IN THE MATTER OF AN ARBITRATION HELD IN EXETER

Claimant/Owner / Counter-Defendant
Zeus Shipping and Trading Company

AND

Respondent/Charterer / Counter-Claimant
Hestia Industries

MEMORANDUM FOR THE OWNERS
TEAM Nº.17

Belen Combarros Gomez
Tania Dias Do Vale
Elia Raboso Pantoja
Stephanie Restrepo Ramirez
Sara Soto Velasco
Carmen Zulueta Solera
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STATEMENT OF FACTS

1. The Claimant, Zeus Shipping and Trading Company, is the owner of the vessel the *Athena*, a vessel with the latest technology to be able to safely transport LNG produced from Hades Shale Gas. The feature of the *Athena* is her ability to re-liquefy boil off gas. The vessel was flagged with the Hades flag.

2. On 21 July 2014, the Claimant entered into a Voyage Charterparty for the carriage of the cargo, Liquified Natural Gas (LNG) on the vessel from the Port of Hades to the Port of Poseidon.

3. The *Athena* left Poseidon and arrived to the Port of Hades on 3 October, and proceeded with the loading of the Cargo. As a consequence of the intent to export the LNG, protests broke down at the Port of Hades.

4. The Cargo was loaded onto the vessel between the dates 3 and 6 October 2014.

5. Unexpectedly, on the 7 October 2014, Jacqueline Simmons took control of the Parliament and the first thing she did was ordering Captain Payne, from the Coast Guard of Hades, to stop the *Athena* from leaving the Port of Hades.

6. That same day, the Coast Guard managed to intercept the vessel, and the Captain of the *Athena*, Captain Marcus Yi, prudently decided to sail back to the port. Captain Yi decided not to disobey Presidential Decree Orders from Jacqueline Simmons, since the vessel was carrying the flag of Hades.

7. On 15 April 2015, the Claimant reported information to the Respondent anticipating the delay of the vessel due to the cargo. The Claimant stated that laytime was still running and when exhausted, the Respondent would have to pay demurrage in the amount of 184 days @ US$50,000/day, totalling US$9.2m.
8. On 30 April 2015, the Respondent refused to pay demurrage in accordance to the Charterparty, which was claimed by the Claimant on 15 October 2015.

9. On 30 September 2015 President Simmons resigned. As a result of the political change, on 5 October 2015, the *Athena* was released by the Coast Guard. The Claimant, following its obligations under the Charterparty, commenced the preparations of the *Athena* to sail from Hades to Poseidon: the Master of the vessel contacted the Claimant, asking which tug it should use for towage services. The Claimant requested that the provider Hestug to be used.

10. On 6 October the *Athena* left Hades Port. Consequently, demurrage ceased to accrue. The Claimant sent an updated invoice of the total demurrage claim (358 days @ US $50,000/day totalling US $17.9m).

11. On 6 October the Claimant hired Hestug, its preferred towage company to perform towage services to the *Athena*. Just after the lines were released, her shaft propeller broke as a result of sabotage at Port of Hades. Accordingly, Hestug towed the *Athena* back to the port.
PART ONE: JURISDICTION

I. THE TRIBUNAL HAS JURISDICTION TO HEAR THE MERITS OF THIS DISPUTE

A. The Tribunal has the power to rule on its own jurisdiction

1. It is a well-established principle of international arbitration that an arbitral tribunal has an inherent power to rule on its own jurisdiction, including questions as to the validity of the arbitration agreement. The Claimant therefore argues that this tribunal has the power to rule on its own jurisdiction.

B. The Charterparty contains a valid Arbitration Agreement, which specifies London as the seat

2. The Claimant and the Respondent concluded a Charterparty on 21 July 2014 at Poseidon, which contains an arbitration agreement.

3. Clause 30 of the Charterparty specifies London as the seat of the arbitration. Consequently, English Arbitration Act 1996 provisions apply to these proceedings. Such clause refers the disputes under the contract to arbitration, in accordance with the requirement established in Section 6 (1) of the Arbitration Act 1996, as it states “arbitration agreement» means an agreement to submit to arbitration present or future disputes”.

4. Furthermore, under Section 5 of the English Arbitration Act 1996, arbitration agreements must be made in writing regardless of it being signed by the parties or not. The parties have validly fulfilled this requirement when they embodied said

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1 English Arbitration Act 1996 Section 30
2 Moot Case, p. 29 – 49
3 Moot Case, p. 45
4 English Arbitration Act 1996 Section 2(1)
agreement in writing into the Charterparty.

II. THE CLAIM FOR DEMURRAGE IS ADMISSIBLE IN THIS ARBITRATION

5. In regard of the scope of the arbitration agreement, according to Clause 30 of the Charterparty⁵, “any dispute arising under this contract shall be referred to arbitration”. The wording “arising under” has been interpreted as to include any dispute in connection with the contract⁶. Therefore, it is a term, as stated in the case *L Brown v Crosby Homes (2005)*⁷, clearly wide enough to comprise any disputes based on the contract’s contents or its provisions.

6. Disputes such as demurrage are clearly included within the arbitration procedure, as the Respondent admitted in the Letter of 16 July 2014. Hence, demurrage is a claim which arises under the Charterparty⁸, included within the arbitration agreement and, ultimately, a matter to be solved by the Tribunal.

III. THE TRIBUNAL HAS JURISDICTION TO DECIDE ON THE MERITS OF THE CLAIM INCLUDING FRUSTRATION

7. The Respondent argues that the contract was frustrated by the 30th April 2015 and, consequently, that the questions of frustration and, hence, of demurrage shall be determined by the courts of Poseidon, as falling beyond the arbitration agreement⁹. The Claimant, on the contrary, contends that (a) even if the contract was frustrated, the arbitration agreement is still valid and binds the parties, as being separable from the rest of the Charterparty. (b) Frustration is within the scope of the arbitration agreement, and any issues based on frustration with regard to the claim on

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⁵ *Moot Case*, p. 45
⁷ *Brown (L) & Sons Ltd v Crosby Homes* (North West) Ltd, [2005] EWHC 3503 (TCC).
⁸ *National Shipping Company of Saudi Arabia v BP Oil Supply Company* [2011] EWCA Civ 1127.
⁹ *Moot Case*, p. 73
demurrage must be solved by this arbitral tribunal.

A. Even if the contract was frustrated the arbitration agreement is still valid and binds the parties, as being separable from the rest of the Charterparty

8. In *Heyman v Darwins Ltd*[^10^] Viscount Simon L. C. established that the arbitration clause survives the frustration of the contract, by precisely referring to an arbitration clause that relates to an arbitration dispute “«in respect of,» or «with regard to,» or «under» the contract”:

9. “I do not agree that an arbitration clause expressed in such terms as above ceases to have any possible application merely because the contract has “come to an end,” as, for example, by frustration. In such cases it is the performance of the contract that has come to an end.” Therefore, the arbitration clause shall be considered applicable.

10. Accordingly, even if the Claimant considers the contract frustrated, the arbitration clause, is effective. Section 7 of the English Arbitration Act clearly establishes the validity of the arbitration clause even if the main contract is regarded as non-existent. As a result, frustration does not affect the arbitration clause. Since demurrage is included in the matters that must be resolved by an arbitral tribunal, the arbitral tribunal has jurisdiction to hear on the merits of the case.

B. Frustration is within the scope of the arbitration agreement, and any issues based on frustration with regard to the claim on demurrage must be solved by this arbitral tribunal.

11. Additionally, Viscount Simon L. C. also argued[^11^] that when the arbitration clause is construed as “arising under”, referring to the *Hirji Mulji* case, frustration should be

[^10^]: *Heyman v Darwins Ltd* [1942] AC 356
considered under the scope of the arbitration agreement:

12. “[...] in a situation where the parties are at one in asserting that they entered into a binding contract, but a difference has arisen between them [...]whether circumstances have arisen which have discharged one or both parties from further performance, such differences should be regarded as differences which have arisen “in respect of,” or “with regard to,” or “under” the contract, and an arbitration clause which uses these, or similar, expressions should be construed accordingly.[...]Ordinarily speaking, there seems no reason at all why a widely drawn arbitration clause should not embrace a dispute whether a party is discharged from future performance by frustration, whether the time for performance has already arrived or not.”

13. Since demurrage is included within the matters that must be resolved by an arbitral tribunal, the Claimant states that the Tribunal has to resolve any issues relating to frustration of the contract upon which the Respondent may rely with regard to the claim. Therefore, the arbitration clause is enforceable, regardless of frustration and confers this. Thus, the arbitral tribunal has with jurisdiction to hear on the merits of the claim.

IV. THIS TRIBUNAL LACKS JURISDICTION UPON THE COUNTERCLAIM RELATING TO SALVAGE REWARD

14. The Claimant denies the possibility of submission to arbitration in these proceedings of the counterclaim made by the Respondent. Such contention stands on the grounds that the matter of salvage does not arise under the contract, and that there is no agreement between the parties to submit the salvage counterclaim to this tribunal.
A. Salvage does not arise under the Charterparty.

15. The content of this counterclaim is not a matter that arises under the Charterparty. As the Respondent itself stated in its letter of 14 July 2014 “we are not prepared to arbitrate disputes that relate to but do not arise out of the terms of the Charterparty”\(^\text{12}\).

16. While there are some provisions in the Charterparty that relate to the obligations for the Respondent and the Claimant in case of salvage of the chartered vessel (e.g. Clause 21: General Average and New Jason Clause), the counterclaim made by the Respondent relies upon an entirely different (alleged) legal relationship of salvage, completely unrelated to the Charterparty, its contents and its consequences.

17. The vessel had contracted the towage services and had an independent relationship with Hestug, not related to its contract with the Respondent. Consequently, the Claimant holds that this tribunal does not have jurisdiction to decide on the counterclaim. Also, in the English Arbitration Act 1996\(^\text{13}\), it is required for a valid arbitration agreement to be in written form, which isn't either the case.

B. There is no separate arbitration agreement or legal grounds providing this Tribunal with jurisdiction over this matter

18. The Respondent replied to the Claimant's first draft for the Charterparty as to be in disagreement with the arbitration clause\(^\text{14}\). Therefore, a change was proposed and accepted by both parties finally entering into the contract.

19. Since the matter of the counterclaim does not arise under the Charterparty, nor it contained a special provision to submitting this matter to an arbitration procedure, the Claimant denies the jurisdiction of the tribunal to decide over a salvage dispute.

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12 Moot Case, p. 25
13 English Arbitration Act 1996, Section 5(1)
14 Moot Case, p. 25
20. Furthermore, there are no legal grounds that provide this tribunal with jurisdiction to decide over an alleged salvage controversy between the parties.
PART TWO: MERITS

I. THE CHARTERPARTY IS STILL IN FORCE

21. The parties agreed upon and validly concluded a Voyage Charterparty. The Charterparty has never been frustrated. Thus, as soon as the Coast Guard released the *Athena*, the Owner and the persons acting on its behalf, commenced preparations to sail from Hades to accomplish their obligations under the contract. Consequently, the Charterparty and the claims made in connection with it are still valid.

II. DEMURRAGE SHALL BE PAID

A. Under Clause 10 of the Charterparty demurrage shall be paid

22. The *Athena* arrived at the Port of Hades on 3 October 2014 and proceeded with Cargo loading. According to Clause 9(c) (i) of the Charterparty, the time permitted for loading was 10 WWD SHINC, calculated from when the Notice of Readiness was tendered (3rd October 2014) until the vessel left the Loading Place\(^\text{15}\). Notice of Readiness was validly given on 3 October 2014\(^\text{16}\). The loading of the Cargo was completed on 6 October 2014\(^\text{17}\). However, the *Athena* could not leave the Loading Place since she was prevented from departing by Hades Coast Guard, due to the Cargo.

23. The Claimant surely confirms that the *Athena* did not leave the Loading Place, but due to the multiple controversies regarding the vessel’s position by the time of the interception, it would be prudent to boost some clarifications. The Master of the

\(^{15}\text{Moot Case, p. 34}\)
\(^{16}\text{Moot Case, p. 51}\)
\(^{17}\text{Moot Case, p. 54}\)
Athena, Captain Yi, prudently followed the instructions of the Coast Guard since the Athena was carrying the flag of Hades. Under UNCLOS, the flag State (the country in which the ship is registered) “shall assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew”18. Moreover, ships shall be subjected to the exclusive jurisdiction of its flag State when sailing on the high seas19. Hence, the Master of the Athena could by no reasonable means defy the order given by the Coast Guard, as it would have been against the law. Therefore, the Master had to direct the vessel to return to Hades port.

24. Consequently, as the Athena did not leave the Port of Hades, time permitted for loading established in Clause 9 of the Charterparty continued to run. When said laytime was exhausted, the Claimant requested the appropriate demurrage rate to the Respondent in two occasions20.

25. Clause 10 of the Charterparty21 provides demurrage to be payable over and above the laytime allowed at the Loading Port. Demurrage can be characterised as an agreement to liquidated payment for detention of the vessel22. Moreover, in Lockhart v Falk23, it was suggested that “the word demurrage no doubt properly signified the agreed additional payment for an allowed detention beyond a period either specified in or to be collected from the instrument; but it has also a popular or more general meaning of compensation for undue detention” 24. Therefore, demurrage is to be defined as an agreed payment for extra laytime25.

18 UNCLOS, Article 94.2.(b)
19 UNCLOS, Article 92.1
20 Moot Case, p. 64 & p. 70
21 Moot Case, p. 36
23 Lockhart v Falk (1874-75) L.R. 10 Ex. 132
24 Ibid, 135
After establishing these facts, it is clear that no interruption to laytime has occurred since the *Athena* arrived to Port of Hades, and that she has been detained beyond the agreed laytime. Accordingly, under the obligations of the Charterparty, the Respondent is liable to the Claimant. The latter is entitled to the demurrage rate for the number of extra days, 358 days, totalling to an amount of US$17.9 million.

**B. Alternatively, the Respondent owes the amounts claimed as demurrage by virtue of the "extra-contractual detention" rule.**

If the Tribunal considers that the Respondent does not owe demurrage according to the Clause 10 of the Charterparty, as well as if the Tribunal considers that the contract is frustrated, the Respondent owes demurrage by virtue of the extra-contractual detention rule. The Claimant contends that the detention of the *Athena* in the Port of Hades ought to be considered beyond the framework of the Charterparty, since the immobilization of the *Athena* is independent from the discharge of the cargo. Furthermore, detention is to be considered an extra-contractual matter when the utilization of the vessel is made outside the loading and unloading operations, or the purposes of the Charterparty.

Accordingly, the Charterers have caused the Owners an economic loss, since they have any attempt to discharge the Cargo. The Cargo was left in the *Athena* for six months, using her as a "floating warehouse", which prevented the Owners from performing other voyages in the vessel.

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26 *Moot Case*, p. 70
The Charterers have used the *Athena* for purpose which was not contemplated in the Charterparty. Thus, the Charterers should compensate the Owners, otherwise there would be an unjust enrichment of the Charterers in expense of the Owners. The Owners indemnity should be calculated at demurrage’s rate, since demurrage is a compensation for the extra usage of the vessel and should be consequently deemed an accurate estimate of the economic loss caused, as a fair refection of the market price that the cargo capacity of a vessel like the *Athena* has. Therefore, the Owners claim for an amount of US$17,9 million.

**III. THERE IS NO FRUSTRATION OF THE CONTRACT AS THE ACTIONS OF THE CLAIMANT AT MOST CONSTITUTED SELF-INDUCED FRUSTRATION**

29. A party cannot rely upon frustration of the contract if the event that prevents performance is brought about by its own election, act or default; in other words, a party cannot rely on “self-induced” frustration. As described in *The Hannah Blumenthal*29: “The essence of frustration is that it is caused by some unforeseen supervening event over which the parties to the contract have no control and for which they are therefore not responsible [...]. The doctrine has no application and cannot be invoked by a contracting party when the frustrating event was at all times within his control; still less can it apply in a situation in which the parties owed a contractual duty to one another to prevent the frustrating event occurring”.

30. As Lord Sumner has expressed “reliance cannot be placed on self-induced frustration”30. Therefore, frustration cannot arise out of the conduct of one party seeking to rely on it. In this case, the party concerned had relied on the delay as a

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29 Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal (The Hannah Blumenthal) [1983] 1 All ER 34
30 Ibid
cause of frustration, similar to the Respondent’s position.

31. The Respondent could have foreseen the potential risk of transporting the Hades Liquefied Natural Gas (HLNG) to Poseidon brought to the effective execution of the contract. Regarding the information released, it was clear that the cargo was the subject of controversy and turmoil around the City State of Hades, especially in its Parliament, and at its port\(^{31}\). As a Hades national, Hestia, subject of political and public anger, knew about the risks of performing the voyage. Nevertheless, it did not inform the Claimant accurately, who was justifiably unaware of the seriousness of the events, and therefore, could not reasonably have anticipated or foreseen the risks of the situation.

32. Furthermore, Hestia’s acts are not consistent with the frustration of the contract alleged by it according to the Estoppel doctrine. The Respondent did not plead frustration when the Athena started the journey to Poseidon months later and it did provide towage services to the vessel when the propeller shaft broke.

33. By its behavior, Hestia deliberately ignored the above-referred facts and kept on with the contract. This constituted an event which the Respondent could have prevented but, nevertheless, caused or permitted in order to rely on it. Hestia did not exercise its obligation to act with the needed due diligence that both the contract and the adventure required. This (a) led to the impossibility to perform the contractual obligation because of the cargo and (b) constituted an event foreseeable by the Claimant. Finally, the Respondent tacitly consented the performance of the contract when the vessel was released, thereby contradicting all its assertions based on frustration.

\(^{31}\) Moot Case, p. 52
A. Impossibility to perform the contractual obligation

34. In a Voyage Charterparty it is a well-established rule that the liability of the cargo relies on the charterer. Therefore, if there is an impossibility to perform the contractual obligations because of the cargo, the responsibility for it will rest on the charterer, here, Hestia. Case law supports that if it is impossible to perform a contractual obligation, then it will be considered frustrated. But this principle does not apply if the impossibility can be attributed to either of the parties. In the case *DGM Commodities Corp v. Sea Metropolitan S.A* [2012] EWHC 1984 (Comm), Mr Justice Popplewell, rejected the intention of the Charterers to rely on frustration in order to be relieved from paying demurrage, since the frustrating event alleged was caused by their own conduct. As a result, the conduct of the party prevented the performance of the contractual obligation.

35. Accordingly, the blame falls upon Hestia, as the cause for the impossibility to perform the contractual obligation was of its conduct and cargo, Hestia’s responsibility. Moreover, Hestia knew that the building of the HNLG plant and the gas export was causing political unrest in Hades, to the point that an ecological group publicly revealed their intentions to prevent the gas exports before the contract was signed. Nevertheless, it did not inform the Claimant of the political turmoil, and continued with the constitution of the contract assuming, thereby, the inherent risk thereto.

36. Furthermore, the Claimant considers that the Respondent failed on the obligation to name a safe port, as stated in the Introduction and in Box 5 of the Charterparty.

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32 *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal (The "Hannah Blumenthal")* [1983] 1 All ER 34, at 44
34 *Moot Case*, p. 26
35 *Moot Case*, p. 29 & 30
The safe port warranty is a promise given by the charterer that the chartered ship would be employed between safe ports\textsuperscript{36}. Once the Charterer undertakes the obligation to provide a safe port, it declares that said port is safe starting from the time of nomination and that it would remain as such during the whole voyage\textsuperscript{37}.

37. The definition of safe port was given by Sellers LJ in \textit{The Eastern City}\textsuperscript{38}: “a port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship”\textsuperscript{39}. Additionally, a port’s safety nor its state are merely a matter of fact at the time of the nomination; the potential risks related to the use of the port should also be taken into account\textsuperscript{40}.

38. Blackburn J held in \textit{Ogden v Graham}\textsuperscript{41} that “if a certain port be in such a state that, although the ship can readily enough, so far as natural causes are concerned, sail into it, yet, by reason of political or other causes, she cannot enter it without being confiscated by the Government of the place, that is not a safe port within the meaning of the charterparty”. Hence, political unsafety is a well-justified reason to name an alternative port.

39. To conclude, the situation happening at Hades Port is not to be considered of unexpected or abnormal occurrence for the Respondent, since the protests that eventually led to the circumstances preventing the \textit{Athena} from leaving the port were certainly know to the Respondent before her arrival. The Respondent should have named a safe port under the Charterparty. The Port of Hades was proved to be

\textsuperscript{36} Scrutton on Charterparties and Bills of Lading, Sweet & Maxwell, London, 2011
\textsuperscript{38} The Eastern City [1958] 2 Lloyd’s Rep 127
\textsuperscript{39} Ibid at 131
\textsuperscript{41} Ogden v Graham (1861) 1 B. & S.
unsafe due to political causes at the moment when the vessel was about to leave from Hades. Therefore, the Respondent is liable for the breach warranty to name a safe port.

40. Consequently, it was Hestia’s conduct and cargo the first and ultimate reasons why the adventure could not have been executed and, for some reason, frustration cannot be deemed to exist in this case as the events constituted a de facto self-induced frustration by the Respondent.

B. Foreseeability of the event by the Respondent

41. In order to apply the impossibility to perform the contractual obligations, it is necessary to prove that the Respondent foresaw that the public and political unrest were because of the cargo and it could escalate to preventing the export of the HNLG gas. The Respondent was fully aware of the commotion and revolt that the production and transport of HLNG carried and the risk that this situation could attain. Thus, Hestia could have foreseen that this fact would end up jeopardizing the contract subscribed with the Claimant and bringing it to an end. In Walton Harvey Ltd v Walker & Homfrays Ltd42 it was stated that if the occurrence of the frustration event is foreseen or foreseeable by one party but not by the either, the normal inference, it is submitted, will be that such risk is taken by the former party. As it was explained earlier in the Claim, the Respondent as a Hades national, was aware of the political unrest, contrary to the Claimant, as it is a foreigner. As a result, the risk was taken by the Respondent, and therefore it cannot rely on frustration.

American case law has shown that the effect of government regulations on contracts cannot be a ground of discharge since the alleged risks were known, not unanticipated or not shown to be reasonably unforeseeable by the party claiming

42 [1931] 1 Ch 274
discharge\textsuperscript{43}.

IV. ALTERNATIVELY, FRUSTRATION AROSE ON 30 APRIL 2015 BUT THE RESPONDENT IS LIABLE FOR THE DEMURRAGE ACCRUED UNTIL 15 APRIL 2015.

42. Alternatively, in case that the Tribunal considers frustration as previously alleged with \textit{The Hannah Blumenthal} and, consequently, performance of the Charterparty according to its terms became impossible, or the commercial purpose of the adventure for which the charterer provided became impossible of attainment, frustration arose not before the 30 April 2015, when Hestia communicated this fact to the Respondent via email.

43. If the events alleged by Hestia constituted frustration by delay, in any case it can be determined to have arisen at the time the vessel was prevented from leaving. According to Clause 9 of the Charterparty, the Respondent is liable for demurrage accrued after the time permitted for loading, calculated from NOR until the vessel leaves the Loading Place. The Claimant sent a valid NOR on 3 October 2014\textsuperscript{44} and the loading of the cargo was completed on 6 October 2014\textsuperscript{45}. The vessel could not leave the loading place because she was intercepted and prevented to leave the Port of Hades by the Coast Guard\textsuperscript{46}. The Claimant diligently informed to the Respondent of the delay caused by the Cargo. The Respondent was informed that laytime continued to run, since the vessel could not leave the loading place.

44. In this case, the Charterparty would have been frustrated at a later stage when it emerged that the effect of the event became more likely to be more severe than originally anticipated. This later stage was the 30 April 2015, day in which the

\begin{footnotesize}
\begin{enumerate}
\item Treitel, G., \textit{Frustration and Force Majeure}, 3\textsuperscript{rd} Ed, Sweet & Maxwell, 2014, p. 509
\item \textit{Moot Case}, p.51
\item \textit{Moot Case}, p. 54
\item \textit{Moot Case}, p. 57
\end{enumerate}
\end{footnotesize}
Respondent sent an email to the Claimant informing about the unilateral determination to consider the frustration of the adventure and thus, the Charterparty.

45. Frustration shall be alleged by the party concerned. The Respondent did not allege the frustration of the Charterparty until 30 April 2015. Thus, if the frustration argument is embraced by the Tribunal, it did not happen before 30 April 2015. The question of sums due, such as demurrage, is therefore governed by common law, which provides for them to be recoverable for any period up to the date of frustration, as Lord Summer said in *Hirji Mulji v Cheong Yue Steamship Co.*\(^47\).

Furthermore, in *Petrinovic & Co Ltd v Mission Francaise des Transports Maritimes*\(^48\) and *Gem Shipping Co. of Monrovia V. Babanaft (Lebanon) SARL (The Fontevivo)*\(^49\), Donaldson J argued that when the contract of carriage was at an end, laytime would also cease to run. As a consequence thereof, the Respondent is liable for demurrage accrued until 15 April 2015 (184 days @ US$50,000/day = US$9.2m), when frustration was alleged.

V. **HESTIA IS NOT ENTITLED TO CLAIM SALVAGE REWARD**

**A. The International Convention on Salvage 1989 applies to the case**

46. In the light of article 2 of the ICS 1989, the preceding convention shall apply to arbitral proceedings concerning salvage claims that are brought in a State party. Since United Kingdom is a State Party of the ICS 1989, it applies to the case\(^50\).

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\(^47\) *Hirji Mulji v Cheong Yue Steamship Co* [1926] AC 497

\(^48\) *Petrinovic & Co Ltd v Mission Francaise des Transports Maritimes* [1941] 71 Lloyd’s Rep. 208; *Error! Marcador no definido.*

\(^49\) *Gem Shipping Co of Monrovia v Babanaft (Lebanon) SARL (The Fontevivo)* [1975] 1 Lloyd’s Rep. 339

B. Lack of right to claim the reward

47. The concept of salvor as defined in *The Neptune*\(^{51}\) is "the one who, without any particular relation to the ship in distress, proffers useful service and gives it as a volunteer adventurer without any preexisting covenant that connected him with the duty of employing himself for the preservation of that ship".

48. The alleged salvage aid provided to the Claimant was given by the company whom he had contracted with for towage services: Hestug\(^{52}\). Even if the tugs were a business owned by the Respondent, it should be Hestug to claim the salvage reward independently under different proceedings.

49. In this case, had there been any salvage, it would be Hestug's right to initiate a process to claim a reward, which cannot be assumed by the Respondent. Businesses in a corporate group are tied by economic dependence, but have legal independence, by which, under English law, Hestug has capacity to make its own claims.

50. The Claimant contends that the Respondent is making an illegitimate claim as it was not the one to provide the services directly, but a business under their group with independent personality as to make judicial claims. The ICS 1989 does not give the Respondent a right to claim reward as salvor, even if there was a salvage.

C. Services provided to the *Athena* do not constitute salvage.

51. The Claimant contends that the services rendered on 7 October by Hestug to the *Athena* do not constitute salvage. Therefore, the Respondent is not entitled to claim a salvage reward on the grounds that (a) the vessel was not in real danger and (b) there was an existing contract between Hestug and Zeus.

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\(^{51}\) *The Neptune* (1824) 1 Hag Adm 227

\(^{52}\) *Moot Case*, p. 71
a) The vessel was not in real danger

52. It is well established not only by the ISC 1989 in its Article 1 but also by case law that the vessel must be in danger at the time that the services are taking place\(^5^3\), as far as the existence of a danger is concerned. It is also a well-settled rule of law that danger must be assessed taking into account all the precise circumstances of the case\(^5^4\). As a result, the assessment of the existence of sufficient danger to hold a claim for salvage must be based on an objective test based on the principle that there is danger when a reasonable man would not refuse the salvage upon the condition of paying a reward\(^5^5\).

53. In the present case, the Claimant contends that, in spite of the fact that the propeller shaft broke, the vessel was able to maintain her position and to keep the cargo safe. Moreover, the Tribunal is requested to consider that the Athena is one of the newest vessels with the latest technology\(^5^6\) that along with the good weather conditions under which the event took place, contributed to the vessel stability and safeness.

54. In addition, it must be taken into account the proximity of the vessel to the berth as well as the fact that the events took place near of the Port of Hades\(^5^7\). All these arguments considered, it is clear that under these circumstances no reasonable seaman would have accepted salvage services. As a result, the Athena was never in real danger.

b) The services were not voluntary

55. The Claimant contends that the service renderer by Hestug were not voluntary in the


\(^{55}\) The owners of the Sea Tractor v The owners of the ship Trump (The Trump) [2007] 2 Lloyd’s Rep 363

\(^{56}\) Moot Case, p.3

\(^{57}\) Moot Case, p.71
sense applicable under salvage law, as they were performed under an existing
towage services contract (b.1). Alternatively, the Claimant argues that the services
were in fact towage services and not salvage (b.2) and, in any case, Hestia has the
duty to diligently care for its property (b.3).

(b.1) The services were rendered within performance of an existing contract

56. Pursuant to article 17 of the ICS 1989, no reward is due if the services were
rendered under an existing contract between the parties. It is a fact that Hestug
services were hired to tow the *Athena* from The Port of Hades\(^{58}\). The Claimant
contends that even if the lines were broken already, the tug contract must be
construed so as to include any service that a reasonable person would expect to be
provided as a result of the relationship. Hence, when the *Athena* suffered a setback
near the port and just after the lines were broken, it is rightfully expected that
Hestug, due to its obligations under the towage contract, must assist her to return to
the port where she could easily be repaired.

57. Furthermore, it is a well-established salvage rule settled in *The Homewood*\(^{59}\) that in
order to constitute salvage by a tow under a towage contract two requirements are
necessary: (1) that the tow must be in danger by reason of circumstances which
could not reasonably have been contemplated by the parties, and (2) that the risks or
the task performed by the tug could not reasonably be within the scope of the
towage contract.

58. In the case, as previously stated, the vessel was never in real danger. In addition,
and facts considered, it is clear that the duty performed was within the scope of the
contract as they merely towed the *Athena* to the Port of Hades and did nothing

\(^{58}\) *Moot Case*, p. 68

extraordinary, beyond what was required or non-contemplated in a towage contract by the parties.

(b.2) The services were towage and not salvage

59. Alternatively, the Claimant contends that even if the Tribunal considers that the previous towage contract between the parties had finished at the time the assistance was provided, Hestug rendered a second towage service.

60. In the *Dimitrios N Bogiazides* 60 the claim of a reward failed on the grounds that the towage of the vessel to Port made by the tug was fast and with no real difficulty. Given the fact that the vessel was not sunk and both aground and as to the good weather conditions and the proximity at port, the services rendered by Hestug cannot be considered as salvage, but they should be deemed towage.

61. In addition, it is a core salvage rule that the most important difference between salvage and towage is the element of danger 61 to the life of the property. Given that the *Athena* was never in danger, the services rendered by Hestug they can only be described as towage.

(b.3) Hestia has the duty to diligently care for its property

62. The Claimant states that Hestia, as the cargo owner, bears a duty to render assistance to preserve its cargo when it is required 62. In consequence, had it been Hestia providing the service or, in any case, given that Hestug is owned by Hestia, it is rightfully expected that Hestug render assistance to the *Athena* while performing towage services or alternatively while being next to the *Athena* when the setback occurred.

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60 *The Dimitrios N. Bogiazides* [1930] 37 LI LRep 27
D. Hestia is not entitled to claim special compensation either

a) There cannot be a special compensation when there is no salvage.

63. As article 14 of the ICS 1989 states, a salvor may be entitled to a special compensation to cover its salving expenses when its performance avoids an environmental disaster, when it has not received a reward under article 13 of the same convention while performing a salvage operation.

64. Since the Claimant denies the existence of a salvage operation for the reasons above explained (the situation of no danger of the vessel, and the coverage by an existing contract), the salvor cannot be entitled to claim any reward (even when a special compensation is independent from the salvage reward).

65. Independently, the Athena was equipped with a technology specially designed to keep the HLNG\textsuperscript{63}, which, since there was no immediate danger, was perfectly safe. Thus, the Respondent makes a counterclaim for a potential danger and potential environmental threat, which is in neither case real at the moment when the tugs provide their services.

b) Article 14 is subordinate to the reward under Article 13.

66. As stated in Nagasaki Spirit\textsuperscript{64}, “although article 14 is undoubtedly concerned to encourage professional salvors to keep vessels readily available, this is still for the purposes of a salvage, for which the primary incentive remains a traditional salvage award [...] the remedy under Article 14 is subordinate to the reward under Article 13”.

67. The Tribunal should decide whether the Respondent has rights arising under Article 13 of the ISC as its promoters “did not choose, as they might have done, to create

\textsuperscript{63} Moot Case, p. 3
\textsuperscript{64} Semco Salvage And Marine Pte Ltd v Lancer Navigation Co Ltd [1997] UKHL 2
*an entirely and distinct category of environmental salvage*\(^{65}\), but to just create an incentive.

E. **Hestia must contribute to the payment of salvage reward.**

68. In the light of the aforementioned, the Claimant submitted that there was no salvage reward due. Nevertheless, even if the Tribunal holds otherwise, it is a firmly established rule that, when it comes to salvage, all those who have benefited from the service must contribute to the payment of the reward\(^{66}\). Further, each part of the salved property must contribute in proportion to its value\(^{67}\). This is a longstanding principle of maritime law that cannot be altered\(^{68}\). Therefore, since Hestug has salved both the vessel and the Respondent’s cargo, the latter must contribute in proportion to the value of the cargo. Consequently, if a reward was awarded, it should be accordingly reduced.

69. The Claimant also contends that even if the Tribunal holds that the *Athena* was unseaworthy, it was due to a latent defect in the machinery. In the light of the facts, it become apparent that while the *Athena* was at the Port of Hades, her propellers were tampered with\(^{69}\) in attempt to sabotage the Charterparty. Thereby, the Respondent must contribute to the payment of the salvage reward proportionally to its property value salved.

70. Additionally, as for assessing the contribution, it must be taken into account that the cargo is of significant value to the Respondent\(^{70}\). Moreover, it must also be taken into consideration that Hestia was going through tough financial circumstances and

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\(^{65}\) Ibid.
\(^{66}\) *The Fusilier* [1864] A.C.; *Tice Towing Line v James McWilliams Blue Line* [1931] 51F.2d 243 (SDNY)
\(^{67}\) Article 13.2 also in case the *M.V. Vatan* [1990] 1 Lloyd’s Rep 336
\(^{68}\) *The Longford* [1881] 6 P.D.; *The Vesta* [1828] 2 Hagg. 189
\(^{69}\) *Moot Case*, p. 71
\(^{70}\) *Moot Case*, p. 61
could not afford any delayed or setback in the performance of its contract\textsuperscript{71}. Consequently, as it is the Respondent who benefits the most from the salvage, it is it who must bear most of the salvage payment.

\textsuperscript{71} Moot Case, p. 26
PART THREE: PRAYER FOR RELIEF

For the reasons set out above, the Claimant requests this Tribunal to:

**DECLARE** that this Tribunal has jurisdiction to hear the merits of the claim relating to demurrage, regardless of frustration; and

**further**

**FIND** that the contract has not been frustrated and the Respondent is liable for demurrage in respect of 358 days, totaling US$17.9 millions, or

*Alternatively,*

**FIND** the amounts claimed as demurrage must be paid by the Charterer on the basis of extra-contractual detention, whether the contract is frustrated or not.

**DECLARE** that this Tribunal lacks jurisdiction to hear the merits of the counterclaim on salvage reward, or

*alternatively,*

**FIND** that the Respondent is not entitled to salvage reward, or

*alternatively,*

**FIND** that any reward payable by the Claimant on grounds of salvage must be reduced and partially bore by the Respondent.