NEWSLETTER – TRANSPORT

NON-PERFORMANCE, NOT DELAY: THE CORRECT MEASURE OF DAMAGES FOR A MISSED COA SHIPMENT

Transatlantica Commodities PTE Ltd v Eurochem Trading GmbH [2026] EWHC 1494 (Comm)

The Commercial Court has dismissed an owners' appeal on a point of law arising from an LMAA award concerning the measure of damages where an owner fails to provide a vessel for a shipment declared under a contract of affreightment (COA). The Court confirmed that such a failure is a non-performance of that shipment, attracting the orthodox contract/market measure of damages, and that a later voyage of a different cargo performed at COA rates is a separate "adventure" that neither cures the breach nor reduces the charterers' recoverable loss.

Background

The owners and charterers entered into a COA dated 21 May 2020 for the carriage of fertiliser cargoes from Sillamae, Estonia to ports in Brazil and North America during the period 15 May to 15 November 2020. The COA provided for three cargoes, or four at the charterers' option.

The declaration regime required the charterers to declare a four-day laycan at least 15 days in advance; the owners then had to nominate a performing vessel at least five days before the first laycan day and narrow the laycan to three days; and the charterers had to approve the nomination within 24 hours.

The first two shipments (the "Union Trader" and the "Monegasque Epee") were performed without any claims.

The third shipment. On 25 September 2020 the charterers validly declared a laycan of 12–15 October 2020 for a specified cargo of three grades of fertiliser. On 7 October 2020 the owners purported to nominate the "Friedrich Schulte" with an ETA of 5–10 November – well outside the laycan – confirming that this was not an error and that they had no ship for October. That nomination was non-contractual.

Treating the owners' response as a refusal, the charterers reserved their rights and, on 9 October 2020, fixed a substitute spot vessel, the "Abtenauer", which loaded and carried the October cargo.

A further declaration. On 15 October 2020 the charterers declared a different cargo. After the owners proved unable to meet the dates, the parties agreed that the "Friedrich Schulte" would carry that cargo with a

laycan of 17–19 November 2020 (slightly outside the COA period); it loaded at Sillamae on 22–27 November 2020.

The arbitration

The charterers claimed the contract/market freight differential on the "Abtenauer" fixture – USD 382,410 plus EUR 4,036.80 of additional storage and trucking – arising from the owners' failure to perform the shipment declared on 25 September 2020. That claim succeeded and was the sole subject of the appeal.

A separate claim relating to the 26 November 2020 declaration failed and was not appealed. The owners' counterclaim for unpaid freight and demurrage on the "Friedrich Schulte" shipment succeeded in the sum of USD 227,523.25.

After netting off, the tribunal ordered the owners to pay the charterers USD 154,886.75 plus EUR 4,036.80 and interest.

The tribunal rejected the owners' case that contract/market damages were unavailable because the "Friedrich Schulte" shipment amounted to delayed performance of the 25 September declaration, and that the charterers could not both claim non-performance damages and take the benefit of that shipment at COA rates.

The appeal

The owners obtained permission to appeal under section 69 of the Arbitration Act 1996 on the following question of law:

"Whether an Award of loss of bargain damages on a "contract/market" basis is the appropriate measure of loss recoverable for delayed delivery of a performing vessel under a contract of affreightment (COA), or for performance of a COA shipment in a manner other than that originally declared by the Charterer."

The owners argued that the third shipment had in fact been performed on the "Friedrich Schulte", albeit late, so that awarding contract/market damages as if it had not been performed delivered the charterers the value of four shipments when their entitlement was to three – an obvious windfall.

In granting permission, the judge had observed that, while the higher cost of alternative freight might be a starting point, it appeared inappropriate to treat as irrelevant the benefit of the third cargo having ultimately been shipped, on a rising market, at the lower COA rate.

The Commercial Court's decision

Henshaw J dismissed the appeal, holding that the tribunal had made no error of law.

The owners' case rested on a false premise. The tribunal had awarded damages for the non-performance of the shipment required by the 25 September 2020 declaration – not for late performance. Properly read, the award found that the October shipment was simply not performed; the owners' 7 October message was a refusal to provide an October vessel, and the later "Friedrich Schulte" voyage did not cure that breach.

Each shipment under a COA is a separate, severable adventure, capable of being breached independently of the others (Larrinaga v Société Franco-Americaine des Phosphates (1923) 14 Ll. L. Rep. 457; Classic Maritime v Limbungan [2019] EWHC 619 (Comm)). Affirming the COA did not convert the later voyage into late performance of the earlier obligation; it was performance of a separate obligation.

It was the "Abtenauer" fixture – not the "Friedrich Schulte" – that mitigated the loss caused by the breach. The owners' primary obligation to perform the October shipment was no longer capable of performance (the cargo having been lifted by another vessel) and had been replaced by a secondary obligation to pay damages, measured by the difference between the COA and market rates, together with the additional storage costs.

There was accordingly no windfall: the charterers recovered only what was needed to put them in the position they would have occupied had the October shipment been performed as declared.

Practical tips for owners

A failure to nominate a vessel that can meet a declared laycan may be deemed non-performance of that shipment, not mere delay. It exposes owners to the contract/market freight

differential, irrespective of whether a later voyage is ultimately performed.

Where owners propose a substitute or later shipment and intend it to discharge the earlier obligation and extinguish the charterers' accrued rights, this should be stated expressly and clear agreement obtained.

Owners should not assume that performing a later voyage "under the COA" cures an earlier non-performance or extinguishes a damages claim. Clear words are required to establish a waiver of accrued rights, and the burden of securing them lies with the party seeking to rely on the waiver.

Practical tips for charterers

Where an owner fails to perform a declared shipment, charterers should reserve their rights promptly and clearly before going into the market for covering tonnage.

Charterers should keep the correspondence clear as to which fixture is the substitute/mitigation fixture and which is a separate shipment, and avoid language suggesting that a later voyage is delayed performance of the earlier obligation.

With careful drafting, charterers can affirm the COA and continue to perform later shipments without giving up accrued rights for an earlier breach; each shipment should be treated as a discrete adventure. Appropriate legal advice should be sought where necessary.

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