

Our Take on the Recent Court of Appeal Judgment Carrying Wider Implications for Trade Financing Deals as the Security That Holding Bills of Lading Provides Is Called Into Question.

On 4 May 2023, the Court of Appeal handed down a widely anticipated judgment dismissing Unicredit Bank AG's appeal of a High Court decision of Mrs Justice Moulder and upholding the dismissal of Unicredit's claim for damages against Owners, Euronav N.V., for delivering part of a cargo to a third party without presentation of the original bills of lading.

The Court of Appeal found that, while there was a breach of Owners' obligation under the bill of lading to discharge without the original of the bills, there was no causation of the loss and, therefore, Unicredit's appeal was dismissed. This short briefing will focus on the wider ramifications for commodity trade financing and the shipping industry, rather than an analysis of the court's key findings on the nature and status of the bill of lading.

Summary of the Facts of the Case

BP Oil International Ltd (BP) sold to Gulf Petrochem FZC (Gulf) a minimum 110,000 mts, maximum of 150,000 mts of very low sulphur fuel oil, for delivery ex ship, at one safe berth – either Fujariah or Singapore. On 6 February 2020, BP voyage chartered the MT Sienna from Euronav N.V. (Owners) for the carriage of the cargo. Owners issued a bill of lading to BP.

Unicredit financed the purchase by Gulf on terms that conferred a security interest in the cargo. Before completion of the carriage, Unicredit paid BP the purchase price, and the charterparty was novated from BP to Gulf. It was intended that BP would indorse the bill to Unicredit prior to discharge. Owing to Covid-19 delays, the indorsement of the bill was not finalised until after discharge. Discharge therefore proceeded against a letter of indemnity issued by Gulf, without presentation of the bill of lading. The bill was indorsed by BP to Unicredit after discharge. By the time Unicredit received the bill of lading, it appeared that Gulf had been guilty of fraud in relation to this and other cargoes. Gulf did not repay the sums it borrowed from Unicredit, and Unicredit tried to claim those sums from Owners on the basis that they should not have discharged the cargo without production of the original bills of lading. Unicredit claimed damages from Owners of US\$24,701,600 for their loss.

Commentary

The Court of Appeal judgment provides reassurance to owners that, in a commodity trade financing situation, the financing bank has an uphill struggle to establish causation when bringing a claim for misdelivery against owners. The financing bank must show that, on the balance of probabilities, if owners had complied with their obligations and refused discharge without production of the bill of lading, the bank would have enforced its security against the cargo so as to recoup its lending. In instances where there is a delivery to fraudsters, unbeknown to the parties involved, this could be very difficult for the bank to prove. Indeed, in this case, it was found that, had Owners complied with their obligations and refused delivery without production of the bill of lading, Unicredit would have required Owners to discharge without production of the bill of lading in any event and therefore the security interest would have been lost, hence the court finding that Unicredit's claim failed on grounds of causation.

The case highlights the importance of the financing bank performing a proper due diligence exercise where a physical trade is involved, particularly where letters of indemnity are issued (which is a frequent occurrence). We anticipate that the judgment will cause a significant review by banks of the security that the bill of lading provides against a cargo, including the validity and extent of any insurance cover attached to the financed cargo. Bankers may require more information from traders and operators and generally may wish to have more involvement and control over the trade. This may have an impact on the trade as a whole, not least as it may slow down what is a fast-moving process. Time is ripe for the widespread adoption of e-bills of lading, but whether the industry and the legal world is ready for it is yet to be seen.

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