

Ship Sale and Purchase: A buyer's right to damages

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The recent English High Court decision of *Orion Shipping v Great Asia Maritime*¹ concerned an appeal under section 69 of the Arbitration Act 1996 from a Tribunal's Partial Final Award. This case gives important guidance as to the type of damages a buyer of a ship can claim if it terminates the contract where the seller has failed to give notice of readiness by the cancelling date. The underlying dispute related to the Buyer (Great Asia Maritime)'s cancellation of a memorandum of agreement (MOA), concluded on June 4, 2021, for the sale of a Capesize bulk carrier, known as the MV "LILA LISBON" (the "Vessel").

The MOA was made on an amended Norwegian Sale Form 2012 ('SALEFORM 2012'), which provided for delivery in mainland China with a Cancelling Date of 20 August 2021. It was the Seller (Orion Shipping)'s original intention to deliver the Vessel on 2 August 2021, however as a result of a new recommendation by the Vessel's classification society being imposed, a dispute arose in late July 2021. Addendum No. 2. to the MOA, dated 6 August 2021, purported to resolve this dispute, contemplating a new delivery window (though without changing the Cancelling Date), to be between 12 and 14 August 2021.

Clause 14 of the MOA stipulated that:

'Should the Sellers fail to give Notice of Readiness by the Cancelling Date or fail to be ready to validly complete a legal transfer as aforesaid they shall make due compensation to the Buyers for their loss and for all expenses together with interest if their failure is due to proven negligence and whether or not the Buyers cancel this Agreement'.

The Sellers were unable to tender delivery during the new delivery window and requested an extension of the Cancelling Date to 15 October 2021, which the Buyers agreed to, without prejudice to their right to claim damages under Clause 14 of the MOA for failure to meet the Cancelling Date due to the Seller's 'proven negligence'.

The Vessel was not delivered by 15 October and the Buyers subsequently arrested it (an act that the Tribunal concluded evinced an intention to bring the MOA to an end) and sought security for a claim for damages for the difference between the contract price and the market value of the vessel. In the arbitral proceedings that followed, the Tribunal determined that the Sellers' failure to be ready to deliver the Vessel and complete a legal transfer by the Cancelling Date was due to their 'proven negligence', a failure to take reasonable steps to arrange for the delivery to take place, yet this did not amount to a repudiatory breach. Despite this, the Tribunal still held that the Buyer was entitled to recover the loss of bargain damages they were seeking, and it is this particular legal point that gave rise to the Seller's appeal.

The main question to be answered was whether the Buyers were entitled to claim market damages under Clause 14, as so awarded by the Tribunal, or whether such damages are only recoverable in respect of a repudiatory breach or a breach of condition, as asserted by the Sellers.

The Sellers' argument was rooted in there being no clear wording which allowed for the Buyers to recover the market measure of damages for loss of bargain. They maintained that "due compensation" under Clause 14 means compensation due at law and is subject to proof of negligence, which in effect limits the scope of damages recoverable. Furthermore, since tendering a Notice of Readiness by the Cancelling Date was not a condition, there is no logical reason why Clause 14 should be read as if it poses a positive obligation, when it is in fact just an adjectival clause providing for the consequences of the notice not being provided.

On the contrary, the Buyers claimed that there was no reason why "loss and all expenses" under Clause 14 could not encompass different losses depending on whether the Buyers cancelled or not. In addition, it was argued that the Seller's interpretation of the clause was uneconomical, and created an imbalance with Clause 13, which addresses buyer's default, where on materially identical wording, loss of bargain damages had been held recoverable. As a final, somewhat expedient point, the Buyers contended an alternative case that time was of the essence, and so the Sellers' breach was in fact a condition of the contract.

The Court dismissed the Buyer's alternative argument that Clause 14 was a condition, considering that the question of law which needed to be determined was:

"Where a Memorandum of Agreement on the SALEFORM 2012 form is lawfully cancelled by a buyer under clause 14 in circumstances where the seller has failed to give notice of readiness or failed to validly complete a legal transfer by the cancelling date and such failure is due to the seller's "proven negligence", is that buyer entitled to recover loss of bargain damages absent an accepted repudiatory breach of contract?"

The Court held that the answer to this question is no. Accordingly, it found that the Tribunal had made an error and the Award, in this respect, was wrong in law. The right to claim damages results from the failure to give notice of readiness by the cancelling date, and therefore, only losses caused by 'that specific failure', such as lost earnings, were recoverable, not those caused by the loss of the contract in general.

The primary takeaway from this judgment is the implications on the application of SALEFORM 2012. Given SALEFORM 2012's position as the industry standard form in numerous shipping jurisdictions for ship sale and purchase, and with English law being one of only three options for governing law contained in Clause 16, any decision of the English courts on its interpretation is important. The *Orion Shipping v Great Asia Maritime* judgment makes it clear that it is not possible to claim for loss of bargain damages under Clause 14 of SALEFORM 2012 where a seller fails to give notice of readiness by the established cancellation date, even where the seller's failure is caused by their proven negligence. It is therefore important for those negotiating the acquisition of a vessel under SALEFORM 2012, to be mindful of the wording of the MOA if the ability to claim loss of bargain damages is to be included.

¹ *Orion Shipping and Trading Ltd v Great Asia Maritime Limited* [2024] EWHC 2075 (Comm).