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### Unicredit Bank A.G v Euronav N.V. [2023] EWCA Civ 471

#### Summary

- The Court of Appeal addressed the question: what is the status of a bill of lading in the hands of voyage charterers after they have ceased to be charterers under the terms of a novation of the charterparty?
- The Court found that, following novation, the bill of lading was not a mere receipt but became evidence of the contract of carriage.

#### Facts

- Gulf Petrochem FZC ("**Gulf**") purchased 80,000mt of very low sulphur fuel oil (the "**Cargo**") from BP Oil International Limited ("**BP**"). The purchase was financed by Unicredit Bank A.G ("**the Bank**").
- The Bank and Gulf intended that Gulf would re-sell to sub-buyers approved by the Bank, on terms that would require the sub-buyers to pay the Bank directly.
- BP chartered the m.v. Sienna (the "**Vessel**") from Euronav N.V. ("**Owners**") on the terms of the BPVOY5 form (the "**Charterparty**"). Clause 30.7 required Owners to comply with a request by BP to discharge the Cargo without production of the bill of lading in return for a letter of indemnity.
- Owners issued a bill of lading naming BP as shipper (the "**Bill**").
- Gulf became the owner of the Cargo, and the Bank's security interest attached to it, on 1 April 2020. Gulf asked BP to indorse the Bill directly to the Bank, but BP could not then do so as the original bills of lading were then still passing through the commercial chain, and would likely be further delayed due to COVID restrictions.
- Owners, Gulf and BP entered a novation agreement on 6 April, which provided that Gulf would replace BP as charterer of the Vessel from that date (the

"**Novation Agreement**"). Clause 30.7 continued to apply, contemplating that Gulf could bring a claim for discharge without production of the Bill under the terms of a letter of indemnity.

- On Gulf's instructions, Owners discharged the Cargo via STS transfer to two vessels between 26 April and 2 May. Owners did not require production of the Bill, which remained in BP's possession, and discharged against Gulf's letter of indemnity. Owners were not aware of the Bank's security interest in the Cargo.
- The Bill was only indorsed to the Bank well after discharge on 7 August, and was received by the Bank on 13 August.
- The Bank was not repaid by Gulf or the sub-buyers.

#### High Court trial

- The Bank claimed that, in delivering the Cargo without production of the Bill, Owners were in breach of the contract of carriage contained in or evidenced by the Bill.
- The Court held that, as BP was both the shipper and the voyage charterer, the issued Bill was only ever and remained a mere receipt, and did not contain or evidence the contract of carriage, which was instead governed by the Charterparty (including Clause 30.7 of BPVOY5). Further, when the Charterparty was novated to Gulf, the Bill did not cease to be a mere receipt and become evidence of the contract of carriage in the hands of the charterer as the Bank had argued. The situation was therefore distinct from one where the bill was indorsed to a third party, and the Bank had no claim.
- On the issue of loss causation, the Court held that any breach of Owners in discharging the Cargo did not cause the loss; the Bank would have suffered the same loss in any event, as it would have

permitted discharge of the Cargo without production of the Bill.

### Grounds for appeal

- The Bank advanced two grounds of appeal:
  1. that the judge was wrong in holding that, following the novation, the bill of lading did not contain or evidence a contract of carriage; and
  2. that the judge was wrong in her findings on causation.

### Court of Appeal judgment

#### Contract or mere receipt?

- On this issue the Bank succeeded. The question of whether a bill of lading: (i) contains or evidences the contract of carriage; or (ii) is a "mere receipt" depends on the contractual intention of the parties at the time the bill was issued. There is only a presumed (or generally presumed) intention of mere receipt, which is subject to contrary agreement.
- It was held that the Bill was not a mere receipt at the time of discharge. When the Charterparty ceased to function as a contract of carriage between Owners and BP upon its novation to Gulf, the Bill became a document containing or evidencing the contract of carriage and remained so at the date of discharge. The fact that the Novation Agreement contemplated that BP could bring a claim for discharge without production of the Bill if it remained the holder was evidence that the parties intended the Bill to evidence the contract of carriage, contrary to the presumption that the parties intended the Bill to be a mere receipt. This rationale of presumed intention is behind section 2 of the Carriage of Goods by Sea Act 1924 ("**COGSA**") as between carrier and indorsee of the Bill.
- Applying s.2(1) COGSA would mean that, once BP indorsed the Bill to the Bank on 7 August, the Bank was put in the same position as if it had been a party to the contract of carriage from the date of issue of the Bill. The contract "springs up" (by reference to what the parties intended) as a result of s.2(1) and is treated by COGSA as having existed from the date of issue of the Bill.

#### Causation

- On this issue the Bank, and therefore the appeal, failed. Although Owners were in breach, that breach was not an effective cause of the loss. What was required was for the Bank to show on the balance of probabilities that, had Owners performed, the Bank would have enforced its security against the Cargo so as to recoup its loss. This required the Court to assess what would have happened to the Cargo had Owners refused to discharge without production of

the Bill. The Court had held that the Bank would have permitted discharge to take place. The Court noted that the obligation to deliver against a bill of lading is contractual, and can therefore be varied by express consent. Had the Bank given its permission for discharge as above, Owners would not therefore have been in breach of their obligations.

### Comment

- The judgment is a very good analysis and explanation of the status of the bill of lading and how its function can change in the trading of commodities. Against that explanation, the decision is not altogether surprising. The Bank lost because it was found on the facts that it would have permitted discharge without production of the Bill, not because it had misinterpreted the legal role of the Bill.
- Popplewell LJ noted that, in this case, Owners were in a position where they would have been able to seek instructions sufficient to discharge without production of the Bill without breaching the contract of carriage. This will often not be the case.
- The Court of Appeal also expressed a view on an alternative point by the Bank not argued below: that, irrespective of whether the Bill was mere receipt in the hands of BP at the time of discharge, s.2(1) COGSA conferred rights of suit on the Bank upon indorsement of the Bill. The Court confirmed that s.2(1) transfers rights retrospectively, even if the indorsement occurs after discharge. In an earlier decision of the Court of Appeal in the *Erin Schulte* [2014], it was common ground between the parties agreed that, after discharge, the bill of lading had been "spent"; however, the Court disagreed holding that rights under a contract of carriage do not cease once the goods are discharged.

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