

**PCA Case N° 2014-02**

**IN THE MATTER OF THE ARCTIC SUNRISE ARBITRATION**

**- before -**

**AN ARBITRAL TRIBUNAL CONSTITUTED UNDER ANNEX VII TO THE  
1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA**

**- between -**

**THE KINGDOM OF THE NETHERLANDS**

**- and -**

**THE RUSSIAN FEDERATION**

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**EXPERT TERMS OF REFERENCE  
MR. IAIN POTTER**

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**ARBITRAL TRIBUNAL:**

**Judge Thomas Mensah (President)  
Mr. Henry Burmester  
Professor Alfred Soons  
Professor Janusz Symonides  
Dr. Alberto Székely**

**REGISTRY:**

**Permanent Court of Arbitration**

## 1. Procedural Background

- 1.1. On 31 August 2014, the Netherlands filed its ‘Memorial of the Kingdom of the Netherlands’ (“**Memorial**”), *inter alia* addressing reparation for injury in Sections V.2.7, VI, VII and reserving the right to submit supplementary written pleadings on reparation for injury.
- 1.2. On 30 September 2014, the Netherlands submitted its ‘Supplementary Written Pleadings on Reparation for Injury’ (“**Supplementary Written Pleadings**”).
- 1.3. On 14 August 2015, the Tribunal issued its Award on the Merits (“**Award on the Merits**”). The Tribunal ruled as follows:

For the above reasons, the Tribunal unanimously:

A. FINDS that it has jurisdiction over all the claims submitted by the Netherlands in this arbitration;

B. FINDS that all the claims submitted by the Netherlands in this arbitration are admissible;

C. FINDS that by boarding, investigating, inspecting, arresting, detaining, and seizing the *Arctic Sunrise* without the prior consent of the Netherlands, and by arresting, detaining, and initiating judicial proceedings against the Arctic 30, the Russian Federation breached obligations owed by it to the Netherlands as the flag State under Articles 56(2), 58(1), 58(2), 87(1)(a), and 92(1) of the Convention;

D. FINDS that by failing to comply with Paragraphs (1) and (2) of the dispositif of the ITLOS Order, the Russian Federation breached its obligations to the Netherlands under Articles 290(6) and 296(1) of the Convention;

E. FINDS that by failing to pay its share of the deposits requested in procedural directions issued by the Tribunal to cover its fees and expenses in this arbitration, the Russian Federation has breached its obligations under Part XV and Article 300 of the Convention;

F. FINDS that the Netherlands is entitled to compensation for:

1. damage to the *Arctic Sunrise*, including physical damage to the vessel, resulting from the measures taken by the Russian Federation, and costs incurred to prepare the vessel for its return voyage from Murmansk to Amsterdam; as well as costs incurred due to loss of use of the *Arctic Sunrise* during the relevant period;
2. non-material damage to the Arctic 30 for their wrongful arrest, prosecution, and detention in the Russian Federation;
3. damage resulting from the measures taken by the Russian Federation against the Arctic 30, including the costs of bail paid as security for their release from custody, expenses incurred during their detention in the Russian Federation, and costs in respect of the persons detained between their release from prison and their departure from the Russian Federation; and
4. the costs incurred by the Netherlands for the issuance of the bank guarantee to the Russian Federation pursuant to the ITLOS Order;

G. FINDS that the Netherlands is entitled to interest, at a rate to be decided by the Tribunal, on the amounts referred to in sub-paragraphs F and I of this paragraph;

H. ORDERS the Russian Federation to return to the Netherlands, by 14 October 2015, all objects belonging to the *Arctic Sunrise* and the persons on board the vessel at the time of its seizure that have not yet been returned, and, failing the timely restitution of these objects, to compensate the Netherlands for the value of any objects not returned;

I. ORDERS the Russian Federation immediately to reimburse the Netherlands the amounts of Russia's share of the deposits paid by the Netherlands;

J. DECIDES that the fees and expenses of the Tribunal incurred to date shall be borne by the Parties in equal shares;

K. DECIDES that each Party shall bear its own costs incurred to date (including the expenses referred to in paragraph 396 above); and

L. RESERVES all questions concerning quantum of compensation and interest to a later phase of these proceedings.

- 1.4. By a letter to the Parties dated 14 August 2015, which enclosed the Award on the Merits, the Tribunal set out instructions for the compensation phase. The Tribunal invited preliminary comments from the Parties regarding the conduct of the compensation phase by 14 September 2015.
- 1.5. By a letter dated 14 September 2015, the Netherlands requested the Tribunal to proceed with the compensation phase of the proceedings.
- 1.6. By a letter to the Parties dated 2 October 2015, the Tribunal noted the failure of the Russian Federation to indicate its intention to participate in the compensation phase of the proceedings. The Tribunal invited the Netherlands to submit an Updated Pleading on Reparation by 2 November 2015, and the Russian Federation to submit its Response on Reparation by 17 December 2015.
- 1.7. On 28 October 2015, the Netherlands submitted the 'Updated Pleading on Reparation of the Kingdom of the Netherlands' ("**Updated Pleading**").
- 1.8. By a letter to the Tribunal dated 30 October 2015, the Netherlands presented further information on the Updated Pleading, attaching a letter dated 30 October 2015 from Greenpeace International, which set out an inventory of items from the *Arctic Sunrise*, with their approximate values, which had been returned to Greenpeace International by the Russian Federation. The Netherlands requested the Tribunal to subtract the value of the items returned, amounting to EUR 7,646, from the overall compensation sought from the Russian Federation.
- 1.9. By a letter to the Parties dated 28 January 2016, the Permanent Court of Arbitration ("**PCA**") sent 'Questions Posed by the Arbitral Tribunal to the Netherlands Pursuant to Article 25 of the Rules of Procedure' ("**Tribunal's Questions**").
- 1.10. On 14 March 2016, the Netherlands submitted 'The Fourth Supplemental Written Pleadings of the Kingdom of the Netherlands' in response to the Tribunal's Questions.

## 2. Relevant Procedural Rules

- 2.1. Article 24(1) of the Tribunal's Rules of Procedure dated 17 March 2014 provides:

After seeking the views of the Parties, the Arbitral Tribunal may appoint one or more independent experts. That expert may be called upon to report on specific issues and in

the manner to be determined by the Arbitral Tribunal. A copy of the expert's terms of reference, established by the Arbitral Tribunal, shall be communicated to the Parties.

- 2.2. In accordance with Article 24(1) of the Rules of Procedure, the Arbitral Tribunal seeks to appoint an expert to be available to assist it as necessary in the course of the arbitration.
- 2.3. Mr. Iain Potter has confirmed his availability to accept an appointment as Expert in this arbitration. Mr. Potter's contact details are as follows:

Mr. Iain Potter  
MDD Forensic Accountants  
10 Collyer Quay  
#05-10 Ocean Financial Centre  
Singapore 049315  
Tel.: +65 6327 3785  
Tel.: +65 8125 2501 (mobile)  
E-mail: ipotter@mdd.com

### **3. The Expert's Undertakings**

- 3.1. Pursuant to Article 24(1) of the Rules of Procedure, the Expert shall assist the Arbitral Tribunal by reporting on specific issues and in the manner to be determined by the Arbitral Tribunal.
- 3.2. The Expert hereby declares that he will perform his duties honourably and faithfully, impartially and conscientiously, as directed by the Arbitral Tribunal.
- 3.3. The Expert further declares that he is, and shall remain, impartial and independent with respect to each of the Parties and that to the best of his knowledge there are no facts or circumstances, past or present, likely to give rise to justifiable doubts with respect to his impartiality or independence. The Expert affirms that he shall refrain from involvement in any other proceeding involving either of the Parties or relating to the subject matter of the present arbitration.
- 3.4. The Expert or the Arbitral Tribunal may terminate this agreement at any time by providing written notice of intent to terminate one month before the termination should become effective.

### **4. The Scope of the Expert's Role**

- 4.1. The Expert shall assist the Arbitral Tribunal in relation to its consideration of whether the amounts claimed by the Netherlands for material damages to the *Arctic Sunrise* and the persons on board are well-founded. Specifically, the Expert shall review the costs overviews prepared by WEA Accountants (Appendices 1 and 2 to the Netherlands' Updated Claim Statement (Annex N-48)) and issue a report on whether the amounts claimed are, in the Expert's opinion, reasonably based.
- 4.2. In order to assist the Expert's work, the Netherlands shall provide the Expert with an itemized list and supporting documentation for all the amounts claimed in the costs overviews prepared by WEA Accountants.
- 4.3. Pursuant to Article 24(4) of the Rules of Procedure, the Expert's report will be communicated to the Parties, who will be given the opportunity to express, in writing, their respective opinions on the report.

- 4.4. The Tribunal reserves the right to modify these Terms of Reference from time to time as it determines necessary.

## **5. Fees and Expenses**

- 5.1. The fees and expenses of the Expert are considered an expense of the Arbitral Tribunal pursuant to Article 31 of the Rules of Procedure. Accordingly, the Expert shall be paid and reimbursed for expenses from the deposits held pursuant to Article 33 of the Rules of Procedure.
- 5.2. The Expert shall furnish the PCA with invoices showing the time spent and disbursements incurred in respect of all payments to be made from the sums deposited.
- 5.3. The fees of the Expert shall be fixed at USD 450 per hour. The fees of the Expert's assistants (if any) shall be fixed at USD 180 per hour. Travel time shall be billed at 50 percent of the hourly rate.
- 5.4. The Expert shall be reimbursed in respect of all expenses reasonably incurred in connection with the fulfillment of his task.

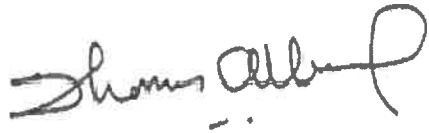
## **6. Confidentiality**

- 6.1. The Expert hereby declares that he will refrain from divulging or using, outside the context of the tasks to be performed by him in this arbitration, any documents, files and information—including all written or oral pleadings, all evidence submitted in the arbitration, all verbatim transcripts of meetings and hearings, and all information pertaining to the deliberations of the Tribunal—which may come to his knowledge in the course of the performance of his task.
- 6.2. The Expert further declares that he will refrain from making—without the express written permission of the Tribunal—any public comment on the subject matter of the dispute, the conduct of any aspect of the proceedings, the positions or arguments of the Parties, or the outcome and/or reasoning of the Tribunal's decision.
- 6.3. The Expert's duty of confidentiality in accordance with these Terms of Reference shall extend both throughout the conduct of this arbitration and in perpetuity. The Expert's duty of confidentiality shall continue irrespective of any termination of this agreement.

## **7. Signature of Terms of Reference**

- 7.1. These Terms of Reference may be signed in counterparts, collectively forming one composite signed document.

Dated: 9 SEPTEMBER 2016



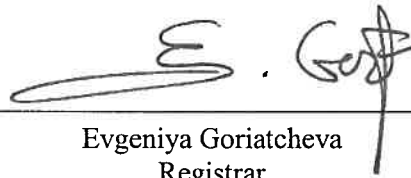
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Judge Thomas Mensah  
President  
on behalf of the Arbitral Tribunal



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Iain Potter  
Expert



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Evgeniya Goriatcheva  
Registrar  
Permanent Court of Arbitration