

**17TH ANNUAL INTERNATIONAL MARITIME LAW
ARBITRATION MOOT COMPETITION 2016**



IN THE MATTER OF A LONDON ARBITRATION

Claimant: Zeus Shipping and Trading Company	Respondent: Hestia Industries
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RESPONDENT'S MEMORANDUM

Team 24

**Huang Pei De
Meaghan Tsi Hui Lim
Navin Pillay
Nur Hijazi bin Jaffar
Rebecca Koh Xu Min**

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STATEMENT OF FACTS

I. THE PARTIES

1. The Respondent, Hestia Industries, is a company in the business of port management and tug services in Hades. In 2010, the Respondent announced its plans to build a Hades Liquefied Natural Gas (HLNG) plant.¹ The Claimant, Zeus Shipping and Trading Company, is a company based in Poseidon. The Claimant owns the Hades-flagged tanker *Athena* (“the Vessel”), capable of transporting HLNG, a cargo with special transportation requirements.²

II. THE CHARTERPARTY

2. On 1 July 2014, the Respondent requested from the Claimant a vessel to carry HLNG from Hades to Poseidon for discharge on 30 October 2014 +/- 3 days.³ On 14 July 2014, the Claimant submitted a draft charterparty. The Respondent proposed a “*non-negotiable*” amendment to the arbitration clause (Clause 30) to limit arbitration to disputes which “*arise out of the provisions of the charterparty*”, and to exclude those which “*do not arise out of the terms of the charterparty*”.⁴ On 21 July 2014, the Claimant acceded to this proposed amendment and replaced the original expression (“*disputes arising out of or in connection with, including any question regarding its existence, validity or termination ...*”) with the expression “*disputes arising under ...*” The final arbitration clause read as follows: “*any dispute arising under this contract shall be referred to arbitration in London*”⁵

III. PERFORMANCE OF THE CHARTERPARTY

3. The Charterparty provided for a voyage from Hades to Poseidon. On 3 October 2014, the Vessel arrived at the port of Hades.⁶ The Vessel’s arrival was greeted by huge protests at the port. The

¹ “Hestia in a tangle” *The Hades Advocate* (Hades, 20 July 2014), Bundle of Facts at 26

² Letter from the Claimant to the Respondent (14 July 2014), Bundle of Facts at 3

³ Letter from the Respondent to the Claimant (1 July 2014), Bundle of Facts at 2

⁴ Letter from the Respondent to the Claimant (16 July 2014), Bundle of Facts at 25

⁵ Voyage Charterparty (21 July 2014), Bundle of Facts at 45-46. See also Letter from the Claimant to the Respondent (21 July 2014), Bundle of Facts at 27.

⁶ Notice of Readiness from Captain to Claimant (3 October 2014 at 0915), Bundle of Facts at 51.

port had to be closed for two hours.⁷ Nonetheless, the Claimant directed the Master to proceed to load the cargo.⁸ On 7 October 2014 at 0900h, the Vessel left the Port of Hades.⁹ On that same day, the Leader of the Opposition Simmons, with the military's aid, staged a coup and overthrew the Hades Government. She became the new President. She then instructed the Hades Coast Guard to intercept the Vessel and escort it back to Hades' port.¹⁰ At the time of interception in the evening of 7 October 2014, the Hades Coast Guard was unsure about the Vessel's precise location, in particular whether it was within Hades territorial waters.¹¹ The Master "*fell for*" the Coast Guard's quick-witted story that he had authority over the Hades-flagged vessel.¹² It is telling that in internal correspondence with the Master, the Claimant condemned the Master's conduct as "*completely unacceptable*" as the Vessel was "*outside of Hades territorial limits*".¹³

4. Despite full knowledge that the Vessel was seized and detained on 8 October 2014, the Claimant did not immediately notify the Respondent that the Vessel had deviated from her designated voyage and had turned back towards Hades.¹⁴ The Respondent managed to track down the Vessel's whereabouts on 10 October 2014 using her own online ship tracking portal.¹⁵ The Respondent sought an explanation from the Claimant. However, the Claimant tried to shift the blame to the Respondent by alleging that the shipment of HLNG was the cause of the deviation.¹⁶
5. On 15 October 2014, the Claimant changed her stance and stated that "*the vessel had not left the Port of Hades and demurrage continues to run*".¹⁷ This was contrary to her earlier internal correspondences with the Master.¹⁸ On 22 October 2014, the Respondent replied that the Vessel

⁷ "Arrival of 'Athena' leads to port protests" *The Hades Advocate* (Hades, 4 October 2014), Bundle of Facts at 52.

⁸ Email from the Respondent to the Master (4 October 2014 at 1300), Bundle of Facts at 53.

⁹ Statement of Facts for MV Athena at Hades (7 October 2014), Bundle of Facts at 54.

¹⁰ *The Hades Advocate* (7 October 2014, online edition), Bundle of Facts at 55.

¹¹ *Ibid.*

¹² "Inside a coast guard operation" *The Hades Advocate* (Hades, 25 October 2014), Bundle of Facts at 62.

¹³ Email from Claimant to Master (8 October 2014 at 18000), Bundle of Facts at 58.

¹⁴ Email from the Respondent to the Claimant (10 October 2014), Bundle of Facts at 59.

¹⁵ *Ibid.*

¹⁶ Email from the Claimant to the Respondent (15 October 2014), Bundle of Facts at 60.

¹⁷ *Email from the Claimant to the Respondent* (n 16).

¹⁸ *Email from Claimant to Master* (n 13).

had in fact left the port but had returned to Port due to the master's incompetence. Thus laytime ceased to run and demurrage did not accrue. The Respondent also emphasised the importance of a timely delivery by 2 November 2014.¹⁹

6. The Claimant did not deliver the HLNG cargo by 2 November 2014. Instead, the Claimant remained silent and did not update the Respondent on her efforts, if any, to secure the release of the Vessel. On 15 April 2015, the Claimant abruptly sent the Respondent an interim invoice claiming demurrage payments amounting to US\$9.2 million.²⁰ The Respondent replied on 30 April 2015 reiterating that demurrage never accrued as the Vessel had already left the Loading Place before demurrage started to run. After the Vessel left the Loading Place, she returned to the Hades Port only because of the Master's incompetence and negligence. The Respondent also notified the Claimant that the Charterparty was frustrated as the Vessel had been due to arrive in Poseidon no later than 2 November 2014, and the delay due to the Master's negligence was in excess of six times the length of time anticipated.²¹ The Claimant did not respond.
7. On 5 October 2015, the Coast Guard released the Vessel.²² The Claimant then invoiced the Respondent a total of US\$17.9m in demurrage.²³ The Claimant hired Hestug, a business owned by the Respondent, to provide tug services for the Vessel.²⁴
8. On or about 7 October 2015, sometime after the Vessel was towed to open waters and the towlines were released, the propellers of the Vessel broke. Fortunately, Hestug's tugs were not far away and were able to salvage the Vessel, saving millions of dollars in cargo and vessel value.²⁵

¹⁹ Email from the Respondent to the Claimant (22 October 2014), Bundle of Facts at 61.

²⁰ Email from the Claimant to the Respondent (15 April 2015), Bundle of Facts at 63-64.

²¹ Email from the Respondent to the Claimant (30 April 2015), Bundle of Facts at 65.

²² Internal correspondences from the Master to the Claimant (5 October 2015 at 0900), Bundle of Facts at 68.

²³ Email from the Claimant to the Respondent (6 October 2015), Bundle of Facts at 69-70.

²⁴ Internal correspondences from the Claimant to the Master (5 October 2015 at 1300), Bundle of Facts at 68.

²⁵ *The Hades Advocate* (7 October 2015, online edition), Bundle of Facts at 71.

9. On 16 November 2015, the Claimant sent the Respondent a letter referring the dispute to arbitration as per Clause 30 of the Charterparty, claiming the alleged demurrage of US\$17.9m.²⁶ The Respondent denied the demurrage claim, arguing that the Tribunal lacked jurisdiction to adjudicate on it, and submitted a counterclaim for the salvage services provided by Hestug.²⁷

²⁶ Email from the Claimant to the Respondent (15 November 2015), Bundle of Facts at 72.

²⁷ Email from the Respondent to the Claimant (23 November 2015), Bundle of Facts at 73.

SUMMARY OF THE ISSUES

1. The following issues arise for determination by the Tribunal:
 - 1) Whether this tribunal has jurisdiction to hear the Respondent's frustration defence to the demurrage claim given the wording "*any dispute arising under this contract*" in the arbitration clause, and accordingly whether there is jurisdiction to determine the demurrage claim.
 - 2) Whether this tribunal has jurisdiction to hear the Respondent's claim for salvage.
 - 3) Whether the Respondent is liable for demurrage for the period between 3 October 2014 and 6 October 2015.

SUBMISSIONS

I. THIS TRIBUNAL DOES NOT HAVE JURISDICTION TO HEAR THE FRUSTRATION ISSUE AND THEREFORE THE DEMURRAGE ISSUE.

1. Western Australian law governs the Charterparty as well as the arbitration agreement. Under Western Australian law, frustration does not “*arise under*” the Charterparty. Both Parties had intended to arbitrate only issues concerning obligations created by or incorporated into the Charterparty and therefore not frustration. Since the arbitration agreement is governed by Western Australian law, the tribunal does not have jurisdiction to hear the Respondent’s defence of frustration.

A. THE ARBITRATION AGREEMENT SHOULD BE INTERPRETED ACCORDING TO THE LAW OF WESTERN AUSTRALIA.

2. The law governing the arbitration agreement is the law governing the Charterparty (Western Australian law) and not the law of the seat of the arbitration. Accordingly, the arbitration agreement is governed by Western Australian law.
3. In the absence of an express choice of law governing the arbitration agreement, courts and arbitral tribunals have applied the governing law of the underlying contract to the associated arbitration agreement. This is especially so when parties expressly agreed to a choice of law clause in the underlying contract²⁸. The principle is that the parties’ choice of law clause extended impliedly to the separable arbitration agreement²⁹.
4. In *Peterson Farms Inc v C & M Farming Ltd*³⁰, the English High court held that an arbitration clause, contained in a contract governed by Arkansas law, was governed by Arkansas law even though the arbitration clause stipulated arbitration in London.
5. This principle was also applied in *Arsanovia Ltd v Cruz City 1 Mauritius Holdings*³¹ where the English High Court held that parties had impliedly intended the choice of law clause (Indian law)

²⁸ Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014), 513-514.

²⁹ *Ibid.*

³⁰ [2004] 1 Lloyd’s Rep 603.

governing the underlying contract to govern the arbitration agreement despite the arbitration being seated in London.

6. Likewise, a number of arbitral tribunal decisions have adopted this approach. In *ICC Case No 11869*³², the tribunal seated in Vienna applied English law to the underlying contract and the arbitration agreement. The choice of law clause which appeared immediately after the arbitration clause stipulated English law to govern the underlying contract and there were “no indications that parties.....wanted to submit the arbitration agreement to a different law than the main contract”³³.
7. On our facts, there is a choice of law clause in the Charterparty (Clause 31) stipulating that the laws of the State of Western Australia shall govern the Charterparty. There is no express choice of law governing the arbitration. In the absence of any express choice of law governing the arbitration, parties impliedly intended the arbitration clause to be governed by the laws of the State of Western Australia as well.

B. UNDER WESTERN AUSTRALIAN LAW, THE ARBITRATION AGREEMENT DOES NOT ENCOMPASS THE FRUSTRATION ISSUE.

1. The pro-arbitration presumption does not apply

8. The pro-arbitration presumption does not apply where parties intend to have their disputes heard in more than one forum. In *Seeley International*, the Federal Court of Australia held that “*the syntactical and semantic analysis*” of an arbitration clause should not be ignored “*particularly where the parties have demonstrated such care in arriving at, and expressing, their bargain*”³⁴. “*It does not flaunt business common sense*” for parties to agree to arbitrate specific disputes while litigating other disputes³⁵. In *Comandate*³⁶, the same Court emphasised that the “*liberal*

³¹ [2012] EWHC 3702.

³² (2011) XXXVI Y.B. Comm. Arb. 47, 51-52.

³³ Born (n 28), 516.

³⁴ *Seeley International Pty Ltd v Electra Air Conditioning BV* [2008] FCA 29, [37].

³⁵ *Ibid.*

³⁶ *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) FCAFC 192.

approach” is “not to say that all clauses are the same or that the language used is not determinative”³⁷.

9. In the present case, the parties had clearly intended to settle their disputes in separate forums. The respondent wrote and rejected a prior version of the arbitration agreement for the express reason that as a matter of their “company policy” they are not prepared to arbitrate all issues arising out of the contract³⁸. The Claimant duly accepted this request by amending the terms of the arbitration agreement³⁹. On these facts, it would be artificial to apply a presumption that parties intended to only arbitrate their disputes.

2. Frustration does not “arise under” the arbitration agreement

10. Ultimately, the scope of the arbitration agreement falls to be determined by an objective interpretation of the text of the arbitration agreement in light of the background information⁴⁰. The parties’ objective intention was to exclude issues relating to frustration from arbitration.
11. Disputes do not “arise under” the contract unless they concern obligations created by or incorporated in the contract. In *Fillite (Runcorn) v Aqua-Lift*, the English Court of Appeal held that “the phrase ‘disputes arising under a contract’ is not wide enough to include disputes which do not concern obligations created by or incorporated in that contract”⁴¹. The position under Western Australia law is similar. In *Paper Products*⁴², the court held that “arising under” is a “restricted form of words...which limit the reference to matters arising ex contractu”⁴³. The meaning of this observation can be understood from an earlier passage which stated that “[s]ome clauses may be too narrow to cover disputes arising in whole or in part outside the four corners of the instrument”⁴⁴. The restricted interpretation of the phrase “arising under” stands in

³⁷ *Comandate* (n 36), [164].

³⁸ Letter from the Responent to the Claimant (16 July 2014), Bundle of Facts at 25.

³⁹ Letter from the Claimant to the Responent (21 July 2014), Bundle of Facts at 27.

⁴⁰ *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896, 912; affirmed in Australia in *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181, [11].

⁴¹ *Fillite (Runcorn) Ltd v Aqua-Lift* (1989) CLR 66.

⁴² *Paper Products Pty Ltd v Tomlinsons (Rochdale) Limited* (1993) 43 FCR 439.

⁴³ *Paper Products* (n 42), 448.

⁴⁴ *Paper Products* (n 42), 446.

contradistinction to the wider interpretation in respect of the phrase “*arising out of*”. In *Comandate*, the court held that the phrase “*arising out of*” was wide enough to encompass disputes beyond contractual obligations and rights only⁴⁵.

12. Since frustration of the contract arises independent of the terms of the contract and goes to the very existence of the contract⁴⁶, it is excluded from the arbitration agreement.
13. “*Any dispute arising under this contract*” does not automatically encompass frustration. In *Heyman v Darwins*⁴⁷, an English case, Lord Wright opined that frustration “*would seem logically to arise ‘under the contract’ and fall within [a submission for arbitration]*”. However, this passage is only *obiter* as the relevant phrase involved is “*arise...in respect of this agreement ...or anything arising hereout*”. Therefore, the case was dealing with a phrase wider in scope than “*arising under*”. The same passage by Lord Wright was referred to by the Australian High Court in *Codelfa Construction Pty Ltd v State Rail Authority of NSW*⁴⁸. However, without affirming the statement, the court instead held that “*all disputes arising out of the Contract...was plainly wide enough to embrace*” a claim based on frustration.⁴⁹

3. Both parties intended to exclude frustration from arbitration.

14. The position that “*arising under*” does not cover issues other than those concerning obligations created by the contract is confirmed by background facts including drafts and negotiations of the Parties. Draft agreement and pre-contractual negotiation are admissible where they show that parties are united in rejecting a possible construction⁵⁰. In *Codelfa*, Mason J held that “*if it transpires that the parties have refused to include in the contract a provision which would give*

⁴⁵ *Comandate* (n 36), [175].

⁴⁶ See generally *Bunge SA v Kyla Shipping Co. (The Kyla)* [2013] 1 Lloyd’s Rep 565; Julian Cooke et al, *Voyage Charters* (4th edn, Informa Law 2014), 696.

⁴⁷ (1942) AC 356, 365-366.

⁴⁸ (1982) 149 CLR 337.

⁴⁹ *Ibid*, 386.

⁵⁰ Sir Kim Lewison and David Hughes, *The Interpretation of Contracts in Australia* (Thomson Reuters 2012), [3.08].

*effect to the presumed intention of persons in their position, it may be proper to receive evidence of that refusal*⁵¹.

15. Both parties agreed only to arbitrate issues arising out of *the terms* of the Charterparty. In rejecting the first draft of the charterparty tendered by the Claimant, the Respondent expressed her non-negotiable intention to limit arbitration to disputes which “*arise out of the provisions of the Charterparty*”. Disputes which “*relate to but do not arise out of the terms of the Charterparty*” were to be resolved by way of litigation⁵². The Claimant acceded to this request by striking out the words “*including any question regarding [the Charterparty’s] existence, validity or termination*”. The Claimant further replaced the broad expression (“*arising out of or in connection with*”) with the restricted expression “*arising under*”. Therefore, it was common ground between the parties that “*arising under*” referred to “*arising under the terms of the contract*”. As discussed above, frustration arises independently of the terms of the contract and is therefore excluded from arbitration.

16. More specifically, the Claimant’s removal of the word “*termination*” at the Respondent’s request evidenced the common intention to exclude issues relating to frustration. In *Heyman*, the court held that, for the purpose of deciding the scope of an arbitration agreement, there is no difference between *frustration* and *termination* by repudiation and acceptance as both bring contractual performance to an end⁵³. In so far as frustration falls under the term “*termination*” for the purpose of the arbitration agreement, the deletion of “*termination*” from the arbitration clause indicates that the Claimant intended to exclude issues of frustration from the scope of the arbitration clause.

⁵¹ *Codelfa* (n 48), 352-353.

⁵² *Letter from the Respondent to the Claimant* (n 38)

⁵³ *Heyman* (n 47), 383.

C. EVEN IF THE LAW GOVERNING THE ARBITRATION AGREEMENT IS ENGLISH LAW, THE ARBITRATION AGREEMENT DOES NOT ENCOMPASS THE FRUSTRATION ISSUE.

17. Even if English law governed the arbitration agreement, the tribunal has no jurisdiction over the frustration issue. The House of Lords in *Fiona Trust* acknowledged that the pro-arbitration presumption may be rebutted if “*the language makes it clear that certain questions were intended to be excluded from the arbitrator’s jurisdiction*”⁵⁴. Further, courts should construe the scope of arbitration clauses in a manner which gives effect to the parties’ reasonable commercial expectations⁵⁵. As shown above, the parties’ mutual commercial expectation was to litigate, instead of arbitrate, any disputes which do not “*arise out of the terms of the Charterparty*”, including the issue of frustration. English law would equally give effect to such reasonable commercial expectation.
18. In any case, the facts of *Fiona Trust* are clearly distinguishable. The case concerned a widely used standard form Shelltime 4 form (“*arising under*”). No actual or attempted amendments were made. The court held that since the draftsman of the Shelltime 4 form regarded “*arising out of*” and “*arising under*” as mutually interchangeable, the pro-arbitration presumption applied in that case to give effect to the parties’ reasonable commercial expectations⁵⁶.

D. IF THE TRIBUNAL HAS NO JURISDICTION OVER THE FRUSTRATION ISSUE, IT CANNOT HEAR THE DEMURRAGE CLAIM

1. The tribunal acts in breach of natural justice if it hears the demurrage claim without the frustration defence.

19. The award is liable to be set aside if this tribunal determines the Claimant’s demurrage claim without hearing the Respondent’s frustration defence. The law governing the setting aside of the award is the law of the seat⁵⁷. Under s68 and s33 of the English Arbitration Act 1996, an award may be set aside if the tribunal fails to comply with its general duty to “*act fairly and impartially*”

⁵⁴ *Fiona Trust & Holding Corporation and others v Privalov and others* [2007] UKHL 40, [13].

⁵⁵ *Ibid*, [12].

⁵⁶ *Ibid*, [12]-[13].

⁵⁷ *Born* (n 28), 3225.

as between the parties, giving each party a reasonable opportunity of ... dealing with [the case] of his opponent”.

20. The arbitral tribunal acts against the arbitration agreement if it breaches natural justice. Cl. 30(d)(1) expressly requires the Arbitrator to “*determine any questions by reference to consideration of general justice and fairness*”.
21. A breach of natural justice in the arbitration process will also render the arbitral award unenforceable. Under the law of Hades, where enforcement is most likely to be sought, an arbitral award will not be enforced if it is against public policy⁵⁸. A breach of natural justice is contrary to public policy.⁵⁹ If an arbitral tribunal is not able to render an enforceable award, it is obliged to decline its jurisdiction. This obligation derives from the parties’ justified interests.
22. Failure to accord both parties procedural fairness constitutes a breach of natural justice⁶⁰. “*The requirements of natural justice vary according to the circumstances*”⁶¹ so as to ultimately avoid practical injustice⁶². Not responding to a party’s case⁶³ or negatively impacting a party’s opportunity to defend itself⁶⁴ can amount to a breach of natural justice. The party at risk of an adverse finding must be given an opportunity to be heard on the finding.⁶⁵ The English High Court has remitted an award back to tribunal on the basis that the tribunal had rendered its award on grounds not raised by parties.⁶⁶ Similarly, in civil law systems, the parties’ right to have a full opportunity to present their case often incorporates the *principe du contradictoire*, which

⁵⁸ International Arbitration Act 1974 (Hades), ss 8(7)(b), 16; UNCITRAL Model Law 1985, Art 34(2)(b)(ii) and 36(1)(b)(ii); *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83, [14].

⁵⁹ International Arbitration Act 1974 (Hades), ss 8(7A)(b) and 19.

⁶⁰ *TCL v Castel* (n 58), [7], [87], [108]

⁶¹ *TCL v Castel* (n 58) [85]; Michael Mustill and Stewart Boyd, *The Law and Practice of Commercial Arbitration in England* (Butterworths 1982), 252; *Wiseman v Borneman* [1971] AC 297, 308, 309 and 320; *Bushell v Secretary of State for the Environment* [1981] AC 75, 95; *Kioa v West* [1985] 159 CLR 550, 583.

⁶² *TCL v Castel* (n 58), [87].

⁶³ *TCL v Castel* (n 58), [88]; *Applicant M164/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 16, [79]-[92], [108], [118]-[119].

⁶⁴ *Born* (n 28), 1219.

⁶⁵ *TCL v Castel* (n 58), [104]; *Dunghutti Elders Council (Aboriginal Corporation) RNTBC v Registrar of Aboriginal and Torres Strait Islander Corporations* [2011] FCAFC 88; *Mahon v Air New Zealand* [1984] AC 808, 820-821.

⁶⁶ Nigel Blackaby, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015), [10.55]; *F Ltd v M Ltd* [2009] EWHC 275, [55]-[56].

requires that no evidence or argument should serve as a basis for a decision unless it has been subject to the possibility of comment and contradiction by the other parties.⁶⁷

23. On our facts, the Respondent's frustration defence is a direct and complete response to the Claimant's claim of demurrage. Thus, it is procedurally unfair for the tribunal to hear the demurrage claim but not the defence. It would be a breach of natural justice to issue such an award.

II. IF THE TRIBUNAL HAS JURISDICTION ON THE FRUSTRATION ISSUE, IT FOLLOWS THAT IT HAS JURISDICTION ON THE SALVAGE COUNTERCLAIM.

A. THE RESPONDENT HAS STANDING TO CLAIM THE SALVAGE AWARD AS SHE IS THE SALVOR.

24. A shipowner can claim salvage in respect of a salvage service provided by his ship. The reward is earned by the ship and prima facie payable to its owner⁶⁸. This is due to the fact that services could not have been rendered without the use of a shipowner's vessel⁶⁹ and the nature of ship operations are now taken as a ship less than a personal service⁷⁰. However, "there are no rigid categories of salvor."⁷¹ This rule is to be read widely, in line with the principled basis of salvage being the public policy to incentivise the provision of salvage services, as recognised⁷² in the preamble to the International Convention on Salvage 1989, which has force of law in Australia⁷³.

25. The Respondent is "*in the business of port management and providing tug services at Hades*"⁷⁴ and Hestug is "*a business owned of*" the Respondent⁷⁵. The Respondent is, at the very least, the ultimate owner of the tugs which salvaged the Vessel, if not the direct owner. As such, the salvage owed to the ships is claimable by the Respondent. Furthermore, the Respondent would be in a position to influence the corporate stance on rendering salvage services, and thus the policy

⁶⁷ *Blackaby* (n 66).

⁶⁸ Francis D Rose, *Kennedy and Rose: Law of Salvage* (7th edn, Sweet & Maxwell 2010), [7.017].

⁶⁹ *Ibid* [7.018].

⁷⁰ *Ibid* [7.012].

⁷¹ *The Sara Star* [1995] 2 Lloyd's Rep 134, 141 (Clarke J), cited in *Rose* (n 68).

⁷² International Convention On Salvage, IMO 1989 (adopted on 28 April 1989 and entered into force on 8 January 1998), Preamble.

⁷³ Commonwealth Navigation Act 2012 (No. 128), s 241(1) read with s14.

⁷⁴ "Hestia in a tangle" *The Hades Advocate* (20 July 2014), Bundle of Facts at 26.

⁷⁵ *The Hades Advocate* (7 October 2015, online edition), Bundle of Facts at 71.

basis of salvage requires that, to encourage a pro-salvage stance, the Respondent should be granted the salvage claim. As such, the Respondent has standing to bring the salvage claim.

B. THE SCOPE OF THE ARBITRATION AGREEMENT IS WIDE ENOUGH TO ENCOMPASS THE SALVAGE COUNTERCLAIM

26. Consistency in approach requires that if the tribunal adopts the pro-arbitration presumption in favour of the Claimant in respect of the frustration issue, it should apply the same presumption in respect of the Respondent's salvage counterclaim. The pro-arbitration presumption is ultimately justified upon the sensible and commercial presumption that "*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*"⁷⁶. Therefore, in giving effect to such a sensible commercial expectation, the tribunal should hold that the parties should settle all their disputes in this arbitration.

C. IN THE ALTERNATIVE, THE RESPONDENT CAN CLAIM SALVAGE THROUGH GENERAL AVERAGE.

27. In the alternative, the tribunal has jurisdiction over the salvage claim because the claim for salvage is a claim "*arising under*" Clause 21 ("*General Average*") of the Charterparty. Parties agreed to settle claims for General Average in accordance with the York/Antwerp Rules ("*YAR*") 1994. Under Rule VI(a) of the YAR 1994, salvage expenditure incurred for the purposes of preserving property involved in the common maritime adventure from peril shall be allowed in general average. The Respondent, as the current bearer of the entire salvage expenditure, has standing to claim general average from the Claimant shipowner.

28. The applicable version is the YAR 1994, regardless of the existence of the YAR 2004. BIMCO considers the YAR 2004 "*a new set of Rules not in any way a modification or amendment of the 1994 Rules*"⁷⁷. Additionally, BIMCO emphasised that the wording referring to York/Antwerp

⁷⁶ *Fiona Trust* (n 54) [13].

⁷⁷ BIMCO, 'General Average: Revision of York-Antwerp Rules' *BIMCO Special Circular* (24 February 2005) No. 2.

Rules in charterparties should reflect the set of Rules to be bound by⁷⁸. Given the drastic and controversial change in position regarding salvage, the fact that parties specified the YAR 1994 in Charterparty cl. 21, despite the YAR 2004 being available at time of contract, should be given effect.

29. Even if the YAR 2004 applies, the Respondent is able to bring its salvage claim within general average. Rule VI(a) admits salvage payments in general average when one party to the salvage paid “*all or any*” proportion of salvage due from another party. It is not clear if the Respondent had made the payments to Hestug. However, in the event that it has, the tribunal should make a positive finding on its jurisdiction to hear the salvage counterclaim.

III. RESPONDENT IS NOT LIABLE FOR DEMURRAGE

A. DEMURRAGE DID NOT ACCRUE BECAUSE THE VESSEL HAD LEFT THE PORT OF HADES BEFORE LAYTIME EXPIRED.

30. Laytime commenced when the Vessel’s Master tendered the Notice of Readiness on 3 October 2014. Since there is no evidence of any bad weather which interrupted laytime, laytime would only expire on 12 October 2014 at the earliest. The physical loading operations were completed by 2350 hours on 6 October 2014 and the Vessel commenced sailing from the Port of Hades at 0900 hours on 7 October 2014. Clause 9(c) provides that laytime is “*calculated from when NOR is tendered until the vessel leaves the Loading Place*”. “*Loading place*”, as nominated in Box 5, is “*1 safe port, Hades*”. Therefore, laytime stops running when the vessel leaves the port limit which coincides with the territorial limit of Hades⁷⁹.

31. The Vessel left the territorial limit of Hades before it was intercepted by the Coast Guard. This is evidenced by The Claimant’s 8 October 2014 email to the Vessel’s Master, castigating the Master for complying with the Coast Guard’s instructions. Indeed, both the master⁸⁰ and the

⁷⁸ *Ibid.*

⁷⁹ Communication dated 15 April 2015, Bundle of Facts at 63

⁸⁰ Memorandum from Hades Coast Guard to President Simmons (8 October 2004), Bundle of Facts at 57.

Claimant⁸¹ aware that the Vessel was outside the territorial limits of Hades. Further, the Vessel appeared to be a Q-max vessel given its maximum carrying capacity of 266,000 m³. Q-max vessels, at their slowest travelling at dead slow-ahead, sail at about 6 knots per hour. The vessel “sailed from Hades” at 9am on 7th October 2014⁸² and was intercepted “late yesterday”⁸³ (7 October). There is no evidence that suggested the Vessel’s journey was disrupted between the time of departure and the time of interception. Therefore, the vessel would have travelled at the slowest a distance of 66 to 90 nautical miles⁸⁴ away from the berth. It follows that the Vessel must have left the port limits before it was intercepted by the Hades Coast Guard.

32. Whether or not the master ought to have complied with the order beyond Hades territorial water is immaterial as laytime had stopped running so long as the vessel is outside of the territorial limit. Therefore, demurrage never accrued because laytime has stopped running on the 7th October 2014. At that time, there were still about 5 days of laytime remaining.

B. EVEN IF THE VESSEL HAD NOT LEFT THE ‘LOADING PLACE’, THE DELAY WAS CAUSED BY THE CLAIMANT’S BREACH OF HER CHARTERPARTY OBLIGATIONS.

33. A charterer is not liable for demurrage if the delay is caused by a fault on the shipowner or those for whom the shipowner is responsible⁸⁵. ‘Fault’ means a ‘breach of contractual obligation’⁸⁶. Even if the Vessel did not leave the “Loading Place” when it was intercepted, the Respondent is not liable for demurrage as the delay was caused by the Claimant’s breach of the Charterparty.

1. The Hades Coast Guard had no authority to detain the Vessel within Hades territorial waters

34. Hades law is the same as Western Australia law save for constitutional matters⁸⁷. In *Ruddock v Vadarlis*, Black CJ emphatically observed that “there is ...no doubt that, as a general principle

⁸¹ Email from the Claimant to the Master (8 October 2014 at 1800), Bundle of Facts at 58

⁸² Statement of Facts in respect of MV Athena at Hades, Bundle of Facts at 54.

⁸³ *Memorandum* (n 56).

⁸⁴ This is calculated based on a traveling time from 7am up to 6pm or 10pm of the same day.

⁸⁵ *Budgett v Binnington* [1891] 1 QB 35.

⁸⁶ *Houlder v Weir* [1905] 2 KB 267.

⁸⁷ Bundle of Facts at 79.

*of law, there is no Executive authority, apart from that conferred by statute, to subject anyone in Australia, citizen or non-citizen, to detention*⁸⁸.

35. Under Hades law, the Coast Guard did not have Executive power under any statute to detain the Vessel in the circumstances. The Coast Guard Bill 2001 (Australia), which was intended to “provide the framework for the establishment of the Australian Coast Guard as a Commonwealth maritime police agency”⁸⁹, has not been enacted.⁹⁰ Even if the Hades Coast Guard may be assimilated to that of an “Officer of Customs” under the Customs Act 1901, the relevant statutory requirements to detain goods are not met. Section 77EA(1) of the Customs Act provides for the power to detain goods “in the public interest”. However, the power does not apply to goods which are “exported from [Hades]”⁹¹. While under the same section, “an order to detain goods has effect despite any provision of this Act to the Contrary”⁹², the power to issue such orders is only vested in the Minister.⁹³ In our case, there was no order to detain the vessel or HLNG from the Minister. The order was issued directly by President Simmons who attained her presidency status through a coup.

36. No Executive power to detain the Vessel existed outside the Customs Act. In *Ruddock v Vadarlis*⁹⁴, the majority of the Federal Court of Australia held that the Executive has the power to prevent aliens on board a ship in the territorial waters of Australia from landing on Australian soil. Black CJ dissented in unequivocal terms and held that “where a statute, expressly or by necessary implication, purports to regulate wholly the area of a particular prerogative power or right, the exercise of the power or right is governed by the provisions of the statute, which are to

⁸⁸ *Ruddock v Vadarlis* (2001) 183 ALR 1, [5]

⁸⁹ ‘Explanatory Memorandum to the Coast Guard Bill 2001’ (Federal Register of Legislation, 2001) at [1]

<<https://www.legislation.gov.au/Details/C2004B01035/Explanatory%20Memorandum/Text>> accessed 19 April 2016.

⁹⁰ Australian Coast Guard Bill 2011 is classified as “not proceeding” since 24 September 2001. “Bills not Passed (all Parliaments)”, (Parliament of Australia)

<http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_not_passed_all_Parliaments?st=2&sr=0&t=&q=&ito=1&expand=False&drvH=7&drt=2&pnu=44&pnuH=44&f=12%2F11%2F2013&to=19%2F04%2F2016&bs=1&pbh=1&bhor=1&pmb=1&g=1&ps=100> accessed 19 April 2016>

⁹¹ Customs Act 1901 (Australia), s77AE(2)(d)(ii).

⁹² *Ibid*, ss77AE(3).

⁹³ *Ibid*, ss77AE(1).

⁹⁴ [2001] FCA 1329.

prevail in that respect”⁹⁵. In any event, the majority’s reasoning was based on s 61 of the Constitution of Australia⁹⁶. Given that the Constitutional law of Hades is different from that of Australia, there is no evidence to suggest that the same power is retained notwithstanding the comprehensive provision in the Customs Act. The Customs Act, as shown above, expressly excludes the power to detain goods which are “*exported from [Hades]*”.

2. The Vessel was unseaworthy

37. The shipowner’s obligation to provide a seaworthy vessel includes providing a master who is qualified to command the vessel and competent in skill and knowledge⁹⁷. The master’s incompetence is a question of fact which may be proved from a single incident⁹⁸. On the facts, the Master was incompetent in complying with the Hades Coast Guard and returning the ship back to the Port of Hades. He knew that the Vessel was outside of Hades’ territorial waters⁹⁹. Even if the Vessel was in Hades territorial waters, the master was clearly aware of the coup which lead to President Simmons’ illegitimate seizure of power. The master was not shown any order from the Minister or in fact any written order at all.
38. Seaworthiness must be judged according to the reasonable standards and practices of navigation at the relevant time¹⁰⁰. The actual conduct of the master was clearly below the reasonable standards. This is self-evident from the Claimant’s internal correspondences where she condemned the Master’s conduct to be “*completely unacceptable*” and required him to step down from command immediately. Indeed, the Hades Advocate suggested that the Master had “*fell for the Coast Guard’s story*”. The Master’s ignorance towards the basic powers of flag

⁹⁵ *Ruddock* (n 94) [33].

⁹⁶ *Ruddock* (n 94) [193].

⁹⁷ *Standard Oil Co of New York v Clan Line Steamers Ltd* [1924] AC 100, 121.

⁹⁸ *Manifest Shipping & Co Ltd v Uni-Polaris Insurance Co Ltd and La Reunion Europeenne (The “Star Sea”)* [1997] 1 Lloyd’s Rep 360, 373-374; *Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd (The Eurasian Dream)* [2002] 1 Lloyd’s Rep 719, [129].

⁹⁹ “Inside a Coast Guard Operation” *The Hades Advocate* (25 October 2014) Bundle of Facts at 62.

¹⁰⁰ *Great China Metal Industries v Malaysian International Shipping Corporation* [1999] 1 Lloyd’s Rep 512, [30]; *The Eurasian Dream* (n 98) [127].

states and port States was the “*real or effective or actual cause*” for the delay caused and demurrage accrued¹⁰¹.

3. The Vessel unjustifiably deviated from its route

39. Deviation from the usual customary route is only justified if it is necessary to save life¹⁰² or to avoid danger to the ship or cargo¹⁰³. In this case, the Vessel deviated from its route to the Port of Poseidon when it returned to the Port of Hades. This deviation is unjustifiable because there is no threat to life or property that necessitated the deviation. Since the Vessel was intercepted by the Coast Guard acting without authority, comprising three men on a rubber dinghy, there was no real or imminent threat to the cargo on board the Vessel.

40. The Claimant cannot take advantage of her unjustified deviation to claim demurrage from the Respondent¹⁰⁴. In *United States Shipping Board*, the House of Lords affirmed the Court of Appeal’s decision that the owners who caused the unjustified deviation were not entitled to demurrage when the charterers exceeded the stipulated time for discharge.

IV. EVEN IF THE RESPONDENT IS LIABLE FOR DEMURRAGE, THE RESPONDENT IS ONLY LIABLE FOR DEMURRAGE UP TO THE POINT THE CONTRACT IS FRUSTRATED.

A. THE SEIZURE AND DETENTION OF THE VESSEL BY THE COAST GUARD RENDERED THE COMMERCIAL PURPOSE OF THE CHARTERPARTY IMPOSSIBLE OF ATTAINMENT.

41. Frustration discharges both parties from all future obligations under the contract, including demurrage¹⁰⁵. A charter is frustrated “*when the commercial purpose of the adventure for which the charter provides becomes impossible of attainment.*”¹⁰⁶ So long as one party is aware of the

¹⁰¹ *Smith Hogg & Co v Black Sea and Baltic General Insurance* [1940] AC 997, 1005.

¹⁰² *Scaramanga & Co v Stamp* (1880) 5 CPD 295, 304.

¹⁰³ *Notara v Henderson* (1872) LR 7 QB 225.

¹⁰⁴ *United States Shipping Board v Bunge y Born Limitada Sociedad* [1925] All ER Rep 173; *Al-Sayar Navigation Co v Delta International Traders* [1982] 11 CLCAD 151, [42].

¹⁰⁵ Baughen Simon, *Summerskill on Laytime* (5th edn, Sweet & Maxwell 2013) 10-17; Cooke (n 46) 696.

¹⁰⁶ Cooke (n 46) [22.1], [22.10]; *The Siboen and The Sibotre* [1976] 1 Lloyd’s Rep 293; *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (the Sea Angel)* [2007] 2 Lloyd’s Rep 517.

other's purpose, the latter's commercial purpose must be taken into consideration in assessing whether the adventure has been frustrated¹⁰⁷.

42. Although the terms of the Charterparty do not explicitly stipulate the duration of the voyage, the underlying basis of the Charterparty as contemplated by the parties was a one-month voyage for the shipment of HLING. The Respondent communicated from its very first Request for Proposal that the charter was for the carriage of a specific amount of HLNG from Hades to Poseidon and from 1 October 2014 +/- 3 days to 30 October 2014 +/- 3 days¹⁰⁸. The Claimant duly tendered the proposal and did not object to the estimated duration of 1 month. The Respondent entered into the Charterparty on the above basis and the Claimant is fully aware of the nature and purpose of the intended voyage.
43. The commercial purpose of a one-month voyage for outbound carriage of HLING from Hades became impossible when performance of the Charterparty was prevented by the seizure and detention by the coast guard. Impossibility of attaining the commercial purpose "*may arise where performance is prevented (or delayed so as to amount to effective prevention) either by physical obstacles or by supervening illegality...under the law of the place of performance*".¹⁰⁹ Hades' Coast Guard seized the vessel on 7 October 2014 pursuant to a presidential decree. The vessel was thereafter physically prevented from leaving the port under the law of Hades. The sole reason for the seizure and detention was to prevent the export of HLING from Hades, the very purpose for which the Charterparty was entered. The detention of the Vessel had rendered it impossible to ship HLNG out of Hades. Further, no other Hades flagged HLNG carrier existed worldwide, which is the only class of vessel permitted in Hades port.
44. It is clear that detention by authorities readily leads to frustration. In *The Adelfa*¹¹⁰, a voyage charterparty was frustrated when discharging was prevented by an executive ban imposed by the

¹⁰⁷ Cooke (n 46) [22.10]; *Krell v Henry* [1903] 2 KB 740.

¹⁰⁸ Letter from the Respondent to the Claimant (1 July 2014), Bundle of Facts at 2.

¹⁰⁹ Cooke (n 46) [22.1]; *Edwinton Commercial Corp* (n 106).

¹¹⁰ [1988] 2 Lloyd's Rep 466.

authorities and by the arrest of the vessel. Similarly in *Scottish Navigation Company, Limited v W.A. Souter & Co*¹¹¹, where the charterparty contemplated a “*Baltic round*”, an order by the Russian authority preventing the ship from returning from Finland to England was held to have frustrated “*the adventure in a mercantile sense*”¹¹².

45. The Charterparty is frustrated as of the date of the seizure. The likely duration and effect of the supervening event is to be assessed at the time of its occurrence. It is not necessary to wait and see¹¹³. Frustration occurs where the intervening event is of an indefinite character and may be assumed to continue for an indefinite period¹¹⁴. In the present case, at the time of the seizure, all available information pointed to a strong political will to retain the Vessel for an indefinite period. By her own words, President Simmons’ “*first act as President*” was to order the interception of the Vessel. Her coup was successful due to military backing and she continued to receive support to stop HLNG production by the General. Indeed, the Claimant recognised that the “*a long delay for our vessel can be anticipated*”¹¹⁵, having been privy to special information that the Vessel would likely “*be kept at Hades and the HLNG on board drawn upon over time...*” Since the detention carried with it all signs of an indefinite delay, the Charterparty was frustrated as of 7th October 2014.

B. THE DELAY HAS RENDERED PERFORMANCE RADICALLY DIFFERENT FROM THAT WHICH THE CHARTERPARTY CONTEMPLATES.

46. Even if the seizure and detention alone were insufficient to frustrate the Charterparty, the ensuing delay has frustrated the Charterparty. A charterparty is frustrated by delay where the delay is sufficiently long to render performance radically different from that which the contract contemplates.¹¹⁶ In *The Quito*, it was held that “*when the causes of frustration have operated so*

¹¹¹ [1917] 1 KB 222.

¹¹² *Ibid* 236.

¹¹³ *Bank Line v Capel (The Quito)* [1919] AC 435.

¹¹⁴ *Scanlan’s New Neon Ltd v Tooheys Ltd* [1943] HCA 43.

¹¹⁵ Letter from the Claimant to the Respondent (15 October 2014), Bundle of Facts at 60.

¹¹⁶ *Cooke* (n 46) [22.19]; *Sivlia v Tarval Pty Ltd* 14 March 1986 unreported judgment of Supreme Court of New South Wales Equity Division; *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] AC 724.

long or under such circumstances as to raise a presumption of inordinate delay, the time has arrived at which the fate of the contract falls to be decided.”¹¹⁷

47. The Respondent was justified in its view expressed on the 30th of April 2015 that the Charterparty has already been frustrated. The more disproportionate the delay is in comparison with the entire length of the chartered the service, the more likely that the charter is frustrated¹¹⁸. To illustrate, in *Jackson v Union Marine Insurance*¹¹⁹, a delay of seven months was held to frustrate the voyage charter from Liverpool to San Francisco. A passenger ship in 1850 would have taken 180 days or three months to travel from Liverpool to San Francisco, thus the delay was slightly over twice the expected journey time¹²⁰. In the present case, after the seizure, there was no indications whatsoever that the executive ban will be lifted any time soon, if ever. Therefore, by 30th April 2015 the latest, or half a year after the seizure, the delay has subsisted for so long that either by itself, or by giving rise to a presumption of indefinite delay, performance had been rendered radically different from the one month voyage contemplated under the Charterparty.

C. THE CHARTERPARTY DOES NOT MAKE PROVISIONS FOR THE SUPERVENING EVENTS

48. A supervening event for which full provision is made in the contract cannot give rise to frustration. However, frustration is not excluded “*where the degree of delay or disruption which has occurred is greater than that which the clause contemplates*”¹²¹.

49. While cl.19 provides for force majeure events, it does contemplate the possibility of an indefinite delay. “[*W*]here supervening events...render the performance of a contract indefinitely impossible, and there is no undertaking to be bound in any event, frustration ensues,

¹¹⁷ *The Quito* (n 113).

¹¹⁸ Cooke (n 46) para 22.21; *Trade & Transport v Iino Kaiun Kaisha (The Angelia)* [1972] 2 Lloyd’s Rep 154; *The Eugenia* [1964] 2 QB 226.

¹¹⁹ (1874) LR 10 CP 125.

¹²⁰ *The Carthagena*, July 30, 1850. ‘Log of Passengers arriving at the Port of San Francisco’ *The Maritime Heritage Project* <<http://www.maritimeheritage.org/log.htm>> accessed 16 April 2016.

¹²¹ Cooke (n 46) para 22.8; *The Quito* (n 113).

*even though the parties may have expressly provided for the case of a limited interruption*¹²².

Clause 19(ii) permits either party to cancel the contract after 30 days from the date of the force majeure event or “*any immediately succeeding period of 30 days*”. It therefore only provides for situations of “*limited interruption*”. There was no positive undertaking by the Respondent to be bound even in an event of indefinite delay. Although the vessel was ultimately released after more than one year of detention upon President Simmons’ resignation, such a possibility was not in any way foreseeable at the time of the seizure. To the contrary, the facts affirmed the reasonable inference that the seizure would have continued indefinitely but for her resignation. Frustration on the facts was not excluded by the force majeure clause.

50. In conclusion, the seizure and detention by the Coast Guard of the Vessel frustrated the Charterparty on 7 October 2014, or in any case by 30 April 2015 the latest.

D. THE FRUSTRATION WAS NOT SELF-INDUCED.

51. The Claimant failed to discharge her burden to prove that the frustration was self-induced¹²³. To succeed, the Claimant has to prove that the frustrating event is attributable to the Respondent’s ‘blame’, ‘fault’ or ‘default’¹²⁴ which involves a breach of the Charterparty¹²⁵. However, her assertion that the Respondent breached the Charterparty by shipping dangerous cargo without its knowledge and consent¹²⁶ is untenable.

52. The HLNG is not a dangerous cargo. A cargo likely to subject the ship to detention is a dangerous cargo.¹²⁷ At the time of contract, there was no such risk. The protest by the

¹²² *Fibrosa v Fairbairn* (1943) AC 32, 40.

¹²³ J W Carter, *Contract Law in Australia* (6th edn, LexisNexis 2012) 33-46; *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154, 166, 174-75, 177, 193, 205; *Allied Mills Ltd v Gwydir Valley Oilseeds Pty Ltd* [1978] 2 NSWLR 26, 30.

¹²⁴ Cooke (n 46) 22.2; Carter (n 123) 33-43, 33-45; *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal (The Hannah Blumenthal)* [1983] 1 AC 854, 920; *In re The Unley Democratic Association* [1936] SASR 473, 482-83.

¹²⁵ Carter (n 123) 33-45; *The Hannah Blumenthal* (n 78) 920.

¹²⁶ Cooke (n 46) 6.49; *Brass v Maitland* (1856) 6 E. & B. 470, 481.

¹²⁷ Cooke (n 46) 6.52; Sir Bernard Eder et al, *Scrutton on Charterparties and Bills of Lading* (23rd edn, Sweet & Maxwell 2015) 7-053; *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].

environmentalists only took place upon the arrival of the Vessel at Hades. Even by that time a coup cannot be said to be likely, let alone a presidential order for the seizure of the vessel.

53. In any event, the Claimant was put on notice of the risk of detention, if any, and consented to the shipment. A shipowner cannot expect any information from the charterer in respect of the dangers posed by the cargo if “*he may himself discover it*”¹²⁸. At the time of contract, the cargo was not “*dangerous*”. The Claimant had received sufficient notice of the intention to ship HLNG and had consented to it in the Charterparty. Judged at that point in time, the notice was sufficient. In so far as the “*legal*” danger in the cargo materialised after the protests on 3 October 2014, the reason behind these protests was not lost on the Claimant. The Vessel’s Master had emailed the Claimant’s Operations Department the very same day to report that the protests related to the Respondent and its shipment of the HLNG on board the Vessel. The Master was clearly cognisant of the fact that the Vessel might likely be detained; the very purpose of his email was to seek advice on whether the Vessel ought to proceed to load the HLNG. Despite his reservations, he was ordered to proceed with the loading of the HLNG on board the Vessel. Without more, this proves that the Claimant consented to the shipment of HLNG on board the Vessel, whatever the risk it may carry as flowing directly from the protest. Hence, even if the Respondent shipped “*dangerous cargo*” in the form of the HLNG on board the Vessel, it did so with the knowledge and consent of the shipowner, the Claimant.

V. EVEN IF THE CONTRACT IS NOT FRUSTRATED, EXCEPTION TO LAYTIME AND DEMURRAGE APPLIED.

54. Clause 9(e) makes provisions for exceptions to laytime and demurrage. So far as relevant, clause 19(e) provides that “*in the event of any delay or hindrance in ...carrying, shipping the cargo actually shipped by reason of...arrests...the 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*”. The clause is specifically worded to provide for exception to both laytime and demurrage.

¹²⁸ *Brass v Maitland* (n 126) 482; *Cooke* (n 46) para 6.53.

55. While “*arrest*” in a limited sense refer to putting the vessel under judicial custody in respect of a claim in rem, it is clear that a broader meaning is intended under clause 9(e) (by contrasting it with clause 19(d)). Clause 19(d) provided for “*court issued arrest proceedings*” to be a force majeure event whereas clause 9(e) merely referred to “*arrests*”. Lord Diplock observed in *Prestcold (Central) Ltd v Minister of Labour*¹²⁹ that “[t]he habit of legal draftsman is to eschew synonyms. ...if he uses different words the presumption is that he means a different thing or concept”¹³⁰. Therefore, when the draftsman referred to “*arrest*” in 9(e) without qualifying it to be “*court issued...proceedings*” as he did in clause 19(d), it is clear that the intention was to refer to arrests by authorities not limited to the courts.
56. The wider meaning intended by the draftsman is in line with the meaning of “*arrest*” when drafted in the form of “*arrest or restraints of princes etc.*” It is clear that “*arrest*” understood in this wider sense covers the interception and retention by coast guards. In *London Arbitration 20/10*, the Indonesian Navy seized the chartered vessel arbitrarily and detained the vessel for a month. The tribunal held that the events fall within the exception of “*arrest or restraint of princes*”. In *Domar Ocean Transport v Independent Refining*¹³¹, a seizure of a barge by the coast guard was held to fall within the same exception.
57. In sum, the interception and detention of the Vessel by the Coast Guard is an “*arrest*” for the purpose of the laytime interruption clause. As the interception occurred on the 7th October 2014, only 4 days after the NOR was given and therefore well within the laytime of 10 days WWD SHINC, laytime ceased to run therefrom and no demurrage is due.

¹²⁹ [1969] 1 WLR 89, 97.

¹³⁰ See *Eureka Funds Management Ltd v Freehills Services Pty Ltd* (2008) 19 VR 676, [52].

¹³¹ 783 F.2d 1185.

PRAYER FOR RELIEF

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

DECLARE that it does not have jurisdiction to determine the frustration issue and thus the demurrage issue.

Further,

DECLARE that it does have jurisdiction to determine the salvage issue.

Further,

ADJUDGE that the Respondent is not liable to the Claimant in demurrage for any amount.