Introduction

Grain Trade Review is a publication that examines shipping and contractual issues relevant to the maritime trade with grains, feed and oilseeds.

In this issue, the Editor reviews the following topics:

- The Contractual Implications Of Changes To VAT Rate Or Trade Tariffs On The Maritime Trade With Soya Beans

- 2024 Revision Of NAEGA FOB Export Contract Form No. 2

- Carrier's Liability For Heat Damage To A Soybean Cargo When Caused By Excessive Heating Of The Ship's Bunker Fuels

If you have any comments about the matters reviewed in this edition, please address them to **editor@commoditylaw.eu**

The Contractual Implications Of Changes To VAT Rate Or Trade Tariffs On The Maritime Trade With Soya Beans

by Vlad Cioarec, International Trade Consultant

A government act or order which introduces a new VAT rate or new trade tariffs does not prevent delivery of the goods, but it could have an impact on the commodity prices and cause delays in the customs clearance and the delivery of the goods. Therefore, the commodity suppliers should include among their sale terms and conditions either provisions specifically covering trade tariff increase or alternatively, a clause covering the change of regulations that could have a material adverse economic effect on the contracting parties. An example of such a clause is the Clause 64 in BP's General Terms and Conditions for the Sales and Purchases of Crude Oil and Oil Products, which has the following provisions:

“Section 64 - New and changed regulations, etc.
64.1 It is understood by the parties that the Seller is entering into the Agreement in reliance on the laws, rules, regulations, decrees, agreements, concessions and arrangements ("Regulations") in effect on the date hereof with governments, government instrumentalities or public authorities affecting the Crude Oil or Product sold hereunder including those relating to the production, acquisition, gathering, manufacturing, transportation, storage, trading or delivery thereof, insofar as such Regulations affect the Seller or the Seller's supplier(s).

64.2 If at any time and from time to time during the currency of the Agreement any Regulations are changed or new Regulations have become or are due to become effective, whether by law, decree or regulation or by response to the insistence or request of any governmental or public authority or any person purporting to act therefor, and the material effect of such changed or new Regulations (a) is not covered by any other provision of the Agreement; and (b) has or will have a material adverse economic effect on the Seller, the Seller shall have the option to request renegotiation of the price(s) or other pertinent terms of the Agreement. Such option may be exercised by the Seller at any time after such changed or new Regulations are promulgated by written notice to the Buyer, such notice to contain the new price(s) or terms desired by the Seller. If the parties do not agree upon new price(s) or terms satisfactory to both parties within 15 days after the date of the Seller's notice, either party shall have the right to terminate the Agreement immediately at the end of such 15 day period.”

Who Bears The Liability For Financial Losses Arising From Delays In FOB Sale Contracts

In FOB contracts, the sellers shall bear all the risks and costs until the time of delivery of goods on board the carrying ship at the loading port. Therefore, the sellers shall bear the additional costs in the case of delays in the clearance of goods by the customs authority, including any charge for the time spent on demurrage by the ship.
In the scenario where a trader buys a commodity cargo on FOB terms for re-sale on CFR terms and incurs a financial loss due to unfavorable price movements while the chartered ship waits for the cargo at the loading port, he can also claim damages for late delivery, in addition to demurrage, but only in the case of contracts stating the delivery period as a shipment period, because in such contracts the seller's obligation to load the goods by the end of the contract delivery period is considered a condition of the contract. In the case of such contracts, the sellers' obligation to have the cargo ready for loading by the contractual due date implies the obligation to have the cargo

cleared by the customs authority by the due date and to do what else it is necessary to enable the vessel to berth on the expiry of the pre-advice period for the vessel's readiness for loading.
However, most of the FOB contract forms incorporated by the grain exporters state the delivery period as a vessel presentation period rather than as a shipment period. In such case, the time of delivery is an obligation which is not of the essence of the sale contract (i.e. not a condition of the contract). At least, this is the rule in English case law. In the case of the prolonged delays in vessel berthing, loading or in the completion of the necessary formalities for the vessel departure, the seller will be liable for demurrage, but the buyer cannot terminate the contract in the case of unfavorable price movements, unless the buyer is able to include in contract specific provisions in this regard. For instance, Clause VI (5) of INCOGRAIN Contract No. 13 stipulates that if the seller does not commence loading within three working days following the day when the vessel is in all respects ready to load at the loading berth, he shall be in default, save in case of force majeure.
In the absence of such provisions, even if the buyer's vessel arrives at loading port and tenders valid NOR when there is sufficient time left for the completion of loading by the end of the last day of the contract delivery period, the seller is not contractually obliged to complete loading by that time. He is not even required to commence loading within a prescribed time. If, for whatever reason, the loading berth or the goods are not available at the time of the vessel's arrival at the loading port, the vessel can be kept waiting and the buyer cannot withdraw the vessel until after the expiry of a "frustrating time", that is ill-defined by the English Courts[1]. The seller shall not be in breach of contract for failing to provide a free berth and commence loading promptly after the vessel presentation for loading, unless the sale contract provides otherwise.

<u>Who Bears The Liability For Financial Losses Arising From Delays In CFR Sale Contracts</u>

In CFR contracts, the buyers shall bear all the risks and costs after the time of delivery of goods on board the carrying ship at the loading port. Therefore, the buyers shall bear the additional costs in the case of delays in the clearance of goods by the customs authority at the discharge port, including any charge for the time spent on demurrage by the ship.
Prolonged delays in the customs clearance of goods at the discharge ports are not uncommon in the maritime trade with China.
For instance, in 2017, while several ships carrying soya bean cargoes were on route to China, the Chinese government decided to reduce the VAT charged on imports of agricultural commodities. In order to take advantage of the reduction of VAT, the Chinese importers let the ships waiting until the decree reducing the VAT entered into force.
A famous case was in June 2018, when the ship "Peak Pegasus" carrying a cargo of 70,000 tonnes of U.S. soya beans sold by Louis Dreyfus to the Chinese buyer Sano Grain rushed from Seattle in a race against the clock in an attempt to reach the Chinese Dalian Port before the noon on 6 July 2018 when new 25% tariffs imposed by Chinese government on US agricultural commodities took effect. The ship missed the noon deadline by just a few hours and then had to wait for over a month off the port pending a settlement over the import tariff. Two other ships carrying U.S. soya bean cargoes, "Star Jennifer" and "Cemtex Pioneer", had a similar experience.
If the CFR sale contracts provide that the quality specifications have to be met at the time and place of delivery of goods on board the carrying ship, then the cargo quality characteristics determined at that time and place shall be conclusive evidence, i.e. final and binding, and the buyers shall bear the risk of deterioration of cargo in the event of prolonged storage on board the carrying ship at the discharge port[2].

1 See the English law case ERG Raffinerie Mediterranee SPA v. Chevron USA Inc., [2007] 2 Lloyd's Rep. 542, [2007] EWCA Civ. 494.
2 See the article "Who Bears The Risk Of Deterioration Of Perishable Commodities In FOB, CFR And CIF Sale Contracts" published in Commoditylaw's Grain Trade Review Edition No. 4.

The Review Of NAEGA FOB Export Contract Form No.2, Edition 2024

by Vlad Cioarec, International Trade Consultant

In March 2024, the North American Export Grain Association (NAEGA) published a new edition of the FOB Export Contract Form No.2 to be used in the FOB sales of grains and oilseeds in bulk by the US and Canadian grains and oilseeds exporters. This article reviews the contract provisions, including the new updates.

Delivery Terms And Vessel Requirements

The Paragraph 1 of Clause 8 provides that delivery shall be made at the discharge end of the loading spout, i.e. FOB Spout Trimmed, because the US terminal elevators assume responsibility for grain only until it leaves the loading spout.

The FOB Spout Trimmed delivery is possible only if the buyer nominates and provides a vessel suitable for spout trimming, i.e. a self-trimming bulk carrier. Hence, the requirement in the Paragraph 2 of Clause 8 for the buyers to nominate self-trimming bulk carriers.

Passing Of Risks And Insurance Cover

In the FOB Spout Trimmed delivery, the seller is responsible for delivering the grain ex elevator spout, i.e. at the discharge end of the shiploader spout. Therefore, the seller's liability shall be limited to his actions in delivering the grain at the discharge end of the shiploader spout.

The risk of loss shall pass to buyer upon delivery of grain at the discharge end of the shiploader spout. The buyer assumes all risks once the grain leaves the discharge end of the shiploader spout. Therefore, the buyer must obtain insurance cover extending from the time the grain leaves the shiploader spout for the purpose of loading.

The buyer has the obligation to provide evidence of insurance cover on the terms stipulated in the Clause 14, i.e. insurance covering marine and war risks, plus strikes, riots, civil commotions and mine risks, at least 5 days prior to the expected date of vessel readiness to load. If the buyer fails to provide such evidence to seller at least 5 days prior to the expected date of vessel readiness to load, the seller shall have the right to obtain such insurance cover for the buyer's account.

ETA Pre-Advice Requirements

The buyer must give the seller the pre-advice of the expected date of vessel readiness to load, i.e. the date on which the shipowners and buyers expect the vessel to arrive at loading port and be ready for loading, in the number of days to be agreed upon by the seller and buyer at the time of concluding the contract and declare the quantity required to be loaded.

Conditions For The Vessel Substitution

Clause 9 provides that the nomination of the substitute vessel shall be subject to the same pre-advice requirements as for the originally nominated vessel, UNLESS the substitute vessel is expected to be ready for action on the same date as the originally nominated vessel, plus or minus one day. In other words, in cases where the substitute vessel is expected to be ready for loading on the same date as the originally nominated vessel, the substitute vessel's nomination notice can be served with a shorter pre-advice than the pre-advice period required in the sale contract for the nomination of the original vessel.

Conditions For The Vessel Presentation For Loading

Clause 8 provides that buyer must present the vessel at loading port *"in readiness to load"* within the contract delivery period and the buyer's vessel must *"file"* before the end of the contract delivery period.

Then Clause 18 stipulates that:

"If vessel fails to file before the end of the Delivery Period, Buyer shall be in breach of contract and Seller shall carry the grain for Buyer's account and risk ..."

Clause 8 defines the meaning of the words *"file"* and *"readiness to load"* as follows:

"For the purposes of this contract a vessel shall be considered filed when it
(a) has tendered valid notice of readiness to load to the charterer or its agent, at the port of loading,
(b) has given written advice of such tender to the loading elevator, complete with all customarily required documents, such advice having been presented between the hours of 09:00 and 16:00 local time on a business day or between the hours of 09:00 and 12:00 noon on Saturday (provided not a holiday) and
(c) is ready to receive grain in the compartments required for loading under this contract."

The shipping terms and conditions of NAEGA FOB Export Contract Form No. 2 are based on the US and Canadian Shipping Regulations for the export of grain and oilseeds in bulk.

Conditions For The Vessel Presentation For Loading Bulk Grain Cargoes At The US Ports

The vessels arriving to load grain at US ports must first pass the National Cargo Bureau and Federal Grain Inspection Service (FGIS) inspections before obtaining the permission to berth.

The vessel shall be considered physically ready to load when it is ready in every respect to receive grain in all compartments necessary for loading the quantity required to be loaded. The vessel's NOR shall not be effective and laytime shall not commence to run until all holds necessary for loading the quantity required to be loaded have passed the inspection.

The National Cargo Bureau surveyor will inspect the vessel's holds and hatch covers to verify their watertightness, but he will also verify the vessel's documents, i.e. the document of authorisation for the carriage of grain in bulk and grain stability booklet, to see whether the vessel complies with the stability requirements and it is structurally safe to load grain in bulk.

The Federal Grain Inspection Service surveyors inspect the vessel's holds to see whether they comply with the standards of fitness stated in the FGIS Directive 9180.48/4/08/09. The FGIS Directive stipulates that the vessel's holds must be clean, free of any residue of previous cargoes, dry, free of infestation, free of rodents and toxic substances and free of foreign odour.

Only after the vessel has passed the National Cargo Bureau and Federal Grain Inspection Service inspections, it can tender NOR to the charterer's agent. The vessel's NOR must be accompanied by the Certificate of Readiness to Load issued by the National Cargo Bureau surveyor and the Official Stowage Examination Certificate issued by the FGIS surveyors.

Upon the receipt of the vessel's NOR, Certificate of Readiness to Load and Official Stowage Examination Certificate, the charterer's agent must file a berth application to the grain elevator operator for obtaining the permission to berth.

The berth application must be accompanied by the following documents:

- a copy of the vessel's NOR signed by the charterer's agent;
- a copy of the Certificate of Readiness to Load issued by the National Cargo Bureau surveyor;
- a copy of the Official Stowage Examination Certificate issued by the FGIS surveyors stating that the vessel is ready to load in all compartments required for loading the grain cargo;

- evidence that the vessel has been entered at the US Customs House;
- a copy of the vessel's International Tonnage Certificate;
- Master's proposed stowage plan.

These are the *"customarily required documents"* referred to in the Paragraph 5 of Clause 8 in the case of vessels presenting for loading US grain or oilseeds.
Once the berth application is accepted by the grain elevator operator, the vessel is entered in the line-up of vessels waiting for their turn to be called at berth for loading. Therefore, what the nominated vessel must *"file"* before the end of the contract delivery period is the berth application accompanied by the NOR and the *"customarily required documents"* mentioned above.

Conditions For The Vessel Presentation For Loading Bulk Grain Cargoes At Canadian Ports

At the Canadian ports, the fitness of the holds for loading and carriage of grain and oilseeds is verified by the Minister of Transport, respectively by the Port Warden in the Port of Quebec, and the Canadian Food Inspection Agency (CFIA).
The vessel shall be considered physically ready to load when it is ready in every respect to receive grain in all compartments necessary for loading the quantity required to be loaded. The vessel's NOR shall not be effective and laytime shall not commence to run until all holds necessary for loading the quantity required to be loaded have passed the inspection.
The Minister of Transport, respectively by the Port Warden in the Port of Quebec, will inspect the vessel's holds and hatch covers to verify their watertightness, but it will also verify the vessel's documents, i.e. the document of authorisation for the carriage of grain in bulk and grain stability booklet, to see whether the vessel complies with the stability requirements and it is structurally safe to load grain in bulk.
The Canadian Food Inspection Agency inspectors verify the compliance with the cleanliness and phytosanitary requirements.
Only after the vessel has passed the Minister of Transport/Port Warden and Canadian Food Inspection Agency inspections, it can tender NOR to the charterer's agent. The vessel's NOR must be accompanied by the Certificate of Readiness to Load issued by the Minister of Transport/Port Warden and the Ship Inspection Approval For Loading form (CFIA/ACIA 1281) issued by the Canadian Food Inspection Agency.
Upon the receipt of the vessel's NOR, Certificate of Readiness to Load and Ship Inspection Approval For Loading form (CFIA/ACIA 1281), the charterer's agent must file a berth application to the grain elevator operator for obtaining the permission to berth. Once the berth application is accepted by the grain elevator operator, the vessel is entered in the line-up of vessels waiting for their turn to be called at berth for loading.
Like in case of vessels presenting for loading grain in bulk at US ports, the vessels presenting for loading grain in bulk at Canadian ports must *"file"* the berth application accompanied by the NOR and the *"customarily required documents"* before the end of the contract delivery period.

Extension Of The Delivery Period

If the buyers' vessel fails to file a berth application and thereby, the buyers fail to present a vessel ready in all respects to load before the end of the delivery period, that is, before 16:00 hours of the last day of the contract delivery period, the buyers shall be deemed in breach of contract.
The NAEGA FOB Export Contract Form No. 2 does not give the buyers a right to request extension of the delivery period. The extension of the delivery period is subject to a subsequent agreement between the sellers and buyers as to the buyers' liability for the cargo carrying charges that will accrue from the day following the expiration of the original delivery period until the day that the full cargo is loaded (Bill of Lading date). The FOB buyers should ensure that there are provisions in charter party which give them the possibility to recover the cargo carrying charges paid to sellers

from the shipowners or require the shipowners to settle the cargo carrying charges directly with the shippers.
In a voyage charter party, the charterers will agree the extension of laycan subject to the shipowners' accepting the liability for the cargo carrying charges accrued after the laycan[1], but in a time charter party, in the absence of specific provisions the cargo carrying charges will be considered too remote to be recoverable.
In a charter party dispute brought to a tribunal of the London Maritime Arbitrators Association (LMAA)[2], a FOB buyer, who had to pay cargo carrying charges due to the vessel's failure to pass the inspection of hatch covers and holds within the contract delivery period, sought to recover the amount of carrying charges from the shipowners as damages for the breach of charter party. The LMAA tribunal rejected the claim on the grounds that there were no provisions in charter party referring to the liability for the cargo carrying charges in case of the vessel's failure to pass the inspection of hatch covers and holds and the shipowners could not reasonably have foreseen that additional storage charges were likely to be incurred.
The Clause 18 of the NAEGA FOB Export Contract No. 2 provides that if the sellers and buyers agree to extend the delivery period, then the buyers will have 35 calendar days from the last day of the original delivery period to present a vessel ready in all respects to load. If the buyers' vessel fails to file a berth application before 16:00 hours of the 35th calendar day following the last day of the original delivery period, the seller has three options:
- to continue to carry the commodity for the buyer's account and risk;
- to declare the buyer in default;
- to tender to buyer warehouse receipts for a quantity equal to the mean contract quantity, in exchange for which the buyer shall pay the FOB contract price plus the accrued carrying charges, but less the loading charges, weighing and inspection charges.

Seller's Timing Obligations And Commencement Of Laytime

The port operators schedule the grain shipments in function of the vessel's laycan and expected readiness date at the loading port. Therefore, the commencement of laytime will depend not only upon the time when the vessel is in all respects ready to load and tenders valid NOR, but also on whether the NOR is tendered within the laycan (delivery period) and after the expiry of the ETA pre-advice period, because the seller's timing obligations to provide a free berth and commence loading are set in function of the expected date of vessel readiness to load pre-advised by the buyer.
The seller must have the goods ready for loading as from the vessel's expected readiness date originally notified by the buyer in the vessel's nomination notice and not sooner.
If the buyer's vessel tenders valid NOR within the laycan (delivery period) after the expiry of the ETA pre-advice period, the laytime shall commence to run at 07:00 hours on the next working day following the day of tendering valid NOR and filling the berth application[3].
If the buyer's vessel arrives at loading port before the first layday, the seller/port operators will allow the vessel to tender NOR and file the berth application, but the seller/port operators shall not be obliged to commence loading before the first layday. In such case, the laytime shall start to count at 00:00 hours on the first layday (first working day of the laycan/delivery period), unless the seller manages to have the goods ready for loading before the first layday and agrees to load earlier in which case the time used for loading before 00:00 hours of the first layday shall count.
If the buyer's vessel arrives at loading port before the expiry of the ETA pre-advice period, the seller/port operators will allow the vessel to tender NOR and file the berth application, but the seller/port operators shall not be obliged to commence loading and the NOR shall not become

1 The grain traders using “NIPPONGRAIN” Charter Party form should pay attention to the Clause 12 (b) which provides that: *“The Owners shall not be responsible for any charges and/or expenses whatsoever incurred to the Charterers which may result from the Vessel's missing the cancelling date.”*
2 See London Arbitration 12/03, (2003) 620 LMLN 2(2)
3 See Clause 1 of Addendum No.1 to NAEGA FOB Export Contract.

effective before the expiry of the ETA pre-advice period. In such case, the laytime shall start to count at 07:00 hours on the next working day following the expiry of the ETA pre-advice period, unless the seller manages to have the goods ready for loading earlier in which case the laytime shall commence to count from the time of commencement of loading.

The Laytime Implications Of The Vessel's Failure To Pass The Holds' Inspection

The vessel shall be considered physically ready to load when it is ready in every respect to receive grain in all compartments necessary for loading the quantity required to be loaded. The vessel's NOR shall not be effective and laytime shall not commence to run until all holds necessary for loading the quantity required to be loaded have passed the inspection.

After passing the holds' inspection and tendering the Notice of Readiness, the buyer's vessel must maintain a ready to load condition to retain her turn to loading.

Upon the vessel's berthing, the vessel's holds are re-inspected by the FGIS/CFIA surveyors. If the vessel fails the re-inspection at the loading berth, the laytime or the time on demurrage shall cease to count from the time the holds fail the re-inspection until the vessel passes[4].

The usual reason why the vessels fail the re-inspection of holds at the berth is due to insects that entered into the holds after the initial inspection. Typically, the number of holds that fail the re-inspection is less than the number of holds required to be loaded. The NAEGA FOB Export Contract does not say how the time shall count in such case. The sale contracts incorporating the terms of NAEGA FOB Export Contract should stipulate that in the event that the number of holds that fail the re-inspection is less than the number of holds required to be loaded, the laytime shall be suspended pro rata for the rejected holds from the time they are rejected until they are re-passed. The rejection of two of the five holds required to be loaded would not normally affect the loading of the approved holds and thereby, the time counting in respect of those holds.

Time Counting In Case Of Multiple Loading Ports

Clause 6 of Addendum No.1 provides that if the first, second or subsequent ports have been nominated by the seller under the contract, the laytime for the second and/or subsequent port(s) shall commence to count upon the vessel's arrival at the respective ports, except when the vessel fails the holds' inspection at such ports, in which case the laytime shall cease to count until the holds pass the inspection.

Settlement Of Demurrage Claims

The contractual time limit for the settlement of demurrage claims is 40 days from the *"date of mailing of properly documented claim"*.

Contractual Implications Of The Force Majeure Declaration By The Seller

Clause 20 stipulates what happens if a specified force majeure event prevents or delays the seller to deliver the goods.

If a specified force majeure event prevents or delays the delivery of the goods, the seller must send notice to the buyer not later than 7 calendar days after the force majeure event occurs or not later than 2 business days after the first day of the contract delivery period, whichever occurs later. At the buyer's request, the seller shall also have to provide a certificate issued by NAEGA certifying the existence, validity and duration of the force majeure event.

If a specified force majeure event prevents or delays the delivery of the goods, the sale contract shall be suspended for the duration of the force majeure event[5]. Clause 20 does not provide for how long the sale contract can be suspended nor whether the buyers can cancel the sale contract if the force majeure event continues beyond a specified period.

4 See Clause 7 of Addendum No.1 to NAEGA FOB Export Contract.
5 The duration of the force majeure event is referred to as the "Cause Period".

Clause 20 provides that if the force majeure event occurs before or during the contract delivery period and terminates during or after the contract delivery period, then the contract delivery period shall be deemed to be extended by a number of days equivalent to the period starting with the commencement of the force majeure event or the commencement of the delivery period, whichever is the later and ending with the termination of the causes and/or the resumption of work after the termination of the causes, whichever is later, but such additional period shall not exceed 30 days. The provisions of Clause 20 may also be invoked in situations where the buyer's vessel has filed the berth application during the contract delivery period but the force majeure event preventing or delaying the delivery of the goods occurs after the end of the contract delivery period. This means that if the buyer's vessel files the berth application before the end of the contract delivery period and is entered in the line-up of vessels waiting for their turn to be called at berth for loading, but the seller cannot commence loading or commences loading and then it has to suspend it due to the occurrence of a force majeure event after the end of the contract delivery period, the seller may invoke the provisions of Clause 20. In such case, if after the resumption of work, the buyer's vessel is not loaded in the order in which it filled the berth application but it is bypassed by other vessel(s) which have filed the berth application at a later date, the seller will have to pay damages to buyer at the charter party demurrage rate for the time lost by the buyer's vessel while waiting its turn to loading.
Clause 4 of Addendum 1 clarifies the issue of time counting during a force majeure event.
In the event that the buyer's vessel or the vessel's agent files the berth application within the contract delivery period and the seller declares force majeure before the expiry of the time allowed for loading, the time shall cease to count for the duration of the force majeure event (the Cause Period).
In the event that the buyer's vessel or the vessel's agent files the berth application within the contract delivery period and the seller declares force majeure after the expiry of the time allowed for loading, the demurrage shall continue to accrue notwithstanding the force majeure event.
In the event that the buyer's vessel fails to file the berth application within the contract delivery period and thereafter the seller declares force majeure, the time shall not count during the force majeure event (the Cause Period) even if the buyer's vessel manages to file the berth application during the force majeure event (the Cause Period). Furthermore, in such scenario, the buyer shall have to reimburse seller the carrying charges for the cargo accrued after the end of the contract delivery period.

Conclusive Inspection And Determination Of The Cargo's Quality And Condition

The quality and condition of the goods ascertained at the time and place of loading by the Federal Grain Inspection Service (FGIS) for the US grain shipments, respectively by the Canadian Grain Commission's inspectors for the Canadian grain shipments shall be final, that is, provided that the official inspection certificates evidence that the grain shipment is within the contract quality specifications, no claim can be made by the buyer for subsequent deterioration.

Weight Determination

The contract form does not state how the weight of cargo is to be ascertained and by whom.
At the US ports, the weighing of bulk grain shipments is made in the terminal elevator scales under the supervision of the Federal Grain Inspection Service. The weight figure determined ashore is verified by the vessel's draft surveys conducted by the National Cargo Bureau surveyors. The weight figure ascertained and certified at the time and place of loading by the Federal Grain Inspection Service shall be final.
At the Canadian ports, the weighing of bulk grain shipments is made in the terminal elevator scales under the supervision of the Canadian Grain Commission's inspectors. The weight figure ascertained and certified at the time and place of loading by the Canadian Grain Commission's inspectors shall be final.

Carrier's Liability For Heat Damage To A Soybean Cargo When Caused By Excessive Heating Of The Ship's Bunker Fuels

by Vlad Cioarec, International Trade Consultant

The English law case **AMS Ameropa Marketing Sales AG & Anor v. Ocean Unity Navigation Inc[1].** was a claim for the heat damage to a small part of a cargo of 49,574.949 MT of soybeans shipped from Convent Louisiana in United States to Abu Qir Port in Egypt.

In June 2020, the grain trading company Ameropa purchased a cargo of 50,000 MT of soybeans in bulk +/-10% on FOB terms from Zen-Noh Grain Corporation. Then on 15 July 2020, Ameropa re-sold the cargo on CIF terms to an Egyptian company called International Oil Multiseed Extraction Co., referred to as “Oilex”.

The soybean cargo was loaded on board the vessel “Doric Valour” on 4 August 2020 from the Zen-Noh Grain Elevator at Convent Louisiana. The Bills of Lading for the soybean cargo were issued by the local agents on behalf of the Master. The Bills of Lading were issued to order, stating the FOB seller, Zen-Noh Grain Corporation as shipper and the CIF buyer, International Oil Multiseed Extraction Co. as the notify party.

On 25 August 2020, Ameropa issued an invoice to International Oil Multiseed Extraction Co. for the amount of USD 21,565,102.82, with the CIF sale price stated as USD 435 per MT. On 2nd September 2020, International Oil Multiseed Extraction Co. paid Ameropa the invoiced amount and became the lawful holder of the Bills of Lading and the owner of the soybean cargo.

On 30th August 2020, the vessel “Doric Valour” arrived at the discharge port, Abu Qir Port in Egypt. When the vessel's holds were unsealed, in one of the five holds, the hold no.4, the surface of the cargo was lumpy, caked, rotten and discolored, having a temperature ranging between 32 and 47 degrees Celsius.

Initially, the vessel's crew started to segregate manually the damaged cargo with buckets and shovels. By 10 September 2020, the vessel's crew manually segregated a quantity of 15.92 MT of damaged cargo that was put into large bags and weighed ashore.

On 10 September 2020, another part of the cargo with discolored soybeans had been discovered, this time in the proximity to a fuel oil bunker tank, but the cargo owners objected to the crew continuing the manual segregation due to the risks of delays and further deterioration of cargo during the lengthy manual segregation of the damaged cargo.

From then on, the discharge of the portions of cargo with discolored beans was done with grabs using the vessel's cranes. The portions of cargo with discolored beans were discharged into trucks parked alongside the vessel. By 12 September 2020, all visually damaged cargo in the hold no.4 had been removed and discharge of the whole cargo was completed by 14 September 2020.

Following the completion of discharge, the rejected parts of the cargo were sent by trucks to a warehouse, located about 100 km away from the port of discharge, where they were inspected and sampled by surveyors acting on behalf of the ship's P&I Club, shippers, consignees, cargo underwriters and charterers.

Beside the quantity of 15.92 MT that had been manually segregated, it was recorded an additional quantity of 3,631.79 MT that was removed by grabs and subsequently rejected by the CIF buyer.

On 17th September 2020, the surveyors acting on behalf of the shippers, consignees and cargo underwriters issued a joint inspection report stating that a further segregation of the rejected cargo quantity of 3,631.79 MT was not feasible and that the respective cargo quantity had to be sold at the highest salvage bid that could be obtained.

1 [2023] EWHC 3264 (Comm)

A salvage tender followed where the highest bid for the cargo quantity of 3,631.79 MT was at the price of 355 per MT[2]. Subsequently, the quantity in question was sold to the bidder who offered that price.

Before the delivery to the salvage buyer, the respective quantity was sampled in the warehouse by surveyors acting on behalf of the ship's P&I Club, shippers, consignees, cargo underwriters and charterers. There were six separate piles of soybeans of different sizes, of which one was the quantity of 15.92 MT that had been manually segregated. The pile with the quantity of 15.92 MT with visibly damaged soybeans was sampled separately from the other five piles. The cargo samples were then sent for laboratory analysis to Salomon&Seaber in London. Soon after that the rejected cargo quantity was delivered to the salvage buyer.

The results of the laboratory analysis of the cargo samples taken from the five piles representing the quantity of 3,631.79 MT showed that they were on-specification.

On 15 March 2021, Ameropa reimbursed International Oil Multiseed Extraction Co. the CIF price for the quantity of 15.92 MT of visibly damaged soybeans that had been manually segregated and the difference between the CIF price and the salvage price for the quantity of 3,631.79 MT that had been removed by grabs. In turn, International Oil Multiseed Extraction Co. assigned its rights under the contract of carriage evidenced by the Bills of Lading to Ameropa to enable the latter to recover the financial loss from the carrier (shipowner).

On 12 July 2021, Ameropa obtained a Court order in South Africa for the arrest of the vessel “Doric Valour” as security for the claim. Then on the following day, Ameropa sent to shipowner a notice of the assignment of the rights that the cargo owners, International Oil Multiseed Extraction Co., had under the contract of carriage evidenced by the Bills of Lading to Ameropa.

On 16 July 2021, the ship's P&I Club issued a Letter of Undertaking to Ameropa to release the ship from arrest. On the basis of the P&I Club's Letter of Undertaking, Ameropa brought the claim in the English Commercial Court as assignee of the rights of the Bills of Lading holder.

Ameropa's right to claim damages depended on what International Oil Multiseed Extraction Co. would have been entitled to claim at the date of the assignment in July 2021.

In the Court proceedings, the shipowner contended that Ameropa did not have the obligation to reimburse International Oil Multiseed Extraction Co. the CIF price for the quantity of 15.92 MT and the difference between the CIF price and the salvage price for the quantity of 3,631.79 MT, because the sale contract was on CIF terms so that the risk of damage to the goods passed at the time of shipment at loading port.

The English Commercial Court and subsequently the English Court of Appeal[3] held that whatever the reason for the reimbursement by Ameropa of the amount claimed by International Oil Multiseed Extraction Co., recovery of that amount from Ameropa did not affect International Oil Multiseed Extraction Co.'s right as the lawful holder of the Bills of Lading to recover full damages under the contract of carriage from the shipowner. The fact that the Bills of Lading holder was previously able to recover the financial loss from a salvage buyer and the seller of goods did not affect his right to recover full damages under the contract of carriage from the shipowner.

A Bills of Lading holder who recovers the financial loss arising from the cargo damage from a salvage buyer and/or the seller of goods by way of a commercial settlement under the sale contract retains the title to sue the carrier under the contract of carriage contained or evidenced by the Bills of Lading[4].

2 It was actually the CIF seller, Ameropa, who arranged the salvage tender and the subsequent sale of the quantity of 3,631.79 MT, but it did so on behalf of the CIF buyer.

3 See AMS Ameropa Marketing and Sales AG & Anor v. Ocean Unity Navigation Inc (Re “Doric Valour”), [2024] EWCA Civ. 1312

4 See Sevylor Shipping And Trading Corp v. Altfadul Company for Foods, Fruits & Livestock & Anor, [2018] EWHC 629 (Comm); [2018] 2 Lloyd's Rep. 33

The Difficulty Of Assessing The Extent Of Physical Damage To A Soybean Cargo When Caused By The Excessive Heating Of The Ship's Bunker Fuels

Ameropa sought to recover the entire amount reimbursed to International Oil Multiseed Extraction Co., that is, the CIF price for the cargo quantity of 15.92 MT of visibly damaged soybeans that had been manually segregated and the difference between the CIF price and the salvage price for the cargo quantity of 3,631.79 MT that had been removed by grabs and subsequently rejected.

In addition to that amount, it sought to recover the expenses incurred for the transport of the rejected quantity of the rejected quantity from the discharge port to the warehouse, along with the storage costs and survey fees.

By the time of trial, the shipowners had admitted that the excessive heating of the ship's bunker fuels caused damage to a small part of the cargo in the hold no.4 and this was a breach by the shipowners of the contract of carriage evidenced by the Bills of Lading. But the shipowners contended that the damages claimed were overstated and that the true extent of the damaged cargo was no more than 300 MT.

The shipowners alleged that the cargo owners acted unreasonably when asked the segregation of the heat damaged soybeans with the use of grabs and when concluded the salvage sale for the rejected cargo quantity of 3,631.79 MT before obtaining the results of the laboratory analysis of the cargo samples.

The English Commercial Court held that based on the evidence from the photos taken by surveyors at the time of discharge, the part of the cargo damaged by heat was within 50 cm of the heated fuel oil tank and based on the area of the fuel oil tank, the maximum quantity of cargo affected by heat damage could not have been more than 80 MT. Nonetheless, the Court held that the use of grabs for the segregation of the heat damaged soybeans from the sound soybeans was not unreasonable because the cargo owners could not know at the time of discharge the extent of the heat damage and the surveyors acting on behalf of the ship's P&I Club did not propose an alternative method of segregation at the time of discharge. This method of segregation avoided the risk of substantial delay and significant admixture throughout the whole cargo stow in the hold no.4.

Once the sound and heat damaged soybeans were admixed at the time of discharge by grabs, it was not practical to attempt to further segregate them.

The segregation of the heat damaged soybeans by grabs and the subsequent sale of the segregated quantity at a discount of 18% of the invoice price was a direct consequence of the shipowners' breach of the contract of carriage.

The cargo owners' decision to sell the rejected cargo quantity through a salvage tender without obtaining first a certificate of analysis was reasonable, because it was not known at the time the actual condition and moisture content of that cargo quantity.

Even though it was later find out that the rejected cargo quantity was actually in a sound condition at the time of the salvage sale on 24-25 September 2020, it could not have remained in that condition if it had been left in the warehouse until early December 2020 when the certificates of analysis were issued due to the improper storage conditions (water leaking from the warehouse ceiling) and the storage costs.

While the risks of further cargo deterioration due to the improper storage conditions were not the shipowners' responsibility, a prompt sale at a discount of 18% on the invoice price protected against further deterioration attributable to the shipowners' breach, including ongoing storage conditions.

As a result, the judge held that Ameropa, as assignee of the Bills of Lading holder rights, was entitled to recover the sum of USD 293,755.10 as contractual damages based on the difference between the CIF invoice value of a sound cargo and the actual value of the cargo on arrival at discharge port[5].

5 The claim for the transport, storage and survey costs was rejected because the transport, storage and survey invoices showed that those costs were incurred by Ameropa and not by International Oil Multiseed Extraction Co.. The

transport, storage and survey costs could have been recovered only if the claimant have proved that such costs were incurred by the Bills of Lading holder, International Oil Multiseed Extraction Co.