17th ANNUAL INTERNATIONAL MARITIME LAW ARBITRATION MOOT COMPETITION 2016

IN THE MATTER OF A LONDON ARBITRATION

CLAIMANT’S MEMORANDUM

Claimant: Zeus Shipping and Trading Company

Respondent: Hestia Industries

Team 24

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A. CASES

Amaltal Corporation Ltd v Maruha (NZ) Corporation Ltd [2004] 2 NZLR 614.


Blunden v Commonwealth of Australia (Australia) [2003] HCA 73.

Brass v Maitland (1856) 6 E. & B. 470.


Brett v Barr Smith (1919) 26 CLR 87.

Budgett v Binnington [1891] 1 QB 35.

Bunge SA v ADM Do Brasil Ltda (The Darya Radhe) [2009] 2 Lloyd’s Rep 175.

Bunge SA v Kyla Shipping Company Limited (The Kyla) [2013] 1 Lloyd’s Rep 565.

C v D [2007] EWCA Civ 1282.

Charles Maruitzen v Baltic Shipping Co [1848] SC 646.


Comandate Marine Corp v Pan Australia Shipping Pty Ltd [2006] FCAFC 192.


Dow Chemical v Isover Saint Gobain ICC Case 4131 (1982).


Fiona Trust & Holding Corporation and others v Privalov and others [2007] EWCA Civ 20.
Fiona Trust & Holding Corporation and others v Privalov and others [2007] UKHL 40.

Five Oceans Salvage Ltd v Wenzhou Timber Group Co (The “Medea K”) [2011] EWHC 3282 (Comm).


Hadley v Clarke (1799) 8 T.R. 259.


Houlder v Weir [1905] 2 KB 267.

Hyundai Merchant Marine v Dartbrook Coal (Sales) [2006] FCA 1324.


Larsen v Sylvester [1908] AC 295.

Larringaga v Societe Franco-Americaine des Phosphates (1923) 14 Lloyd’s Rep 457.

Mitchell, Cotts & Co v Steel Brothers & Co Ltd [1916] 2 KB 610.

The M/V Saiga (No. 2) (1999) 38 ILM.

OT Africa Line Ltd v Magic Sports Corp, [2005] EWCA Civ 710.


The Penelope (1928) 31 LI Lloyd’s Rep 96.


Philippines v Philippine International Air Terminals Co Inc [2007] 1 SLR 278.

The Quito [1919] 1 AC 435.


Ruddock v Vadarlis [2001] FCA 1329


Scanlan’s New Neon Ltd v Tooheys Ltd (1943) 67 CLR 169.


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B. STATUTES


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C. INTERNATIONAL MATERIALS


D. BOOKS


Sir Kim Lewison and David Hughes, *The Interpretation of Contracts in Australia* (Thomson Reuters 2012).


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STATEMENT OF FACTS

I. THE PARTIES

1. The Claimant, Zeus Shipping and Trading Company, is a company based in Poseidon. The Claimant owns a Hades-flagged Liquified Natural Gas (LNG) tanker called Athena (“the Vessel”). It is the only vessel in the world able to transport the unique form of LNG produced from Hades Shale Gas (“HLNG”). The Respondent, Hestia Industries is a company based in Hades. It has been in the business of port management and tug services and has in late 2014 commenced gas liquefaction business.

II. THE CHARTERPARTY

2. On 1 July 2014, the Claimant as “Owners” and the Respondent as “Charterers” entered into negotiations for the hire of the Vessel to transport HLNG from Hades to Poseidon for a single voyage (“the Charterparty”). The Charterparty was finalised on 22 July 2014. The arbitration clause (Clause 30) provided that “any dispute arising under this contract shall be referred to arbitration in London ....”¹

III. PERFORMANCE OF THE CHARTERPARTY

3. On 3 October 2014, the Vessel arrived at the port of Hades.² Upon the Vessel’s arrival, huge protests erupted as a sign of political and public anger against the Respondent’s HLNG shipment. Environmental groups oppose the extraction of the HLNG gas because the production process to liquefy the gas is said to emit ten times more carbon dioxide than conventional gas liquefaction plants. The protests led to the closure of the port of Hades for two hours.³ Despite this troubling state of affairs, the Master and crew of the Vessel acted speedily and completed the loading of HLNG within four days.⁴

¹ Voyage Charterparty (21 July 2014), Bundle of Facts at 45-46.
² Notice of Readiness (3 October 2014 at 0915), Bundle of Facts at 51.
³ “Arrival of ‘Athena’ leads to port protests” The Hades Advocate (Hades, 4 October 2014), Bundle of Facts at 52.
⁴ Statement of Facts for MV Athena at Hades (7 October 2014), Bundle of Facts at 54.
4. On 7 October 2014, the Vessel left Hades port at 9 am. On that same day, a military coup seized control of the Parliament. This movement was precipitated by the protest and public opposition against the Respondent’s HLNG shipment. The coup leader turned President immediately instructed the Hades Coast Guard to intercept the Vessel and have it return to Hades port due to her commitment to stop the shipment. The Hades Coast Guard intercepted the Vessel on 7 October 2014 while the vessel was still in Hades territorial waters. The Master complied with the Coast Guard’s instruction to report to port as the Vessel was within Hades’ territorial limits.

5. In a letter dated 15 October 2014, the Claimant reminded the Respondent that laytime continued to run and when exhausted, demurrage would accrue at US$50,000/day as the Vessel did not leave the Port of Hades. Laytime had commenced on 3 October 2014 when the notice of readiness was tendered and would have been exhausted by 12 October 2014. The respondent replied on 22 October 2014 to deny liability for demurrage without providing any reasons. Despite ample warning from the Claimant that a “long delay” was expected, the Respondent insisted that the cargo be delivered to Poseidon by 2 November 2014.

6. Although the HLNG cargo was not delivered by 2 November 2014, the Respondent remained silent until the Claimant sent an interim invoice for US$9.2 million on 15 April 2015. On 20 April 2015, the Respondent alleged for the first time that the Vessel had left the Loading Place but had returned to Hades port due to the Master’s incompetency and negligence. The Respondent also alleged for the first time that the Charterparty had been frustrated by the ensuing delay (“the frustration”).

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5 *Statement of Facts for MV Athena at Hades* (n 4).
6 *The Hades Advocate* (7 October 2014, Online Edition), Bundle of Facts at 55.
7 Letter from the Claimant to the Respondent (15 October 2014), Bundle of Facts at 60.
8 Ibid.
9 Letter from the Respondent to the Claimant (22 October 2014), Bundle of Facts at 61.
10 Letter from the Claimant to the Respondent (15 April 2015), Bundle of Facts at 63-64.
11 Letter from the Respondent to the Claimant (30 April 2015), Bundle of Facts at 65.
12 Ibid.
7. On 30 April 2015, the Respondent tried unsuccessfully to arrange an alternative vessel to tranship the cargo of HLNG but to no avail.\textsuperscript{13} Hades would only permit Hades-flagged vessels in port and the Vessel was the only HLNG carrier in the world that could ship the cargo.\textsuperscript{14}

8. On 5 October 2015, the Vessel was released by the Coast Guard. The Claimant immediately commenced preparations for the Vessel to sail to Poseidon.\textsuperscript{15} The Claimant contracted separately with Hestug, a business owned by the Respondent, to provide tug services.\textsuperscript{16} However, the propeller shafts of the Vessel broke after the towlines were released. The propellers of the Vessel had been tampered with while the Vessel was detained at Hades port. Hestug came back to rescue and salved the Vessel.\textsuperscript{17}

9. In the meantime, on 6 October 2015, the Claimant sent the Respondent a final invoice. The Respondent did not respond to this letter at all.\textsuperscript{18} Until 16 November 2015, demurrage amounting to US$17.9m remained unpaid. The Claimant thereupon referred the dispute to arbitration as per Clause 30 of the Charterparty.\textsuperscript{19} The Claimant is claiming for the total demurrage claim of US$17.9m with interest and cost on the ground that the Vessel was prevented from leaving Hades port by the Hades Coast Guard and did not leave the Loading Place until 6 October 2015.

10. The Respondent replied on 23 November 2015 disclaiming all liability for demurrage on the basis that the Charterparty had been frustrated by 30 April 2015.\textsuperscript{20} The Respondent also objected to arbitral tribunal’s jurisdiction to hear the “frustration” issue because it is not within the scope of the arbitration clause.\textsuperscript{21}

\begin{itemize}
\item \textsuperscript{13} Email from the Respondent to WeBroke (30 April 2015 at 1200), Bundle of Facts at 66.
\item \textsuperscript{14} Email from WeBroke to the Respondent (30 April 2015 at 1200), Bundle of Facts at 66.
\item \textsuperscript{15} Email from the Master to the Claimant (5 October 2015 at 0900), Bundle of Facts at 68.
\item \textsuperscript{16} Email from the Claimant to the Master (5 October 2015 at 1300), Bundle of Facts at 68.
\item \textsuperscript{17} The Hades Advocate (7 October 2015, Online Edition), Bundle of Facts at 71.
\item \textsuperscript{18} Letter from the Claimant to the Respondent (6 October 2015), Bundle of Facts at 69-70.
\item \textsuperscript{19} Letter from the Claimant to the Respondent (10 November 2015), Bundle of Facts at 72.
\item \textsuperscript{20} Letter from the Respondent to the Claimant (23 November 2015), Bundle of Facts at 73.
\item \textsuperscript{21} Ibid.
\end{itemize}
SUMMARY OF THE ISSUES

1. This Tribunal has to determine the following issues:

1) Whether this tribunal has jurisdiction to determine the frustration issue, given the words “any dispute arising under this contract” in the arbitration clause. If the answer is “no”, whether the inability to determine the frustration issue equates to inability to determine the demurrage claim.

2) Whether this tribunal has jurisdiction to determine the Respondent’s salvage claim.

3) Whether the Respondent is liable for demurrage for the period between October 2014-October 2015.

4) Whether the Charterparty was frustrated so as to defeat the claim for demurrage.
SUBMISSIONS

I. THE TRIBUNAL HAS JURISDICTION TO HEAR BOTH THE FRUSTRATION ISSUE AND THE DEMURRAGE CLAIM.

1. The Respondent denies this tribunal’s jurisdiction to hear the frustration defence and accordingly the demurrage claim. The Respondent appears to take the position that the arbitration clause does not encompass “frustration” (the subjective non-arbitrability argument). However, the challenge must fail.

2. Additionally, s11 of Hades’ Carriage of Goods by Sea Act\(^2\) (COGSA) may potentially render ineffective any exclusive arbitration clause in a sea carriage contract that does not choose Hades as the seat of arbitration (the objective non-arbitrability arguments). However, this argument was not pleaded by the Respondent\(^2\). In any event, since English law is the proper law governing the arbitration agreement, mandatory foreign law such as the Hades COGSA does not apply\(^2\).

A. THE ARBITRATION AGREEMENT ENCOMPASSES THE FRUSTRATION ISSUE.

1. The subjective non-arbitrability issue is governed by English law.

3. The law governing the substantive validity of the arbitration clause is the law governing the seat of the arbitration and not the law governing the Charterparty. As London is the seat of arbitration, the arbitration clause is governed by English law.

4. If parties chose a seat of arbitration which is different from the place of the substantive contractual law, this indicates that parties wanted to separate their obligation to arbitrate from their obligations under the substantive contract\(^2\). Many courts and tribunals have held that an arbitration agreement is governed by the law of the seat of the arbitration\(^2\). The English Court of

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\(^2\) See Carriage of Goods by Sea Act 1991(Australia), s11 which is in para materia with Hades law.

\(^2\) Respondent’s Point of Defence and Counter Claim, point 4 and 5, Bundle of Facts at 76.

\(^2\) OT Africa Line Ltd v Magic Sports Corp, [2005] EWCA Civ 710.


Appeal in *C v D*\(^{27}\) held that since the arbitration agreement “normally [has] a closer and more real connection” with the place of the seat, the arbitration agreement is “more likely” to be governed by the law of the seat rather than the law governing the contract. The Singapore High Court in *Philippines v Philippine International Air Terminals Co Inc*\(^{28}\) also affirmed that Singapore law governed the arbitration agreement notwithstanding that the law of the Philippines governed the main contract. The parties and the place of contractual performance were in the Philippines. Yet, the arbitral tribunal held that the parties’ choice of an ICC arbitration seated in Singapore suggested that a law other than Philippines’ should govern the arbitration clause and that “law other than Philippines” is Singapore law.

5. Likewise, in ICC Case no 14046\(^{29}\), the arbitral tribunal, with reference to Art V(1)(a) of the New York Convention, reasoned that, in the absence of parties’ stipulation as to the applicable law of the arbitration clause, the law of the seat should govern the arbitration clause.

6. On our facts, the choice of law clause only governs the main contract. The choice of London as the seat of arbitration indicates that parties intended English law to govern the arbitration agreement. Therefore, the scope of the arbitration agreement is to be determined under English law.

2. The arbitration agreement encompasses the frustration issue under English law.

   a. *There is a pro-arbitration presumption that an arbitration agreement will cover all disputes unless there are express exclusions.*

7. English Law (including the Arbitration Act 1996) applies. The Arbitration Act 1996 (UK) does not expressly prescribe rules on the interpretation of arbitration agreements\(^{30}\). It only provides that the arbitral tribunal has jurisdiction “in respect of a matter which under the agreement is to

\(^{27}\)[2007] EWCA Civ 1282, [22], [26], [28].

\(^{28}\)[2007] 1 SLR 278.


be referred to arbitration”. English courts have approached the question of interpretation by applying a pro-arbitration presumption31.

8. The House of Lords in Fiona Trust held that parties are presumed “to have intended any dispute arising out of the relationship into which they have entered ... to be decided by the same tribunal...unless the language makes it clear that certain questions were intended to be excluded from the arbitrator’s jurisdiction.”32 This approach is overwhelmingly supported by subsequent English decisions33, other national courts34, arbitral tribunals35 and commentators36.

b. Frustration is an issue that “arises under” the charterparty.

9. Nothing in Clause 30(a) specifically excludes “frustration” from the tribunal’s jurisdiction. Clause 30(a) provides that “any dispute arising under the contract shall be referred to arbitration in London”.

10. The phrase “arising under” of Clause 30(a) is wide enough to encompass the issue of frustration. In Charles Maruitzen v Baltic Shipping Co37, the court interpreted the words “any dispute arising under [the charterparty]” as encompassing the issue of frustration. Although this case was decided by the Outer House of Scotland, Lord Blades relied specifically on observations made by the English House of Lords in Heyman v Darwins38. In Heyman, Lord Wright opined that issues of frustration “would seem logically to arise ‘under the contract’ and to fall within the submission...”39 His Lordship finds it “difficult to distinguish a dispute where there is a claim for damages and the defence set up is that the contract is frustrated from any other defence, or to

32 Ibid (UKHL) [13], [26].
33 Barclays Bank plc v Nylon Capital LLP [2011] EWCA Civ 826, [27].
35 Born (n 30) 107.
36 Born (n 30) 1318.
38 [1942] AC 356.
39 Ibid 383.
understand why such a dispute should be outside a submission of disputes under the contract\textsuperscript{40}.

The above observation was cited and followed in \textit{Kruse v. Questier}\textsuperscript{41} which held that the phrase “arising out of this contract” covers issues of frustration\textsuperscript{42}. Pilcher J regarded “arising out of” as “words of a similar character” to those referred to in \textit{Heyman} (“arising under”) and based his decision solely on the basis of the observation made in \textit{Heyman}\textsuperscript{43}.

c. Parties did not intend to exclude “frustration” from the arbitration agreement

11. The above establishes the arbitral tribunal’s jurisdiction over the frustration issue. It is not open to the Respondent to rely on prior drafts and emails. “[O]nce the formal charterparty has been drawn up and signed by the parties ...it is not permissible to have regard to fixture telexes, or the pre-fixture negotiations, in order to construe the terms of the charterparty.”\textsuperscript{44} The same rule applies to the interpretation of arbitration agreements.

12. In any event, nothing in the prior negotiations or drafts shows a common intention to exclude frustration from the tribunal’s jurisdiction. First and foremost, there was nothing in the Respondent’s correspondence which suggested a specific exclusion of frustration from the scope of the arbitration agreement. The Respondent agreed to the final wording which referred to disputes “arising under” the contract. This phrase, on its face, covers frustration. Had the parties intended to exclude frustration from the scope of the arbitration agreement, they would have explicitly state as such in the arbitration agreement. They did not do so.

13. According to the Respondent, she was “prepared to arbitrate disputes ...which arise out of the provisions of the Charterparty”. Courts have interpreted “arise out of” liberally to cover disputes

\textsuperscript{40} \textit{Heyman v Darwins} (n 38) 383, 366 (Viscount Simon L.C.).
\textsuperscript{41} [1953] 1 QB 669, 677.
\textsuperscript{42} \textit{Ibid} 674, 699: There are some discrepancies in the report as to the actual wording of the arbitration clause. While in the judgment Pilcher J referred to “disputes from time to time arising out of this contract”, the head note quoted “all disputes from time to time arising under this contract”.
\textsuperscript{43} \textit{Kruse} (n 41), 674.
\textsuperscript{44} \textit{Investors Compensation Scheme v West Bromwich Building Society} [1998] 1 WLR 896; BCCI v Ali [2002] 1 AC 251; \textit{Chartbrook v Persimmon Homes} [2009] AC 1101. See also Julian Cooke et al, \textit{Voyage Charters} (4\textsuperscript{th} edn, Informa Law 2014), [1.97].
on frustration. In so far as “out of the provisions of the Charterparty” may be more restrictive, the Claimant never agreed to such unilateral statement of subjective intention. Communication of subjective intention does not without more create mutuality.

3. The frustration issue is arbitrable even under Western Australian law.

14. Even if this tribunal finds that the law governing the arbitration agreement is the same as the law governing the main contract, which is Western Australian law, the tribunal still has jurisdiction over the frustration issue. The English pro-arbitration presumption applies similarly under Western Australian law. In Comandate Marine Corp v Pan Australia Shipping Pty Ltd, the Federal Court of Australia adopted a “liberal approach” towards interpretation which was “underpinned by the sensible commercial presumption that the parties did not intend the inconvenience of having possible disputes from their transaction being heard in two places”. This “liberal approach” was cited as authority by the UK House of Lords in Fiona Trust in reaching a similar position in England. This position was endorsed by the Federal Court of Australia in Seeley International v Electra Air Conditioning. Further, the observation in Heyman that frustration “arises under” the contract is also approved by the High Court of Australia in Codelfa Construction v State Rail Authority.

B. The tribunal has jurisdiction over the demurrage claim.

15. The Respondent argues that if the tribunal has no jurisdiction over the frustration issue, “it follows” that it has no jurisdiction to determine the demurrage claim. Presumably, the Respondent is arguing that (1) the tribunal has no jurisdiction because the arbitration agreement

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46 Chartbrook (n 44).
48 Ibid [163].
49 Ibid [165].
50 [2008] FCA 29, [24].
is brought to an end by frustration, or (2) natural justice dictates that the demurrage claim must be heard together with the frustration defence. Both arguments are incorrect.

1. **The arbitration agreement is valid even if the Charterparty is frustrated.**

16. Frustration of the main contract does not *ipso facto* deprive the jurisdiction of an arbitral tribunal.

The jurisdiction of the arbitral tribunal as conditioned upon the validity of the arbitration agreement is governed by the law of the seat and therefore English law.\(^{52}\) In *Heyman*, the House of Lords held that an arbitral tribunal’s jurisdiction to hear a dispute is not affected even if one party alleges that the main contract has been frustrated.\(^{53}\) This decision is clearly correct in view of the subsequent codification of the principle of separability in s7 of the Arbitration Act (UK)\(^{54}\) and the affirmation of the same by the House of Lords in *Fiona Trust*.\(^{55}\) The principle of separability was similarly endorsed by the Australian Federal Court in *Comandate Marine v Pan Australia*.\(^{56}\)

2. **It is not against natural justice for the tribunal to hear the demurrage claim even if it does not have jurisdiction over the frustration issue.**

17. The validity of an award is governed by the law of the seat of the arbitration.\(^{57}\) Accordingly challenges to set aside the award based on breach of natural justice or procedural irregularity must fall within s68 of the English Arbitration Act 1996.\(^{58}\) In *Terna Bahrain*, the London High Court refused to set aside an ICC award challenged on the ground that the arbitrator had decided the case on a basis allegedly not advanced by a party and which the party thus had no opportunity to address.\(^{59}\) Popplewell J held that “Relief under section 68 will only be appropriate where the

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\(^{52}\) As established at para 3 of these submissions.

\(^{53}\) *Heyman* (n 38).

\(^{54}\) Arbitration Act 1996 (UK), s 7.

\(^{55}\) *Fiona Trust* (n 31). See also *Gary Born* (n 30) 378-382.

\(^{56}\) (2006) 238 ALR 457.


\(^{58}\) *Five Oceans Salvage Ltd v Wenzhou Timber Group Co (The "Medea K")* [2011] EWHC 3282 (Comm), [25].

tribunal has gone so wrong in its conduct of the arbitration, and where its conduct is so far removed from what could reasonably be expected from the arbitral process, that justice calls out for it to be corrected." Thus a mere lack of opportunity to respond, such as on our facts where the Respondent raises its lack of opportunity to present its defence of frustration to the demurrage claim, is not grounds to refuse to hear the demurrage claim.

II. THIS TRIBUNAL DOES NOT HAVE JURISDICTION TO HEAR THE RESPONDENT’S SALVAGE CLAIM.

A. THE ARBITRATION AGREEMENT DOES NOT ENCOMPASS A CLAIM FOR SALVAGE.

18. The scope of the arbitration agreement does not encompass the Respondent’s counterclaim for salvage. A claim to be brought before an arbitral tribunal must have a sufficient connection with the underlying contract to be covered by the arbitration agreement. The claim for salvage does not have any connection whatsoever with the Charterparty. This claim for salvage can be contrasted with the issue of frustration which falls within the scope of the arbitration agreement. The issue of frustration specifically deals with the question of whether the underlying contract has become terminated and the effect of such termination on the contracting parties.

B. HESTUG AS THE SALVOR IS NOT A PARTY TO THE ARBITRATION AGREEMENT.

19. Even if the scope of the arbitration agreement is wide enough to encompass the salvage claim, the Respondent’s salvage claim must fail because the Respondent did not carry out the salvage operation on the Vessel. Hestug is the owner of the tugs which carried out the salvage operations, not the Respondent. Consent is a prerequisite for arbitration and no evidence suggests that Hestug is privy to the Charterparty, let alone the arbitration agreement. The Claimant similarly did not consent to Hestug becoming a party to the arbitration agreement.

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60 Terna Bahrain (n 59), [85].
61 Redfern 6th edn (n 57), [2.56].
C. THE RESPONDENT CANNOT RELY ON THE “GROUP OF COMPANIES” DOCTRINE TO BRING THE SALVAGE CLAIM.

1. The “group of companies” doctrine is only accepted under French law.

20. The “group of companies” doctrine was developed in the ICC case of Dow Chemical v Isover Saint Gorbain. Dow Chemical USA, the parent company, and a French subsidiary, both non-signatories of the contract containing the arbitration agreement, brought a claim against Isover Saint Gorbain. The tribunal held that the non-signatories could still be bound by the arbitration agreement because they played a significant role in the negotiation, performance and termination of the underlying contract which contained the arbitration agreement.

21. However, the “group of companies” doctrine has not been accepted universally. Courts in Switzerland, England and Netherlands have rejected the doctrine. Indeed, the English High Court in Peterson Farms Inc v C Farming Ltd stated emphatically that the group of companies doctrine “forms no part of English law”.

2. In any event, the requirements of the “group of companies” doctrine are not met.

22. Under the “group of companies” doctrine, the non-signatory companies must have played a significant role in the negotiation, performance and termination of the contract containing the arbitration agreement. In Dow Chemical, one of the non-signatory companies was the ‘catalyst’ and was pivotal in establishing the contractual agreement while the other was the party named in the contract as responsible for performance.

23. In contrast, on the facts of our case, Hestug played no role whatsoever in the negotiation of the Charterparty. Hestug also was not named as the party responsible for the performance of the

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62 ICC Case 4131 (1982).
63 Ibid 135.
64 Redfern 6th edn (n 57), [2.45].
65 Redfern 6th edn (n 57). See also Born (n 30), 1452.
67 Dow Chemical (n 62), 135.
Charterparty. In fact, Hestug had no involvement whatsoever until October 2015, more than 12 months after the Charterparty was concluded.

24. Accordingly, even if the “group of companies” doctrine is applicable, the Respondent cannot rely on the doctrine to bring a claim on salvage because the requirements of the doctrine are not met on the facts of this case.

D. THE RESPONDENT CANNOT RELY ON GENERAL AVERAGE TO BRING THE SALVAGE CLAIM.

25. Alternatively, the tribunal does not have jurisdiction even if the salvage claim is re-characterised as a claim by the Respondent for general average contribution from the Claimant. Under Clause 21 of the Charterparty, parties have agreed to settle all claims for general average in accordance with the York/Antwerp Rules (“YAR”) 1994 “as amended, modified or subsequent version thereof for the time being in force”. Under Rule VI (a) of the YAR 1994, “expenditure incurred … in the nature of salvage” shall be allowed in general average. “Expenditure incurred” means the actual payment of money by a party to the salvor.68 There is no evidence that the Respondent paid Hestug for the salvage services rendered to the Vessel.

26. Even if the YAR 2004 applies as a “subsequent version” of YAR 1994, actual payment of the salvage service is still a prerequisite for a claim in general average. Rule VI (a) of the YAR 2004 states that “salvage payments … shall lie where they fall and shall not be allowed in general average, save only that if one party to the salvage shall have paid all or any of the proportion of salvage …due from another party”. Even if the Respondent falls within the exception, there is no evidence that it had “paid” the salvage bill.

III. THE RESPONDENT IS LIABLE FOR DEMURRAGE.

A. THE VESSEL DID NOT LEAVE THE PORT OF HADES BEFORE LAYTIME EXPIRED AND DEMURRAGE STARTED ACCRUING.

27. The Charterparty stipulated a maximum laytime of 10 WWD SHINC. Once the Vessel’s Master tendered the Notice of Readiness on 3 October 2014, laytime began running. Laytime would have expired on 12 October 2014. Thereafter, demurrage would start accruing unless the Vessel had by that time left the “Loading Place” (defined in the Charterparty as the port of Hades, which coincides with the territorial water limit of Hades). In this case, the Vessel did not leave the port of Hades until 7 October 2015. Hence, the Respondent is liable for demurrage for the period between 12 October 2014 and 7 October 2015.

28. The Respondent alleges that the Vessel was outside Hades’ territorial waters when it was intercepted by the Hades Coast Guard hours after it departed the port of Hades on 7 October 2014. While the Claimant in its internal email expressed her belief at the time that the vessel was outside of Hades territorial limit, there is no objective evidence supporting this subjective understanding. In any event, the Claimant corrected its position later in stating that the vessel has not left Hades’ territorial waters when intercepted. Indeed, the Hades Coast Guard was unclear as to the exact location of the Vessel when intercepted. However, given that the Hades Coast Guard used a dinghy to intercept the Vessel, it is unlikely that a rubber dinghy is capable of travelling more than 12 nautical miles within a few hours to intercept the Vessel. In the circumstances, the Respondent did not prove on a balance of probability that the Vessel left Hades’ territorial waters on 7 October 2015.

69 Voyage Charterparty (21 July 2014), cl. 9 (c), Bundle of Facts at 34-35.
70 Voyage Charterparty (21 July 2014), Box 5, Bundle of Facts at 29.
71 Letter from Claimant to the Respondent (15 April 2015), Bundle of Facts at 63.
72 Email from the Claimant to the Claimant’s Master (8 October 2014 1800), Bundle of Facts at 58.
73 Letter from Claimant to the Respondent (n 50).
IV. THE RESPONDENT HAS NO DEFENCE TO THE CLAIM IN DEMURRAGE

A. THE CLAIMANT DID NOT BREACH ANY CONTRACTUAL OBLIGATION BY COMPLYING WITH THE HADES COAST GUARD’S ORDERS.

29. Laytime and demurrage stops running if there is a delay caused by the shipowner’s fault. Fault means a ‘breach of obligation’. The Claimant did not breach its obligation as the vessel was seaworthy and the Master was competent and exercised due diligence in ordering the Vessel to return to the port. In any case, the onus lies on the Respondent to prove unseaworthiness, if any.

30. In fact, the Hades Coast Guard has jurisdiction to detain Hades flagged ships either within its jurisdiction or on the high seas. In Ruddock v Vadarlis, the Federal Court of Australia held that the Executive’s power extends to the territorial seas in the absence of statutory extinguishment. There is no suggestion that under the Constitutional law of Hades, President Simmons’ exercise of power is extinguished by any Statute. The high seas are subject to international law. Ships on the high seas fall under the exclusive jurisdiction of the flag state. This jurisdiction includes enforcement jurisdiction.

31. However, to confirm this prima facie jurisdiction, and for domestic law to apply extra-territorially, there must be “a substantial and bona fide connection between the subject matter and the source of the jurisdiction relied upon”. This requirement is “based upon notions of comity, reciprocity, and mutual respect between different legal jurisdictions. Those considerations tend to advance the just and efficient administration of the law and the avoidance of conflict caused by excessive assertions of jurisdiction.”

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75 Budgett v Binnington [1891] 1 QB 35.
76 Houlder v Weir [1905] 2 KB 267.
78 Ruddock v Vadarlis [2001] FCA 1329 at [193] and [197]
79 Blunden v Commonwealth of Australia (Australia) [2003] HCA 73, [70].
82 Blunden (n 79), [72].
83 Regie Nationale des Usines Renault SA v Zhang (2002) 210 CLR 491, 528; Blunden (n 58), [73].
32. On our facts, there is a bona fide connection between the Vessel and Hades’ jurisdiction. Hades’ Coast Guard was exercising jurisdiction over the Hades-flagged Vessel in, or shortly after it departed from, Hades. The cargo owner is a Hades based company and the cargo originated from Hades. The HLNG on board the Vessel has triggered massive protests of an unprecedented scale by citizens of Hades causing the closure of the Hades port. Even though the shipowner is Poseidon based, “[t]he ship, every thing on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant.” As such, Hades is the only state connected and the exercise of its jurisdiction would not be excessive or cause conflict. Therefore, the master was not negligent. He was in fact obliged to comply with the order to return to Hades Port.

B. THE CHARTERPARTY IS NOT FRUSTRATED.

33. Respondent argues that the delay arising from the Coast Guard’s seizure and detention of the Vessel had frustrated the Charterparty. This defence must fail because (1) the contract made full provision for these events; alternatively, (2) the frustration is self-induced.

1. The Charterparty made full provision for the seizure and detention of the Vessel by the Coast Guard.

34. Frustration cannot arise when the contract expressly contemplates and provides for the supervening event. Courts will ascertain the legal consequences of the event by applying the contractual provisions rather than the general law. Whether or not the supervening event is fully contracted for depends on the proper construction of the contract.

35. In this case, the Charterparty made full provision for the alleged supervening event. The Coast Guard’s seizure and detention of the Vessel is a “force majeure” event as defined in Clause 19(c)

86. *The Kyla* (n 64) 565; *Gold Group Properties v BDW Trading* [2010] BLR 235, [45].
and 19(d). In particular, the events constitute either “hindrances of whatsoever nature in ... shipping of products occurring without the negligence of the Charterer” (Clause 19(c)) or “intervention of sanitary or customs authorities... or other similar cause” (Clause 19(d)).

36. First, the Coast Guard’s seizure and detention falls within “hindrances of whatsoever nature in ... shipping ... of products” [emphasis added] in Clause 19(c). The *ejusdem generis* principle does not apply when the word “whatsoever” is used. In *Larsen v Sylvester*[^87], the English House of Lord held that “hindrances of what kind soever beyond their control, preventing or delaying the working, loading or shipping of the said cargo” must be given its full and absolute meaning because the phrase “of what kind soever” evinced an intention to exclude the *ejusdem generis* principle. Following the approach in *Larsen*, it is immaterial that the first part of Clause 19(c) referred to issues with transportation facilities and stoppages of the Shipper’s fuel supply (“inability to obtain or delays in securing transportation facilities, stoppages of the Shipper’s fuel supply, hindrances of whatsoever nature ...”). The broad width of the later part “hindrances of whatsoever nature ...” excludes the operation of the *ejusdem generis* principle.

37. The *ejusdem generis* rule of construction on the other hand applies to Clause 19(d). According to this rule, there is a presumption that expansive words cover exceptions of the same type or genus as the preceding words[^88]. In *Tillmanns & Co v SS Knutsford Ltd*[^89], the English Court of Appeal construed the words “or any other cause” as “some violent act attributable to human agency” when interpreted *ejusdem generis* with the words “war or disturbance”. Clause 19(d) is largely similar. It refers to “war”, “hostilities” and “riots” but is broadened by events such as “quarantine”, “intervention of sanitary or customs authority” and “Court issued arrest proceedings”. Nevertheless, an act of force attributable to human or government agency is a

[^87]: [1908] AC 295.
[^89]: (1980) 13 CC 244.
common feature across the enumerated events. “Force” here includes force of law and not mere physical force. Hence, seizure and retention by the Coast Guard falls within this genus.

38. Further, the “force majeure” clauses (Clauses 19 (i) to (iii)) exclude the doctrine of frustration in respect of any force majeure event. The effect of Clause 19 is as follows:

   a. The affected party has to give the other party prompt written notice when any of “force majeure” event arises (Clause 19(i));

   b. Where such a notice is given, the party affected by the “force majeure” event must “take reasonable steps to minimise any delay so caused” (Clause 19(i));

   c. If the delay subsists for more than 30 days, the contract may be cancelled with a further notice by either party within a further 15 days (Clause 19(ii)); and

   d. The right to cancel is renewed thereafter but only on the expiry of every 30 day interval (Clause 19(ii)).

39. These provisions alter the common law default position in two respects. First, neither party may cancel the contract for any delay within the first 30 days even if it otherwise constitutes a frustrating event under common law. Secondly, after 30 days, parties may cancel the contract unilaterally even if the event would not have otherwise frustrated the contract. The right to cancel the contract is further renewed every 30 days. The desire for certainty and predictability underpins these provisions. The combined effect of the clauses is to provide both parties with the certainty as to whether the contract is kept alive between the parties. In short, by including drafting clause 19, the parties intended to replace the common law doctrine of frustration by a contractual system of the right to cancel upon notice.
40. In *Bremer Handelsgesellschaft v Vanden Avenne Izegem*[^90], the contract contained a similarly worded force majeure clause. The clause provided for notice to be given for delay caused by force majeure events, a right to cancel by the buyer if delay lasts for more than a month, and the automatic extension of the contract for a further month where no cancellation notice is given. The House of Lords held that the force majeure clause "is a complete regulatory code in the matter of force majeure, and that accurate compliance with its stipulation is essential to avoid commercial confusion ..."[^91]

41. The observation in *Bremer* remains good law today. In cases where frustration was found notwithstanding a force majeure clause, the force majeure clauses are much less comprehensive. In other words, in those cases, the "force majeure" clauses did not fully address the "event". In *The Quito*[^92], the force majeure clause did not cover requisition by government of the ship before delivery to the charterer and the right to cancel was not extended to the shipowner. In *The Penelope*[^93], there was no stipulation as to the right to cancel by either party.[^94]

42. In the present case, the Respondent did not give notices under Clause 19. Fourteen days after the Vessel’s interception, the Respondent stated that the Claimant “will be liable to it unless its cargo ... is delivered ... by 2 November 2014.” The Respondent’s position at that time was that the contract remained subsisting and that there was neither a force majeure event under Clause 19 nor frustration at common law. Thereafter, the Respondent remained silent for half a year. Throughout this period, the Respondent did not take the position that the events were force majeure or frustration. It was only on 30 April 2015, in response to a letter from the Claimant, that the Respondent suddenly claimed frustration. However, none of the required notices under Clause 19 had been given at any point of time.

[^91]: Ibid 116.
[^92]: [1919] 1 AC 435.
[^93]: (1928) 31 L1 Lloyd’s Rep 96.
[^94]: Ibid 103.
2. In any event, any frustration is self-induced.

43. Even if the Charterparty was frustrated, the frustration was self-induced. Frustration is self-induced when the frustrating event is attributable to “blame”, “fault” or “default” on the part of the party claiming frustration.\(^95\) One way to prove “blame”, “fault” or “default” is to prove a breach of contract by the party claiming frustration.\(^96\) As the shipper, the Respondent was under a strict obligation, implied by law, not to ship dangerous goods without the Claimant’s consent.\(^97\) A cargo is dangerous if its shipment was likely to subject the ship to detention\(^98\).

44. The Respondent breached this obligation because the HLNG was a dangerous cargo. Hades’ President Simmons has always been vocal about her opposition to the Respondent’s shipping of HLNG. More importantly, Simmons expressly said that she “will not rest until [she has stopped] the export of HLNG from Hades”. It is clear from these facts that the shipment of the HLNG would likely subject the Vessel to detention.

45. It is arguable that the coup and Simmons’ corollary seizure of power could not have been predicted. However, this argument fails to consider the fact that there has consistently been substantial opposition within Hades to the exportation of HLNG. Even before the conclusion of the Charterparty, local newspaper in Hades recorded a definite plan of “significant protests” by Hades environmental groups. More significantly, the protests that marked the Vessel’s arrival at the Port of Hades were of such a character that the Port had to be closed. Six people had to be evacuated to hospital with serious but non-life threatening injuries. Six members of Simmons’ then-opposition party had to be ejected from the Hades parliament chamber. Consequently, it cannot be denied that there was significant nation-wide and cross-spectrum political pressure on


\(^{96}\) Carter (n 95) 33-45. See also The Hannah Blumenthal (n 74) 920.

\(^{97}\) Cooke (n 44) 6.49. See also Brass v Maitland (1856) 6 E. & B. 470.

\(^{98}\) Cooke (n 44) 6.52. See also Mitchell, Cotts & Co v Steel Brothers & Co Ltd [1916] 2 KB 610; Bunge SA v ADM Do Brasil Ltda (The Darya Radhe) [2009] 2 Lloyd’s Rep 175, [33]; Sir Bernard Eder et al, Scruton on Charterparties and Bills of Lading (23rd edn, Sweet & Maxwell 2015) 7-053.
the then-government to stop the Respondent’s shipment of HLNG. The only reason why the then-government did not succumb to this pressure was that Simmons and her party seized power just four days after the arrival of the Vessel at the Port of Hades. Therefore, the facts clearly prove that it is likely that the Vessel would have been detained due to the shipment of the HLNG.

46. In short, the Respondent took the risk of shipping the HLNG. Clause 19 provided an agreed mechanism for resolving delays. However, having failed to invoke clause 19, the Respondent cannot now seek alternative recourse under frustration.

C. THE RESPONDENT’S LIABILITY TO PAY DEMURRAGE IS NOT AFFECTED BY THE FORCE MAJEURE CLAUSE.

1. The force majeure clause was not invoked.

47. As shown above, the force majeure clause was never invoked by the Respondent Alternatively, the defence of self-induced frustration applies equally to a force majeure event.99

2. The only exceptions to demurrage are contained within the interruptions to laytime clause (Clause 9(e)).

48. In any event, the force majeure clause (Clause 19) does not apply to liability to pay demurrage. The exceptions to laytime and demurrage are exhaustively provided for under “Interruptions to Laytime” (Clause 9(e)). For voyage charterparties, general exceptions or force majeure clauses “will not normally be read as applying to provisions for laytime and demurrage, unless the language is very precise and clear”.100 In The Solon101, a clause headed “Strikes and Force Majeure” provided that “[s]trikes...always excepted”. The court nevertheless concluded that strike at the load port did not provide an exception to the running of laytime. Given the parties’

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99 Hyundai Merchant Marine v Dartbrook Coal (Sales) [2006] FCA 1324.
100 Sametiet M/T Johs Stove v Istanbul Petrol Rafinerisi A/S (The Johs Stove) [1984] 1 Lloyd’s Rep 38; Ellis Shipping Corp v Voest Alpine Intertrading (The Lefthero) [1992] 1 Lloyd’s Rep 109; The Solon [2000] 1 Lloyd’s Rep 292. See also Schofield (n 67) 4.113-17; Cooke (n 23) 15.24.
101 The Solon (n 100).
use of clear words in providing for a laytime exception, the “Strike and Force Majeure” was not intended to provide an exception to laytime.102

49. Similarly, Clause 9(e) specifically provides “laytime not to count during the period of such delay or hindrance and demurrage not to accrue even if the vessel is already on demurrage.” In contrast, the Force Majeure Clause (Clause 19) does not contain any specific reference to laytime or demurrage. It only provided that “neither party shall be liable for any failure to perform or delay in performing its obligations...” Therefore, Clause 19 clearly does not provide for exceptions to laytime or demurrage.

50. Further, on a proper construction, Clause 19 was not intended to apply to laytime and demurrage. First, Clause 9(e) contains an exhaustive list without any general expansive phrase such as “or any other similar cause” as found in Clause 19(d). Secondly, Clause 9(e) contains more limited grounds of exception compared to those in Clause 19. For example, Clause 9(e) provides only for “war, public enemies and arrests”, whereas, as shown above, Clause 19(d) makes exception for the entire genus of acts of force attributable to human agency. Parties could not have intended to include under Clause 19 the very exceptions which they intended to exclude under Clause 9(e). If so, much of Clause 9(e) would be rendered redundant. Hence, the only reasonable explanation is that Clause 19 was not intended to apply to laytime and demurrage at all.

D. THE SUPERVENING EVENTS DOES NOT CONSTITUTE THE INTERRUPTIONS TO LAY TIME CLAUSE.

51. Under Clause 9(e), the only exception to laytime and demurrage potentially relevant to this case is “arrest”. “Arrest” is a legal term of art. It refers to “a legal action in admiralty to seize a vessel ... as security for a claim”.103 Where a contract contains a legal term of art, the court

102 Ibid 299.
should give its technical meaning in law “unless the contrary is made perfectly clear”. While in the marine war insurance context, “arrest” refers to “political or executive acts, and does not include a loss caused by ... judicial process”, this meaning is ascribed because the phrase is immediately followed by “restraints and detainments of ... Princes”. The marine war insurance context is also completely distinguishable.

52. The facts in London Arbitration 20/10 are analogous. The Indonesian Navy arbitrarily arrested a vessel chartered for voyage. The tribunal held that the event is a “restraint of princes” and did not rely on the ground of “arrest” which was provided in the same general exception clause. Similarly, the interception and retention by the Coast Guard was an arbitrary exercise of power by the order of an illegitimate president. This event is best a “restraint of prince” rather than “arrest”.

53. Where this Tribunal finds that “arrest” has more than one meaning, the ambiguity must be resolved against the Respondent who is seeking to rely on the exception clause. It is sufficient to interpret “arrest” as referring solely to the judicial process. Had the Respondent intended otherwise, it could have sought to amend the clause to include “restraint of prince” or other terms to provide for a more expansive reading of “arrest”. Having failed to do so, the exception clause must be interpreted narrowly. Therefore, the seizure and retention by the Coast Guard does not fall within the scope of any exception to laytime or demurrage.

104 *Brett v Barr Smith* (1919) 26 CLR 87, 93. See also Sir Kim Lewison and David Hughes, *The Interpretation of Contracts in Australia* (Thomson Reuters 2012) 5.08.
106 Cooke (n 44) 15.23. See also *The Forum Craftsman* [1991] Lloyd’s Rep 81, 87.
PRAYER FOR RELIEF

For the reasons submitted above, the Claimant respectfully requests this Tribunal to:

**DECLARE** that it has jurisdiction to hear the frustration issue;

*Alternatively,*

**DECLARE** that inability to hear the frustration issue does not bar jurisdiction to determine the demurrage claim.

*Further,*

**DECLARE** that it does not have jurisdiction to hear the salvage claim.

*Further,*

**ADJUDGE** that the Respondent is liable to the Claimant in Demurrage for US$17.9m with interest and cost.