



When is a bill of lading contract not a contract of carriage?

William Stansfield, Senior Associate in CJC’s London office, reviews the recent High Court decision in *UniCredit Bank v Euronav*.

It is commonly said that a bill of lading serves three functions – a receipt for the goods loaded by the shipper; a document of title; and evidence of the terms of the contract of carriage.

However, one long-established exception to the principle that a bill of lading represents the terms of the contract is when a bill of lading is issued to a shipper who also happens to be the charterer of the vessel. In these circumstances, it is the applicable charterparty that governs the parties’ relationship and the bill is said to be a “mere receipt” for the goods loaded, at least until such time as the bill is passed to a third party.

The decision of the English Commercial Court in *UniCredit Bank v Euronav* case examined this point in some detail.

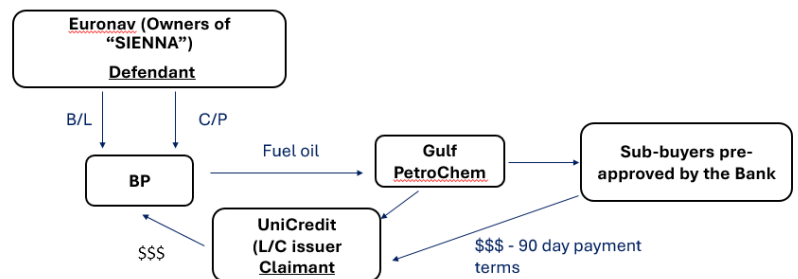
The facts

The facts of the case may be briefly summarised as follows:

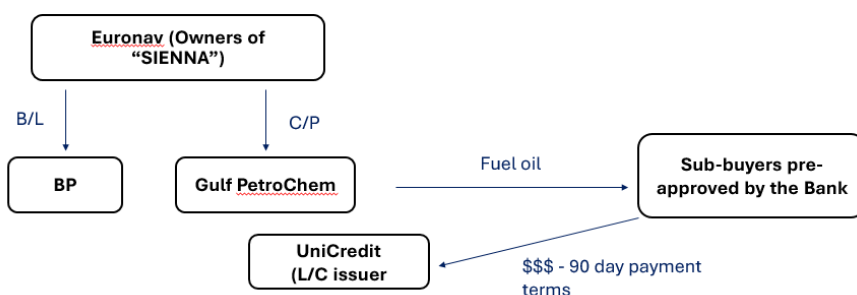
BP Oil International (“BP”) were the sellers of a cargo of fuel oil and the original charterers of “SIENNA” (the “Vessel”), a tanker owned by Euronav (the “Owners”). Gulf Petrochem were the buyers of the cargo from BP. By a bill of lading issued at Rotterdam and dated 19 February 2020, the Owners acknowledged shipment of the cargo on board “SIENNA” for carriage to and delivery at Fujairah. On 1 April 2020, UniCredit (the “Bank”) financed the purchased of the cargo by way of a letter of credit.

Under a financing facility between the Bank and Gulf Petrochem, the intention was that the cargo would be sold to sub-purchasers pre-approved by the Bank who would pay the Bank directly within 90 days from the date of invoice.

Pre-novation



Post - novation



On 6 April 2020, a novation agreement was entered into by which Gulf Petrochem became the charterer of the Vessel. However, an important point of detail is that BP retained possession of the bill of lading throughout the entire voyage.

The cargo was discharged by way of STS transfer between 26 April and 2 May 2020, without the Owners requiring production of the bill of lading.

In late July 2020 (when the 90-day payment terms for the sub-buyers to pay were expiring), the Bank began to suspect that it had fallen victim to a fraud alleged to have been committed by certain employees of Gulf Petroleum.

BP endorsed the original bill of lading to the Bank in August 2020.

The issues

The Bank never received reimbursement. Accordingly, the Bank (who now held the original bill of lading) looked to recover its losses from Owners by arguing that the Owners were in breach of the (alleged) bill of lading contract by reason of delivering the cargo without production of the bill of lading.

The Owners put forward two grounds of defence:

1. Firstly, they could not be in breach of the bill of lading, because the bill of lading was not a contract but rather a receipt for the cargo loaded.
2. Secondly, the Bank either agreed to discharge the cargo without production of the original bill of lading, or would have permitted discharge of the cargo without production of the original bill of lading, and therefore the Bank had felt no loss.

It is the first defence which raises the interesting point of English law. The Bank's position was that the bill of lading temporarily lost its contractual status whilst it was in the hands of the charterer (i.e., BP), but its contractual status was regained when BP ceased being the charterer of the vessel following the novation arrangement.

It was common ground that where a shipper is also the charterer, the bill of lading is not the contract of carriage of goods but a mere receipt. The Court also noted that it was "*clear on the authorities*" that where a bill of lading is issued to a charterer and then indorsed to a third party, it attains contractual status upon indorsement on the basis that "*a new contract appears to spring up between the ship and the consignee on the terms of the bill of lading*".

The Bank argued that conceptually, there was no difference between a situation where a voyage charterer indorses a bill of lading to a third party and the situation that had arisen here, which was that, by virtue of the novation agreement, BP ceased to be the charterer of the Vessel and therefore the bill of lading (which remained in BP's possession) became the contract of carriage in the hands of a third party.

The Court rejected the Bank's argument on two grounds.

Firstly, the Court said that the proposition that the Bank was arguing for was simply not supported by any of the pre-existing English authorities.

Secondly, the Court looked at what the parties' intentions were at the time the novation occurred. The Owners argued that there was no reason to conclude that Owners and BP intended that their relationship would be governed by the terms of the bill of lading if their existing contractual relationship (under the charterparty) was dissolved by reason of the novation. The Owners went as far as saying that it would be perverse to infer the creation of contractual rights in a document (the bill of lading) which previously had no contractual status, from an agreement (the novation) in which the existing contractual relations (the charterparty) were terminated.

For those reasons, the Court concluded that the bill of lading did not have contractual status, and accordingly the Bank's claim under the bill of lading failed.

It was therefore strictly unnecessary for the Court to consider the Owners' alternative case that the Bank either agreed or would have agreed to discharge without production of the bill of lading, but having considered all the witness evidence put before it, the Court concluded the Bank would have suffered the loss in any event.

CJC Perspective

1. It might be said that thanks to a legal technicality, the Owners had a narrow escape from judgment being entered against them. The Court's decision may be explained by the combination of the fact that the original bill of lading remained in the shipper's (i.e., BP's) possession together with the novation arrangement.
2. One unusual feature of this case is that BP retained possession of the bill of lading after it sold the cargo, even though BP was paid under a letter of credit. Very often, the seller would need to present the original bill to the bank to trigger payment under the letter of credit. From the judgment, part of the explanation for this lies in fact that the transaction took place at the beginning of the Covid-19 pandemic, and endorsing the original bill of lading to the Bank prior to the commencement of discharge was impossible.
3. Had BP endorsed the bill of lading to the Bank at the time that BP was paid under the letter of credit, it is likely that a new contract would have emerged on the terms of the bill of lading which the Bank could have sued on.
4. As it was, BP remained in possession of the bill of lading until after discharge had completed. The Court found that in those circumstances, the bill of lading never attained contractual status at the time the (alleged) breach occurred. Accordingly, the parties' relations were governed (only) by the charterparty contract, which, following the novation, was between the Owners and Gulf Petrochem.
5. The Bank was not a party to the charterparty, and if this judgment survives any future appeal, the Bank is without a contractual remedy against the Owners.

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