MEMORANDUM FOR ZEUS SHIPPING AND TRADING COMPANY

ON BEHALF OF
ZEUS SHIPPING AND TRADING COMPANY
CLAIMANT

AGAINST
HESTIA INDUSTRIES
RESPONDENT

TEAM

ADITYA D’SOUZA • ANIRUDDH NIGAM • ASHWIJ RAMAIAH • NIKITA GARG
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Questions Presented

I. Whether the Arbitral Tribunal has the jurisdiction to determine the dispute regarding frustration of the Charterparty?

II. Whether the Charterparty was frustrated?

III. Whether the Respondent is liable to pay demurrage?

IV. Whether the Respondent is entitled to a salvage reward?
STATEMENT OF FACTS

THE PARTIES AND THE CHARTERPARTY

On 21st July, 2014, Hestia Industries ("RESPONDENT"), agreed to charter the Athena, a Hades flagged vessel, from Zeus Shipping and Trading Company ("CLAIMANT"), by way of a negotiated Voyage Charterparty. The object of the Charterparty was to deliver 260,000m$^3$ of Liquified Natural Gas based in Hades ("HLNG") to Poseidon. Any dispute arising under the contract was to be submitted to arbitration in London pursuant to Clause 30 of the Charterparty ("arbitration clause"). The Athena arrived at the port of Hades on 21st July, 2014 amidst violent protests led by the opposition leader Jacqueline Simmons who turned the export of HLNG into a political issue.

THE MILITARY COUP

The Athena arrived at the Port of Hades and accordingly, issued a Notice of Readiness on 3rd October, 2014. Despite temporary interruptions, the cargo was loaded onto the ship by 6th October, 2014. On 7th October, 2014, the Athena sailed from the Port of Hades and a Statement of Facts to the same effect was issued by the Master, which was not mutually endorsed. On the same day, the political demonstrations escalated and Jacqueline Simmons seized control of the parliament through a military coup d'état. She instructed the Hades Coast Guard to intercept the Athena and order it to return to its berth. The Coast Guard was able to pursue and intercept the Athena. After some resistance, the Master of the Athena obliged with the orders of the Coast Guard since the Athena was a Hades flagged vessel. The Coast Guard then obtained control of the vessel and ordered it to return to its berth at the Port of Hades.
THE DEMURRAGE CLAIM

The *Athena* was detained within the Port of Hades till 6th October, 2015. The Claimant contends that the *Athena* had not left the loading place and was stranded within the Port, and hence demurrage for a period of 358 days is payable. Respondent initially denied this claim, arguing that the vessel had left the loading place. However, later the Respondent communicated that the delay in the performance of the contract was so radically different from what they had initially contemplated that the Charterparty had been frustrated due to inordinate delay.

THE SALVAGE CLAIM

On 5th October, 2015, the Coast Guard freed the *Athena* to leave the Port of Hades. However, the propellers of the vessel were tampered with and shortly after setting sail under its own steam, both the propeller shafts broke. At this point, tugs belonging to Hestug that had guided the *Athena* to open waters rendered timely assistance to the vessel. Interestingly, Hestug was owned by Hestia Industries. Respondent claims salvage reward for this operation.

THE DISPUTE

The Claimant referred the dispute to arbitration, claiming demurrage under the Charterparty. However, the Respondent contends that the Charterparty had been frustrated. Consequently, the Respondent contends that the arbitral tribunal’s jurisdiction to hear the issue on frustration is also disputed.

The Respondent also filed a counterclaim, seeking a salvage reward for services rendered during the salvage operation carried out by Hestug. Both parties have appointed their arbitrators, and mutually agreed on the competence of the tribunal to rule on its own jurisdiction. The Tribunal has invited written submissions from both parties, and scheduled oral arguments from 3-8 July, 2016.
ARGUMENTS ADVANCED

I. THE ARBITRAL TRIBUNAL HAS THE JURISDICTION TO DETERMINE THE ISSUE OF FRUSTRATION OF CONTRACT

1. CLAIMANT referred the dispute regarding the demurrage claim to arbitration on 16\textsuperscript{th} November, 2015.\textsuperscript{1} RESPONDENT contends that the Charterparty had been frustrated, and no claim lies against them. It is well settled that the determination of the scope of an arbitration clause depends upon the express language of the clause and the intention of the parties to it.\textsuperscript{2} It is submitted that the arbitral tribunal has the jurisdiction to determine \textit{all} the disputes, including frustration for two reasons. \textit{First}, the wording of the arbitration clause implies its inclusion [A]. \textit{Secondly}, there is no intention to exclude frustration from the scope of the arbitration clause [B].


2. The arbitration clause in the Charterparty provides that any “\textit{dispute arising under the contract}” is subject to arbitration in London.\textsuperscript{3} The scope of an arbitration clause is determined through its express wording.\textsuperscript{4} The phrase “\textit{dispute arising under the contract}” refers to disputes that relate to the interpretation and performance of the contract.\textsuperscript{5} It also refers to disputes regarding the rights and obligations created under the contract.\textsuperscript{6} Frustration

\textsuperscript{1} Correspondence between Zeus Shipping and Trading Company and Hestia Industries, Page 72, The Bundle.
\textsuperscript{3} Clause 30, Voyage Charterparty, Page 45, The Bundle.
occurs when contractual obligations become incapable of being performed due to a radical change in the circumstances required for their performance.\(^7\) Therefore, it relates to both contractual obligations and the performance thereof. Consequently, it is submitted that the dispute on frustration of the Charterparty is one that falls under the arbitration clause.

3. In *Heyman*,\(^8\) it was stated that a difference on an implied term of the contract is covered under an arbitration clause just as much as a difference on an express term.\(^9\) Further, it was held that since frustration involves a difference on the applicability of an implied term, it is a “dispute arising under a contract”. In the instant case, the dispute on frustration rests on whether there is an implied term that an inordinate delay in the delivery of cargo is sufficient to discharge the contract. Therefore, it is submitted that this dispute falls under the Charterparty and is within the scope of this arbitral tribunal’s jurisdiction.

**[B] THERE IS NO INTENTION TO EXCLUDE FRUSTRATION FROM THE SCOPE OF THE ARBITRATION CLAUSE**

4. In order to determine the parties’ intention about the scope of an arbitration clause, the circumstances in which the clause comes into existence must be taken into consideration.\(^10\) It is submitted that there is no indication of the parties’ intention to exclude frustration from the scope of the arbitration clause for two reasons. First, the specific correspondence between the parties prior to the execution of the contract does not imply such exclusion [i]. Secondly, in any case, the clause should be interpreted broadly to arrive at the parties’ intention [ii].

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\(^7\) Pioneer Shipping Ltd v. BTP Tioxide Ltd (The Nema), [1982] AC 724; Davis Contractors Ltd v. Fareham Urban District Council, [1956] UKHL 3.
\(^8\) Heyman v. Darwins, [1942] AC 356.
i. The specific correspondence between the parties prior to the execution of the contract does not imply exclusion of frustration issue

5. The circumstances in which the present Charterparty came into existence involve specific correspondence between the CLAIMANT and the RESPONDENT. In this correspondence, the RESPONDENT sought to amend the original arbitration clause that provided for arbitration of disputes arising out of or in connection with the Charterparty. This was done to exclude other disputes that merely related to the terms of the Charterparty (such as misrepresentation) from the ambit of the arbitration clause. Consequently, the clause was amended to provide for arbitration of any dispute arising under the Charterparty.

6. It is submitted that this correspondence is only indicative of an intention to exclude claims such as misrepresentation from the scope of the arbitration clause. The exclusion does not extend to the question of frustration. This is because a dispute on frustration is significantly different in nature from a dispute on misrepresentation. Frustration is intricately related to contractual performance and the rights and obligations therein. However, a dispute as to whether a contract is induced by misrepresentation mostly relates to matters that either precede the contract or are contemporaneous with it. Therefore, it cannot be said to arise as a result of the contract. Consequently, the specific correspondence between the parties does not indicate an intention to exclude the contractual issue of frustration from the scope of the arbitration clause.

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11 Clause 30, Voyage Charterparty, Page 20, The Bundle.
12 Correspondence between Hestia Industries and Zeus Shipping and Trading Company, Page 25, The Bundle.
13 Clause 30, Voyage Charterparty, Page 45, The Bundle.
14 Fillite (Runcorn) Ltd v. Aqua Lift, 45 BLR 27.
15 Amalgamated Investment and Property Co Ltd v. John Walker and Sons Ltd, [1977] 1 WLR 164.
16 Fillite (Runcorn) Ltd v. Aqua Lift, 45 BLR 27.
ii. In any case, the clause should be interpreted broadly to arrive at the parties’ intention

7. The RESPONDENT may contend that an arbitration clause with the phrasing “dispute arising under the contract” is narrower in scope than the clause “dispute arising out of or in connection with the contract”. However, most common law jurisdictions have adopted a liberal approach to interpretation of arbitration clauses. These courts have done away with distinctions between such similar sets of words. This approach is underpinned by the sensible commercial presumption that parties do not intend to have possible disputes arising from their contract to be heard in two different forums.

8. Therefore, it is submitted that these distinctions should not be drawn in the present instance. In the absence of express exclusion of the issue of frustration from the arbitration clause, interpreting it to provide for settlement of the contractual claims of demurrage and frustration at different forums would be opposed to the commercial purpose and intent of the contract. Consequently, the clause should be interpreted broadly to allow for the determination of all contractual disputes by this arbitral tribunal, including the dispute on frustration.

II. THE CHARTERPARTY IS NOT FRUSTRATED DUE TO THE DELAY

9. President Simmons ordered the Athena to be intercepted and brought back to its berth at Hades. The Athena was finally allowed to sail after nearly a year. The RESPONDENT

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20 The Hades Advocate, Page 55, The Bundle.

21 Correspondence between Zeus Shipping and Trading Company and Hestia Industries, Page 69, The Bundle.
contends that this delay in delivering the cargo frustrates the Charterparty. It is submitted that the Charterparty is not frustrated for two reasons. First, the force majeure clause precludes the applicability of the doctrine of frustration of contract [A]. Secondly, even if the doctrine is applicable, the delay does not frustrate the Charterparty [B].

[A] **THE FORCE MAJEURE CLAUSE PRECLUDES THE DOCTRINE OF FRUstration**

10. The Charterparty contains an express *force majeure* clause to address delays suffered by the parties. It is submitted that this clause precludes applicability of the doctrine of frustration for two reasons. First, the event is covered by the *force majeure* clause [i]. Secondly, the right under this clause has been forfeited [ii].

   *The event is covered by the force majeure clause*

11. If there is an express *force majeure* clause in the contract which covers specific extraneous events, then the legal consequences of such events will be governed by the express clause in the contract and not by the doctrine of frustration. In the instant case, the voyage was delayed because the *Athena* was intercepted and brought back to its berth at Hades by an express order of the President of Hades. A delay in a commercial adventure because of the intervention of sovereign or governmental powers is ordinarily classified as “restraint of princes”.  

12. Clause 19(d) of the Charterparty applies to delays suffered by the parties due to hostilities, internal war, mobilization or “other similar cause”. The term “similar cause” must be interpreted using the rule of *ejusdem generis*. “Restraint of princes” is a specific

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22 RESPONDENT, Points of Defence and Counterclaim, Page 76, The Bundle.  
23 Clause 19, Voyage Charterparty, Page 45, The Bundle.  
27 Clause 19(d), Voyage Charterparty, Page 45, The Bundle  
28 CHITTY ON CONTRACTS, 956 (32nd edn., 2015); Sun Fire Office v. Hart, 1889 14 App Cas 98.
event included in the genus of hostilities, armed intervention, internal war etc. Therefore, Clause 19(d) expressly covers the cause of the delay. Consequently, the legal consequences of the delay should be governed by Clause 19 of the Charterparty and not by the doctrine of frustration.

**ii. RESPONDENT has forfeited their right under the force majeure clause**

13. Clause 19(2) stipulates that if a party is affected by a delay of more than 30 days and wishes to terminate their outstanding obligations under the Charterparty, then they are obliged to provide due notice of their intention to terminate the outstanding obligations within 15 days. In the instant case, the RESPONDENT did not provide notice despite the delay lasting for a year. Therefore, they forfeited the right expressly arising out of the Charterparty. Consequently, they cannot claim the same right under the doctrine of frustration.

**[B] EVEN IF FRUSTRATION IS APPLICABLE, THE DELAY DOES NOT FRUSTRATE THE CHARTERPARTY**

14. It is submitted that even if the doctrine of frustration applies, the Charterparty is not frustrated. A change in circumstances by an extraneous event can only render a contract frustrated if the new circumstances “radically change” the nature of rights and/or obligations of the parties from their reasonable contemplation at the time of entering into the contract. In the instant case, the delay does not radically change the rights and obligation of the parties.

15. *First*, under the Charterparty, the RESPONDENT had the right to charter the *Athena* for the voyage, subject to the obligation to pay freight and demurrage charges. Even after the delay, the same rights and obligations continued. RESPONDENT may argue that they had reasonably contemplated their cargo to be delivered by 2\textsuperscript{nd} November, 2014. However, it is

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29 The Fontevivo, 1975 1 Lloyds Rep 339.
submitted that this claim is invalid. First, the nature of rights and obligations of the parties to a contract should be constructed by the express provisions of the contract. The construction of rights and obligations under these provisions must be governed by what fair and reasonable individuals would presumably agree to. In the instant case, there is no provision in the Charterparty which says that the cargo should be delivered by 2\textsuperscript{nd} November, 2014 or within any particular timeline. Therefore, it cannot be said that the RESPONDENT reasonably contemplated their right to have the voyage completed by 2\textsuperscript{nd} November, 2014.

16. Secondly, the fact that the proposal mentioned the completion of cargo by 2\textsuperscript{nd} November, 2014 is immaterial. In a wholly written contract, new rights and/or obligations cannot read into contractual terms based on extrinsic evidence. Therefore, the RESPONDENT cannot claim that they reasonably contemplated that they had the right to have the voyage completed by 2\textsuperscript{nd} November, 2014.

17. Thirdly, there is no implied term in the Charterparty that the voyage should be completed within a *reasonable period* of time. RESPONDENT may argue that there is an implied term in every commercial contract that the contract must be completed within a reasonable period of time. However, when dealing with questions of frustration, implied terms which are not derived from any express provision cannot be read into the contract. Therefore, the Charterparty was not frustrated due to the frustration of an implied term.

### III. RESPONDENT IS LIABLE TO PAY DEMURRAGE

18. The *Athena* was intercepted by the Coast Guard and ordered to return to its berth at the Port of Hades on 7\textsuperscript{th} October, 2014. CLAIMANT contends that the *Athena* had not “*left the

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33 Correspondence between Hestia Industries and Zeus Shipping and Trading Company, Page 2, The Bundle.
34 Gordon v. Macgregor, (1909) 8 CLR 316.
loading place” for the purposes of the Charterparty and thus, laytime continues to run. Consequently, the RESPONDENT is liable to pay demurrage.

[A] THE ATHENA HAD NOT COMPLETED THE LOADING PROCESS

19. The Charterparty provides for laydays to end when the Athena leaves the loading place, which is when the loading process as is contractually stipulated ends. It is submitted that the Athena did not leave the loading place, and consequently the loading process is not complete. First, the Charterparty defines loading as a process that ceases when the ship “leaves the loading place” [i]. Secondly, the ship had not left the Port of Hades [ii]. Thirdly, the Statement of Facts does not establish that the Athena had left the port [iii]. Therefore, the contractually stipulated process of loading was not over and laytime continued to run.

i. The Charterparty defines loading as a process that ceases when the Ship “leaves the loading place”

20. The Charterparty defines “loading” as a process that ceases when the Ship leaves the Loading Place. RESPONDENT may argue that this differs from the ordinary commercial meaning. However, the ordinary commercial meaning of the loading operation cannot be imported in the presence of clear contractual definition and intention to depart from it. Therefore, the process of loading, and consequently, operation of laytime ends when the ship “leaves the loading place” as is contractually defined.

21. Further, the Charterparty designates the Port of Hades as the “Loading Place” for the purpose of calculation of laytime. A specific berth was not nominated in the Charterparty. Therefore, the nature of the Charterparty is that of a “Port Charterparty”. Consequently, the

37 Clause 9(c), Voyage Charterparty, Page 34, The Bundle.
39 Box 5, Voyage Charterparty, Page 29, The Bundle.
40 Agrimpex Hungarian Trading Co v. Sociedad Financiera de Bienes Raices SA (The Aello), 1957 1 WLR 1228; D. Davies, COMMENCEMENT OF LAYTIME, 3 (4th edn., 2006).
relevant area to be considered for determination of the end of the loading process is the legal limits of the Port of Hades.

\[ \text{ii. The Ship had not left the Port of Hades} \]

22. It is submitted that the \textit{Athena} cannot be considered to have “left” the Port of Hades for three reasons. \textit{First}, the limits of the Port must be interpreted in their commercial sense. \textit{Secondly}, the Reid test is satisfied by the \textit{Athena}. \textit{Thirdly}, in any case, the \textit{Athena} was in the Port of Hades for a year.

\[ \text{a. The Limits of the Port Must Be Interpreted in Their Commercial Sense} \]

23. The legal limits of a port refer to the commercial area of the port, and not the geographical or fiscal limits of the port.\(^{41}\) The “commercial area” of the port refers to the area that ordinary businessmen would refer to, which may be wider than the territorial limits of the port.\(^{42}\) The test to determine “commercial area” requires inquiry into a set of circumstances relevant to the voyage, such as freedom from port authorities and control, which is broader than a mere delimitation of the area of the port.\(^{43}\)

24. The test to determine whether a ship is within the commercial area of the port is the Reid Test as laid down in \textit{The Oldendorff}.\(^{44}\) As per the Reid test, port discipline and control over movement of ships is a crucial factor in determining the limits of a port.\(^{45}\) The test for determining port discipline is “whether the authorities of the Port are able to exercise powers over the movement and conduct of ships”.\(^{46}\) Therefore, in the instant case, the mere fact that the \textit{Athena} was outside the territorial limits of the Port of Hades is inconclusive to deciding the question.

\(^{41}\) Leonis Steamship Co v. Rank, 1908 1 KB 499; The Aello, 1957 1 WLR 1228; E.L. Oldendorff & Co v. Tradax Exports SA (The Johanna Oldendorff), 1974 AC 479.
\(^{44}\) The Johanna Oldendorff, 1974 AC 479; Sailing Ship Garston & Co v. Hickie, 1885 15 QBD 580.
b. **The Reid Test to Determine Port Limits is Satisfied**

25. It is submitted that the Reid test is satisfied by the *Athena* in the instant case. *First*, the Coast Guard is an authority of the Port. It is submitted that the phrase “authorities of the Port” must be interpreted to include authorities exercising quasi-governmental powers over the movement of vessels.\(^{47}\) The Coast Guard is a “body administering business carried on at the port”.\(^{48}\) *Further*, the officer of the Coast Guard was a “member of the defence force” exercising power as an “authorised person” under the Australian Navigation Act, 2012.\(^{49}\) The actions of the officer therefore, were actions of the authorities of the Port.

26. *Secondly*, direct control over the movement of the *Athena* was exercised. The Coast Guard ordered the ship to return to berth, and the order was complied with.\(^{50}\) In *Garston*, it was held that the exercise of powers which the shipowners and shippers submit to, whether legally or not, is the strongest possible evidence of an area falling within the limits of a port.\(^{51}\) Consequently, the legality of the compliance with the order is immaterial to the question of whether the *Athena* had left the loading place. In the instant case, the order of the Coast Guard was complied with and the *Athena* returned to its berth.\(^{52}\) Therefore, the *Athena* was within the “commercial area” of the Port of Hades, and did not “leave the loading place”.

**c. In Any Case, the Ship Was in the Port of Hades for a Year**

27. The fact that the *Athena* was in the Port for a year indicates that it would be absurd to hold that it had left the loading place. An ordinary and reasonable construction of the words “*left the loading place*” would imply departing the Port in a state to perform the voyage.\(^{53}\)

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\(^{48}\) Sec. 4, Customs Act 1901.

\(^{49}\) Sec. 1AA, Navigation Act 2012; Sec. 183UA, Customs Act 1901; Sec. 203C, Customs Act 1901.

\(^{50}\) Correspondence between Jim Payne and President Simmons, Page 57, The Bundle.


\(^{52}\) E-Mail correspondence between the *Athena* and Zeus Ship Operations, Page 58, The Bundle.

\(^{53}\) *Roelandts v. Harrison*, 1854 9 Ex 444; Moir v. Roy, Ex AC 1815 3M&S 461.
Therefore, leaving the loading place would imply commencement of the third stage of the voyage, which did not happen in the instant case.  

28. In *Sharp v. Gibbs*, the Court refused to hold that a ship which had left the limits of a port but was forced to return due to a mutiny should be considered to have “left the port”. This is because the phrase “left the loading place” implies freedom from the perils of the port, which includes freedom from the jurisdiction of port authorities. In the instant case, such freedom was not achieved and the Coast Guard was able to pursue the ship and order it back. Therefore, it cannot be said that the *Athena* had “left” the Port of Hades despite staying in the Port of Hades.

iii. The Statement of Facts does not establish that the Athena had left the Port

29. It is submitted that the Statement of Facts is not mutually endorsed. The evidentiary value of the Statement of Facts cannot be ascertained without its ratification by the Port Authorities or its mutual endorsement by the Charterer.

30. In any case, it is submitted that the Statement of Facts is inconclusive to decide the present dispute. The Statement of Facts merely mentions that the *Athena* had “sailed from” the Port of Hades. The phrase “sailed from” has been held to refer merely to “breaking ground”, without necessarily leaving the port. In *Van Baggen*, the Court established a distinction between “sailing from” and “departing”, holding that a ship could sail from a point within the port, but not depart the limits of the port. Therefore, the fact that the *Athena* had “sailed from” the Port of Hades does not determine whether the *Athena* had left the Port of Hades.

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54 Per Lord Diplock in *The Johanna Oldendorff*, 1974 AC 479.
55 *Sharp v. Gibbs*, 1857 j 1 H&N 801.
57 *High Seas Venture v. Sinom (Hong Kong)*, 2007 EWHC 673.
58 Statement of Facts, Page 54, The Bundle.
[B] **DEMURRAGE HAS CONTINUED TO ACCRUE DUE TO THE ABSOLUTE NATURE OF THE CONTRACT**

31. The *Athena* had not “left the loading place” for the purposes of the demurrage contract. It is submitted that since the loading process was not completed, laytime continued to run till 6th October, 2015 for three reasons. *First*, the contract of demurrage is an absolute contract [i]. *Secondly*, the exception clauses do not apply in the instant case [ii]. *Thirdly*, the Shipowner was not at fault [iii]. Therefore, laytime continued to run till 6th October, 2015 and demurrage is payable.

   *i. The contract of demurrage is an absolute contract*

32. The general rule applicable to contracts of demurrage is that if the charterer agreed to load or unload within a fixed period of time he was answerable for the non-performance of that agreement, whatever the nature of the impediments, unless they were covered by exceptions in the charterparty or arose through the fault of the shipowner.\(^{61}\) The nature of liability of the charterer in a demurrage claim, therefore, is absolute in nature.\(^{62}\)

33. Therefore, the exercise of control over the movement of the ship by sovereign authorities which impedes the loading process does not interrupt the counting of laytime unless it is explicitly excepted for. In *Cantiere Navale Triestina*, the exercise of control over the movement of the vessel by the Russian Government was not excepted for, and it was held that laytime continued to run due to the absolute nature of the contract.\(^{63}\) Similarly, in the instant case, the mere fact that authorities exercising governmental powers restrained the movement of the ship does not automatically interrupt laytime. Consequently, the absolute nature of demurrage indicates that laytime continues to run.

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\(^{62}\) *William Alexander v. Akt Hansa*, 1920 AC 88; *The Dora*, 1925 2 KB 172.

\(^{63}\) *Cantiere Navale Triestina v. Soviet Naphtha Export Agency (The Dora)*, 1925 2 KB 172.
ii. The exception clauses do not apply

34. It is submitted that the interruption to the voyage has not been excepted for. Consequently, laytime continues to run. First, Clause 19 of the Charterparty is inapplicable to the current dispute. The Force Majeure clause in the Charterparty is a generally worded clause.\(^64\) Generally worded clauses do not apply to provisions of laytime and demurrage unless specifically provided for.\(^65\) In The Lefthero, the test laid down was that the amount of clarity needed in a clause to exempt Charterers from paying demurrage cannot be lower than the amount of clarity needed to excuse them from the primary obligation of loading the vessel in a specified time.\(^66\) In the instant case, the generally worded Clause 19 is worded more ambiguously than the “Interruptions to laytime” clause with respect to the obligation of demurrage. Clause 19 of the Charterparty must be constructed in light of authoritative interpretations on similarly worded clauses.\(^67\) Consequently, Clause 19 cannot apply to provisions of laytime and demurrage.

35. Secondly, the “Interruptions to laytime” clause does not except the situation. The interruptions to laytime clause presents an exhaustive list of situations where the running of laytime may be interrupted.\(^68\) The wording of the clause is clear and precise. Further, the absence of any phrase which is capable of interpretation using the principle of *ejusdem generis* is indicative of the exhaustive nature of the list. The instant situation falls under the exception usually referred to as “the restraint of princes”.\(^69\) The “interruptions to laytime”

\(^{64}\) See J. Schofield, LAYTIME AND DEMURRAGE, 219 (6\(^{th}\) edn., 2013).


\(^{68}\) F.D. Ly, Interpretation Clauses in International Contracts, 6 INTERNATIONAL BUSINESS LAW JOURNAL, 719, 756 (2000).

\(^{69}\) The Fontevivo, 1975 1 Lloyds Rep 339; The Dora, 1925 2 KB 172.
clause does not contain this particular exception, which appears to be a deliberate omission.\textsuperscript{70}

Therefore, the contractual intentions of the parties indicate that a situation falling under “\textit{restraint of princes}” would not interrupt laytime. Consequently, laytime continued running.

\textit{iii. The “Fault of the Shipowner” defence cannot be claimed}

\textbf{36.} It is submitted that the RESPONDENT cannot claim the “\textit{fault of the shipowner}” defence for two reasons. \textit{First}, the effective cause of the delay is the cargo on the \textit{Athena}. \textit{Secondly}, the Master was not at fault for the delay.

\textbf{a. The Cargo is the Effective Cause of the Delay}

\textbf{37.} It is submitted that the effective cause of the delay was the cargo on board the \textit{Athena}. The chain of events which resulted in the detention of the \textit{Athena} was triggered by the loading of HLNG on the \textit{Athena}. This is because the cargo on board the \textit{Athena} was declared unlawful and led to the interception of the ship by the Coast Guard. Since the chain of causation flows from the \textit{nature} of the cargo, the Charterer is at fault for triggering it.

\textbf{38.} In an analogous situation in \textit{The Greek Fighter}, the test to determine the effective cause of the delay was “\textit{what triggered the chain of events which led to the delay}”.\textsuperscript{71} In the instant case, the trigger of the chain of events was the loading of HLNG cargo on the \textit{Athena}. The orders to intercept the \textit{Athena} would not have been given but for the presence of the cargo on the ship. The RESPONDENT may argue that the conduct of the Master is the effective cause of the delay. However, any conduct of the Master would not break the chain of causation that originates and flows from the shipment of HLNG on the \textit{Athena}.\textsuperscript{72} Therefore, the effective cause of the delay was the cargo loaded by the RESPONDENT, and no fault can be attributed to the Shipowner.

\textsuperscript{70} Clause 9(e), Voyage Charterparty, Page 35, The Bundle.

\textsuperscript{71} Ulises Shipping Corporation v. Fal Shipping Co (The Greek Fighter), 2006 EWHC 1729; Total Transport Co v. Arcadia Petroleum (The Eurus), 1996 2 Lloyds Rep 408.

\textsuperscript{72} Triad Shipping Co v. Stellar Chartering & Brokage Co (The Island Archon), 1995 1 All ER 595; The Greek Fighter, 2006 EWHC 1729.
b. **The Master was not at fault for the delay**

39. It is submitted that the Master was not at fault for the delay, and therefore the “fault of the shipowner” defence cannot be claimed. *First*, the Coast Guard was exercising authority as an “authority of the Port”\(^73\). The vessel was still within the limits of the Port, and therefore, subject to the territorial jurisdiction of the Hades Coast Guard.

40. In any case, the *Athena* was in the contiguous zone. The *Athena* was just outside the territorial waters of Hades, in the area known as the contiguous zone.\(^74\) The Coast Guard of Hades, as an agent of the Crown, can exercise jurisdiction with respect to matters of “customs, fiscal, immigration or sanitary laws”.\(^75\) In the instant case, the export of a “prohibited good” such as HLNG is a violation of Hades customs law.\(^76\) The Coast Guard can therefore exercise lawful jurisdiction over the vessel.

41. Further, the Coast Guard exercised flag state control. The vessel was a Hades flagged vessel\(^77\), which made it subject to control of the Flag state\(^78\). The order of the Coast Guard to return to port would be a binding order on Hades flagged vessels under international law.\(^79\)

42. *Secondly*, the **CLAIMANT** did not breach any contractual obligation. The “fault of the shipowner” as a defence to a demurrage claim must indicate the “breach of an obligation” by the Shipowner or the people he is responsible for.\(^80\) In the instant case, the Master of the ship did not breach any obligation. There exists an implied warranty that the performance of the contract will be considered lawful performance.\(^81\) The orders of the Coast Guard were issued

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\(^76\) Sec. 4B, Customs Act 1901.

\(^77\) Box 20, Voyage Charterparty, Page 29, The Bundle.


lawfully under Australian law. Non-compliance with these orders would amount to a breach of law. His duty of care extends to ensuring lawful performance, and consequently, compliance with the orders of the Coast Guard. Therefore, the actions of the Master cannot be termed a contractual “fault”. Consequently, laytime continued to run till 6th October, 2015 and demurrage accrued is payable by the RESPONDENT.

IV. THE CHARTERERS ARE NOT ENTITLED TO SALVAGE REWARD

43. On 6th October, 2015, the tugs owned by the RESPONDENT guided the Athena to open waters and released the towlines. The propeller blades of the Athena were tampered with while the ship was at Hades which led to the breakage of both the propeller shafts. The tugs, being in the vicinity rendered assistance to the ship and have claimed a salvage reward. It is submitted that such a claim is invalid for three reasons. First, the arbitral tribunal does not have jurisdiction to hear the claim for the salvage reward [A]. Secondly, the elements required to constitute a salvage service are not satisfied [B]. Thirdly, the assistance provided to the Athena falls squarely within the scope of the towage contract [C].

[A] THE ARBITRAL TRIBUNAL DOES NOT HAVE JURISDICTION TO HEAR THE SALVAGE CLAIM

44. It is submitted that the arbitral tribunal does not have the jurisdiction to hear this claim since it is not a dispute that falls within the scope of the arbitration clause. For a dispute to be subject to arbitration, both, the interpretation of the words used in the clause and the intention of the parties to it, should imply its inclusion within the clause. In the instant case,
both these parameters imply the exclusion of a salvage claim from the scope of the arbitration clause.

45. It is established that the phrase “dispute arising under the contract” refers to disputes that relate to the interpretation and performance of the contract and the rights and obligations created under it. In the instant case, the Charterparty does not contain any clause regarding the provision of salvage services. Therefore, it does not create any rights or obligations with respect to a salvage operation that is carried out by one party for another. Further, the performance of salvage operations cannot be termed as the performance of contractually stipulated obligations. Additionally, the absence of a specific provision is indicative of the parties’ intent to exclude a dispute on salvage from the purview of the arbitration clause. Therefore, the RESPONDENT’s claim for salvage does not fall under the jurisdiction of this tribunal. Consequently, the claim should be determined by the Admiralty Court that has the requisite jurisdiction under Sec. 9 of the Admiralty Act, 1988.

[B] THE CONSTITUTIVE ELEMENTS OF A SALVAGE SERVICE ARE NOT SATISFIED

46. The constitutive elements of a salvage claim are that there should be: [i] a recognised subject of salvage, [ii] which is in a position of danger; [iii] the salvage service must be rendered by a “volunteer”; and [iv] it should be successful in preserving the subject. The constitutive requirements of salvage are cumulative. In the instant case, there is a specialised subject of salvage - the Athena, and the service rendered by the tugs resulted in

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90 Voyage Charterparty, The Bundle.
91 Sec. 9(1), Admiralty Act, 1988.
93 J. Reeder, BRICE ON MARITIME LAW OF SALVAGE, 2 (5th edn, 2011).
the ship being safe.\textsuperscript{95} However since two elements, namely [ii] and [iii] are not met, there is no “salvage”.

\begin{itemize}
  \item[i.] The Athena was not in a position of danger
\end{itemize}

\textbf{47.} \textit{First}, the standard of danger to establish a claim for salvage is that, the danger should be real, sensible,\textsuperscript{96} well founded,\textsuperscript{97} and must not be fanciful or only vaguely possible.\textsuperscript{98} \textit{Admittedly}, in the instant case, the \textit{Athena} has suffered damage by virtue of the loss of propellers. However, the mere fact that a vessel has suffered damage does not put the vessel in a position of danger.\textsuperscript{99} There is no general rule, that where a ship is without any means of propulsion, she is necessarily in danger until she is repaired.\textsuperscript{100} In such a situation the ship would only drift.\textsuperscript{101} In the instant case, loss of propulsion power would result in the \textit{Athena} drifting and not being in a position of danger.

\textbf{48.} \textit{Secondly}, if a vessel is in some difficulty and it could by means of self-help place itself in a situation of safety, it would not be in a position of danger.\textsuperscript{102} In \textit{The North Goodwin Case},\textsuperscript{103} the ship broke free of the vessel towing her and began drifting.\textsuperscript{104} A claim for salvage was made on the basis that the ship was in danger. However, such a reward was denied, stating that the ship was equipped with anchors and could bail itself out of the situation of difficulty. In the instant case, assuming there was a situation of danger, the \textit{Athena} could have dropped anchors and placed itself in a situation of safety, negating danger.

\textbf{49.} \textit{Thirdly}, the standard of danger is whether a reasonable, prudent and skilful person in charge of the venture would refuse a salvor’s help if it were offered upon the condition of his

\textsuperscript{96} Watson v. Firemen’s Fund Insurance Company, [1922] 2 K.B 335.
\textsuperscript{97} J. Reeder, \textit{BRICE ON MARITIME LAW OF SALVAGE}, 49 (5\textsuperscript{th} edn, 2011).
\textsuperscript{98} The Mount Cynthos, (1937) 58 Lloyd’s Rep. 18.
\textsuperscript{99} F.D. Rose, \textit{KENNEDY & ROSE: LAW OF SALVAGE}, 164 (6\textsuperscript{th} edn., 2001).
\textsuperscript{100} The Troilus, [1951] A.C. 820; The Glaucus, (1948) 81 Lloyd’s Rep. 262.
\textsuperscript{102} The North Goodwin (No. 16), [1980] 1 Lloyd’s Rep. 71.
\textsuperscript{103} The North Goodwin (No. 16), [1980] 1 Lloyd’s Rep. 71.
paying a salvage reward. In the instant case, the *Athena* would have dropped anchors and subsequently called for a towage service. Therefore, the master of the *Athena* would have refused a salvor’s help upon the condition of paying a salvage reward.

50. *Fourthly*, it has been held that, despite losing propulsion power, salvage services are not required if the ship is in a “safe place”. A “safe place” has been defined as “a place where the ship can lie in safety even though she cannot be repaired there and may have to remain there for an indefinite time until tugs can tow her away at a fixed contract price for the towage service”. In the instant case, on anchorage, the ship would be in a safe place until tugs arrive and tow it away. Consequently, the element of danger is not satisfied.

   **ii. The service provided by the tugs does not fall under the domain of “voluntary” service**

51. A party’s entitlement to a salvage reward depends upon whether he rendered the service in respect of which he claims “voluntarily”. This means that the service was not rendered by virtue of a pre-existing legal obligation. It is submitted that in the instant case, the tugs provided by Hestug, a business owned by Hestia Industries do not fall within the definition of a “volunteer”.

52. A shipowner is not entitled to claim a reward in respect of services provided by the members of his crew. The employer is not entitled to put forward an independent claim for having in some way provided the personnel who rendered the assistance. Therefore, the RESPONDENT being the owner of the tugs cannot claim a salvage reward.

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53. A salvor is defined as “a person who renders assistance to a ship in distress and has no particular relation to that ship.”

Further, if a service is rendered solely in the interest of self-preservation, it is *prima facie* not a salvage service. A salvor, claiming in substance for the salving of his own property is against reason. In the instant case, the salvors, having chartered the salved vessel for the purposes of carrying cargo, had a relation to the ship.

54. The presence of incidental and ancillary benefits does not entitle someone to a salvage claim if the action was primarily motivated by self-interest. Therefore, in the instant case even though an incidental and ancillary benefit might be conferred upon the *Athena*, the tugs are not entitled to a salvage reward because the same has been done primarily in self-interest.

55. *Admittedly*, in *The Sava Star* it was held that cargo owners, despite having an interest in the salved property will be entitled to a salvage reward. However, the judgment was *per incuriam* the fact that a counter claim could nullify the salvage reward. A circuity of claims should be avoided when a shipowner could make a counter claim against the cargo owner.

In the instant case, a general average claim made by the CLAIMANT would amount to a circuity of claims, and therefore a claim for salvage cannot be maintained.

[C] THE ASSISTANCE PROVIDED TO THE *ATHENA* FALLS SQUARELY WITHIN THE SCOPE OF THE TOWAGE CONTRACT

56. It is submitted that the assistance provided by the tugs is not a salvage service and falls within the ambit of towage service for two reasons. *First*, the towage contract subsisted at the time the assistance was rendered. *Secondly*, the elements required to convert a towage service into that of salvage are not satisfied.

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113 The Collier, (1866) L.R.1 A.& E. 83.


i. The towage contract subsisted at the time the assistance was rendered to the Athena

57. It is submitted that the duties and obligations that the tugs owed to the Athena subsisted while the tugs were rendering assistance to the ship. Standard commercial practice indicates that the cesser of a towing contract occurs when (i) either “the final order from the tow to cease holding, pushing, pulling, moving, escorting, guiding or standing by the tow or to cast off ropes wires or lines have been carried out” (ii) or when “the towing line has been finally slipped”, whichever is the latter of the two.\(^{117}\) In the instant case, the towing lines have been released.\(^{118}\) However, the final order by the ship was not given at the time of releasing the towlines and was given at a later point of time. Therefore, the towage contract subsisted even after the towing lines were released.

58. It is submitted that the tugs were merely standing by when the Athena realised that the both its propeller shafts had broken. On such an occurrence, only the ship could have realised the breakage and communicated the same to the tugs. Standard commercial practice indicates that a towage contract begins when a “tug is in a position to receive orders”,\(^{119}\) which has been interpreted to mean “a physical position which is within hailing distance.”\(^{120}\) It is submitted that for a final order to be given to the tugs, such tugs should also have to be in a position to receive orders. The conclusion of a towage contract would be on the rendering of such a final order or when the tug is no longer in a “position to receive” such an order. Therefore, the final order of the Athena to render assistance was given when the tugs were in the vicinity. Consequently, the towage contract subsisted at the time of rendering assistance.

59. Further, if a position of danger arises by some cause outside the contemplation of the contract, it is the duty of the tug to stand by the tow and to do all that she reasonably can to

\(^{117}\) Clause 1(b)(iv), The U.K. Standard Conditions for Towage and Other Services, 1986.
\(^{118}\) The Hades Advocate, Page 71, The Bundle.
take care and protect the ship.\textsuperscript{121} Even if the vessel was in danger, it is the duty of the tug to not leave the vessel until she is in a safe place.\textsuperscript{122} Therefore, the assistance by the tugs falls within the scope of the towage contract.

\textit{ii. In any case, the elements required to convert a towage service into that of salvage are not satisfied}

60. In order to constitute a salvage service by a tug under contract to tow, two elements are necessary. \textit{First}, the tow must be in danger by reason of circumstances which could not reasonably have been contemplated by the parties. \textit{Secondly}, risks must be incurred or duties performed by the tug which cannot be reasonably held to be within the scope of the contract.\textsuperscript{123} It is submitted that in the instant case, both these elements are not met.

a. \textbf{The \textit{Athena} is not in a position of danger}

61. As is submitted above, the \textit{Athena}, by virtue of losing both her propellers is not in a position of danger.\textsuperscript{124} In any case, a possible danger resulting from the loss of propulsion power is something that could not have been reasonably contemplated by the parties.

b. \textbf{The assistance provided by the tugs can reasonably be held to be within the scope of the towage contract}

62. The test to determine whether the assistance provided is within the scope of the towage contract or if it converts to a salvage service is to determine whether it would require from the tugs, a service of a different class;\textsuperscript{125} not merely in quantity, but in quality, from


\textsuperscript{124} See IV(B)(i), Written Submissions for the \textbf{CLAIMANT}.

\textsuperscript{125} The Glenbeg, (1940) 67 Lloyd’s Rep. 437.
what they were engaged to do.\textsuperscript{126} The towage contract cannot be changed into salvage merely because some unexpected incident takes place in the course of the towage.\textsuperscript{127} A little departure from the exact mode of performance should not bring about the conversion.\textsuperscript{128}

63. In the instant case, the \textit{Athena} lost both her propellers, which did not lead to a situation of danger but which would lead to the ship drifting in open waters. In this situation, the tugs would attach the towlines and tow the \textit{Athena}. Therefore, the service provided by the tugs would not be that of a different class, but would be of a character akin to ordinary towage. It has been held that in simply putting out a line to the ship and towing her clear, the tug had not incurred risks or performed duties outside the scope of those contemplated by the contract.\textsuperscript{129} Consequently, the assistance provided by the tugs is reasonably within the scope of the towage contract.

\textbf{PRAYER}

In light of the above submissions, the \textbf{CLAIMANT} requests the Tribunal to declare:

1. That the Tribunal has jurisdiction to rule on the frustration issue.
2. That the Charterparty is not frustrated due to delay.
3. That the \textbf{RESPONDENT} is liable to pay demurrage.
4. That the Tribunal does not have jurisdiction to rule on the salvage reward.
5. Alternatively, that the \textbf{RESPONDENT} is not entitled to salvage reward.

And it is therefore prayed for the following reliefs:

1. US$ 17.9 Million as demurrage.
2. Other costs or relief as the tribunal may deem fit.

\textsuperscript{126} The Domby, (1941) 69 Lloyd’s Rep. 161.
\textsuperscript{127} The Domby, (1941) 69 Lloyd’s Rep. 161.
\textsuperscript{128} The Liverpool, [1893] P. 154.
\textsuperscript{129} The North Goodwin (No. 16), [1980] 1 Lloyd’s Rep. 71.