

Legal Case Discussion

[Maersk Katalin - A decision of the Singapore High Court in The Maersk Katalin \[2024\] SGHC 282.](#)

Winson Oil Trading Pte Ltd (Winson Oil) sold a cargo of gasoil 10ppm sulphur (cargo) to Hin Leong on DES terms. The cargo was shipped onboard the Maersk Princess (vessel) pursuant to a voyage charterparty between Maersk Tankers Pte Ltd (Maersk), as owners of the vessel and Winson Oil as charterers. Winson Oil issued a letter of indemnity to Maersk for the cargo to be delivered and discharged in lieu of presentation of the original bills of lading (OBLs).

The shipment was from Mailiao, Taiwan to Universal Terminal, Singapore. The sale contract provided for payment by irrevocable letter of credit 30 days after notice of readiness is tendered by the vessel at the port of discharge. The commercial invoice value of the cargo was around USD \$43 million.

The vessel commenced discharge of the cargo on 28 February 2020, not against the original BLs, but pursuant to the letter of indemnity.

On 3 March 2020, Hin Leong applied to United Overseas Bank Ltd (UOB) for a letter of credit (LC) to finance its purchase of the cargo from Winson Oil. Hin Leong's application for the LC was made pursuant to an uncommitted banking facility granted by UOB to Hin Leong for a total amount of USD \$250 million, comprising various lines of credit, which included 'LC1' sub-facility for 'sold' cargoes, and an 'LC2' sub-facility for 'unsold cargoes'.

By the time Hin Leong applied for the LC from UOB, the cargo had already been discharged.

UOB approved the application and issued the LC the next day, on 4 March 2020. The LC was booked under the LC2 sub-facility, and its maturity date was 27 March 2020.

On 5 March 2020, Winson Oil made a compliant presentation under the LC and payment was made by UOB accordingly.

UOB received the OBLs much later in June or July 2020. By this time, Hin Leong had declared that it was insolvent. Understandably, the bank moved to enforce its security in the OBLs by claiming as lawful holders against Maersk for mis delivery. The bank arrested the Maersk Katalin, a sister vessel, in Singapore.

In the legal proceedings, Maersk did not dispute that it had discharged the cargo without presentation of the OBLs. However, one of the main defences raised was that the loss UOB suffered was not caused by Maersk's breach of the contract of carriage. This so-called causation defence was successfully raised by the defendant shipowner in *The Sienna* [2022] 2 Lloyd's Rep 467.

The Sienna is an English Commercial Court case, concerning Gulf Petrochem, in which the shipowner managed to defeat the bank's claim for mis delivery, on the basis that the bank would have permitted the shipowner to discharge the cargo without production of the original bills. That decision was upheld on appeal.

So in the Singapore Court, what Maersk did was to model its case on the Sienna playbook.

Maersk argued that the OBLs were never intended to act as security by UOB, which was instead content to rely on the creditworthiness of Hin Leong. Maersk contended that UOB knew that the cargo had already been discharged prior to the issuance of the LC. Maersk argued therefore, that in the counterfactual, UOB would have in any event permitted discharge of the cargo without production of the OBLs. Accordingly, UOB would have suffered the same losses, even without Maersk's breach of the contract of carriage.

While the Singapore High Court accepted that a Sienna-type causation defence could be a potential defence against a mis delivery claim, it also said that "common sense and logic demands a baseline inference or a starting position that banks like UOB take security for a reason, and the security will not be parted with in the absence of commercial reasons for doing so". As such, insofar as the causation defence hinges on proof of the fact that UOB would have counterfactually given its authorisation, it is for Maersk to lead evidence to prove that fact, and not for UOB to refute it. Accordingly, Maersk bore the evidential burden of showing that UOB would have, in any event, permitted discharge of the cargo without production of the OBLs.

The Court found that Maersk failed to meet the evidential burden required for the causation defence to succeed. It undertook a detailed examination of the facts, and found that ultimately, the evidence presented did not support the inference that UOB would have, in any event, consented to the discharge of the cargo without the OBLs.

The Court was also not convinced by Maersk's argument that UOB had known that the cargo had already been discharged prior to the issuance of the LC:

- first, there was no contemporaneous material that clearly indicated to UOB's officers, at the time, that the cargo had already been discharged;
- secondly, and importantly, according to the court, the transaction here was one conducted between professional bankers and their clients. The active monitoring of financed cargoes is not one of the bank officers' primary functions; and
- thirdly, the transaction was processed by the bank in a very short time (under two days) and on an urgent basis at Hin Leong's request.

The Court thus took a somewhat pro-bank approach, leaning on the side of the bank's officers, in finding that it was reasonable for them not to have monitored the status of the cargo, and certainly not in the compressed one-to-two-day timeframe from application to approval.

In the end, the Court awarded USD \$39 million to the bank. The orthodox approach in assessing damages for mis delivery is the difference between

- (i) the value of the goods at the time and place where they should have been delivered and
- (ii) (ii) what the claimant would have had to pay to receive it.
- (iii) Substantial time was spent by parties on the question of damages, and expert evidence was led.
- (iv) The result is that there was about a difference of USD \$4 million, from the drawdown amount of USD \$43 million.

Key takeaways

There are a few takeaways from this case. We are seeing a reversal away from The Sienna, and perhaps a much vaunted return to orthodoxy. That said, we expect that The Sienna will continue to be a popular authority for shipowner defendants; although as we have seen from the case of Maersk Katalin, this will be no easy task.

Because of The Sienna, it has become that much harder to obtain summary judgment on a mis delivery case in the courts, as the shipowner defendant will try to raise all kinds of evidential issues, and point to cases like The Sienna and Maersk Katalin to argue that it is necessary to have a trial to cross-examine the bank's officer. Bank claimants can also now expect convoluted documentary requests from the shipowner defendant, hoping to unravel a smoking gun.

As such, in pursuing claims for mis delivery, it is very important, more so than ever, to make sure the claim is as secure as possible. In other words, to secure the security.

In most cases, that would entail doing the following:

- issuing protective writ(s) to guard against change of ownership of the vessel;
- engaging the shipowner to ask for voluntary security, copy of charterparty referred to in the BL to find out the jurisdiction clause, and to ask whether the vessel was on demise charter at the material time.
- if no security is provided voluntarily, move to arrest the vessel; and
- to commence the claim in time, and in the appropriate forum.