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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.

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- **ANEC Contract No. 112, Edition 2016**
- **The Documentary Arrangements For On-Sale Of Vegetable Oil Cargoes In Split Quantities**
- **FOSEA Contract No. 60, Edition 2016**
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If you have any comments about the matters reviewed in this edition, please address them to editor@commoditylaw.eu

Review Of FOSFA Contract No. 52, Edition 2019

by Vlad Cioarec, International Trade Consultant



The FOSFA Contract No. 52 is a contract form issued by FOSFA to be used for the FOB sales of crude sunflowerseed oil in bulk of EU origin delivered at the port of Rotterdam, at sellers' berth. The sellers have the option to deliver the crude sunflowerseed oil at the ports of Amsterdam, Antwerp, Ghent, Dunkirk or Dieppe provided that they exercise this option not later than the first business day of the month prior to commencement of the delivery period. The sellers have also the option to deliver crude sunflowerseed oil of any other origin, but with the customs duty paid.

Vessel Nomination

The pre-advice period for the submission of the vessel's or barge's nomination notice is minimum 15 days prior to the expected date of the vessel or barge readiness to load, except in the event of a string of FOB back-to-back contracts, where the vessel's or barge's nomination notice must reach to the first seller not later than 10 days before the expected date of the vessel or barge readiness to load.

The FOSFA Contract No. 52 does not stipulate any requirements to be complied with by the vessel to be nominated by the buyers, other than the requirement to be classed 100A1 in Lloyd's Register or have an equivalent class notation assigned by other classification society.

Conditions For The Vessel Substitution

The buyers may substitute the originally nominated vessel 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. FOSFA Contract No. 52 does not allow the buyers to request extension of 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 8 of FOSFA Contract No. 52 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. 52 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. 52 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.

Nomination Of The Loading Berth

Following the nomination of ship or barge by the buyers, the sellers must nominate the loading berth. This is an express requirement of FOSFA Contract No. 52. The nomination of the loading berth by the sellers is a condition precedent to the presentation of ship or barge for loading, because until the loading berth is nominated by the sellers, the buyers cannot present the ship or barge to take delivery of the goods. Hence, the sellers' failure to nominate a berth in due time will constitute a breach of contract.

If the sellers nominate a Tank Storage Installation as the loading berth and the sunflowerseed oil cargo has been delivered to the Tank Storage Installation by a ship, the sellers shall have to present to buyers before loading a copy of the FOSFA Combined Masters Certificate issued by the Master of the vessel that carried the oil by sea from origin to the Tank Storage Installation showing that the immediate previous cargo carried by the ship was a commodity listed in the Annex to EU Commission Directive 2004/4/EC or any successive Directive in force at the Bill of Lading date.

The EU Commission Directive 2004/4/EC is no longer in force since 17 June 2014. It was repealed by the EU Commission Regulation No. 579/2014¹, but the list of acceptable previous cargoes set out in the Annex to the EU Commission Regulation No. 579/2014 is mostly the same as in the Annex to EU Commission Directive 2004/4/EC.

The restrictions beyond the immediate previous cargo stated in the FOSFA List of Acceptable Previous Cargoes would also be applicable.

If the sellers nominate a Tank Storage Installation as the loading berth and the sunflowerseed oil cargo has been delivered to the Tank Storage Installation by a barge, the sellers shall have to present to buyers before loading a statement declaring the last three cargoes of the barge that carried the oil by inland waterways from origin to the Tank Storage Installation and certifying that the barge was dedicated for the transport of foodstuff only.

If the sellers nominate a Tank Storage Installation as the loading berth and the sunflowerseed oil cargo has been delivered to the Tank Storage Installation by truck, the sellers shall have to present to buyers before loading a statement certifying that the truck that carried the oil to the Tank Storage Installation was dedicated for the transport of foodstuff only.

Irrespective of the mode of transport used for delivery of the oil cargo to the Tank Storage Installation, whenever the sellers nominate a Tank Storage Installation as the loading berth, they will have to present to buyers before loading, in addition to the above-mentioned documents, a statement declaring the three previous cargoes in the shore tank(s) where the sunflowerseed oil is stored and certifying that the immediate previous cargo in the shore tanks used for the storage of the oil was a product listed in the Annex to EU Commission Directive 2004/4/EC or any successive Directive in force at the date of the actual storage of goods, i.e. EU Commission Regulation No. 579/2014.

NOR And Commencement Of Laytime

The first sentence of Clause 9 of FOSFA Contract No. 52 stipulates that:

“Notice of readiness at loading port to be given during local office hours and laytime to start counting 6 hours after such notice has been tendered.”

What the Clause 9 says it is that if the vessel's NOR is given during office hours, the laytime shall start to count at 6 hours after the time when the NOR has been tendered. What the Clause 9 does not say it is that if the vessel's NOR is given outside office hours, then provided the vessel complies with the contract conditions for giving the NOR, the NOR remains valid but it will become effective only at the start of office hours on the next working day. A non-contractual NOR which is given outside the office hours is not effective to start the laytime clock running at the time it is given².

The Clause 9 of FOSFA Contract No. 52 stipulates also that the vessel's NOR must not be given prior to the expiry of the 15 days' pre-advice period. If nonetheless the vessel gives NOR before the expiry of the 15 days' pre-advice period, the vessel's NOR shall not become effective to start the

1 The EU Commission Regulation No. 579/2014 stipulates that the liquid oils intended for human consumption may be transported by sea in vessels which are not dedicated for the transport of foodstuffs provided that the previous cargo was a substance or a mixture of substances listed in the Annex to the Regulation.

2 See the English law case *Galaxy Energy International Ltd. v. Novorossiysk Shipping Company* (The “Petr Schmidt”), [1998] 2 Lloyd's Rep. 1

laytime prior to the expiry of the 15 days' pre-advice period unless the sellers agree to load earlier in which case the laytime shall start to count from the time of commencement of loading.

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 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. 52 shall be referred to arbitration in accordance with the FOSFA Rules of Arbitration and Appeal.

The Functions Of Mate's Receipt In A Chain Of FOB Sale Contracts

by Vlad Cioarec, International Trade Consultant



The commodity trading companies, which do not buy the commodities directly from actual suppliers but through a chain of FOB sale contracts and then wish to on-sale the goods abroad on CFR or CIF terms, need Bills of Lading identifying them as shippers for the CFR/CIF sale and to arrange the Customs clearance of the goods at loading port. Such a commodity trader needs to be identified as exporter and shipper in all the commercial documents required for the CFR/CIF sale and Customs clearance of goods, including the Bills of Lading.

If the suppliers and the other FOB sellers in the chain do not wish to arrange the Customs clearance and pay the Customs duty, they do not necessarily need Bills of Lading to transfer title to the goods. In such cases Mate's Receipts made out to order are used instead of Bills of Lading as evidence of shipment and document of title between the commodity suppliers who shipped the goods, the other FOB sellers and exporter¹. The supplier(s) and then each FOB seller in the chain endorses the Mate's Receipt(s) and delivers them to the next in exchange for payment until the Mate's Receipt(s) reach in possession of the exporter. Then the exporter surrenders the Mate's Receipt(s) to the vessel's agents in exchange for the original Bills of Lading indicating the exporter as shipper.

Quoted below is an example of charter party clause stating the conditions for the issuance of Bills of Lading in exchange for the original Mate's Receipt(s):

“At the loading port, the Master shall sign Mate's Receipts made out to order of the shippers and indicating the Charterers as notify party. The Owners shall instruct the vessel's agents to release the original Bills of Lading only after the presentation by Charterers of the original Mate's Receipts properly endorsed.”

To ensure that the vessel's agents will not release the original Bills of Lading before obtaining the original Mate's Receipt(s), the Masters usually give instructions to the vessel's agents in the letter of authority for signing the Bills of Lading and insert in the Mate's Receipts a statement setting the charter party condition for the issuance of Bills of Lading to the charterers. Examples of such statement can be found in the US law cases **R. L. Rothstein Corporation v. Kerr Steamship Company, Inc.**² and **Buckeye Cellulose Corporation v. Atlantic Mutual Insurance Company**³. In **R. L. Rothstein Corporation v. Kerr Steamship Company, Inc.**, a Mate's Receipt issued for a cargo of tallow contained the following statement:

“OCEAN BILL OF LADING TO BE RELEASED ONLY AGAINST SURRENDER OF THIS MATE'S RECEIPT PROPERLY ENDORSED.”

“Bill of Lading may be obtained from the vessel's master or owner or agent only against surrender of the duly signed and endorsed original of this mate's receipt.”

The cargo was sold along a chain of three FOB sale contracts involving four companies. The third seller in the chain became bankrupt and did not pay the second seller. The final FOB buyer chartered the carrying vessel and on-sold the cargo to a foreign buyer on CFR terms.

1 See Clause 15 of FOSFA Contract No. 52, Clause 15 of FOSFA Contract No. 60 and Clause 14 of FOSFA Contract No. 82.

2 21 AD 2d 463 - NY: Appellate Div., 1st Dept. 1964.

3 643 F.Supp. 1030, United States District Court, S.D. New York (1986)

In a rush to obtain the payment from the foreign buyer, the charterer asked the vessel's agents to issue the Bills of Lading without the surrender of the Mate's Receipt.

The case was a claim made by the second seller in the chain against the carrier for conversion of cargo. The question before the Court was whether these conditions in Mate's Receipt bound the carrier and vessel's agents which issued the Bills of Lading.

The Court held that since the Mate's Receipt is not a negotiable document of title, the condition inserted in the Mate's Receipt as to the release of Bills of Lading was essential. The relevant comments of the Court are quoted below:

“[I]n this case [...] the mate's receipt by the stipulation of the parties controlled the issuance of the bill of lading, and thus indirectly the goods. To that extent it served as a document of title, at least between immediate parties to the receipt. [...] By the condition in the mate's receipt, expressly stipulated, the carrier was a party to this mode of protecting the seller's interest.”

This case set the rule in US case law that the conditions stipulated in the Mate's Receipt as to the issuance of Bills of Lading are enforceable and the carriers and their agents that issue the Bills of Lading before obtaining the original Mate's Receipt(s) will be liable to the holders of the Mate's Receipt(s) for conversion of cargo.

In **Buckeye Cellulose Corporation v. Atlantic Mutual Insurance Company**, the Mate's Receipts issued for a cargo of cottonseed oil contained the following statement:

“BILL OF LADING NOT TO BE ISSUED UNTIL ORIGINAL DULY SIGNED AND ENDORSED MATE'S RECEIPT HAS BEEN SURRENDERED IN EXCHANGE FOR BILL OF LADING.”

The cargo of cottonseed oil was shipped in parcels by various suppliers on 31 January and 2 February 1979. The suppliers sold their parcels to Buckeye Cellulose Corporation on FOB terms. Buckeye Cellulose Corporation on-sold the entire cargo shipped on board the carrying vessel to a company called Thomas P. Gonzalez Corporation. Thomas P. Gonzalez Corporation chartered the carrying vessel and on-sold the cargo on CFR terms to an Egyptian government agency.

Things went wrong due to the late payment of the shippers by Buckeye Cellulose Corporation which in turn could not get paid under L/C due to the late presentation of documents, including the Mate's Receipts. In the meantime Thomas P. Gonzalez Corporation, which bought the cargo from Buckeye Cellulose Corporation, obtained the original Bills of Lading without the presentation of the original Mate's Receipts.

Buckeye Cellulose Corporation brought claims against the shipowners and Thomas P. Gonzalez Corporation to recover the value of the cottonseed oil cargo. The claims were eventually settled out of court.

Timing of payment is essential in the FOB sales based on Mate's Receipt(s).

The shippers selling vegetable oil parcels based on Mate's Receipts should also give instructions to the vessel's agents to release the original Bills of Lading only after the presentation of the original Mate's Receipt(s) properly endorsed. Clause 16 of FOSFA Contract No. 51 has the following provisions:

“If Mate's Receipts are presented for payment, Sellers shall be entitled to instruct vessel's agents that the Bill(s) of Lading may only be issued in exchange for the original Mate's Receipt.”

Review Of ANEC FOB Contract Form No. 112, Edition 2016

by Vlad Cioarec, International Trade Consultant



The ANEC FOB Contract No. 112 is a FOB contract form issued by ANEC (Brazilian Grain Exporters Association) to be used for the FOB sales of parcels of Brazilian crude sunflowerseed oil in bulk.

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. 112 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. 112 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. 112 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. 112 provides that the contractual time limit for the

¹ See Sub-Clause 10.2 paragraph (C).

presentation 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-advice 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-advice requirement stipulated in the Clause 8 of ANEC Contract No. 112. 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-advice 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 0.10% in respect of the Free Fatty Acids, then the analysis results certified by the sellers' surveyors shall be final.

If the difference between the sellers' and buyers' surveyors analysis certificates exceeds 0.10% in respect of the Free Fatty Acids, 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. 112

³ See Clause 11 of ANEC Contract No. 112

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. 112 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 Documentary Arrangements For On-Sale Of Vegetable Oil Cargoes In Split Quantities

by Vlad Cioarec, International Trade Consultant



In the maritime trade with vegetable oil cargoes, the commodity traders frequently source large parcels from a few suppliers on FOB terms for on-sale in smaller quantities on CIF terms.

The commodity traders have two options for the delivery of split parcels at destination.

The first option is to ask the carriers to replace the original Bills of Lading issued to the shippers with new Bills of Lading for the split parcels. This option can be taken into consideration only in case of cargoes carried along long voyages that allow the commodity traders sufficient time to obtain the original Bills of Lading before the vessel's arrival at the discharge port.

The carriers asked to replace the original Bills of Lading with new Bills of Lading at the time of vessel's fixture should take into consideration the duration of voyage from the loading port(s) to the discharge port(s), the time necessary for the payment of freight and release of Bills of Lading to the shippers, the time necessary for the circulation of Bills of Lading in the banking chain and presentation of Bills of Lading for cancellation.

Singapore law case **Samsung Corporation v. Devon Industries Sdn Bhd**¹ provides an example of how things go wrong. In that case a commodity trader, Devon Industries bought a number of parcels of Brazilian soyabean oil on FOB terms from different shippers for on-sale in smaller quantities to buyers in Bangladesh on CIF terms. For the carriage of soyabean oil cargoes from Brazil to Bangladesh, Devon Industries voyage chartered the vessel "Dolores".

The parcels of soyabean oil had been commingled on board the carrying vessel. The total weight of cargoes loaded on board was 10,500 metric tonnes. The claim was made by one of the shippers, Samsung Corp. which loaded a parcel of 1,000 metric tonnes on 13 May 1993 and a parcel of 1,500 on 15 May 1993.

The voyage charter party stipulated that Bills of Lading would be released to shippers only upon the payment of freight which was payable within 5 working days after loading. However, Devon Industries failed to pay the freight in due time, causing a delay of two weeks in the release of Charter Party Bills of Lading to the shippers, who received the Bills of Lading by early June 1993. These Bills of Lading were marked "freight collect".

In the meantime, on 24/25 May 1993 the shipowner's agents in Singapore issued new Bills of Lading showing Devon Industries as shippers and "freight pre-paid". The cargo of 10,500 metric tonnes was split in 18 parcels, for each parcel being issued a different Bill of Lading. All the new 18 Bills of Lading were tendered for payment by Devon Industries to CIF buyers' banks between 26 May and 16 June 1993.

When Samsung Corp tendered the original Bills of Lading on 15 June 1993 for the 2,500 metric tonnes cargo, Devon Industries did not pay.

The Singapore High Court said that the practice of splitting up bulk cargoes of vegetable oils for on-sale as smaller parcels and issuance of Bills of Lading for such split parcels, so-called "global Bills of Lading", "is perfectly in order" provided the original Bills of Lading issued to the real shippers have been previously surrendered to shipowners for cancellation.

The second option is to surrender the original Bills of Lading before the vessel's arrival at the discharge port and ask the vessel's agents at the discharge port to issue ship's delivery orders to each buyer for his parcel(s). A ship's delivery order should contain the carrier's undertaking to deliver the parcel of cargo to the company specified in the delivery order. Provided the ship's delivery orders comply with the provisions of section 1(4) of the UK's COGSA 1992, the ship's delivery orders could allow the commodity traders to on-sale the split parcels in CFR and CIF sale contracts. This

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

option is provided in the Clause 10 of FOSFA Contract No. 54 (FOSFA Contract For Vegetable and Marine Oil In Bulk - CIF Delivered Weight) and Clause 11 of FOSFA Contract No. 81 (FOSFA Contract For Palm and Palm Kernel Oil Products In Bulk - CIF Terms) with the requirement to be accompanied by *“non-negotiable or photostat copy of the relative Bill/s of Lading if required by Buyers”*.

A ship's delivery order will entitle a CIF buyer to demand delivery of the goods to which the document relates and to sue the carrier if the goods are damaged. In the event of delays in discharging the parcels of cargo caused by the shore tanks, each buyer shall be liable only for his pro rata share of demurrage based on how much the quantity of his individual parcel bears to the total quantity of cargo on board the vessel. The section 3(2) of COGSA 1992 stipulates that:

“Where the goods to which a ship's delivery order relates form a part only of the goods to which the contract of carriage relates, the liabilities to which any person is subject by virtue of the operation of this section in relation to that order shall exclude liabilities in respect of any goods to which the order does not relate.”

Review Of FOSFA Contract No. 60, Edition 2016

by Vlad Cioarec, International Trade Consultant



The FOSFA Contract No. 60 is a contract form issued by FOSFA to be used for the FOB sales of biodiesel (Fatty Acid Methyl Esters) 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 15 days prior to the expected date of the vessel readiness to load, except in the event 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 FOSFA Contract No. 60 does not stipulate any requirements to be complied with by the vessel to be nominated by the buyers, other than the requirement to be classed 100A1 in Lloyd's Register or equivalent.

Conditions For The Vessel Substitution

The buyers may substitute the originally nominated vessel 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 consecutive 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 6 of FOSFA Contract No. 60 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. 60 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. 60 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 first sentence of Clause 7 of FOSFA Contract No. 60 stipulates that:

“Notice of readiness at loading port to be given during local office hours and laytime to start counting 6 hours after such notice has been tendered.”

What the Clause 7 says it is that if the vessel's NOR is given during office hours, the laytime shall start to count at 6 hours after the time when the NOR has been tendered. What the Clause 7 does not say it is that if the vessel's NOR is given outside office hours, then provided the vessel complies

with the contract conditions for giving the NOR, the NOR remains valid but it will become effective only at the start of office hours on the next working day. A non-contractual NOR which is given outside the office hours is not effective to start the laytime clock running at the time it is given¹.

The Clause 7 of FOSFA Contract No. 60 stipulates also that the vessel's NOR must not be given prior to the expiry of the 15 days' pre-advice period. If nonetheless the vessel gives NOR before the expiry of the 15 days' pre-advice period, the vessel's NOR shall not become effective to start the laytime prior to the expiry of the 15 days' pre-advice period unless the sellers agree to load earlier in which case the laytime shall start to count from the time of commencement of loading.

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 13 in FOSFA Contract No. 60, 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. 60 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

FOSFA Contract No. 60 does not stipulate a time limit within the contract delivery period for the buyers to present the nominated vessel ready in all respects for loading.

In **ERG Raffinerie Mediterranee SPA v. Chevron USA Inc.**², 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

1 See the English law case *Galaxy Energy International Ltd. v. Novorossiysk Shipping Company* (The “Petr Schmidt”), [1998] 2 Lloyd's Rep. 1

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

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. 60 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”)**³.

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. 60 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. 60 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 13.

Unlike FOSFA Contract No. 51, FOSFA Contract No. 60 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

3 [1992] 2 Lloyd's Rep. 586

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.60 shall be referred to arbitration in accordance with the FOSFA Rules of Arbitration and Appeal.

The Vessel Requirements In Biodiesel Trade

by Vlad Cioarec, International Trade Consultant



The biodiesel products are assigned to the Pollution Category Y and should be carried only with the IMO Ship Type 2 chemical tankers.

The vessel's cargo tanks must be made of stainless steel or mild steel lined with solvent-free, amine-cured phenolic epoxy coating that is resistant to corrosion caused by the fatty acids.

Given that the biodiesel cargoes are hygroscopic, they must be carried under a dry Nitrogen blanket in order to prevent the absorption of moisture from the tank ullage spaces and an increase in the water content. The nominated vessel must have on board a fully functional Nitrogen generator system and portable gas bottles to supply a Nitrogen blanket sufficient to cover the surface area of cargo in each tank to be loaded and maintain the dry Nitrogen blanket at the required level throughout the voyage from the port of loading to the port of discharge.

The vessel must have on board the following documents:

- a valid International Pollution Prevention Certificate for the Carriage of Noxious Liquid Substances in Bulk;
- a valid International Certificate of Fitness for the Carriage of Dangerous Chemicals in Bulk listing the biodiesel product in question as a permitted cargo;
- 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 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 all other respects.