



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:

- **GTA FOB Contract No.1, Edition 2018**
- **The Australian Shipping Regulations For The Export Of Grain And Oilseeds In Bulk**
- **Who Bears The Liability For The Time Lost By The Vessel Due To Port Congestion If The Vessel Subsequently Fails To Pass The Holds' Inspection**
- **The Liability For The Vessel Berthing Delays Incurred Due To The Unavailability Of The Bills Of Lading At The Port Of Discharge**

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

The Review Of GTA FOB Contract No.1, Edition 2018 And Australian Shipping Regulations For The Export Of Grain And Oilseeds In Bulk

by Vlad Cioarec, International Trade Consultant



The GTA FOB Contract No.1 is a contract form issued by Grain Trade Australia to be used for the FOB sales of Australian grain and oilseeds in bulk.

Vessel Nomination

Vessel Requirements

Clause 12 stipulates that the tankers, tween deckers and ore/oil vessels are excluded. Furthermore, it states that the FOB buyer must “*provide freight to permit shipment to be made in accordance with this contract*”. Given that the delivery terms are “FOB stowed and spout trimmed”, it means that the buyers of Australian grain cargoes should nominate only conventional bulk carriers, i.e. single deck, self-trimming bulk carriers.

Except for the International Ship Security Certificate, the contract does not mention any other IMO required certificates, i.e. the Document of Authorisation For The Carriage of Grain in Bulk, Maritime Labour Certificate, Safety Management Certificate and Document of Compliance with the ISM Code.

In order to ensure the shipowners' compliance with the requirements of the International Transport Workers' Federation (ITF), the contract requires the buyers to include in the charter party the following clause:

“The Owners of the Vessel guarantee that the minimum terms and conditions of employment of the crew of the Vessel are now or will be prior to presentation of the Vessel for loading and will remain for the period of the Charterparty covered by an I.T.F. [International Transportworker's Federation] Agreement or a bona fide trade union agreement acceptable to the I.T.F.”

However, the shipowners are not part to the sale contracts. The vessel nomination clause should have included the requirement that if the vessel sails under a Flag of Convenience, the vessel must have on board a valid ITF Blue Card. A valid ITF Blue Card is the evidence of the fact that the minimum terms and conditions of employment of the crew of the vessel are approved by the ITF.

The sale contract should have also stipulated that if berthing and/or loading of the vessel is prevented or delayed by a boycott of the vessel by the shore labour (stevedores) due to the vessel not possessing a valid ITF Blue Card, any time lost thereby shall not count and the buyers shall reimburse the sellers any expenses whatsoever caused thereby, including the cargo storage charges.

Vessel Nomination Procedure

The Sub-Clause 9(c) of the GTA FOB Contract No.1 stipulates that the buyers must give sellers the vessel's nomination notice “*within the time specified in any applicable Port Protocol but no fewer than 22 consecutive days before the first day of the Delivery Period*” providing the vessel's laycan, vessel's ETA, vessel's name and details, approximate quantity of cargo required to be loaded, demurrage/dispatch rates and cargo's destination.

The final quantity of cargo “as per stow plan” must be notified not later than 10 days prior to the vessel's ETA. Any additional quantity requested by the buyer within the contractual tolerance is to be paid at the contract price.

The Port Protocols published by the Australian port operators provide different nomination procedures and different pre-advance periods.

CBH Group established a 22 days' pre-advance period for the submission of the vessel's ETA notice rather than for the actual nomination of vessel. The vessel's ETA notice must be given not later than 22 days prior to the vessel's ETA and not prior to the first day of the delivery period. The only condition is that the vessel's ETA to be within the vessel's laycan at loading port referred to as the "Shipping Window". The actual nomination of the vessel "*does not have to be provided until the date that is no later than 15 days before the ETA*", while the Stowage Plan can be provided until not later than 48 hours before the vessel's ETA¹.

Viterra established a 14 days' pre-advance period for the vessel's nomination².

GrainCorp requires the Australian exporters to give first the vessel's ETA notice not earlier than 42 days and not later than 21 days prior to the delivery period. The vessel's nomination notice has to be provided not later than 10 days prior to the vessel's ETA date³.

ETA Notice

GTA FOB Contract No.1 has no provisions but the Sub-Clause 13.1 of GTA Voyage Charter provides that the vessel's Master must notify the shippers and charterers within 24 hours after the acceptance of vessel, giving the vessel's ETA and providing the stowage plan with the maximum quantity of cargo that can be loaded on deepest departure draft.

ETA Updates

GTA FOB Contract No.1 has no provisions but the Sub-Clause 13.1 of GTA Voyage Charter provides that the vessel's Master must notify the shippers as to the vessel's ETA at the first loading port at every 24 hours from the time of nomination.

Conditions For The Vessel Substitution

The buyers may substitute the originally nominated vessel provided that the substitute vessel complies with the contract requirements to be able to load the same quantity within the same laycan as the originally nominated vessel.

The Clause 13 of GTA FOB Contract No.1 does not provide a time limit for the submission of substitution notice. It requires the buyers to give the substitution notice "*as soon as possible*" before the ETA of the originally nominated vessel.

Sub-Clause 10.1 of GTA Voyage Charter provides that the shipowners may nominate a substitute vessel if they send the substitution notice to the shippers and charterers at least 12 clear days before the commencement of laycan period and the ETA of the substitute vessel is not later than the last day of laycan period.

GrainCorp Bulk Wheat and Bulk Grain Port Terminal Services Protocols stipulate that a nominated vessel may be substituted with another vessel provided that the substitute vessel is a vessel of similar size and capacity, with similar rates of de-ballasting and loading capability as the originally nominated vessel and that the substitute vessel will arrive within 5 days of the originally nominated ETA date. Otherwise, the Australian exporters and ultimately, the buyers will be required to pay a new booking fee for the requested storage capacity.

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

The buyers must present the nominated vessel ready in all respects to load at all hatches required for loading under the sale contract. To be considered physically ready to load, the nominated vessel must comply with the regulations of the Australian Maritime Safety Authority (AMSA) and holds'

1 See CBH Group Port Terminal Rules – 2017/2018.

2 See Viterra Port Loading Protocols – Version December 2015.

3 See GrainCorp Bulk Wheat and Bulk Grain Port Terminal Services Protocols – 2017/2018.

cleanliness requirements of the Australian Government Department of Agriculture.

Vessel Compliance With The AMSA Regulations

The AMSA regulations are stipulated in The Marine Order 33 (Cargo and cargo handling – grain) 2016 of The Australian Maritime Safety Authority.

At least 72 hours before intended loading of grain in bulk, the Master must send to the Australian Maritime Safety Authority a notice of intention to load grain.

Before loading, an inspector of the Australian Maritime Safety Authority will require the vessel's Master to demonstrate that the vessel can comply with the stability requirements of the International Grain Code. The vessel's Master must provide to the AMSA inspector the documents necessary to demonstrate the compliance with the International Grain Code: i.e. the Document of Authorisation For The Carriage of Grain in Bulk, the approved grain stability data, proposed loading plan, grain stability calculations, shear force and bending moment calculations.

Vessel Compliance With The Holds' Cleanliness Requirements Of Department Of Agriculture

The Export Control (Plant and Plant Products) Order 2011 requires that the vessels intending to load bulk grain cargoes be inspected and approved for loading by a marine surveyor appointed by the shipowners and by an authorised officer of the Australian Government Department of Agriculture.

The obligations of marine surveyor are stipulated in the Section 33 of The Export Control Order 2011. The marine surveyor shall inspect the vessel's holds to establish whether they are suitable to carry the grain cargo.

“If the marine surveyor is satisfied that the vessel:

(a) is free of conditions that could result in contaminating, wetting or imparting an odour of goods; and

(b) is a suitable vessel to carry the goods in the areas proposed;

the marine surveyor may issue a certificate to that effect and give the certificate and a copy to the master of the vessel.”

The obligations of the authorised officers of the Department of Agriculture are stipulated in the Section 37 and Schedule 5. The authorised officers inspect the vessel to verify whether she complies with the phytosanitary requirements stated in the Section 37 of the Export Control Order 2011, that is, *“there are no pests, or infestible residues that could harbour pests or diseases, or conditions that could permit cross – infestation”*. After inspection, the authorised officers will issue the Vessel Approval, *“if he or she is satisfied that:*

(a) the cargo spaces and other parts of the vessel, or any cargo already loaded in the vessel, are not likely to infest or infect the goods with pests;

(b) no material is present in the cargo spaces or other parts of the vessel that is likely to harbour pests or diseases.”

The Contractual Time Limit For Tendering Valid NOR

In GTA FOB Contract No.1, the contract delivery period is a period for presentation of the vessel during which the buyers' vessel must arrive and tender valid NOR. If subsequently, the contracting parties agree to narrow this period, then the buyers' vessel must arrive and tender valid NOR within the narrowed period rather than the original delivery period.

In a dispute settled by the GTA Tribunal (GTA Arbitration No. 187/2014) the buyers contended that the sale contract required the vessel only to arrive within the narrowed period and not to tender valid NOR.

The sale contract in dispute incorporated the terms and conditions of GTA FOB Contract No.1, Edition 2008, which provided that the buyers' vessel must arrive and tender valid NOR within the

contract delivery period, but also that following the laycan fixation the NOR had to be tendered “*at latest by 12:00 hours on the last day of the laycan*”.

The contract delivery period was 1 – 30 April 2013. The contracting parties subsequently agreed to narrow the delivery period to the vessel's laycan which was 9 – 15 April 2013.

The vessel arrived at loading port and tendered NOR at 07:06 hours on 12 April 2013 but on 18 April 2013 the vessel failed the holds' inspection at anchorage.

On 23 April 2013, the vessel finally passed the holds' inspection and the Master tendered a new NOR. The cargo was loaded between 26 and 29 April 2013.

The sellers claimed the reimbursement of additional port storage charges paid to the port operators due to the vessel's failure to pass the holds' inspection and tender valid NOR within the laycan.

The sale contract provided that:

“It is the responsibility of the Buyer to ensure the performing/nominated vessel complies with all restrictions of the load port and load berth. Should loading of the vessel be precluded or delayed due to non-compliance, all resulting costs and penalties are for Buyers' account.”

The GTA Tribunal upheld the sellers' claim holding that the terms “delivery period”, “laycan” and “vessel arrival window” were used interchangeably to refer to the period for the presentation of vessel and once the narrowed delivery period was agreed, the buyers' vessel had to tender valid NOR within that period.

In the GTA FOB Contract No.1, Edition 2015, the former requirement from the Clause 13 of GTA FOB Contract No.1, Edition 2008, to tender NOR “*at latest by 12:00 hours on the last day of the laycan*” was dropped. The current edition of GTA FOB Contract No.1, Edition 2018, provides that the vessel must tender valid NOR within the contract delivery period and that the NOR may only be given from Monday to Friday, except holidays at the loading port, between 09:00 hours and 17:00 hours local time which means that the buyers' vessel must tender valid NOR and therefore, be approved for loading not later than 17:00 hours on the last working day of the contract delivery period.

These provisions are inconsistent with those of Sub-Clause 20.1 of the GTA Voyage Charter which provides that the vessel must be ready in all respects to load at all hatches at first loading berth by 24:00 hours on the last day of the laycan.

The Implications Of The Vessel's Late Arrival

The port operators schedule the grain shipments in function of the vessel's laycan and expected readiness date.

If the Master will notify the shippers and port agents that the vessel will not be able to present for loading on the expected readiness date due to unexpected delays on the approach voyage to the loading port, the port operators will re-schedule the shipment date usually with no additional costs provided that the vessel will arrive within the contractual time limit after the expected readiness date.

The time limit is usually 5 days after the expected readiness date. If the delay in the vessel's arrival exceeds the time limit allowed by the port operators, the port operators will charge additional costs.

The CBH Group Port Terminal Rules stipulate that if the vessel will tender valid NOR 5 or more clear days than the vessel's expected readiness date, the shippers shall pay an “Incorrect ETA Fee”⁴.

If the vessel arrives after the expiry of laycan but within the 7 days' grace period after the laycan, the shippers shall pay a “Late Vessel Fee”⁵.

Given that the port operators will invoice these additional charges for the shippers' account, the Australian shippers should provide in their sale contracts the buyers' obligation to reimburse the

4 See Sub-Clause 8.1 (e).

5 See Sub-Clause 8.1 (f).

sums paid for these charges.

The sale contracts should also stipulate the contractual time limit for the presentation of vessel for loading after the expected readiness date. For instance, the Clause 9 of GAFTA Contract No. 79A provides that the buyers must present the vessel ready for loading within 5 days from the expected readiness date. Another example is the Clause 7 of ANEC Contract No. 44 which provides that the buyers must present the vessel ready for loading within 10 days from the expected readiness date⁶.

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

If the vessel arrives within the laycan but fails the holds' inspection, the port operators will charge additional costs.

If the vessel removal from berth due to the rejection of holds requires the shifting of other vessels to avoid the port blockage, GrainCorp will charge the costs of shifting the other vessels up to a maximum amount of \$ 50,000⁷.

If a vessel that has failed the holds' inspection is delayed by more than 10 days after the expected readiness date, GrainCorp will apply additional storage charges for the cargo starting from the 11th day after the expected readiness date (Assigned Load Date) until the commencement of loading⁸.

CBH Group Port Terminal Rules require the Australian shippers to arrange for the holds' inspection to be performed within 24 hours after the vessel's arrival at the anchorage place⁹ and provide the Bulk Vessel Approval Record Part B – Vessel Approval (ship's holds inspection certificate) within 24 hours of completion of the inspection. If nonetheless the vessel is ordered to berth by the shippers without first passing the holds' inspection and after berthing she fails the holds' inspection, CBH Group will charge a “Failed Survey Fee”¹⁰. The “Failed Survey Fee” will apply from the day the vessel fails the holds' inspection (Day 1) up to and including the day the vessel is deemed to have passed the holds' inspection, each day inclusive¹¹.

The Clause 15 of GTA FOB Contract No.1 provides only that the cost of holds' inspections are for the buyers' account¹². It has no provisions about the additional costs that might be incurred as a result of the vessel's failure to pass the holds' inspection.

Given that the port operators will invoice these additional charges for the Australian shippers' account, the Australian shippers should provide in their sale contracts the buyers' obligation to reimburse the sums paid for these charges. In turn, the buyers should ensure that the sale contracts and charter parties have corresponding provisions so that in case the vessel fails to pass the inspection of hatch covers and holds, the buyers be able to recover the charges paid to sellers from the shipowners.

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, 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 London Maritime Arbitrators Association (LMAA)¹³, 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

6 5 days in case of vessel substitution.

7 See Sub-Clause 37.5 of GrainCorp Bulk Wheat and Bulk Grain Port Terminal Services Protocols.

8 See Sub-Clause 37.3 of GrainCorp Bulk Wheat and Bulk Grain Port Terminal Services Protocols.

9 There are similar requirements in GTA Voyage Charter – AusGrain 2015. Sub-Clause 15.2 provides that the holds' inspection must be performed within 24 hours after the vessel's arrival weather permitting “or otherwise as soon as is practical after weather permits”.

10 See Sub-Clause 12.2(b) of CBH Group Port Terminal Rules – 2017/2018.

11 See Sub-Clause 12.2(g) of CBH Group Port Terminal Rules – 2017/2018.

12 The Sub-Clause 15.2 of GTA Voyage Charter provides that the cost of holds' inspections are for the shipowners' account.

13 See London Arbitration 12/03, (2003) 620 LMLN 2(2)

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.

NOR And Commencement Of Laytime

The GTA FOB Contract No.1 is a berth sale contract. The vessel's Master may tender NOR only upon the vessel is ready in all respects to load, i.e. after the vessel was inspected and approved for loading by a qualified marine surveyor and an authorised officer of the Australian Government Department of Agriculture, at the berth ordered by the sellers.

However, if the loading berth is occupied at the time of the vessel's arrival at or off the loading port (or so near as the vessel is permitted to approach), the vessel's Master will be entitled to give NOR upon arrival at the port roads or waiting place. The laytime shall commence to run upon the expiry of the 24 hours' Notice time and shall count as if the vessel was in berth and in all respects ready for loading, unless subsequently the vessel fails the holds' inspection in which case the NOR tendered at the waiting place shall be deemed invalid and the time lost waiting for berth will not count as laytime or time on demurrage.

After the vessel is finally approved for loading, the Master can tender a "*fresh valid NOR*". In such case, the laytime shall commence to count upon the expiry of the 24 hours' Notice time after the "*fresh valid NOR*" has been accepted by the sellers, unless the port operators commence loading earlier in which case the laytime will commence to run from the time of commencement of loading. In the event that the sellers will deliver the goods at multiple loading ports, the laytime will commence to run as follows:

- at the first loading port, from the expiry of the 24 hours' Notice time after the sellers' acceptance of valid NOR, unless the port operators commence loading earlier in which case the laytime will commence to run from the time of commencement of loading;
- at the second or subsequent loading port, from 12:00 hours on the day of the vessel's arrival at the port, if the vessel arrives before 12:00 hours, and from 09:00 hours on the next day following the day of the vessel's arrival at the port, if the vessel arrives at or after 12:00 hours, unless loading commences earlier, in which case the time will start to count from the commencement of loading.

Extension Of The Delivery Period

The GTA FOB Contract No.1 does not give the buyers the 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.

Weight Determination

The contract stipulates that the weight figure determined and certified by the surveyors at loading port shall be final.

The weight figure stated in the Mate's Receipt and Bills of Lading is normally based on the weighing made on the terminal silo scales. The grain terminal operators and surveyors verify the accuracy of the silo scales by making a comparison with the weight figure resulted from the vessel's draft survey. If the weight figure determined by silo scales exceeds the weight figure determined by the vessel's draft survey by more than what is deemed acceptable by the grain terminal operator, then the weight figure used for invoicing and issuance of Bills of Lading will be the one determined by vessel's draft survey.

Quality And Condition Determination

Quality and Condition shall be determined based on the composite sample drawn during loading by the port operator. The sellers' surveyor certificate attesting the quality and condition of goods at the time and place of loading shall be final as to the quality and condition of goods at loading port.

In case of grain cargoes, the surveyors are also required to determine and certify the fitness of goods for the purpose for which they are purchased, i.e. human or animal consumption. There is no mention in the contract about this or about the requirement that the surveyors' certificate as to the fitness of goods shall be final.

Fumigation

The buyers have the option to request the fumigation of cargo after the completion of loading, but they shall bear all the costs and liabilities resulting therefrom.

Insurance Cover

The buyers must obtain insurance covering the grain shipment from the time of commencement of loading, i.e. from the time the grain passes the discharge end of the shiploader spout because that is the point upon which the risks of loss and damage pass to buyers in case of a sale on FOB spout trimmed basis, and upon the sellers' request must provide evidence of insurance cover.

Prevention Of Delivery Clause

The GTA FOB Contract No.1 incorporates the GAFTA Prevention of Delivery Clause to avoid conflicts between different terms in case of back-to-back sales, where the grain traders buy the cargoes FOB basis subject to the terms of GTA FOB Contract No.1 and sell them on CFR or CIF basis subject to the terms of GAFTA Contract No. 19.

Deadline For Giving Notice Of Force Majeure

In case of an event of force majeure such as

- the prohibition of export or other executive or legislative act done by or on behalf of the government of the country of origin restricting export; or
- blockade, acts of terrorism or hostilities; or
- strikes, lockout, riot or civil commotion; or
- breakdown of loading installation, fire or Act of God; or
- unforeseeable and unavoidable impediments to [inland] transportation or navigation;

that prevents the sellers' performance of their contractual obligations, the sellers must serve notice to the buyers within 7 consecutive days of the occurrence or not later than 21 consecutive days before the commencement of the contract delivery period, whichever is the later.

In such case, the sale contract shall be suspended for the duration of the force majeure event, initially up to 21 consecutive days after the end of the contract delivery period.

Deadline For Giving Notice Of Cancellation

If the force majeure event continues for 21 days after the end of the contract delivery period, the buyers may cancel the contract by serving a notice on the sellers not later than the first business day after the end of the 21 day period.

If the buyers do not cancel the contract, the contract shall remain in force for an additional period of 14 days. After this 14 day period, the contract shall be automatically cancelled if the force majeure event continues to prevent the sellers' performance of contract.

Notice Of Cessation Of Force Majeure Event

If the force majeure event ceases before the contract can be cancelled (i.e. that is before the expiry of 21 day period after the end of contract delivery period or if the contract is not cancelled by the

buyer after the 21 days' period, before the expiry of 35 (21+14) days' period after the end of the contract delivery period), the sellers must notify the buyers that the force majeure event has ceased.

Time Allowed For Delivery After The Cessation Of The Force Majeure Event

The sellers shall be entitled from the date of cessation of force majeure event to as much time as was left for delivery under the contract prior to the occurrence of force majeure event. If the time that was left for delivery under the contract is 14 days or less, a period of 14 consecutive days shall be allowed for the delivery of goods.

Settlement Of Disputes

Disputes arising out of or under the sale contracts incorporating the GTA FOB Contract No.1 shall be referred to arbitration in accordance with the GTA Dispute Resolution Rules.

Who Bears The Liability For The Time Lost By The Vessel Due To Port Congestion If The Vessel Subsequently Fails To Pass The Holds' Inspection

by Vlad Cioarec, International Trade Consultant



Should the time lost by the vessel waiting for berth count as laytime or time on demurrage if after berthing the vessel's hatch covers and/or holds fail to pass the inspection?

The question of liability for the time lost by the vessel waiting for berth was raised in three English law cases involving grain shipments.

The first case was **Compania de Naveira Nedelka S.A. v. Tradex Internacional S.A. (The “Tres Flores”)**¹. In that case the vessel arrived at loading port to load a cargo of maize, but it was instructed to wait at anchorage for an available berth. The Master tendered NOR on 22 November 1970 upon the vessel's arrival at the anchorage place, but when the vessel was called to berth on 30th November, the port authorities discovered pests in the holds and ordered the fumigation of holds. After the fumigation, on 1 December the vessel's holds were re-inspected and approved for loading.

The shipowners claimed the payment of demurrage charge contending that the laytime commenced at 14:00 hours on 23rd November. The charterers rejected the demurrage claim on the ground that they accepted the NOR only at 11:00 hours on 1 December and therefore, the laytime commenced at 14:00 hours on 1 December.

The charter party contained the following clause:

“Before tendering notice [of readiness] master has to take necessary measures for holds to be clean, dry, without smell and in every way suitable to receive grain to shippers/charterers' satisfaction.”

The English Court of Appeal held that the charter party requirement that the vessel's holds be clean, dry, without smell and in every way suitable to receive grain was a condition precedent to the validity of the NOR. Because of that condition precedent, the vessel had to be ready at the time the NOR was given and not at a time in the future. The condition precedent was not fulfilled until the fumigation had been completed and the vessel passed the inspection of holds on 1 December. Therefore, the time lost by the vessel waiting for berth from the expiry of the Notice period at 14:00 hours on 23 November until 11:00 hours on 1 December when the vessel passed the holds' inspection did not count as laytime or time on demurrage.

The second case was **United Nations Food and Agriculture Organisation-World Food Programme v. Caspian Navigation Inc. (The “Jay Ganesh”)**². In that case the vessel arrived at loading port to load a cargo of rice, but it was instructed to wait at anchorage for an available berth. The Master tendered NOR on 10 August upon the vessel's arrival at the anchorage place. When the vessel was called to berth on 8th September, the port authorities discovered insects in the holds and ordered the fumigation of holds. After the fumigation, on 9th September the vessel's holds were re-inspected and approved for loading.

The shipowners claimed the payment of demurrage charge for the time lost by the vessel waiting for berth. The charterers rejected the demurrage claim.

The charter party contained the following clauses:

1 [1973] 2 Lloyd's Rep. 247

2 [1994] 2 Lloyd's Rep. 358

“8. Notice of Readiness (Loading and Discharging)

(a) At each port of loading and discharging notice of readiness shall be given by the Master to the Charterers or their agents when the Vessel is in the loading or discharging berth and has obtained customs clearance and free pratique and is in all respects ready to load and discharge.

(b) At loading port before tendering notice of readiness, the Owners and the Master shall ensure that all holds of the Vessel are clean, dry and free from smell and in all respects suitable to receive the cargo to the Shippers'/Charterers' satisfaction.

(c) If a loading/discharging berth is not designated or if such designated berth is not available upon the Vessel's arrival at or off the port, notice of readiness may be given upon arrival at the customary waiting place at or off the port, whether cleared at Customs or not and whether in free pratique or not.

9. Laytime Counting (Loading and Discharging)

(c) If the notice of readiness has been tendered while the vessel is at or off the port, in accordance with Clause 8(c) the laytime shall commence to count and shall count as if the vessel were in berth ...

(e) If after berthing the Vessel is found not to be ready in all respects to load/discharge, the actual time lost until the Vessel is in fact ready to load/discharge (including customs clearance and free pratique if applicable) shall not count as laytime or as time on demurrage.”

The charterers contended that the Sub-Clause 8 (b) required the vessel to be physically ready to load the rice cargo and therefore, the vessel's physical readiness was a condition precedent to the validity of NOR.

The shipowners contended that the NOR tendered on 10 August was valid so as to start the running of laytime from 11 August but subject to deduction of about two and a half days from berthing on 7 September to 9 September when the vessel passed the holds' inspection.

The LMAA Tribunal and English Commercial Court held that when the Master tendered NOR on 10 August he believed that the vessel was physically ready to load, but unknown to the Master the vessel's holds were infested with insects. The NOR tendered at anchorage was valid and the laytime started to run from 11 August so that the time lost by the vessel waiting for berth counted. If after berthing the vessel was found not to be physically ready to load, the time actually lost until she was ready did not count. The relevant paragraph of the judgment is quoted below:

“The overall effect of clauses 8 and 9 is accordingly, that this form of charter party requires that the charterers must pay for waiting time at the anchorage when they have not provided a berth, but that if the vessel then causes delay after arrival in berth because she was not in truth then ready to load or discharge, that loss of time is to be borne by the owners.”

The third case was **Agrimex Ltd. v. Tradigrain S.A. & Ors**³. In that case the vessel arrived at loading port to load a cargo of feed wheat, but it was instructed to wait at anchorage for an available berth. The Master tendered NOR on 11th March 1999 upon the vessel's arrival at the anchorage place. In the NOR the Master warranted that the vessel was *“in all respects ready to load her cargo ... in accordance with the terms and conditions of the charterparty”*. When the vessel was called to berth on 26th March 1999, she failed the holds' inspection due to the rust found on the hatch covers. After the removal of rust, the vessel's holds were re-inspected and approved for loading on 27th March 1999.

The FOB buyers claimed the payment of demurrage charge for the time lost by the vessel waiting for berth. The sellers rejected the demurrage claim. The question in dispute was whether the NOR tendered on 11th March was valid given that the vessel failed the holds' inspection after berthing on

3 [2003] EWHC 3451 (Comm)

26th March.

The FOB sale contracts under which the dispute arose incorporated the charter party terms. The voyage charter party was based on SYNACOMEX 1990 Continent Grain Charter Party form which stipulated that if the loading berth is unavailable at the time of vessel's arrival, the Master may tender NOR from "any usual waiting place", whether in port or not, whether in free pratique or not, whether customs cleared or not, provided that the Master warrants that the vessel is in all respects ready to load. If after the vessel's berthing the surveyors inspect the vessel's holds and reject them, the laytime or time on demurrage shall not count from the time the vessel's holds are rejected until the vessel's holds are accepted.

The FOB sellers contended that the NOR given at the time of the vessel's arrival at the port roads was invalid, because the vessel was not in fact ready in all respects to load and since no fresh NOR had been tendered upon the surveyor's approval of holds, the laytime did not start to count until the commencement of loading. Furthermore, it would be inconsistent with the sale contract terms to import charter party terms because the sale contracts require the service of a valid NOR and that connotes that the vessel must be ready to receive the cargo at the time it is tendered.

The English Commercial Court held that the words "as per charterparty" and "all other conditions as per relevant charterparty" were sufficient to incorporate into the sale contracts "*provision in the charterparty permitting the service of a notice of readiness when the loading berth was not available, and the provision about the position if a notice of readiness was served in such circumstances and the vessel was subsequently found to be unready*".

"[A] notice of readiness valid under the charterparty should be effective under the sale contract unless the parties stated the contrary either expressly or by clear implication."

The implication of this Court decision is that in the FOB sale contracts incorporating the SYNACOMEX Charterparty terms the time lost by the vessel waiting for berth shall count for laytime purposes in cases where after berthing the vessel's holds fail the inspection. That would be the case in the FOB contracts for the sale of French grain which are typically based on the INCOGRAIN Contract form No.13 that incorporates expressly the terms of SYNACOMEX Charterparty. It would also be the case in the FOB contracts for sale of Ukrainian, Romanian and Russian grains because the GAFTA Contract form No.49 used for such sales does not have any provision covering NOR tendering and time counting so that the NOR tendering and time counting provisions of SYNACOMEX Charterparty are incorporated by general words, as in *Agrimex Ltd. v. Tradigrain S.A. & Ors*⁴.

The Provisions Of The Other FOB Contract Forms On The Question Of Liability For The Time Lost By The Vessel Waiting For Berth In Case Of Subsequent Failure To Pass The Inspection Of The Hatch Covers And Holds

The GTA FOB Contract No.1 is a berth sale contract. The vessel's Master may tender NOR only upon the vessel is ready in all respects to load at all hatches, i.e. after the vessel was inspected and approved for loading by a qualified marine surveyor and an authorised officer of the Australian Government Department of Agriculture, at the berth ordered by the sellers.

However, if the loading berth is occupied at the time of the vessel's arrival at or off the loading port (or so near as the vessel is permitted to approach), the vessel's Master will be entitled to give NOR upon arrival at the port roads or waiting place. The laytime shall commence to run upon the expiry of the 24 hours' Notice time and shall count as if the vessel was in berth and in all respects ready for loading, unless subsequently the vessel fails the holds' inspection in which case the NOR tendered at the waiting place shall be deemed invalid and the time lost waiting for berth will not count as

4 [2003] EWHC 3451 (Comm)

laytime or time on demurrage.

After the vessel is finally approved for loading, the Master can tender a “*fresh valid NOR*”. In such case, the laytime shall commence to count upon the expiry of the 24 hours' Notice time after the “*fresh valid NOR*” has been accepted by the sellers, unless the port operators commence loading earlier in which case the laytime will commence to run from the time of commencement of loading. To avoid situations where the shipowners incur additional costs due to berth congestion, the Australian port operator CBH Group requires the Australian shippers to arrange for the holds' inspection to be performed within 24 hours after the vessel's arrival at the anchorage place⁵ and provide the Bulk Vessel Approval Record Part B – Vessel Approval (ship's holds inspection certificate) within 24 hours of completion of the inspection.

Another example of berth sale contract is **GAFTA Contract No. 38** which provides that the sellers' loading obligation and commencement of laytime will be subject to the vessel's berthing at the nominated berth and vessel passing the holds' inspection, thereby protecting the Argentine grain shippers against the potential liability for demurrage due to the time lost by the buyers' vessel waiting for berth in case of port congestion.

The shipping terms and conditions of **NAEGA FOB Export Contract** are based on the US and Canadian Shipping Regulations for the export of grain and oilseeds in bulk.

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.

Only after the vessel has passed the National Cargo Bureau and FGIS inspections and the vessel's Master has obtained the relevant certificates, he can tender NOR to the charterer's agent who will then file a berth application for obtaining the terminal elevator operator's permission for the vessel to come at berth for loading.

Upon the vessel's berthing, the vessel's holds are re-inspected by the FGIS 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 passes⁶. 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.

The NAEGA FOB Export Contract does not say when the vessel is considered an “arrived ship” for the purpose of tendering the NOR in the event that the vessel has to wait outside the port limits due to port congestion. It has no provisions in respect of the commencement of laytime in such case and no time counting provisions if the vessel subsequently fails to pass the holds' inspection.

The Sub-Clause 18 (b) of NORGRAIN 89 Charterparty form stipulates that if the vessel is prevented to enter the limits of the loading port because the loading berth or a lay berth or an anchorage place is not available within the port limits or by an order of the Charterers or a port authority, and the Master warrants that the vessel is physically ready in all respects to load, the Master may tender the vessel's Notice of Readiness “*from the usual anchorage outside the limits of the port*”. If after entering the limits of the loading port, the vessel fails to pass the National Cargo Bureau and/or FGIS inspections, the time lost by the vessel from the time the vessel fails the inspections until she is passed shall not count as laytime or time on demurrage, “*but if this delay in*

5 There are similar requirements in GTA Voyage Charter – AusGrain 2015. Sub-Clause 15.2 provides that the holds' inspection must be performed within 24 hours after the vessel's arrival weather permitting “or otherwise as soon as is practical after weather permits”.

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

obtaining said passes exceeds 24 running hours shex all time spent waiting outside the limits of the port shall not count”.

Given that the NAEGA FOB Export Contract has no provisions on this matter, the FOB buyers of US and Canadian cereals and oilseeds should ensure that the sale contracts and voyage charterparties have corresponding provisions on the question of liability for the time lost by the vessel outside the loading port limits due to port congestion.

The Liability For The Vessel Berthing Delays Incurred Due To The Unavailability Of The Bills Of Lading At The Port Of Discharge

by Vlad Cioarec, International Trade Consultant



The answer to the question of liability will depend on the actions of the parties involved: shipowners and charterers in the voyage charter party, respectively the sellers and buyers in CFR and CIF sale contracts.

If the berth at the port of discharge is available, the vessel must proceed to berth and tender NOR upon berthing. The shipowners cannot refuse the berthing of vessel due to unavailability of the Bills of Lading and then claim damages for detention¹. The late presentation of Bills of Lading may be due to delays in the banking chain. In such cases, the vessel could enter the berth, but the Master shall be entitled to refuse delivery of the cargo until the presentation of the original Bills of Lading². If the shipowners will incur demurrage and extra berth charges while waiting for the Bills of Lading at the berth, they shall be entitled to claim the reimbursement of these charges from the charterers, shippers and/or Bill of Lading holders.

If the sellers are the shippers they will remain liable as an original party to the contract of carriage, but if the sellers are not the shippers, then they cannot be held liable under the Bills of Lading.

The buyers will become liable as Bill of Lading holders upon getting into the possession of the Bills of Lading and making a formal demand for delivery of the cargo.

The party liable should be the party responsible for the delay in the presentation of the Bills of Lading. To avoid disputes, the CFR/CIF sale contracts should stipulate who shall bear the demurrage and berth charges incurred by the shipowners while waiting for the Bills of Lading at or off the berth.

What if the Master receives instructions from the charterers not to proceed to berth?

In **Glencore Grain Ltd. v. Goldbeam Shipping Inc.**³, the vessel arrived at the port of discharge on 14th June but it was not allowed to proceed to berth by the charterers due to a dispute with the buyers under the sale contract. When the dispute was settled and the Bills of Lading were presented to the ship's agent on 9th August, the Master received instructions to proceed to berth.

The shipowners claimed damages for detention of vessel prior to berthing. The LMAA Tribunal held that the vessel berthing delay was caused by the charterer's breach of charter party contract. Insofar the charterer's breach of charter party contract prevented the vessel from reaching the berth and become an "arrived ship", the shipowners were entitled to recover damages for detention of vessel prior to berthing.

Therefore, only when the Master receives instructions from the charterers or the holders of Bills of Lading not to proceed to berth, the shipowners can recover the costs for the time lost by the vessel prior to berthing. The shipowners cannot refuse the berthing of vessel due to unavailability of the Bills of Lading and then claim damages for detention prior to berthing.

1 London Arbitration No. 11/03 (2003) 619 LMLN 4

2 London Arbitration No. 11/03 (2003) 619 LMLN 4

3 [2002] 2 Lloyd's Rep 244, [2002] EWHC 27 (Comm)