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ZEUSS SHIPPING COMPANY - STATEMENT OF THE CLAIMANT

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15. The Star Maria[2002] EWHC 1423 (Admlty)
16. The Tyne Tugs v Aldora (Owners) [1975] QB 748
17. The Whippingham (1934) 48 L I L Rep 49
18. XL Insurance Ltd v Owens Corning, [2001] 1 All E.R. (Comm) 530

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1. The Arbitration Act 1996
2. The Arbitration Rules of the Maritime Law Association of Australia and New Zealand
3. NYPE 1993, Asbatankvoy
4. Salvage Convention 1989

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2. Đorđe Dobrota, Branko Lalić, Ivan Komar, Problem of Boil - off in LNG, Trans. marit. sci. 2013; 02: 91 – 100
5. Y. Baatz etc, Maritime Law (3rd edn, Informa Law from Routledge)
LIST OF ABBREVIATIONS

Arbitration Agreement: referring to clause 30 in the voyage charter
The Charterer: Hestia Industries
The Owner: Zeus Shipping and Trading Company
The Vessel: MV Athena
Voyage Charter: Dated 21 July 2014
Leader of Hades Opposition Party: Jacqueline Simmons
Master: Master of the Athena
I. STATEMENT OF FACTS

A. THE PARTIES

1. Pursuant to a Voyage Charterparty dated 21 July 2014 (the “Charterparty”), between “Zeus Shipping Trading Company” (the “Owner”) and “Hestia Industries” (the “Charterer”), the Charterer chartered the vessel “Athena” (the “Vessel”), belonging to the Owner.

B. THE CHARTERPARTY

2. According to the Charterparty, the parties agreed that a vessel capable of transporting LNG, produced by Hades Shale Gas (HLNG), would perform a voyage loading on 1 October 2014 (+/- 3 days) HLNG in the port of Hades and discharging on 30 October 2014 (+/- 3 days) in Poseidon. For that purpose, the Owner on 14 July 2014 enclosed to the Charterer its own form of voyage charterparty, which was generally accepted by the Charterer with the exception of the arbitration clause.

3. More specifically, pursuant to the Charterer’s email dated 16 July 2014, the Charterer was “only prepared to arbitrate disputes in London which arise out of the provisions of the charterparty such as disputes about demurrage”. On the other hand, it was “not prepared to arbitrate disputes that relate to but do not arise out of the terms of the charterparty such as an allegation that one party of the other was induced to enter into the contract by way of misrepresentation”.

4. On 21 July 2014 the Owner enclosed the finalised Charterparty for the voyage of the Vessel from Hades to Poseidon which was accepted by the Charterer according to its email dated 22 July 2014. Pursuant to clause 30 of the Charterparty “any dispute arising under this contract shall be referred to arbitration in London by a tribunal of 3 arbitrators (...) in accordance with the Arbitration Rules of the Maritime Law Association of Australia and New Zealand.”
C. PERFORMANCE OF THE CHARTERPARTY

5. Upon the arrival of the Vessel at the port of Hades on 04 October 2014 the Master reported to the Owner that there was a huge protest in relation to the export of the cargo. However, the Owner ordered the Master to proceed with cargo loading which commenced on 03 October 2014 and was completed on 06 October 2014. The Vessel sailed from the port on 07 October 2014.

6. On the same day the Leader of Hades Opposition Party, Jacqueline Simmons, seized control of Hades' Parliament, backed by the Hades military and ordered the Coast Guard to intercept the Vessel and force it to return to the port of Hades. Irrespective of whether the Vessel was within the territorial waters of Hades at the time that the Coast Guard approached her, she carried the Hades flag and consequently the Master had to comply with the orders of the Coast Guard and return the Vessel to the port. The order executed by the Coast Guard was one of presidential decree and as such not one which a Master could reasonably ignore.

7. Subsequently, the Vessel was trapped in the port with the Charterer’s cargo on board for more than one year, awaiting the continuance of the voyage. As the Vessel in fact did not leave the loading port throughout the whole period, demurrage accrued after the expiry of laytime on 13 October 2014.

8. After the resignation of President Simmons on 07 October 2015 the Vessel was freed to leave the port of Hades. However, after towlines were released from her, both propeller shafts broke. “Hestug”, a business owned by the Charterer, guided the Vessel to open waters and was not far away from the Vessel, when it asked for further assistance, as it was clear that the Vessel needed to return to the port for repairs.
Part One

Part A: This tribunal has the jurisdiction to rule on this matter

Preliminary issue of jurisdiction

9. The Owner argues that the Tribunal has authority to decide on the question of jurisdiction, which if held can provide the opportunity to challenge the scope of the Arbitration Agreement. According to clause 30 of the Charterparty, any dispute arising out of or in connection with this contract, including any question regarding its existence, validity, or termination, shall be referred to arbitration in London by a Tribunal of 3 arbitrators in accordance with the Arbitration Rules of the Maritime Law Association of Australia and New Zealand. The wording of the Arbitration Agreement indicates that the seat of the arbitration is London and therefore the law governing the Arbitration Agreement is English Law.

Doctrine of Separability

10. The Charterer insists that the frustration and the demurrage issue should be determined by the courts of Poseidon in accordance with the laws of Australia that apply under clause 31 of the Charterparty. The Owner challenges this view, arguing that under s.7 of the Arbitration Act 1996 the Arbitration Agreement is a distinct agreement.¹ The strong awareness of the separable nature of an arbitration agreement further derives from the Fiona Trust & Holding Corp v Privalov, in which Lord Hoffman emphasized in his judgment that an arbitration agreement must be treated as a distinct agreement.²

11. It means that the Arbitration Agreement exists separately from the Charterparty and therefore the seat of the arbitration and the law governing the Arbitration Agreement may be different from the governing law of the Charterparty.

¹ Arbitration Act 1996 s.7
² Fiona Trust And Holding Corporation & 20 Others V Yuri Privalov & 17 Others [2007] UKHL 40
Law applicable to the arbitration clause

12. Pursuant to clause 31, Australian law is the law applicable to the Charterparty, but it does not explicitly provide the law governing the Arbitration Agreement. In the Sulamérica decision, the English Court of Appeal has established a three-stage test to determine the governing law of an arbitration agreement:

(i) whether there is an express choice of law governing the arbitration agreement;
(ii) if not, whether the intention of the parties can be implied;
(iii) if it cannot be implied, it is necessary to consider what would be the law with the “closest and most real connection” to the arbitration agreement.

13. The position that the venue can potentially indicate the applicable law of the arbitration clause is mentioned in the Art. 2 of Geneva Protocol on Arbitration Clauses 1923:

“The arbitral procedure, including the constitution of the arbitral tribunal shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.”

This clause mainly strengthens the argument that the proper law governing the Arbitration Agreement is that of the venue.

14. Lord Mustill commented on the dominant role of the English seat whereby there is no express governing law in the arbitration agreement:

“Given that the act is the parliamentary expression of a national policy concerning the arbitral process it seems unlikely that even an express choice of foreign law in relation to an arbitration with a seat in England could have any impact on the mandatory provisions of the Act, and equally that anything other than such an express choice in writing could enable the rules of the foreign law of arbitration to take precedence over the non-mandatory provisions of the English Act.”

3 Sulamérica Cia Nacional De Seguros SA & Ors v Enesa Engenheria SA & Ors [2012]
4 Alastair Hednerson, Singapore Academy of law Journal, (2014) 26 SAcLJ; 890-893
15. Consequently, the proper law of the Arbitration Agreement included in this Charterparty should be English law.

**Doctrine “competence-competence”**

16. The doctrine of “competence-competence” deals with disputes over the tribunal's jurisdiction, when the validity and scope of the arbitration clause are in doubt. Section 30(1)(c) of the Arbitration Act 1996 states that unless the parties otherwise agree the tribunal may rule on its own substantive jurisdiction on what matters have been submitted to arbitration in accordance with the arbitration agreement. Thus, the Tribunal will decide whether or not it has jurisdiction over the issues in dispute in view of the Arbitration Agreement.

**The Tribunal has jurisdiction to determine the frustration issue**

17. Following the doctrine of “competence-competence” the Tribunal can decide whether the frustration issue falls under its jurisdiction.

18. The Arbitration Agreement in the Charterparty states the following:

30. ARBITRATION

(a) Any dispute arising under this contract shall be referred to arbitration in London by a sole arbitrator/a tribunal of 3 arbitrators (strike out whichever is inapplicable) in accordance with the Arbitration Rules of the Maritime Law Association of Australia and New Zealand.

19. Consequently, it has to be examined whether frustration falls in the definition of the term 'arising under' and therefore under the Arbitration Agreement.

20. The Arbitration Agreement is in itself a contract and parties can submit to it only those disputes that they have mutually agreed to.

21. If the parties were to exclude certain issues from the Arbitration Agreement, they would have to state directly that some issues are excluded from the arbitrators’ jurisdiction. English

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5 Arbitration Act 1996 S. 30(1)(c)
courts are more likely to use the liberal approach in the determination of the scope of the arbitration clause and will not readily give weight to arguments that some disputes do not fall within the wording of the clause unless specifically indicated.\textsuperscript{6}

22. The most recent decision confirming that there is no difference in the interpretation of the different phrases in arbitration clauses is the \textit{Fiona Trust}. Lord Hope stated that drawing a difference between the phrases would amount to “fussy distinctions”.\textsuperscript{7} Lord Hoffman delivered the leading judgment: “\textit{The construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language made it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.}”

Accordingly, the decision thereby confirms that arbitration is suitable not only for contractual issues, but for a broader range such as pre/after-contract matters.\textsuperscript{8}

23. In the \textit{Fiona Trust} Lord Hoffman referred to the case of \textit{Mackender v Feldia AG}.\textsuperscript{9} The authorities concluded that the phrase “arising under the contract” in the arbitration clause of the insurance policy was wide enough to determine whether the contract can be avoided for non-disclosure. Accordingly, 'arising under' in the present Arbitration Agreement should be wide enough to cover the issue of whether the Charterparty was frustrated.

24. Overall, the issue of frustration should be viewed as falling within the Arbitration Agreement in the absence of the express indication that national courts should hear it. Additionally, the phrase “arising under” does not influence the scope of the arbitration clause and is wide enough to include all contractual and non-contractual matters.

\textsuperscript{6} Premium Nafta Products Ltd v Fili Shipping Ltd [2008] UKHL 40;
\textsuperscript{7} Fiona Trust And Holding Corporation & 20 Others V Yuri Privalov & 17 Others [2007] UKHL 40
\textsuperscript{8} \textit{Ibid}
\textsuperscript{9} \textit{Mackender v Feldia} [2012] EWCA Civ 638
Part Two

Part A: The contract was not frustrated

25. On 30 April 2015 the Charterer denied the payment of demurrage and claimed the contract was frustrated. The Owner rejects any possible frustration of the contract.

The doctrine of frustration

26. Under the doctrine of frustration, a contract may be discharged if, after its formation, an unforeseen event occurs which makes performance of the contract impossible, illegal or essentially different from what was contemplated.\(^\text{10}\)

Impossible

27. The impossibility of performance is defined in the case of *Taylor v Caldwell* where Blackburn J stated:

"The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance."\(^\text{11}\)

28. In regards to impossibility in performing the contract, it can be stated that the Vessel was indeed in full capacity to perform the object of the contract. The Vessel kept the LNG at the specified conditions as requested by the Charterer over the period that the Vessel was held in the port. No request was ever made for the cargo to be unloaded.

29. Furthermore a clear sign that the contract was neither impossible nor frustrated, was the communication between the Charterer and the Owner, proving the full knowledge of the ongoing contract, without a complaint for more than six months after it became clear that the Vessel would not leave the port for an unspecified period.


\(^{11}\) *Taylor v Caldwell* (1863) 3 B&S 826
Illegal

30. In the case of *Avery v Bowden* it was discussed, when illegality can cause frustration. In this case the ship had to load cargo in the port of Odessa. However, the ship was unable to perform its obligations due to the prohibition to load the cargo in the port of an enemy. The performance of the obligation under the Charterparty would have been in breach of law. Hence, the contract was frustrated.

31. Contrary to this, in the present case the performance of the contract was not illegal at any moment; there was no law or disposition banning the carriage of LNG. The true reason why the Vessel was not in the condition of leaving the port was a unique decision expressed by Jacqueline Simmons, only applicable to this Vessel. In fact, the newspaper Hades Advocate later suggested that the reason for this was that the government received bribes from a competitor of the Charterer.

Bars to Frustration

32. Ewan MacIntyre formulated a conclusive list of the bars to frustration:

1) when it is more difficult or expensive to perform;
2) where there is a *force majeure* clause covering the event;
3) when the frustrating event is foreseen;
4) when the impossibility of performance is the fault of either of the parties (self-induced frustration)

33. It is clear that the trapping of the Vessel in the port of Hades made the successful completion of the Charterparty more difficult. However, it was by no means ever suggested that it would not be possible to negotiate that the Vessel was allowed to leave at some stage. Further,
there was no other vessel in the world which could have performed the contract, as Hades at the
time only allowed vessels carrying the Hades flag into the port. The Vessel was therefore
worldwide the only ship capable of transporting LNG out of Hades and successfully completing
the contract. The fact that this took longer than expected should not frustrate this Charterparty.
34. The event claimed by the Charterer as unforeseen, namely the trapping of the Vessel in
the port of Hades, can contrary to the Charterer's stance be deemed to have been foreseeable. Prior
to the confirmation of the finalised version of the Charterparty from 21 July 2014, there was an
article in the “‘Hades Advocate” dated 20 July 2014 where it was stated that environmental
objectors would protest against the Charterer's activity in Hades. Moreover, on 04 October 2014
the opposition of the government made a clear statement of their intentions to stop the business
of exporting LNG. This was common knowledge available to both parties.
35. However, the Charterer decided to take a risk and carry out the voyage despite the
potential unsafety of the port. This leaves the Charterer with the allocation of risk, as it was
discussed in *Herne Bay Steam Boat Co v Hutton*.17
36. Frustration is an unforeseen event which arises outside of the control of the parties. A
contract cannot be deemed frustrated, if the unforeseen event happened due to the fault of either
party. The Charterer knew about the protests in Hades and in nominating the port of Hades as a
safe one, when in fact it was unsafe, the Charterer acted in a way which contributed to the event
that it names as the frustrating event.

**Part B: Breach of Safe Port Clause: Damages for damage caused to the Vessel**
37. One of the most important obligations of the charterer is to determine a safe loading and
discharging port. Generally, a charterparty expressly states in its standard terms that the ship may
only be ordered to safe ports.18

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15 Email dated 14 July 2014
16 Email dated 04 October 2014
17 *Herne Bay Steam Boat v Hutton [1903] 2 KB 683*
38. Pursuant to *The Eastern City* “a port will not be safe unless in the relevant period of time, the particular ship can reach it, use it and return from it without in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship”.  

39. The obligation of a charterer derives either from an express term in the charterparty or from an implied term. In the present case, the Owner proposed its own form of voyage charterparty that was accepted by the Charterer except for the arbitration clause. Although in the printed form there was no standard clause in relation to the safeness of the loading and discharging ports, in the completed form box 5, the phrase “1 safe port, Hades”, and in box 9, “1 safe berth, Poseidon”, clearly demonstrate that the Charterparty contained an express safe port warranty.

40. Pursuant to the express safe port warranty, the Charterer warranted that the port would be prospectively safe at the time that the ship arrived there, used it and left. Upon arrival of the Vessel to the port of Hades on 04 October 2014, the Master reported to the Owner that there was a protest against the export of HLNG and took instructions to proceed with the loading procedure, regardless of the political and public anger in Hades in relation to the abovementioned export which was already known to both parties. Parker LJ *in The Omo Wonz* stated that the political risk must be sufficient for a reasonable ship owner or master to decline to send or sail its vessel there. In the present case, the political risk of the protest that was taking place upon arrival of the Vessel to the port of Hades on 03 October 2014, was not adequately sufficient for the Owner to decline to order the Vessel to load at the port, therefore the Master’s decision to enter the loading port was reasonable. However, it did present a potential risk of interruption of the loading process which according to the allocation of risk is the Charterer's risk.

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18 NYPE 1993, Asbatankvoy  
41. On the other hand, the Charterer breached its safe port warranty as, according to the
definition of the safe port in The *Eastern City*, when the Vessel arrived at the loading port it
could use it but could not leave it. More specifically, not only could the Vessel not leave the
port, but it was trapped in the port of Hades for more than one year.

**Part C: Claim for demurrage**

**Laytime continued to run**

42. Laytime is called the limited period of time allowed to load and discharge cargo between
loading and discharging ports. When laytime is exceeded, the charterer is in breach of the
charterparty and is liable to pay damages to the shipowner as a compensation for that breach. As
in laytime clauses the parties allocate the risk of delay between themselves, these clauses can be
considered as the most significant in the charterparty and each charter contains its own
calculation for this period.

43. In the present case clause 9 (c) (i) covered laytime: “*Time permitted for loading*
(*calculated from when NOR is tendered until the vessel leaves the Loading Place*) is 10 WWD
*SHINC*”. According to this clause, the parties agreed that laytime at the loading place would
start when the Notice of Readiness (“NOR”) is tendered and would cease ten weather working
days (i.e WWD SHINC) after this date.

44. The NOR was tendered on the 3rd October 2014 at 09:15 by the Master of the Vessel,
Captain Marcus Yi, stating that the Vessel, “[has] arrived at the port of Hades and is ready for
the purposes of clause 9 of the charterparty dated 21 July 2014”. The Vessel had arrived at the
loading place according to box 5 of the Charterparty “1 safe port Hades” and the NOR had been
tendered on 03 October 2014 according to box 17 of the Charterparty and the Vessel was ready
to load the cargo. As the three requirements in order for laytime to start (arrived Vessel, Notice
of Readiness, readiness of the Vessel) had been satisfied and as the Vessel was at the immediate and effective disposal of the charterer, laytime started on 03 October 2014.  

45. Laytime generally ends either upon the expiry of the laytime allowed and the commencement of demurrage, or upon the completion of cargo operations, if these are concluded within the laytime allowed. Pursuant to The Laytime Definitions for Charterparties 2013 demurrage is defined as “an agreed amount payable to the Owner in respect of delay to the vessel beyond the laytime for which the Owner is not responsible.” According to this definition, the completion of cargo operations is not decisive when deciding when laytime ends. Therefore, each charterparty contains its own calculation of laytime and attention should be drawn to the specific agreement of the parties.

46. According to clause 9 (c) (i) of the Charterparty, the laytime allowed is 10 WWD SHINC calculated from when the NOR is tendered until the vessel leaves the loading port. As per Statement of Facts in respect of the Vessel dated 07 October 2014 signed by the Master, loading was commenced on 03 October 2014 and was completed on 06 October 2014. On 07 October 2014 while the Vessel was sailing from the loading port, the Hades Coast Guard intercepted the Vessel and forced it to return to its berth at the Port of Hades.

47. As the Owner already stated in its letters dated 15 October 2014 and 06 October 2015, after the interception of the Vessel by the Coast Guard the Vessel had never left the Port of Hades and laytime continued to run until 13 October 2014 and when exhausted, demurrage accrued at the sum of US $50,000/day according to clause 10 and box 24 of the Charterparty.

48. In a letter dated 30 April 2015 sent to the Owner, the Charterer argued that the Vessel left the loading place denying its liability for the demurrage payment due to the alleged negligence of the Master, when returning to the port. However, as described in the article from 25 October 2014 in the Hades Advocate titled “Inside a coast guard operation” even the Coast Guard had no

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22 Y. Baatz etc, *Maritime Law* (3rd edn, Informa Law from Routledge) 165
exact knowledge of the Vessel's position and whether it was outside or inside the territorial waters of Hades when intercepted.

49. It has been decided that demurrage can continue to run, if the vessel’s absence from the port is only temporary. Support for this view can be found in the decision of the Court of Appeal in Cantiere Navale Triestina v Handelsvertretung der Russe Soviet Republik Naphtha Export. In particular, it was argued by Atkin LJ:

“Indeed, if one comes to think of it, there can be no reason why the absence of the ship from the harbour, once the lay days have begun to run, without any fault on the part of the owner, should prevent the lay days from continuing to run and the ship going on demurrage. A ship may be prevented from loading by causes quite outside the will of either the shipowner or the charterer and yet the charterer is liable for demurrage. It appears to me to make no difference whether the vessel is in harbour 50 yards away from a berth and cannot get to it or whether she is 50 miles away.”

50. As the abovementioned argument of Atkin LJ can be interpreted in the present case, even if the Vessel sailed from the port on 07 October 2014, laytime continued to run, as the absence of the port was proved temporary and the return was outside the will of the shipowner.

**The Master was not negligent**

51. The Owner argued in its letter dated 30 April 2015 that the Vessel “returned only because of the incompetence and negligence of the Master”. In fact, the Master did not do anything more than complying with the terms of the Charterparty and the United Nations Convention on the Law of the Sea 1982.

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23 Cantiere Navale Triestina v Handelsvertretung der Russe Soviet Republik Naphtha Export (1925) 21 Ll L Rep 204 (CA)
24 Ibid., at p. 211
52. According to Article 217 (enforcement by flag States) “States shall ensure compliance by vessels flying their flag or of their registry with applicable international rules and standards, established through the competent international organization or general diplomatic conference, and with their laws and regulations adopted in accordance with this Convention.”

53. Moreover, as per The Law Institute of Hades Journal “it all turns on whether the announcement by the President Simmons that she required the vessel to return to its berth at Hades, amounted to a Presidential Decree. If it did, then it would be enforceable by an officer of the Hades government anywhere in the lands and territories of Hades. It is possible that because the Athena carried the Hades flag, a Presidential Decree could be enforced on board the vessel”.

54. As the Vessel carried the Hades flag, the Master had to comply with the orders of the Coast Guard as an officer of the Hades government and return the Vessel to its initial place in the port, regardless of the fact that the Vessel was in fact within the territorial waters of Hades.

55. As per clause 19 of the Charterparty referring to Force Majeure events, it is clearly stated that “nothing herein contained shall exempt the Shipowners from liability to comply with any Government, State or Provincial Regulations”. Although it is clear that no force majeure even occurred, as the unstable political situation as well as the beliefs of President Simmons were already known in common knowledge, in the case of such event, the shipowner -and specifically the Master- would have to comply with the orders of any Government State or Provincial Regulations.

56. Moreover, according to clause 22 of the Charterparty: “No Bills of Lading to be signed for any blockaded port and if the port of discharge be declared blockaded after Bills of Lading have been signed, or if the port to which the ship has been ordered to discharge either on signing Bills of Lading or thereafter, be one to which the ship is or shall be prohibited from going by the Government of the nation under whose flag the ship sails or by any other Government, the Owners shall discharge the cargo at any other port covered by this Charter
Party as ordered by the Charterers (provided such other port is not a blockaded or prohibited port as above mentioned) and shall be entitled to freight as if the ship had discharged at the port of discharge to which she was originally ordered.”

57. In general, the commonly used war clauses give the vessel liberty to comply with the orders or directions of various authorities or bodies, for example the flag state, war risk underwriters, any other government or the Security Council of the United Nations or directives of the European Community.

58. In the present case, as the Vessel was prohibited by the Government from sailing to the discharging port by the Government of the nation under whose flag the ship was sailing (i.e. the Hades government), the Master, as per clause 22 of the Charterparty, was obliged to comply with such orders.

Use of the Vessel

59. Although the English courts have not reached a definite conclusion of what is meant by demurrage, it has been established that the significance of the term in a particular case turns on the particular words of the contract. It has been determined in *ERG Raffinerie Mediterranee SpA v Chevron USA Inc (The Luxmar)* that the nature and purpose of demurrage is compensation for the owners' loss of the use of the vessel.

60. Moreover, in *Steel, Young & Co v Grand Canary Coaling Co*, Mathew LJ said that "[t]here is no ground for suggesting that the obligation to pay demurrage is by way of damages for breach of the charterparty. It is merely a payment for use of the ship."  

61. In the present case, the Vessel due to the interception of the Coast Guard on 07 October 2014 was prevented from leaving the loading port and returned to its berth. It is non-negotiable

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26 *Trading Society Kwik-Hoo-Tong ofJava v TheRoyal Commission onSugar Supply* (1924) 19 L1 Law Rep 90, 92 (Roche J).
28 (1902) 7 Corn Cas 213 (CA).
29 Ibid, 217.
that the reason for this direction by the Coast Guard is directly related to the cargo on board the Vessel. According to the abovementioned clause 22 of the Charterparty, in case the port to which the Vessel would sail was “prohibited from going by the Government of the nation under whose flag the ship sails” the Owners should “discharge the cargo at any other port covered by this Charter Party as ordered by the Charterers (provided such other port is not a blockaded or prohibited port as above mentioned) and shall be entitled to freight as if the ship had discharged at the port of discharge to which she was originally ordered.” As there was no other nominated port except for the discharging port to which the Vessel was prohibited from going by the Government of the flag state, the Master had no other option than to return to the only loading port to which he was permitted to sail according to the Charterparty in order to discharge the cargo.

62. However, the cargo remained in the Vessel throughout the whole period during which the Vessel remained in the Port of Hades. The fact that the particular vessel was the only vessel carrying the Hades flag that had the ability to re-liquefy boil off gas, was already known to the Charterer. According to LNG experts this reliquefaction equipment allows the stabilization of the temperature of the cargo at low temperature, in order for the LNG to be maintained in the vessel for a more extended period than it could normally be.30 It has been proved that the installation of the abovementioned system in LNG tankers is intended for long distance transportation of liquefied natural gas.31

63. As the Charterer did not discharge the cargo and the Vessel was permitted to leave the port with the cargo in it, it is clear that the Charterer was using the Vessel as the perfect storage place in order to maintain the temperature and mainly the quality of its cargo without any cost. Although the Vessel could not perform its obligation to carry the cargo to the discharging port, the cause of this delay was not due to reasons for which the Owner was responsible. What is

30 http://www.freeportlng.com/BOG_Reliquefaction.asp
more, as a result of the abovementioned incidents the Vessel was trapped in a port for an unknown period with the prohibited cargo in it, maintaining the quality of it, without the ability to leave the port. As a consequence, it was not the Owner who was using its ship but the Charterer. Therefore, as it has been stated in the abovementioned cases, demurrage should be awarded to the Owner as a compensation for the loss of the use of its Vessel, while the Charterer was using it, from the time that laytime ceased to run i.e. on 13 October 2014 until the date when the Vessel left the loading port on 06 October 2015, as it is stated in the Invoice dated 06 October 2015.

**Damages for detention**

64. In the event that the Tribunal finds that no demurrage accrued after laytime expired, damages for detention of the Vessel in the loading port are requested by the Owner.

**Part D: Salvage**

65. The Owner objects to the Charterer's counterclaim for salvage as detailed in points 7-9. Point 7 specifically states the following: "Shortly after releasing the tow lines, the vessel began to drift in an uncontrolled manner."

66. The Owner strictly denies that the Vessel was drifting in an uncontrolled manner or that it was in a position of danger amounting to salvage at the time of the towing.

67. Further points 8 and 9 state: "The Charterer's tugs undertook a salvage operation in respect of the Vessel, successfully preserving the value of the vessel and cargo. In the premises, the Charterer is entitled to a salvage reward."

68. The Owner denies that the act of towing the vessel back to the port amounts to salvage. The Owner admits that the Charterer's business, Hestug, has provided towage services to the Owner as detailed in point 6 of the counterclaim. However, the further towage service provided
after the tugs had left and returned does not amount to salvage, but merely to an orally formed towage agreement.

**Pure salvage**

69. The first point that the Owner would like to raise is that in order for the Charterer's counterclaim to be successful, this award would have to be based on what is considered in law to be the outcome of pure salvage, as there was no contract for salvage in place. The Owner submits that two of the elements required for pure salvage by the International Convention on Salvage 1989, namely the existence of danger and the volunteer requirement, are not sufficiently fulfilled to constitute a salvage award. Further the claim for salvage should also be debarred by the Charterer's self-interest in the cargo and the Charterer's contractual relations with the Owner in a Voyage Charterparty dated 21 July 2014.

70. The Salvage Convention 1989 has identified the following elements of salvage and set out a number of bars to salvage. Elements of salvage are those that need to be fulfilled in order to claim salvage. Case law shows that it is not sufficient to only fulfil one or two of the constitutive elements. Bars to salvage are exceptions which render a salvage award null, even if all the elements are fulfilled.

**Elements**

- Maritime Property
- Danger
- Volunteer

**Bars:**

- Self-interest
- Contractual or public duty

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32 IMO, International Convention on Salvage 1989
33 *ibid*
Maritime Property

71. The first element to establish pure salvage is defined in the International Convention on Salvage 1989 Article 1(c): “Property means any property not permanently and intentionally attached to the shoreline and includes freight at risk.” According to Lord Esher MR in The Gas Float Whitton (No 2), such property is limited to the ship, her apparel and cargo, as well as the wreck of these and freight.34

Danger

72. The second element needed in order to claim a pure salvage award is danger. The element of danger was defined as a physical one in The Whippingham which must be present at the time of the services rendered.35

73. The facts publicly known about the danger to Vessel and cargo were described by the Hades Advocate. "However, after the towlines were released from the vessel, it became apparent that while at Hades, the propellers of the vessels had been tampered with and shortly after setting sail under its own steam, both propeller shafts broke."36 The Owners submit that this statement of fact was not accurate, lacks objectivity and does not carry any legal or factual weight. In light of the fact that this statement was written by journalists who are neither technicians nor familiar with the mechanisms of vessels, the Owners submit that this piece of information should be disregarded by the Tribunal.

74. The Owners submit that the Vessel was in fact not in danger at the time of the services rendered. The case of The Geertje K in which some of the property was not exposed to danger shows that no claim could be made in relation to the cargo, which was not exposed to danger. The test set out for danger in this case is whether a reasonable, prudent and skilful person in

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34 [1897] AC 337, HL
35 Simon Baughen, 2015, Shipping law, p. 286; The Whippingham (1934) 48 LI I Rep 49
36 Hades Advocate 07 October 2015
charge of the venture would not have refused the salvor's help. 37 According to The Aldora the requirement of danger is slightly widened by the fact that it can be a reasonable apprehension of future danger, instead of a present one. 38

75. The Owners argue that they would have refused salvage services, as the Vessel was neither in danger at the time of the services rendered, nor exposed to a future danger.

76. Indeed the Owners submit that they completed an oral towage agreement with the Charterer's business, Hestug, following on from the contract which was in place before to tow the Vessel out of the port. When it was clear that the Vessel needed repairs, before it could proceed to the discharge port Poseidon, the Owners requested Hestug to take the Vessel back to the port.

77. Ordinarily, the burden of proofing danger is on the party claiming salvage, here the Charterer, so it will have to meet the threshold set out by the courts.

Volunteer:

78. As stated by Simon Baughen, in order for a salvage award to be granted, the person who saves maritime property which was in danger must be a volunteer:

"The entitlement to salvage will be lost if the person rendering assistance cannot be shown to have acted as a ‘volunteer’ – that is, where the assistance was rendered pursuant to a prior duty owed towards the owners of the salved property arising before the onset of the danger. " 39

79. The Owners are not satisfied that the Charterer acted as a volunteer. This is for the following reasons presented by the bars to salvage.

Bars to salvage

37 Simon Baughen, Shipping Law, [2015] p. 286
38 The Tyne Tugs v Aldora (Owners) [1975] QB 748
39 Simon Baughen, Shipping Law [2015], p. 288
80. It is public policy that salvage cannot be claimed if the alleged salor has had a prior contractual duty, a statutory obligation or self-interest in the property or if there was no cure. The owners argue that two of these bars apply in this case. Firstly, there was a prior contractual duty. Secondly, the Charterer had self-interest in saving their own cargo.

**Prior contractual duty:**

81. The Owners submit that the Charterparty between the parties dated 21 July 2014 was never frustrated and therefore still alive at the time of the towing of the Vessel by Hestug. This presents a contractual relationship between the Cargo owner claiming to be the salor and the Owner. According to the cases of *San Demetrio*, *The Aldora* and *The Star Maria* this prevents a salvage award from being awarded.\(^4\)

**Self-interest:**

82. Further, the Owners also submit that the Charterer had a self-interest in salving the cargo and should therefore be barred from claiming salvaged. According to *The Sava Star* and Art 12 (3) of the Salvage Convention 1983 salvage cannot be claimed by someone with a self-interest in the maritime property.\(^1\)

83. This has also been confirmed by *The Texaco Southampton*, when a contract was made specifically to tow a disabled vessel in danger. Salvage, therefore, could not be claimed by the head contractor as the services to be performed would not go beyond the ambit of those for which it had been engaged under its particular contract of towage. For the same reason, neither the subcontractor that actually towed the vessel, nor its crew, were entitled to claim salvage.\(^2\)

**Alternative argument**


\(^1\) *The Sava Star*, Art 12 (3) of the Salvage Convention 1983 salvage

\(^2\) *The Texaco Southampton*[1983] 1 Lloyd's Rep. 94
84. Alternatively, if the court finds that there should be a salvage award, the owners argue that the calculation of the award should merely focus on the towing.