

*HFW*



**COMMODITIES  
CASE UPDATE**

JULY 2023

# HFV COMMODITIES CASE UPDATE

## JULY 2023

We are delighted to present the July 2023 edition of the Commodities Case Update, with a summary of 12 key recent cases relevant to the commodities sector. With a market leading commodities team, we have over 100 lawyers who provide a full service internationally. The group is led by a team of over 25 partners, who are based in all our offices around the world, including in the major trading hubs of London, Paris, Geneva, Dubai, Singapore, Hong Kong and Sydney. If you would be interested in receiving a bespoke training session and presentation about the cases referred to in this update or any other cases of interest, please contact your usual contact at HFW, or the authors of this update Andrew Williams and Damian Honey. As well as being of general interest for those working in commodities, our intention is that for lawyers working in-house, a bespoke training session tailored to your specific needs will allow you to meet the change in CPD requirements introduced by the SRA. It will allow you to demonstrate that you have reflected on and identified your L&D needs and met these. Please do contact us if this would be of interest.

We hope that you find this update useful.



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## Sara & Hossein Asset Holdings Ltd v Blacks Outdoor Retail Ltd [2023] UKSC 2

Court: Supreme Court

Date: 18 January 2023

### Summary

Where a lease provided that the total amount payable by the tenant under a landlord's certificate was conclusive in the absence of manifest or mathematical error or fraud, the Supreme Court held that the certificate was conclusive as to the sum payable but it did not stop the tenant from later disputing liability.

### Facts

The case concerned a dispute over non-payment of a service charge under a lease between Sara & Hossein Asset Holdings Ltd as the landlord (the "**Landlord**") and Blacks Outdoor Retail Ltd as its tenant (the "**Tenant**"). The lease contained a service charge clause which set out "*the landlord shall on each occasion furnish to the tenant as soon as practicable after such total cost and the sum payable by the tenant shall have been ascertained a certificate as to the amount of the total cost and the sum payable by the tenant and in the absence of manifest or mathematical error or fraud such certificate shall be conclusive*" (the "**Clause**"). The lease also contained a provision that entitled the Tenant to inspect books, records, invoices and accounts regarding the service charge. The Tenant failed to pay the service charge for two years, claiming that it was excessive. The Landlord issued proceedings and sought summary judgment, arguing that the certificate was conclusive, subject only to manifest or mathematical error or fraud (the "**Permitted Defences**"). The Tenant claimed that the certificate was only conclusive as to the costs incurred by the Landlord, but not as to the Tenant's service charge liability.

### Findings

The lower court agreed with Tenant. The Landlord appealed and the Court of Appeal found in the Landlord's favour. The Tenant appealed to the Supreme Court. Unusually, a majority in the Supreme Court held that neither party's interpretation of the Clause was satisfactory:

1. The interpretation of the Landlord was inconsistent with other provisions of the lease and the internal context of the contract. For instance, there was a detailed dispute mechanism contained under the lease that might adjust the amount payable by the Tenant, so the certificate could not be entirely conclusive as to the Tenant's liability.
2. The interpretation of the Tenant contradicted the natural and ordinary meaning of the Clause, which stated that the certificate was conclusive as to both the amount of total cost and sum payable by the Tenant.

The Supreme Court held there was an alternative interpretation, opting for a "pay now, argue later" regime. It dismissed the appeal but held that this would not preclude the Tenant from pursuing its counterclaim in respect of its underlying liability for the disputed charge payments. The dissenting judge found the interpretation of the majority irreconcilable with the ordinary meaning of the words used in the Clause and agreed with the Landlord's interpretation.

### HFW Comment

"Certificate final clauses" are relatively commonplace in commodity trading contracts. Although in a landlord-tenant context, this decision could have significant implications for the way these clauses, and contracts more widely, are interpreted. The Supreme Court's emphasis on reaching a decision that fitted the commercial bargain as a whole rather than focussing on the natural and ordinary meaning of the contract is significant. Specific attention should be paid to final and binding provisions to ensure that the contract emphasises their final and binding effect where that is sought, or otherwise that dispute resolution provisions are drafted to ensure that any dispute in relation to a certificate is resolved quickly and in a way that does not conflict with the final and binding provisions.

**Integral Petroleum S.A. v (1) Petrogat FZE (2) Ms Mahdieh Sanchouli;  
(3) Mr Hosseinali Sanchouli; (4) Mr Kanybek Beisenov [2023] EWHC 44  
(Comm)**

Court: Commercial Court (KBD)

Date: 18 January 2023

### Summary

Where an order against a defendant could not be enforced because its assets had been transferred to an unidentified company, the Court granted an application under section 423 of the Insolvency Act 1986 (the "**s423**"), transactions defrauding creditors. It also held several directors personally liable.

### Facts

Integral Petroleum S.A. ("**Integral**"), an oil trading company based in Geneva and Petrogat FZE ("**Petrogat**"), an oil trading company based in the UAE, entered into a contract for the sale of sulphur oil. Petrogat's sole director was Mr Beisenov and Mr and Ms Sanchouli were *de facto* directors. The contract contained an LCIA arbitration clause and an English governing law clause.

In January 2018, in breach of an injunction, Petrogat converted 37 railway tank cars to Iran. Integral commenced arbitration and applied for an injunction for delivery of the 37 railway tank cars and/or damages. Integral was ultimately awarded US\$439,448.37 plus interest and costs but, at the date of this judgment, none of the award had been paid. In April 2018, Integral applied for security for costs but Petrogat's accounts were subsequently emptied, with 'significant sums' being transferred to an unidentified company, Company A.

In May 2021, Integral made an urgent without notice application for a worldwide freezing order. This was granted but the defendants did not comply and refused to identify Company A. In October 2021, Integral made an application under s423 regarding the sums transferred from Petrogat's accounts in 2018 ("**the Transfers**"). Breaching an order, the defendants continued to withhold information and were barred from defending the claim. The Court considered three questions when making the order under s423:

- i) Were the Transfers transactions at an undervalue, as per s423(1)?
- ii) If so, were the Transfers for a Prohibited Purpose, as per s423(3)?
- iii) Was Integral a 'victim' as per s423(5) and entitled to apply for the order?

### Findings

The Court found in Integral's favour on all three questions.

On question one, the Court did not accept that all of the monies transferred were used to discharge Petrogat's liabilities and run Company A. Instead, the liabilities were modest and a gift, rather an inter-company loan, was inappropriate. '[A]t least the bulk of' the sum was transacted at an undervalue.

On question two, Petrogat had argued that the Transfers were due to problems with its bank accounts in Abu Dhabi. However, the Court noted that the Transfers had not been made to another Petrogat account and, again, were not loans. This was consistent with protecting against enforcement and putting the assets beyond Integral's reach. It also drew adverse inference from the defendants' pattern of evasiveness. Where there was more than one purpose, only one needed to be a Prohibited Purpose and, on the balance of probabilities, this was satisfied.

Finally, the Court considered the definition of a victim under s423(5). Integral was found to be "a person who is, or is capable of being, prejudiced by" the Transfers due to its outstanding claim and any potential future orders.

The Court found that, under s423(2)(a) and (b), relief should be 'restorative', by putting Integral in the position it would have been in had the Transfers not happened, and 'protective' of Integral as the victim. Authorities generally pointed away from making an order against a director unless they had benefitted as a direct result. However, here (i) the defendants' deliberately breached Court orders making it impossible to identify and make an order against Company A; (ii) the funds were untraceable and the defendants' precise interests in Company A unidentifiable; and (iii) the directors of both Petrogat and Company A were the same. Finally, the Court declined to accept that the defendants did not receive a benefit or to attempt to quantify it. Overall, therefore, the Court held that Mr and Ms Sanchouli and Mr Beisenov were personally liable, on a joint and several basis, to pay the outstanding judgment directly to Integral.

### HFW comment

This case highlights the serious consequences for directors who use themselves to shield an entity and protect its assets. Although it is rare to find a director personally liable under s423, the

risk is there. It also demonstrates the severe limitations that can be placed upon a party who deliberately breaches a Court order.

## ADM International Sarl v Grain House International SA [2023] EWHC 135 (Comm)

Court: Commercial Court

Date: 26 January 2023

### Summary

ADM International Sarl ("**ADM**") made an application to commit a Moroccan company, Grain House International SA ("**GHI**"), for contempt of court, because GHI failed to comply with numerous arbitration orders. The Court found GHI and its directors in breach and imposed a custodial sentence on one of the directors.

### Facts

ADM entered into several contracts with GHI for the sale of various agricultural commodities. Despite the parties' agreement, GHI failed to pay costs incurred by ADM during performance of the contracts. The parties subsequently signed an instalment agreement with a payment schedule and containing a GAFTA dispute clause but after the first instalment, GHI failed to make any further payments. ADM commenced GAFTA arbitration against GHI and applied for various court orders in support of the arbitration, including an asset disclosure order ("**ADO**"), further disclosure order ("**FDO**") and a worldwide freezing order ("**WFO**"). After GHI failed to comply with these orders, ADM brought four contempt allegations against GHI and its directors before the English Commercial Court.

### Findings

The Court found that all three Defendants had knowledge of all the terms of the orders. In particular, the Second Defendant (a director of GHI) knew of and was responsible for the company's breach. Both GHI and the director were found to be in contempt of Court.

In respect of breaches of the FDO, the contempt was past and purged and was therefore technical and historical, attracting no penalty save in costs of the committal proceedings. It was also alleged that GHI had omitted several months of bank statements that were required to be provided. In this aspect, where there was a breach, the Court again accepted that the contempt was technical. The Court largely focused on the alleged breach of the WFO that interlinked with a failure to declare encumbrances. These were found to be deliberate and unremedied breaches. The Court also accepted that GHI had obviously dissipated assets, finding the breach had continued and was deliberate.

The Court sentenced the Second Defendant to one year's imprisonment and imposed a £75,000 fine on GHI.

### HFW comment

This judgment is a reminder of the stiff penalties which can be imposed on companies and directors if they do not comply with court orders – and demonstrates the important leverage this can provide to innocent parties affected by non-compliance. It provides helpful guidance on the threshold to establish contempt, which must be proved to criminal standard, and makes clear that a longer sentence would be imposed for deliberate serious breaches of disclosure obligations linked to a freezing order.

## Gravelor Shipping Ltd v GTLK Asia M5 Ltd [2023] EWHC 131 (Comm)

Court: Commercial Court

Date: 27 January 2023

### Summary

In this summary judgment, the Court held that payment into a frozen account would satisfy a payor's payment obligations. Further, the Court endorsed the Court of Appeal's view in *MUR Shipping v RTI* [2022] EWCA Civ 1406, finding that an obligation to take "all necessary steps" in a sanctions payment restrictions clause required a payee to nominate an alternative bank account and accept payment in a non-contractual currency.

### Facts

Gravelor Shipping Ltd (the "**Charterer**") chartered two bulk carriers (the "**Vessels**"), under bareboat charterparties (the "**Charterparties**") from GTLK Asia M5 Ltd and GTLK Asia M6 Ltd (the "**Owners**"). The Owners are part of the GTLK group, whose ultimate parent company is JSC GTLK, which is owned and/or controlled by the Russian Ministry of Transportation. The Charterparties were essentially finance leases, providing the Charterer with a means of financing the purchase of the Vessels. The Charterparties contemplated that at their expiry, title to the Vessels would be transferred to the Charterer. On 3 March 2022, the Charterer informed the Owners of its intention to purchase the Vessels. The Charterparties required payment in US Dollars (clause 8.6) to a specified bank account. Clause 8.10 stated: "*Where a payment under this Charterparty is incapable of being processed by the relevant banking institution and has not been received by the Owner on the due date by virtue of the Owner becoming a Sanctions Target, the Owner and the Charterer shall cooperate and promptly take all necessary steps in order for the payments to be resumed.*"

JSC GTLK and its associates were made the subject of EU sanctions in April 2022 and US sanctions in August 2022. The Charterer contended that the effect of the sanctions was that it could not pay the sums due in the currency stipulated in the Charterparties (US Dollars) or into the account nominated by the Owners for payment. The Charterer proposed payment into a frozen account. The two key issues for the Court were:

1. Whether the Charterer could discharge its burden to pay by paying into a frozen account.
2. Whether the wording in clause 8.10 permitted the Charterer to pay, and required the Owners to receive, payment in a currency other than the contractual currency (US Dollars).

### Findings

The Court held that payment into a frozen account would satisfy the Charterer's payment obligations. It endorsed Mr Houseman KC's observation in *Havila Kystruten AS v STLC Europe Twenty-Three Leasing Limited* [2022] EWHC 3166: "*Whether or not the payee ... has access to or gets the benefit immediate or otherwise, of funds in such bank account is immaterial ... This account was frozen when it was nominated. No other entity has access to or the benefit of such funds, and certainly not the payor ... which is what matters most.*" The position "would not change if the account had become frozen after nomination". By paying into the account, the Charterer would have done all that the Charterparties required. Ultimately, the mere fact that the transfer of funds is made into a bank account from which the Owners will have great difficulty withdrawing them does not of itself mean that payment has not taken place for the purposes of the Charterparties. The Owners' inability to access the funds would be due to an "entirely external limitation" (the sanctions).

The Court affirmed the Court of Appeal's judgment in *MUR Shipping v RTI* and noted that "*clauses in contracts which are intended to address extraneous circumstances which render performance in the manner originally anticipated impossible, while keeping the relevant obligations alive as a matter of substance, or in "a ... practical sense", may well involve one party accepting performance otherwise than "in strict accordance with its terms."*" The expression "all necessary steps" in clause 8.10 required the Owners to nominate an alternative bank account into which the required payment could be made, even if the Owners would be restricted in their ability to access or use those funds. Moreover, the Owners were required to accept payment in a non-contractual currency.

### HFW Comment

This and other recent judgments arising from the impact of the invasion of Ukraine suggest that it is prudent to include clearly worded force majeure and sanctions clauses in contracts, which provide for how and in what currency payment should be made in the event of sanctions biting. HFW (William Gidman, Philip Kelleher and Sofie Maeland Tykvenko) acted for Gravelor in this case.



## Anron Bunkering DMCC v Glencore Energy UK Ltd [2023] EWHC 295 (Comm)

Court: Commercial Court

Date: 14 February 2023

### Summary

The Court found that it is not necessary to terminate the underlying contract before bringing a claim for unjust enrichment. The cause of action in unjust enrichment on the ground of failure of basis accrues when the state of affairs contemplated as the basis for payments fails to materialise.

### Facts

Anron Bunkering DMCC (the "**Claimant**") and Glencore Energy UK Ltd (the "**Defendant**") entered into a contract dated 15 July 2015 (the "**July Contract**") under which the Defendant would sell the Claimant unleaded gasoline for delivery to Yemen. Under a contract dated 27 November 2015 (the "**November Contract**"), the Defendant agreed to sell two further instalments of unleaded Gasoline to the Claimant for delivery to Yemen.

In performance of the July Contract, the Defendant shipped the gasoline and discharge was completed on or around 29 November 2015. In part performance of the November Contract, a portion of the contracted quantity of gasoline was discharged in Yemen by 27 April 2016 (the "**first instalment**"). The rest of the first instalment was discharged in the UAE and sold to a third party. The remaining quantity under the November Contract (the "**second instalment**") was not delivered because, in late December 2015, the Claimant elected to accept the Defendant's repudiation of the remainder of the November Contract. The Claimant had made advance payments totalling around US\$ 52.1 million between July 2015 and April 2016 and in June 2022, it brought an unjust enrichment claim for sums "due under" the July and November Contracts. The Defendant sought summary judgment, arguing that the claim was time-barred on the basis that the relevant payments were made, and the alleged non-delivery occurred, more than six years before the claim was issued.

### Findings

The Court confirmed that the limitation period is six years for claims for unjust enrichment "*founded on simple contract*" within the meaning of section 5 of the Limitation Act 1980. The claims were for the recovery of sums transferred on a basis that subsequently failed and the causes of action accrued when the failure of basis occurred. Before considering when the failure of basis occurred, the Court held that a contract does not need to be terminated in a sale of goods case before a claim in unjust enrichment can be brought and noted that the test is whether "*the state of affairs contemplated as the basis or reason for that payment [had] failed to materialise.*" That test may be met without termination of the contract. However, there will be circumstances where the test is not met without termination, for example delivery of defective goods or late delivery.

The Court held that any real possibility of delivery of the first instalment of the November Contract had gone by 4 May 2016, by which time the goods had been sold to a third party. From such time, the Defendant was no longer entitled to hold the advance payments because the state of affairs contemplated as the basis for such payments - the deliveries under the July Contract and the November Contract - had failed to materialise. On the facts, the cause of action in unjust enrichment on the ground of failure of basis had arisen by 4 May 2016. Therefore, the Claimant's claims were time-barred by at latest 4 May 2022, before the Claimant had issued proceedings.

### HFV Comment

Ensuring that any claim for unjust enrichment is brought within the limitation period requires the claimant to determine when the failure of basis occurred. Termination may not be required in order to show that the state of affairs contemplated as the basis or reason for the payment has failed to materialise.

## Glencore Energy UK Limited v NIS J.S.C. Novi Sad [2023] EWHC 370 (Comm)

Court: Commercial Court

Date: 23 February 2023

### Summary

In this case, the Court considered how parties had defined the extent of their liabilities under a Settlement Agreement ("**SA**"). In doing so, the Court considered the meaning of 'good faith', as well as what the parties had agreed regarding definitions of 'actual loss' and 'prevailing market rate.'

### Facts

The claimants, Glencore Energy UK Ltd, ("**Glencore**") and defendants, NIS J.S.C Novi Sad, ("**NIS**") entered into a contract for the sale and purchase of crude oil. Glencore also obtained a performance bond as security for performance of its obligations. After delivery by Glencore to the terminal where the oil was to be transported to NIS, the oil was found to be off spec, putting Glencore in breach of contract and needing to replace the cargo. The contaminated oil was partially stored by Janaf Naftaved JSC ("**Janaf**"), who claimed storage fees from NIS at a default rate. NIS claimed against Glencore under the sale contract in relation to both the cargo contamination and the storage costs (at Janaf's default rate). Glencore acknowledged liability but disputed Janaf's default rate. The parties then signed the SA, which broadly provided that they would negotiate on the amount of the storage fees, with Glencore broadly accepting liability to reimburse NIS. After several failed attempts at communication, NIS demanded payment of the performance bond sum from the paying bank. Glencore brought its claim for reimbursement of part of that sum, with the amount to be reimbursed forming the crux of the dispute.

### Findings

The SA included specific clauses defining the scope of Glencore's liability to NIS for the oil storage costs. Under these, Glencore agreed to reimburse NIS for its liability to Janaf providing that liability reflected: a) Janaf's actual loss; and b) the prevailing market rate for storage costs. The SA also provided that the parties would negotiate in good faith to agree the storage fee reimbursement sum. NIS argued the clause meant that in the absence of such an agreement, it could claim against Glencore under the original sale contract and that the limitations imposed by the SA in relation to actual loss and market rate would not be applicable. The Court held that the SA functioned to limit the extent of NIS' claim against Glencore in relation to storage fees. It also considered the meaning of 'actual loss' in relation to Janaf's costs - explaining that this would amount to the increase in costs resulting from the additional burden of storing contaminated oil. The Court did not consider that Janaf's default rate was the 'prevailing market rate', and instead considered that this should be the market rate on a spot basis for storage of oil at the particular locations discussed by the parties. Glencore's slowness to communicate in the context of the pandemic did not amount to a failure to negotiate in good faith. Taking into account Janaf's actual loss and the prevailing market rates, NIS was entitled to a reduced sum for the storage fees and must reimburse Glencore for part of the performance bond payment.

### HFW comment

This case demonstrates the English courts' commercial awareness when dealing with disputes. It also highlights the importance of clearly defining the scope and extent of liability for claims within settlement agreements from the outset, to avoid misunderstanding.

## Quadra Commodities S.A. v XL Insurance Company SE and Others

[2023] EWCA Civ 432

Court: Court of Appeal (Civil Division)

Date: 21 April 2023

### Summary

The Court of Appeal held that an insurable interest exists even if goods have not been sufficiently identified or separated.

### Facts

Quadra Commodities SA ("**Quadra**"), was the policy holder under a Marine Cargo Open Policy and XL Insurance Company Se ("**XL**"), was the insurer. The original facts concern arrangements for the sale and purchase of corn, grain and wheat with two companies in the Agroinvest Group. Quadra had either agreed to pay, paid or paid 80% of the purchase price in each case and, prior to delivery, the corn was stored in bulk, commingled with other corn, in elevators. However, a fraud occurred whereby the same corn was sold to multiple buyers, with multiple warehouse receipts issued for the same cargo. Quadra made a claim under its insurance policy, which contained a clause making it possible to claim for misrepresentation. XL denied the claim, arguing that Quadra did not have an insurable interest because the corn was held in bulk and so not sufficiently described or identified.

At first instance, Quadra was found to have shown that, on the balance of probabilities, goods corresponding in quantity and description to that noted on the warehouse receipts were present when they were issued. The Court then held that there was an insurable interest because they had been purchased under 'a contract about the property', giving Quadra a right to the goods. XL appealed, arguing that Quadra did not have an insurable interest on the grounds that:

- (1) The goods, corresponding to the description in the receipts, did not exist.
- (2) The goods were not sufficiently identified in the bulk.
- (3) There was not immediate right to possession.
- (4) The practical consequences of the first instance decision indicate that it is wrong.

Quadra sought to uphold the claim on the grounds that:

- (1) It had satisfied its prima facie burden of proof in proving that the goods of the corresponding description existed.
- (2) Quadra had a proprietary interest in the bulk under section 20A Sales of Goods Act ("**SGA**").
- (3) The loss would be covered under the 'Fraudulent Documents Clause'.

### Findings

The Court of Appeal held that the lower court was correct in finding that the warehouse receipts proved that the corn existed. They were not evidence of ownership, but it was key to the fraud that inspectors saw corn of the corresponding quantity, grade and year of crop. The corn did not need to be sufficiently identified from the bulk for Quadra to have an insurable interest. There was no authority to support the contrary idea which would also be retrogressive. Payment, part-payment and immediate right to possession each gave Quadra an insurable interest in the corn. Finally, the fourth ground of appeal – that insurers would be injured from multiple claims for the same fraud - was 'misconceived'. It was not possible to determine whether indemnities had been paid out to any buyers other than Quadra and the insurers had taken a premium for that risk. The Court of Appeal did not address Quadra's argument in relation to s20A SGA.

### HFW Comment

This decision will be welcome news to policyholders involved in the sale and purchase of commodities held in bulk. To establish an insurable interest in goods held in common bulk, a policyholder is not required to ascertain the goods or sufficiently identify them within part of the bulk. This may still be necessary to establish a proprietary interest, but evidence of payment for goods held in bulk will be sufficient to establish an insurable interest as a matter of English law. Where multiple policyholders are able to evidence payment for the same commodities that have been oversold, this decision may lead to insurers paying several indemnities in respect of the same parcels of goods.

## **Celestial Aviation Services Ltd v UniCredit Bank AG (London Branch) [2023] EWHC 663 and 1071 (Comm)**

Court: Commercial Court

Date: 23 March 2023 and 5 May 2023

### **Summary**

In this case, the Commercial Court considered two Part 8 claims heard together concerning the impact of UK, EU and US sanctions on payment obligations under standby letters of credit ("**LCs**").

### **Facts**

The dispute related to several LCs issued by Sberbank to Celestial Aviation Services Limited ("**Celestial**") and Constitution Aircraft Leasing (Ireland) 3 Limited and Constitution Aircraft Leasing (Ireland) 5 Limited ("**Constitution**") in relation to leases of aircraft to Russian companies. The LCs were confirmed by UniCredit shortly after issue.

In March 2022, both Celestial and Constitution made valid demands for payment in USD under the LCs. UniCredit refused to make payment on the grounds that it was prohibited from doing so by reason of sanctions imposed by the UK and the EU in response to the conflict in Ukraine, specifically: Regulations 11, 13 and 28 of the Russia (Sanctions) (EU Exit) Regulations 2019 No. 855 (UK Regulations) and of Article 3c of Council Regulation (EU) 2022/328 (EU Regulation). UniCredit also claimed US sanctions prohibited it from paying USD sums.

Celestial and Constitution brought proceedings against UniCredit. Before judgment was handed down, UniCredit applied for and obtained licences in the UK, EU and US to permit payment to go ahead. However, a dispute remained on the issues of costs and interest. The principal issues were:

- (1) Did the UK Regulations prohibit payment under the LCs? The parties accepted that this would also determine whether EU Regulations prohibited payment under LCs as the Regulations were materially the same.
- (2) Does US law have the effect of suspending or otherwise excusing non-performance of UniCredit's obligation to pay in USD under the LCs?

### **Findings**

The Court found that UniCredit was not relieved of the obligation to make payment to the claimants under the LCs by reason of Regulations 11, 13 or 28 of the UK Regulations, and was not satisfied that as a matter of US law, payment under the LC would breach the terms of the relevant US sanctions.

#### *Regulation 28 – the provision of financing for the supply of restricted goods/technology*

The purpose of this Regulation was clear, namely "to ensure that financial assistance was not provided to Russian parties in relation to, inter alia, the supply of aircraft". The Court did not accept UniCredit's submission that the Regulation should be read broadly but considered it important to take a step back and ask whether the fulfilment of an independent obligation owed by a German bank to Irish companies can be said to be intended to benefit the Russian entities who happened to be involved in other elements of the overall transaction. The answer to this question was clear – it could not. This focus was on intention, rather than object or effect.

#### *Regulation 11 – the dealing with funds or economic resources owned, held or controlled by a designated person*

Regulation 11 did not come into force until after the date on which the obligation to make payment under the LCs matured. Obiter, the Court rejected UniCredit's argument that paying the claimants would amount to "dealing" with "funds" which were "owned held or controlled" by Sberbank (Sberbank retained a legal interest in the LC). In the Court's view, UniCredit was not "dealing" with Sberbank's property when making a payment to the claimants under the LCs, because UniCredit was satisfying its own independent contractual obligations.

#### *Regulation 13 – making funds available to any person for the benefit of a designated person*

Regulation 13 did not come into force until after the date on which the obligation to make payment under the LCs matured. Again on an obiter basis, the Court considered that payment by UniCredit would not discharge Sberbank's obligations under the LC, because while this would satisfy its obligation to pay the claimants, Sberbank would remain under an equal obligation to reimburse UniCredit, with no overall reduction in liability.

#### *US sanctions*

At the moment that the payment obligations accrued, there was no relevant prohibition under US law. With regard to payment obligations arising after the relevant US prohibition came into force, the Court confirmed the principle that an obligation will not be enforced if performance

would require the performing party to act unlawfully. However, while the contractual obligation assumed payment would be made through a correspondent bank, that did not mean UniCredit could not choose to perform in any other way, including via the tender of cash. Where the fundamental obligation is to make payment, and where it is possible to make such payment, then the bank must do so.

#### **HFW Comment**

This case shows the weight the Court gives to a purposive reading of sanctions' regulations in order to give effect to the parties' contractual intentions. The Court will not read the regulations broadly and rigidly where this would have the effect of unjustly excusing a party from contractual performance, to the detriment of the other. It also confirms the autonomy principle in relation to obligations under an LC.

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

Court: Court of Appeal

Date: 4 May 2023

### Summary

The Court of Appeal identified that the relevant question to be answered when determining whether a bill of lading ("**BL**") contained or evidenced a contract was the presumed intention of the parties at the time that the BL was issued. Further, the effect of s. 2(1) of the Carriage of Goods by Sea Act 1992 was that, upon indorsement of the BL to another party subsequent to discharge, a contract on the terms of the BL came into existence retrospectively. The obligation to deliver against a bill of lading is a contractual one which can be varied by express consent.

### Facts

BP Oil International Limited ("**BP**") sold Gulf Petrochem FZC ("**Gulf**") a cargo of very low sulphur fuel oil (the "**Cargo**"). Gulf's purchase was financed by UniCredit Bank AG ("**UniCredit**"). BP had voyage chartered a vessel from Euronav N.V. ("**Euronav**") to carry the Cargo, and a BL was issued by Euronav with BP named as shipper. Once the Cargo had been sold, Euronav, BP and Gulf entered into a novation agreement by which Gulf became the voyage charterer in place of BP.

Gulf asked BP to indorse the BL and send it to UniCredit, to which they agreed. However, due to Covid-19 related delays, the BL was not indorsed before discharge, and BP remained in possession of the BL. Gulf instructed Euronav to discharge the Cargo without production of the BLs, in accordance with the terms of the charterparty, but in breach of the terms of the BL. UniCredit did not approve the discharge.

Gulf did not repay the sums which UniCredit had financed for the purchase of the Cargo, and when the BL was subsequently indorsed to UniCredit, it brought a claim against Euronav alleging a breach of contract contained in or evidenced by the BL and a loss of around US\$24.7m. At first instance, the Court held that UniCredit's claim failed on the basis that:

- (1) The BL did not contain or evidence a contract of carriage but was a mere receipt because the shipper and the voyage charterer (BP) were the same party. The Court rejected UniCredit's argument that when BP ceased to be the voyage charterer by virtue of the novation agreement, a contract came into existence at that stage. Accordingly, at the time of discharge, Euronav's contractual obligations were set out in the charterparty alone, namely to discharge without production of the BL if ordered to do so by the voyage charterer, and there was no breach of contract.
- (2) Even if there had been a contract evidenced by the BL at the time of delivery, breach of the same had caused no loss, or the same loss would have been suffered by UniCredit in any event.

UniCredit appealed both findings.

### Findings

The Court of Appeal identified that the relevant question to be answered when determining whether a BL contained or evidenced a contract was the presumed intention of the parties at the time that the BL was issued. On the facts, their presumed intention was that on novation, the BL would evidence a contract of carriage. Therefore, there was a contract evidenced by the BL at the time of discharge, the terms of which had been breached by Euronav when it discharged the Cargo without the BL. The Court further held that, even if it was wrong on that analysis, the effect of s. 2(1) of the Carriage of Goods by Sea Act 1992 was that, upon indorsement of the BL to UniCredit subsequent to discharge, a contract on the terms of the BL came into existence retrospectively which had been breached by discharge without production of the BL.

In terms of causation, the Court upheld the decision at first instance. Noting the factual findings of the lower court (that if Euronav had refused to discharge the Cargo without production of the BL, it would have sought instructions from UniCredit as to what should be done with it, and that UniCredit would have instructed Euronav to discharge it without production of the BL), the Court of Appeal found there was no causation of the loss. The obligation to deliver against a bill of lading is a contractual one which can be varied by express consent.

### HFW Comment

The Court of Appeal's decision in relation to the function of a bill of lading will be welcome to banks which regularly hold bills of lading as security. UniCredit has sought permission to appeal the causation issue to the Supreme Court. HFW (Michael Buisset, Caroline West and Olivier Bazin) act for UniCredit in this case.

## Jalla and another v Shell International Trading and Shipping Co Ltd and anor [2023] UKSC 16

Court: Supreme Court

Date: 10 May 2023

### Summary

In this case, the Supreme Court considered the meaning of a continuing cause of action in the context of an attempt by claimants to make amendments to their statement of case after the expiry of the limitation period.

### Facts

The claimants were two Nigerian citizens, Mr Jalla and Mr Chujor, who brought a claim in the tort of private nuisance against defendants, Shell International Trading and Shipping Co Ltd ("**STASCO**") and Shell Nigeria Exploration and Production Co Ltd ("**SNEPCO**"), in respect of the Bonga Spill, a leak which began on 20 December 2011. A flowline carrying crude oil from the seabed, off the coast of Nigeria, to an oil tanker ruptured. The leak was stopped after about six hours but around 40,000 barrels of crude oil escaped into the ocean - some of which travelled to and reached the claimants' land. Mr Jalla and Mr Chujor brought a claim against the defendants in the tort of private nuisance, with the reasoning that the oil pollution from the spill had caused undue interference with the use and enjoyment of their land. Their initial claim was brought within the limitation period. However, the claimants later issued amendments to their pleadings beyond the point of expiry of the limitation period. The claimants contended that since the oil spill had not been cleared up properly, there was a 'continuing cause of action' accruing each day against the defendants, and therefore their amendments fell within the limitation period.

### Findings

The Supreme Court agreed with the decisions of the lower courts that the persistence of oil on the claimants' land did not amount to a continuing cause of action. Therefore, the limitation period had expired and the claimants were not able to make amendments to their pleadings beyond the date of the limitation period expiring. The Court considered various cases in arriving at this decision, most notably distinguishing the case of *Delaware Mansions Ltd v Westminster City Council* [2001] UKHL 55, [2002] 1 AC 321 ("**Delaware Mansions**"), which the claimants had put forward as authority for the failure to remediate a continuing nuisance providing a fresh cause of action. The Court noted that the defendant's continuing responsibility for removing the tree in *Delaware Mansions* was not comparable to a single one-off event as in the present case, because the defendants did not have control over the oil on the claimants' land, and therefore could not remove it. The Court concluded that the correct accrual point of the cause of action in this case was the point at which the oil spill originated and struck the claimants' land, and that there was no additional breach of duty by the defendants which had occurred beyond that one-off event.

### HFW comment

This case highlights the importance of paying close attention to limitation periods and also clarifies that even though a nuisance may continue, it is not a continuing nuisance in the legal sense if there is not a continuing cause of action.

## Fim Bank Plc v KCH Shipping Co Ltd ("Giant Ace") [2023] EWCA Civ 569

Court: Court of Appeal (Civil Division)

Date: 24 May 2023

### Summary

This appeal confirmed that the scope of Article III, rule 6 of the Hague Visby Rules has been extended from that under the Hague Rules. Consequently, claims for misdelivery after discharge must now be brought within one year.

### Facts

Fim Bank Plc ("**Fim Bank**"), the claimant at arbitration and the appellant in this case, financed the purchase of coal (the "**cargo**") by Farlin Energy & Commodities FZE ("**Farlin**"). KCH Shipping Co Ltd ("**KCH**"), the respondent in this case, chartered the vessel under a voyage charterparty and carried the cargo under the bills of lading on the Congenbill (1994) form. The effect of the charterparty was to incorporate the Hague Visby Rules into the bills of lading. The cargo was discharged and subsequently misdelivered to sub-buyers, despite the fact that Fim Bank held the bills of lading as security by way of a pledge.

Fim Bank did not receive payment and eventually gave notice of arbitration to KCH, arguing that KCH had breached its contract of carriage by delivering the cargo to a buyer without bills of lading. However, KCH contended that its liability was extinguished because the claim had not been brought within one year of delivery and it was therefore time-barred. Both the arbitration tribunal and the lower court agreed with KCH. Fim Bank appealed to the Court of Appeal.

### Findings

The appeal was dismissed. The Court of Appeal addressed 3 issues:

- (1) Does Article III, rule 6 of the Hague Visby Rules apply to a claim for misdelivery occurring after discharge of the cargo has been completed?
- (2) If not, was there an implied term in the bills of lading to the effect that the Hague Visby Rules including Article III, rule 6 would apply to govern the parties' relationship after discharge of the cargo (referred to in argument as "the Carver implied term")?
- (3) If the answer to either of these questions is "yes", does clause 2(c) of the Congenbill form have the effect of disapplying the time bar in Article III, rule 6?

The Court first analysed the scope of Article III, rule 6 under the Hague Rules, considering it alone as well as in the context of the articles surrounding it and the international interpretation it has been given. It held that the scope was limited to claims from the start of loading to the end of discharge. However, the Court held that the scope of Article III, rule 6 had been extended under the Hague-Visby Rules. Adding the word 'whatsoever' made the wording 'critically different' so that claims brought for misdelivery after discharge are also time-barred at one year. In its reasoning, the Court placed emphasis on the *travaux préparatoires*. The amendment had been made with wrongful delivery specifically in mind. The *travaux préparatoires* were therefore held to be a 'bull's eye hit' for demonstrating the drafters' intentions and were determinative. The Court also held that, on balance, commentary found that the limit now applies post-discharge. Consequently, KCH's liability was extinguished, and Fim Bank could not claim.

In relation to issue (2), the Court struggled to find an implication in fact or in law but declined to answer this definitively because the Hague Visby Rules applied in the present case anyway.

In relation to issue (3), the Court held that this was artificial and not a question of law arising from the award. If it excluded liability of the carrier for misdelivery after discharge, then the time-bar issue would not arise; if the carrier remains liable then it is subject to the time limit.

### HFW Comment

This decision clarifies the change in scope of Article III, rule 6 under the Hague-Visby Rules. Parties with cargo interests, such as financial institutions like Fim Bank, should be mindful of the need to act quickly to bring misdelivery claims so as to avoid being time-barred.



## Rhine Shipping DMCC v Vitol SA [2023] EWHC 1265 (Comm)

Court: Commercial Court

Date: 26 May 2023

### Summary

The Commercial Court identified as crucial the distinction between internal and external hedging in assessing whether sale contract hedges should be taken into account when determining damages.

### Facts

The dispute related to a voyage charter between Rhine Shipping DMCC ("**Rhine**") as disponent owner and Vitol SA ("**Vitol**") as charterer. The parties agreed that Vitol was liable to Rhine for unpaid demurrage and so the dispute centred on Vitol's counterclaim, for breach of the charter due to the vessel's delay in proceeding to one of the load ports, and whether Rhine was liable for the increased price that Vitol had to pay to the seller of the cargo ("**TOTSA**").

A key issue in the case was whether Vitol's hedging arrangements should be taken into account in assessing damages. Vitol had entered into a number of internal swaps within its own internal risk management system (the "**Risk System**") to hedge against increases in the purchase price under the TOTSA contract caused by any delay in loading the vessel. The swaps were not with external counterparties and were purely internal. After it became clear that the pricing dates under the TOTSA contract would be later than anticipated, the internal swaps were rolled so that the pricing dates of the internal hedge matched the delayed anticipated dates for pricing under the TOTSA contract. The rolling of the swaps generated a "gain" of US\$2,871,971 against the TOTSA trade in the Risk System and there was a corresponding loss for the internal counterparty to the swap. Vitol had to pay TOTSA an additional US\$3,674,834 because of the late loading of the cargo. The loss recorded on the Risk System for the TOTSA purchase was US\$802,863 (US\$3,674,834 less US\$2,871,971, the "gain" generated by the swaps). The Court had to decide whether the internal system of hedging entered into by Vitol reduced the loss that could be claimed from Rhine.

### Findings

#### Could the "gains" made on rolling the swaps be taken into account?

The Court found that the swaps were entirely internal to Vitol and not akin to the conclusion of a contract between two separate legal entities. There was no external hedge that related directly to the relevant transactions in the case, although the Court accepted that the likely position was that the risk generated by the rolling of the swaps was offset within the Risk System by opposite risks which had originated with other physical trades.

The Court reviewed previous authorities<sup>1</sup> and concluded that: "*hedging is capable of being taken into account, at least if undertaken in a reasonable attempt to mitigate loss...*"

...

*Where a party has entered into a hedging transaction with a third party (an "external hedge"...) and has done so in consequence of the breach in order to mitigate its loss, [previous case law]<sup>2</sup> suggests that profits made on such a hedge are to be brought into account in reduction of the loss... Similarly, if such a hedge turns out to be loss-making for the claimant, it may be that the loss is recoverable from the defendant as a cost incurred in pursuit of reasonable mitigation".*

If transactions in relation to the rolled swaps had been entered into due to the breach of the charter and had been with third parties, the profits made on them would have been taken into account in the reduction of Vitol's loss. However, here the swaps were internal and could not be legally recognised as binding contracts, as an entity cannot contract with itself. They were internal arrangements which transferred risk between Vitol portfolios and were regarded as not affecting Vitol's profit or loss.

The Court noted that a trader of Vitol's size may not have to hedge externally because its book of business is large enough to find other transactions that carry opposite risks. However, the other transactions were not entered into for the purposes of hedging the transaction in question. They were separate and independent from each other and were not entered into in order to mitigate or hedge risk – they were transactions entered into in the course of ordinary trading. Consequently, any "profits" on the internal swaps could not be brought into account to reduce the loss suffered under the charter.

#### Was the loss too remote?

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<sup>1</sup> Including *Glencore Energy UK Ltd v Transworld Oil Ltd* [2010] EWHC 141 (Comm) and *Choil Trading SA v Sahara Energy Resources Ltd* [2010] EWHC 374

<sup>2</sup> See, in particular, *Swynson Ltd v Lowick Rose LLP* [2018] AC 313

Rhine argued that the claim for US\$2,871,971 (the alleged "gain" on the swaps") was too remote to be recoverable. In effect, its argument was that it was not reasonably foreseeable that Vitol would not hedge its losses externally. Rhine argued that if internal hedging did not operate to reduce Vitol's loss (from a legal perspective), it was not reasonably foreseeable that Vitol would trade on that basis, so that Rhine should not be liable for the sum of US\$2,871,971 as Vitol's losses would have been reduced by this sum had it hedged externally rather than internally. However, the expert evidence established that Vitol's internal hedging processes were common for such a large trading house. Internal hedging by Vitol was therefore reasonably foreseeable to Rhine as a carrier. The relevant losses were within the reasonable contemplation of the parties at the time of contracting and recoverable.

### Comment

Court judgments relating to hedging are relatively rare and so it is helpful to have guidance from this latest decision. If transactions are hedged internally as part of a global risk portfolio, there is a much higher chance that they will be considered independent transactions which cannot be taken into account in the assessment of damages to reduce loss. The Court's decision on foreseeability, that internal hedging by a large oil trader should be reasonably foreseeable to a shipowner, is also informative.

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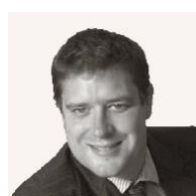
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