INTERNATIONAL MARITIME LAW
ARBITRATION MOOT 2016

TEAM 1 SMU Claimant

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STATEMENT OF FACTS


2. Before the Parties entered into the Charterparty, there were negotiations from 1 to 21 July 2014. On 1 July 2014, the Respondent requested for a vessel suitable for the transport of Hades Liquefied Natural Gas (“HLNG”). On 14 July 2014, the Respondent requested for an amendment to Clause 30 (“Arbitration Clause”) to limit the scope of arbitrable issues. The Claimant agreed and returned a revised version of the Charterparty on 21 July 2014. This was agreed to on the same day.

3. To signal its commitment to the commercial adventure, the Claimant flagged the Athena with the Hades flag even before the Charterparty was entered into.

4. Parties agreed that the Respondent would be liable to pay demurrage if the loading time was exceeded.

5. On 3 October 2014, the Athena arrived at the Hades port (“Port”), and began loading. On 7 October 2014, the shipmaster of the Athena (“Master”) issued a Statement of Facts, and proceeded to sail from the Port.

6. On the same day, the incumbent government was overthrown in a coup. The new President (“Simmons”) instructed the Coast Guard to intercept the Athena (“Presidential Decree”). The Coast Guard intercepted the Athena as it was leaving the Port, and asserted authority over the vessel because it was Hades-flagged. The Master complied with the Coast Guard’s instructions, and returned to the Hades port.
7. Unfortunately, the Athena was detained at the Port for a year. The Claimant notified the Respondent that the latter was liable for demurrage according to the terms of the Charterparty.

8. The Athena was released on 5 October 2015 following Simmons’ resignation. The Claimant emailed the Master to engage Hestug as a tug operator on 5 October 2015. The Respondent was owner of Hestug.

9. After Hestug towed the Athena out to open sea, the crew discovered that the vessel’s propellers had been tampered with. The vessel was immobilized in the open waters. However, the Hestug operator was still nearby, and towed the Athena to a safe location.

10. The HLNG cargo was successfully delivered to the Respondent in Poseidon.

I. THIS TRIBUNAL HAS JURISDICTION TO DETERMINE THE FRUSTRATION CLAIM

11. The Tribunal has jurisdiction to determine whether the Charterparty was frustrated. The Arbitration Clause stipulates that disputes relating to frustration of the contract should be referred to arbitration.

A. This Tribunal is competent to determine its jurisdiction

12. As a preliminary matter, the Tribunal has the capacity to determine its jurisdiction. Article 16 of the UNICRITAL Model Law codifies the Kompetenz–Kompetenz principle, pursuant to which arbitrators may rule on their own jurisdiction.¹

¹ The International Arbitration Act 1974 (Cth) adopts the UNICRITAL Model Law on International Commercial Law.
B. The Arbitration Clause covers the Frustration Claim

13. The dispute relating to the frustration should be referred to arbitration for two reasons. First, the clause is wide enough to include claims relating to frustration. Secondly, the Respondent’s attempts to admit pre-contractual negotiations to interpret the Charterparty should be rejected. Thirdly, even if pre-contractual conduct of the Parties could be admitted as evidence, the aided interpretation of the Arbitration clause indicates that the frustration claim should be arbitrated.

i. The language of the Arbitration Clause should be broadly construed

14. The phrase “[a]ny dispute arising under this contract” in the Arbitration Clause includes all disputes, unless the language explicitly excludes certain issues from arbitration. This strict rule promotes legal certainty. Furthermore, clauses in arbitration agreements are given a wide interpretation because parties generally intend to refer all disputes to the same arbitral tribunal. Applying these propositions, the Arbitration Clause does not expressly exclude any issue from arbitration. Thus, it was intended by parties that all claims, including claims for frustration, fall within the term “arising under”.

15. This result is also a commercially sensible outcome. The Parties probably did not intend to litigate on the issue of frustration, whilst subjecting all other disputes to arbitration. If this were so, there would be further dispute as to the suitability of

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2 Fiona Trust & Holding Corporation v Privalov [2008] 1 Lloyd Rep 254. “If any businessman did want to exclude disputes about the validity of a contract, it would be comparatively simple to say so”
3 Ibid.
4 Francis Travel Marketing Pte Ltd v Virgin Atlantic Airways Ltd (1996) P 39 NSWLR 160. Therefore, they are drafted in broad, inclusionary terms, rather than referring only certain categories of dispute to arbitration and leaving others to the jurisdiction of national courts. Redfern & Hunter International Arbitration 6th Edition at [2.69].
forum, thereby delaying the subsequent issue on demurrage. The general rule is aligned with Australia’s emphasis on efficiency and cost-effectiveness.

ii. Pre-contractual negotiations are not admissible

16. Pre-contractual negotiations are not admissible determining the meaning of contractual terms. The law makes this distinction for reasons of practical policy, for this would accord utterances in ordinary life greater meaning than that which parties intended. Thus, the correspondence between 1 to 21 July is inadmissible evidence to help determine the meaning of the Arbitration Clause.

iii. Even if the pre-contractual conduct of the Parties can be considered, they indicate that the Frustration claim should be subject to arbitration.

a. The letter from Hestia did not evidence the Parties’ intentions to exclude the Frustration Claim from arbitration

17. Prior to the signing of the Charterparty, the Parties amended the Arbitration Clause by substituting “related to or in connection with” with “arising under”. This amendment was in accordance with the Respondent’s preference that “[Hestia is] only prepared to arbitrate disputes arising out of the provisions of the charterparties ... such as a dispute about demurrage ... [Hestia is] not prepared to arbitrate disputes that relate to but do not arise out of the terms of the charterparty ... such as misrepresentation.”

18. From these pre-contractual negotiations, the Parties have set out what should be included (disputes involving demurrage) and excluded (disputes involving misrepresentation) from this Tribunal’s jurisdiction. The above conduct demonstrates

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7 Peter Megen; Adam Peters “International Arbitration Act 2010 (Cth)” – Towards a new brand of Australia International Arbitration” The Western Australian Jurist at [91].
8 Investors Compensation Scheme Ltd. v West Bromwich Building Society [1998] 1 WLR 896 at 912-913
9 Charterparty Clause 30, Moot Problem at p 20.
that the Parties intended a frustration claim to fall under the Arbitration Clause for two reasons.

19. First, the Parties only intended for situations similar to misrepresentation to be excluded.\textsuperscript{11} Frustration is not similar to misrepresentation. Frustration relates to the radical alteration of obligations to be completed under the terms of a contract,\textsuperscript{12} whereas misrepresentation merely relates to an inducement into a contract.\textsuperscript{13}

20. Secondly, Parties intended for “disputes about” demurrage to be arbitrated.\textsuperscript{14} The issue of frustration is pertinent to determine whether demurrage is payable.\textsuperscript{15} In the Agathon, one of the issues raised was whether frustration should be referred to arbitration. Lord Denning stated that “the frustration point will affect the other matters which have yet to be determined … if the case has to go to arbitration on other points, it would be right for it to go to arbitration on this point.”\textsuperscript{16} The implication of preventing the Frustration Claim to be heard in arbitration would lead to the undesirable situation where the decisions reached by this Tribunal on claims for demurrage and salvage award could be moot if frustration was established from subsequent litigation. To exclude the frustration claim and subject it to court proceedings would not only delay the overall process but also render arbitration of the demurrage and salvage issues uncertain.

\textsuperscript{11} \textit{Ibid}
\textsuperscript{12} \textit{Nickoll & Knight v Edridge} [1901] 2 KB 126.
\textsuperscript{13} \textit{Treitel, The Law of Contract}, Edwin Peel, 12\textsuperscript{th} Edition.
\textsuperscript{14} Letter from Hestia to Zeus, 16 July 2014, Moot Problem at p25.
II. THE CHARTERPARTY BETWEEN ZEUS AND HESTIA IS NOT FRUSTRATED.

21. The Charterparty is not frustrated for two reasons. First, the commercial objective of the contract had been achieved. Second, the risk of delay caused by the Coast Guard’s intervention had already been contemplated by clause 19 of the Charterparty (“Force Majeure Clause”).

A. The commercial objective the Charterparty had been fulfilled

22. The Charterparty could not have been frustrated because its commercial objective of transporting the HLNG has been fulfilled.\(^{17}\) The commercial objective of this Charterparty was the transport of HLNG produced in Hades.\(^{18}\) The HLNG cargo required a specialized tanker as it “liquefies at a lower temperature”.\(^{19}\) Therefore, the main obligation that the Claimant undertook was to provide a suitable vessel capable of maintaining a low temperature throughout the transport.\(^{20}\)

23. The fact that a contract becomes more difficult to perform or less profitable does not amount to frustration. Rather, the crux is whether the supervening event rendered performance radically different than what was contractually undertaken.\(^{21}\) The doctrine of frustration should not be invoked lightly.\(^{22}\)

24. Accordingly, a large increase in the duration for the performance of contractual obligations does not, in itself, frustrate the commercial objective of the

\(^{17}\) Letter from Hestia to Zeus, 2 July 2014, Moot Problem, at p 2.

\(^{18}\) Ibid.

\(^{19}\) Ibid.

\(^{20}\) Letter from Hestia to Zeus, 14 July 2014, Moot Problem, at p 3.

\(^{21}\) Davis Contractors v Fareham UDC [1956] AC 696.

\(^{22}\) The Super Servant 2 (1990) 1LLR 1.
contract. In *Tsakiroglou*, the defendant agreed to ship peanuts through the Suez Canal route. The closing of the canal compelled the defendant to take a longer route via the Cape of Good Hope. Although shipping would have taken four times as long with increased costs, the court held that it was still possible to perform the contract.

25. In the present case, the commercial objective of the Charterparty was fulfilled because the Claimant provided a specialized vessel for the transport of HLNG, and ensured delivery with no loss of damage. The one year delay in delivery of HLNG does not amount to a frustration of the contract.

B. *The supervening event falls within the Force Majeure Clause*

26. Frustration does not result when the supervening event has been contemplated by a force majeure clause. In the present case, the Force Majeure Clause contemplates a detention by the Coast Guard. Thus, the detention is a force majeure event, not a frustrating event.

i. *The supervening event falls within “intervention by custom authorities”.*

27. The relevant clause set out in the Charterparty is “19(d) mobilization, war (declared or undeclared), hostilities, epidemics, quarantine, riots, intervention of sanitary or customs authorities”. An “intervention by... custom authorities” includes the situation in which the Coast Guard is authorised by law to detain a ship. As the Coast Guard was so authorised, the risk of the event falls within the Force Majeure.

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23 *Davis Contractors v Fareham UDC* [1956] AC 696.
25 Ibid.
26 *Jackson v The Union Marine Insurance Co Ltd* (1874) LR 10 CP 125.
27 Charterparty Clause 19(d), Moot Problem, at p40.
29. The phrase in the force majeure clause “intervention…of custom authorities” should be construed to include an intervention by the Coast Guard authorised by law.

30. The Coast Guard ‘s interception was authorised by law because Simmons had cloaked the Coast Guard with the authority to carry out functions of a similar nature by a customs authority. For there to be authority of a similar nature, “the qualities or character required by the body giving the order ... must therefore include essentially the exercise of full executive and legislative power over an established territory.”

31. A customs authority is responsible for regulating the import and export of goods. The Coast Guard, because of Simmon’s Presidential Decree, had been so authorised to carry out the functions of a customs authority. Thus the Coast Guard’s detention of the Athena fell within the ambit of the force majeure clause.

a. The Presidential Decree has been validly issued

32. The Presidential Decree was valid because it met the common formalities required. A common formality for an act by the President is the signature of the President as well as the countersignature of the Prime Minister or other relevant ministers.

33. It is likely that this formality has been met because the new President had control over the Hades Parliament. It was reported that “the Opposition Leader of Hades, seized control of the parliament, backed by the military” and became the new President. Her first act as the President was to instruct the Coast Guard to have the Athena returned to port, to stop the export of HLNG cargo. As the previous

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29 This is the formality requirement for Italy, Austria, France, Germany and Iceland, Parliamentary Reports of Australia, Papers on Parliament No. 31, 1998, Juliet Edeson, “Powers of Presidents in Republics. As well as Korea. Statutes of the Republic of Korea – Korea Legislative System and Procedures.

30 The Hades Advocate, 7 October 2014, Moot Problem, at p55.

31 Ibid.
parliament was overthrown, the president’s control over parliament meant that she could nominate members of her own party as ministers. Therefore, it is likely that the new president was able to get the countersignature of the relevant minister and follow the requisite formalities.

b. Hades has jurisdiction over the Athena as it was Hades-flagged

34. The State of Hades exercised jurisdiction over the Athena because Athena flew Hades’ flag. Article 92 of the United Nations Convention on the Law of the Sea (“UNCLOS”) confers exclusive jurisdiction to States whose flags are being flown on the high seas. Article 91 of UNCLOS requires a genuine link between a State and the ship.

35. A genuine link refers to “the effective exercise of a State’s jurisdiction and control in administrative, technical and social matters over ships flying its flag.” However, such jurisdiction and control arises only after registration. Therefore so long as a vessel is flagged and registered in an open-registry, the laws of the Flag State is applicable.

36. In the present case, Hades adopts an open-registry as foreign vessels can be flagged and non-Hades flagged vessels are not permitted in port. Thus, the fact that the Athena, a Hades-flagged vessel, was allowed to dock at the Port provides a strong

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32 Art 92 UNCLOS. The Law of Western Australia governs the Charterparty and Australia is a signatory of the UNCLOS as of 22 March 2002, UN Oceans & Law of the Sea – Declarations and Statements.
33 Art 91 UNCLOS.
34 Art 5 1958 Convention of the High Seas.
inference that the Athena was properly registered. Therefore there was a genuine link existed and and the laws of Hades are enforceable on the Athena.

ii. The supervening events falls within the scope of “other similar cause” in Clause 19(d)

37. The interpretation of “other similar clause” should be interpreted broadly to include the effect of a delay from a supervening illegality of the HLNG cargo, as the ejusdem generis principle does not apply.

38. The meaning of the terms of a commercial contract is determined by what a reasonable businessperson would have understood those terms to mean. General words are to be taken in the larger sense unless the true construction of the force majeure clause requires the court to conclude that the words are intended to be limited to things ejusdem generis with those specifically mentioned before.

39. It is necessary to identify a relevant genus to which the specific words restrict the general words belong. If they lack an identifiable class, the general words must usually be taken at its face value and given the width of the meaning they normally bear. An additional factor is for the court to consider the factual matrix of the contract to determine if it is the Parties’ intentions for ejusdem generis to apply.

40. Clause 19(d) contemplates a multitude of events occurring, including war, epidemics, riots and court issued arrest proceedings. There is no discernible genus and on the facts, no indication from either parties that they intended for application of the ejusdem generis principle to constrain a reading of “or other similar clause”.

38 Electricity Generation Corporation v Woodside Energy Ltd [2014] HCA 7 at [35].
41 Ibid.
41. In looking at the factual matrix of this Charterparty, it is obvious that the cargo HLN G might be prevented from being exported. Therefore it would be inherently unlikely that the parties intended that in such circumstances there should be no cover for this delay. Therefore, the Presidential Decree which ordered the return of the Athena due to the illegal nature of its cargo fell within the scope of Clause 19(d).

iii. Conclusion

42. To conclude, the Coast Guard’s intervention could not amount to a frustrating event because it already falls within the Force Majeure clause in the Charterparty. This is so because the phrase “intervention of port...authorities” or “other similar cause” in the clause includes the Coast Guard’s authorised act of detaining the Athena. This act was so authorised by the Presidential decree and per the law of flags. The Coast Guard’s actions fell squarely within the clause.

43. The Charterparty sets out the consequences if a force majeure clause arose, one of which being, “if the deliveries are suspended for more than 30 days the shipment in arrears may be cancelled at the option of either party who must inform the other party of such cancellations within 15 days.” The Respondent did not elected to cancel the shipment in arrears, and therefore has no remedy.

III. THE RESPONDENT IS LIABLE FOR DEMURRAGE

44. The Respondent is liable for demurrage for three reasons. First, loading was not concluded within the stipulated laydays. Secondly, the laytime exceptions in clause 9(e) of the Charterparty do not apply. Thirdly, the Claimant was not at fault for causing the delay to the Athena.

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43 Clause 19 of the Charterparty; Moot Problem, at p 41.
A. The Respondent exceeded the stipulated laydays because the Athena did not leave the Port.

45. Demurrage is incurred if the Athena fails to leave the Port within 10 weather working days after the Notice of Readiness is tendered. Demurrage accrues as the calculated laydays exceed the contractually stipulated 10WWD SHINC after the Notice of Readiness (“NOR”). As the NOR was issued on 3 October 2014, the contractually stipulated laydays ran from the 3 to 13 of October 2014. Since the Athena did not leave the Port within this period, demurrage was incurred.

i. The Athena did not leave the Port because she was still within its boundaries

46. The Athena was still within Port boundaries when intercepted.

47. The contractually understood boundaries of the “Port of Hades” under the Charterparty does not refer to the actual legal boundaries of Hades’ territorial waters. References to a particular port in a charterparty must be understood in its ordinary commercial sense (“the commercial port”). Beyond an area for cargo operations, the commercial port only extends to waters where “port discipline” is exercised.

48. Thus, a vessel is considered to have left the port only when it is beyond the limits of the commercial port. The submission of ships to the discipline of the port authorities is a strong indication that the ships are within the commercial port limits.

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44 Clause 9(c)(i) of the Charterparty, Moot Problem at pg 34: “calculated from when the NOR is tendered until the vessel leaves the Loading Place”.
45 Clause 10 of the Charterparty, Moot Problem at pg 36; Clause 9(c)(i) of the Charterparty, Moot Problem at pg 34. Voyage Charterparty Box 5, Moot Problem at pg 29.
46 Notice of Readiness, 3 October 2014, Moot Problem at 51.
47 Price v Livingstone (1882) 9 Q.B.D. 679 at p 68. See also J Schofield, Laytime and Demurrage (6th ed) Lloyd’s Shipping Law Library at p 83.
50 Sailing Ship “Garston” Co v Hickie 15 QBD 580 at 590.
The Australian High Court in *The Commonwealth v The Huon Channel* applied this test to determine the meaning of “port” under the Commonwealth Light Dues Regulations 1915.\(^{51}\) Since the Marine Board exercised jurisdiction over the body of water in Sullivan’s Cove, this area was found to be within the port.\(^{52}\)

49. In the present case, the Coast Guard exercised authority over the *Athena*, and the Master submitted to the authority of the Coast Guard.\(^ {53}\) Thus, the *location* at which the *Athena* was intercepted, was within the *commercial port* of Hades. Accordingly, the Respondent is liable for demurrage as the *Athena* did not leave the Port within the stipulated laydays.

**ii. The issuance of a statement of facts does not mean that the *Athena* had “le[ft] the Loading Place” under clause 9(c)(ii)**

50. The Respondent referred to a maritime custom\(^ {54}\) that a vessel is deemed to have left the port upon the issuance of a statement of facts. However this purported custom cannot assist in interpreting the expression “leaves the Loading Place” under clause 9 (c)(i) of the Charterparty.\(^ {55}\)

51. A practice is regarded as a custom only if it is definite and generally acquiesced to.\(^ {56}\) A custom is definite if it is established by a course of conduct.\(^ {57}\) On the facts, the Respondent has not referred to any course of conduct which establishes the purported custom.

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\(^{51}\) *The Commonwealth and Anor v The Huon Channel and Peninsula Steamship Company* [1918] HCA 18.

\(^{52}\) *Ibid.*


\(^{54}\) Letter from Hestia to Zeus, 22 October 2014, Moot Problem, at p 61.

\(^{55}\) *Ibid.*


\(^{57}\) *Strathlorne Steamship Co v Hugh Baird & Sons* 1915 S.C. 956 at 975.
52. Even if the purported maritime custom exists, the Charterparty is inconsistent with the purported custom. Where such inconsistency arises, the contract must prevail.\textsuperscript{58} In the present case, the Charterparty is irreconcilable with the purported custom, for it contemplates a physical movement beyond the boundaries of the port of Hades,\textsuperscript{59} rather than the issuance of a document. The Charterparty must prevail, and the Athena cannot be deemed to have left the Port.

\textbf{B. The present case does not fall within the laytime exceptions in clause 9(e)}

53. The Coast Guard’s interception of the Athena does not fall into the laytime exception relating to “arrests”, or “delay or stoppage of goods in transit”. Thus, laytime continued to run despite the delay caused by the Coast Guard’s actions.

54. Clause 9 (e) reads as follows:

“In the event of any (delay/hindrance) in loading … the particular cargo…due to… arrests ['the first limb']: delay or stoppage of goods in transit ['the second limb'].”\textsuperscript{60}

\textit{i. The Coast Guard’s interception did not amount to an “arrest”}

55. The expression “arrests” under clause 9(e) should be taken to refer to only court-ordered arrest proceedings. Thus, the Coast Guard’s interception of the Athena does not fall within “arrests”. “[A]rests” should interpreted narrowly for two reasons.


\textsuperscript{59} Price v Livingstone (1882) 9 Q.B.D. 679 at p 68. See also J Schofield, \textit{Laytime and Demurrage} (6th ed) Lloyd’s Shipping Law Library at p 83.

\textsuperscript{60} Charterparty Clause 9(e), Moot Problem pg 35.
a. The proposed interpretation is more reasonable

56. The term “[a]rrests” should be interpreted to mean only court-ordered arrests, as this would accord with the commercial understanding of the term. In Tisand Pty Ltd v Owners of the Ship MV Cape Moreton, the court accepted that an “arrest” in the context of section 20(3) of the Australian Admiralty Act 1988 is conducted pursuant to a right to proceed in rem. Such proceedings are court-ordered. Furthermore, the court held that the provisions relating to “arrest” in the aforesaid Act have an “international…and maritime context of some pedigree” because it could be traced to the 1952 International Arrests Convention. Such is the understanding of arrests in the international maritime context.

57. Furthermore, arrests are treated distinctly from detention by port authorities authorized by a sovereign or executive power, otherwise known as a “restraint of kings, princes and people”. In the present case, the Coast Guard who had been cloaked with President Simmon’s executive decree fell right into this category rather than that of “arrest”. This distinction is also present in many standard form charterparties. Thus, “arrests” has the narrow meaning of detention of a ship pursuant to a court-issued order an action in rem, and does not extend to detention by port authorities authorized by a sovereign power.

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63 Australian Admiralty Act 1988 at s 20.
64 Admiralty Rules 1988 r 40(1).
65 Tisand Pty Ltd v Owners of the Ship MV Cape Moreton (Ex Freya) (2004) 141 FCR 29 at [62].
68 BPVOY clause 17 and Bimchemvoy 2008 clause 35.
b. If Clause 9(e) is ambiguous, it should be read *contra proferentem* against the Respondent

58. If the meaning of “arrests” remains ambiguous, this ambiguity should be resolved against the Respondent. The *contra proferentem* rule stipulates that an ambiguous term should be construed against the party relying on the term.\(^69\) Any ambiguity arising from “arrests” should thus be construed against the Respondent because he seeks to rely on the ambiguous term.\(^70\)

59. Exclusion of liability is permissible only if supported by unambiguous wording.\(^71\) As “arrests” does not clearly refer to either a court-issued order, or detention by port authority, it should be resolved against the Respondent to mean the former.

60. Accordingly, the word “arrests” in clause 9(e) should be interpreted to refer only to court-issued orders for arrest. The Coast Guard’s interception is not covered by this clause, and the Respondent is not exempted from its liability for exceeding laytime.

**ii. The Coast Guard’s interception did not amount to a “delay or stoppage of goods in transit”**

61. Patently, “stoppage of goods in transit” is inapplicable. It is a legal doctrine in a sale of goods context, that may only be invoked by the seller if the buyer becomes insolvent.\(^72\) As regards delay, this exemption to the running of laytime should be void.

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\(^69\) *Canada Steamship Lines Ltd v R* [1952] UKPC 1; *Christie & Vesey v Helvetia* [1960] 1 Lloyd’s Rep. 540 (EWHC) at pg 546.


\(^71\) *Burton & Co v English & Co.* (1883) 12 Q.B.D. 218 at 224; *Savill Bros Ltd v Bethell* (1902) 2 Ch 523 at 537-8. See also *North v Marina* [2003] NSWSC 64 [66].

\(^72\) Halsbury’s Laws of Australia at [70-1065]; *Sale of Goods Act 1895*, Division 3, s43; see also United States Steel Products Co v Great Western Railway [1916] AC. *Booth Steamship Co Ltd v Cargo Fleet Iron Co Ltd* [1916] 2 KB 570.
62. The exemption of “delay [to] goods in transit” should not be given effect to. Where the effect of an exemption clause eclipses the primary obligation to the extent that the obligation becomes *illusory*, the court will limit the effect of the exception clause.\(^{73}\) In *Tor Line v Alltrans Ltd*,\(^ {74}\) the express words of an exemption clause stated that the shipowner was not liable for any delay, howsoever caused. Yet the owner had an obligation to complete the voyage in a timely manner. Since this exception clause would render the primary obligation illusory, the House of Lords limited the effect of the clause to physical damage to goods.\(^ {75}\)

63. In the present case, the Respondent was under an obligation to load cargo at the Port.\(^ {76}\) The exception of “delay [to] goods in transit” should not be given effect to because its effect is so broad it eclipses the Respondent’s obligation to load.

64. The exception is too broad for two reasons. Firstly, the period of transit fully encompasses the laytime period during. “[I]n transit” connotes the period during which goods are transported between two points, and this includes the loading period.\(^ {77}\) In the present case, the transit period was between the loading of cargo on 3 October 2014 until the goods are eventually discharged at Poseidon. Secondly, the exception appears to apply to delay for any reason.

65. Accordingly if the exception is given full effect, Respondent’s obligation to load during laytime period will be illusory because the period of transit fully encompasses the laytime period. To avoid this absurdity, the “delay [to] goods in transit” should not be given effect to.

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\(^ {74}\) *Tor Line AIB v Alltrans Group of Canada Ltd* [1984] 1 W.L.R. 48.

\(^ {75}\) *Tor Line AIB v Alltrans Group of Canada Ltd* [1984] 1 W.L.R. 48 at 54.


\(^ {77}\) *NEC Australia Pty Ltd v Gamif Pty Ltd* 42 FCR 410 (1993).
transit” exception should only take effect if fault is present. As discussed below, the Claimant is not at fault. Thus the exemption clause does not apply.

C. The Claimant is not at fault for the delay due to the Coast Guard’s interception

66. Laytime is interrupted if the shipowner is at fault for delay. The shipmaster is the shipowner’s agent. Thus, the Master and the Claimant will be referred to interchangeably.
67. The Master is not at fault because he had acted reasonably in the circumstances.
68. The Master’s compliance with the Coast Guard was reasonable. The shipmaster is not at fault if he acts reasonably. This was established in Leeds Shipping v. Duncan Fox (“Leeds”). In Leeds, the issue was whether the captain was at fault because he had caused delay, in refusing to pay stevedores to work harder in loading the ship. The court held that it was reasonable for the captain to refuse paying the stevedores bonus wages.
69. In the present case, the Master had acted reasonably in complying with the Coast Guard’s order because he was under the impression that the Coast Guard had authority over the Athena.
70. First, the Master would have been impressed by the apparent authority of the Coast Guard. Given that the Coast Guard was acting under the instruction of President

78 [66-72] of the Memorandum.
Simmons,\textsuperscript{82} by citing the President’s authority to the Master, the Coast Guard would be clothed with apparent authority to detain the Athena.

71. Secondly, the reasonable shipmaster would know little about shipping registration and flags of convenience, and would therefore have insufficient knowledge to challenge the Coast Guard’s assertion. According to international standards, shipmasters are not expected to know of the law relating to shipping registration and flags of convenience.\textsuperscript{83}

72. Accordingly, the Master was justified in complying with the Coast Guard regardless of whether it had actual authority.

IV. THE RESPONDENT IS NOT ENTITLED TO A SALVAGE AWARD

A. The respondent is a separate legal entity from Hestug

97. Hestia is not entitled to enforce Hestug’s legal rights to claim for salvage. The respondent and Hestug are separate legal personalities as it is shown that Hestug is “a business owned by Hestia”.\textsuperscript{84} Furthermore, Hestug was, reported to have been, the “tug company which came to the rescue” of the Athena, it is trite law that legal rights should be enforced by the corresponding legal entity.\textsuperscript{85}

98. Furthermore, the Respondent does not fulfil the judicially acknowledged classes of salvor.\textsuperscript{86} There are three descriptive characteristics of a salvor: (1) the party is personally engaged in a salvage service; (2) the party possesses or owns the salvor

\textsuperscript{82} The Hade Advocate, 7 October 2014. Moot Problem at p55.
\textsuperscript{83} Adoption of the Manila amendments (Standard of Training, Certification and Watchkeeping for Seafarers, 1978), STCW/CONF.2/34 at pg 60. See also Marine Order 71 pursuant to Australian Navigation Act 2012, under which the syllabus for a diploma required to obtain an unlimited certificate as a shipmaster excludes shipping registration and flags of convenience.
\textsuperscript{84} The Hades Advocate, 7 October 2015, Moot Problem at p71.
\textsuperscript{85} Salomon v A Salomon & Co Ltd [1897] AC 22; Foss v Harbottle (1843) 2 Hare 461.
\textsuperscript{86} Sir William Rann Kennedy, Francis D. Rose, Kennedy and Rose on the Law of Salvage (Sweet and Maxwell, 9\textsuperscript{th} Edition, 2013) at p209, paragraph 7-006.
vessel; (3) the owner or the person entitled to possession of other property (apart from a vessel) which was used to provide salvage services.\(^87\)

99. The Respondent was not personally involved in the salvage service. Moreover, the Respondent only owns Hestug as a legal entity but has not shown to have possessory rights or ownership over the tugboat. Hestug, as a distinct legal entity, possesses and owns the tugboat. There is no judicial acceptance that a holding company of an owner of the salvor vessel would be allowed to claim as a salvor.

100. Thus the Respondent is precluded from pursuing this action since Hestug is the entity that should pursue the claim for a salvage award.

**B. The Respondent did not provide salvage services**

101. Alternatively, even if this Honourable Tribunal finds that Hestia has the locus standi to claim for a salvage award, Hestug did not provide salvage services.

102. The test to establish a salvage service requires 3 elements: (1) Danger to the ship that is being salvaged; (2) the salvor must have been a volunteer; and (3) success of the salvage.\(^88\)

103. The first two elements for salvage have not been fulfilled. As to the third element, the Claimant accepts that the value of the Athena and the HLNG was

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\(^87\) *Ibid.*

preserved. However, it is insufficient to merely show preservation of the vessel and its cargo if the preservation was not pursuant to a salvage operation.

i. **The Respondent was not a volunteer for the “salvage” operation**

104. The Respondent is not entitled to a salvage award since it did not render the rescue service “voluntarily”. First, the respondent rendered the service by virtue of pre-existing legal obligations. Secondly, Hestia could not be characterised as a volunteer, as the service was motivated by self-interest, and was thus gratuitous.

a. **Hestug had a pre-existing contractual relationship with the claimant.**

105. In the present case, there was a pre-existing contractual relationship in the form of a towage contract between Hestug and Zeus. This is shown in the correspondence between the Athena and Zeus on 5 October 2015 where specific instructions were given to Athena from Zeus to “use Hestug for tug services.”

106. For a towage contract to be converted into a salvage contract, the Respondent need to show that – (1) there were unforeseen circumstances putting the Athena in danger (2) that risks are incurred or duties performed by Hestug that could not reasonably be held to be within the scope of the contract.

107. First, there were unforeseen circumstances in the form of the breakdown of the propeller. However, the unforeseen circumstances did not create a sufficient level of danger to the Athena.

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89 The Hades Advocate, 7 October 2015, Moot Problem at p71.
90 Sir William Rann Kennedy, Francis D. Rose, Kennedy and Rose on the Law of Salvage (Sweet and Maxwell, 9th Edition, 2013) at paragraph 8-001
91 Ibid 8-054.
108. The danger that the Athena faced was not one that could have been so “extraordinar[ily] peril[ous]” such that it was “uncontemplated”.  
93 The presence of “sudden violence of wind or waves, or other accidents” is usually evidence of uncontemplated events.  
94 Hence, the immobilization of the Athena from a propeller breakdown would not suffice to have been an uncontemplated event. There were no immediate or pressing consequences from the immobilization.

109. Secondly, Hestug’s salvage service did not fall outside the scope of obligations under the towage contract.  
96 There is an implied duty for tugboats, like Hestug, to stay with the tow and to persevere in the completion of the towage services.  
97 Hestug’s salvage service fell within this implied duty, as its towage service extending to successfully towing the Athena to “open waters”, ensuring that the Athena was towed to a safe place, and ensuring it had the capacity to continue its journey to its destination.  
99 The breakdown of the Athena’s propeller immediately after “the towlines were released from the vessel” was an interruption fell within the meaning of “ensuring it had the capacity to continue its journey to its destination.”


94 *The Minnehaha* (1861) 15 Moo. (PC) 133 at 152–154.

95 The Hades Advocate, 7 October 2015, Moot Problem at p71.

96 Per Lord Kingsdown in *The Minnehaha* (1861) 15 Moo. P.C. 133 at 158.


98 The Hades Advocate, 7 October 2015, Moot Problem at p71.

110. Thus Hestug should not be found to have been volunteers. The courts are reticent to ensure that “a little departure from the exact mode in which the contract is to be performed is not magnified so as to convert towage into salvage services.”

b. Hestug had self-interest to salvage the Athena

111. Alternatively, Hestug was not a volunteer as it was self-interested in the rescue service. Notwithstanding the fact that Hestug and Hestia are separate legal personalities, the economic interests of a subsidiary and its holding company are tied. Therefore Hestug has interests in the cargo by virtue of the fact that Hestia owns the HLNG aboard the Athena.

112. The policy reasoning behind awarding a salvage award beyond the terms of the towage contract is to encourage tugboats to rescue vessels in need even though this goes beyond the towage contract. The presence of self-interest should disentitle a party from a salvage award, as there is no lack of motivation to embark on the rescue service. In *Simon v Taylor*, four divers who were salvors of a submarine and the mercury onboard were not entitled to a salvage award as they were “motivated not by any intention to salve for the benefit of the owners of the submarine and the cargo, but solely for their own benefit”.

113. In the present case, Hestug requires no further motivation to perform this rescue service as it was motivated by the self-interest to salvage the HLNG that belongs to its holding company, Hestia. Thus the predominant motivation for the salvage in the present case is Hestug’s self interest in preserving Hestia’s cargo.

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101 Commissioner of Taxpayer Audit and Assessment v Cigarette Co of Jamaica Ltd (in liquidation) [2012] UKPC 9 at [14].
ii. There was no danger to the Athena or the cargo

a. The present circumstances did not amount to danger for the purposes of “salvage”

114. To establish danger, it would not be necessary that the subject matter be in danger of total loss.\(^{103}\) The test is whether a reasonable person in charge of the venture would have refused a salvor’s help if it were offered to him upon the condition of paying a salvage award.\(^{104}\)

115. The Athena would not have accepted Hestug’s help at the rates of salvage services. First, there was no danger to the Athena or the cargo that merited a salvage award. Breakdown of the ship’s machinery is insufficient if unaccompanied by factors such as violent weather\(^{105}\) or potential of collisions.\(^{106}\) These indicia would help lead to a conclusion of an obvious danger that is posed.

116. There was no identifiable danger to Athena apart from having a broken propeller and being immobilized at sea. For danger to be operative for salvage purposes, it must not be “fanciful but a real possibility”. The Charlotte aptly illustrates this principle. The ship got caught up among breakers during a violent gale with fog, rain and heavy seas and was subsequently towed to safety. It was held that the assistance rendered needs to prevent “any damage or misfortune that might possibly expose [the ship] to destruction”. The level of distress faced by the Athena was merely one of immobilization.

\(^{103}\) The Mount Cynthos (1937) 58 Lloyd’s Rep. 18 at 25.


\(^{105}\) The Charlotte (1848) 3 Wm. Rob. 68.

\(^{106}\) Ibid.
117. Secondly, there was no opportunity for the Athena to assess its alternatives and options in the form of other tugs willing to tug them to shore at a cheaper rate than a salvage award. The salvage occurred only shortly after the breakdown of the propeller, as Hestug’s tugboats “were not far away” from the Athena before the rescue.\textsuperscript{107} This can be contrasted to the case of \textit{The Troilus} where the salvaged ship had the opportunity to evaluate its alternatives by contacting other tugboats for their services. The ship in that case finally agreed to the tow by the initial tug after exhausting all its options after contacting the other tugboats in the region.\textsuperscript{108} Thus a reasonable person in charge of the Athena would not have agreed to this tow if it had been known that the tow would be pegged to a salvage award instead of the rates under the pre-existing towage contract.

\textbf{I. PRAYER OF RELIEF}

For the reasons set out above, the Respondent requests the Tribunal to:

\begin{itemize}
  \item \textbf{FIND} that this Tribunal has jurisdiction to determine the frustration claim
  \item \textbf{FIND} that there was no frustration of the charter
  \item \textbf{FIND} that the Respondent is liable to pay for demurrage and detention
  \item \textbf{DECLINE} to find a salvage award for the Respondent
\end{itemize}

\textsuperscript{107} The Hades Advocate, 7 October 2015, Moot Problem at p71.
\textsuperscript{108} \textit{The Troilus} [1951] A.C. 820.