



Commoditylaw

Biofuels Trade Review

Edition No.1, June 2020

Introduction

Biofuels Trade Review is a publication in which are reviewed shipping and contractual matters relevant to the international trade with vegetable oils and biofuels.

In this issue, the Editor reviews the following topics:

- **ANEC FOB Contract Form No. 81, Edition 2016**
- **The Trade Requirements And Shipping Regulations Regarding The Cargo Description In The Bills Of Lading Issued For Vegetable Oil And Biodiesel Cargoes**
- **FOSEA Contract No. 51, Edition 2020**
- **The Intended Effect Of Commingling Clause In The Charter Party Bills Of Lading Issued For Parcels Of Vegetable Oils And Biodiesel**
- **The Evidentiary Value Of The Certificate Of Analysis In FOB Sales Of Parcels Of Vegetable Oils And Biodiesel Commingled On Board The Carrying Vessel**
- **The Evidentiary Value Of The Quality Certificate In The Chain Of Commodity Sale Contracts**

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

The Review Of ANEC FOB Contract Form No. 81, Edition 2016

by Vlad Cioarec, International Trade Consultant



The ANEC FOB Contract No. 81 is a FOB contract form issued by ANEC (Brazilian Grain Exporters Association) to be used for the FOB sales of parcels of Brazilian Degummed Soyabean Oil.

Vessel Nomination

The pre-advance period for the submission of the vessel's nomination notice is minimum 15 days prior to the expected date of vessel readiness to load. In the vessel's nomination notice the buyers must provide the vessel's name and details (flag, age, ownership) and the quantity required to be loaded which must be in multiples of 500 MT. The minimum nominated quantity must be at least 500 MT.

The ANEC FOB Contract No.81 does not stipulate any requirements to be complied with by the vessel to be nominated by the buyers.

Conditions For The Vessel Substitution

The Clause 8 of ANEC Contract No.81 provides that the buyers may substitute the originally nominated vessel in the following conditions:

- the ETA of substitute vessel is not more than 5 days earlier or 5 days later than the last reported ETA of the originally nominated vessel;
- if the ETA of the substitute vessel is earlier than the last reported ETA of the originally nominated vessel, the vessel substitution notice must be given to sellers with at least 3 working days prior to the substitute vessel's ETA.

Maximum two substitutions are allowed under ANEC Contracts.

A third substitution is allowed for short shipped quantities.

Conditions For The Vessel Presentation For Loading Vegetable Oil Cargoes At Brazilian Ports

The ANEC Contract has no provision concerning the conditions for the presentation of vessel for loading, no cleanliness warranty and no mention about the mandatory inspection of tanks and pipelines and manifolds.

The acceptance of vessels for loading vegetable oil cargoes at Brazilian ports is subject to the prior approval of tanks by a surveyor of the Brazilian Ministry of Agriculture and a FOSFA Member Superintendent appointed by the sellers.

The vessel's NOR tendered after berthing must be accompanied by the Certificate of Fitness for the Carriage of Cargo issued by the surveyor of the Brazilian Ministry of Agriculture and the FOSFA Certificate of Compliance, Cleanliness and Suitability of Ship's Tanks issued by the FOSFA Member Superintendent.

NOR And Commencement Of Laytime

The vessel's Master may tender NOR only upon the vessel is ready in all respects to receive the vegetable oil cargo, i.e. after the vessel was inspected and approved for loading by a surveyor of the Brazilian Ministry of Agriculture and a FOSFA Member Superintendent, at the berth ordered by the sellers.

If the loading port is congested and/or the berth is not available at the time of the vessel's arrival at

the loading port, the vessel's Master can give NOR upon arrival at the anchorage place¹. The laytime will commence to run upon the expiry of 6 hours' Notice time after the NOR has been tendered.

The ANEC Contract does not stipulate clearly whether the time lost by the vessel waiting for berth will count or not as laytime or time on demurrage, if after berthing, the vessel fails the tanks' inspection. The Sub-Clause 10.2 paragraph (C) provides that:

“Vessel must be ready in all respects to receive cargo. In case vessel is found unsuitable, laytime starts to count only when vessel is declared suitable in all respects to receive cargo.”

ANEC Contract Options For Counting The Time Spent By The Vessel At Anchorage Waiting For The Goods

The vegetable oil cargoes are sent to Brazilian ports by trucks. This leads to congestion on the roads and at the ports. The slow arrival of cargoes caused in the past loading delays and long waiting times for the buyers' vessels.

ANEC Contract provides two options for counting the time lost by the vessel waiting for the goods: **The first option** is stated in Clause 10.1. In this case, the time lost waiting for the goods shall not count as laytime but the buyers shall be entitled to claim damages for detention for the time lost thereby.

The second option for counting the time lost waiting for the goods is stated in Clause 10.2. In this case, the time lost waiting for the goods will count as laytime or if the laytime is exceeded, as time on demurrage. However, by stipulating a low rate of loading, the Clause 10.2 gives the Brazilian exporters a lengthy laytime and thereby protects them against a potential extensive liability for demurrage.

In case of contracts for sale of parcels to be shipped by more than one shipper, the time shall count pro rata. If one or several shippers/sellers do not have the goods ready for loading and loading is stopped due to non-availability of their parcels, then the pro rata counting of laytime shall stop from the moment when all other parcels are loaded by the shippers/sellers who had the goods ready for loading and the time shall count separately for the shippers/sellers of remaining parcels.

If the vessel is not allowed to berth or is required to vacate the berth because one or several shippers/sellers do not have the goods ready for loading, after getting the goods ready, those shippers/sellers shall be the first to load and any time lost thereby shall be for his/their account up to the moment he/they have loaded all his/their goods. Thereafter, the time shall count pro rata between the shippers/sellers who had their goods ready for loading.

The Debit Notes for detention or demurrage or despatch must be settled within 30 days from the date of presentation, but ANEC Contracts do not stipulate a time limit by which such debit notes should be presented.

The Contractual Time Limit For Tendering Valid NOR

The port operators schedule the vegetable oil shipments in function of the vessel's laycan and expected readiness date. The Clause 8 of ANEC Contract No. 81 provides that the shipment date will be on the 16th day after the vessel nomination date or vessel substitution date in case of a short shipped quantity.

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 Clause 8 of ANEC Contract No. 81 provides that the contractual time limit for the presentation

¹ See Sub-Clause 10.2 paragraph (C).

of vessel for loading is 10 days from the expected readiness date notified in the vessel's nomination notice. In the event that the originally nominated vessel does not present ready for loading within the 10 days' time limit, the nomination shall be deemed to have lapsed and the buyers will have to make another vessel nomination subject to the minimum 15 days' pre-advise period.

The buyers must present the vessel ready in all respects for loading by 17:00 hours on the last day of the contract delivery period provided that the buyers have complied with the minimum 15 days' pre-advise requirement stipulated in the Clause 8 of ANEC Contract No.81. If the buyers nominate the vessel with at least 15 days before the last working day of the delivery period and the vessel arrives and tenders valid NOR by 17:00 hours on that day, the buyers shall be deemed to have complied with the contract requirement² and the sellers will have to bear the cargo carrying charges accrued after the delivery period.

Conditions For Extension Of The Delivery Period

Should the buyers fail to present the vessel in ready in all respects for loading by 17:00 hours on the last day of the contract delivery period, they have the right to claim extension of the delivery period with additional 30 days by notice served to sellers³.

The extension of the delivery period shall also be deemed to have been claimed in case of the late nomination of vessel. If the buyers nominate the vessel in less than 16 days before the expiry of the contract delivery period, the extension shall be deemed to have been claimed and the buyers will have to reimburse to sellers the cargo carrying charges accrued from the first working day after the expiry of the delivery period until the Bill of Lading date, even if the vessel arrives and tenders NOR by 17:00 hours on the last day of the contract delivery period, because the sellers must have the goods ready for loading on the 16th day after the vessel nomination date (i.e. after the expiry of the 15 days' pre-advise period), not sooner.

Buyers' Obligation To Provide Evidence Of Insurance Cover

The buyers must obtain cargo insurance cover as per the Clause 5 of FOSFA Contract No.54 covering the marine risks as per the Institute FOSFA Trades Clauses (A) and the war risks and risks of strikes as per the Institute War and Strikes Clauses (FOSFA Trades). Upon the sellers' request, the buyers must confirm by notice to sellers before the commencement of loading that the cargo insurance cover has been effected. If the buyers fail to provide evidence of insurance cover in due time, the sellers shall have the right to obtain insurance cover for the buyers' account and expense.

Quality Determination

The sellers' surveyor analysis certificate attesting the quality characteristics of the cargo at the time and place of loading shall be final, that is, the buyers will have to pay for the cargo based on such certificate.

The buyers have the option to appoint independent surveyors to sample the cargo jointly with the sellers' surveyors and provide their analysis results of the cargo sample.

If the difference between the sellers' and buyers' surveyors analysis certificates does not exceed 0.05% in respect of the Free Fatty Acids, 0.02% in respect of the Moisture Content and 0.002% in respect of Phosphorous, then the analysis results certified by the sellers' surveyors shall be final.

If the difference between the sellers' and buyers' surveyors analysis certificates exceeds any of the above-mentioned percentages, then either party may ask within 30 days from the Bill of Lading date a third analysis of cargo sample. In such case, the average of the two closest analysis results shall be final as to quality of the cargo and shall be settled by a complementary debit note. The timing of payment of shipping documents shall not be delayed thereby.

² See Clause 11 of ANEC Contract No.81

³ See Clause 11 of ANEC Contract No.81

Weight Determination And Certification

The cargo weight figure shall be determined and certified by the independent surveyors appointed by the sellers based on the shore tanks gauging.

The cargo weight figure determined based on shore tanks gauging shall be the basis for the calculation of FOB price and issuance of commercial invoice, irrespective of any other weight figure resulted from the vessel's tank ullages.

Settlement Of Disputes

ANEC Contract No. 81 provides two options for the settlement of disputes:

- FOSFA arbitration in accordance with the FOSFA Arbitration Rules; or
- arbitration by Associacao Brasileira de Arbitragem – ABAR, Chamber of Arbitration in Sao Paulo, Brazil.

The Proper Description Of Vegetable Oil And Biodiesel Cargoes In The Bills Of Lading

by Vlad Cioarec, International Trade Consultant



The shippers of vegetable oil and biodiesel cargoes must provide in the Bills of Lading a cargo description that must be compliant with both trade requirements and shipping regulations.

The Trade Requirements Regarding The Cargo Description In The Bills Of Lading Issued For Vegetable Oil And Biodiesel Cargoes

Over the last years a number of international and national agencies have been set up to promote the sale of sustainably produced commodities.

The first of these was the Roundtable on Sustainable Palm Oil (RSPO) set up in 2004 with the purpose to prevent the deforestation for the conversion of land covered by tropical forest into palm plantations and to promote the production and use of sustainable palm oil. The parties to RSPO are the growers, processors, traders, environmental and social NGOs and financial institutions.

They have agreed a set of principles and criteria to define what they mean by sustainability¹ and an international certification scheme has been developed to ensure that the palm oil sold as sustainable palm oil has indeed been produced sustainably.

The sales of sustainable palm oil certified by RSPO started in November 2008.

The crude palm oil certified by the RSPO is referred to in international trade as “Certified Sustainable Palm Oil”, so that by this trade name the cargoes of crude palm oil are described in the sale contracts, commercial invoices, cargo manifests and Bills of Lading.

The end product manufacturers who wish to use the RSPO Trademark and claim that their products are produced from RSPO certified palm oil can procure the palm oil through any of the four supply chain systems used by RSPO to trace the origin of palm oil: i.e. “Identity Preserved”, “Segregated”², “Mass Balance”³, “Book and Claim”⁴. Therefore, in case of sustainable palm oil certified by RSPO, the Bills of Lading will also mention the supply chain system used. There is a similar procedure for the shipments of certified sustainable palm kernel oil.

The second international agency was the Roundtable on Sustainable Biofuels (RSB) set up in 2007 to promote the production and use of sustainable biofuels. In 2013, RSB extended its scope to cover all biomaterials and changed its name in “The Roundtable on Sustainable Biomaterials”.

The third international agency was the Roundtable on Responsible Soy Association (RTRS) set up in 2011 to promote the production and use of sustainable soy.

In 2015 the Malaysian government set up its own certification scheme for sustainable palm oil - “Malaysian Sustainable Palm Oil (MSPO)”. MSPO uses two supply chain systems to trace the origin of palm oil: “Mass Balance” and “Segregation”.

Similarly to the Malaysian government, the Indonesian Ministry of Agriculture set up its own certification scheme for sustainable palm oil - “Indonesian Sustainable Palm Oil (ISPO)”.

1 RSPO Principles and Criteria for Sustainable Palm Oil Production are referred to as “RSPO Supply Chain Certification Standard”. RSPO Principles and Criteria are used by the independent auditors approved by the RSPO to verify the growers and processors. See www.rspo.org

2 In the “Identity Preserved” and “Segregated” supply chain systems, the sustainable palm oil originated from certified mills is kept separate from the non-sustainable palm oil throughout the supply chain. See www.rspo.org

3 In the “Mass Balance” supply chain system, the sustainable palm oil originated from certified mills is mixed with ordinary palm oil, but monitored administratively throughout the supply chain.

4 See the document “RSPO Supply Chain Certification Systems” approved by RSPO Executive Board on 25 November 2011 (page 11-12) at www.rspo.org

Whatever certification scheme it is used by the traders, they will have to comply with the certifiers' requirements to enable the end product manufacturers to use the certifiers' trademark.

The Shipping Regulations Regarding The Cargo Description In The Bills Of Lading Issued For Vegetable Oil And Biodiesel Cargoes

The vegetable oils and biodiesel products are classed as “noxious liquid substances” in Annex II of the MARPOL Convention and have to be carried by ships pursuant to the provisions of the MARPOL Annex II and IBC Code⁵. To enable the carriers to comply with the requirements of the MARPOL Annex II and IBC Code, the shippers of vegetable oils and biodiesel products have the obligation under the IBC Code to properly describe their cargoes in the shipping documents.

The shippers must provide in the shipping documents the cargo's product name by which it is listed in the Chapter 17 of the IBC Code. This requirement is stipulated in the paragraphs 16.2.2 and 17.2 of the IBC Code with the following provisions:

“Any cargo offered for bulk shipment shall be indicated in the shipping documents by the product name under which it is listed in chapter 17 or 18 of the IBC Code or the latest edition of the MEPC.2/Circular under which it has been provisionally assessed ...” (paragraph 16.2.2)

“The product name shall be used in the shipping document for any cargo offered for bulk shipments. Any additional name may be included in brackets after the product name ...” (paragraph 17.2)

For instance, a cargo of crude palm oil certified by the RSPO shall be described in the Bills of Lading by the trade name “Certified Sustainable Palm Oil” and the product name “Palm Oil” by which it is listed in the Chapter 17 of the IBC Code.

A cargo of crude palm kernel oil certified by the RSPO shall be described in the Bills of Lading by the trade name “Certified Sustainable Palm Kernel Oil” and the product name “Palm Kernel Oil” by which it is listed in the Chapter 17 of the IBC Code.

A cargo of biodiesel produced from palm oil certified by the RSB shall be described in the Bills of Lading by the trade name “Certified Sustainable Palm Methyl Ester” and the product name “Palm Oil Fatty Acid Methyl Ester” by which it is listed in the Chapter 17 of the IBC Code.

Similarly, a cargo of biodiesel produced from soyabean oil certified by the RSB shall be described in the Bills of Lading by the trade name “Certified Sustainable Soy Methyl Ester” and the product name “Soybean Oil Fatty Acid Methyl Ester” by which it is listed in the Chapter 17 of the IBC Code. But a blend of “soybean oil fatty acid methyl ester” and “palm oil fatty acid methyl ester” shall be shipped under the generic description “Fatty Acid Methyl Ester (m)”.

The shippers must also provide in the shipping document the cargo's viscosity at 20°C, if it is equal to or greater than 50 mPa.s at 20°C, and the cargo's melting point, if it is equal to or greater than 0°C, to enable the carriers and discharge port authorities to know whether or not a pre-wash of the vessel's cargo tanks is necessary following unloading of the cargo⁶. This requirement is stipulated in the paragraphs 16.2.6 and 16.2.9 of the IBC Code which have the following provisions:

“16.2.6 Where column o in the table of Chapter 17 refers to this paragraph, the cargo's viscosity at 20°C shall be specified on a shipping document, and if the cargo's viscosity exceeds 50 mPa.s at 20°C, the temperature at which the cargo has a viscosity of 50 mPa.s shall be specified in the

5 The International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk.

6 The Regulation 13.7 Section 7 paragraph 3 of the MARPOL Annex II stipulates that after the carriage of solidifying and high-viscosity cargoes in Pollution Category Y, the vessels are required to pre-wash their cargo tanks prior to departure from the port of discharge and discharge the residues/water mixture to a shore reception facility at the port of discharge.

shipping document.

16.2.9 Where column o in the table of Chapter 17 refers to this paragraph, the cargo's melting point shall be indicated in the shipping document.”

The requirement is also stipulated in the Section 5 of the Procedures and Arrangements Manual in the MARPOL Annex II which contains the following provisions:

“Information relating to melting point and viscosity, for those substances which have a melting point equal to or greater than 0°C or a viscosity equal to or greater than 50 mPa.s at 20°C, shall be obtained from the shipping document.”

The pre-wash requirement of the MARPOL Annex II came into force on 1st January 2007 and was initially applicable only to the high-viscosity substances defined in the Regulation 1 Paragraph 17.1 of the MARPOL Annex II as *noxious liquid substances in Pollution Category X or Y with a viscosity equal to or greater than 50 mPa.s at the unloading temperature.*

The pre-wash requirement of the MARPOL Annex II is not currently applicable to vessels carrying palm oil cargoes because the palm oil cargoes are unloaded at a temperature range between 50 and 55°C where the palm oil viscosity is 24 mPa.s. But it would normally be applicable to vessels carrying cargoes of rapeseed oil, soyabean oil and sunflower seed oil in bulk.

The rapeseed oil cargoes have a discharge temperature range between 15 and 20°C and a viscosity at 20°C between 72 and 82 mPa.s⁷.

The soyabean oil cargoes have a discharge temperature range between 20 and 25°C and a viscosity at 20°C between 59 and 62 mPa.s⁸.

The sunflower seed oil cargoes have a discharge temperature range between 15 and 20°C and a viscosity at 20°C of 68 mPa.s⁹.

However, there were veg oil shippers and charterers who sought to avoid the additional cost of tanks' pre-washing by giving heating instructions to the carriers to get the cargoes out of the high-viscosity range.

Following a number of pollution incidents in the Gulf of Finland caused by the vessel discharges into the sea of tank washings containing residues of such veg oil cargoes, the IMO ESPH Working Group¹⁰ has drafted a number of amendments to the MARPOL Annex II and the IBC Code to extend the application of the MARPOL's pre-wash requirements to the high-viscosity and solidifying substances considered to be persistent floaters. In the Regulation 13 of the MARPOL Annex II it was introduced a new paragraph 7.1.4 where the high-viscosity persistent floaters are defined as *substances in Pollution Category Y with a viscosity equal to or greater than 50 mPa.s at 20°C*, while the solidifying substances considered to be persistent floaters are defined as *substances in Pollution Category Y with a melting point equal to or greater than 0°C*.

These amendments will enter into force on 1 January 2021.

The vessels carrying such cargoes to ports in the Baltic Sea, Norwegian Sea and North Western Europe area including the United Kingdom, Ireland, Belgium, France, Spain and Portugal will be required from 1 January 2021 to pre-wash their cargo tanks prior to leaving the port of discharge and then discharge the residue/water mixture generated during the pre-wash to a shore reception facility until the vessel's cargo tanks are empty.

These substances are identified in the column “o” in the table of Chapter 17 of the IBC Code by reference to the newly introduced paragraph 16.2.7 of the IBC Code which has the following provisions:

7 See the Annex to the IMO document ESPH 22/10 at www.imo.org in IMODocs section

8 See the Annex to the IMO document ESPH 22/10 at www.imo.org in IMODocs section

9 See the Annex to the IMO document ESPH 22/10 at www.imo.org in IMODocs section

10 The Working Group on the Evaluation of Safety and Pollution Hazards of Chemicals

“Where column “o” in the table of chapter 17 refers to this paragraph, the cargo is subject to the prewash requirements in regulation 13.7.1.4 of Annex II of MARPOL.”

Amongst the substances identified in the table of Chapter 17 of the IBC Code that will become subject to the mandatory tanks' pre-washing are: camelina oil, castor oil, coconut oil, corn oil, cotton seed oil, grape seed oil, groundnut oil, illipe oil, jatropha oil, mango kernel oil, olive oil, palm kernel oil, palm oil, rapeseed oil, soyabean oil and sunflower seed oil.

The cost implications of the new regulations will have to be considered by the commodity traders in the price quotations and vessel fixtures for the vegetable oils carried in large quantities such as palm oil, palm kernel oil, rapeseed oil, soyabean oil and sunflower seed oil to ports in North Western Europe.

The palm oil has a melting point of 39°C. At 20°C the palm oil is solid.

The palm kernel oil has a melting point ranging from 25 to 28°C¹¹. At 20°C the palm oil is solid.

The rapeseed oil has a melting point of -10°C¹². At 20°C the rapeseed oil has a viscosity ranging from 72 to 82 mPa.s¹³.

The soyabean oil has a melting point equal to 0°C¹⁴. At 20°C the soyabean oil has a viscosity ranging from 59 to 62 mPa.s¹⁵.

The sunflower seed oil has a melting point ranging from -12 to -8°C¹⁶. At 20°C the sunflower seed oil has a viscosity of 68 mPa.s¹⁷.

The vessels carrying cargoes of rapeseed oil, soyabean oil and sunflower seed oil in bulk to ports in North Western Europe cannot avoid anymore the tanks' pre-washing requirement by heating the cargoes during the voyage.

In the last twelve years, the veg oil shippers sought to avoid the responsibility for the costs related to the tanks' pre-washing by not providing the required information about the cargo's viscosity and melting point in the Bills of Lading on the grounds that this information would make the Bills of Lading non-compliant with the other commercial documents when tendered for payment under letters of credit.

It should not be difficult to add a clause in L/C to allow the presentation of Bills of Lading containing the required information about the cargo's viscosity and melting point.

To overcome this issue INTERTANKO proposed at the 56th session of the Marine Environment Protection Committee that the shippers use an optional shipping document instead of Bill of Lading for the provision of information about the cargo's viscosity and melting point.

After the amendments to MARPOL Annex II and IBC Code related to the discharge of cargo residues and tank washings of high-viscosity, solidifying and persistent floating products will enter into force on 1 January 2021¹⁸, the commodity traders who ship vegetable oils in bulk to destinations in North Western Europe will have the obligation to provide in the shipping document, whether such document is the Bill of Lading or the optional shipping document proposed by INTERTANKO, the cargo's viscosity at 20°C and melting point.

11 See the Annex to the IMO document ESPH 22/10 at www.imo.org in IMODocs section

12 See the Annex to the IMO document ESPH 22/10 at www.imo.org in IMODocs section

13 See the Annex to the IMO document ESPH 22/10 at www.imo.org in IMODocs section

14 See the Annex to the IMO document ESPH 22/10 at www.imo.org in IMODocs section

15 See the Annex to the IMO document ESPH 22/10 at www.imo.org in IMODocs section

16 See the Annex to the IMO document ESPH 22/10 at www.imo.org in IMODocs section

17 See the Annex to the IMO document ESPH 22/10 at www.imo.org in IMODocs section

18 The draft amendments to MARPOL Annex II and IBC Code were approved by the IMO's Marine Environment Protection Committee at its seventy-third session held between 22 and 26 October 2018, then by the IMO's Maritime Safety Committee at its one hundredth session held between 3 and 7 December 2018. The amendments to MARPOL Annex II were formally adopted by the IMO's Marine Environment Protection Committee on 17 May 2019 by the Resolution MEPC.315(74). The amendments to the IBC Code were formally adopted by the IMO's Marine Environment Protection Committee on 17 May 2019 by the Resolution MEPC.318(74) and then by the IMO's Maritime Safety Committee on 14 June 2019 by the Resolution MSC.460(101).

Review Of FOSFA Contract No. 51, Edition 2020

by Vlad Cioarec, International Trade Consultant



FOSFA Contract No. 51 is a contract form issued by FOSFA in conjunction with CIARA (Camara de la Industria Aceitera de la Republica Argentina) to be used for the FOB sales of Argentinian vegetable oils in bulk and FOB sales of Argentinian biodiesel (Fatty Acid Methyl Esters) in bulk.

Ship Nomination

The pre-advice period for the nomination of ship is minimum 10 days prior to the ship's expected date of berthing (stated in the contract as the “expected date of ship readiness to load”).

In the ship's nomination notice the buyers must provide the following information: the quantity of cargo required to be loaded, ship's name and flag, ship's expected date of berthing, ship's demurrage rate, ship's agents at loading port and final country of destination for the goods.

The FOSFA Contract No. 51 does not stipulate any requirements to be complied with by the ship to be nominated by the buyers.

Conditions For The Ship Substitution

The FOSFA Contract No. 51 stipulates that if the nominated ship is unable to proceed to the loading port due to an event outside the buyers' control, the buyers can substitute the nominated ship provided that the expected berthing date of the substitute ship is not earlier than the expected berthing date of the originally nominated ship and not later than 5 working days.

The buyers must give the ship substitution notice to sellers not later than 2 working days before the expected berthing date of the originally nominated ship.

The FOSFA Contract No. 51 does not allow the buyers to make more than two substitutions, unless the sellers agree otherwise.

Conditions For The Ship Presentation For Loading Vegetable Oil And Biodiesel Cargoes At Argentinian Ports

The FOSFA Contract No. 51 has no provisions concerning the conditions for presentation of ship for loading, no cleanliness warranty, no mention as to the mandatory inspection of tanks and pipelines and no reference to the FOSFA Operational Procedures.

The acceptance of ships for loading vegetable oil cargoes at Argentinian ports is subject to the prior approval of tanks by SENASA¹ inspectors and a FOSFA Member Superintendent appointed by the sellers. The ship's NOR tendered after berthing must be accompanied by the tanks approval certificate issued by SENASA inspectors and the FOSFA Certificate of Compliance, Cleanliness and Suitability of Ship's Tanks issued by the FOSFA Member Superintendent.

The Clause 8 of FOSFA Contract No. 51 has conflicting provisions on this matter. First, it stipulates that the Master or ship's agents can tender the NOR once the vessel is in berth and ready in all respects to receive the vegetable oil cargo. Then it provides that:

“Should superintendents after inspection find ship's tanks require further cleaning, time required to clean not to count as laytime.”

The vessel is either ready or not ready. The Master cannot tender NOR until the vessel is declared ready in all respects to load.

The Clause 8 of FOSFA Contract No. 51 is a modified version of the Clause 7 of FOSFA Contract

1 Servicio Nacional de Sanidad y Calidad Agroalimentaria, i.e. National Health and Agrifood Quality Service.

No. 53, but unlike the FOSFA Contract No. 53, the FOSFA Contract No. 51 is a berth sale contract. The vessel cannot tender NOR before reaching at berth and passing the tanks' inspection. The FOSFA Contract No. 51 should have stipulated that the vessel's NOR must be accompanied by the SENASA inspector's certificate of approval and FOSFA Certificate of Compliance, Cleanliness and Suitability of Ship's Tanks issued by a FOSFA Member Superintendent. Another clause of FOSFA Contract No. 51 with conflicting provisions is Clause 9. The second sentence of Clause 9 has the following provisions:

“Should commencement of loading be delayed due to ship's tank/s not being passed by the appointed superintendent or for any other reason for which Sellers are not contractually responsible, any extra costs incurred by Sellers shall be for Buyer's account.”

The above sentence is a modified version of the sixth sentence of FOSFA Contract No. 53 which provides that:

“Should commencement of loading be delayed by more than 72 hours after acceptance of the Notice of Readiness due to ship's tanks not being passed by the appointed superintendent or for any other reason for which Sellers are not contractually responsible, any extra costs incurred by Sellers shall be for Buyers' account.”

The problem is that the Clause 9 of FOSFA Contract No. 51 contains both the original and modified provisions. Besides the fact that by retaining the sixth sentence of FOSFA Contract No.53, the FOSFA Contract No. 51 has two different provisions on the same matter, the original provisions of FOSFA Contract No. 53 do not make sense in the FOSFA Contract No. 51, since the buyers' vessel cannot tender NOR before passing the tanks' inspection. Therefore, the sixth sentence of Clause 9 of FOSFA Contract No. 51 should be deleted.

Extension Of The Contract Delivery Period

The buyers have the right to request extension of the contract delivery period with maximum 30 days *“in which to provide suitable freight”*. The buyers must give notice to sellers requesting extension of the delivery period not later than 16:00 hours on the last business day of the contract delivery period.

Extension Of The Contract Delivery Period And Liability For The Cargo Carrying Charges

FOSFA Contract No. 51 is a berth sale contract. The buyers' vessel must arrive at the berth nominated by the sellers and tender valid NOR within the contract delivery period, that is, not later than the last business day of the contract delivery period.

If the buyers' vessel presents ready in all respects for loading at the nominated berth within the last days of the contract delivery period, the sellers will have to load the goods even if it shall be necessary to complete loading after the expiry of the contract delivery period and bear the cargo carrying charges accrued thereafter, notwithstanding the provisions of Clause 15 which stipulate that:

“Should Buyers not have taken delivery within the delivery period specified in the contract, Buyers are to pay Sellers Carrying Charges calculated from the first day following the last day of the delivery period so specified until Bill/s of Lading date/s, as follows ...”

This matter was addressed by the English Commercial Court in the English law case **Kurt A. Becher v. Voest Alpine Intertrading (The “Rio Apa”)**².

2 [1992] 2 Lloyd's Rep. 586

In that case a cargo of soybean meal pellets was sold basis FOB San Martin with a contract delivery period - July 1988. The sale contract incorporated the Argentine Centro terms, including the following clauses:

“EXTENSION OF DELIVERY: Should Buyers not tender vessel(s) in readiness to load within the specified period for delivery, the Buyers shall be in default unless the Buyers give notice to the Sellers ... that an extension is claimed.”

“CARRYING CHARGES: Should Buyers not load within the delivery period, ... Buyers are to pay Sellers carrying charges ...”

The buyers' vessel arrived on 18th July 1988 in Zona Comun in Rio de la Plata but the Master was instructed to wait there due to congestion in the Up-River port of San Martin.

The vessel could not berth until 31 July 1988, the last day of the contract delivery period. The buyers did not claim extension of the delivery period.

The cargo was loaded between 2 and 4 August 1988 and after shipment, the sellers contended that the buyers failed “to load” within the contract delivery period and claimed the reimbursement of carrying charges incurred for the goods between 1 and 4 August 1988.

The English Commercial Court rejected the sellers' claim holding that given that the buyers fulfilled their contractual obligation under the extension of delivery clause to present the vessel ready for loading at nominated berth within the contract delivery period, there was no point to claim extension of the delivery period. Since no extension was claimed, no carrying charges were due.

The Court held that the buyers had only the obligation to present the vessel ready for loading at nominated berth within the contract delivery period and not to load the goods within such period.

Given that the Carrying Charges Clause of FOSFA Contract No. 51 is with minor modifications the Carrying Charges Clause of Argentine Centro terms, the decision of English Commercial Court in The “Rio Apa” case is equally applicable to FOSFA Contract No. 51 which means that if the buyers' vessel is unable to proceed to berth until the final days of the delivery period due to congestion in loading port, the sellers will have to bear the cargo carrying charges accrued after the expiry of the contract delivery period, notwithstanding the provisions of Clause 15.

The Clause 15 of FOSFA Contract No. 51 is an attempt to pass the responsibility for the carrying charges incurred due to the vessel's late presentation for loading for whatever reason, including the vessel's late arrival, port congestion or vessel's failure to pass the tanks' inspection, to the buyers.

The problem is that unlike the GAFTA Contracts No. 38 and 39, the FOSFA Contract No. 51 does not distinguish between the loading delays caused by the vessel's late arrival and loading delays caused by the congestion at loading port. If the buyers' vessel arrives within the contract delivery period and cannot proceed to the loading berth due to congestion, it is not fair nor commercially reasonable to hold the buyers liable for the carrying charges³.

In order to avoid the additional cost of carrying charges after the expiry of the delivery period due to the vessel's late arrival, the Argentinian sellers could stipulate a contractual time limit for the presentation of vessel for loading, as provided in the GAFTA Contract No.39 (GAFTA Contract form for the FOB sales of Argentinian oilseed meals in bulk).

3 An example of such case was the English law case *Miserocchi v. Agricultores Federados Argentinos SCL and Bunge AG*, [1982] 1 Lloyd's Rep. 202, where the buyers' vessels could not proceed to loading berths until after the expiry of the contract delivery period due to port congestion. The sellers shipped the parcels after the expiry of the contract delivery period and claimed reimbursement of the cargo carrying charges accrued after the expiry of the contract delivery period. The English Commercial Court held that in the absence of contrary provisions in the sale contracts, the risk of vessels' late presentation for loading falls on the buyers. Since the buyers had the obligation to present the vessels ready for loading at the nominated berths within the contract delivery period, they were held liable for the cargo carrying charges accrued after the expiry of the contract delivery period due to the vessels' late presentation for loading.

The GAFTA Contract No. 39 stipulates a time limit of 5 consecutive days before the expiry of the contract delivery period for the buyers to present a vessel ready in all respects for loading. If the buyers will not be able to present the nominated vessel ready in all respects for loading before the 5 days' time limit, they shall bear the cargo carrying charges accrued from the first day following the expiry of the contract delivery period until the Bill of Lading date.

Another provision that can be “borrowed” from the GAFTA Contract No. 39 is the second sentence of Sub-Clause 10(b) which stipulates that:

“Should the vessel be prevented from proceeding to the nominated port or berth of loading for reasons outside the vessel's control, she will be considered filed provided she has reached a point where she has been instructed to wait by the Argentine Port Authorities.”

What this means it is that in case of congestion at the Up-River ports, the buyers' vessel shall be considered an “arrived ship” provided that she has arrived at the place where she has been instructed to wait for orders by the Argentine Port Authorities, e.g. Recalada Pilot Station or Zona Comun in Rio de la Plata, earlier than 5 consecutive days before the expiry of the contract delivery period.

Extension Of The Delivery Period In Case Of Force Majeure Event

In case of a force majeure event, the contract delivery period shall be extended with 21 days beyond the termination of the force majeure event, unless the force majeure event continues for more than 60 days beyond the contract delivery period in which case the sale contract shall be cancelled.

Extension Of The Delivery Period In Case Of Prohibition Or Partial Restriction Of Exports

In case of prohibition or partial restriction of exports, the contract delivery period shall be extended with 21 days beyond the termination of the prohibition, unless the prohibition continues for more than 30 days in which case the sale contract shall be cancelled.

Sellers' Timing Obligations And Time Counting

The FOSFA Contract No. 51 is a berth sale contract. It gives to the Argentinian exporters the same advantage as to voyage charterers in berth charterparties. The buyers' vessel shall be considered an “arrived ship” for the purpose of commencement of laytime only after the vessel has entered at the berth nominated by the sellers.

The commencement of laytime will be not only in function of the time when the buyers' vessel tenders valid NOR at the nominated berth but also in function of the pre-advice period. The sellers' loading obligation date is on the next working day following the expiry of the pre-advice period. Until that date the sellers are not obliged to provide a free berth and commence loading.

If nonetheless the buyers' vessel arrives at nominated berth and tenders valid NOR before the expected readiness date, that is, before the expiry of the pre-advice period, the sellers or rather the port operator acting on their behalf shall not be obliged to commence loading and the NOR shall not become effective before the expiry of the pre-advice period, unless the sellers manage to have the goods ready for loading and agree to start loading earlier than the expiry of the pre-advice period, in which case the laytime shall commence to count from the time of commencement of loading.

If the buyers' vessel arrives at nominated berth and tenders valid NOR after the expiry of the pre-advice period, that is, on the vessel's expected date of berthing, the laytime will commence to run at 6 hours after the NOR has been tendered, even if the sellers start loading sooner.

By making the commencement of laytime subject to the vessel berthing, the FOSFA Contract No.51 protects the Argentinian exporters against the potential liability for demurrage in case of time lost by the vessel waiting for berth due to congestion at the port of loading. If the vessel is prevented to proceed to berth due to congestion in the port of loading, the sellers will have no liability for the

time lost by the vessel thereby.

But if the vessel is not allowed to berth due to sellers' failure to have their parcels ready for loading or to provide the cargo readiness documents to the port operators in due time, the buyers shall be entitled to claim damages for breach of contract, because the FOB sellers have the contractual obligation to have their cargoes ready for loading on the next working day following the expiry of the pre-advice period and an implied obligation not to prevent the buyers' vessel from becoming an "arrived ship"⁴. The measure of contractual damages for detention of vessel prior to berthing due to the late readiness of the cargo should be calculated based on the charterparty demurrage rate and pro rata.

If a FOB buyer charters a vessel to procure a number of parcels from different suppliers subject to the Conditions of FOSFA Contract No. 51 and then the buyer has to settle a demurrage claim under charterparty for the time lost by the vessel prior to berthing due to the suppliers' failure to have their parcels ready for loading, the buyer can recover the amount paid to the carrier from the suppliers on the basis of their share of liability. Each FOB supplier will be liable in damages for the portion of demurrage which is directly due to such supplier's failure to have his parcel(s) and documents ready when the vessel was ready to proceed to berth. The buyer will have to claim damages separately from every late supplier for the share of demurrage incurred by the vessel due to such supplier.

Weight Determination

The cargo weight figure shall be determined and certified by FOSFA Approved Superintendents appointed by buyers based on the shore tanks gauging, if the vegetable oils are delivered from shore tanks or based on the weighbridge weighing, if delivered from tank cars.

The cargo weight figure determined based on the shore tanks gauging or weighbridge weighing shall be stated in the superintendents' certificate of weight and Bills of Lading and shall be the basis for the calculation of FOB price and issuance of commercial invoice, irrespective of any other weight figure resulted from the measurement of vessel's tanks ullages.

Quality Determination

Clause 13 of FOSFA Contract No. 51 provides that the superintendents' analysis certificate based on the analysis of samples taken at the time and place of loading shall be final as to description and quality of the goods which means that no other evidence in relation to the matters certified may be relied on by the buyers subsequently to challenge the evidentiary value of the analysis certificate⁵.

Settlement Of Disputes

Disputes arising out of the sale contracts incorporating the FOSFA Contract No. 51 shall be referred to arbitration in accordance with the FOSFA Rules of Arbitration and Appeal.

4 See the English law case *Sociedad Financiera de Bienes Raices v. Agrimpex (The "Aello")*, [1960] 1 Lloyd's Rep. 623.

5 See the English law case *Toepfer v. Continental Grain Co.*, [1974] 1 Lloyd's Rep. 11.

The Intended Effect Of Commingling Clause In The Charter Party Bills Of Lading Issued For Parcels Of Vegetable Oils And Biodiesel

by Vlad Cioarec, International Trade Consultant



The bulk liquid commodities shipped in parcels, such as vegetable oils or biodiesel, are typically carried in vessel's tanks with no segregation. The Bills of Lading issued for such cargoes contain a statement that the parcel is carried in bulk commingled with other parcels with no segregation and the carrier undertakes to deliver to Bill of Lading holder only the proportion of the bulk represented by the quantity stated in the Bill of Lading. The intended effect of such statement has been explained by the Singapore High Court in the law case **Samsung Corporation v. Devon Industries Sdn Bhd**¹.

In that case a middleman bought parcels of soyabean oil from various suppliers in Brazil for on-sale to buyers in Bangladesh. The middleman managed to get the payment from the buyers before paying all the suppliers. One of the suppliers, Samsung Corporation sued the middleman in Singapore to recover the value of his cargo.

Samsung Corporation shipped at the Port of Rosario two parcels of soyabean oil: a parcel of 1,000 metric tonnes and a parcel of 1,500 metric tonnes. The Bills of Lading issued for the two parcels contained the following clause:

“Quantity covered by this bill of lading is part of a larger shipment loaded commingled in same tank.”

The Singapore High Court held that when similar cargoes are loaded on board the vessel by different shippers and these cargoes are commingled with one another with the consent of all the shippers and it is agreed that each shipper would be entitled to demand the delivery of a quantity of the commingled cargo equal to that loaded by such shipper, each shipper of such cargoes is bound by the commingling clause. It is a well established rule of common law that where one consignment becomes unidentifiable mixed with another and the shipowner cannot be made liable for such admixture, the owners of the consignments so mixed become tenants in common of the whole commingled cargo in the proportions in which they would have severally contributed to that whole. This rule is stated in Section 20A of the Sale of Goods Act 1979 of the United Kingdom which provides that in case of goods forming part of a bulk, once the bulk from which the goods are part of is identified and the goods paid for, each buyer of such goods becomes an owner in common of the whole of the bulk with an undivided share in the bulk equivalent to the quantity of goods paid for.

Sub-section 10.1.2 of Shell's General Terms & Conditions for Sales and Purchases of Products, 2010 Edition has the following wording:

“In the case of delivery as a part cargo lot where the Product deliverable hereunder is not identifiable or ascertainable on board the Seller's Vessel separately from Product destined for receivers other than the Buyer, [...] the Buyer shall be an owner in common of the bulk with the other receivers, each owning a proportion of the bulk represented by their respective bills of lading to the total quantity recorded on all the bills of lading issued in respect of the bulk.”

FOSFA Contract forms contain the following clause:

1 [1996] 1 SLR 469; [1995] SGHC 246

“UNASCERTAINED GOODS: In every instance where a parcel of goods sold by this contract forms an unidentified part of a larger identified quantity of goods of the same description, no separation or distinction shall be necessary and, until separation and identification of the parcel sold hereby from the larger quantity has taken place, the unpaid Seller and/or the Buyer who has made payment is/are the pro rata owner(s) of the whole of the larger quantity in common with Seller(s) and Buyer(s) of the other parts of the larger quantity.”

The FOSFA Contract forms for CIF deliveries of vegetable oils stipulate the following conditions for the issuance of Bills of Lading covering commingled parcels²:

“The Bill/s of Lading must identify the ship's tank/s into which the oil is loaded but should the oil be commingled with other parcels the Bill/s of Lading must indicate the total commingled quantity.”

NIOP Rule 1.3 for CFR and CIF sales of bulk vegetable oils stipulates that:

“the sellers must arrange for the carrier to indicate on bills of lading, when parcels in bulk are loaded commingled with other parcels, the total commingled quantity together with a stipulation that as near as practicable proportional delivery shall be made of the commingled parcels to the holders of respective bills of lading.”

Rule 1.3 further provides that the CFR and CIF sellers are required to present for payment the Bills of Lading accompanied by a Charter Party Guarantee which guarantees to hold the Buyer harmless from any consequences which may arise from the commingling clause of the Bills of Lading. Section 20A, sub-section 4 of the Sale of Goods Act 1979 stipulates also that:

“(4)Where the aggregate of the undivided shares of buyers in a bulk determined under subsection (3) above would at any time exceed the whole of the bulk at that time, the undivided share in the bulk of each buyer shall be reduced proportionately so that the aggregate of the undivided shares is equal to the whole bulk.”

This means that if the delivered quantity will be less than the shipped quantity due to the inherent loss that occurs during the sea carriage of vegetable oil cargoes, each buyer's share in the bulk shall be reduced proportionately and the carrier of commingled parcels will deliver to each Bill of Lading holder only that proportion of the bulk represented by the quantity stated in the Bill of Lading. In the Vegoilvoy Charter Party form the relevant provisions are in the Sub-clause 7(g) which has the following wording:

“When shipments are to be commingled upon loading in the tanks of a vessel

- It is understood that the Vessel will carry cargoes supplied by other Charterers to be carried subject to the terms of substantially similar part-cargo charter parties.

Where the products are similar, the Vessel shall have the right to commingle such products in the tanks of the Vessel, in which case the Vessel undertakes to deliver only that proportion of the cargo actually loaded in the designated tanks which is represented by the percentage that the total amount specified in the bill of lading bears to the total of the commingled shipments delivered at destination.

Neither the Vessel nor Owner assumes any responsibility for the consequences of such commingling, nor for the separation thereof at the time of delivery.”

² See the Clause 10 of FOSFA Contract No. 54 – Contract for Vegetable and Marine Oil (In Bulk) – CIF Terms and Clause 11 of FOSFA Contract No. 81 – Contract for Palm and Palm Kernel Oil Products In Bulk – CIF Terms.

Based on these provisions, the carriers of bulk liquid chemicals drafted commingling clauses for insertion in the Charter Party Bills of Lading when issued for parcels of vegetable oils. An example of such commingling clause is quoted below:

“This shipment of Metric Tons was loaded on board the vessel as part of one original lot of Metric Tons stowed in with no segregation as to parcels. The shipment has been commingled with other parcels on board at the request, risk and liability of the shipper. Neither the vessel nor the owners assume any responsibility for the consequences of such commingling nor for the separation thereof at the time of delivery. The vessel undertakes to deliver only that portion of the cargo actually loaded in the designated tanks which is represented by the percentage that the total amount specified in the Bill(s) of Lading bears to the total of the commingled shipments delivered at destination.”

The Charter Party Bills of Lading with commingling clauses are acceptable by banks under letters of credit.

ISBP paragraph G21 has the following provisions:

“A charter party bill of lading may indicate that the goods are part of a larger consignment loaded onto the named vessel by reference to “without segregation”, “commingled” or words of similar effect.”

The Evidentiary Value Of The Certificate Of Analysis In FOB Sales Of Parcels Of Vegetable Oils And Biodiesel Commingled On Board The Carrying Vessel

by Vlad Cioarec, International Trade Consultant



In veg oil and biodiesel trades, it is a common practice for the commodity traders to procure the necessary cargo quantity not from one supplier, but from different suppliers on FOB terms and charter vessels to transport the parcels shipped by the different suppliers commingled on board.

Given that in FOB sales the risk of loss or damage to the goods passes to buyers at the time and place of delivery, the risk for FOB buyers is that the parcels shipped by different suppliers might have different quality characteristics and some of the parcels might be out of the contractual specification and thereby might affect the quality characteristics of the bulk in the vessel's tanks where such parcels are loaded.

If the procurement contracts concluded by the commodity traders with the FOB suppliers provide that the superintendents' analysis certificates based on samples taken at the time and place of loading shall be final as to quality, then such certificates will remain binding as between the FOB suppliers and commodity traders, in the absence of fraud or manifest error¹.

The commodity traders buy parcels from different suppliers to on-sale the whole cargo on board the vessel on out-turn quality terms whereby the cargo's quality characteristics must comply with the contractual quality specifications at the destination. If the cargo does not comply with the contractual quality specifications at the destination, the commodity traders will have to settle the deficiencies with the final buyer and try to recover the loss from the suppliers who shipped off specification parcels.

A supplier who delivered a contractual compliant cargo has no liability to the FOB buyers, if his parcel has been commingled on board the carrying vessel with off specification parcels loaded by other suppliers. The Bills of Lading and Certificates of Quantity issued for the parcels will state that the parcels had been commingled on board the vessel.

For the parcels certified by the superintendents to comply with the contractual specifications, the FOB buyers are precluded to claim that their quality characteristics were inferior to what the superintendents' analysis certificates state².

As regards the suppliers who deliver off specification parcels, their liability will depend on the extent of the deficiencies between the parcels' quality characteristics certified by the superintendents and the contractual quality specifications and proportion of the off specification parcels in the bulk.

If there is only a small deficiency in a parcel delivered by one of the suppliers, the FOB buyer can claim at the time of presentation of documents for payment by that supplier a price allowance or damages for breach of warranty as to quality specifications, but the price allowance will only be due for the quantity of the off specification parcel delivered by the FOB supplier in question and not for the quantity of the bulk on-sold by the FOB buyer. The extent of price allowance will be in function of the extent of the deficiency or deficiencies.

If there is a significant difference between the cargo quality characteristics and contractual quality specifications that amounts to a non-compliance with the contract description of goods, the FOB buyers would be entitled to reject the goods.

1 See AIC Ltd. v. ITS Testing Services (UK) Ltd. (The "Kriti Palm"), [2006] EWCA Civ. 1601; [2007] 1 Lloyd's Rep. 555.

2 See Toepfer v. Continental Grain Co., [1974] 1 Lloyd's Rep. 11

The Evidentiary Value Of The Quality Certificate In The Chain Of Commodity Sale Contracts

by Vlad Cioarec, International Trade Consultant



In English contract law, the case **Toepfer v. Continental Grain Co.**¹ set the rule that if the sale contract states that the quality certificate shall be final and binding on both seller and buyer, no other evidence in relation to the matters certified may be relied on by the buyers to challenge the evidentiary value of the quality certificate.

In **AIC Ltd. v. ITS Testing Services (UK) Ltd. (The “Kriti Palm”)**², Lord Justice Rix said that:

“In a typical case, a cargo might be tested at destination and found to have a different quality from that certified, or even to be out of specification. The contract contemplates that, if a query is raised, then further testing will be done by mutual agreement upon the formally sealed and retained samples, and probably by an independent referee. It may be concluded that the certificate is arguably or probably inaccurate, and possibly even negligently so. Nevertheless the certificate will bind, where it is expressed to be final and binding, in the absence of fraud or manifest error.”

The evidentiary value of the quality certificate in commodity trade is subject to exceptions of fraud and manifest error.

The fraud committed by the inspector would vitiate the quality determination irrespective of whether it affected the result. As regards the error, the English Courts distinguish the immaterial error from the material error.

What errors made by inspectors are considered to be an immaterial error?

A mistake made in the quality certificate by the inspector who certifies the results of cargo sample analysis is considered an immaterial error.

In **Veba Oil Supply & Trading GmbH v. Petrotrade Inc.**³ the English Court of Appeal held that an immaterial error on the face of the quality certificate does not vitiate the quality determination and therefore, it has no effect on the finality of the quality certificate.

In **Toepfer v. Continental Grain Co.**⁴ the inspector mistakenly described the durum wheat grade as “No. 3 hard amber” instead of “No. 3 amber”. Lord Denning held that such a mistake does not invalidate the quality certificate even if the certifier admitted that he has made a mistake.

A mistake made by an inspector in the quality certificate will not provide grounds for questioning the quality determination if the sale contract clause referring to the quality determination provides that such quality determination shall be final and binding and the seller has performed his contractual obligations. The quality certificate remains binding as between the seller and buyer and all down the chain of sellers and buyers, notwithstanding the mistake.

Another example of immaterial error is when the inspection company committed an immaterial departure from the instructions of the contracting parties that could not even potentially affect the scientific process of quality determination. Simon Brown LJ said that such error would be irrelevant.

1 [1974] 1 Lloyd's Rep. 11

2 [2006] EWCA Civ. 1601; [2007] 1 Lloyd's Rep. 555.

3 [2001] EWCA Civ. 1832; [2002] 1 Lloyd's Rep. 295.

4 [1974] 1 Lloyd's Rep. 11

What errors made by inspectors are considered to be material error?

When appointing the inspectors to determine the quality of commodity cargoes, the sellers and buyers give instructions to inspectors as to the quality characteristics required to be analyzed and the test methods to be used for the laboratory analysis of cargo samples. The instructions include also the requirement that the inspectors retain the cargo sample for the period stipulated by sellers and buyers in contract.

The inspectors must comply with the instructions given by sellers and buyers. In case of the inspectors' failure to apply the test method they were instructed to apply and/or failure to retain the cargo sample, the quality determination and quality certificate will not be binding on the buyers.

In **Veba Oil Supply & Trading GmbH v. Petrotrade Inc.**⁵ a contract for the supply of a cargo of gas oil required the determination of gas oil density using the test method D1298. The inspectors used a different test method than the test method D1298. Upon the vessel's arrival at the port of discharge, the gas oil density was tested with the method D1298 and found to be off-specification.

The buyers contended that the quality determination made at loading port was not final and binding because the inspectors did not use the test method specified in the sale contract.

The English Court of Appeal held that the inspectors' error in using the wrong test method rendered the quality certificate uncontractual, invalid and ineffective.

In case of a material breach of instructions, the quality certificate is not binding on the contracting parties because the inspector had not done what he was instructed to do. The fact that the use of the wrong test method cannot have affected the “ultimate result” did not save the quality determination. Simon Brown LJ held that:

“Once a material departure from instructions is established, the Court is not concerned with its effect on the result. ... [T]he determination in those circumstances is simply not binding on the parties.”

A material departure from instructions vitiates the quality determination irrespective of whether or not it affects the result. This kind of error is considered a “manifest error”.

In **Veba Oil Supply & Trading GmbH v. Petrotrade Inc.**⁶ the English Court of Appeal defined the “manifest errors” as *“oversights and blunders so obvious and obviously capable of affecting the determination as to admit no difference of opinion.”*

In **Galaxy Energy International Ltd. (BVI) v. Eurobunker S.p.A.**⁷, Thomas J. said that:

“The manifest error must relate to the [quality] certificate or the procedure that led to the making of the certificate; for example , it would be a manifest error if a plain and obvious mistake of transcription had been made or a plain and obvious error had been made in testing or in sampling or in mixing the samples.”

Therefore, an obvious error committed by the inspectors when determining the quality of cargo will vitiate the quality determination.

A case similar to **Veba Oil Supply & Trading GmbH v. Petrotrade Inc.**⁸ was **AIC Ltd. v. ITS Testing Services (UK) Ltd. (The “Kriti Palm”)**⁹. In that case a cargo of gasoline was sold to an US company. One of the quality characteristics of gasoline – Reid Vapour Pressure (RVP) should have been maximum 9 PSI by the test method D5191.

The sale contract specified the test method D5191 because only that test method could satisfy the

5 [2001] EWCA Civ. 1832; [2002] 1 Lloyd's Rep. 295.

6 [2001] EWCA Civ. 1832; [2002] 1 Lloyd's Rep. 295.

7 [2001] 2 Lloyd's Rep. 725

8 [2001] EWCA Civ. 1832; [2002] 1 Lloyd's Rep. 295.

9 [2006] EWCA Civ. 1601; [2007] 1 Lloyd's Rep. 555.

conformity with the Colonial Pipeline Specification which has to be met in USA by gasoline for the purpose of transport through the pipelines.

The inspectors used a different test method than the test method D5191 stated in the sale contract and instructions received from the contracting parties.

Upon the vessel's arrival in USA, the analysis of cargo samples revealed that RVP was higher than 9 PSI.

The FOB buyers brought a claim against the inspection company contending that if the cargo samples had been originally tested using the test method D5191, it would have been shown to be off-specification.

The English Court of Appeal held that the use of the wrong test method was a material error because the gasoline conformity with CPS was an US law requirement for the importation of cargo in USA as gasoline. The use of the wrong test method amounted to manifest error and therefore, the quality certificate was invalid and not binding on the FOB buyers.

If the quality certificate is invalid, the buyer is entitled to reject the shipping documents and the goods.

What if the inspectors fail to retain the cargo samples?

In **Exxonmobil Sales and Supply Corporation v. Texaco Ltd.**¹⁰, one of the clauses of the sale contract required the retention of cargo samples tested by inspectors at loading port for a period of 90 days after the completion of loading.

The buyers contended that the inspectors' quality determination was not final and binding because the inspectors failed to retain the cargo samples and therefore, they have not followed the contractual procedure for determining the quality of cargo.

The English Commercial Court held that:

“where the retention of a portion of the tested oil can fairly be described as part of the agreed procedure to be followed by the independent expert, albeit the final step and one to be taken after the oil has been tested and its quality determined, and the inspector does not take that final step, the party seeking to rely upon the inspector's determination cannot say that the agreed procedure has been followed. In those circumstances, assuming that the departure cannot be said to be trivial or de minimis, it seems to me seriously arguable that the other party has not agreed to be bound by the inspector's determination, notwithstanding that the result of the determination would not have been affected.”

10 [2003] 2 Lloyd's Rep 686, [2003] EWHC 1964 (Comm).