State of Play: loss of bargain damages in The *Lila Lisbon*

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Starting point

- Loss of bargain (“LOB”) damages means loss resulting from the fact that contract not being performed.
- As a matter of common law, LOB damages only recovered where there is a repudiatory breach of contract.

The *Lila Lisbon* – Factual Background

- Pursuant to an MOA dated 4 June 2021, the Sellers agreed to sell and the Buyers agreed to buy a Capesize Bulk Carrier, the MV "Lila Lisbon".
- The MOA was on an amended Norwegian SALEFORM 2012.
- The Vessel was not delivered by the Cancelling Date and the Buyers cancelled and made a claim for damages for the difference between the contract price (USD $15 million) and the current market price (USD $16.85 million).

The *Lila Lisbon* – Clause 14

Clause 14 of the MOA provided:

Should the Sellers fail to give Notice of Readiness in accordance with Clause 5(b) or fail to be ready to validly complete a legal transfer by the Cancelling Date the buyers shall have the option of cancelling this Agreement….

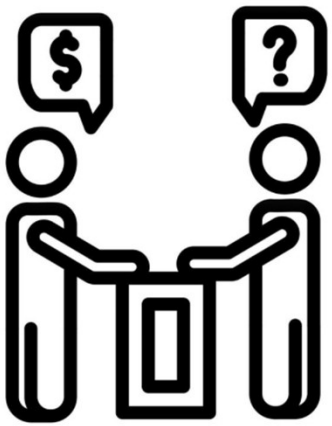
Should the Sellers fail to give Notice of Readiness by the Cancelling Date or fail to be ready to validly complete a legal transfer as aforesaid they shall make due compensation to the Buyers for their loss *and for all expenses together with interest* ***if their failure is due to proven negligence***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

The *Lila Lisbon* – Key Issue

The Buyers commenced arbitration, seeking to recover the sum of USD $1.85 million pursuant to Clause 14 of the MOA.

The central issue was whether LOB damages were payable under Clause 14.

Tribunal Decision



The Tribunal found that:

1. The Sellers' failure to deliver by the Cancelling Date was attributable to their proven negligence.
2. The Sellers were not in **repudiatory** breach.
3. The Buyers were, however, entitled to bring the MOA to an end under Clause 14.

Tribunal Decision

<u>As to the question of whether the Buyers could recover LOB damages under Clause 14</u>, the Tribunal held that they could:

(1) Clause 14 conferred a right to cancel and a right to compensation where the failure was caused by proven negligence.

(2) On its ordinary meaning the parties would have understood such "compensation" to extend to the consequences of cancellation thereunder, including LOB damages.

High Court

The Sellers appealed to the High Court :

"If a MOA on the Saleform 2012 form is lawfully cancelled by a buyer under Clause 14 because the vessel is not delivered by the cancelling date as a result of the Sellers' "proven negligence", is that buyer entitled to recover loss of bargain damages ***absent an accepted repudiatory breach of contract****?"*

High Court

There was no clear wording in Clause 14.

1. On its natural and ordinary meaning, however, the does not give a right to claim LOB damages where cancellation takes place absent a repudiatory or renunciatory breach.
2. Clause 14 permits the Buyers to be compensated for the failure to give NOR by the Cancelling Date.
3. The losses and expenses recovered under the Clause must be caused **by that specific failure** (not the subsequent cancellation).

Court of Appeal

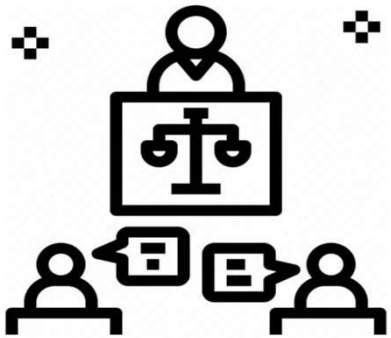
The Buyers appealed to the Court of Appeal on two grounds, the second of which was:

That the Judge was wrong to conclude that Clause 14 only allows the Buyers to recover losses and expenses which have accrued prior to cancellation. Clause 14 entitles Buyers to recover loss of bargain damages.

Court of Appeal

However, CA considering first the nature of Sellers' obligation:
"*In my judgment therefore clause 5 does impose on Sellers an implied obligation to exercise reasonable diligence to deliver the vessel by the Cancelling Date*" (see [59]).
This is interesting: analogy with implied obligation to exercise reasonable endeavours to deliver into C/P by cancelling date (e.g. The *Democritos* [1976] 2 Lloyd's Rep. 149).

Court of Appeal



Turning to key issue, CA held that, on a proper construction of Clause 14, LOB damages were recoverable. In its view:

1. This was the natural and ordinary meaning of the language used in the clause, and in particular, the words "*due compensation*" and "*loss*" (see [71]-[72] and [75]).
2. The words used in the clause did not require those losses to have "*crystallised*" at the time of cancellation: (see [80]).
3. If the buyer cancels following the sellers' failure to be ready, can be equated to case of non-delivery, for which damages would use the market measure (i.e. s.51(3) of the Sale of Goods Act 1979 - see [94] and [104]).

Court of Appeal

1. Not odd to confer on innocent party contractual right to terminate and claim LOB damages, even if easier way to do it might be to make the term a condition (see [109]).
2. No need for clear words before clause can be construed as having that effect (see [134]).
3. This construction was supported by earlier authorities, including the decisions in *The Solholt* [1981] 2 Lloyds Rep 574 and *The Al Tawfiq* [1984] 2 Lloyd's Rep 598 (see [148] and [149])

For what it adds: I think that conclusion is correct and accords with market expectations: see e.g. *The Lila Lisbon, Commercial Court Reverses Industry Understood Practice on Damages* (UK Defence Club, 28 08 24).

Where are we now?

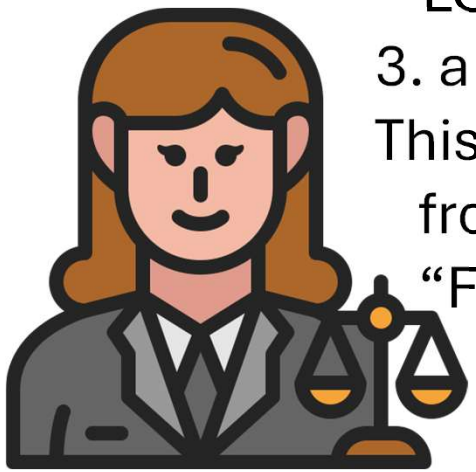
1. On basis of CA decision, LOB damages **<u>are recoverable</u>** under Clause 14 of the Norwegian Saleform 2012 form, whether or not there has been a repudiatory breach by the sellers.
2. But Supreme Court giving permission for further appeal.
3. Note that BIMCO has adjusted wording in 2025 version of SALEFORM to make clear that LOB damages payable. Seems clear what the market wants.

Interesting detour: challenging the "Financings" principle?

CA canvassed the possibility that LOB damages might be recovered where:

1. there is no repudiatory breach;
2. there is no "*express provision*" permitting recovery of LOB damages; but
3. a breach of contract leads to contractual cancellation.

This second point would represent a significant departure from the law as currently understood: what is called the "Financings" principle.



The Financings Principle

Why did the point arise?

The Sellers argued that there is a principle that, in general, a party exercising a contractual right of termination as a reaction to breach is not entitled to LOB damages unless the breach is repudiatory. Suggested that principle should inform construction of Clause 14.

The Financings Principle

This principle is known as "the Financings principle" (after Financings Ltd v Baldock [1963] 2 QB 104). It was summarised by Dias J as follows:

- LOB cannot be recovered on the exercise of a contractual right of termination **unless** the claimant can show a repudiatory breach and that it exercised its common law right to terminate for repudiation; **however**
- It is open to the parties to make express provision as to the consequences of cancellation pursuant to a contractual right.

Usually explained as matter of causation: e.g. The *Spar Capella* [2015] EWHC 718 (Comm) at [100]: "*…the owner's loss of bargain following exercise of a contractual right of termination was not the result of the hirer's breach in making late payments, but of the owner's election to exercise his right to determine the contract*".

The Financings Principle

Before CA in The *Lila Lisbon*, there was no debate about the principle. Buyers simply argued that Clause 14 was an "*express provision*", so principle irrelevant.

Hence at [115]-[116]: "[*The Buyers] did not before us dispute the principle…that means we did not hear any argument as to the scope of the principle. That some such principle exists I do not doubt…*"

The Financings Principle?

However, Nugee LJ going on to query the scope of the Financings principle:

1. Referring to some cases in which identified and relied upon: leases, hire purchase contracts (Financings) and time C/Ps (The *Spar Capella*).
2. Then, at [119]: ***It is not obvious to me that the same principles necessarily apply to a contract for a single transaction such as a sale***. *That seems to me a very different type of contract. Unlike a lease or charterparty or the like, the contract is not intended to govern the parties' relationship for an extended period which is prematurely brought to an end by the exercise of a right to cancel… We were not referred to any case where the Financings principle has been applied to a contract of this type* ***and I think there is a real question whether it does apply in the same way****"*.

The Financings Principle?

Note esp. his view on causation analysis: "*where the innocent party terminates as a reaction to the other party's breach, it does not seem wrong to regard both the breach and the termination as causes of the loss*" (at [124]).

That analysis would open the door to claims for LOB damages when (non-repudiatory) breach leads to contractual cancellation. But:

1. Surely "causation" in this context is matter of policy, not the specific facts of the case?
2. Why would conclusion be different for "one-off" contracts…?
3. Does it end up implying that Financings decision wrong, and various cases like The *Spar Capella* and SLB v. PAK [2026] EWHC 449 (Comm) all argued and decided on mistaken basis…!

Appeal to the Supreme Court

Permission to appeal to the Supreme Court was granted on 18 December 2025, and the appeal itself was heard on 2 June 2026.
Waiting for judgment…
Best guess:

1. Conclusion on construction of Clause 14 will be upheld.
2. Detour will be ignored or suggested to be misguided.