Introduction

Grain Trade Review is a publication in which shipping and contractual matters relevant to the international trade with grains, feeds and oilseeds are reviewed.

In this issue, the Editor reviews the following topics:

- NAEGA FOB Export Contract No.2, Edition 2018

- The US And Canadian Shipping Regulations For The Export Of Grain And Oilseeds In Bulk

- The Vessel Requirements In The Grain And Oilseeds' FOB Sale Contracts

- Charterparty And Bill Of Lading Clauses Used To Protect The Carriers Of Bulk Grain Cargoes In Case Of Shore – Ship Differences As To Cargo Weight At Loading Port

- Charterparty And Bill Of Lading Clauses Used To Protect The Carriers Of Bulk Grain Cargoes In Case Of Claims Based On "Paper Shortages"

- The Carriers' Responsibility Over The Proper Description Of Apparent Condition Of Bulk Grain Cargoes In Bills Of Lading

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

The Review Of NAEGA FOB Export Contract No.2, Edition 2018 And The US And Canadian Shipping Regulations For The Export Of Grain And Oilseeds In Bulk

by Vlad Cioarec, International Trade Consultant

The NAEGA FOB Export Contract No. 2 is a contract form issued by the North American Export Grain Association (NAEGA) to be used for the FOB sales of grain in bulk by the US and Canadian grain exporters.

Settlement Of Price For The Contract Quantity Tolerance

A tolerance of 5% more or less of the mean contract quantity can be granted to the buyer at the market price in the country of origin of the commodity on the last date of loading, if such date is a business day, otherwise the market price on the previous business day.
In the event that the seller and buyer do not agree on the market value by the time the shipping documents are ready to be transmitted to the buyer, the seller shall invoice the entire shipment provisionally at the contract price. Thereafter, the final invoice for the difference between the contract price and market value shall be presented as soon as possible and payment shall be made immediately.
If the sale is for a quantity between minimum and maximum limits, there will be no margin in excess of the maximum limit.
If the contract covers multiple shipments to be loaded by more than one vessel, the loading tolerance of 5% shall apply on the difference between the mean contract quantity and the quantity that has been delivered on the previous vessels, that is, the loading tolerance shall apply on the unshipped balance only.

Weight Determination

The contract form does not state how the weight of cargo is to be ascertained and by whom.
At US ports, the weighing of bulk grain shipments is made in the terminal elevator scales under the supervision of the GIPSA's 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 GIPSA's Federal Grain Inspection Service shall be final.
At 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.

Conclusive Inspection And Determination Of Cargo's Quality And Condition

The quality and condition of the goods ascertained at the time and place of loading by the 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. Furthermore, the Clause 7 of the NAEGA FOB Export Contract No. 2 contains an exclusion clause with the following provisions:

“The commodity is not warranted free from defect, rendering same unmerchantable, which would not be apparent on reasonable examination, any statute or rule of law to the contrary

notwithstanding."

If the purpose of this clause is to protect the sellers of soya beans against claims for subsequent deterioration, then these provisions are inappropriate.
This clause is an old-fashioned clause originally included in the Edition 1938 of the London Corn Trade Association contracts and the London Cattle Food Trade Association Contract Form No. 6 and currently is still used in the FOSFA Contract No. 23 (Contract For South American Soyabeans In Bulk – CIFFO terms), FOSFA Contract No. 24 (Contract For Canadian/USA Soyabeans – CIF terms), FOSFA Contract No. 25 (Contract For Soyabeans In Bulk – CIF Delivered Weight) and FOSFA Contract No. 36 (Contract For Canadian Rapeseed – CIF/C&F terms).
In the English law case **Henry Kendall Ltd. v. William Lillico Ltd.**[1], Lord Pearce held that this clause does not protect the sellers in case of a breach of the implied condition as to merchantability of goods, because the exclusions of warranty are not sufficient to exclude conditions of contract. In the same case, Lord Morris said that the words used in the clause *"are wholly inapt to exclude a condition of the contract. They do not refer to a condition. You do not exclude a condition by excluding or purporting to exclude a warranty."* This rule was upheld by the English Court of Appeal in **KG Bominflot Bunkergesellschaft Für Mineralöle mbh & Co KG v. Petroplus Marketing AG**[2], where Lord Justice Rix said that the statutory implied conditions cannot be excluded by reference to warranties but only by provisions which expressly refer to conditions.
Even though the NAEGA FOB Export Contract No. 2 is subject to New York law, that Court decision would still be applicable. Therefore, the FOB sellers using NAEGA FOB Export Contract No. 2 should consider the necessity of including in their sale contracts a clause excluding the seller's liability for breach of conditions implied by statute and/or common law[3].

Delivery Terms And Vessel Requirements

The Clause 8 of NAEGA FOB Export Contract No. 2 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 Clause 8 of NAEGA FOB Export Contract No. 2 stipulates also that delivery shall be subject to the elevator tariff to the extent that the elevator tariff does not conflict with the terms of the contract. What the contract does not say it is that the loading charge published in the elevator tariff is subject to the condition that delivery shall be made at the discharge end of the loading spout to one self-trimming bulk carrier. 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. The only helpful provisions are in Addendum No.1 which stipulates that the loading rate guaranty applies provided that lifting under the contract is by one self-trimming bulk carrier only.
If the buyer does not present for loading a self-trimming bulk carrier, Addendum No.1 Clause 8 stipulates that any trimming costs and overtime costs for performing trimming shall be for the buyer's account. The loading charge will be higher if the buyer nominates and presents for loading a non-self-trimming bulk carrier due to the additional costs and time spent for performing the trimming. The loading charge will be even higher if the buyer nominates and presents for loading a tween-deck general cargo vessel for which the grain elevator operators charge the highest price for loading.

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1 [1968] UKHL 3, [1969] 2 AC 31

2 [2010] EWCA Civ. 1145

3 For an example of such provisions see the Sub-Clause 28.1.2 of Shell's General Terms and Conditions for Sales and Purchases of Crude Oil, 2010 Edition, and the Sub-Clause 59.1.1 of BP Oil International Limited General Terms & Conditions for Sales and Purchases of Crude Oil and Petroleum Products – 2015 Edition which stipulate that: *"[S]ave to the extent that exclusion thereof is not permitted or is ineffective by operation of law, all statutory or other conditions or warranties, express or implied, with respect to the description or satisfactory quality of the Crude Oil or Product or its fitness for any particular purpose or otherwise are hereby excluded."*

Vessel Nomination

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

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. 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

The Clause 8 of NAEGA FOB Export Contract No. 2 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. The Clause 18 of NAEGA FOB Export Contract No. 2 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 ...”

The Clause 8 of NAEGA FOB Export Contract No. 2 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 Edition 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 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.

If the vessel is an OBO (Ore/Bulk/Oil) Combination Carrier which has previously carried petroleum products, the vessel's NOR must be accompanied by a Gas Free Certificate issued by a local marine chemist who must certify that the vessel's holds are gas-free.

These are the *"customarily required documents"* referred to in the Clause 8(b) in 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.

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 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[4], 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)[5], 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 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 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 the 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

4 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."*
5 See London Arbitration 12/03, (2003) 620 LMLN 2(2)

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.
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 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 shall cease to count from the time the holds fail the re-inspection until the vessel passes[6].
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

The laytime for the second and/or subsequent port(s) shall commence to count upon the vessel's arrival at that port(s), except when the vessel fails the holds' inspection at such port(s), 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*

6 See Clause 7 of Addendum No.1 to NAEGA FOB Export Contract.

mailing of properly documented claim".

Force Majeure

If the delivery of the grain is prevented or delayed at the terminal elevator due to any of the following causes:

- riots, strikes, lockouts, interruptions in or stoppages of the normal course of labour;
- embargoes or exceptional impediments to inland transportation;
- Action by Federal, State or local government or authority;

and the seller sends notice to buyer no later than 2 business days after the date of commencement of the causes or no later than 2 business days after the first day of the delivery period, whichever occurs later, and at buyer's request, provides a certificate issued by NAEGA certifying the existence and the duration of the causes, the seller's obligation to deliver the goods shall be suspended while the causes are in effect until the termination of the causes and/or the resumption of work after the termination of the causes, whichever is the later.

If the cause preventing or delaying the delivery of grain cargo commences before or during the delivery period and terminates during or after the delivery period, then the delivery period shall be deemed to be extended by a number of days equivalent to the period starting with the commencement of the causes 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 force majeure provisions of Clause 20 may also be invoked in situations where the buyer's vessel has filed the berth application during the delivery period but the cause preventing or delaying the delivery of grain cargo commences after the end of the delivery period. This means that if the buyer's vessel files the berth application before the end of the 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 delivery period, the seller may invoke the provisions of Clause 20.

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 pay to buyer damages at demurrage rate for the time lost by the buyer's vessel while waiting its turn to loading.

Passing Of Risk

The seller is responsible for delivering the grain ex elevator spout, i.e. at the discharge end of the shiploader spout. 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 NAEGA FOB Export Contract No. 2, 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.

The Vessel Requirements In Grain And Oilseeds' FOB Sale Contracts

by Vlad Cioarec, International Trade Consultant

Grain and oilseed cargoes are transported by sea with four types of vessel:
- Conventional Bulk Carriers;
- OBO (Ore/Bulk/Oil) Combination Carriers;
- Box Shaped Bulk Carriers.
- Tween Deck General Cargo Vessels.

The Conventional Bulk Carriers are single deck vessels with heptagonal shaped holds which prevent the empty spaces from developing in the upper edges of the holds. They are the most economical type of vessel because their holds can be filled with free flowing grain in bulk without the need for any trimming of the cargo other than the spout-trimming by the shiploader or grab trimming. Hence, these type of holds are referred to as “self-trimming holds” and the conventional bulk carriers are referred to as “self-trimming bulk carriers”.

The OBO (Ore/Bulk/Oil) Combination Carriers are vessels designed to carry both dry bulk cargoes and oil cargoes. They are single deck vessels with self-trimming holds but the access of shiploader or grab to the holds could be difficult due to the small hatch openings. Hence, they usually require extra trimming in addition to spout trimming and their loading takes longer than the loading of a conventional bulk carrier.

The Box Shaped Bulk Carriers are single deck vessels with box shaped holds. The loading of grain in bulk into the box shaped holds takes longer and costs more than the loading into the self-trimming holds of the conventional bulk carriers, because after loading the upper edges of the box shaped holds remain unfilled and therefore, it is necessary the trimming of cargo, i.e. levelling of grain cargo by moving it to the upper edges of the holds to reduce the risk of shifting during the voyage. This is the reason why the box shaped bulk carriers are referred to as “non-self-trimming bulk carriers”.

Amongst the vessels with box shaped holds are: the open hatch gantry crane bulk carriers, semi-open hatch gantry crane bulk carriers, open hatch jib crane bulk carriers, semi-open hatch jib crane bulk carriers. These vessels are referred to as “Box Shaped Bulk Carriers”.

The Tween Deck General Cargo Vessels are vessels with two decks designed for the carriage of both break bulk and bulk cargoes. The loading of grain in bulk on board the tween deck general cargo vessels takes longer than in case of any other type of vessel and therefore, the grain terminal operators charge the highest rate for loading such vessels.

The FOB price quotations and sale contracts should stipulate the type of vessel required to be nominated because the loading rate, the time necessary for loading and ultimately, the loading costs are in function of the type of vessel presented for loading, particularly the vessel's deck configuration, the vessel's hold shape and vessel's deballasting capacity.

The ANEC FOB Sale Contracts No. 41, 42, 43 and 44 are the only grain FOB sale contract forms that stipulate a different loading rate for each type of vessel:
- for Self-Trimming Bulk Carrier – 2,000 MT per day;
- for Non-Self-Trimming Bulk Carrier – 1,500 MT per day;
- for Non-Bulk Carrier – 1,200 MT per day[1].

It also states that the buyer has the option to execute the contract with non-bulk carrier vessels but in such case the price will increase with USD 2 per metric ton over the price for delivery to bulk

1 See Sub-Clause 9.2 of ANEC FOB Sale Contract forms No. 41, 42, 43 and 44.

carrier vessels[2].
The type of vessel required to be nominated in the FOB sale contracts should be in function of the delivery terms quoted by the sellers.
The FOB prices are quoted either on “spout trimmed” basis, on “grab trimmed” basis or on “stowed and trimmed” basis.
The exporters from the Black Sea Region quote the FOB prices on “grab trimmed” basis or on “stowed and trimmed” basis depending on whether the grain is loaded by cranes fitted with grabs or by shiploader. The grain is delivered by grabs in cases where the grain is stored in warehouses rather than silos and loading is made by shore cranes fitted with grabs or where the grain is loaded from barges by floating cranes fitted with grabs. A FOB price quoted on “grab trimmed” basis means that the seller's responsibility ends when the grain is dumped into the vessel's holds by grab.
The Canadian, US and Australian grain exporters quote the FOB prices on “spout trimmed” basis, because at Canadian, US and Australian ports the grain in bulk is loaded into the vessel's holds directly from the terminal elevators by means of shiploader spout. A FOB price quoted on “spout trimmed” basis means that the seller's responsibility ends when the grain is delivered at the discharge end of the shiploader spout.
Both NAEGA FOB Export Contract No. 2 and GTA FOB Contract No.1 provide that delivery shall be made on FOB spout trimmed basis but without stating the type of vessel required to be nominated by the buyer. A FOB spout trimmed delivery is possible only if the buyer nominates and presents for loading a vessel suitable for spout trimming, i.e. a self-trimming bulk carrier. That's why a price quotation on FOB Spout Trimmed basis should also mention the type of vessel suitable for such delivery, as in the example provided below:

“USD ….... per metric ton, basis delivery FOB Spout Trimmed one (1) self-trimming single deck bulk carrier.”

In the ANEC FOB Sale Contracts No. 41, 42, 43 and 44 the unit price is stated to be basis delivery FOB stowed and trimmed to a “Bulk Carrier”. The Brazilian grain exporters should specify in the price quotations and sale contracts what type of bulk carrier would be suitable for such delivery: i.e. a self-trimming bulk carrier or a non-self-trimming bulk carrier.
Another requirement concerning the vessel to be nominated it is that related to the vessel's deballasting capacity. The nominated vessel must have sufficient deballasting capacity to enable the loading terminal operator to achieve the maximum loading rate applicable to that size of the vessel without the interruption of loading, i.e. the ballast water must be discharged at a rate which prevents the interruption of loading or at least it does not require the interruption of loading in excess of the time permitted by the terminal operator.
If the vessel sails under a Flag of Convenience, the vessel must have on board a valid ITF Blue Card to evidence the fact that the minimum terms and conditions of employment of the crew of the vessel are approved by the ITF (International Transport Workers' Federation).
Another requirement concerning the vessel to be nominated it is that the nominated vessel must have on board all the IMO required certificates valid, including the Document of Authorisation For the Carriage of Grain in Bulk and Grain Loading Manual, International Ship Security Certificate, Maritime Labour Certificate, Safety Management Certificate and Document of Compliance with the ISM Code.
The operators of the Australian grain terminals use the RightShip Vetting System to determine whether to accept or reject the vessel nomination.

2 See Clause 9 of ANEC FOB Sale Contracts No. 41, 42, 43 and 44.

RightShip uses three risk categories on a five star rating scale in the assessment of nominated vessels:

1. **Accept**[xxx]
A three, four or five star rating means that the vessel is an acceptable risk with no further query required.

2. **RightShip review**[xx]
A two star rating means that RightShip must make a further review of the risk profile of the vessel, including the physical inspection of vessel. The two star rating is given to the vessels over 18 years of age.

3. **Further Investigation required**[x]
A one star rating means that RightShip needs to conduct a more detailed review of the vessel and owners, including the physical inspection of vessel.

Charterparty And Bill Of Lading Clauses Used To Protect The Carriers Of Bulk Grain Cargoes In Case Of Shore – Ship Differences As To Cargo Weight At Loading Port

by Vlad Cioarec, International Trade Consultant

The quantity of bulk grain cargoes transported by sea is determined at each point of transfer of responsibility:
- at the time of shipment on board the carrying vessel at loading port, the quantity of cargo is ascertained by shore scales and vessel's draft readings made by the marine surveyors appointed by the shippers and shipowners;
- at the port of discharge, the quantity of cargo is determined based on the vessel's draft readings and then by shore scales.

The export duty, FOB price and settlement of payment in the FOB sale contracts are all based on the shipped weight figure ascertained at the time of shipment by shore scales. The purpose of the vessel's draft surveys at loading port is to check the accuracy of weight figure determined by shore scales.

Minor differences up to 1% occur sometimes between the weight figure ascertained by shore scales and the weight figure calculated based on the vessel's draft survey, because while the automatic bulk grain weighers must have an accuracy of +/- 0.1%, for the vessel's draft surveys the accuracy is in the range of +/- 0.5 – 1%.

In case of minor differences up to 1% between the weight figure ascertained by shore scales and the weight figure calculated based on the vessel's draft survey, the Masters are instructed to issue a Letter of Protest. But if the difference between the shore and ship weight figures exceeds the customary allowance of 1%, the carriers will require the shippers to state in the Bills of Lading the weight figure calculated based on the vessel's draft survey results. An example of charter party clause stipulating the conditions for the issuance of Bills of Lading in such cases is provided below:

“The weight of cargo shall be determined at loading port by shore scales and this weight figure shall then be inserted in the Bills of Lading, unless the Master informs the Charterers that the weight figure determined by shore scales exceeds the weight figure determined by Vessel's draft survey by more than 1%. In such case, the Charterers shall appoint a marine surveyor to make Vessel's draft survey at loading port jointly with a surveyor appointed by Owners. If the weight figure calculated based on the results of joint draft survey is less than the weight figure determined by shore scales by more than 1%, then the weight figure to be recorded in the Bills of Lading shall be the one determined by joint draft survey.”

In turn, the grain traders drafted charter party clauses requiring the shipowners to issue the Bills of Lading with the weight figure determined by shore scales notwithstanding the shore-ship difference and providing an indemnity to shipowners for the possible quantity shortage at discharge port up to the extent of the shore-ship difference at loading port. An example of such charter party clause is provided below:

“The weight of cargo shall be determined at loading port by shore scales and this weight figure shall then be inserted in the Bills of Lading.
To check the accuracy of weight figure determined by shore scales, the Owners shall nominate a marine surveyor to make the Vessel's draft survey at loading port jointly with a surveyor appointed by Charterers. If the weight figure determined by shore scales exceeds the weight figure determined by Vessel' draft survey by more than 1%, the Bills of Lading shall be issued without comments to the

difference between the weight figure recorded in Bills of Lading and the weight figure calculated based on draft survey results, but the Charterers shall keep the Owners free of responsibility for the possible shortage at discharge up to the extent of the difference between the weight figure determined by shore scales and the weight figure determined by Vessel's draft survey at loading port."

The ship agents commonly state the shore weight figure in the Bills of Lading under the qualifying statement *"said to weigh"*, notwithstanding that in many jurisdictions the Courts do not accept such disclaimer[1] [2]. A weight disclaimer in a Bill of Lading may protect the carriers in cases where the shore weight figures are not considered a reliable evidence and the vessel's draft readings at loading and discharge ports were verified by independent surveyors. In such cases, the Courts held that in the absence of independent evidence of the shore weight figure, the prima facie evidence of the weight of cargo provided by the Bills of Lading on a *"said to weigh"* basis is not deemed enough[3] and the carriers have not been held responsible for the differences in weight that were attributable to measurement errors and inherent loss in weight[4].
Given the custom in international grain trade for the issuance of Bills of Lading with the weight figure determined by terminal silo[5] scales, the United Kingdom had proposed the inclusion in the Hague Rules of a provision whereby in case of shortage claims for bulk cargoes, the shipper was bound to prove the weight actually delivered to the carrier. Failing to obtain consent on this matter, United Kingdom included in COGSA 1924 provisions regarding the issuance and evidentiary value of Bills of Lading for bulk cargoes[6], that were thereafter adopted in all British Empire, including Australia[7], Singapore, Malaysia, India and Malta. Similar provisions were adopted in US Carriage of Goods by Sea Act 1936, in Philippines Carriage of Goods by Sea Act, 1936 and Canada's Carriage of Goods by Water Act, 1936[8]. They are still in force in United States[9], in Philippines[10],

1 In the judgment of a claim for the shortage of a wheat cargo shipped from Tianjin to Rotterdam the Hamburg Court of Appeal held that the carrier cannot rely on the meaning of the clause *"said to weigh"* for an exclusion of liability and the carrier should in fact state that it had no reasonable means of checking the cargo's weight so as to exclude its liability.

2 The 1975 UNCITRAL Report on Bills of Lading contains the following commentary: *"Some jurisdictions have held that, in order to avoid responsibility for statements as to weight shown on the bill of lading, a carrier's reservation to such statements noted on the bill of lading must be sufficiently specific to advise the consignee or other third party of the relevant facts giving rise to the reservation. These jurisdictions have not accepted vague or general reservations and some have insisted that, to be given effect, a reservation must disclose the grounds for the carrier's suspicion that the shipper's information is inaccurate or why the carrier lacks reasonable means for verifying the information."* See paragraph 36 of "Fourth Report of the Secretary-General on responsibility of ocean carriers for cargo: bills of lading" (A/CN.9/96/Add.1; UNCITRAL Yearbook, vol.VI: 1975) at the 8th Session of United Nations Commission on International Trade Law (UNCITRAL). The Report can be viewed on UNCITRAL web site www.uncitral.org

3 See Noble Resources Ltd. v. Cavalier Shipping Corporation (The "Atlas"), [1996] 1 Lloyd's Rep. 642

4 See Asian Terminals, Inc. v. Simon Enterprises, Inc., The Supreme Court of the Republic of the Philippines, First Division, G.R. No. 177116, 27 February 2013; Malayan Insurance Co., Inc. v. Jardine Davies Transport Services, Inc., The Supreme Court of the Republic of the Philippines, G.R. No. 181300, 18 September 2009.

5 In US and Canada, the silos are referred to as "grain elevators".

6 Those provisions of UK's Carriage of Goods by Sea Act, 1924 (Section 5) were repealed by Carriage of Goods by Sea Act 1971.

7 Those provisions of Australia's Sea-Carriage of Goods Act, 1924 (Section 8) were repealed by Australian Carriage of Goods by Sea Act 1991.

8 The provisions of Section 6 of Canada's Carriage of Goods by Water Act, 1936 were repealed by Part 5 of Marine Liability Act.

9 See Section 1310 of US Carriage of Goods by Sea Act, 1936

10 See Section 11 of Philippines Carriage of Goods by Sea Act, 1936

Singapore[11], Malaysia[12], India[13], Pakistan[14], Malta[15], in some of the states which are part of Commonwealth, i.e. Jamaica[16], Antigua and Barbuda[17], Tuvalu[18], Solomon Islands[19], Niue[20], and in the British Overseas Territories, e.g. Bermuda[21], Montserrat[22]. These provisions stipulate that:

"Where under the customs of any trade the weight of any bulk cargo inserted in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or the shipper, and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then, notwithstanding anything in the Rules, the bill of lading shall not be deemed to be prima facie evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading, and the accuracy thereof at the time of shipment shall not be deemed to have been guaranteed by the shipper."

In the US law case **Spencer Kellogg v. S/S Mormacsea[23]**, the US District Court of New York held that these law provisions would be taken into consideration only if there is evidence of the trade custom and the weight disclaimer inserted in the Bills of Lading by the carriers complies with the law provisions, i.e. the carrier states in Bill of Lading that *"there is a custom of relying upon the weight stated by a specified third party, and that the purported weight is that declared by the third party, not by the carrier".*
Furthermore, the US District Court of New York held that the weight figure should not be indicated separately as the actual weight of goods and then separately disclaimed.
Accordingly, it is recommended to write the weight disclaimer in the Bills of Lading taking into consideration the relevant law provisions in the shipper's country and the rules adopted by the Courts in this matter. For instance, in the United States, the accuracy of weight figure stated in the Bills of Lading issued for grain and oilseeds cargoes is certified by a government agency, the Federal Grain Inspection Service. The weighing of US grain shipments is made in the terminal elevator scales under the supervision of federal inspectors so that any weight disclaimer in the Bills of Lading should state that, and not just state *"said to weigh"*. Therefore, when a weight disclaimer is deemed necessary in the Bills of Lading, the shipowners can give instructions to the ship agents to issue the Bills of Lading with the following statement:

"The weight figure stated in this Bill of Lading has been furnished by the Federal Grain Inspection Service in accordance with the custom of trade for ascertaining the weight of bulk grain cargoes with the terminal elevator scales.
Carrier agrees to issue this Bill of Lading with the weight figure ascertained by terminal elevator scales relying on the custom of trade and makes no representation with regard to the accuracy of weight figure stated herein. According to the weighing performed ashore under custom of trade, the shipment of wheat in bulk is said to weigh: …...................."

Based on the New York District Court's interpretation of US COGSA 1936 in **Spencer Kellogg v.**

11 See Section 5 of Singapore Carriage of Goods by Sea Act, 1998
12 See Section 6 of Malaysian Carriage of Goods by Sea Act, 1950
13 See Section 6 of Indian Carriage of Goods by Sea Act, 1925
14 See Section 6 of Pakistan's Carriage of Goods by Sea Act, 1925
15 See Section 6 of Malta's Carriage of Goods by Sea Act, 1954
16 See Section 15 of Jamaica's Carriage of Goods Act
17 See Section 5 of Carriage of Goods by Sea Act of Antigua and Barbuda, 1926
18 See Section 5 of Tuvalu's Carriage of Goods by Sea Ordinance, 1926
19 See Section 6 of Solomon Islands Carriage of Goods by Sea Act, 1926
20 See Section 10 of Niue Sea Carriage of Goods Act, 1940
21 See Section 4 of Bermuda Carriage of Goods by Sea Act, 1926
22 See Section 6 of Montserrat Carriage of Goods by Act, 2002
23 538 F. Supp. 230 (S.D.N.Y. 1982)

S/S Mormacsea[24], the Bills of Lading with such statement would not be deemed prima facie evidence of weight in case of shortage claims against the carriers, provided such Bills of Lading incorporate the provisions of US COGSA 1936, as does NORTH AMERICAN GRAIN BILL OF LADING form.
Currently, there is no Bill of Lading form in use with a weight disclaimer referring to the custom of trade for ascertaining the weight of bulk grain cargoes. For a brief statement, the carriers can use as example the weight disclaimer of the “AUSTWHEAT BILL” form published in 1990 by the former Australian Wheat Board to be used for Australian wheat shipments. The weight disclaimer had the following wording:

“Shippers' description of goods
….. in bulk
the weight ascertained or accepted by the Silo Authority[25] under the custom of the trade, weight shipped unknown, and to be delivered in the like apparent good order and condition at the aforesaid port(s) of discharge.
Silo Authority's Weights -
Weight shipped unknown, but said to weigh: …....................”

If the Bill of Lading is not prima facie evidence of the weight stated therein, the CFR and CIF buyers claiming the value of quantity shortage from the carriers will have the burden to prove that the weight stated in the Bill of Lading was actually shipped on board the vessel. In such case the responsibility for the quantity shortages is primarily upon the shippers and surveyors.
For the US grain shipments the shortage claims are settled to buyers by a state agency, GIPSA (Grain Inspection, Packers and Stockyards Administration) because this agency provides the Federal Grain Inspection Service certification of quality and weight for the US export shipments of grains.
A similar approach it is recommended in Canada where the accuracy of weight figure stated in the Bills of Lading is certified by a government agency, the Canadian Grain Commission. The weighing of Canadian grain shipments is made in the terminal elevator scales under the supervision of the Canadian Grain Commission's inspectors so that any weight disclaimer in the Bills of Lading should state that.
The settlement of shortage claims with these agencies is based on their certificates of weight.

24 538 F. Supp. 230 (S.D.N.Y. 1982)
25 The reference to “Silo Authority” in “AUSTWHEAT BILL” form and later in “AUSGRAIN BILL” form was a reminiscent of the time when the port grain terminals in Australia were owned and operated by the former Bulk Handling Authorities. The Bulk Handling Authorities were state monopolies authorised to receive, store and handle wheat on behalf of Australian Wheat Board. There was a Bulk Handling Authority in each Australian state. However, since 1990 when the “AUSTWHEAT BILL” form was adopted, things have changed. The former Bulk Handling Authorities became private companies and export grains in their own name. The weight of Australian grain shipments is now determined under the supervision of the independent superintendent companies. So that the reference to “Silo Authority” in the “AUSTWHEAT BILL” form should be deleted and the Bills of Lading should state that the weight of cargo has been ascertained by the independent superintendent company pursuant to the custom of trade for ascertaining the weight of bulk grain cargoes with the silo scales.

Charterparty And Bill Of Lading Clauses Used To Protect The Carriers Of Bulk Grain Cargoes In Case Of Claims Based On "Paper Shortages"

by Vlad Cioarec, International Trade Consultant

The shortage claims under the Bills of Lading are made by the CFR and CIF buyers.

The CFR and CIF prices and the settlement of payment in the CFR and CIF sale contracts are based on the shipped weight figure ascertained at the time of shipment by shore scales, but if there is any difference between the Bill of Lading weight figure and the shore delivered weight figure, the sellers must reimburse to buyers the value of such quantity differences. Therefore, the sellers should pay for the quantity differences and not the carriers.

Nonetheless, the CFR and CIF buyers frequently claim the value of quantity differences from the carriers. The claims are based on the figures resulted from shore weighing on the grounds that the commodity prices and settlement of payment are based on these weight figures and therefore, the calculation of damages for the quantity shortages should also be based on these figures.

An example of such case was provided in London Maritime Arbitration Case No. 27/17[1].

A commodity trader chartered a vessel for the carriage of a cargo of wheat in bulk sold on CFR Alexandria, Egypt terms. The voyage charter party provided that the shipowners will not be responsible for cargo shortages resulting from the comparison of weight figures ascertained by shore scales at loading and discharge ports as long as the seals of hatch covers remained intact during the carriage.

Upon the completion of discharge, the Egyptian buyers made a shortage claim based on the difference between the Bill of Lading weight figure and the weight figure ascertained by Customs weighbridge at discharge port. The Egyptian buyers detained the vessel for 10 hours after the completion of discharge until the shipowners settled the shortage claim.

Then the shipowners started arbitration proceedings against the voyage charterers (CFR sellers) to recover the amount paid to CFR buyers and the charges for detention of vessel after the completion of discharge.

The charter party did not provide which party shall be responsible for the settlement of a shortage claim and for the time lost by the vessel at discharge port due to such claim.

After analysing the documentary evidence, the LMAA[2] Tribunal held that since the seals of hatch covers were found intact upon the vessel's arrival at discharge port, the alleged cargo shortage occurred due to the measurement errors at discharge port. Therefore, the charterers were bound to indemnify the shipowners for the settlement of shortage claim with cargo receivers and for the time lost thereby by the ship at discharge port.

The carriers of bulk grain cargoes contend that discrepancies between the Bill of Lading weight figure and the weight figure ascertained by Customs weighbridge at discharge port occur due to the use of different weighing devices which do not have the same measurement accuracy. Hence, such discrepancies are merely *"paper shortages"*.

The carriers contend that according to Art.1(e) of the Hague-Visby Rules, the carrier's responsibility for the goods begins from the time when the goods are loaded on board the ship and ends when the goods are discharged from the ship and therefore, the question of carrier's liability should be determined by comparing the weight figures stated in the vessel's draft survey reports issued at loading and discharge ports and analysing all other relevant evidence: i.e. hatch sealing certificate[3], hatch unsealing certificate[4] and empty holds certificate.

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1 (2017) 987 LMLN 4

2 London Maritime Arbitrators Association

3 The certificate signed by shippers' representative confirming the sealing of hatch covers on completion of loading.

4 The certificate signed by receivers' representative confirming the integrity of seals upon the ship's arrival at the port of discharge.

The shipowners include in their charterparties clauses that place the responsibility for "paper shortages" upon charterers when the draft survey reports, hatch sealing and unsealing certificates and empty holds certificates evidence no physical loss of cargo. These clauses require the charterers either to indemnify shipowners in the event of shortage claims settled by the latter[5] or to settle themselves the shortage claims lodged by the cargo receivers, as in the following example:

"If the seals of hatch covers are found intact upon the vessel's arrival at discharge port and the weight figure calculated based on the joint draft survey at discharge port is compatible with the weight figure calculated based on the joint draft survey at loading port, then the Owners shall not be responsible for any shortage claim which is to be settled directly between the Charterers and Receivers."

The shipowners can protect against claims for "paper shortages" also by including in the Bill of Lading's Conditions of Carriage a clause stipulating that the carrier shall only be liable for the cargo shortage or loss to be determined as the difference between the weight figure ascertained by joint draft survey at loading port and the weight figure ascertained by joint draft survey at the port of discharge. Such a clause shall be opposable to the Bill of Lading holders.

5 See the Award No. 1158 of Chambre Arbitrale Maritime de Paris published in Gazette de la Chambre Issue No.18/ 2008

The Carriers' Responsibility Over The Proper Description Of Apparent Condition Of Bulk Grain Cargoes In Bills Of Lading

by Vlad Cioarec, International Trade Consultant

Conditions For The Issuance Of Bills Of Lading For Contaminated Cargoes

Grains are not shipped perfectly clean. It is customary to contain a small percent of non-damaging foreign materials, usually no more than 1%, resulting either from harvest or thereafter that had not been eliminated through the cleaning process. The ratio of such foreign materials in grain cargoes must be within the permissible ratio stated in sales contract specifications, otherwise the cargo would either be sold at a discount or rejected.

The responsibility to ascertain whether the quality of grain cargoes is in conformity with the sales contract specifications is upon the independent surveyors appointed by sellers and buyers[1].

The grain charter parties frequently include loading survey clauses which provide that the Master has the right, in conjunction with the charterers' surveyor, that is, subject to surveyor's consent, to reject any cargo that contains foreign materials or alternatively, clause the Bills of Lading issued for such cargo. However, whilst the surveyor's responsibility is to determine whether the cargo is in conformity with the quality specifications of sales contract, the Master's responsibility under Article III Rule 3 of the Hague-Visby Rules is to properly describe in Bill of Lading the apparent order and condition of cargo. Whether the cargo is in accordance with the quality specifications of sales contract it is irrelevant to the Master[2]. The Master is not concerned with the quality specifications for the cargo but with its apparent condition and the way this is described in Bill of Lading[3].

Due to the different responsibilities of surveyors and Master, disputes occurred in the past over the interpretation of loading survey clauses and the way cargo was described by the shippers in Bill of Lading, the surveyors arguing that cargo is within the quality specifications of the sale contract, the carriers and Masters arguing that the cargo description in the Bills of Lading had to mention about the presence of foreign materials and their nature.

If the sale contract stipulates that the grain cargo may contain a small percent of foreign materials such as 1 or 2% and the surveyors certify that the content of foreign materials does not exceed the maximum limit stipulated in the sale contract, then the shipper's description of cargo in the Mate's Receipt and Bills of Lading should mention about that. Otherwise, the Master should add a remark to shipper's description specifying the nature and estimated quantity of foreign materials.

In a dispute reported in 2006[4], the LMAA Tribunal held that if the surveyor says that cargo is within the quality specifications of the sales contract, the Master cannot reject the cargo but he can qualify the shipper's description of cargo to mention about the foreign materials.

In case of clausing the Mate's Receipt and Bills of Lading, the Master's statement should indicate the estimated proportion of foreign materials in the cargo, presumably based on the samples' analysis made by vessel's P&I Club surveyors, e.g. “cargo contains ...% foreign materials”, and not just mention about contamination, to avoid creating a false impression about the extent of contamination. In **The “David Agmashenebeli”**[5] case, the English High Court held that words which indicate that only a small proportion of the cargo is likely to be affected would be essential.

The failure to properly describe the cargo in Bill of Lading would expose the carrier to claims from the buyers of cargo.

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1 The only major exporting countries were quality inspections are performed by state agencies are United States and Canada.

2 See London Arbitration No. 12/07 (2007) 719 LMLN 3

3 See London Arbitration No. 12/07 (2007) 719 LMLN 3

4 London Arbitration No. 19/06 (2006) 705 LMLN 1(2)

5 [2002] EWHC 104; [2003] 1 Lloyd's Rep. 92

In the Australian law case **Hunter Grain Pty Ltd. v. Hyundai Merchant Marine Co. Ltd. and Malaysian International Shipping Corporation BHD**[6], a cargo of soyabean meal in bulk had been contaminated at the commencement of loading with a residue of soda ash left in the conveyor loading equipment from a previous shipment due to stevedore's failure to properly clean the loading equipment. When the belt conveyor set in motion, the vessel's officer supervising the loading noticed that an unidentified material was loaded in one of the vessel's holds before the soyabean meal. The Master asked the stevedores to stop the loading, but the stevedores refused insisting that the quantity of contaminant which had entered into the vessel's hold was not substantial. The stevedores were backed by the cargo surveyor which estimated that the quantity of contaminant was less than 50 pounds or 22.7 kilograms.
After the completion of loading, the vessel's Chief Officer issued the Mate's Receipt with the following clause:

"EXCEPTION. Above cargo of soy bean meal has been noted to have been contaminated with soda ash cargo residues from the loading facility/conveyor system during start of loading operation."

After the vessel sailed away, the shipper gave the time charterer a letter of indemnity for issuing the Bill of Lading without the clause inserted in the Mate's Receipt by the vessel's Chief Officer.
The clean Bill of Lading enabled the shipper to obtain the payment under letter of credit on 24 August 1990. On 5 September 1990, the shipper informed the buyer that:

"a quantity of soda ash was loaded on board the vessel prior to the loading of the consignment and that some contamination had occurred [but the surveyor estimated that] the quantity was only 20 or 30 kilograms."

After discharge of cargo at destination, it was found that about 23 tonnes of the total quantity of 3,352 tonnes of cargo had been badly affected. Also affected, although less seriously than the 23 tonnes, were a further 772 tonnes, i.e. over 20 percent of the entirety of the cargo. Based on out-turn results, it was estimated that *"almost a tonne of soda ash was in the conveyor system"*.
The buyer of cargo, Hunter Grain, sought to recover the financial loss incurred from the time charterer, Hyundai Merchant Marine and the shipowner, Malaysian International Shipping Corporation through a claim for misrepresentation of the condition of soyabean meal cargo in the Bill of Lading.
The Federal Court of Australia held that the issuance of Bills of Lading by charterer's agents without the Chief Officer's remark in the Mate's Receipt about contamination constituted a misrepresentation intended to deceive the paying bank and ultimately, the buyer as consignee of the cargo. The Court held that the shipowners had no involvement in the issuance of Bills of Lading without the Mate's Receipt clause about contamination and that time charterers and their agents, Sunrise were responsible for the misrepresentation. The relevant passage of the judgment is quoted below:

"My analysis of the evidence has shown that Malaysian did not engage in any misleading or deceptive conduct.
Its employees, particularly the Master and Chief Officer of the vessel, brought the contamination to the notice of Hyundai's agents and provided them with a qualified receipt in respect of the cargo. [...]
There is a strong case for saying that Hyundai did engage in such conduct. …
Hyundai and its agent, Sunrise, lent themselves to a situation in which they well knew that the Hunter Grain as consignee of the cargo and its Bank were to be deceived by the sending to

6 (1993) 117 ALR 507

Australia of a false document, namely, a bill of lading containing a clean receipt for the cargo when a qualified receipt was required. ...
Hyundai cannot therefore be heard to deny that the goods were received on board in apparent good order and condition. The fact that they were not due to no fault of Hyundai is not to the point …
The estoppel prevents it from relying on this evidence."

Thus, if the carrier issues a clean Bill of Lading for a cargo in a damaged condition in exchange for a letter of indemnity from the shipper and then a third party purchases the cargo in reliance on the clean Bill of Lading, the carrier is estopped from offering other evidence of the cargo's pre-shipment condition. The damage will be presumed to have occurred after loading and the carrier will therefore be liable for it.

Conditions For The Issuance Of Bills Of Lading For Infested Cargoes

Should the cargo description in the Bills of Lading mention about the insect infestation when the cargo is fumigated after being loaded on board the vessel?
This question was raised in the 1999 US law case **Ventura Maritime Co. Ltd. v. ADM Export Co.**[7], where a cargo of soyabean meal was noticed at the time of shipment to be infested with live insects. After loading, the shipper had fumigated the cargo.
The dispute broke out when the Master put in the Mate's Receipt the remark *"cargo fumigated due to live infestation"*. After finding about this, the original buyer was not interested anymore to buy the cargo. The shipper found another buyer in Ireland which agreed to accept the Bills of Lading with the remark *"cargo fumigated due to live infestation"*. When the cargo was discharged in the port of Dublin, it was free of infestation, dead or alive.
The shipper claimed damages for delay in the issuance of Bill of Lading. The US District Court of Louisiana ordered the shippers to submit their claim to arbitration in London pursuant to the arbitration clause incorporated in the Bill of Lading.
The LMAA Tribunal held in similar disputes that if the grain cargo is infested with insects, the carrier is not only entitled to demand that the Bills of Lading issued for the cargo be properly claused, but they have a duty vis-à-vis third party holders of Bills of Lading to ensure that the Bill of Lading reflect accurately the condition of cargo at the time of shipment[8]. This is so even in cases where the vessel is chartered based on "SYNACOMEX 2000" grain charter party which includes the following provisions:

"When fumigation has been effected at loading port and has been certified by proper survey or by a competent authority, Bills of Lading shall not be claused by Master for reason of insects having been detected in the cargo prior to such fumigation."

The fact that the Master is aware that the cargo will be fumigated after the completion of loading it is irrelevant to the Master[9]. Although there is a practice to fumigate the grain cargoes after the completion of loading, this does not mean that all grain cargoes can contain live insects to the extent that they are readily noticeable during loading. Furthermore, there have been cases where the fumigation was not properly done at loading port and the cargo was found infested at the port of discharge.
The Master's responsibility under Article III Rule 3 of the Hague-Visby Rules is to properly describe in Bill of Lading the apparent order and condition of cargo. If the clause 11 "SYNACOMEX 2000" grain charter party is interpreted as requiring the Master to mis-state the condition of cargo in the Bills of Lading in order to deceive the buyers of cargo, then it is

7 44 F. Supp. 2d 804 - Dist. Court, ED Louisiana 1999
8 See London Arbitration No. 12/07 (2007) 719 LMLN 3
9 See London Arbitration No. 12/07 (2007) 719 LMLN 3

unenforceable. The clause was also considered to be contrary to the Article III Rule 8 of the Hague-Visby Rules.