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Soundings

# Palmali v Litasco: quantification of damages under contracts of affreightment

**The task of quantifying the losses arising due to a breach of a contract of affreightment is not always straightforward. The recent decision in Palmali Shipping SA v Litasco SA [2020] EWHC 2581 (Comm) highlights the issues involved and provides welcome guidance. In particular, it considers the application of the "transferred loss principle" in the context of losses borne by different companies within the same corporate group.**

Palmali Shipping SA brought a $1.9 billion claim against their charterer, Litasco SA, for losses arising from alleged breaches of a long-term contract of affreightment (CoA).

The issue in dispute arose out of Palmali's slightly unusual loss calculations. Palmali calculated the profits it would have made under the CoA by assuming that certain shipments would have been performed by ships owned by other companies in its wider corporate group. For shipments onboard those ships, Palmali calculated its lost profit on the basis that it was only required to deduct the cost of bunkers and port charges from the sums payable under the CoA, and was not required to deduct the hire, freight or demurrage it would incur in the use of these ships.

This was contrary to the ship management agreements between Palmali and the intra-group companies, which did provide for these companies to invoice Palmali for freight. However, Palmali argued that, in practice, they would not be required to settle the intra-group debt arising from these freight invoices.

Litasco applied for summary judgment on the quantification of Palmali's loss of profit claim. Palmali countered this strategy by cross-applying to amend their claim to include recovery of losses incurred by the intra-group companies under the 'transferred loss' principle.

Litasco's summary judgment application was successful.

### "Net loss approach"

The judge noted that "[d]etermining the loss which a claimant has suffered for the purposes of awarding damages involves a "net loss approach" which takes account of expenses caused or benefits lost by the breach, but also expenses saved and non-collateral benefits obtained as a result of the breach."



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Palmali argued that damages should be assessed on the basis that no liabilities to the intra-group companies needed to be brought into account because, in practice, these would never be paid.

The judge did not consider that this argument was supported by Palmali's evidence. Consequently, he ruled that Palmali had no realistic prospect at trial of establishing an entitlement to claim damages calculated on a basis which did not reflect Palmali's realistic liabilities to the intra-group companies under the additional voyages.

### "Transferred loss principle"

Alternatively, Palmali claimed it was entitled to recover the loss suffered by the intra-group companies based on the "transferred loss principle".

The transferred loss principle is formulated, on its broadest basis, as follows where one contracting party (B) has promised another (A) that it will confer a benefit on a third party (C) but does not do so if A has an interest in the performance of B's promise, A can recover damages in the amount of the cost of providing C with the promised benefit.

The English courts have, in previous cases, restricted the application of this principle to cases where the "known object" of the transaction was to benefit a third party and where recognition of the contracting party's right to recover the third party's loss was necessary "to give effect to the object of the transaction and to avoid a 'legal black hole'".

As to the first point, in this case it would be necessary to show that the "known object" was to confer a benefit on the intra-group companies. However, that was not the case here. The object of the CoA was for Palmali to benefit from Litasco's financial obligations; it was was a separate matter for Palmali as to the terms on which they contracted with the intra-group companies such as to enable them to perform their obligations under the CoA.

As to the second point, there was no 'legal black hole', since the intra-group companies had a remedy for their losses. Palmali, as the sole recipient of payments under the COA, was able to sue for the loss of those benefits. Meanwhile, any benefits which the group companies obtained would be derived from the contracts which Palmali, in turn, entered into with them and those contracts would themselves provide the group companies with a remedy. The existence of this alternative remedy would preclude the application of the transferred loss principle.

### Comment

As well as underlining the importance of supporting a claim with reliable evidence, the decision provides a welcome analysis and application of the transferred loss principle, which is potentially complex and vague. The court's ruling rejected an ambitious attempt to expand its scope, lending some much-needed certainty to the principle for future cases.

**If Members have any questions in relation to the above issues, they are invited to contact the Club for further information.**

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