17TH INTERNATIONAL MARITIME LAW ARBITRATION MOOT

2016

TEAM NO. 22

CLAIMANT/OWNER                      RESPONDENT/CHARTERER
Zeus Shipping and Trading Company          Hestia Industries

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WRITTEN SUBMISSION ON BEHALF OF THE CLAIMANT
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1. On July 1, 2014, Hestia Industries\(^1\) sent a request for proposal to Zeus Shipping and Trading Company\(^2\) for conveyance of Hades Liquefied Natural Gas (HLNG) from Hades to Poseidon. After negotiations between the parties, a voyage charterparty was entered into for the use of Athena, a vessel technologically equipped to convey HLNG and carrying the Hades flag. The one point of negotiation which was highlighted was the need to have a provision that would enable arbitration on disputes which arise out of the charterparty. On July 22, 2014, the voyage charterparty was finalised and entered into.

2. Athena arrived at the port of Hades on October 3, 2014 only to witness violent protests against the cargo that was meant to be shipped. Despite that, the master of Athena was successful in loading cargo and setting sail from Hades on October 7, 2014. However, following a coup orchestrated by the leader of opposition, Jacqueline Simmons with the help of General Makepeace, leader of Hades military, a presidential decree was passed ordering the Coast Guard to ensure the return of Athena back to the port. Subsequent return of the vessel to the port resulted in its detention at the port. Due to the continued presence of Athena at the port, claimants demanded payment of demurrage by the respondents.

3. However, on September 30, 2015, President Simmons tendered her resignation amidst allegations of bribery and corruption against her government. Pursuant to such resignation, Athena was released from the port and demurrage ceased to accrue.

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\(^1\) Hereinafter respondent.

\(^2\) Hereinafter claimant.
4. Hestug was employed by the Athena for tug services. Once the towlines were released from Athena, it became apparent that the propeller shafts of the vessel had been tampered with, while she was at the port. Soon after, both the propeller shafts broke and Hestug’s tug was used to render assistance.

5. The claimants, on November 16, 2015, gave notice to respondents for arbitration in order to settle the claim for demurrage while the respondents added a counter claim, claiming that tug services provided by Hestug were salvage services.

ARGUMENTS ADVANCED

1. THE ARBITRAL TRIBUNAL HAS THE REQUISITE JURISDICTION TO ADJUDICATE UPON THE ISSUE OF FRUSTRATION

6. The claimant contends that the arbitral tribunal does have the requisite jurisdiction to adjudicate upon the issue of frustration, because:

   A) The arbitration clause is severable from the contract and allegations of frustration would not invalidate it.

   B) The issue of frustration is one that arises under the contract and can therefore be adjudicated upon by the tribunal.

A) THE ARBITRATION CLAUSE IS SEVERABLE FROM THE CONTRACT AND ALLEGATIONS OF FRUSTRATION WOULD NOT INVALIDATE IT

7. The claimant contends that the allegations of contractual frustration brought forth by the respondent would not invalidate the arbitration clause, as it stands separate from the main charterparty, in Australian law.\(^3\) As per Article 16(1) of the Australian International Arbitration Act, 1978, the arbitration agreement shall be treated as an

\(^3\) Blackaby et al., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION, “Agreement to Arbitrate” (OUP, 6th ed. 2015).
agreement independent of its other terms. Even a decision that the main contract is null and void would not invalidate the agreement. Therefore, the claimant contends that the allegations that the underlying contract was frustrated will not invalidate Clause 30 of the charterparty.

**B) THE ISSUE OF FRUSTRATION ARISES UNDER THE CONTRACT AND CAN BE ADJUDICATED UPON BY THE TRIBUNAL**

8. The claimant submits that the issue of frustration of contract is one that arises under the contract and can be arbitrated upon in the instant case. The House of Lords, in *Fiona Trust v. Yuri Privalov*⁴ (hereafter “*Fiona Trust*”), held that jurisdiction clauses in arbitration agreements needed to be liberally construed. A strong presumption was made in favour of parties intending to have their disputes resolved by arbitration, and against the intention of the parties to litigate in such circumstances, unless the language of the clause made clear a contrary intention.⁵ Per Hoffman, L.J,

> “The construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator’s jurisdiction.”⁶

9. The Court of Appeal, in *Mackender & Ors. v. Feldia A.G*⁷ (hereafter “*Mackender*”), held that the expression “arising under” should be given a wider meaning. In

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⁵ *Ibid*.
⁶ *Ibid* at 46.
⁷ (1967) 2 QB 590.
Mackender, it was held that the expression “arising under” could include, in the absence of an explicit intention, an adjudication of whether the contract could be avoided for non-disclosure as it was intrinsically linked to the contractual dispute at hand.8 Fiona Trust, went on to do away with the difference between “arising out of” and “arising under”9, making the intention of the parties in such cases decisive.10

10. The claimant therefore submits in light of these authorities, that firstly, the term “arising under” should be interpreted so as to include claims of frustration; and secondly, that neither the language used by the contract nor the intention of the parties have indicated an exclusion of frustration claims from the consideration of the tribunal. It is further contended, that the intention to arbitrate claims of frustration was an implied term in the contract and therefore will “arise under” it.

B.1) THE TERM “ARISING UNDER” SHOULD BE INTERPRETED SO AS TO INCLUDE CLAIMS OF FRUSTRATION

11. In the instant case, a charterparty dated 21 July 2014 was entered into between the claimant and respondent.11 The arbitration clause of the same (hereafter “Clause 30”) stated that “Any dispute arising under this contract shall be referred to arbitration.” It is contended by the respondent that this clause would exclude claims of frustration from being decided by the tribunal. It is respectfully submitted as per Mackender, that the clause would have to be interpreted broadly and a wide meaning be given to the term “under this contract”.12

10 Ibid at 43.
12 Mackender & Ors. v. Feldia A.G., (1967) 2 QB 590, 597
12. In the instant case, claims relating to demurrage have been explicitly included in the contract, and arbitration has been agreed upon as the preferred method of dispute resolution. Therefore, the claimant submits that an issue relating to the frustration of the contract, which directly impacts the demurrage claim should be included within the ambit of being “under this contract”.

B.2) NEITHER THE LANGUAGE OF THE CONTRACT, NOR THE INTENTION OF THE PARTIES EXPLICITLY EXCLUDES CLAIMS OF FRUSTRATION

13. The House of Lords in Chartbrook v. Persimmon Homes (hereafter “Chartbrook”) held that pre-contractual negotiations are inadmissible while construing the scope of a contractual clause. Therefore, the claimant contends that while the letter sent to it by the respondent dated July 16, 2014 may be relevant to determine contractual intention, the scope of the arbitration clause cannot be restricted by the same. The scope of the clause can therefore only be restricted by the language of the clause.

14. In the instant case, Clause 30 merely stated that “Any dispute arising under this contract shall be referred to arbitration”, and nothing else. The claimant respectfully submits that as per Fiona Trust, there has been no explicit exclusion of frustration claims as per the Clause 30, and therefore a broad reading must be adopted towards the clause, as per Mackender. Additionally, as per Fiona Trust, the intention of the parties becomes decisive. The claimant submits that the intention of the parties has clearly been in favour of including the frustration claim within the ambit of the

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13 Moot Proposition, “Clause 10, Charterparty”, 36.
14 See Memorial on behalf of Claimant, ¶2 3. et seq.
15 (2009) 1 A.C. 1101
16 Ibid at 1119.
17 Moot Proposition, “Clause 30, Charterparty”, 45.
arbitration, so much so that the same can be said to have become an implied term in
the contract.

B.2.1) THE INTENTION TO ARBITRATE THE FRUSTRATION IN THE PRESENT CASE IS AN
IMPLIED TERM IN THE CHARTERPARTY

15. The claimant submits that in the present case, the intention of the parties to arbitrate
the claim of frustration is an implied term in the charterparty. The United Kingdom
Supreme Court in Marks and Spencer v. BNP Paribas\(^{18}\) (hereafter “Marks and
Spencer”) settled the law on implied terms and held that the following conditions
need to be satisfied for the implication of a term in a commercial contract. Firstly, the
term must be reasonable and equitable. Second, the term must be necessary to give
business efficacy to the contract or it should be so obvious that it goes without saying.
Thirdly, it must be capable of clear expression, and fourthly, it must not contradict an
express term of the contract. Further, it was held in the case of BP Refinery
Westernport v. Shire of Hastings\(^{19}\) (reaffirmed in Marks and Spencer), that the
presumed intentions of the parties need to be taken into account while implying
terms.\(^{20}\)

16. The claimant submits, in light of the authorities cited, that the intention to arbitrate a
claim of frustration was clearly existent within the facts and circumstances of the
case. The claimant’s letter dated 16 July, 2014 clearly indicated an intention to
arbitrate all “disputes about demurrage”.\(^ {21}\) Therefore, the claimant submits that an
intention can clearly be presumed that all claims relating to demurrage were to be

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\(^{18}\) (2015) UKSC 72.
\(^{19}\) 180 CLR 266.
\(^{20}\) Ibid at 283.
\(^{21}\) Moot Proposition, “Email from Hestia Industries to Zeus Shipping and Trading Company dated July 14,
2014”, 25.
arbitrated before the present tribunal. Demurrage under the common law runs until the contract has either been frustrated or repudiated.\textsuperscript{22} The claimant therefore submits the issue as to whether demurrage under the contract is due or not becomes contingent upon the tribunal admitting and consequently adjudicating of the frustration claim.\textsuperscript{23}

17. The claimant therefore, submits that the intention of the parties can clearly be presumed in favour of arbitrating the frustration claim. Additionally, it is contended that it fulfils all the requirements laid down under \textit{Marks and Spencer}, so as to qualify as an implied term. \textit{Firstly}, it is contended that the clause is reasonable and equitable as it merely gives life to the intention of the parties, under a broad reading of the arbitration clause as under \textit{Fiona Trust} and \textit{Mackender}.

18. \textit{Secondly}, the claimant submits that such an implication gives business efficacy to the contract. As has already been established, the two claims of frustration and demurrage are intrinsically interlinked,\textsuperscript{24} and therefore the latter cannot be decided without adjudicating the former. The English High Court in \textit{Lombard North Central v. GATX Corporation}\textsuperscript{25} (hereafter \textit{“Lombard”}) held that arbitration clauses, when narrowly construed, pose the danger of fragmentation of disputes, whereby different parts of the same dispute are adjudicated at different fora.

19. The claimant therefore submits that in the instant case, a term providing for the arbitration of both the frustration and the demurrage issues together would undoubtedly provide business efficacy to the contract, considering the sizeable cost, effort and time involved in pursuing effectively the same remedy before two different fora, in two different countries as per \textit{Lombard}.

\textsuperscript{23} See Memorial on behalf of Claimant, ¶ 3. \textit{et seq.}
\textsuperscript{24} \textit{Ibid} at ¶ 2-3. \textit{et seq.}
\textsuperscript{25} (2012) 1 C.L.C. 884.
20. *Thirdly*, and *fourthly*, the claimant submits that term in question is capable of clear expression in the contract as the intention behind the same has been clearly evident from the behaviour of the parties, and does not contradict an express term in the contract, because *firstly*, there exists no express term in the contract that excludes the arbitrability of a frustration claim; and *secondly*, as per *Chartbrook*, pre-contractual negotiations are inadmissible in questions of contractual construction. Therefore, judging merely by the existence of Clause 30 of the charterparty, as well as the express intention to arbitrate demurrage as per Clause 10, the term seeking to be implied does not contradict the express terms of the contract.

21. In light of the authorities cited, the claimant submits that the intention to arbitrate the issues of frustration and demurrage together can be read into the contract as an implied term. Therefore, the issue of frustration would be one that arises “under the contract”, as provided for by Clause 30, and can therefore can be adjudicated upon by the tribunal.

2. **THE CHARTERERS ARE LIABLE TO PAY DEMURRAGE AS LAYTIME CONTINUED TO RUN:**

22. The charterers are liable to pay demurrage because

   A) Athena had not left the loading port as the coast guard was able to exercise control over the vessel.

   B) Laytime was continuing as the vessel had not left the loading port.

   C) Demurrage is payable due to the expiry of laycan provided in the charterparty

**A) ATHENA HAD NOT LEFT THE LOADING PORT**

24. The claimant submits that Athena had not left the loading place on October 8, 2014 by virtue of the control the coast guard was able to exercise in making it
return to the port. Further, the term ‘loading place’ should not be narrowly interpreted to only include the berth, and it includes the commercial area of the port too.\(^{26}\) Since the ship was not able to resist the actions of the coast guard, the ship was still within the commercial area of the port.

25. A vessel is clearly ‘at the port’ when she is within port limits.\(^{27}\) Loading port in shipping terms must be understood in the popular business or commercial sense.\(^{28}\) Commercially, a loading port is defined as “an area within which ships are loaded with and/or discharged of cargo and includes the usual places where ships wait for their turn or are ordered or obliged to wait for their turn no matter what the distance from that area”.\(^{29}\)

26. Coastal/port states have long been recognised as having jurisdiction over their territorial sea and internal waters, for the purposes of applying and enforcing laws.\(^{30}\) Furthermore there is no difference in the level of control that may be exercised over a foreign vessel in the port as opposed to one anchored in an isolated bay,\(^{31}\) amplifying the expanded jurisdiction of a port. Control over vessels has always been seen in determining the jurisdiction of the port.\(^{32}\) Since the coast guard was able to exercise control over the vessel, and direct it to return back to the port of Hades, the claimant submits that the vessel had not left the loading


\(^{27}\) Julian Cooke et al., VOYAGE CHARTERS, “Laytime”. ¶ 33.3 (Routledge, 4th ed. 2014).


\(^{31}\) Ibid at ¶ 2.3.3.

\(^{32}\) Ibid.
port. As the vessel had not left the loading place, the respondent cannot argue for deviation of the vessel.\textsuperscript{33}

\textbf{B) THE LAYTIME WAS CONTINUING}

27. Clause 9(c)(i) of the charterparty provided for laytime to continue for ten weather working days (WWD), and defined loading to be complete when the vessel left the loading place.\textsuperscript{34} Therefore laytime ended only when the vessel left the loading place.

28. The claimant accepts that laytime normally ends with the loading of goods and stowing of the goods.\textsuperscript{35} But it is \textit{customary} for the parties to extend laytime.\textsuperscript{36} The charterparty extended laytime till the period the vessel left the loading place,\textsuperscript{37} and therefore laytime ended only when the vessel left the loading place.\textsuperscript{38} As the vessel had not done so,\textsuperscript{39} the claimant submits that the laytime clock was still running till the time departure was effective. Demurrage starts accruing after laytime provided for in the charterparty ends.\textsuperscript{40}

\textbf{C) DEMURRAGE IS PAYABLE}

29. The claimant submits that the respondent is liable to pay demurrage as laytime is still running. The duration of laydays, according to the charter party, was for ten WWD. Laytime, according to the charterparty, would come to an end when the vessel left the loading place.\textsuperscript{41} Since the vessel did not leave the loading place, the

\textsuperscript{33} Bernard Eder et al., \textit{SCRUTON ON CHARTERPARTIES AND BILLS OF LADING}, “Performance of Contract: Loading”, ¶ 9-017 (Sweet and Maxwell, 22\textsuperscript{nd} ed. 2011)
\textsuperscript{34} Moot Proposition, “Charterparty”, 34.
\textsuperscript{35} John Schofield, \textit{LAYTIME AND DEMURRAGE}, “Demurrage”, (Routledge, 6\textsuperscript{th} ed. 2011).
\textsuperscript{36} London Arbitration 18/05—LMLN 675, 28 September 2005.
\textsuperscript{37} Moot Proposition, “Clause 9(c) (i) of the Charterparty”, 34.
\textsuperscript{38} Burnett and Company v. Danube and Black Sea Shipping Agencies, (1933) 2 K.B. 438.
\textsuperscript{39} See Memorial on behalf of Claimant, ¶ 2.A et seq.
\textsuperscript{40} John Schofield, \textit{LAYTIME AND DEMURRAGE}, “Demurrage”, (Routledge, 6\textsuperscript{th} ed. 2011).
\textsuperscript{41} Moot Proposition, “Clause 9(c) (i) of the Charterparty”, 34.
claimant submits that laydays continued and the laytime provided in the charterparty expired leading to a claim for demurrage.

30. Lay days are the days which parties have stipulated for loading or discharge of cargo, and if they are exceeded, charterers are considered to be in breach of the charterparty. Breach of laytime by the charterer leads to payment of demurrage. Demurrage is an amount that has been agreed upon, payable to the owner, due to delay in the vessel’s departure, beyond laytime, for which the owner is not responsible. It is an accepted proposition of law that demurrage is not payable by the charterer when the owner is at fault. In this case, however, the claimant submits that they have committed no wrong in detaining the vessel as such detention happened due to failure of the charterer in nominating a safe port.

31. In cases where a breach of the charterparty or other default by the charterer results in the vessel being delayed after it has reached its specified destination, the general rule is that damages for detention are not claimable and the charterer is entitled to apply his laytime against the delay. The claimant submits that there was breach of safe port warranty committed by the respondent. Breach of the safe port warranty made charterers liable to pay damages to the shipowners in respect of losses sustained by reason of entering the unsafe port. Since detention on the port was by virtue of nomination of an unsafe port, reliance upon the doctrine of frustration by charterers is not good in law. Furthermore as the

42 Union of India v. Compania Naviera Aeolus SA (The Spalmatori), (1964) AC 868, 899.
45 See Memorial on behalf of Claimant, ¶ 3.C.1 et seq.
47 See Memorial on behalf of Claimant, ¶ 3. C.1 et seq.
charterparty did not get frustrated, charterers are liable to pay shipowners
demurrage, up till the time the charterparty existed, as well as damages for
detention for any subsequent period during which the vessel remains trapped.

32. Loss of time due to detention in an unsafe port is also meant to be compensated
for in accordance with the demurrage clause and not by way of damages for
 detention. In the case of The Vine, damages were awarded at the demurrage
rate where the delay was caused by breach of safe berth warranty, and therefore
 it is submitted that demurrage should be paid for the detention of the ship.

33. The respondent cannot argue that demurrage will run only for a reasonable period
as the demurrage period was unstated, because demurrage continues to run till the
contract is repudiated or frustrated. The claimant will, subsequently, prove that
the charterparty was not frustrated. Thus, in the absence of a stipulation limiting
the time on demurrage, demurrage at the agreed rate accrued continuously until
completion of functions that stopped laytime from running.

34. In the alternative, the tribunal decides that the charterparty was frustrated, the
claimant submits that the object of doctrine of frustration is to achieve justice,
and therefore the respondent is still be liable to pay compensation for utilisation of
the vessel by virtue of its use to store cargo.

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49 See Memorial on behalf of Claimant, ¶ 3 et seq.
55 See Memorial on behalf of Claimant, ¶ 3 et seq.
3. **The charterparty was not frustrated by reason of the delay which occurred in delivery of the cargo:**

35. The claimant submits that the charterparty was not frustrated because:

   A) There was no frustrating delay

   B) There was no supervening illegality

   C) A case of self-induced frustration

**A) There was no frustrating delay**

36. The respondent has argued that the charterparty has been frustrated due to radical change in the performance of charterparty\(^{58}\) due to frustrating delay,\(^{59}\) and we submit that there has been no radical change in the performance of the charterparty nor has there been any frustrating delay.

37. The doctrine of frustration is not to be lightly invoked and must be kept within very narrow limits. It ought not to be extended as it kills the contracts and discharges both the parties from any further liability.\(^{60}\) There is no prima facie rule that detention of a vessel by authorities gives rise to frustration\(^{61}\) or that frustration results from an unexpected and unjustified temporary detention of a chartered vessel by port authorities.\(^{62}\) Any question of frustration requires a multi-factorial approach.\(^{63}\) Such approach would lead us to objectively ascribe the nature of the supervening event, and the contemplation of the event and the delay.\(^{64}\)

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\(^{58}\) Moot Proposition, “Points of Defence and Counterclaim delivered on behalf of Hestia Industries”, 76.

\(^{59}\) Ibid.


\(^{63}\) Ibid.

\(^{64}\) Ibid.
38. Delays which are fundamental enough to transmute the job undertaken into a job of a different kind lead to frustration.\(^65\) A charterparty cannot be thrown up merely because there has been a “commercially unacceptable delay”, that is to say, delay exceeding a reasonable time.\(^66\) The delay which occurred due to confiscation of the ship did not make the charterparty impossible to perform, but merely made performance more onerous. It is submitted that a contract cannot be frustrated simply because it became more onerous to perform.\(^67\)

39. In the alternative it is observed that even if the delay occurred through no one’s fault, as long as it was in contemplation of the parties, the charterparty is not frustrated.\(^68\) Delays arising out of contemplation of the parties do not lead to frustration.\(^69\) Disappointed expectations do not themselves give rise to frustrated contracts.\(^70\) The confiscation, it is submitted was not totally unexpected and was ordinary in character\(^71\) as there were multiple protests against the export of HLNG. It was a risk undertaken by the respondent to export a controversial good, and therefore the respondent cannot rely on the risky nature of the good for frustration of the charterparty.\(^72\)

**B) THERE WAS NO SUPERVENING ILLEGALITY**

40. The claimant submits that there was no supervening illegality. The vessel returned to the port because of instructions of the coast guard, as the vessel was still within the port state jurisdiction. The instructions of coast guard arose due to the respondent’s goods and thus the respondent is responsible for the time lost due

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\(^65\) Sir Lindsay Parkinso & Go. Ltd. v. Commissioners of Works, (1949) 2 K.B. 632.
\(^67\) Davis Contractors v. Fareham Urban DC, (1956) AC 696, 724.
\(^68\) Ibid.
\(^70\) National Carriers Ltd v. Panalpina (The Northern), (1981) AC 675, 700.
to detention by the coast guard. It is further submitted that the respondent cannot claim frustration through supervening illegality as the presidential decree was invalid.

41. The presidential decree passed by Jacqueline Simmons instructing the Hades Coast Guard to intercept Athena and make it return to the port was invalid. Simmons’s authority to pass the decree came after she initiated a coup against the legitimate government. The usurpation of power by Simmons, a member of Opposition, with military support, was not envisaged under the previous constitutional set up, and thus the coup abrogated the existing constitutional order. Regimes following such abrogation of the constitutional order have been considered illegitimate, rendering all laws and orders passed thereunder invalid. Therefore the presidential decree being passed under such an illegal regime was invalid.

42. While jurists like Hans Kelsen seek to legitimise laws made under such regimes by using the doctrine of efficacy, this doctrine has been widely rejected as it merely encourages usurpers of power. Instead, the doctrine of necessity is used to validate those acts and laws that were necessary for public interest, peace and good order under the regime. This doctrine is employed for the orderly running of the state, in order to validate laws averting grave danger. The decree by Simmons did not satisfy this threshold of necessity. The decree passed by

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73 State v. Dosso, (1958) PLD SC 553.
75 Ibid.
77 Madzimbamuto v. Lardner-Burke, (1968) 3 AER 561.
79 Manby v. Scott, I Lev. 4 (1672).
80 Texas v. White, (1868) 7 Wallace 733.
81 Madzimbamuto v. Lardner-Burke, (1968) 3 AER 561.
Simmons wasn’t necessitated for the orderly running of the state and at most was needed for abating mere protests at the port of Hades. Moreover, usurpation of power by the executive of the legislature is not condoned, even under the doctrine of necessity. Therefore as the presidential decree was invalid, there was no supervening illegality which frustrated the charterparty.

43. In the alternative, the presidential decree was found to be invalid, it is still submitted that the charterparty is still frustrated as the master was duty bound to follow the instructions of the coast guard as long as the vessel was in the port state jurisdiction, and the vessel returned back following the instructions from the coast guard.

C) THE PRESENT SCENARIO IS A CASE OF SELF-INDUCED FRUSTRATION

44. The claimant submits that the respondent did not nominate a safe port and the port, after the enactment of the presidential decree and consequent action of the coast guard, became prospectively temporarily unsafe.

C.1) THE CHARTERER DID NOT NOMINATE A SAFE PORT

45. The charterparty clearly provided for the charterer to nominate a safe loading port. The clause provided in the charterparty is an express warranty for the same. In the case of The Archimidis the Court of Appeal held that the express typed provision for “1 safe port” constituted a warranty by the charterer of the safety of the port. The charterparty has a similar provision and therefore it is submitted that charterparty provides for an express nomination of a safe port.

83 R v. Hampden, 3 St. Tr. 825 (1637).
84 Bevan Marten, PORT STATE JURISDICTION AND THE REGULATION OF INTERNATIONAL MERCHANT SHIPPING, “Background to Port State Jurisdiction”, ¶ 2.3.3 (Springer, 2013).
85 Moot Proposition, “Point 5 of the Charterparty”, 29.
87 Ibid at ¶¶ 22–33.
46. Lord Sellers exposition on the test of safety in the case of Leeds Shipping Co. Ltd. v. Société Française Bunge (The Eastern City)\textsuperscript{88} is the leading authority for the test of safety.\textsuperscript{89} He observes:

“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\textsuperscript{90} without, in the absence of some abnormal occurrence,\textsuperscript{91} being exposed to danger which cannot be avoided by good navigation and seamanship.”\textsuperscript{92}

47. The nature of warranty of safety is a contractual promise made, at the time when the charterer nominates the port, to the shipowner, proceeding for loading, regarding the prospective safety of the port during the time the vessel is present at the loading port.\textsuperscript{93} Athena, once it reached the port, was not able to return from there as it was confiscated by the coast guard, and therefore the port became unsafe. Intervention by the coast guard is not an abnormal occurrence as they have the power to board and inspect a vessel at the port as well as detain a vessel till national laws are complied with.\textsuperscript{94} Furthermore not only should the occurrence be abnormal, it should be unexpected too.\textsuperscript{95} Therefore it is submitted that the port of Hades failed the Sellers test of safety because the vessel was not able to return back without any abnormal occurrence.

\textsuperscript{88} (1958) 2 Lloyd’s Rep. 127
\textsuperscript{89} Bernard Eder et al., SCRUTTON ON CHARTERPARTIES AND BILLS OF LADING “Performance of Contract: Loading”, ¶ 9-017 (Sweet and Maxwell, 22\textsuperscript{nd} ed. 2011).
\textsuperscript{90} Limerick Steamship Co. Ltd v. W. H. Stott & Co. Ltd (The Innisboffin), (1921) 1 K.B. 568, (1921) 2 K.B. 613.
\textsuperscript{91} Kodros Shipping v. Empresa Cubana de Fletes (The Evia), (1983) 1 A.C. 736.
\textsuperscript{92} Leeds Shipping Co. Ltd. v. Société Française Bunge (The Eastern City), (1958) 2 Lloyd’s Rep. 127, 131
\textsuperscript{93} Kodros Shipping v. Empresa Cubana de Fletes (The Evia), (1983) 1 A.C. 736, 749.
\textsuperscript{94} Erik Jaap Molenaar, Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage, 38(1) ODIL 225.
\textsuperscript{95} Uni-Ocean Lines v. C-Trade (The Lucille), (1984) 1 Lloyd’s Rep. 244.
48. Mere risk of confiscation, as a characteristic of a port, to which a vessel is ordered may suffice to render the port unsafe. \[96\] Since, with Athena, confiscation actually happened, the claimant submits that the nominated port was unsafe.

49. A nominated port has to be prospectively safe at the time of the vessel’s likely visit and departure. \[97\] In the case of The Evia, \[98\] it was observed that if a prospectively safe port becomes unsafe, it is the secondary obligation of the charterer to nominate an alternate port, failing which the charterer would be in breach of the charterparty. \[99\] Respondents failed to nominate an alternative safe port and were, thus, in breach of their alternate obligation.

50. The claimant submits that the argument of the respondent that there was a disproportionate delay \[100\] and that the nature of contract changed fundamentally \[101\] cannot be accepted as this is a case of self-induced frustration.

51. The object of frustration is to give effect to the *demands of justice*. \[102\] Such object is not fulfilled if the party claiming frustration is at fault. \[103\] A frustrated event must take place without blame or fault on the side of the party seeking to rely upon it. \[104\]

52. It is submitted that in cases where failure to nominate a safe port leads to a predicament which is termed as frustrating the charterparty, such predicament

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\[99\] Ibid at 763.

\[100\] Moot Proposition, “Points of Defence and Counterclaim delivered on behalf of Hestia Industries”, 76.

\[101\] Ibid.


\[103\] Ibid.

cannot be termed as frustration in favour of the charterers. 105 The claimant submits that Athena was detained because the respondent failed to nominate a safe port.106 Moreover, it was the respondent’s cargo that was the reason for detention. Therefore the respondent cannot claim the defence of frustration as it was in consequence of its nomination of an unsafe port107 that led to the so called ‘frustration’, thereby it is case of a self-induced frustration.108

4. THE SERVICES PROVIDED BY HESTUG WERE NOT SALVAGE SERVICES

53. The claimant submits that services provided by Hestug were not salvage services. since:

A. There was no danger being faced by Athena that required rendition of salvage services

B. In arguendo, Athena was in a state of danger, services provided by Hestug’s tug were continuation of the existing towage contract

A) THERE WAS NO DANGER BEING FACED BY ATHENA THAT REQUIRED RENDITION OF SALVAGE SERVICES

54. Salvage services are considered to be rendered by a volunteer whenever maritime property is saved from danger.109 A volunteer is considered to have provided

106 See Memorial on behalf of Claimant, ¶ 3. C.1) et. seq.
108 John Wilson, CARRIAGE OF GOODS BY SEA, “Implied Obligations in a Contract of Affreightment” 86.
salvage services to a vessel only when it does not have a duty, contractual\textsuperscript{110} or otherwise,\textsuperscript{111} to protect the ship.

55. The onus to prove that a vessel has been rendered salvage services rests on the salving vessel.\textsuperscript{112} Hence, in this case, it rests upon Hestia to prove that the services it rendered to Athena were salvage services and did not arise from any pre-existing contractual duty.

56. Moreover, rendition of salvage services is seen, both, from the perspective of the cargo\textsuperscript{113} and the vessel.\textsuperscript{114} For a claim of salvage to exist against the cargo and the vessel, it needs to be proved that both the cargo and the vessel were in danger. Such proof of danger to maritime property is important as the underlying purpose of giving salvage reward is the need to award parties that saved maritime property in peril, thereby encouraging continuation of such salving practices.\textsuperscript{115}

57. In such contemplation of danger, courts have held that there needs to be a reasonable apprehension of peril to maritime property.\textsuperscript{116} The danger being contemplated should not be fanciful, but should be a reasonable possibility.\textsuperscript{117} Nor is there a requirement for immediate danger.\textsuperscript{118} However, there needs to be reasonable apprehension of danger.

58. In the case of Athena, both propeller shafts broke pursuant to release of towlines, merely impairing the vessel’s mobility. Here, as according to the reasonable

\textsuperscript{110}The Vrede, (1861) 167 E.R. 143, 144.
\textsuperscript{111}Simon Rainey, \textsc{The Law of Tug and Tow and Offshore Contracts}, “Towage and Salvage”, 408 (Routledge, 3\textsuperscript{rd} ed. 2013).
\textsuperscript{112}The Princess Alice, (1849) 166 E.R. 914, 916.
\textsuperscript{114}Simon Baughen, \textsc{Shipping Law}, “Salvage” 282, 286 (Routledge, 6\textsuperscript{th} ed., 2015).
\textsuperscript{115}The Sappho, (1930) 37 L.L. Rep. 122, 147.
\textsuperscript{116}The Phantom v. Hurrell (The Phantom), (1866) LR 1 A&E 58, 60.
\textsuperscript{117}The Mount Cythnos, (1937) 58 L.I. Rep 18, 25.
\textsuperscript{118}Owners of Cargo Lately Laden on Board the Troilus v. Owners, Masters and Crew of the Glenogle (The Troilus and the Glenogle), (1951) A.C. 820, 823.
apprehension test, no situation of danger prevailed. A few factors can make this clear. Mostly, danger is presupposed if circumstances like bad weather, etc. are present, calling into question the physical safety of the vessel.\(^{119}\) There were no such indicators that could put the Athena in danger at the time its propeller shafts broke. It has been held that the mere fact that an immobile ship is being towed does not imply that services being rendered are salvage services.\(^{120}\) In cases where the only problem with the vessel is that of immobility, seeking towage assistance might be commercially more prudent.

59. In addition to the absence of any reasonable apprehension of danger, it is to be noted that Athena was not at a distance far away from the port of Hades, and hence, could have easily called for alternate towage services. Towage services can be availed by disabled vessels, too, and rendition of services to them are not to be perceived as salvage services.\(^{121}\) Thus, as per the judicially evolved prudent master test,\(^{122}\) the Athena was not in a condition where any reasonable, prudent, master of a vessel would have accepted salvage services. This was because at the given point, when Hestug’s tug offered assistance, there was no reasonable apprehension of physical danger. Moreover, alternate tug services could have been availed by Athena, too.

60. The circumstance in which Athena found itself can be distinguished from cases like *The Troilus v. The Glenogle*\(^{123}\) where a vessel, which had lost use of its propellers in the middle of the Indian Ocean, was perceived to be rendered salvage services by the vessel that rescued it. The difference between this case and Athena

\(^{119}\) The *Kingalock*, (1854) 1 Spinks A&E, 263.


\(^{121}\) The *Texaco Southampton*, (1983) 1 Lloyd's Rep. 94.

\(^{122}\) The *Annapolis & The Golden Light & The H.M. Hayes*, (1861) 167 E.R. 150, 161.

\(^{123}\) (1951) A.C. 820.
is that while in the former, the vessel was rendered immobile 1,050 miles from the
nearest port, in the case of Athena, the vessel had just entered open waters, and
hence could have availed tug services with greater ease.

61. Hence neither was the vessel stranded, nor was there any reasonable apprehension
of danger at the time. Since the vessel was not in danger, the cargo on board the
vessel was not in a state of danger, either. This was especially because of the latest
technology Athena was equipped with which enabled it to safely store HLNG for
long periods of time.

B) IN ARGUENDO, ATHENA WAS IN A STATE OF DANGER, SERVICES PROVIDED BY HESTUG’S
TUG WERE CONTINUATION OF THE EXISTING TOWAGE CONTRACT

62. The primary requirement for a party to be entitled to a claim for salvage reward is
that services rendered by it should be purely voluntary and should not be arising
out of any contractual relationship.\textsuperscript{124} If the party claiming such reward had a duty
to keep the vessel safe, prior to the onset of danger, then services rendered cannot
be considered to be salvage services.\textsuperscript{125} Thus, it is well established that if a party
is performing services under a towage contract, no claim for a salvage reward will
exist.\textsuperscript{126}

63. It is submitted that in the present case, services provided by Hestug’s tug,
throughout, were part of the towage contract entered into between Athena and
Hestug. The purpose of employment of tug services at the port is for facilitation of

\textsuperscript{124} The Clan Steam Trawling Co. Limited v. Aberdeen Steam Trawling and Fishing Co. Limited, 1908 S.C.651, 654.
\textsuperscript{125} The Vrede, (1861) 167 E.R. 143, 144.
\textsuperscript{126} Yvonne Baatz, MARITIME LAW, “The Liabilities of the Vessel”, 223, 237 (Routledge, 3\textsuperscript{rd} ed. 2014).
departure from the port.\textsuperscript{127} Since the purpose of employment of the tug service is for facilitation of departure of the vessel, in the case of Athena, the contract could have reasonably ended only when the vessel was capable of departing. Just as the towlines were released, it became evident that the propeller shafts had been tampered with, hence bringing into question the successful departure of Athena.\textsuperscript{128}

64. Common practice indicates that contracts of towage are entered into for the ‘reasonably necessary and safe operation of the vessel’.\textsuperscript{129} Moreover, it is the duty of the tug to ensure the safety of the tow while discharging its services.\textsuperscript{130} Since it is the duty of a tug to ensure the safety of the vessel, while discharging its duties, Hestug’s tug’s contractual duty extended to ensuring that Athena would be able to depart successfully and that it wasn’t left in any danger that would prevent it from departing. This is especially because the contract entered into was to enable the departure of Athena from the port of Hades.

65. In addition to this, since the fault in propeller shafts wasn’t known at the time the towage contract was entered into, at the port of Hades,\textsuperscript{131} it was impossible for the master to convey the fault while entering into the contract. It has been held that in such a case where circumstances of the vessel change during the execution of the towage contract, the contract will still remain one of rendition of towage services till the time the nature of the contract remains same and tugs do not incur any peril due to such changed circumstances.\textsuperscript{132}

\textsuperscript{128} Moot Proposition, “The Hades Advocate, Online Edition”, 71.
\textsuperscript{129} Simon Rainey, \textit{The Law of Tug and Tow and Offshore Contracts}, “Towage and Salvage”, 14 (Routledge, 3\textsuperscript{rd} ed. 2013).
\textsuperscript{130} The Refrigerant, (1925) P. 130.
\textsuperscript{131} Moot Proposition, “The Hades Advocate dated 7 October 2015”, 71.
66. It has been established that in discharge of their duties, the standard of obligation upon tugs is that of best endeavours.\textsuperscript{133} This duty of best endeavours is considered to be performed when tugs display reasonable skill and diligence in discharge of their duties.\textsuperscript{134} Since Hestug’s tug’s contractual obligation was to ensure safe departure of Athena, upon the breaking of the vessel’s propeller shafts, it fell within the tug’s reasonable contractual duty to render assistance to Athena. Provision of such services was not different in scope from that envisaged in the contract.

67. It is true that typically a towage contract ends with the release of towlines,\textsuperscript{135} however every instance of parting of the towlines does not necessarily imply an end of the towage contract.\textsuperscript{136} If after the towline is reconnected, the nature of the service being rendered by the tug continues to remain the same as was contracted for, the towage contract is seen to continue.\textsuperscript{137} Thus, if the scope and nature of services intended to be performed remain the same, towage services do not get translated into salvage services.\textsuperscript{138} In the understanding of what would fall within the scope of these towage contracts, courts have held that it would be absurd to suppose that the service to be rendered would be exactly the same as envisaged at the time of entering into the contract.\textsuperscript{139} There are bound to be some variations in the performance of services from what was envisaged in the contract, however if the nature of service remains the same, then the towage contract continues to exist throughout.

\textsuperscript{133} The Julia, (1861) 167 E.R. 110.
\textsuperscript{134} The Marechal Suchet, (1911) P. 1, 12.
\textsuperscript{135} The Clan Colquhoun, (1936) 54 Ll L Rep 221.
\textsuperscript{137} The North Goodwin No.16, (1980) 1 Lloyd's Rep. 71, 74.
\textsuperscript{138} The Minnehaha, (1861) 15 Moo PC 133, 152-154.
\textsuperscript{139} The White Star v. Kerr, (1865-67) LR 1 A&E 68, 70.
68. In light of the arguments advanced, it is clear that no salvage services were rendered towards Athena by Hestug’s tug. Services rendered by Hestug’s tug were not different from what was initially envisaged in the contract and the tug was not placed in danger in rendition of such services. While it is required that valid rendition of salvage services be rewarded and encouraged, it has been acknowledged that the judicial mind should be cautious while awarding salvage rewards. This caution is needed to prevent tugs from exploiting the towed vessel and claiming salvage reward even when services rendered fall within the ambit of contractual duty of the tug.¹⁴₀

| PRAYER |

In light of issues raised, arguments advanced and authorities cited, it is humbly requested that this Hon’ble Tribunal may be pleased to adjudge and declare:

1. That the arbitral tribunal has the requisite jurisdiction to adjudicate upon the issue of frustration;
2. That the respondents are liable to pay demurrage as laytime continued to run;
3. That the charterparty was not frustrated by reason of the delay which occurred in delivery of the cargo;
4. That the services provided by Hestug were not salvage services

ALL OF WHICH IS RESPECTFULLY SUBMITTED

COUNSELS FOR THE CLAIMANT

¹⁴₀ The Liverpool, (1893) P. 154, 164.