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# Biofuels Trade Review

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## 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:

- **The Vessel Requirements In The Vegetable Oils FOB Sale Contracts**
- **PORAM Contract No. 7, Edition 2012**
- **FOSEA Contract No. 82, Edition 2016**
- **Documentary Evidence Used To Analyse The Shortage Claims For Vegetable Oil Cargoes**
- **Charterparty And Bill Of Lading Clauses Used To Protect The Carriers Of Vegetable Oil Cargoes In Case Of Claims For Quantity Shortages**

If you have any comments about the matters reviewed in this edition, please address them to [editor@commoditylaw.eu](mailto:editor@commoditylaw.eu)

## The Vessel Requirements In The Vegetable Oils FOB Sale Contracts

by Vlad Cioarec, International Trade Consultant



The vegetable oils are assigned to the Pollution Category Y and should normally be carried only with the IMO Ship Type 2 chemical tankers. However, the IMO Ship Type 2 chemical tankers are not allowed to load more than 3,000 m<sup>3</sup> of cargo into any single tank, irrespective of the cargo tanks' capacity.

In case of parcels larger than 3,000 m<sup>3</sup> the FOB buyers can nominate either IMO Ship Type 3 chemical tankers or oil tankers certified to carry Noxious Liquid Substances in bulk.

The Regulation 4.1.3 of MARPOL Annex II introduced in 2007 stipulates that a ship certified to carry the vegetable oils identified by the letter “k” in the Chapter 17 of the IBC Code may be exempted by the Flag State Administration from the carriage requirements stated in the Regulation 11 of MARPOL Annex II (i.e. the IBC Code requirements regarding the design and construction of ships to be certified for the carriage of Noxious Liquid Substances in bulk identified in the Chapter 17 of the IBC Code) provided that:

- the ship is a NLS tanker<sup>1</sup> that meets all requirements of the IBC Code for Ship Type 3, except those for cargo tank location;
- the ship has wing tanks and her cargo tanks are located inboard, as in case of IMO Ship Type 2 configuration;
- the ship complies with the requirements regarding the double bottom tanks;
- the ship's Certificate of Fitness indicates the exemption granted.

In case of the IMO Ship Type 3 chemical tankers, there is no restriction regarding the cargo quantity that may be loaded into a single cargo tank.

The nominated vessel must have on board a fully functional inert gas (nitrogen) generator system and/or portable gas bottles to supply an inert gas blanket sufficient to cover the surface area of cargo in each tank to be loaded and maintain the inert gas blanket at the required level throughout the voyage from the port of loading to the port of discharge to prevent the air oxidation of the vegetable oil cargo.

In the FOB sale contracts incorporating the FOSFA Contracts, the vessel must comply with the FOSFA Qualifications and Operational Procedures for Ships Engaged in the Carriage of Oils and Fats in Bulk for Edible and Oleo – Chemical Use in force at the date of the vessel nomination. For vegetable oil cargoes shipped from ports in the European Union, the vessel must also comply with the EU Commission Regulation No. 579/2014, which means that the vessel's cargo tanks must be made either from stainless steel or mild steel lined with epoxy resin or technical equivalent.

In the FOB sale contracts incorporating the NIOP Trading Rules, the vessel must comply with the requirements stipulated in the NIOP Operational Procedures.

The vessel's previous three cargoes must have been unleaded and non-toxic and must not appear on the FOSFA List of Banned Immediate Previous Cargoes. The vessel's last prior cargo must appear on the FOSFA List of Acceptable Previous Cargoes or on NIOP-FOSFA Harmonized International List of Acceptable Previous Cargoes.

The vessel's tanks calibration charts must be valid and certified by recognized agencies for such certification.

The vessel's heating coils must be able to maintain the temperatures required in the IASC Heating Instructions for the vegetable oil to be shipped.

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<sup>1</sup> A NLS tanker is defined in Regulation 1 Paragraph 16.2 of MARPOL Annex II as a ship constructed or adapted to carry a cargo of Noxious Liquid Substances in bulk, including an “oil tanker” certified to carry a cargo or part cargo of Noxious Liquid Substances in bulk.

The vessel must have on board the following documents:

- a valid International Pollution Prevention Certificate for the Carriage of Noxious Liquid Substances in Bulk and/or a valid International Certificate of Fitness for the Carriage of Dangerous Chemicals in Bulk listing the vegetable oil in question as a permitted cargo; In case of Type 3 chemical tankers, the Certificate of Fitness must state the exemption granted by the ship's Flag State Administration from the requirements stated in Regulation 11 of MARPOL Annex II for the carriage of vegetable oils identified by letter "k" in the Chapter 17 of the IBC Code.
- the Procedures and Arrangements Manual approved by the ship's Flag State Administration;
- the Cargo Record Book;
- the Shipboard Marine Pollution Emergency Plan for Noxious Liquid Substances approved by the ship's Flag State Administration;
- a valid International Ship Security Certificate;
- a valid Safety Management Certificate and a Document of Compliance with the ISM Code;
- a valid Maritime Labour Certificate.

If the vessel sails under a Flag of Convenience, the vessel must have on board a valid ITF Blue Card to evidence the fact that the minimum terms and conditions of employment of the crew of the vessel are approved by the ITF (International Transport Workers' Federation).

The shippers and port authorities require that the nominated vessels have an up-to-date Vessel Particulars Questionnaire in the SIRE and/or CDI databases and a copy of the SIRE or CDI inspection report uploaded in the SIRE/CDI systems.



The PORAM Contract No. 7 is a joint contract issued by the Palm Oil Refiners Association (PORAM), Malayan Edible Oil Manufacturers' Association and Malaysian Palm Oil Association to be used for the FOB sales of palm oil and palm kernel oil in bulk from any origin.

## **Vessel Nomination**

The pre-advice period for the nomination of vessel is minimum 14 days prior to the vessel's ETA at loading port. If the vessel's nomination notice is received by the sellers in less than 14 days prior to the last day of the contract shipment period and thereby the buyer fails to comply with the contract pre-advice requirements, the buyer shall be deemed to be in default and the seller shall be entitled to terminate the contract<sup>1</sup>.

The PORAM Contract No.7 does not stipulate any requirements to be complied with by the vessel to be nominated by the buyer.

At least 4 days before the vessel's ETA, the buyer must furnish to seller the following information: name of the vessel's agents at loading port, destination of cargo, notify party, demurrage rate, whether or not commingling is permitted, buyer's bank name and address if the payment shall be made by collection.

## **Vessel Substitution**

The buyer may substitute the originally nominated vessel provided that the substitute vessel's ETA at loading port will not be earlier and not later than that of the originally nominated vessel.

The buyer must give the vessel substitution notice to seller at least 48 hours before the ETA of the substituted vessel.

The PORAM Contract No.7 should have also stipulated that if the substitute vessel presents for loading earlier than the ETA date of the originally nominated vessel, the substitute vessel's NOR shall not become effective and the time will not count as laytime prior to such date.

## **Vessel Presentation For Loading**

The fitness and cleanliness of the vessel's tanks and pipelines must be certified by a MPOB (Malaysian Palm Oil Board) surveyor appointed by the seller.

In the event that the vessel's tanks and pipelines are found to be unsuitable by the surveyors, the buyer will have the option to substitute the vessel.

Should the commencement of loading be delayed by more than 72 hours beyond the vessel's ETA due to the vessel's failure to pass the tanks' inspection, the buyer will have to reimburse to the seller all the additional costs incurred by the seller for the cargo including the extra storage and heating charges.

What is interesting at PORAM Contract No.7 is that the buyers are only required to present a vessel for loading within the contract shipment period. It is not a condition of contract that the buyer's vessel to tender valid NOR within the contract shipment period. The Clause 3 (i) stipulates that if the buyer calls upon the seller to load the cargo, then the seller shall have to load the cargo even if the vessel is found unsuitable by the MPOB surveyor. In such case, the cargo samples to be used for the quality determination will be drawn at time of shipment from the shore tanks and not from the vessel's tanks.

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<sup>1</sup> See the article "The Implications of the Buyers' Non-Compliance with the Pre-Advice Requirements in the Grain FOB Sale Contracts" published in *Commoditylaw's Grain Trade Review* Edition No.3

### **Laytime And Demurrage provisions**

The PORAM Contract No.7 is a berth sale contract. It gives the palm oil shippers the same advantage as to voyage charterers in berth charterparties. The buyer's 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 laytime will commence to run when the vessel is alongside the nominated berth and ready in all respects to receive the palm oil cargo.

By making the commencement of laytime subject to the vessel berthing and approval of the vessel's tanks by the MPOB surveyor, the PORAM Contract No.7 protects the palm oil shippers 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.

Any time lost prior to berthing due to the shippers'/sellers' failure to have the goods ready for loading or to provide the cargo readiness documents to the port operators in due time shall fall outside the scope of laytime, but the buyer shall be entitled to claim damages for detention of vessel prior to berthing<sup>2</sup> because the FOB sellers have an implied obligation not to prevent the buyer's vessel from becoming an "arrived ship"<sup>3</sup>.

The commencement of laytime will be not only in function of the time when the buyer's vessel is alongside the nominated berth and ready in all respects for loading but also in function of the pre-advise period. The sellers' loading obligation date is on the next working day following the expiry of the 14 days' pre-advise period. Until that date the sellers are not obliged to commence loading.

If nonetheless the buyer's vessel arrives at loading port before the expiry of the 14 days' pre-advise period, the seller(s) shall not be obliged to commence loading before the expiry of the pre-advise period, unless the sellers manage to have the goods ready for loading and agree to start loading earlier than the expiry of the pre-advise period, in which case the laytime shall commence to count from the time of commencement of loading.

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.

Any demurrage incurred due to loading delays caused by the shippers/sellers who did not have the goods ready for loading shall be borne by such shippers/sellers only.

### **Seller's Obligation To Have The Cargo Ready For Loading**

The seller(s) must confirm to the buyer at least two days before the vessel's ETA that the cargo shall be ready to load on the ETA date. However, the seller's obligation to commence loading shall be subject to the buyer's compliance with the obligation to provide a letter of credit conforming with the contract requirements at the latest on the "day prior to commencement of loading", i.e. on the day prior to the vessel's ETA.

The PORAM Contract No.7 should have stipulated what will happen if the buyer fails to provide a letter of credit conforming with the contract requirements at the latest on the day prior to the vessel's ETA, i.e. whether the seller would be entitled to terminate the contract or to postpone

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2 Calculated by reference to demurrage rate.

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

delivery of the goods until the receipt of a letter of credit conforming with the contract requirements.

### **Extension Of The Shipment Period**

If the buyer will not be able to present a vessel ready for loading within the contract shipment period, he will have the right to request extension of the contract shipment period with an additional period of maximum 8 days.

The buyer must give to seller notice requesting extension of the shipment period not later than the last day of the contract shipment period and provide evidence with the charter party or fixture note that the vessel's laycan at loading port was indeed within the contract shipment period.

In case the shipment of goods is made during the extension period, the contract price will be increased as follows:

- with ½ %, if the loading is completed within 4 days after the contract shipment period;
- with 1%, if the loading is completed within 5 or 6 days after the contract shipment period;
- with 1½ %, if the loading is completed within 7 or 8 days after the contract shipment period.

In addition to the late shipment penalty, the buyer will also have to pay any increase in export duty at loading port occurred after the expiry of the contract shipment period.

Provided the buyer's vessel presents ready in all respects for loading and tenders valid NOR during the extension period, the seller shall if necessary complete loading even after the 8 days' extension period. In such case, the contract price will not be increased by more than 1½ %. For instance, if the buyer's vessel arrives at loading port within the 8 days' extension period but it is unable to proceed to berth due to port congestion, the maximum penalty that shall apply shall be 1½ % over the contract price even if the berthing and loading shall be completed after the 8 days' extension period.

### **Weight Determination**

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

### **Extension Of Contract Shipment Period In Case Of Prohibition Or Partial Restriction Of Exports**

In case of prohibition or partial restriction of exports, the contract shipment period shall be extended by 30 days. If the seller is unable to ship the goods during the 30 days' extension period, the sale contract shall be cancelled.

### **Extension Of Contract Shipment Period In Case Of Force Majeure Event**

In case of a force majeure event, the contract shipment period shall be extended for a period not exceeding 60 days.

If the force majeure event ends within the final 21 days of the extended period, then a further 21 days shall be allowed after the termination of the force majeure event.

### **Settlement Of Disputes**

The disputes shall be referred to PORAM arbitration in Malaysia in accordance with the PORAM Rules of Arbitration and Appeal.

## The Review Of FOSFA Contract No. 82, Edition 2016

by Vlad Cioarec, International Trade Consultant



The FOSFA Contract No. 82 is a joint contract form issued by FOSFA and GAPKI (Gabungan Pengusaha Kelapa Sawit Indonesia, i.e. Indonesian Palm Oil Association) to be used for the FOB sales of crude palm oil in bulk.

### Price Settlement For Quantity Tolerance

A margin up to 2% more or less of the contract quantity can be granted to buyers at contract price. If the contract covers multiple shipments, the margin on the mean contract quantity that can be granted to buyers shall not be affected thereby, that is, the margin/tolerance shall apply on the unshipped balance only.

### Vessel Nomination

The pre-advice period for the submission of the vessel's nomination notice is minimum 14 days prior to the expected date of the vessel readiness to load, except in case of a string of FOB back-to-back contracts, where the vessel's nomination notice must reach to the first seller not later than 10 days before the expected date of the vessel readiness to load.

The vessel's laycan at loading port shall not exceed a spread of 7 days, which shall be within the contract delivery period.

If the vessel's nomination notice is received by the sellers in less than 14 days (10 days in case of a string) before the expected date of the vessel readiness to load, the sellers shall not be entitled to reject the nomination, provided that the buyers nominate the vessel with at least 15 days (11 days in case of a string) before the end of the contract delivery period. This means that even if the buyers nominate the vessel in less than the required number of days stipulated in the sale contract as the pre-advice period, the sellers can accept the vessel's nomination, provided that the time left from the vessel's nomination date until the end of the contract delivery period is minimum 15 days (11 days in case of a string) to cover the contractual pre-advice period, because the sellers' obligation to commence loading will be on the 15th day after the vessel's nomination date (11th day in case of a string), not sooner.

Any time lost by the vessel in the event of a presentation for loading before the expiry of the pre-advice period shall be for the buyers' account. If the vessel's Master tenders NOR before the expiry of the 14 days' pre-advice period (10 days' pre-advice period in case of a string), the vessel's NOR shall not become effective to start the laytime prior to the expiry of the 14 days' pre-advice period (10 days' pre-advice period in case of a string), unless the sellers agree to load earlier in which case the laytime shall start to count from the time of commencement of loading.

The FOSFA Contract No. 82 does not stipulate any requirements to be complied with by the vessel to be nominated by the buyers.

### Conditions For The Vessel Substitution

The buyers may substitute the originally nominated ship provided that the expected readiness date of the substitute vessel will not be earlier than that of the originally nominated vessel and not later than 10 days, unless otherwise agreed by the sellers, and that the expected readiness date of the substitute vessel falls within the contract delivery period.

The buyers must give the vessel substitution notice to sellers not later than 2 business days before the expected readiness date of the originally nominated vessel.

What the Clause 7 of FOSFA Contract No. 82 does not say it is that the substitute vessel must

comply with the requirements stipulated by the sellers in the sale contract in respect of size and de-ballasting capacity.

The FOSFA Contract No. 82 should have also stipulated that if the substitute vessel presents for loading earlier than the expected readiness date of the originally nominated vessel, the substitute vessel's NOR shall not become effective and the time will not count as laytime prior to such date.

The FOSFA Contract No. 82 should have also stipulated what will happen if the substitute vessel does not present ready for loading within the 10 days' time limit after the expected readiness date of the originally nominated vessel.

### **NOR And Commencement Of Laytime**

The vessel's Master may tender NOR only upon the vessel is ready in all respects to receive the palm oil cargo, i.e. after the vessel's tanks and pipelines had been inspected and approved for loading by FOSFA Member Superintendents. However, 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 place. Any demurrage incurred thereby by the vessel shall be equally divided between the buyers and sellers.

The laytime will commence to run upon the expiry of 6 hours' Notice time after the NOR has been tendered.

If the vessel presented by the buyers for loading fails to pass the tanks' inspection upon berthing, the time lost from rejection until approval of tanks by superintendents shall not count as laytime. Furthermore, if the commencement of loading will be delayed by more than 72 hours after the time of the sellers' acceptance of NOR due to the vessel's failure to pass the tanks' inspection, any extra storage charges incurred by the sellers shall be for the buyers' account.

### **Extension Of The Delivery Period**

The buyers have the right to request extension of the contract delivery period with maximum 15 days *“in which to provide suitable freight”*.

The buyers must give notice to sellers requesting extension of the delivery period not later than the 16:00 hours on the last business day of the contract delivery period.

If the buyers will be unable to present a suitable vessel ready in all respects for loading before the expiry of the extension period, they have the option to request delivery in storage tanks at loading port provided they give a minimum 4 business days pre-advice to sellers. In such case, the buyers shall make the payment against the presentation by the sellers of the superintendents' Certificate of Analysis, Certificate of Origin and warrant or delivery order issued by the port storage installation.

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

The newly introduced Clause 12 in FOSFA Contract No. 82, Edition 2016 stipulates 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 ...”*

However, FOSFA Contract No. 82 leaves open two possibilities:

- nomination of a vessel with a late laycan;
- nomination of a vessel with an early laycan, when the vessel arrives within the laycan but she cannot proceed to berth due to congestion.

## Scenario with a late laycan

Clause 3 of FOSFA Contract No. 82 requires that the vessel's laycan at loading port to be within the contract delivery period, but it does not stipulate a time limit for the buyers to present the nominated vessel ready in all respects for loading.

In **ERG Raffinerie Mediterranee SPA v. Chevron USA Inc.**<sup>1</sup>, the contract delivery period for a FOB sale of gasoline was 27 - 30 May 2004. The time allowed for loading was 36 hours with a 6 hours' Notice period. The buyers nominated a vessel with a laycan 29/30 May 2004. The English Court of Appeal held that by nominating a vessel with a laycan in the last two days of the contract delivery period, the buyers turned the contract delivery period into a period for the presentation of vessel in which the vessel could arrive and tender NOR at any time up to 24:00 hours on the last day of the contract delivery period.

Therefore the FOB sale contracts incorporating FOSFA Contract No. 82 should stipulate a time limit for the buyers to present the nominated vessel ready in all respects for loading and tender valid NOR, taking into consideration the time necessary to load the cargo quantity at the contractual loading rate before the end of the contract delivery period. The vessel's laycan at loading port should allow to sellers sufficient time for the completion of loading between the next day following the last day of laycan (i.e. cancelling day) and 23:59 hours on the last day of the contract delivery period. Therefore, the buyers must nominate a vessel with a laycan that will allow to sellers a sufficient time to load the goods in the days following the cancelling day until the end of the contract delivery period.

## Scenario with the early laycan when the vessel arrives within the laycan but she cannot proceed to berth due to congestion

This matter was addressed by the English Commercial Court in the English law case **Kurt A. Becher v. Voest Alpine Intertrading (The "Rio Apa")**<sup>2</sup>.

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

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1 [2007] 2 Lloyd's Rep. 542; [2007] EWCA Civ. 494.

2 [1992] 2 Lloyd's Rep. 586

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. 82 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. 82 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 12.

Unlike FOSFA Contract No. 51, FOSFA Contract No. 82 does not require the vessel to arrive at the berth to tender NOR. If the ship arrives at the loading port within the laycan but she cannot proceed to berth due to congestion, the Master can tender NOR upon the ship's arrival at the usual anchorage place and thereby the buyers will comply with their contractual obligation to present the vessel ready for loading within the contract delivery period, notwithstanding the subsequent delays incurred by the vessel due to congestion.

However, in the event that the vessel upon being called to berth fails to pass the tanks' inspection and loading is thereby delayed by more than 72 hours, the Clause 7 of FOSFA Contract No. 82 stipulates that “*any extra costs incurred by Sellers shall be for Buyers account*”.

#### **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.

#### **Settlement Of Disputes**

Disputes arising out of the sale contracts incorporating the FOSFA Contract No. 82 shall be referred to arbitration in accordance with the FOSFA Rules of Arbitration and Appeal.

## Documentary Evidence Used To Analyse The Shortage Claims For Vegetable Oil Cargoes



by Vlad Cioarec, International Trade Consultant

The quantity of vegetable oil cargoes transported by sea is measured and calculated at each point of transfer of responsibility and then comparisons are made to see if there is any difference.

The vegetable oil cargoes are delivered to vessels either directly from tanker lorries or from loading port storage tanks.

In case of parcels of vegetable oils delivered to vessels from tanker lorries, the export duty and FOB price are calculated based on the weight figure resulted from the weighbridge weighing of tanker lorries. Hence, the Bills of Lading, surveyor's certificate of weight and all other commercial documents required for payment must state the weight figure resulted from the weighbridge weighing of tanker lorries. This is a custom of trade stated in the Clause 12 of FOSFA Contract No. 51 and Clause 9 of ANEC Contract forms No. 81, 83, 110, 112.

In case of vegetable oil cargoes shipped on board the vessels from shore tanks, the export duty and FOB price are calculated based on the weight figure resulted from shore tanks gauging. In such case, the Bills of Lading, surveyor's certificate of weight and all other commercial documents required for payment must state the weight figure resulted from the shore tanks gauging. This is a custom of trade stated in the Clause 12 of FOSFA Contract No. 51, Clause 10 of PORAM Contract No.7 and Clause 9 of ANEC Contract forms No. 81, 83, 110, 112.

After loading of cargo in the vessel's tanks is completed, the cargo quantity is once again measured and calculated based on vessel's tank ullages. Accordingly, at loading port the relevant documents for comparison are the weighbridge report, shore tanks gauging report and vessel's ullage report.

At the port of discharge, the weight of cargo is calculated based on ullage measurements made on board the vessel before discharge and after discharge based on storage tanks measurement and/or weighbridge weighing of the tanker lorries that carry the cargo from the port to the consignee's premises. At the port of discharge, the relevant documents used for comparison are the ship's ullage report made before discharge, out-turn quantity report and in case of full cargoes, the dry tank certificate showing that all the cargo carried on board has been delivered and the cargo tanks are empty after discharge.

The measurement procedures for vegetable oil cargoes in shore tanks and ship's tanks are similar to the procedures used in case of petroleum oil cargoes. However, the fact that the vegetable oil cargoes are traded based on weight means that the figures used for comparison are the weight figures and the reference to quantity is a reference to weight.

Out-turn quantity shortages occur sometimes due to measurement errors, inherent loss of cargo in long voyages and the use of different VCF Tables for the calculation of shipped weight figure and delivered weight figure.

The shortage claims for vegetable oil cargoes are made by the cargo insurers on behalf of the CFR and CIF buyers who pay for the cargoes based on the shipped weight figure stated in the Bills of Lading and want to recover the value of quantity shortage resulted from the difference between the Bill of Lading weight figure and out-turn report's weight figure<sup>1</sup>.

In cases involving shortage claims for vegetable oil cargoes, the Courts analyse all the relevant documents evidencing how the weight of cargo was determined at the time of shipment at loading

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<sup>1</sup> In the US law case *Spencer Kellogg v. S/S Mormacsea*, 538 F. Supp. 230 (S.D.N.Y. 1982), the District Court of New York held that: “[T]he quantity of cargo that a consignee was actually able to sell or use is the fairest measure of damages, since any oil it is able to sell or use redresses its actual damages accordingly. [...] The proper and fair net shortages for purposes of damages in this case, therefore, are the differences between the amounts reflected on the bills of lading and the amounts delivered to the storage tanks.”

port and at the time of delivery at the port of discharge.

The carriers argue that pursuant to Art.1(e) of Hague-Visby Rules, the carrier's responsibility for the goods begins from the time when the goods are loaded on board the ship and ends when they are discharged from the ship and accordingly, any in-transit loss should be determined by comparing the weight figures stated in the vessel's ullage reports made after loading and before discharge<sup>2</sup>.

In this regard, Sub-clause 7(a) of VEGOILVOY tanker voyage charter party form has the following provisions:

*“The cargo shall be pumped into the Vessel at the expense, risk and peril of the Charterer, and shall be pumped out of the Vessel at the expense of the Vessel, but at the risk and peril of the Vessel only so far as the Vessel's permanent hose connections, where delivery of the cargo shall be taken by the Charterer or its consignee.”*

In the US law cases *Northeast Petroleum Corp. v. S.S. Prairie Grove*<sup>3</sup>, *Kerr-McGee Refining Corporation v. M/V La Libertad*<sup>4</sup>, *New England Petroleum Co. v. OT SONJA*<sup>5</sup>, the US District Court of New York held that in case of a carriage subject to such charter party provisions a cargo receiver may not base a shortage claim upon computations made at a point subsequent to the point of delivery defined in the charter party, i.e. vessel's permanent hose connections, and the question whether there was any in-transit loss has to be determined by comparing the quantity figures stated in vessel's ullage reports made after loading and before discharge.

If the Bills of Lading contain or incorporate such charter party terms and the vessel's ullage readings were verified by independent surveyors, in case of shortage claims the Courts would normally give preference to the weight figures stated in the vessel's ullage reports, notwithstanding the prima facie evidence provided by the Bills of Lading.

The Indian Courts adopted the rule that the quantity based on shore tank receipt or weighbridge weighing of tanker lorries should only be used for the assessment of import duty<sup>6</sup> and the carrier's liability for cargo shortages should be determined by comparing the ship's ullage quantity at discharge port with the ship's ullage quantity at loading port<sup>7</sup>.

A similar rule was adopted in Pakistan by the Pakistan High Court in the law case **Trading Corporation of Pakistan v. Inter-Continental Oceanic Enterprises Corporation and Others (The “Nitsa”)**<sup>8</sup>. In that case the consignee of a shipment of soya bean oil in bulk made a shortage claim for the difference between the Bill of Lading's weight figure (25,801.749 Metric Tonnes) and out-turn weight figure (25,557.657 Metric Tonnes).

The carrier's evidence consisted of the vessel's ullage reports and dry tank certificate. The weight figure stated in the vessel's ullage report made after loading was 25,862.600 Metric Tonnes, while the weight figure stated in the vessel's ullage report made before discharge was 25,863.014 Metric Tonnes.

The carrier argued that the results of joint ullage measurements of the vessel's tanks made by after loading and before discharge by surveyors representing the shipper, consignee and the carrier were a proof that no loss occurred during the carriage. The entire quantity found on board the vessel was discharged into the shore tanks and a dry tank certificate was issued indicating that nothing

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2 See *Trading Corporation of Pakistan v. Inter-Continental Oceanic Enterprises Corporation and Others (The “Nitsa”)*, [2000] 1 Lloyd's Rep. 563.

3 1977 AMC 2139 (S.D.N.Y. 1977)

4 529 F. Supp. 78 (S.D.N.Y. 1981)

5 732 F. Supp. 1276 (S.D.N.Y. 1990)

6 See Indian Supreme Court's order dated 20 February 2002 in the case of *Commissioner of Customs (Import), Mumbai v. M/s. National Organic Chemical Industries Ltd. (NOCIL)* [2002 (142) ELT A280 (S.C.)]; See also the Indian law case *Godrej Industries Ltd. v. Collector of Customs (Bombay High Court 2004)*.

7 See the Indian law case *Shaw Wallace & Co. Ltd. v. Assistant Collector of Customs & Others* [1986 (25) ELT 948 (Bombay)].

8 [2000] 1 Lloyd's Rep. 563

remained on board the vessel. The carrier contended that the shortage could only have occurred after the cargo had been discharged and according to Hague Rules, the carrier's responsibility for the cargo ends when the vegetable oil leaves the ship's manifold at the port of discharge. Based on the carrier's evidence, the Pakistan High Court held that there was no actual shortage.

Although the Bill of Lading is a prima facie evidence of the quantity of cargo stated to have been shipped on board the vessel, the carrier can rebut this evidence with a vessel's ullage report certified by an independent surveyor at loading port, the Mate's Receipt and a letter of protest stating that the actual weight of cargo shipped on board the vessel was not that provided by the shipper in the Bill of Lading. In **Trading Corporation of Pakistan v. Inter-Continental Oceanic Enterprises Corporation and Others (The "Nitsa")**<sup>9</sup>, the Pakistan High Court held that the carrier can evidence with the Mate's Receipt and a letter of protest that the quantity was short shipped at the port of loading. The relevant comments are quoted below:

*“For this purpose the master of the ship can rely on the mate's receipt and if he is bound to sign for the amounts in excess of the amount actually loaded, for instance because of certain binding term of charter-party, then he could lodge a note of protest at the port of loading before sailing... Such note of protest may be accepted in evidence to show that the quantities actually loaded on board were not the same as shown in the bill of lading.”*

However, in cases where the vessel's ullage report at loading port was not certified by independent surveyors or the carriers did not even produce a vessel's ullage report, the Courts determined the carrier's liability based on the shore weight figures evidenced by the Bills of Lading and out-turn report.

An example of such case is the US law case **Spencer Kellogg v. S/S Mormacsea**<sup>10</sup>.

In that case the weight of two castor oil cargoes shipped on board the vessel from tanker lorries was determined by a Brazilian Government agency based on the results of weighbridge weighing of tanker lorries before and after loading. The weight figures determined by weighbridge weighing were stated in the Bills of Lading issued by the ship's Master who did not check their accuracy by ullage measurement of the vessel's tanks. Upon delivery at the port of discharge, the consignee made a shortage claim for the differences between the Bill of Lading's weight figure resulted from the weighbridge weighing of tanker lorries and the weight figures resulted from the shore tanks gauging at the port of discharge.

The District Court of New York and US Court of Appeals for the Second Circuit upheld the claim.

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9 [2000] 1 Lloyd's Rep. 563

10 538 F. Supp. 230 (S.D.N.Y. 1982); 703 F.2d 44 (2<sup>nd</sup> Cir. 1983).

## Charterparty And Bill Of Lading Clauses Used To Protect The Carriers Of Vegetable Oil Cargoes In Case Of Claims For Quantity Shortages



by Vlad Cioarec, International Trade Consultant

The quantity of vegetable oil cargoes is measured and calculated at the time of shipment both on shore and the vessel and then comparisons are made to see if there is any difference.

In case of parcels of vegetable oils delivered to vessels from tanker lorries, the export duty and FOB price are calculated based on the weight figure resulted from the weighbridge weighing of tanker lorries. Hence, the Bills of Lading, surveyor's certificate of weight and all other commercial documents required for payment must state the weight figure resulted from the weighbridge weighing of tanker lorries. This is a custom of trade stated in the Clause 12 of FOSFA Contract No. 51 and Clause 9 of ANEC Contract forms No. 81, 83, 110, 112.

In case of vegetable oil cargoes shipped on board the vessels from shore tanks, the export duty and FOB price are calculated based on the weight figure resulted from shore tanks gauging. In such case, the Bills of Lading, surveyor's certificate of weight and all other commercial documents required for payment must state the weight figure resulted from the shore tanks gauging. This is a custom of trade stated in the Clause 12 of FOSFA Contract No. 51, Clause 10 of PORAM Contract No.7 and Clause 9 of ANEC Contract forms No. 81, 83, 110, 112.

After loading of cargo in the vessel's tanks is completed, the cargo quantity is once again measured and calculated based on vessel's tank ullages.

Because the Master's clausing of Bills of Lading with the ship's weight figure may create difficulties for the shipper in obtaining the payment for the cargo, the commodity traders drafted charter party clauses whereby the shipowners are required to issue the Bills of Lading with the weight figure determined by shore scales, as in the example provided below:

*“Bills of Lading to be issued in accordance with the shore weight figures supplied by the Shipper or Charterer. If there will be any discrepancies between the shore weight figures and those resulting from the ullage measurement of Vessel's tanks, the shore weight figures will prevail and the Bills of Lading shall be issued without comments relating to the Vessel's calculation of the cargo weight received on board.”*

A weight disclaimer in a Bill of Lading may protect the carriers in cases where the shore weight figures are not considered a reliable evidence and the vessel's ullage reports at loading and discharge ports were certified by independent surveyors<sup>1</sup>.

The carriers of vegetable oil cargoes issue the Bills of Lading based on an amended VEGOILVOY Bill of Lading form and state the shore weight figure with the following disclaimer:

*“A quantity in bulk said by shippers to be:*

.....

*The quantity, measurement, weight, gauge, quality, nature, value and actual condition of the cargo unknown to the carrier, the Vessel and the Master.”*

The carriers can also use a weight disclaimer based on the custom of trade for the calculation of the

<sup>1</sup> In such cases, the Courts held that in the absence of independent evidence of the shore weight figure, the prima facie evidence of the weight of cargo provided by the Bills of Lading is not deemed enough and the carriers have not been held responsible for the differences in weight that were attributable to measurement errors and inherent loss in weight. See *Trading Corporation of Pakistan v. Inter-Continental Oceanic Enterprises Corporation and Others (The “Nitsa”)*, [2000] 1 Lloyd's Rep. 563.

commodity price based on the shore weight figure.

For Argentine vegetable oil shipments, the evidence of this custom of trade is the Clause 12 of FOSFA Contract No.51 “Contract For Argentine Vegetable Oils In Bulk – FOB Terms” which has the following provisions:

*“12. WEIGHTS: Shipped weight, as certified by the surveyor, ascertained by gauging either in officially calibrated land tank/s or tank barge/s from which the oil is delivered or by delivery via certified weigh scales, or from tank cars which, if not calibrated, shall be weighed before and after loading by single weighing only (front and back axle weighing not allowed). ...*

*Weight ascertained by vessel's tank(s) ullage or draft survey shall be contractually irrelevant.”*

For the Brazilian vegetable oil shipments, the evidence of this custom of trade is the Clause 9 of ANEC Contract forms No. 81, 83, 110, 112 which has the following provisions:

*“9. WEIGHT: To be final at time and place of shipment per certificate/s issued by Independent Surveyor, based on figures ascertained by measurement of shore tanks, where available, cost being for Seller's account. Buyer has the option, at his expense, and for his own guidance, to request for joint weight control, advising the Seller in due time the name of the Independent Surveyor he is appointing. For all effects and purposes results of the Seller's Independent Surveyor will be final. Any figure, other than the shore tanks, where available, will not be acceptable.”*

The shipping laws of some of the most important exporting and importing countries of vegetable oils and biodiesel products – i.e. United States<sup>2</sup>, Malaysia<sup>3</sup>, Singapore<sup>4</sup>, India<sup>5</sup> and Pakistan<sup>6</sup> - include provisions as to the intended legal effect of a weight disclaimer based on custom of trade when inserted into the Bills of Lading for bulk cargoes. These provisions stipulate that:

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

To date the only Court interpretation of these law provisions was made in the US law case **Spencer Kellogg v. S/S Mormacsea**<sup>7</sup>.

In that case the weight of two castor oil cargoes shipped on board the vessel from tanker lorries was determined by a Brazilian Government agency based on the results of weighbridge weighing of tanker lorries before and after loading. The weight figures determined by weighbridge weighing were stated in the Bills of Lading with the following disclaimer:

**“WEIGHT OF CARGO DETERMINED BY A THIRD PARTY AND ISSUANCE OF THIS BILL OF LADING SHALL NOT BE AN ADMISSION BY CARRIER THAT WEIGHT STATED IN THIS BILL OF LADING IS ACCURATE.”**

The ship's Master who did not check the accuracy of shore weight figures by ullage measurement of

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

3 See Section 6 of Malaysian Carriage of Goods by Sea Act, 1950

4 See Section 5 of Singapore Carriage of Goods by Sea Act, 1998

5 See Section 6 of Indian Carriage of Goods by Sea Act, 1925

6 See Section 6 of Pakistan's Carriage of Goods by Sea Act, 1925

7 538 F. Supp. 230 (S.D.N.Y. 1982); 703 F.2d 44 (2<sup>nd</sup> Cir. 1983)

the vessel's tanks.

Upon delivery at the port of discharge, the consignee made a shortage claim for the differences between the Bill of Lading's weight figure resulted from the weighbridge weighing of tanker lorries and the weight figures resulted from the shore tanks gauging at the port of discharge.

In the Court proceedings, the carrier contended that the Bills of Lading were not prima facie evidence of delivery to the vessel of the amounts stated therein, because the shipments were weighed by independent surveyors hired by the shipper and not by the carrier and *“the typical procedure in such cases is for the shipper to provide the quantities stated in the bill of lading”*. However, the carrier failed to provide evidence that there is a custom of trade for the issuance of Bills of Lading with the shore weight figure.

The District Court of New York and US Court of Appeals for the Second Circuit upheld the claim. Referring to the Bills of Lading statement that weight of cargo was determined by a third party, the US District Court of New York made the following comments:

*“Under COGSA, this should not be sufficient to put the consignee on notice that it cannot rely upon the weights stated in the bills. Given the importance of enabling consignees to rely upon carrier representations in bills of lading, and the fact that consignees must know that carriers commonly seek to disclaim their statutory duty to stand behind such representations irrespective of any custom, carriers should be required to make it clear in any disclaimer that they are at least claiming to rely upon a custom of the trade. A disclaimer purportedly based on a custom should be given effect only where the carrier states its claim that there is a custom of relying upon the weight stated by a specified third party, and that the purported weight is that declared by the third party, not by the carrier. Here, the bills do not suggest reliance upon any such custom, the third party is not identified, and the weight is first given as the actual weight of the goods received and then separately disclaimed. Under these circumstances, the consignee is entitled to the protection Congress intended consignees normally to have.”*

Based on this Court interpretation, the Bills of Lading issued with the weight figure resulted from the weighbridge weighing of tanker lorries should have a weight disclaimer with the following provisions:

*“The weight figure stated in this Bill of Lading has been furnished by ..... (FOSEA Approved Superintendent) in accordance with the custom of trade for ascertaining the weight of castor oil in bulk by weighbridge weighing of tanker lorries.*

*Carrier agrees to issue this Bill of Lading with the weight figure ascertained by weighbridge weighing of tanker lorries relying on the custom of trade and makes no representation with regard to the accuracy of weight figure stated herein. According to the weighing performed ashore under custom of trade, the shipment of castor oil in bulk is said to weigh: .....”*

If the Bill of Lading is not prima facie evidence of the weight stated therein, the CFR and CIF buyers claiming the value of quantity shortage from the carriers will have the burden to prove that the weight stated in the Bill of Lading was actually shipped on board the vessel.

If the carrier can evidence with the ship's ullage reports that there was no in-transit loss or that the in-transit loss was within the contractual allowance for the inherent loss in weight that occurs during the sea carriage of vegetable oil cargoes, then the responsibility for the quantity invoiced in excess of the delivered quantity should belong to the seller who must reimburse the buyer.

In case of vegetable oil cargoes carried on long voyages, the carriers can include in charterparties and Bills of Lading's Conditions of Carriage a clause providing that the carrier shall only be liable for the in-transit loss to be determined as the difference between weight figures ascertained by joint ullage surveys of vessel's tanks at loading and discharge ports, if such loss exceeds a contractual

allowance of 0.5% for the inherent loss in weight.  
An example of Bill of Lading's in-transit clause is quoted below:

*“The Carrier shall not be liable for any in-transit loss in weight of cargo below 0.5% of the Bill of Lading's weight figure. “In-transit loss” shall be determined as the difference between the weight figure ascertained by ullage measurement of Vessel's cargo tanks at loading port and the weight figure ascertained by ullage measurement of Vessel's cargo tanks at the port of discharge.”*

In charter parties the in-transit loss clause has the following provisions:

*“Owners shall not be liable for any in-transit loss in weight of cargo below 0.5% of the Bill of Lading's weight figure. “In-transit loss” shall be determined as the difference between the weight figure ascertained by ullage measurement of Vessel's cargo tanks at loading port and the weight figure ascertained by ullage measurement of Vessel's cargo tanks at the port of discharge.”*

If the Bills of Lading contain such clauses or incorporate charter parties with such clauses, in case of shortage claims the shipowners would only be liable for cargo shortages in excess of contractual loss allowance. Another effect of incorporation into the Bills of Lading of in-transit loss clauses is that in case of shortage claims the Courts would normally give preference to the evidence provided by vessel's ullage reports rather than the Bills of Lading and out-turn report.

The in-transit loss clauses were initially drafted for oil tanker charter parties following a series of US Court decisions in the early 1980s which declined to accept a trade allowance for in-transit loss in oil trade in the absence of a specific reference in the contract of carriage<sup>8</sup>.

The US law requirement for express reference in the contract of carriage of in-transit loss allowance means that an in-transit loss allowance can be opposable to a third party holder of Charter Party Bill of Lading, such as a CFR or CIF buyer, only if the in-transit loss allowance is specified in a charter party clause and the charter party containing the clause is properly incorporated in the Bill of Lading or if the Bill of Lading's Conditions of Carriage include a clause that the carrier shall not be responsible for any in-transit loss that is below the specified tolerance.

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<sup>8</sup> See Kerr-McGee Refining Corporation v. M/V La Libertad, 529 F. Supp. 78 (S.D.N.Y. 1981), Amerada Hess Corp. v. S.S. Phillips Oklahoma, 558 F. Supp. 1164 (S.D.N.Y. 1983) and Sun Oil Company of Pennsylvania v. M/T Carisle, 771 F.2d 805 (3<sup>rd</sup> Cir.1985).