



Introduction

Coal Trade Review is a publication in which are reviewed shipping and contractual matters relevant to the international trade with coal, ores and mineral concentrates.

In this issue, the Editor reviews the following topics:

- **The Vessel Requirements In The Coal FOB Sale Contracts**
- **The Shipping Conditions For Sales Of Australian Coal Basis FOBT Newcastle**
- **Buyer's Remedies For Delivery Of Contaminated Coal**
- **Implications Of Price Adjustment For Iron Ore Cargoes On Letter Of Credit Payment**
- **How The CIF Buyers Could Take Advantage Of The Exceptions To Time Counting**

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

The Vessel Requirements In The Coal FOB Sale Contracts

by Vlad Cioarec, International Trade Consultant



Coal is transported by sea with three types of vessel:

- Conventional Bulk Carriers;
- OBO (Ore/Bulk/Oil) Combination Carriers;
- Box Shaped Bulk Carriers.

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

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

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

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

The operators of major coal terminals, i.e. Kooragang and Carrington Coal Terminals in the Port of Newcastle, Dalrymple Bay Coal Terminal in the Port of Hay Point, Richards Bay Coal Terminal, Neptune Bulk Terminals and Westshore Terminals at Roberts Bank in Vancouver, Norfolk Southern's Lamberts Point Coal Terminal at Norfolk, DTA Coal Terminal at Newport News, accept only single deck, self-trimming bulk carriers because they do not provide mechanical or manual trimming.

These coal terminals have modern loading installations that dump and distribute the coal evenly into the vessel's holds at high speed. The coal is evenly trimmed by the shiploader spout which is directed to all corners of the holds to avoid any void spaces. Hence, the delivery of coal at these terminals is made on **FOB spout-trimmed basis**.

Another requirement concerning the vessel to be nominated it is that related to the vessel's deballasting capacity. The nominated vessel must have sufficient deballasting capacity to enable the loading terminal operator to achieve the maximum loading rate applicable to that size of the vessel without the interruption of loading, i.e. the ballast water must be discharged at a rate which prevents the interruption of loading or at least it does not require the interruption of loading in excess of the

time permitted by the terminal operator.

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

Another requirement concerning the vessel to be nominated it is that the nominated vessel must have all the IMO required certificates valid, including a Certificate of Fitness for the Carriage of Solid Bulk Cargoes listing coal as a permitted cargo, a Certificate of Fitness for the Carriage of Dangerous Goods, the Bulk Carrier Booklet endorsed by the Flag State Administration, the International Ship Security Certificate, Maritime Labour Certificate, Safety Management Certificate and the Document of Compliance with the ISM Code.

In case of sale contracts providing for delivery of coal basis FOBT at an open sea anchorage in Kalimantan such as Taboneo Anchorage, Muara Satui Anchorage or Tanjung Anchorage, the buyers are required to nominate geared bulk carriers to allow the sellers to load the coal from barges using the vessel's cranes and grabs operated by local stevedores.

For the coal cargoes in the range of 30,000 – 60,000 metric tonnes, the nominated vessel must be equipped with 4 cranes with a lifting capacity (Safe Working Load) of 30 metric tonnes each, fitted with 4 electro – hydraulic grabs with a capacity of 10 – 12 cubic meters each. The vessel's gear certificates (i.e. certificate of test and thorough examination of lifting appliances, certificate of test and thorough examination of derricks used in union purchase, certificate of test and thorough examination of loose gear, certificate of test and thorough examination of wire rope) must be valid and up-to-date. The vessel's gears must have been examined and certified by a surveyor to be in safe working condition at least once in the last 12 months preceding the laycan at loading port.

The operators of Australian coal terminals, i.e. Port Waratah Coal Services Ltd. and Dalrymple Bay Coal Terminal Pty Ltd., and the Indonesian shipper PT Arutmin use the RightShip Vetting System to determine whether to accept or reject the vessel nomination.

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

1. Accept^{xxx}

A three, four or five star rating means that the vessel is an acceptable risk with no further query required.

2. RightShip review^{xx}

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

3. Further Investigation required^x

A one star rating means that RightShip needs to conduct a more detailed review of the vessel and owners, including the physical inspection of vessel.

Review Of The Shipping Conditions For Sales Of Australian Coal Basis FOBT Newcastle



by Vlad Cioarec, International Trade Consultant

Laycan Fixation and Vessel Nomination Notice

The buyers shall give to sellers 30 days' notice of the 10 days' laycan spread within which the buyers propose to present the vessel for loading the coal cargo. If the sellers will accept the laycan, then not later than 10 days prior to the first day of the laycan, the buyers shall have to nominate the vessel and declare the quantity of cargo required to be loaded with the 5% contractual tolerance.

Vessel Requirements

The nominated vessel must be single deck, self-trimming bulk carrier, gearless or geared, but the geared vessels, i.e. Handysize and Handymax vessels, will be accepted by the terminal operators provided that their cranes will be positioned in such a way so as not to impede the normal operation of the shiploaders and thereby reduce the loading rate.

The vessel must be classed Lloyd's 100A1 or equivalent and be described as "Bulk Carrier" in the Class Certificate.

The nominated vessel must have all the IMO required certificates valid, including a Certificate of Fitness for the Carriage of Solid Bulk Cargoes listing coal as a permitted cargo, a Certificate of Fitness for the Carriage of Dangerous Goods, the Bulk Carrier Booklet endorsed by the Flag State Administration, the International Ship Security Certificate, Maritime Labour Certificate, Safety Management Certificate and the Document of Compliance with the ISM Code.

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 vessel must be less than 18 years old.

The nominated vessel must have sufficient dewatering capacity to enable the loading terminal operator to achieve the maximum loading rate applicable to that size of the vessel without the interruption of loading, i.e. the ballast water must be discharged at a rate which prevents the interruption of loading.

Size Restrictions

- at Kooragang Terminal: minimum 70,000 tonnes DWT
 maximum 210,000 tonnes DWT
 maximum LOA: 300 metres
 maximum Beam: 50 metres

- at Carrington Terminal: minimum 30,000 tonnes DWT
 maximum 180,000 tonnes DWT
 maximum LOA: 275 metres
 maximum Beam: 47 metres

- at Newcastle Coal Infrastructure Group Coal Terminal: minimum 35,000 tonnes DWT
 maximum LOA: 300 metres
 maximum Beam: 50 metres

The vessel's nomination is subject to acceptance by the port operators Port Waratah Coal Services Ltd., in case of vessels nominated to load at Kooragang Terminal and/or Carrington Terminal, and Newcastle Coal Infrastructure Group, in case of vessels nominated to load at Newcastle Coal Infrastructure Group Coal Terminal.

The port operator Port Waratah Coal Services Ltd. uses the RightShip Vetting System to determine whether to accept or reject the vessel nomination. To obtain RightShip approval, the nominated vessels must receive a minimum three star rating level. The nomination of vessels over 18 years of age is not acceptable because the RightShip Vetting System downgrades them automatically to a two star rating and require their physical inspection.

ETA Notice

If the vessel nomination is accepted by the terminal operators, the buyers will charter the vessel and then give the ETA Notice at least 14 days prior to the vessel's ETA at the Port of Newcastle.

ETA Updates

The buyers must ensure that the vessel's Master will give through the port agents the ETA notices at 10/7/5/3/2 days, 24 hours, 12 hours and 6 hours before the vessel's ETA at the pilot station. In the event that the Master fails to give any of the above-mentioned notices, the sellers will be allowed to add 24 hours extra to the laytime.

Conditions For The Vessel Substitution

The buyers may substitute the originally nominated vessel provided that:

- they give the vessel substitution notice to the terminal operators at least 5 days before the ETA of the originally nominated vessel;
- the substitute vessel will not arrive earlier than the ETA of the originally nominated vessel;
- the substitute vessel complies with the contract requirements in respect of type, size and de-ballasting capacity to be able to load the cargo quantity ordered by the buyers within the contractual time allowed for loading;
- the vessel's demurrage rate is not higher than that of the originally nominated vessel.

The Submission Of The Vessel's Loading Plan

At least 10 days prior to the vessel's ETA, the vessel's Master must provide through the vessel's agents the following information:

- the vessel's loading plan and hatch loading sequence based on loading with one shiploader;
- the exact quantity of coal required to be loaded based on the vessel's loading plan;
- arrival and departure drafts.

In case of the Master's failure to provide the vessel's loading plan and the exact quantity of coal required to be loaded at least 10 days before the expected date of vessel readiness to load, the sellers shall only be responsible to load the minimum quantity stated in the vessel's nomination notice.

Conditions For The Vessel Presentation For Loading

The vessels arriving to load coal in bulk at the Port of Newcastle must comply with the regulations of the Australian Maritime Safety Authority and requirements of the port operators, Port Waratah Coal Services Ltd., respectively Newcastle Coal Infrastructure Group.

The vessel must present for loading with the cargo holds clean, dry, empty, free of waste material and remnants of previous cargo and with the draught marks legible.

The inspection of holds shall be made by a qualified marine surveyor appointed by the sellers. The marine surveyor shall certify the cleanliness of holds by issuing the Hold Cleanliness Inspection Certificate. If the vessel has previously carried potential contaminants such as phosphates, sulphur, cement, salt, potash or iron ore, the marine surveyor inspecting the holds must certify that the holds

are clean and free of contaminants.

If the vessel is an OBO (Ore/Bulk/Oil) Combination Carrier which has previously carried petroleum products, the Master can tender NOR only upon the vessel passing the inspection of Australian Maritime Safety Authority and presenting a Gas Free Certificate issued by a qualified marine chemist stating that the vessel's holds are free of contaminating gases and odor.

NOR

The vessel's Master shall tender NOR upon the vessel's arrival at the outer anchorage or pilot station of the Port of Newcastle at any time, day or night, including Saturdays, Sundays and Holidays, provided that the vessel has obtained the ISPS clearance and is in all respects ready to load coal in bulk.

The 12 hours' Notice time shall start to count from the time of acceptance of NOR by the terminal operators provided that the vessel has arrived within the agreed laycan not prior to the expiry of the 14 days' ETA pre-advice period and is in all respects ready to load the coal cargo.

The vessel shall be considered ready in all respects for loading if:

- she has obtained the ISPS clearance prior to the NOR tendering;
- she is not subject to an arrest order;
- she presents for loading in a seaworthy condition;
- she passes the holds' inspection after berthing.

If the Master tenders NOR before obtaining the ISPS clearance, the NOR shall be invalid and the Master will have to tender a new NOR upon receiving the ISPS clearance.

If the vessel is arrested or attached at berth prior to the commencement of loading, the NOR shall be deemed invalid and the Master will have to tender a new NOR only after the issuance of the release warrant by the Court.

If, after berthing, the vessel is found by the port authorities not ready in all respects to load the coal cargo, the vessel's NOR shall be invalid and the Master will have to tender a new NOR after the vessel is in fact ready all respects for loading.

If the marine surveyor rejects the holds, the Master may tender a new NOR only after he obtains the Hold Cleanliness Inspection Certificate from the marine surveyor.

If the vessel is arrested or attached at berth prior to the commencement of loading, the sellers' loading obligation will be suspended until the Marshal will release the vessel from arrest. In such case, the Master will have to tender a new NOR after the vessel is released from arrest.

Commencement Of Laytime

The commencement of laytime shall depend not only on the time when the buyers' vessel tenders valid NOR but also on the buyers' compliance with other contract requirements.

One of the contract requirements that may affect the commencement of laytime is the requirement to present the vessel ready in all respects for loading within the agreed laycan, after the expiry of the ETA pre-advice period.

The port operators Port Waratah Coal Services Ltd. and Newcastle Coal Infrastructure Group schedule the coal shipments in function of the vessel's laycan and ETA at the port of Newcastle. Therefore, the commencement of laytime will depend not only upon the time when the vessel is ready in all respects to load and tenders valid NOR, but also on whether the NOR is tendered within the laycan and after the expiry of the ETA pre-advice period.

If the vessel arrives at the loading port and tenders valid NOR within the agreed laycan after the expiry of the 14 days' ETA pre-advice period, the laytime will commence to run at 12 hours after the port operator's acceptance of the NOR, unless the port operator commences loading sooner in which case the laytime will commence to run from the time of commencement of loading.

If the vessel arrives at the loading port and tenders valid NOR before the first day of the agreed laycan, the NOR shall not become effective before 00:00 hours on the first day of the agreed laycan

and the 12 hours' Notice time shall commence to run from 00:01 hours on the first day of the laycan period.

If the vessel arrives at the loading port and tenders valid NOR before the expiry of the 14 days' ETA pre-advice period, the NOR shall not become effective before 00:00 hours on the fourteenth day after the day of nomination and the 12 hours' Notice time shall commence to run from 00:01 hours on the fourteenth day after the day of nomination.

If for any reason, including the vessel's late arrival or failure to pass the holds' inspection, the vessel does not tender valid NOR before the end of the cancelling day (the last day of the laycan period), the berthing of vessel after the laycan shall be subject to the consent of the port operator and the laytime will commence to run when the loading starts.

The commencement of laytime will also be in function of the Master's compliance with the deadline imposed by the port operators for the submission of the vessel's loading plan. If the Master fails to provide the vessel's loading plan to the port operator at least 72 hours prior to the vessel's ETA, the vessel shall not be included in the berthing programme on the expected readiness date and the 12 hours' Notice time shall not commence to run before the 72 hours' time limit from the submission of the vessel's loading plan has elapsed.

In case of the vessel substitution, the commencement of laytime will also be in function of the buyers' compliance with the 5 days' time limit imposed by the port operators for the submission of the substitution notice. If the substitute vessel arrives and tenders NOR before the expiry of the 5 days' notice period, the NOR shall not become effective before 00:00 hours on the fifth day after the day of substitution and the 12 hours' Notice time shall not commence to run before 00:01 hours on the fifth day after the substitution notice date.

The laytime shall cease to count at the time when the loading, trimming and final draft survey have been completed or when the cargo documents required to effect the Customs clearance are on board, whichever is the later.

Loading Conditions

The coal cargo shall be delivered free on board the vessel spout trimmed. Any extra trimming (beyond spout trimming) necessary due to the vessel's construction shall be for the buyers' account and any time lost thereby shall not count.

Cargo Weight Determination

In case of full cargoes, the weight figure used for invoicing and issuance of Bills of Lading shall be determined by a marine surveyor based on the vessel's draft survey before and after loading.

In case of parcels provided by different shippers or different coal brands that are loaded separately as distinct parcels, the weight figures used for invoicing and issuance of Bills of Lading are based on the conveyor belt weightometer readings which are considered more accurate than the draft surveys of a partially loaded vessel.

Buyer's Remedies For Delivery Of Contaminated Coal



by Vlad Cioarec, International Trade Consultant

Coal cargoes must be delivered free from any detrimental foreign materials such as earth, stones, wood or mine blasting materials and any organic contaminants which may be mixed with coal during storage at the loading terminal.

One such contaminant could be considered the petroleum coke, commonly referred to as “petcoke”. The petroleum coke is a solid waste by-product of heavy crude oil and tar sands refining process that resembles coal in appearance. The petroleum coke is sometimes added by US shippers to the thermal coal cargoes in proportions ranging from 10% to 30% in order to meet the quality specifications in respect of Gross Calorific Value. The petroleum coke has a higher energy content and a lower cost than thermal coal, but it has a lower Volatile Matter than thermal coal, which makes it difficult to ignite in boilers. It is thought that by blending the petroleum coke with thermal coal, the burning coal will ignite the petroleum coke and keep it burning.

Not all power plant operators are willing to burn in their boilers coal blends with petroleum coke. Besides the problem with ignition, the petroleum coke emits more carbon dioxide than thermal coal and has a higher sulphur and heavy metals (notably Vanadium) content, thereby generating higher toxic emissions of sulphur dioxide and heavy metals. These disadvantages make the petroleum coke an undesirable fuel for most power plant operators.

The power plant operators who are not willing to accept coal blends with petroleum coke should stipulate this matter clearly in their procurement contracts in the form of a warranty that the supplier shall not add any petroleum coke to the coal cargo(es) to be delivered under such contracts.

The procurement contracts should also provide remedies in case of breach of this warranty and of the warranty in respect of foreign materials.

In the procurement contracts requiring delivery of coal cargoes on CFR or CIF basis, the contractual remedies should include the supplier's obligation to reimburse the buyer for all expenses incurred by the buyer in screening and disposing of the foreign materials and/or petroleum coke from the coal cargo and the buyer's right to deduct from the contract price (price invoiced by the supplier for the contaminated cargo) the amount invoiced for the quantity of foreign materials and/or petroleum coke.

The buyer's failure to stipulate these matters in the procurement contract can leave the buyer exposed to legal disputes with the supplier. An example of such legal dispute was the US law case *Carbontek Trading Co. Ltd. v. Phibro Energy, Inc.*¹. In that case the Danish power plant operator, Elkraft Power Company sought to procure a cargo of approximately 70,000 MT of thermal coal from the commodity trading company Phibro Energy.

The procurement contract concluded by Elkraft Power Company with Phibro Energy stipulated a price of US\$ 32 per MT and provided that New York law applied to disputes arising under the contract.

Phibro Energy bought the coal cargo on FOB terms from an US supplier called Carbontek Trading Co. at a price of US \$ 25 per MT. For the carriage of coal cargo from US loading port to Denmark, Phibro Energy chartered the vessel “Seneca”.

Phibro Energy and Elkraft Power Company appointed local surveyors to inspect the coal piles intended for loading on board the vessel “Seneca”. During inspection, the surveyors discovered that the coal piles contained petroleum coke and informed the buyers, but by the time Phibro Energy notified the supplier Carbontek of their intention to reject the cargo for the fact that it contained petroleum coke, Carbontek Trading already commenced loading the cargo.

1 910 F. 2d 302 (5th Cir. 1990)

Then Phibro Energy asked Carbontek Trading to discharge the cargo loaded and replace it with non-contaminated coal, but Carbontek Trading continued to load the coal/petcoke blend and upon the completion of loading commenced a legal action in US Courts in an attempt to force Phibro Energy to pay the full contract price for the cargo. Phibro Energy counterclaimed damages as compensation for the contamination of coal cargo with petroleum coke, pursuant to the provisions of Article 2 section 2 – 714 of New York Uniform Commercial Code.

Upon the inspection of cargo in Denmark, it was discovered that the cargo of 70,000 MT contained a quantity of 6,500 MT of petroleum coke, of which 500 MT were so mixed in with coal in one hold of the ship that it did not significantly affect the quality of that part of the cargo. Elkraft Power Company agreed to accept delivery of the cargo subject to a deduction of US\$ 192,000 as compensation for the contamination of coal cargo with petroleum coke, the amount of US\$ 192,000 representing the price that would have been paid for the quantity of 6,000 MT of petroleum coke (US\$ 32 x 6,000 MT). In turn, Phibro Energy paid Carbontek the contract price less a deduction for the amount that would have been paid for the quantity of petroleum coke (US\$ 25 x 6,000 MT) and demurrage charges for the time spent on demurrage by the carrying vessel at loading port due to the dispute over the addition of petroleum coke to the coal cargo.

The US Court of Appeals for the Fifth Circuit held that Phibro Energy (FOB buyer) was entitled to reject the cargo at the time of shipment after discovery of the contamination with petroleum coke and that the subsequent acceptance of cargo was subject to Phibro Energy's right to deduct damages from the contract price, pursuant to Article 2 section 2 – 717 of New York Uniform Commercial Code², for the quantity of petroleum coke added to the coal cargo.

As regards the amount deducted by Phibro Energy from the contract price (FOB price invoiced by Carbontek, i.e. US\$ 150,000 (US\$ 25 x 6,000 MT), this was calculated in accordance with the provisions of Article 2 section 2 – 714 paragraph 2 of New York Uniform Commercial Code which stipulates that:

“The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.”

US\$ 150,000 deduction for the quantity of 6,000 MT of petroleum coke was intended to represent the difference between the value of the goods if they had been as warranted and the value of the goods accepted based on the price settlement agreement between Phibro Energy and Elkraft Power Company.

In Carbontek Trading Co. Ltd. v. Phibro Energy, Inc., the buyers were able to base their claim on the statutory provisions of New York Uniform Commercial Code, which provided remedies for breach of warranty in respect of accepted goods. The power plant operators from Far East provide in their coal procurement contracts that their national law applies to disputes arising under the contracts. In order to avoid legal disputes with the coal suppliers, the power plant operators should stipulate in their procurement contracts remedies in addition to those provided in the national statutes for breach of contractual warranties.

2 Article 2 section 2 – 717 of New York Uniform Commercial Code stipulates that: *“The buyer on notifying the seller of his intention to do so may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract.”*

Implications Of Price Adjustment For Iron Ore Cargoes On Letter Of Credit Payment

by Vlad Cioarec, International Trade Consultant



The quality characteristics of iron ore cargoes must comply with the standard specifications of the benchmark used as reference for the calculation of the base price. If the cargo's quality characteristics differ from the quality specifications of the benchmark (i.e. Base Specifications), the Base Price calculated based on the average of the benchmark price quotations published for the reference price will have to be adjusted proportionately in accordance with the contract provisions.

If the cargo's iron content is higher than the contract specification and the cargo has a smaller content of impurities and moisture than the maximum permissible limits for impurities and moisture, the Base Price will be adjusted upwards.

If the cargo's iron content is lesser than the contract specification and the cargo has a greater content of impurities and/or moisture than the maximum permissible limits for impurities and moisture and/or the iron ore does not comply with the physical specifications, the Base Price will be adjusted downwards.

For iron ore cargoes sold on CFR basis to Chinese buyers, the sellers will make an initial drawing under letter of credit for the provisional price calculated based on the cargo's net weight and quality characteristics certified by the surveyors at loading port and then wait for the results of the ship's draft survey and sample's moisture, chemical and physical analysis performed by CIQ at the discharge port for the final settlement.

Initial Drawing Under Letter Of Credit

The banks issuing the letters of credit for the payment of iron ore cargoes calculate the L/C amount based on the average of price quotations published on the days preceding the date of issuance of LC for the benchmark used as reference. After shipment of the iron ore cargo, the sellers calculate the base price in the provisional invoice based on the average of the benchmark price quotations on the five days preceding the Bill of Lading date and the quality differentials between the benchmark and iron ore cargo.

The letters of credit issued for iron ore cargoes stipulate a tolerance limit of +/- 10% for both the cargo quantity and amount available for payment. It may happen that the amount of provisional invoice is more or less than the 10% tolerance limit due to the benchmark price rising or fall during the reference period or the upward or downward adjustment of the base price. Article 18(b) of UCP600 stipulates that the banks may accept a commercial invoice issued for an amount in excess of the amount permitted by the letter of credit, provided they will not pay an amount in excess of that permitted by the letter of credit.

UCP600 does not say anything about the situation when the invoice value is less than the amount of the letter of credit. Therefore, the letters of credit issued for iron ore cargoes should include a special condition to address this matter.

An example of such condition is the Special Condition 27 of BP Letter of Credit format¹ which has the following provisions:

“Any discrepancy resulting from the invoice value exceeding or falling below the US dollar range allowed in this letter of credit is acceptable. In the event that the invoice amount does not exceed the LC value, payment will be effected on the invoice amount. In the event that the invoice value

¹ See Schedule B of BP Oil International Limited General Terms & Conditions for Sales and Purchases of Crude Oil and Petroleum Products – 2015 Edition

exceeds the maximum value of the LC, the bank will pay on the maximum value allowed under this Letter of Credit.”

Final Settlement

The final settlement shall be made on the basis of the results of the ship's draft survey and sample's moisture, chemical and physical analysis performed by CIQ at the discharge port.

If the dry weight figure certified by CIQ based on the vessel's draft readings and moisture analysis results is within 0.5% of the dry weight figure certified by the surveyors at the loading port, the dry weight figure certified by CIQ shall be final and binding upon the seller and buyer.

If the difference between the dry weight figure certified by the surveyors at the loading port and the dry weight figure certified by CIQ at the discharge port exceeds 0.5% and the seller and buyer cannot reconcile the difference, the average between the two figures shall be used for the calculation of final price.

If there is a difference of less than or equal to 0.50% in iron content between the figure certified by the surveyors at the loading port and the figure certified by CIQ, the iron content certified by CIQ shall govern and shall be the basis for the calculation of the final price.

If the difference in percentage in iron content between the figure certified by the surveyors at the loading port and the figure certified by CIQ is more than 0.50% but less than or equal to 1%, the average of the two figures shall be final and binding and shall be the basis for the calculation of the final price.

If there is a difference in percentage in iron content by more than 1% or there is a significant difference between the analysis results certified by the surveyors at loading port and those certified by CIQ at discharge port in respect of any other chemical or physical characteristics, the seller and buyer shall consult to reconcile the difference and if the difference cannot be reconciled, then, at the request of either the seller or the buyer, the umpire sample shall be analysed by an independent umpire inspection company mutually agreed by the seller and buyer and the results of the umpire analysis shall be final and binding upon the parties and shall be the basis for the calculation of final price.

If the base price in the final invoice will be higher than the base price in the provisional invoice due to the price adjustments and thereby the final price will be higher than the provisional price, the buyer shall have to remit the difference between the final price and provisional price along with any balance of the provisional price left unpaid.

If the base price in the final invoice will be lesser than the base price in the provisional invoice due to the price adjustments and thereby the final price will be lesser than the provisional price, the seller shall have to remit the difference between the provisional price or amount of the provisional payment and the final price.

How The CIF Buyers Could Take Advantage Of The Exceptions To Time Counting



by Vlad Cioarec, International Trade Consultant

In **Suek AG v. Glencore International AG**¹, a vessel carrying a coal cargo sold on CIF basis could not proceed to berth because the berth was occupied by another vessel at the time of the vessel's arrival at the port of discharge. However, the low tide would have prevented the vessel anyway to proceed to berth had it been available. Nonetheless, the vessel's Master tendered NOR upon arrival at the usual waiting place based on the WIBON terms of the charter party and sale contract.

The CIF sale contract provided that:

“In case the berth is occupied on arrival, vessel can tender NOR at the usual waiting place ATDN SSHINC, whether in berth or not, whether in port or not, whether in free pratique or not, whether customs cleared or not.

.....

Time taken waiting for first available tide after the Carrying Vessel's arrival and/or to shift from pilot station or anchorage to berth, and opening of the Carrying Vessel's hatch covers shall not count as Laytime or time for Demurrage.”

The dispute was whether the vessel's Master was entitled to give NOR at the usual waiting place given that the vessel could not have proceeded to the berth due to the tidal conditions.

The English Commercial Court held that:

“notwithstanding the presence of tidal conditions also preventing access to the berth, the unavailability of that berth entitled the Master of the HANG TA to give NOR.”

Therefore, the NOR tendered at the usual waiting place was valid but the time lost by the vessel waiting for the next high tide had to be deducted from the laytime.

The case showed how the CIF sellers can take advantage of the fact that the berth is occupied at the time of the vessel's arrival, notwithstanding the tidal conditions. To avoid such claims, the CFR buyers should stipulate in the sale contracts that if the vessel is prevented from proceeding to berth due to the tidal conditions, bad weather, strikes of tugs or pilots, the vessel's NOR shall not be accepted until such hindrance has ceased in integrity.

1 [2011] 2 Lloyd's Rep. 278, [2011] EWHC 1361 (Comm)