

ARBITRATION AWARD: REPORT

(NOVEMBER 2010)

1. On 27th October 2010 a Tribunal, comprising a Queen's Counsel and 3 prominent members of the London Maritime Arbitrators' Association ("LMAA")¹, ruled on how damages are to be assessed in light of Charterers' failure to perform shipments under a Contract of Affreightment ("COA"). Under a COA a charterer is contractually bound to elect laycan dates, usually on terms that these are on fairly evenly spread basis over the course of the COA and Owners have to nominate a performing vessel. The time for performance of these obligations may have an impact on the assessment of damages.
2. In this case the brief facts were as follows:-The parties entered into 2 separate long term COA's to transport raw materials under 2 separate routes. Under each COA the performance of the shipments had to be evenly spread throughout the course of the year. During the global financial crisis Charterers (whom Thomas Cooper represented) admitted they were unable to perform. Owners submitted their claim for damages and demanded about US\$16million excluding interest and costs. Charterers, on the other hand, disagreed with Owners' assessment of damages and instead proposed to pay about US\$2.2million in compensation. As the parties were unable to agree on the level of compensation the references proceeded to a hearing before the Tribunal. To protect their position on costs the Charterers served a part 36 type offer.
3. At the hearing the following issues were placed before the Tribunal to determine.
 - A. How should the phrase "fairly evenly spread" be interpreted in the context of a COA?
 - B. What is the relevant date to determine the market rate given that damages are assessed on the basis that it is contract rate less market rate?
 - C. Whether the Owners could recover their alleged positional benefit loss.²
 - D. In the event positional benefit was recoverable, which was the relevant Baltic Cape Index ("BCI") to assess the cost of the ballast voyage? LONDON
4. In respect of the 1st issue the Tribunal rejected Owners' interpretation. Owners proposed that for the shipments to be evenly spread during a year there needed to be the same gap between the start of the year and the start of the laycan date as there was between the last laycan period and the end of the year and the same gap between the end of each laycan period and the start of the next laycan period. ATHENS
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5. Charterers on the other hand stated that Owners' approach was unrealistic and uncommercial. Charterers' interpretation took into account that the fairly evenly spread provision was at Charterers' option and largely dictated by the plants' requirement for raw materials as long as it was evenly spread. Ultimately Charterers argued that there was no precise even spread between each shipment. The Tribunal ruled in favour of Charterers' interpretation. Accordingly, Charterers were able to choose the intended shipment period in respect of each COA. By PARIS
SINGAPORE

¹ The references were consolidated hence the peculiar number of 4 arbitrators

² Owners maintained that as a result of Charterers' failure to perform the shipment they had to nominate a vessel to ballast to the next load port to perform a follow on fixture. Had Charterers performed their contractual obligations Owners would have saved on the cost and length of the ballast voyage.

doing so they inevitably dictated the date of breach and by fixing the date of breach they were able to assess damages on that day.

6. With regard to the 2nd issue the Tribunal had to consider whether the relevant date to determine the market rate was the date of breach, or whether the market rate should be the average of 15/18 days following the date of election of the laycan spread. Charterers argued that in reality Owners would only have nominated tonnage in the market after Charterers elected their laycan spread. In this regard it can take up to 15 or 18 days to nominate, depending on market movements. In a rising market an owner may nominate tonnage earlier and in the falling market an owner may delay nomination until the last possible date to nominate. Charterers relied on the speech of Lord Brown in the “GOLDEN VICTORY” [2007] 2 AC 353³: to advance their argument. During cross examination Owners’ witness admitted that the Owners may nominate their ship at a later date.
7. The Tribunal held that they were reluctant to depart from the date of breach rule. The Tribunal was of the view that the date of breach rule provided a just date for assessing the market rate because it placed the risk of future market movements on that party. Consequently, damages were to be assessed at the date of breach.
8. In respect of the 3rd issue (by far the most contentious because, apart from it being a “novel” issue with no previous case law direct on point to assist, there was a lot of money turning on it) Owners argued that had it not been for Charterers’ breach they would not have incurred the cost of ballasting a vessel for up to 20 days to the next load port to perform the follow on shipment. Had Charterers performed each shipment under the COA it would have taken only 7 days for the performing vessel to ballast to the next load port following completion of discharge under the COA. Consequently, Owners would have saved 20 days ballast cost. They wanted to be compensated accordingly. Owners argued that the level of compensation should be calculated by either by (i) discounting the relevant Baltic Capesize Index by 10% or (ii) awarding them the cost of the 20 day’s additional ballast voyage. Indeed the concept and argument was novel. However, notwithstanding numerous requests to disclose evidence of actual loss (as opposed to a theoretical loss), Owners were not prepared to disclose evidence of (a) the identity of the performing vessel (b) the terms of the follow on shipment and (c) details of the load and discharge port.
9. Charterers maintained that such a head of loss was simply irrecoverable for the following reasons:
 - A. It was not within the contemplation of the parties at the time of contract;
 - B. The pricing of the COA did not factor positional benefit;

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³ “... the underlying principle is that the victim of a breach of contract is entitled to damages representing the value of the contractual benefit to which he was entitled but of which he has been deprived. He is entitled to be put in the same position as money can do it, as if the contract had been performed. The assessment of the date of breach rule can usually achieve that result. but not always. In *Miliangos v George Frank (Textiles) Limited* [1976] AC 443, 468-469, Lord Wilberforce referred to the “general rule” that damages for breach of contract are assessed at the date of breach but went on to observe that “it is for the Courts, or for Arbitrators, to work out a solution in each case best adapted to giving the injured Plaintiff that amount in damages which will most fairly compensate him for the wrong he has suffered”, and, when considering the date at which a foreign money obligation should be converted into sterling, chose the date that “gets nearest to securing to the creditor exactly what he bargained for”. If a money award of damages for breach of contract provides to the creditor lesser or a greater benefit than the creditor bargained for, the Award fails, in either case, to provide a just result”.

- C. The freight pricing under a COA is the outcome of protracted negotiations between the parties taking into account each party's bottom line position, that is, the cost of performance and each party's likely freight market view over the span of the COA. Charterers said that if the freight rate was discounted (assuming it was) then it would have been the result of a number of factors and not necessarily linked to positional benefit; and
- D. It was too remote.
10. The Tribunal also considered whether the Charterers assumed the responsibility to bear the positional loss. In this regard, the Tribunal held that the:
- A. Charterers had no knowledge of how Owners would have contracted with the new charterers;
- B. Charterers had no control over Owners' dealings with any new charterers;
- C. The outcome of such dealings was completely unpredictable; and
- D. The loss claimed would not be the product of the market itself but the result of arrangements entered into between Owners and new charterers.
11. The Tribunal ruled, once again, in Charterers' favour and dismissed Owners' claim for compensation arising out of alleged positional loss. As the claim for positional loss fell away, the Tribunal naturally stated there was no need to determine the appropriate BCI to assess positional loss. See issue 3(D).
12. Following Staughton J's remarks in the "NOEL BAY" practitioners were aware that a vessel's position may be relevant when assessing damages. This case offered the Tribunal an opportunity to address the positional loss issue and determine whether a shipowner is permitted to claim such a head of loss. The Tribunal rejected it. The Tribunal's approach conveyed a general reluctance, in the absence of compelling evidence, to depart from the usual principles when assessing damages and extending the scope of the heads of loss. Also, it was difficult to say to what extent the Tribunal was swayed by arguments that Owners' claim was nothing more than a loss of chance claim. The prospects of recovering a claim for loss of chance are usually slim.

If there are any questions arising from the case please feel free to contact the case handler, Dharmendra Nair whose details appear below, or Yollanda Alie, at yollanda.alie@thomascooperlaw.com:



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Thomas Cooper advised the successful Charterers in this case. The identity of the parties is deliberately withheld to ensure confidentiality. At the time of publication it is understood the Owners are likely to seek permission to appeal.