or whether it would give bulk discounts. It also lacked the ability to predict the price of LPG in the volatile oil market. Thus, the loss of profits cannot be awarded to the Respondent, since the quantification of the loss was nearly impossible, being unpredictable, extensive and even subject to the vagaries of the individual contracts entered.

52. Cases of potentially extensive loss, as claimed by the Respondent as additional costs incurred by way of penalties for failure to supply to third parties, need to be treated with extra circumspection keeping in mind good commercial sense. These cases have as yet not been filed and there is no account of any potential third party buyers. The damages claimed being unquantifiable and more importantly unpredictable, attract the application of the assumption of responsibility test. In the absence of any express or implied proof, the claims fail this test. It is submitted that the Claimant did not assume responsibility for the extended damages suffered by the Respondent and thus cannot be held liable.

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110Per Lord Roger in The Achilleas, at 364; Chitty, Supra note 95, at 1630.
**PRAYER**

In light of the above submissions the Claimant requests this Arbitral Tribunal to:

**DECLARE** that this Tribunal has jurisdiction to hear the dispute.

**ADJUDGE** that the Respondent is liable –

a) To the Claimant for breach of contract and/or duty;

b) To the Claimant for liabilities incurred due to the Respondent’s breach of duty; and

c) To compensate the claimant in full for **US$ 18,978,807**.

And that the Respondent’s Counterclaim is not maintainable.

And that the Claimant is not liable for breach of contract to deliver LPG cargo.

And therefore **AWARD** the Claimant

a) Damages in respect of its actual losses amounting to **US$ 9,055,967**;

b) A declaration that the Claimant is entitled to indemnification (and or damages amounting to an indemnity) of **US$ 9,922,840** in respect of,

   (i) The claims made against it by third parties;

   (ii) The future running expenses incurred for the vessel as a result of the incident.

d) Compound Interest pursuant to Section 49, Arbitration Act, 1996 (UK).

e) Costs.

**TEAM 14**

*COUNSEL FOR THE CLAIMANT*