UNIVERSITAS PADJADJARAN
Team 21

MEMORANDUM FOR THE CLAIMANT

ON BEHALF OF
Zeus Shipping and Trading Company
CLAIMANT

AGAINST
Hestia Industries
RESPONDENT

TEAM
FAUZI MAULANA HAKIM
JODY RIYADI KUNTO
MUHAMMAD NUR MAHATMANTA
VALDY ADHA FIREZA
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<td>CARGO</td>
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STATEMENT OF FACTS

1. On 1 July 2014, Hestia Industries (RESPONDENT) sent a correspondence containing a request for a proposal to Zeus Shipping and Trading Company (CLAIMANT) to charter a vessel to ship 260,000 m$^3$ of HLNG (CARGO).

2. On 14 July 2014, CLAIMANT replied, stating that it had purchased the Athena (VESSEL) and was willing to charter it on a per voyage basis. CLAIMANT then sent a proposed form of the contract.

3. On 16 July 2014, RESPONDENT stated that it would like to amend the arbitration clause, indicating that it would not arbitrate disputes that relate to but do not arise out of the terms of the charterparty.

4. On 20 July 2014, a group called Save Hades Group made a statement to The Hades Advocate, a publicly available publication, that ‘they are planning significant protests around the commissioning of the Hestia HLNG plant’ and that they were adamant in their efforts to stop HLNG exports.

5. On 21 July 2014, CLAIMANT sent the finalised charterparty containing an amended arbitration clause. Both parties then agreed on the terms of this finalised contract as the charterparty (CHARTERPARTY).

6. On 3 October 2014, VESSEL arrived at PORT of Hades (PORT). Captain Marcus Yi (MASTER) of VESSEL then sent a notice of readiness to RESPONDENT. The next day, a huge protest erupted at PORT. Loading continued amid the protests. VESSEL set sail at 09.00 A.M on 7 October 2014.

7. On the same day, a coup occurred in Hades. The coup was followed by an order from the new president, Jacqueline Simmons, ordering VESSEL to return to PORT. On 8 October 2014, the Hades coastguard (COASTGUARD) issued a memorandum stating that they had successfully intercepted VESSEL and ordered it to return to PORT on the basis that VESSEL was obligated to comply by virtue of their use of the Hades flag. It is unclear whether or not VESSEL was actually outside Hades territorial limit. VESSEL was then detained by the Government of Hades.
8. On 15 April 2015, CLAIMANT sent an invoice for demurrage, requesting payment in the amount of US$9,200,000 to RESPONDENT. RESPONDENT denied liability, claiming that CHARTERPARTY was frustrated, therefore absolving RESPONDENT of liability. On 30 September 2015, President Simmons, the President of Hades, resigned.

9. VESSEL was released on 5 October 2015 and planned to set sail, but required tugboats in order to do so. MASTER was advised to use Hestug, a company owned by RESPONDENT, for the services required. It was later revealed that that VESSEL’s propellers were damaged, and VESSEL was then assisted by Hestug.

10. On 6 October 2015, CLAIMANT sent another invoice in an amount of US$17,900,000 on the basis of 358 days of demurrage. RESPONDENT further denied liability.

11. On 16 November 2015, CLAIMANT proposed commencing arbitration to resolve the disputes regarding CHARTERPARTY. RESPONDENT replied it was of the opinion that CHARTERPARTY had been frustrated. RESPONDENT further claimed that it was nonetheless entitled to a salvage reward for Hestug’s act of rescuing VESSEL.

I. THIS TRIBUNAL HAS JURISDICTION TO RESOLVE FRUSTRATION DISPUTES

This tribunal has the power to determine its own jurisdiction in accordance with the competence-competence principle. CLAIMANT asserts that this tribunal shall decide ex aequo et bono under the stipulation of Clause 30 (d)(i).

A. Clause 30 acts as a valid agreement on arbitration terms

1. A valid agreement surrounding arbitration terms is made when an arbitration clause is agreed upon. The terms of the clause are flexible. For example, in the case of Tritonia Shipping Inc v.

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1 S 30 (1) UK Arbitration Act 1996
South Nelson Forest Products Corporation, an arbitration clause merely containing the terms “arbitration to be settled in London” constituted a valid arbitration agreement. Other cases also show that courts will enforce similar clauses.

2. The arbitration agreement contained within clause 30 of CHARTERPARTY manifests a similar intention to arbitrate and provision of the seat of arbitration. Clause 30 is therefore indisputably a valid arbitration agreement.

B. The arbitration agreement withstands frustration of contract

3. The doctrine of separability signifies that an arbitration clause in a contract can be separated from the rest of the contract. This reasoning is consistent with the principal that an arbitration clause is not indicative of the purpose of the contract it is contained in, and hence, it survives upon frustration. To void the clause upon frustration would undermine the purpose of its creation, since it is most vital in cases of void contracts.

4. Therefore, even if this tribunal decides that CHARTERPARTY was frustrated, the agreed arbitration clause should survive and both parties are bound to its terms.

C. Frustration falls under the scope of ‘any disputes arising under this contract’

i. The phrase ‘any dispute’ covers frustration disputes

5. ‘Any dispute’ phrases have been interpreted to cover every dispute that parties to the contract are in which relates in some way to the substance of the contract, including frustration disputes.

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7 Heyman v Darwins Ltd [1942] AC 356, per Lord Macmillan p. 374
10 Forwood and Co v Watney [1880] LJQB 447; Re Hohenzollern Aktien Gesellschaft fur Locomotivbahn and City of London Contract Corp [1886] 54 LT 596
11 The Sea Angel [2007] 2 LLR 517, Rix LJ introduces a multi-factorial approach to assess whether or not a contract is frustrated. One of them is the terms of the contract itself.
Even if RESPONDENT argues that frustration disputes are non-contractual because they are not
governed directly by any terms of CHARTERPARTY, ‘any dispute’ extends to cover frustration
disputes regardless.12

ii. The broad interpretation of ‘arising under’ covers frustration disputes

6. CLAIMANT submits that the amendment of the wording of the arbitration clause does not exclude
frustration disputes from the arbitration terms.

7. The Fiona Trust13 stipulates that the phrase ‘arising under’ should be construed liberally and is
broad enough to apply to disputes relating to the existence or legality of the contract.14 It also
dictates that arbitration clauses should be construed in accordance with the presumption that both
parties intend their disputes to be settled by one tribunal. If the parties wish to exclude certain
disputes the above presumption, the intention must be made within the language of the clause.15

8. Accordingly, as there is no exclusion of any dispute, specifically frustration, within the language
of the arbitration clause, the clause must be presumed to cover all disputes between CLAIMANT
and RESPONDENT. It is also submitted that the frustration dispute questions the very existence of
CHARTERPARTY, ergo is within the terms of the arbitration clause.

9. The second claim in this dispute, the demurrage claims, are contractual claims that are
indisputably covered by the arbitration clause. The ‘presumption of one-stop arbitration’
established above would also be undermined if frustration claims were excluded because there
would be two claims arising from the same contract, (frustration and demurrage) that would be
settled in two different proceedings.

10. For these reasons, the phrase ‘arising under’ must be interpreted broadly and thus, the
determination of frustration falls under this tribunal’s jurisdiction.

12The Damianos [1971] 2 All ER 1301 per Langley J; Andrew and Keren Tweedale, Arbitration of Commercial
13Premium Nafta Products Ltd and others v Fili Shipping Company Ltd [2007] UKHL 40
14Id., per Lord Justice Longmore at pp. 17
15Id., per Lord Hoffman
iii. Alternatively, even a narrow interpretation of ‘arising under’ still covers frustration disputes

11. Even if RESPONDENT contends that the phrase ‘arising under’ used in the arbitration clause should be interpreted narrowly, frustration disputes are still within

12. A narrow interpretation of the phrase ‘arising under’, is laid out in the case of Fillite (Runcorn) Ltd v Aqua-Lift.16 Nourse J defined the phrase as claims that result ‘as a result of’ and ‘with reference to’.

13. Frustration without a doubt exists ‘as a result of’ CHARTERPARTY; but for the existence of CHARTERPARTY, there would never be an issue of frustration.

14. Frustration is also a dispute that arises ‘with reference to’ CHARTERPARTY. This is evidenced by the fact that the doctrine of frustration only operates when a frustrating event, which is not provided for by the contract17 and was not caused by either party’s breach,18 renders the performance of the contract impossible.19 The existence of frustration is assessed only with reference to the terms of CHARTERPARTY. Rix LJ in the Sea Angel case concluded it is fundamental to take into account the terms of the contract in determining the contract’s frustration.20 The second test is therefore also fulfilled.

15. It is well established that the question of frustration is included within the scope of the arbitration clause. This is immaterial of whether or not it is interpreted broadly.

D. The 16 July 2014 correspondence does not exclude frustration from the arbitration agreement

i. The exclusion within the correspondence does not exclude frustration disputes

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17 Edwinton Commercial Corporation and Anr v Tsavliris Russ (The Sea Angel) [2007] 2 LLR 517; The Eugenia (Ocean Tramp Tankers Corp v V/O Sovfracht) [1964] 2 QB 226
20 The Sea Angel [2007] 2 LLR 517
16. In the 16 July 2014 correspondence RESPONDENT wrote that it was only prepared to arbitrate disputes ‘...which arise out of the provisions of the charterparty such as a dispute about demurrage’. Further, RESPONDENT added a broad and obscure phrase to exclude: ‘...disputes that...do not arise out of the terms of the charterparty, such as misrepresentation’. 21

17. As argued above, 22 frustration disputes arise ‘with reference to’ the contract, ergo they are disputes that are directly governed by the terms of CHARTER PARTY. Frustration evidentially bears more resemblance to demurrage disputes, which RESPONDENT was prepared to arbitrate, 23 than to misrepresentation. The resemblance is inherent in the fact that both disputes can only be resolved by referring to the terms of the charterparty.

18. Hence, RESPONDENT was in fact prepared to arbitrate frustration disputes according to the terms of the 16 July 2014 correspondence.

ii. Disputes that ‘arise out of and not just relate to the terms of the charterparty’ can be deemed as synonymous with ‘any dispute arising under this contract’

19. The phrase ‘...disputes which arise out of the provisions of the charterparty such as a dispute about demurrage’ used by RESPONDENT in the 16 July 2014 correspondence is synonymous with the interpretation of the phrase ‘arising under’. This is because RESPONDENT did not object to CLAIMANT’s amendment of the arbitration clause to ‘any dispute arising under this contract...’ as a proper clause to embody RESPONDENT’s intention, It is therefore plausible to infer that RESPONDENT agreed that ‘arising under’ and ‘disputes which arise out of the provisions of the charterparty’ have the same meaning.

20. At this point, both the interchangeability of the two phrases and the fact that both the broad and narrow interpretations of the phrase ‘arising under’ cover frustration disputes have been

21 Facts, p. 25
22 Paragraph 14 of this memorandum
23 Facts, p. 25
established. The ultimate conclusion must be that the correspondence dated 16 July 2014 did not exclude frustration from the arbitration agreement.

II. THIS TRIBUNAL’S JURISDICTION DOES NOT EXTEND TO SALVAGE CLAIMS

A. RESPONDENT itself excluded salvage from the arbitration terms

21. If a party wishes to exclude a certain dispute from the terms of arbitration, then the dispute cannot be settled in arbitration no matter how broadly the arbitration clause is construed.

22. In the correspondence dated 16 July 2014, RESPONDENT stated that it is not prepared to arbitrate disputes that ‘do not arise out of the terms of the charterparty.’ 24 The example given by RESPONDENT ‘such as misrepresentation’, supports the fact that it is axiomatic that the wording of the exclusion within the correspondence must be understood to include all disputes that are not governed by the terms of CHARTERPARTY. CLAIMANT agreed to this exclusion, proven by its amendment of the arbitration clause. 25 RESPONDENT persistently argues that the correspondence must be relied on as a fundamental factor in determining the scope of the arbitration agreement.

23. A non-contractual salvage, as what was purportedly done by Hestug, imposes a right of a salvage reward to the salvor, irrespective of the existence of any contract, specifically in this case, CHARTERPARTY. The immateriality of the existence of CHARTERPARTY clearly means that the salvage dispute is not a dispute that ‘arise[s] out of the terms of the’ CHARTERPARTY.

24. Salvage disputes are therefore excluded from this tribunal’s jurisdiction by admission of RESPONDENT itself and thus cannot be heard in these proceedings.

B. Alternatively, RESPONDENT and Hestug cannot be deemed to be one entity

25. CLAIMANT strongly emphasizes in advance that RESPONDENT in the current proceeding is Hestia Industries, not Hestug.

24 Facts, p. 25
25 Facts, p. 28
26. The company that ‘came to the rescue’ and rendered assistance to VESSEL was Hestug.\(^{26}\) According to the facts, Hestug is a ‘business owned by… Hestia Industries.’\(^{27}\) It would be safe to assume that the word ‘owned’ means that RESPONDENT owns the majority of Hestug’s shares, making it a subsidiary of RESPONDENT.\(^{28}\) However, in this proceeding, the two companies cannot be viewed as one because a parent company and its subsidiary are two separate legal entities.\(^{29}\) Consequently, in the event that the service was indeed salvage, CLAIMANT’s liability to pay salvage reward is to Hestug and not to RESPONDENT.

### III. RESPONDENT IS LIABLE FOR DAMAGES INCURRED IN RELATION TO THE DETENTION OF VESSEL

27. CLAIMANT contends that RESPONDENT is liable for damages due to breaches in fulfilling contractual obligations that led to the detention of VESSEL. CLAIMANT would like to first establish that (A) MASTER is not liable for the detention of VESSEL and CLAIMANT is thus still entitled to damages, before (B, C) elaborating on Respondent’s breach of contract (D) which was not waived by CLAIMANT. Then, CLAIMANT will show that the damages are recoverable through (E) an action for demurrage (F) because VESSEL remained in PORT, or alternatively, (G) if VESSEL was deemed to have left PORT, through an action for detention.

#### A. MASTER was neither incompetent nor negligent and did not cause VESSEL’s detention

28. In *The Eurasian Dream* case, the court held that incompetence was to be distinguished from negligence, and further, that it may be derived from a disinclination to perform the job properly.\(^{30}\)
MEMORANDUM FOR THE CLAIMANT

29. In this case, MASTER was in fact inclined to comply with COASTGUARD’s order, so as to adhere to Clause 17 (b) of CHARTERPARTY. This clause states that VESSEL is to comply with all requirements and regulations for all ports and countries of call under CHARTERPARTY. MASTER reasonably assumed that the order coming from COASTGUARD was coming from PORT and to adhere to the order would be to adhere to Clause 17. This is therefore not an act of incompetence due to the fact that MASTER was simply abiding by his interpretation of CHARTERPARTY.

ii. MASTER was not negligent in leading VESSEL back to PORT

30. Negligence is the omission of doing something that a reasonable man would do, or actively doing something that a prudent and reasonable man would not do.

31. In this case, in complying with COASTGUARD’s order based on the President’s instruction, MASTER acted according to the duty laid out in Clause 17 (b). Subjectively, this is clearly the conduct of a reasonable man. It would be unreasonable for MASTER not to follow orders coming from the state of Hades through COASTGUARD, in particular as VESSEL carried the flag of that state. It would be further unreasonable to question the legality of COASTGUARD’s order, which prima facie seemed to be lawful. Thus, there is no breach of duty on behalf of MASTER, and he is neither negligent nor incompetent.

B. RESPONDENT is liable for damages due to dangerous cargo

32. CLAIMANT contends that RESPONDENT is liable for damages for its provision of dangerous cargo.

33. Provision of cargo that is not of a dangerous nature is an absolute and implied obligation of the shipper. At the very least, if the carrier is in no reasonable position to know such circumstances, the shipper must inform the carrier of the dangerous cargo.

31 Facts, p. 39, 58.
33 Mid West Shipping Co. v D.I. Henry [1971] 1 Lloyd’s Rep 375, 379
34 Brass v Maitland [1856] 6 E & B 470 at pp.482 and 484; Effort Shipping Co Ltd v Linden Management SA (The Giannis NK) [1998] 1 All ER 495 at p.506
36 Mitchell, Cotts v Steel [1916] 2 KB 610; The Athanasia Comninos[1990] 1 Lloyd’s Rep 277, QB
34. Atkin J in *Mitchell, Cotts v Steel* opined that unlawful cargo, which may implicate the vessel in a risk of seizure or delay “is precisely analogous to the shipment of a dangerous cargo which might cause the destruction of the ship.”

35. In the concurrent case, RESPONDENT should have been aware of its dangerous CARGO that implied a risk of detention of VESSEL. VESSEL was then prohibited from leaving the port due to the status of CARGO, which indeed led to detainment of and delay to VESSEL. This is evidence of their dangerous nature, the consequential damages of which RESPONDENT is liable for.

36. In any event, RESPONDENT is still liable even if, as the shipper, it denies the dangerous condition of its own CARGO. Therefore, it must be said that, in any circumstance, RESPONDENT is liable for damages stemming from its dangerous CARGO.

C. **RESPONDENT is liable for damages due to failure to nominate a safe PORT**

37. CLAIMANT further contends that RESPONDENT is liable for damages stemming from detention for nominating an unsafe port.

38. According to *AIC Ltd v Marine Pilot Ltd*, a charterparty that simply contains an express statement of a port being safe is enough to constitute as a warranty that the port is safe. In the current case, RESPONDENT’s express determination of PORT’s safety was contained in the statement “1 safe port of Hades”, and as such is sufficient to be considered a safe port warranty.

39. *K/S Penta Shipping v Ethiopian Shipping Lines Corp* established that even if only by reason of politics, a vessel cannot enter the port without being confiscated by the local government, the port is deemed unsafe.
40. In the case at hand, VESSEL failed to leave PORT because it was confiscated as a consequence of the political instability of the state of Hades.\textsuperscript{45} As a result, CLAIMANT suffered from 358 days of VESSEL’s confiscation and additionally, VESSEL’s propeller shaft sustained physical damage.\textsuperscript{46}

41. According to The Lucille case, the event triggering the unsafe nature of the port must not be of “abnormal occurrence”\textsuperscript{47} that is both “abnormal and unexpected”.\textsuperscript{48} In this case, RESPONDENT should have acknowledged and expected the prospect of political instability in view of its environmentally unfriendly CARGO at the time of the port’s nomination.\textsuperscript{49} This political instability directly led to the order to detain VESSEL. Indeed, there was a direct correlation between the political instability and the detention that followed. Thus, the change in conditions of PORT could be “expected” and is thus not holistically an “abnormal occurrence”.

42. In addition, Ullises Shipping Corporation v Fal Shipping Co. Ltd held that a port may be unsafe if there is a risk of loss of a vessel due to even an unjustified confiscation, and an absence of any effective means of preventing it under the justice system.\textsuperscript{50}

43. In our case, there is information to indicate that VESSEL’s holding was a result of illegal bribery and was unjustified, and there were no effective means of preventing it under Hades law.\textsuperscript{51}

44. For the reasons above, RESPONDENT is liable for damages for detention resulting from their failure to nominate a safe port.

D. The rights to damages from the breaches have not been waived by CLAIMANT

45. CLAIMANT submits that the breaches carried out by RESPONDENT have not been waived.

i. The unsafe port breach has not been waived

\textsuperscript{45}Facts, p. 62
\textsuperscript{46}Facts, p. 71
\textsuperscript{47}Per Sellers J, The Eastern City [1958] 2 Lloyd’s Rep 127 at p 131
\textsuperscript{48}The Lucille [1984] 1 Lloyd’s Rep. 244
\textsuperscript{49}Kodros Shipping Inc. v Empresa Cubana de Fletes The Evia (No. 2) [1983] 1 A.C. 736
\textsuperscript{50}Ullises Shipping Corporation v Fal Shipping Co. Ltd (The Greek Fighter) [2006] 2 C.L.C. 497
\textsuperscript{51}Fact
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46. If, arguendo, CLAIMANT submits that the imminent unsafeness of PORT was foreshadowed by the news report, the safe port warranty cannot be considered waived merely from the fact that CLAIMANT proceeded with CHARTERPARTY.

47. At the time of the formation of CHARTERPARTY, RESPONDENT was also privy to this news report. Notwithstanding its existence, RESPONDENT still issued the safe port warranty in box 5. Relying on this fact, CLAIMANT then assumed that all possible unsafeness of PORT had been considered and dealt with by RESPONDENT, or RESPONDENT would not have issued the warranty. This act of good faith towards RESPONDENT, entrusting that it fulfilled its obligation of providing a safe port should not be used as a basis for waiver.

48. Moreover, the issuance of the Notice Of Readiness cannot be used as a sign of waiver. The Court of Appeal in the The Kanchenjunga case held that an issuance of an NOR on the basis of compliance only waives the right to refuse an order of proceeding to an unsafe port or to repudiate the contract, but not to the right to claim damages. Therefore, CLAIMANT still has valid grounds to claim for damages regardless of the NOR issued.

ii. The dangerous nature of CARGO was not waived

49. It has been established that notice of the dangerous nature of a cargo is an absolute obligation from shippers. Therefore, the presence of a notice is necessary for dangerous cargo to actually be waived by the carriers.

50. In the present case, RESPONDENT issued no such notice and RESPONDENT maintains all liability until that obligation is fulfilled. CLAIMANT did not waive the dangerous nature of CARGO.

E. Damages are recoverable through an action for demurrage

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52 Procedural Orders No. 2, point 2
53 Facts,
54 (The Kanchenjunga) [1990] 1 Lloyd’s Rep 391
51. Under common law, it is well known demurrage clauses cover more than detention that is specific to loading, in the strictest sense of putting CARGO on-board. Thus, if certain breaches recoverable through damages for detention occur within laytime, it is recoverable through demurrage if the demurrage clause can be interpreted to allow such a recovery. Similarly, within CHARTERPARTY, Clause 9c states the time permitted for laytime is 10 WWDSHINC and that time for loading is considered to be over when VESSEL leaves the loading place. The terms of this clause mean that the detention of VESSEL beyond laytime, regardless of whatever causes such a detention, as long as it is attributed to RESPONDENT’s actions, still falls within demurrage if it lasts longer than 10 days.

F. VESSEL was still in PORT limits and thus was still in demurrage

52. To prove that VESSEL was in demurrage, it must be proven that it was still within PORT area. It is customarily understood that the limits of the loading area are contingent on the type of CHARTERPARTY. A port is deemed to be much larger than a dock or berth.

53. However, due to the difficulty of setting physical limits of a PORT area because of a lack of admiralty charts, a different approach must be taken in setting PORT limits for the case at hand. Sailing Ship Garston Co. v Hickie deemed that port limits may extend beyond the place of loading and unloading to the farthest point where port authorities still exercise jurisdiction, legally or not, in providing an element of safety within that area.

54. In the instant case, VESSEL was considered to still be within the area of PORT and thus COASTGUARD successfully accessed and boarded VESSEL. COASTGUARD then exercised their

56Chandris v Isbrandtsen-Moller (1950) 84 Lloyds Rep 347
57Facts, p. 34
58Facts, p. 36
60Facts, p. 62
power in redirecting VESSEL back to berth.\textsuperscript{62} As COASTGUARD, by definition, provides security, they are considered “port authorities” who are the “users” of PORT. Since they successfully policed and redirected VESSEL, it follows that VESSEL was still within the area of their jurisdiction, and thus the area of PORT.

56. Moreover, the \textit{Johanna Oldendorff}\textsuperscript{63} case provided a test whereby if shipowners could prove that the vessel was still under the control of the charterers, then the vessel was still considered to be within PORT, as this control would mean that it was still “loading”.

57. In this case, VESSEL’s departure depended on RESPONDENT’s insuring that such a departure was possible. In doing so, RESPONDENT would have to confirm that PORT was safe and that CARGO not unlawful. However, RESPONDENT did not fulfil these obligations to affirm the ability of VESSEL to leave port.\textsuperscript{64} In this sense, the party that was in control of ensuring that VESSEL was able to leave PORT and loading time would terminate was RESPONDENT. Thus, it follows that VESSEL was still under its control and had not finished loading when the confiscation occurred.

58. Ultimately, it is clear that VESSEL never legally left the port area of Hades.

G. \textbf{In the alternative, RESPONDENT is liable for damages for detention}

59. RESPONDENT’s breach of contract, namely its failure to nominate a safe port,\textsuperscript{65} and the failure to ship a non-dangerous cargo,\textsuperscript{66} led to VESSEL’s detainment. In the event that this tribunal finds that VESSEL had indeed left PORT and therefore demurrage did not begin to accrue, CLAIMANT pleads for damages for detention.

60. Damages for detention are recoverable if a charterer is in breach of the charterparty in any respect, except for the excessive use of laytime.\textsuperscript{67} In the \textit{Independent Petroleum Group v

\begin{footnotesize}
\textsuperscript{62}Facts, p. 55, 62
\textsuperscript{63}\textit{The Johanna Oldendorff} [1973] 2 Lloyd’s Rep 285
\textsuperscript{64}Paragraph – of this memorandum
\textsuperscript{65}Paragraph 37-44 of this memorandum
\textsuperscript{66}Paragraph 32-36 of this memorandum
\end{footnotesize}
MEMORANDUM FOR THE CLAIMANT

Seacarriers, the vessel’s detention due to the unsafeness of the port nominated by the
charterer allowed for the recovery of damages for detention by the owners. The same damages
due to a dangerous cargo which caused the vessel to be detained can also be recovered.

61. CLAIMANT makes a claim for 358 days of VESSEL’s detention calculated through the demurrage
rate. Damages for detention resulting from a breach by the charterer are prima facie equal to
the amount that the ship could have earned at market rates during the period of detention. The
loss of market rate fees can be calculated by the agreed demurrage rate, which can be used as
evidence of the market rate. The lack of information regarding the market rate in the current
case further supports that the calculation should be based on the demurrage rate. In addition, the
very purpose of demurrage, which is a recovery of “what it is supposed to cost the owner to keep
the ship”, supports this principle.

62. For the above stated reasons, if this tribunal finds that VESSEL left PORT, the damages incurred
as a result of breaches carried out by RESPONDENT are recoverable through an action for damage
for detention which would equal the same amount as the demurrage payable.

IV. THE CHARTERPARTY WAS NEVER FRUSTRATED

63. RESPONDENT argues that CHARTERPARTY was discharged by frustration in view of the delay
which made the voyage radically different from that which was contemplated at the time of the
formation of CHARTERPARTY. To make a viable case for frustration, this radical difference
would have to be detrimental to the contract. If it, for instance, makes the performance of

149; Yvonne Baatz, Maritime Law, 3rd ed, (New York: Informa Law from Routledge, 2014), p. 173; Paul Todd,
272
69Mitchell, Cotts v Steel [1916] 2KB at p. 614
70Facts, p. 30
73Nielsen v Wait (1885) 16 QBD 67 per Lord Esher at pp. 70-71
74Facts, p. 65
75Davis Contractors v Fareham Urban District Council [1956] AC 696 at p. 728 per Lord Radcliffe; John Wilson,
contractual obligations impossible, or if the contract loses its commercial purpose even if obligations were performable.\(^\text{76}\) It should be underlined that this “difference” cannot be based on the mere fact that a contract takes a longer amount of time,\(^\text{77}\) or is more expensive to perform.\(^\text{78}\)

64. Several limitations to the doctrine of frustration must also be considered,\(^\text{79}\) for frustration is not invoked lightly.\(^\text{80}\) Accordingly, CLAIMANT argues that (A) a breach of the discharge date in RESPONDENT’s correspondence\(^\text{81}\) cannot amount to frustration as it was not a contractual obligation, (B, C) there are no viable causes to frustrate CHARTERPARTY and (D) that certain limitations defined by case law apply to the case at hand.

A. **The discharge date was not an obligation of the contract and cannot be used as a basis for frustration**

65. The discharge date on the 1 July 2014 correspondence cannot be considered as a term that would be a factor in determining frustration, as it was not an express clause of CHARTERPARTY.\(^\text{82}\)

66. *Davis Contractors v Fareham UDC* held that breach of an implied term resulting in frustration would be unfair for the party who did not recognize the importance attached to the term by the other party.\(^\text{83}\) Hence, if the discharging date was an implied term,\(^\text{84}\) it cannot be relied on as a basis of frustration.\(^\text{85}\)

67. In this case, CLAIMANT admits that it was informed of the discharge date. However, RESPONDENT did not consider CHARTERPARTY, which specifically excludes the discharge date, as problematic.\(^\text{86}\) RESPONDENT only brought up the arbitration clause as requiring amendment. The

\(^{76}\)Herne Bay Steam Boat v Hutton\(\text{[1903]}\) 2 KB 683; Krell v Henry \(\text{[1903]}\) 2 KB 740

\(^{77}\)Davis Contractors v Fareham UDC\(\text{[1956]}\) AC 696; Tamplin SS Co v Anglo-Mexican Petroleum Products Co\(\text{[1916]}\) 2 AC 397

\(^{78}\)Ocean Tramp Tankers Corp. v V/O Sovfracht (The Eugenia)\(\text{[1964]}\) 2 QB 226; Tsakiroglou & Co Ltd v Noblee Thorl GmbH\(\text{[1962]}\) AC 93

\(^{79}\)Per Lord Radcliffe in *Davis Contractors Ltd v Fareham Urban District Council* \(\text{[1956]}\) AC 696

\(^{80}\)Pioneer Shipping Ltd v BTP Tioxide Ltd \(\text{[1982]}\) AC 724, p. 752

\(^{81}\)Facts, p. 2

\(^{82}\)Facts, p. 2

\(^{83}\)Davis Contractors v Fareham Urban District Council \(\text{[1956]}\) AC 696; Krell v Henry \(\text{[1903]}\) 2 KB 740

\(^{84}\)FA Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd \(\text{[1916]}\) 2 AC 397

\(^{85}\)Facts, p. 65

\(^{86}\)Facts, p. 25
assumption which follows is that both parties agreed that the discharge date was an implied term, but because frustration cannot be based on an implied term, it is not fundamental to CHARTERPARTY to the point of causing frustration in the case of breach.

68. The Captain George K case elaborates that the purpose of a voyage charter is to deliver a cargo in a specific vessel from one point to another with reasonable dispatch if it lacks a discharge date. According to this case, where an expressed date of delivery is lacking, the reasonable dispatch principle applies. ‘Reasonable dispatch’ implies an obligation for the carrier to perform the contract within a reasonable time, but even so, only when it is possible to proceed with the voyage.

69. Under this principle, it is clear that CHARTERPARTY is broad enough to remain effective in the new situation, as there were no breaches that would allow frustration. Indeed, MASTER enacted ‘reasonable dispatch’ when he proceeded with the voyage as soon as VESSEL was released.

B. The delay cannot be considered to have frustrated CHARTERPARTY

70. When assessing frustration of a contract due to delay, CLAIMANT contends that a partially objective point of view, disregarding the parties’ expectations, should be taken. Based on that approach, CHARTERPARTY has not been frustrated due to a lack of radical difference. RESPONDENT cannot argue that CHARTERPARTY was frustrated due to the delay of the detention.

i. The judgment must be made according to the facts available at the proceedings

71. In deciding whether a charterparty was radically affected by a delay, The Nema case emphasized that it should be determined on an informed judgment based on the facts readily available.

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90 Hick v Raymond [1893] AC 22, per Lord Watson p. 32
91 Davis Contractors v Fareham UDC [1956] AC 696
92 Facts, p. 66
Further, it should consider what is likely to occur, but that often requires that the court wait upon events to accurately determine whether a delay constitutes a frustrating delay.93

72. While the above principle may not always apply, the fact that in this case the delaying event has receded leads to a conclusion; the facts readily available to this arbitration cover the whole event of the delay and that this tribunal has no choice but to consider the facts completely. Indeed, there are no additional events that are yet to occur.

73. Thus, to prove frustration, the difference in circumstances developed from the detention would have to alter the purpose of CHARTERPARTY based on the facts available in the proceedings.

ii. According to the facts, CHARTERPARTY was not radically altered by the delay

74. Since objectively it is evident that the delay was not permanent and did not make CHARTERPARTY impossible to perform, if the delay were to frustrate CHARTERPARTY, it must have caused other forms of losses to the objects of the contract. Accordingly, the delay did not frustrate the contract as there were no objects destroyed.

75. There were no losses incurred on CARGO, as no part of CARGO was physically lost.94 A drop in the market price of CARGO cannot count as loss, for Amalgamated Investment and Property Co Ltd v John Walker & Sons95 established that a change in market price, even due to government intervention, does not lead to frustration. Secondly, there was no such physical loss incurred by VESSEL as it was not destroyed or detained permanently. VESSEL simply required repairs that were readily available at PORT.

76. Therefore, with the objects of CARGO and VESSEL still intact, it was simply required that the voyage continued in order to fulfil the commercial purpose of CHARTERPARTY; that is, to deliver CARGO in VESSEL “Athena”, without any “radical difference” to contractual obligations.

93 Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) [1982] AC 724
95 Amalgamated Investment and Property Co Ltd v John Walker & Sons [1977] 1 WLR164; British Movietonews Ltd v London and District Cinemas [1952] AC 166, p. 185, where a ‘wholly abnormal rise or fall in prices’ would not amount to frustrate a contract.
iii. Even if subjective expectations of the parties were to be considered, the delay did not frustrate CHARTERPARTY

77. If this tribunal, in finding if frustration is possible, holds that one must also consider the expectations of the parties involved, the delay to VESSEL could not be considered to dramatically alter CHARTERPARTY as it was contemplated by the parties.

78. In the present case, RESPONDENT did not object to the exclusion of the discharge date from CHARTERPARTY. A safe port warranty was issued despite indicators that VESSEL was under a threat of detention.96 It also still implored CLAIMANT to free VESSEL months after detention,97 as there exists a high threshold on how long of a delay can alter a charterparty.98 RESPONDENT was under full awareness that VESSEL could be confiscated if CHARTERPARTY continued, and the detention of VESSEL was reasonably expected by CHARTERPARTY.

C. VESSEL’s detention cannot be said to have frustrated CHARTERPARTY

79. CLAIMANT contends that at the date of the detention, CHARTERPARTY was not frustrated.

80. In many cases during the Gulf War, frustration was caused by the delay of, as opposed to the detention of the vessel.99 Lord Sumner stated that the decision of the parties to declare or not to declare frustration at the date of the alleged frustrating event must be taken into consideration to decide when exactly was the charterparty frustrated. In Bank Line v Capel,100 the charterparty was not found to be frustrated at the date of the vessel’s requisition because the parties did not decide to declare the contract as frustrated at the date of the vessel’s detention.101

81. In the present case, RESPONDENT did not declare frustration immediately after VESSEL was detained. Instead, after CLAIMANT informed that a ‘long delay for our vessel can be

96Facts, p. 29
97Facts, p. 61
99The Eugenia [1964] 2 QB 226, 239; Edwinton Commercial Corp v Savliris Russ (Worldwide Salvage & Towage) Ltd (‘The Sea Angel’) [2007] 2 All ER (Comm) 634, 666 [118]
100Bank Line v Arthur Capel & Co [1919] AC 435
101Bank Line v Arthur Capel & Co [1919] AC 435 per Lord Sumner at p. 454
anticipated’. Respondent replied that ‘Zeus must take all steps necessary the secure the release of the Athena’. Such a comment implies that carrying out the contract still had some significance. This is very similar to the facts of Bank Line v Capel, in which after the vessel was requisitioned, the parties agreed to treat the contract as continuing while the owners sought the vessel’s release. Such conduct barred the argument that the contract was frustrated by the event. Therefore, Charterparty was not frustrated by the detention of the Vessel.

D. The alleged frustrating event was self-induced by Respondent

82. When the frustrating event is caused by one of the parties, this will be regarded as self-induced frustration that does not discharge the contract, and further, the party who brought about the event cannot rely upon it. In The Eugenia, since the charterer was in breach of contract for ordering the vessel to an unsafe port, the contract was not held to be frustrated.

83. In our case, as established above, the default of Respondent in its failure to nominate a safe port and failure to declare Cargo dangerous led to the detention of Vessel.

84. Thus, the doctrine of frustration cannot apply since it was self-induced.

V. Respondent is not entitled to salvage reward

85. Claimant contends that Respondent is not entitled to salvage rewards as (A) the elements of salvage are not fulfilled, (B) the service rendered was towage and did not convert to salvage, and (C) the need for service arises as a consequence of Respondent’s own breach of contract.

A. The elements of salvage were not fulfilled

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102 Facts, p. 60
103 Facts, p. 61
107 Ocean Tramp Tankers Corp v VO Sovracht (The Eugenia) [1964] 2 QB 226
108 Paragraph 32 and 37 of this memorandum
86. Salvage requires four criteria for the right to a reward to arise, namely: (i) a recognised subject matter; (ii) the object of salvage must be in danger at sea; (iii) the salvors must be volunteers; and (iv) there must be success by either preserving or contributing to the preservation of the property. If any of these element is not fulfilled, then the service does not amount to salvage. CLAIMANT submits that the element of danger (ii) and voluntary act (iii) were not fulfilled.

i. The element of danger was not fulfilled

87. The requirement of the danger within salvage necessitates that the danger must be real and expose the object of salvage to destruction or damage. This can be fulfilled by, for example, the vessel heading towards sure-fire collision. In The Troilus, Lord Justice Denning asserts that salvage services only occur when the master must accept the service or lose his ship. A grounded or a drifting vessel with an option to stop does not fulfil this element.

88. Under this approach, it is clear that VESSEL’s inability to move because of its broken propeller shafts does not constitute ‘danger’ for the purposes of the test, as its ‘drifting’ state can be easily stopped using its anchor. It must also be noted that VESSEL, when it was found that both of its propeller shafts were broken, was just entering open waters and was not far away from the port. It could easily have entered into a towage contract to help it enter the port to seek repairs.

89. The element of danger is therefore non-existent in the case at hand.

ii. The requirement that the service be a voluntary act was not fulfilled

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112 The Troilus v The Glenogle [1951] AC 820, p. 110

113 The Domy [1941] 69 L1 L Rep 161


115 Facts, p. 71
90. ‘Voluntary’ means that the services are not rendered due to a pre-existing agreement or an official duty, nor are they for self-preservation. On this basis, RESPONDENT in fact conducted towage.

91. Towage is a service of providing assistance to the ship to bring it back to the harbour when there is nothing more than escorting it required. Factually, there are no extraordinary occurrences in the present case that can indicate the service as any different from reasonable contemplation of parties in a normal towage contract. It is thus clear that the service rendered by the tugboats was merely towage, which falls under a towage contract and fails to fulfil the act in being voluntary. As will be elaborated in the coming paragraphs, a towage contract need not be in writing.

B. The service can safely be assumed to be towage

92. In practice, a towage contract can be made when a vessel requiring assistance to dock signals a tug and the tug comes alongside and take the vessel’s line. A towage contract therefore need not be in writing. When the towing operation commences, both the tug and the tow are bound by the terms, conditions, and rates set forth in the tariff.

93. Under the above basis, a lack of a written towage contract in the facts does not prove that the service is voluntary. First, CLAIMANT contends that even if there is a lack of precise terms regarding the service, the safest assumption is that it was towage, in particular since it was a tugboat that assisted VESSEL. Second, it is not uncommon for LNG carriers to require towage service to enter ports, meaning that it would not be outside of common practice for VESSEL to request service from a tugboat to enter a berth.

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118 Hanrey B. Stover Jr., Special Provisions of Towage Contracts, Marquette Law Review Volume 2 Issue 1 Summer 1959, p. 39
MEMORANDUM FOR THE CLAIMANT

94. In view of the above, the conclusion is that the service rendered by Hestug is fundamentally the same as towage. The tug was not exposed to any danger, and there are no risks incurred which were outside of the scope of a typical towage contract.

C. The towage service was not converted to salvage

95. Towage services can convert into salvage services in certain situations. These situations arise when (1) the tow is in danger as a consequence of reasons outside of the contemplation of the parties,\(^\text{121}\) and (2) the danger causes the tug risks that could not reasonably be held to be within the scope of the contract.\(^\text{122}\)

96. Both of the requirements are not fulfilled in the present case. As outlined clearly above, there was no any danger to the tow.\(^\text{123}\) As to the second point, it is submitted that there are no indications of additional risks incurred to the tug in the towing process.

97. For the above reasons, RESPONDENT contends that the service cannot be converted to salvage.

D. Supposing that there was no towage contract, the service still does not conform with the concept of salvage

98. The concept of salvage is based on the idea that anyone who assists a vessel or other maritime property and aids in saving it is entitled to a reward for his efforts.\(^\text{124}\) RESPONDENT’s conduct precludes it from claiming that this concept applies. This is because RESPONDENT created the danger to VESSEL by breaching the contract,\(^\text{125}\) hence RESPONDENT must be excluded from the right to a salvage reward.\(^\text{126}\) The conduct of assisting VESSEL by RESPONDENT is more reasonable to be regarded as a means of mitigating its own breach, which, fundamentally and conceptually, is different from salvage.


\(^{123}\)Paragraph 87-89 of this memorandum


\(^{125}\)Paragraph 32 and 37 of this memorandum

99. Accordingly, CLAIMANT submits that even if the service was not contractual, it cannot be regarded as salvage.

VI. RESPONDENT IS LIABLE FOR ALL LOSSES AND DAMAGES

A. RESPONDENT is liable to pay US$17,900,000 worth of damages for VESSEL’s detention

100. In view of the above, it is clear that VESSEL had gone into demurrage. The demurrage clause is contained within clause 10 of CHARTERPARTY, which also contains the rate of demurrage to be paid and this should thus be the basis of calculation. The nomination of an unsafe port and provision of dangerous cargo directly led to the detention which occurred within demurrage time as VESSEL was still in PORT. VESSEL’s detention within the demurrage time lasted for 358 days, which amounts to US$17,900,000 in damages.

101. In the alternative, if VESSEL had left PORT and was thus no longer in demurrage, the same amount of damages is recoverable through an action for damages for detention.

B. RESPONDENT is liable for the first demurrage term in the event of frustration

102. In the event that CHARTERPARTY is deemed to be frustrated, CLAIMANT contends that RESPONDENT is still liable to pay for part of the demurrage.

103. In the Lorna I, the involved parties’ release from obligations following a frustrating event did not apply retroactively to obligations accruing beforehand. Collins M.R. in Chandler v Webster stipulates that frustration does not invalidate everything already which has already occurred in pursuance of the contract, or the “loss lies where it falls”. The only available statutory grounds to overturn this precedent is the Law Reform (Frustrated Contracts) Act 1943, which is inapplicable to voyage charters.

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127 Paragraph 51-52 of this memorandum
128 Facts, p. 11
129 Facts, p. 30
130 Facts, p. 70
132 [1904] 1 KB 493

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104. In our case, the purported frustrating delay\textsuperscript{134} occurred after the accrual of demurrage.\textsuperscript{135} Thus, \textsc{respondent} is at least still liable for the demurrage accruing before 30 April 2015, which amounts to US$9,200,000 from 184 days of demurrage.\textsuperscript{136}

\textbf{C. In addition, \textsc{respondent} is liable for the broken propeller shaft and the towage fee}

105. \textit{The Houston City}\textsuperscript{137} held that the owners are entitled to damages if the master reasonably obeys the charterer’s order and the ship is damaged as a result of the unsafety of the port.

106. As a result of \textsc{respondent}’s nomination of unsafe port,\textsuperscript{138} \textit{Vessel} required towage, or any services which were rendered by the tugs to \textit{Vessel}, to guide it back to berth due to its broken propeller shaft.\textsuperscript{139} Consequently, \textsc{respondent} is liable for damages consisting of the broken propeller shaft and also the towage fee or fees associated with any services rendered by the tugs to \textit{Vessel}.

\textbf{PRAYER FOR RELIEF}

For the reasons set out above, \textsc{claimant} respectfully requests this tribunal to:

\textbf{DECLARE} that this tribunal has the jurisdiction to settle the frustration and demurrage claims, \textit{and further}

\textbf{DECLARE} that the salvage claim is outside this tribunal’s jurisdiction;

\textbf{FIND} that the contract was not frustrated and \textsc{respondent} is liable for \textit{Vessel}’s detention as argued above;

\textbf{AWARD} damages to \textsc{claimant} on the amounts claimed.

\textsuperscript{134}\textit{Facts}, p. 65
\textsuperscript{135}\textit{Facts}, p. 63
\textsuperscript{136}\textit{Facts}, p. 64
\textsuperscript{137}\textit{Reardon Smith Line Ltd. v Australian Wheat Board (The Houston City)} [1956] A.C 266 (P.C); [1954] 2 Lloyd’s Rep 342; \textit{The Archimidis} [2008] EWCA Civ 175; [2008] 1 Lloyd’s Rep 597
\textsuperscript{138} Paragraph 37-44 of this memorandum
\textsuperscript{139}\textit{Facts}, p. 71