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INTERNATIONAL MARITIME LAW ARBITRATION MOOT
3 – 8 JULY 2016
EXETER & LONDON, ENGLAND

UNIVERSITAS INDONESIA
Veritas, Probitas, Justitia
EST. 1849

IN A MATTER OF AN ARBITRATION
MEMORANDUM FOR THE CLAIMANT

ON BEHALF OF
ZEUS SHIPPING & TRADING CO
(CLAIMANT)

AGAINST
HESTIA INDUSTRIES
(RESPONDENT)

TEAM NO. 9
ALBERTUS J. SUKARDI – DENNY ADIPUTRA –
GREITA ANGGRAENI – RAISYA MAJORY
TEAM NO. 9

MEMORANDUM FOR THE CLAIMANT
I. THIS ARBITRAL TRIBUNAL HAS JURISDICTION TO HEAR THIS PROCEEDING

A. The Arbitration Clause covers disputes regarding frustration of the Charterparty
   i. The phrase “arising under” in the Arbitration Clause shall be widely interpreted
   ii. Even if the Arbitration Clause is to be interpreted narrowly, the dispute on frustration still falls within the ambit of the Arbitration Clause
   iii. The Respondent’s subjective intention to exclude frustration is immaterial

B. Demurrage is a dispute arising under the Charterparty

II. THE RESPONDENT IS LIABLE FOR DEMURRAGE UNDER CLAUSE 10 OF THE CHARTERPARTY IN THE AMOUNT OF USD17.9 MILLION

A. The Respondent never completed loading before the laytime expired

B. The Respondent is not entitled to any exceptions to exempt itself from its liability to pay demurrage
   i. Demurrage accrued without the fault of the Claimant
   ii. The laytime was not interrupted by the Interruption to Laytime Clause of the Charterparty
      a. The detention of the Athena does not constitute an event interrupting the laytime
      b. There is no “catch-all” phrase which could cover the detention of the Athena
   iii. The Respondent cannot rely on Force Majeure Clause to exempt its liability on demurrage
      a. There is no express provision excepting the laytime and demurrage
      b. In any event, the Respondent failed to comply with the procedural obligation under the Force Majeure Clause

C. The occurrence of delay in the loading operations never frustrated the Charterparty
   i. The performance of the Charterparty was not radically different
ii. The delay was caused by the Respondent’s decision to ship dangerous cargo.....

III. THE RESPONDENT IS NOT ENTITLED TO CLAIM SALVAGE REWARDS
SINCE THE ASSISTANCE RENDERED WAS A MERE TOWAGE......................

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SUMMARY OF FACTS

1. Zeus Shipping and Trading Company as the shipowner ("Claimant") entered into a voyage charterparty ("Charterparty") with Hestia Industries as the charterer ("Respondent") to ship a newly developed liquefied natural gas produced from Hades Shale Gas ("HLNG"). The shipment of the HLNG required a vessel equipped with new technology to be able to safely transport the HLNG. The vessel assigned for this voyage was the Athena, operated under the Hades flag.

2. The laytime provision in Clause 9.c.i of the Charterparty stipulated that time permitted for loading is 10 weather working days, Sundays and holidays included ("WWD SHINC"), which was calculated from when the Notice of Readiness was tendered until the vessel left the Loading Place, which was the port of Hades ("Loading Port"). Pursuant to Clause 10 of the Charterparty, demurrage would be payable if loading was not completed within the permitted laytime.

3. During the conclusion of the Charterparty there was appeared a news item reporting objections by the environmentalists to the export of the HLNG, since it was considered to emit ten times the amount of CO₂ compared with a conventional gas liquefaction plant. These objections escalated when the Athena docked at the Loading Port on 3 October 2014 and was met with a violent rampage by the environmentalists. Despite this, the Athena continued the loading operation.

4. The Athena finished loading on 7 October 2014 and then “sailed from Hades” as recorded in the Statement of Facts issued by the Master of the Athena (the “Master”). On the same day, a military coup d’etat took place; the leader of Hades’ Opposition Party, Jacqueline Simmons, seized control of its Parliament, backed by Hades’ military. The coup d’etat was precipitated by the protests and public opposition to the export of HLNG by the Respondent.
5. As the new President, Jacqueline Simmons immediately instructed the Hades Coast Guard to intercept the *Athena* and have her returned to her berth. On 7 October 2014, the Hades Coast Guard intercepted the *Athena* and ordered the Master to return to port. The Master obeyed this order, resulting in the detention of the *Athena* in the Loading Port.

6. After almost a year of detention, the *Athena* was then released. As per the Claimant’s request, it was Hestug, a tug company owned by the Respondent (“*Hestug*”), which guided the *Athena* to open water. However, when she was in open water, her propellers broke. Hestug, which was not far off, assisted the *Athena*.

**SUMMARY OF ARGUMENTS**

The Claimant contended that the laytime continued to run during the period of detention and, since the *Athena* had not left the Loading Port before the laytime expired, the Respondent was liable to pay demurrage; for 358 days, this amounted to USD17.9 million. In response, the Respondent claimed that the Charterparty had been frustrated, thus the Claimant’s claim on demurrage could not stand. The Respondent also alleged that the *Athena* had already left the Loading Port at the time of the interception, rendering it not liable for demurrage. Additionally, the Respondent submitted a counterclaim for salvage reward for its assistance to the *Athena* when her propellers broke.
ARGUMENTS PRESENTED

I. THIS ARBITRAL TRIBUNAL HAS JURISDICTION TO HEAR THIS PROCEEDING

1. Absent of any express stipulation to the contrary, the law governing a contract is assumed to be the governing law of an arbitration agreement related to disputes arising from such contract. In the present Case, the Charterparty did not expressly provide the governing law of the arbitration agreement but it expressly provided that the law governing the Charterparty is Western Australian law. As there is no express stipulation to the contrary, Western Australian Law is assumed to be the governing law of Clause 30 of the Charterparty (the “Arbitration Clause”).

2. The Claimant submits that the Respondent is liable for demurrage. In response, the Respondent contends that the Charterparty had been frustrated and that the Arbitral Tribunal has no jurisdiction over claims related to frustration. Further, the Respondent submits that, consequently, this Arbitral Tribunal also has no jurisdiction to determine the Claimant’s demurrage claim.

3. However, the Claimant submits that in light of the Arbitration Clause, this arbitral tribunal (“Arbitral Tribunal”) has jurisdiction to address the disputes on (A) frustration of the Charterparty, and (B) demurrage claim.

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2. Charterparty Cl. 30, 31, Moot Scenario p. 45, 46.
3. Charterparty Cl. 31, Moot Scenario p. 46.
4. Statement of Claim, ¶8, Moot Scenario, p. 75.
5. Statement of Defense, ¶3, Moot Scenario, p. 76.
7. Charterparty Cl. 31, Moot Scenario, p. 46.
A. The Arbitration Clause covers disputes regarding frustration of the Charterparty

4. Claims related to frustration fall within the ambit of the Arbitration Clause since (i) the phrase “arising under” used in the Arbitration Clause shall be widely interpreted to also cover claims related to frustration. (ii) Even if it is to be interpreted narrowly, claims related to frustration still fall within the scope of the Arbitration Clause. Additionally, (iii) the Respondent’s subjective intention is immaterial in interpreting the scope of the Arbitration Clause.

   i. The phrase “arising under” in the Arbitration Clause shall be widely interpreted

5. The Arbitration Clause stipulates that “[a]ny dispute arising under this contract shall be referred to arbitration…” In Fiona Trust and Paharpur Cooling Towers Ltd v Paramount,9 the phrase “arising under” is given a wide scope in favour of arbitration.10 This recent development has displaced the view that “arising under” has a narrower scope than other phrases such as “arising out of” or “in connection with.”11 Consequently, “arising under” is now widely understood to cover not only disputes related to rights and obligations of the parties under the Charterparty, but also disputes on the termination of the contract due to frustration.

6. This interpretation is reasonable as it seeks to have all disputes related to a contract be decided by the same tribunal and avoid the inconvenience of a multiplicity of proceedings.12 In the same vein, claims regarding frustration of the Charterparty should be

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8 Charterparty Cl. 30, Moot Scenario, p. 45.
11 Ibid.
considered to fall within the ambit of the Arbitration Clause to which this Arbitral Tribunal has jurisdiction upon.\textsuperscript{13}

\textit{ii. Even if the Arbitration Clause is to be interpreted narrowly, the dispute on frustration still falls within the ambit of the Arbitration Clause}

7. In the event that this Arbitral Tribunal finds that the phrase “arising under” shall be interpreted narrowly, claims related to frustration still fall as a dispute arising under the Charterparty.\textsuperscript{14}

8. The phrase “arising under” is to be interpreted to cover all disputes, which requires recourse and reference to the clauses of a contract.\textsuperscript{15} The assessment of elements of frustration of the Charterparty requires this Arbitral Tribunal to have recourse, and to refer, to the clauses of the Charterparty. For instance, this Arbitral Tribunal has to refer to provisions regarding laytime and demurrage to determine whether the delay which occurred in the present Case is a frustrating one.\textsuperscript{16} Therefore, frustration should fall as a dispute “arising under” the Charterparty.

\textit{iii. The Respondent’s subjective intention to exclude frustration is immaterial}

9. The Respondent might argue that it intended to narrow the scope of the Arbitration Clause.\textsuperscript{17} However, such intention must be expressly stipulated in the Arbitration Clause.\textsuperscript{18} In the absence of such, this Tribunal shall only assess the Parties’ intention objectively.\textsuperscript{19}

10. An objective intention shall be viewed from the position of a reasonable person, and not based on the subjective intention of the parties.\textsuperscript{20} As established in \textit{Fiona Trust}, in

\textsuperscript{13} Charterparty Cl. 30, Moot Scenario, p. 45.
\textsuperscript{15} \textit{Scott v Del Sel}, \textit{supra} n.14.
\textsuperscript{16} Charterparty Cl. 9, 10, Moot Scenario, p. 34, 35, 36.
\textsuperscript{17} Moot Scenario, p. 25.
\textsuperscript{18} \textit{Vettreria Etrusca Srl v Kingston Estate Wines Pty Ltd} [2008] SASC 75, [21]; \textit{Fiona Trust}, \textit{supra} n,9.
\textsuperscript{19} \textit{Electra Air Conditioning BV v Seeley International Pty Ltd} [2008] FCAFC 169.
\textsuperscript{20} \textit{Pacific Carriers Ltd v BNP Paribas} [2004] 218 CLR 451; \textit{Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd} [2004] 219 CLR 165 (“\textit{Alphapharm”}); \textit{GMA Garnet Pty Ltd v Barton International Inc} [2010] 183
concluding an arbitration clause, a reasonable businessman would have intended to avoid
the inconvenience and ineffectiveness of a multiplicity of proceedings by referring disputes
to different forums.\textsuperscript{21} The subjective intention of the parties, pre-contractual negotiations
or past correspondence, shall not be taken into account by this Arbitral Tribunal as it will
be superseded by the agreed choice of language used in the contract between the parties.\textsuperscript{22}
The rationale is to enforce contractual promises with a high degree of predictability and to
avoid prolonged conflict in reconciling the differences between the parties’ subjective
beliefs.\textsuperscript{23}

11. In the Case at bar, the Respondent could not claim that the Arbitration Clause does not
cover frustration of the Charterparty based on its subjective intention \textit{per se}, without any
express stipulation to exclude frustration in the Arbitration Clause. Thus, for the above
reasons, the Arbitral Tribunal therefore has jurisdiction to resolve disputes related to the
frustration of the Charterparty.

\textbf{B. Demurrage is a dispute arising under the Charterparty}

12. A dispute regarding the liability of one party governed in a contract is a dispute “arising
under” such contract.\textsuperscript{24} The dispute regarding the Respondent’s liability to pay for
demurrage is a dispute “arising under” the Charterparty as it is expressly governed in
Clause 10.\textsuperscript{25} As such, this Arbitral Tribunal has jurisdiction to hear the disputes related to
demurrage.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{21} Fiona Trust, supra n. 9; Transfield Philippines, supra n.12.
\item \textsuperscript{22} Codelfa Construction Pty Ltd v State Rail Authority (NSW) [1982] 149 CLR 337; Chartbrook Ltd v Persimmon Homes Ltd [2010] 1 P. & C.R. 9 (“Chartbrook”); John R Keith Pty Ltd v Multiplex Constructions (NSW) Pty Ltd [2002] NSWSC 43; Smith v Hughes [1871] L.R. Q.B. 597.
\item \textsuperscript{23} Alphapharm, supra, n.20; Chartbrook, supra n.22.
\item \textsuperscript{24} Scott v Del Sel, supra n.14.
\item \textsuperscript{25} Charterparty Cl. 10, Moot Scenario, p. 36.
\end{itemize}
\end{footnotesize}
In conclusion, the Arbitral Tribunal has jurisdiction to hear both claims related to frustration and demurrage.

II. THE RESPONDENT IS LIABLE FOR DEMURRAGE UNDER CLAUSE 10 OF THE CHARTERPARTY IN THE AMOUNT OF USD17.9 MILLION

In a voyage charterparty, a charterer is under an obligation to complete loading operations within the time permitted for those, known as laytime. Failure to do so will render the charterer liable for demurrage. As established in William Alexanders & Sons v. Aktieselskabet Dampskibet Hansa, the charterer is answerable for its failure to load within the permitted laytime, whatever the nature of the impediment(s), unless it can prove that such impediment(s) is covered by an exception clause in the charterparty or if such failure arises due to the fault of the shipowner or those for whom the shipowner is responsible.

In the Case at bar, the Respondent is liable for demurrage under Clause 10 of the Charterparty in the amount of USD17.9 million since (A) the Respondent never completed loading before the laytime expired. Further, (B) the Respondent is not entitled to any exceptions to exempt itself from its liability to pay demurrage. Additionally, (C) contrary to the Respondent’s contention, the Charterparty was never frustrated.

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A. The Respondent never completed loading before the laytime expired

16. As seen in Clause 9.c.i of the Charterparty, laytime is 10 weather working days, Sundays and holidays included ("WWD SHINC"); calculated from when Notice of Readiness is tendered until the *Athena* has left the Loading Place, which is the port of Hades (the "Loading Port"). As such, placement of cargo on board of the *Athena, per se*, does not constitute as completion of loading under this Charterparty.

17. Here, the *Athena* arrived in the Loading Port and commenced her loading operations on 3 October 2014. To comply with the laytime provision, the Respondent had to finish loading by leaving the Loading Port at the latest on 12 October 2014. However, the Respondent failed to do so, leading to its liability to pay demurrage since the *Athena* had not left the Loading Port before the laytime expired.

18. In determining whether a vessel has left the port, one shall assess the limit of such port. The determination of the limit of the port is not confined only to its geographical limit. In *Sailing-Ship “Garston” Co. v. Hickie & Co (“Garston”)*, it was held that when a vessel is still in an area where the port authorities exercise their control and such vessel submits to the jurisdiction which is claimed by those authorities, it will be regarded that the parties are to accept such area as a “port.” The legality of control exercised by the port authorities is immaterial.

19. In the Case at hand, the relevant authority exercised its control by ordering the *Athena* to return to the port on 7 October 2014. The master of the *Athena* (the “Master”) submitted

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29 Charterparty Cl. 9(c)(i), Moot Scenario, p. 34.
30 *Ibid*.
31 Charterparty Box 5, Moot Scenario, p. 2, 29.
32 Moot Scenario, p. 51, 53.
33 Charterparty Cl. 9(c)(i), Moot Scenario, p. 34.
35 Garston, *supra* n.34.
36 *Ibid*.
37 Moot Scenario, p. 55, 57, 58.
to the relevant authority’s order by returning to the port where it was unable to leave. 38 By submitting to the relevant authority’s exercise of control, the Respondent accepted that the area where the 

Athena was intercepted is a part of the port.

20. The Respondent might argue that the control exercised by the relevant authority to which the 

Athena submitted was illegitimate. However, such question is irrelevant in determining the extent of a port area. This is because, based on Garston, the legality of control exercised by the relevant authorities is immaterial the legality of control exercised by the relevant authorities is immaterial. 39

21. In conclusion, the Athena’s submission to the order from the relevant authority implies that the Athena was still within the Loading Port at the time of interception, resulting in its detention beyond the expiry of the laytime on 12 October 2014, which renders the Respondent liable for demurrage.

B. The Respondent is not entitled to any exceptions to exempt itself from its liability to pay demurrage

22. When a charterer fails to load or unload within the stated laytime, it is under an absolute obligation to pay demurrage to the shipowners. 40 The Charterer is only exempted from such absolute liability if it can show that it was the shipowner’s fault that led to the demurrage accruals, 41 and/or it is exempted by the exception clauses of the Charterparty. 42 In the present Case, the Respondent is still absolutely liable for demurrage to the Claimant since (i) demurrage accrued without the fault of the Claimant, (ii) laytime was not interrupted by the “Interruptions to Laytime” clause in Clause 9.e of the Charterparty, and (iii) the

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38 Ibid., p. 57, 58.
39 Garston, supra n.34.
40 Overseas Transportation Co v Mineralimportexport (The Sinoe) [1972] 1 Ll Rep 201 (“The Sinoe”).
41 Ibid.
Respondent cannot rely on “Force Majeure” clause in Clause 19 of the Charterparty to exempt its liability on demurrage.

i. **Demurrage accrued without the fault of the Claimant**

23. In *Stolt Tankers Inc v Landmark Chemicals SA*, the charterer could only be exempted from its demurrage liability if it can be proven that such liability arises due to the fault of the shipowner or of whomever he is responsible. Such fault has to be voluntary, meaning that the shipowner “has not done his part in regard to something which was within his power to do so.” The burden of proof to prove the shipowners’ fault lies on the charterer.

24. However, in any event, the Claimant will prove that the act of the Master in following the Hades Coast Guard’s (“Coast Guard”) order to return to the Loading Port was involuntary and was reasonable to be done in such circumstances.

25. In the present Case, the Master’s decision to return was not a voluntary act. Rather, he was compelled by the Coast Guard to do so. The situation at that time was beyond the control of the Master. Further, the Master’s act in complying with such order was reasonable.

26. In *Compania Crystal de Vapores of Panama v. Herman & Mohatta (India)*, a master is considered to have acted reasonably if he complies with a party who was in the best position to judge what the master should have done in a particular situation.

27. In that case, when the vessel was ordered by the harbour master to leave its berth, the judge held that the master’s decision to comply with the harbour master’s order was reasonable because the harbor master was, at that time, the party who was in the best position to judge

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43 *Stolt Tankers Inc v Landmark Chemicals SA* [2001] WL 1479871 (“Stolt Tankers”); The Sinoe, supra n.40; *Ropner Shipping Co Ltd v Cleeves Western Valleys Anthracite Collieries Ltd* [1927] 1 KB 879; *William Alexanders*, supra n.28.


45 *Gem Shipping v Babanaft (The Fontevivo)* [1975] 1 Lloyd's Rep. 339; The Altus, supra n.44.

46 Moot Scenario, p. 57, 58, 60.

47 *Compania Crystal de Vapores of Panama v Herman & Mohatta (India) Ltd* [1958] 3 W.L.R. 36.
what the master should have done in that situation.\textsuperscript{48} In those circumstances, the judge assumed the harbour master’s act was authorised by the law of that country and did not go further to assess its true legitimacy.\textsuperscript{49} In that case, as the master was deemed to have acted reasonably, the laytime continued to run and the charterer was not exempted from demurrage.\textsuperscript{50}

28. Similarly here, the Master complied with the Coast Guard’s orders to return to the Loading Port.\textsuperscript{51} Under these circumstances, the Coast Guard was in the best position to judge what the Master should have done. As such, the Master’s act is reasonable and does not amount to a fault which could exempt the Respondent from its liability to pay demurrage. Therefore, the laytime continues to run and when expired, demurrage shall accrue.

\textit{ii. The laytime was not interrupted by the Interruption to Laytime Clause of the Charterparty}

29. The Respondent is liable for demurrage because no exception clauses provided in the Charterparty could exempt the running of the laytime and demurrage. The Respondent might argue that the detention of the \textit{Athena} falls within one of the hindrances interrupting laytime provided in Clause 9.e of the Charterparty (\textit{“Interruption to Laytime Clause”}).\textsuperscript{52} However, the detention neither (a) falls within the hindrances provided therein; nor (b) can it be accommodated by a broad interpretation of the Interruption to Laytime Clause, as it does not contain a catch-all phrase.

\begin{itemize}
\item \textsuperscript{48} \textit{Ibid.}
\item \textsuperscript{49} \textit{Ibid.}
\item \textsuperscript{50} \textit{Ibid.}
\item \textsuperscript{51} Moot Scenario, p. 58.
\item \textsuperscript{52} Charterparty Cl. 9(e), Moot Scenario, p. 35.
\end{itemize}
a. The detention of the *Athena* does not constitute an event interrupting the laytime.

30. The Respondent might attempt to classify the detention of the *Athena* as an “arrest,” or because it represented “public enemies,” which would both be events interrupting the laytime pursuant to Clause 9.e of the Charterparty.53 However, the detention of the *Athena* does not fall within the definition of such events.

31. In *The Radauti*,54 it was established that a phrase used in a contract will be defined in accordance with its definition or interpretation which was given by the court. Therefore, the determination of whether the detention of the *Athena* falls within the definition of “arrest” or “public enemies” shall be in accordance with the interpretation provided by the determination already given by courts.

32. “Arrest” is defined as a legal action to seize a vessel, cargo, container or other maritime property to claim and enforce a maritime lien.55 Further, “public enemies” is defined in *Russell v Niemann* as another nation, or government of a foreign country, at war with the ruler of state of the vessel and her owner.56

33. In the present Case, the detention of the *Athena* did not relate to any maritime lien so as to constitute as “arrest,” nor was it an act of a foreign government in a time of war under the definition of “public enemies.” Therefore, the Respondent could not rely on the Interruption to Laytime Clause to stop the laytime from running and demurrage from accruing when the *Athena* was detained by the new Hades government.

b. There is no “catch-all” phrase which could cover the detention of the *Athena*

34. A “catch-all” phrase is a phrase designed to extend the range of the events covered by an exception clause.\(^\text{57}\) An example of a catch-all phrase would be “whatsoever,” or “etc,” stipulated at the end of an exception clause.\(^\text{58}\) The absence of such phrases within a clause would render the clause to be interpreted strictly based on what is stipulated or following the scope of previous events listed in the exception clause.\(^\text{59}\)

35. In the present Case, the Interruption to Laytime Clause does not contain a “catch-all” phrase which could accommodate events not stipulated in such Clause.\(^\text{60}\) Consequently, the detention of the *Athena* did not interrupt the laytime from running.

   iii. *The Respondent cannot rely on Force Majeure Clause to exempt its liability on demurrage*

36. The Respondent could not rely on the force majeure clause in Clause 19 of the Charterparty (“*Force Majeure Clause*”) to exempt its liability to pay demurrage since (a) the Force Majeure Clause cannot be invoked as there are no express provisions excepting laytime and demurrage, and (b) even if the Force Majeure Clause is enforceable, the Respondent failed to comply with the procedural obligation under Force Majeure Clause.

   a. There is no express provision excepting the laytime and demurrage

37. In order for a force majeure clause to exempt a party from its liability for demurrage, it is established that the clause should expressly provide that it stops the running of laytime and

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\(^{58}\) McKendrick, *supra* n.57, p. 91.

\(^{59}\) *Herman v Morris* [1919] 35 Times LR 574.

\(^{60}\) Charterparty Cl. 9(e), Moot Scenario, p. 35.
exempt liability for demurrage. In *The Solon*, it was held that even if the event fell within the scope of a force majeure clause, without express provision to relieve the party from the continuance of the laytime and demurrage, such provision cannot be relied upon to exempt the particular party from the running of the laytime and demurrage.

38. In the Case at hand, no part of the Force Majeure Clause expressly stipulates that the Clause can be relied upon to suspend the continuance of the laytime or to the extent of relieving the Respondent from its liability to pay demurrage. Therefore, the Respondent may not rely on the Force Majeure Clause to relieve itself from its liability to pay demurrage.

b. In any event, the Respondent failed to comply with the procedural obligation under the Force Majeure Clause

39. The Respondent shall be prevented from relying on force majeure since it failed to give notice to the Claimant after the occurrence of a force majeure event, as required in the Force Majeure Clause.

40. In *Cargill International v. Peabody*, a charterer was prevented from relying on a force majeure clause because it failed to follow the procedural requirements stipulated under the contract, which was to give prompt notice to the non-affected party.

41. Here, the Respondent never provided any notice of a force majeure event to the Claimant as required by the Force Majeure Clause. Thus, failure to comply with the procedural obligation debars the Respondent from relying on the Force Majeure Clause.

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64 Charterparty Cl.19(i), Moot Scenario, p. 41.

65 *Cargill International SA v Peabody Australia Mining Ltd* [2010] NSWSC 887.

66 Charterparty Cl. 19(i), Moot Scenario, p. 41.
C. The occurrence of delay in the loading operations never frustrated the Charterparty

42. To exempt itself from the liability to pay demurrage, the Respondent argued that the Charterparty was frustrated. However, the doctrine of frustration shall not be lightly invoked, since it could be arbitrarily used as an escape measure to avoid a bad bargain. Thus, it requires a high threshold to establish frustration, in which three requirements have to be satisfied, namely: the delay renders the performance of the contract to be radically different, the delay was not caused by either party, and the delay was unforeseeable. These requirements are cumulative, hence failure by the Respondent to fulfil even one element would render the doctrine inapplicable. Here, the alleged frustrating event was a delay caused by the action to stop the HLNG export (the “Delay”). The Respondent failed to satisfy two requirements because (i) the performance of the Charterparty was not radically different, and (ii) the delay was caused by the Respondent’s decision to ship dangerous cargo; hence, the Charterparty was not frustrated.

i. The performance of the Charterparty was not radically different

43. For a contract to be frustrated, the frustrating event must render the performance of the contract to be radically different from what was contemplated by the parties at the conclusion of the contract. Radically different performance shall on a case-by-case basis, taking into account all relevant factors objectively, and shall not be based on a party’s election or decision to treat the delay as frustrating. As such, disappointed expectations,

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67 Statement of Defense, ¶3, Moot Scenario, p. 76.
69 Davis Contractors, supra n.68.
70 Ibid.
71 Moot Scenario, p. 55, 57.
72 Brisbane City Council v Group Projects Pty Ltd [1979] HCA 54.
hardship, or mere inconvenience in performing the contract, do not give rise to frustration.\textsuperscript{74}

The fact that the performance has become more onerous or more expensive is not sufficient to give rise to frustration.\textsuperscript{75}

44. In the present Case, the facts stated that the Delay was almost a year.\textsuperscript{76} However, in the context of frustration caused by delay, the duration of such delay is not the sole factor to be assessed. Lord Simon in \emph{National Carriers} elucidated that the supervening event must “significantly change the nature of the outstanding contractual rights and/or obligations.”\textsuperscript{77}

Hence, in the event of delay, the assessment is whether the performance of the contract at a later date, as a matter of business, was the same contractual obligation or a different obligation.\textsuperscript{78}

45. To illustrate, in \emph{Ringstad v. Golling},\textsuperscript{79} two years of delay in delivering carbide was not sufficient to frustrate the contract. The High Court of Australia (“\textbf{HCA}”) considered that the carbide “…are not articles of fleeting demand, or passing fashion, nor are they shown to be of abandoned or greatly diminished application in commerce or industry.”\textsuperscript{80} The HCA held that the performance to deliver the carbide could be simply resumed after the delay.\textsuperscript{81}

46. Similarly in our Case, there is no fact in the present Case that HLNG is of fleeting demand, or passing fashion, nor are they shown to be of abandoned or greatly diminished application in commerce or industry. Thus, the mere fact that the Delay was for almost a year does not


\textsuperscript{75} \textit{Ocean Tramp Tankers Corporation v V/D Sovfracht (The Eugenia)} [1964] 2 Q.B. 226 (“\textbf{The Eugenia}”).

\textsuperscript{76} Moot Scenario, p. 70.


\textsuperscript{78} \textit{FA Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd} [1916] 2 AC 397.

\textsuperscript{79} \textit{Ringstad v Golling & Co Pty Ltd} [1924] HCA 57.

\textsuperscript{80} \textit{Ibid}.

\textsuperscript{81} \textit{Ibid}.
necessarily mean that the performance of the contract is radically different. This Delay does not significantly change the contractual obligations of the Parties, thus it does not render the performance to be radically different from what was contemplated by the Parties.

47. In contrast, in Jackson v Union Marine Insurance ("Jackson v Union"), delay for only a few months had frustrated the charterparty since the onward delivery of the cargo, in that case from Newport to San Francisco, was intended for a specific time and purpose.\(^\text{82}\) Thus, the delay would render the performance to be radically different from what was contemplated by the parties if it was not delivered in a timely manner.\(^\text{83}\)

48. That case can be distinguished from our Case. Here, no fact indicated that the Respondent intended to use the HLNG for a particular market or purpose. Had the Respondent intended to use the HLNG for a particular market or purpose and the delay occurred, similar to what happened in Jackson v Union, the Charterparty might be frustrated. However, this is not the case.

49. If that was really the case, the Respondent would likely follow the gesture of the charterer in Jackson v Union,\(^\text{84}\) which is to immediately charter another vessel after the occurrence of delay, because the cargo shipped was intended for a particular purpose and time.\(^\text{85}\) However, here, during the period of Delay, the Respondent remained silent and attempted to charter another vessel and claimed frustration of the Charterparty only after five months of Delay and when the demurrage invoice had been issued.\(^\text{86}\) This set of facts indicate that time was not of the essence. Hence, the Delay did not render the performance of the Charterparty to be radically different from that contemplated by the Parties.

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\(^\text{82}\) Jackson v Union Marine Insurance Co Ltd [1874-75] L.R. 10 C.P. 125 ("Jackson v Union")
\(^\text{83}\) Ibid.
\(^\text{84}\) Ibid.
\(^\text{85}\) Ibid.
\(^\text{86}\) Moot Scenario, p. 66.
ii. The delay was caused by the Respondent’s decision to ship dangerous cargo

50. It is an established rule that, in order to invoke the doctrine of frustration, it has to be without blame or default on either side. As Lord Sumner established in Bank Line v. Capel, reliance cannot be placed on a self-induced frustration. Frustration will not occur if the event which prevents performance of the contract is brought about by a party’s own act, election or default.

51. The test of whether the frustrating event was “self-induced” was elaborated in J. Lauritzen AS v. Wijsmuller B.V. (“The Super Servant Two”). The question was whether the frustrating event relied upon by a party to discharge its obligation was truly an outside event. The essence of frustration is that it should not be due to the act or election of the party seeking to rely on it. Further, if a party’s act caused or contributed to what had made the performance impossible, then the plea on frustration shall fail.

52. In The Super Servant Two, the shipowner contracted with the charterer to transport an oil rig by using either one of the two vessels ‘SSI’ or ‘SSII’. The charterer selected SSII, and the shipowner chartered SSI to another charterer. Before the contract was performed, the SSII sank. Consequently, no vessel was available for the transportation of the oil rig, and

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88 Bank Line v Capel, supra n.68.
91 Joseph Constantine, supra n.87; Davis Contractors, supra n.68; Maritime National Fish, supra n.89; Hirji Mulji v Cheong Yue Steamship Co Ltd [1926] A.C. 497; Denny Mott & Dickson Ltd v James B. Fraser & Co Ltd [1944] A.C.265.
93 The Super Servant Two, supra n.90.
94 Ibid.
95 Ibid.
the shipowner pleaded for frustration to discharge further liabilities. The court held that the contract was not frustrated by the sinking of SSII, but by the election of the charterer to charter the SSI for another voyage. It can be inferred that the court was satisfied that the frustrating event is self-induced as long as there was a contribution by a party’s act or election to permit the occurrence of the event.

53. In the present Case, the Arbitral Tribunal shall apply the same test to determine whether the frustrating event was self-induced. The decision of the Respondent to ship dangerous goods in the first place contributed to the delay suffered by the Athena. Therefore, the Respondent cannot rely on the doctrine of frustration to discharge itself from liability.

54. Under a voyage charter, a shipper has an implied obligation not to ship dangerous cargo. Dangerous cargo is not limited to cargo likely to inflict physical injury or pose a danger to the ship, but also if they are unlawful and likely to subject the ship to delay, detention or seizure.

55. In the present Case, the Respondent shipped the controversial HLNG. The HLNG amounts to a dangerous cargo because it likely to subject the ship to delay, detention or seizure. Therefore, the Respondent is in breach for shipping such a dangerous cargo. The detention was a result of a coup d’etat which was precipitated by the protest, and public opposition to the export of HLNG by the Respondent. As such, the Respondent’s election to ship HLNG, which amounted to a dangerous cargo, contributed to Delay. In conclusion,

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96 Ibid.
97 Ibid.
100 Moot Scenario, p. 2, 52.
101 Ibid., p. 55.
frustration cannot be invoked by the Respondent to relieve itself from its liability to pay demurrage.

III. THE RESPONDENT IS NOT ENTITLED TO CLAIM SALVAGE REWARDS SINCE THE ASSISTANCE RENDERED WAS A MERE TOWAGE

56. On or about 6 October 2015, the tug company owned by the Respondent ("Hestug") provided towage services to the Athena.\textsuperscript{102} Shortly after releasing the towlines, the Athena’s propellers broke and Hestug rendered assistance to her.\textsuperscript{103} The Respondent claimed for salvage rewards for its assistance to the Athena.\textsuperscript{104}

57. The Claimant submits that the Respondent is not entitled to salvage rewards since assistance rendered by Hestug to the Athena did not amount to salvage, but merely a towage.\textsuperscript{105}

58. Assistance is considered as a towage when it is only to accelerate the performance of a vessel’s voyage.\textsuperscript{106} A towage can only amount to salvage if, in the respective circumstances, dangers arise beyond that which tows are accustomed to as to make it unjust to compensate them only by ordinary towage fees, or risks incurred could not reasonably be held to be within the scope of the towage contract.\textsuperscript{107} Further, there has to be additional risks to the tugs and dangers to the vessel to which the service was provided.\textsuperscript{108}

59. In The Port Hunter,\textsuperscript{109} assistance rendered to a vessel with broken propellers under circumstances of no danger was regarded as a mere towage.\textsuperscript{110} In that case, the tug did not...

\textsuperscript{102} Ibid., p. 71.
\textsuperscript{103} Ibid.
\textsuperscript{104} Statement of Defense, ¶9, Moot Scenario, p. 77.
\textsuperscript{105} Moot Scenario, p. 71.
\textsuperscript{106} The Princess Alice [1849] 3 W Rob 138.
\textsuperscript{107} The Homewood [1928] 31 Ll L Rep 336.
\textsuperscript{109} Ibid.
\textsuperscript{110} The Port Hunter [1910] P.343
encounter any risk in assisting the vessel and it was merely accelerating the vessel’s voyage to a port of repair. Meanwhile in *The Medora*, the only reason why towage amounted to salvage was due to the existence of a disastrous event when the vessel drifted down the river. Any vessel performing acts of towage in such circumstance was without doubt entitled to salvage as both the salving and salved vessels were in a dangerous state.

60. In the present Case, Hestug was merely expediting the voyage of the *Athena* to safety without incurring any additional risk or danger that was beyond duties associated with towage. Further, in contrast to *The Medora*, there are no facts in the present Case to indicate that there was a disastrous event that could pose a danger to both the *Athena* and Hestug during the time of assistance. Therefore, Hestug’s assistance was merely a towage and the Respondent is not entitled to salvage rewards.

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111 *The Medora* [1853] 164 E.R.
112 Ibid.
113 Moot Scenario, p. 71.
PRAYER FOR RELIEF

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

DECLARE that this Arbitral Tribunal has jurisdiction to hear this proceeding;

Further,

ADJUDGE that the Respondent is liable to pay demurrage in the sum of USD17.9 million, since:

a. the Respondent never completed loading before the laytime expired;

b. the Respondent is not entitled to any exceptions to exempt itself from its liability to pay demurrage; and

c. the Charterparty was never frustrated;

Further,

ADJUDGE that the Respondent is not entitled to claim salvage rewards.