



**Commoditylaw**

# **Biofuels Trade Review**

**Edition No. 4, June 2021**

## 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 Bioethanol Trade**
- **ANEC FOB Contract Form For FOB Sales Of Soybean Oil**
- **The Vessel Requirements In Biomass Trade**
- **GAFTA Contract Form For FOB Sales Of Biomass**
- **The Price Implications Of The Different Quality Characteristics Of Biodiesel Products**

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 Bioethanol Trade

by Vlad Cioarec, International Trade Consultant



Ethanol is listed under the product name “Ethyl alcohol” in the IBC Code Chapter 18 which means that it does not have to be carried by sea in chemical tankers. Nonetheless, ethanol traders and buyers require the carriage of ethanol cargoes in IMO Ship Type 3 chemical tankers or product tankers certified to carry Noxious Liquid Substances in bulk.

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.

Given that the ethanol 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 “Ethyl alcohol” 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.

## Review Of ANEC FOB Contract Form No. 81, Edition 2020

by Vlad Cioarec, International Trade Consultant



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

### **Vessel Nomination**

The pre-advance period for the submission of the vessel's nomination notice is minimum 10 days prior to the expected date of vessel readiness to load. In the vessel's nomination notice the buyers must provide the vessel's ETA date, IMO Number, flag, age and ownership and the quantity required to be loaded which must be in multiples of 500 MT. The minimum nominated quantity must be at least 500 MT.

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

### **Conditions For The Vessel Substitution**

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

- the originally nominated vessel is unable to proceed to loading port due to a force majeure event or the seller agrees the vessel substitution;
- the buyers must give written notice of substitution of the vessel to seller with at least 3 working days prior to the substitute vessel's ETA at loading port;
- the notice of substitution must include all the information required about the substitute vessel, i.e. IMO number, flag, age, ownership;
- the ETA date of substitute vessel is not more than 5 days earlier or 5 days later than the last ETA date reported by the Master of the originally nominated vessel.

Maximum two substitutions are allowed under ANEC Contracts. A third substitution is allowed only 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 soybean 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 place<sup>1</sup>.

The laytime will commence to run upon the expiry of 6 hours' Notice time after the valid NOR becomes effective, that is, after the expiry of the 10 days' pre-advice period. NOR tendered after 17:00 hours local time (Brazilian local time) on a regular business day or after 11:00 a.m. on Saturdays or Sundays and Holidays shall become effective only from 8:00 a.m. on the next business day.

If the Master tenders NOR upon arrival at the anchorage place and after berthing the vessel fails the tanks' inspection, the time lost by the vessel waiting for berth will not count as laytime or time on demurrage. In such case, the laytime shall start to count upon the vessel is declared ready in all respects for loading.

### **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 Sub-Clause 11.1. 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 detention shall be payable at the rate stated in the vessel nomination.

**The second option** for counting the time lost waiting for the goods is stated in Sub-Clause 11.2. 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 Sub-Clause 11.2 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 because one or several sellers do not have the goods ready for loading, the faulty sellers will be jointly and exclusively responsible for the time lost by the vessel until berthing.

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

### **The Contractual Time Limit For Tendering Valid NOR**

The port operators schedule the vegetable oil shipments in function of the vessel's laycan and expected readiness date. The Clause 8 of ANEC Contract No. 81 provides that the loading obligation date will be on the 11th day after the vessel nomination date or the first day of the contract delivery period, whichever is later.

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

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

---

1 See the last paragraph of Clause 11.

of vessel for loading and tendering valid NOR 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 loading obligation date shall be postponed with another 10 days.

The buyers must present the vessel ready in all respects for loading by 17:00 hours local time (Brazilian local time) on the last business day of the contract delivery period provided that the buyers have complied with the minimum 10 days' pre-advice requirement stipulated in the Clause 8 of ANEC Contract No. 81.

If the buyers nominate the vessel with at least 10 days before the last working day of the delivery period and the vessel arrives and tenders valid NOR by 17:00 hours local time (Brazilian local time) on the last working day of the delivery period, the buyers shall be deemed to have complied with the contract requirement and the sellers shall, if necessary, complete loading after the delivery period<sup>2</sup>.

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

If the buyer nominates the vessel with at least 10 days before the last working day of the delivery period and the nominated or substitute vessel arrives and tenders valid NOR by 17:00 hours on the last working day of the delivery period but the seller cannot commence or complete loading during the delivery period, the sellers shall, if necessary, commence and/or complete loading after the delivery period and bear the cargo carrying charges accrued after the delivery period.

Should the buyers fail to present the vessel 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 sellers not later than the last day of the contract delivery period.

In case of late nomination of vessel, that is, when the buyers nominate the vessel in less than 11 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 11th day after the vessel nomination date (i.e. after the expiry of the 10 days' pre-advice period), not sooner.

### **ANEC Contract Options In Respect Of Liability For Carrying Charges During Strike Periods**

**The first option** is stated in Sub-Clause 13.1. In this case the buyers will not be liable for the cargo carrying charges accrued during strike periods, regardless of whether the vessel was berthed or not.

**The second option** is stated in Sub-Clause 13.2. In this case the buyers would also be liable for the cargo carrying charges accrued during strike periods.

### **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 cargo's quality characteristics (specified in the sale contract) must be determined and certified by a FOSFA member superintendent appointed by the seller, based on a composite sample taken in

---

<sup>2</sup> See Clause 5 of ANEC Contract No. 81.

accordance with the method in ISO 5555.

The buyers have the option to appoint a FOSFA member superintendent to sample the cargo jointly with the sellers' surveyor and provide their analysis results of the cargo sample provided that the seller shall be advised, at the latest upon the vessel's berthing, of the name of the surveyor the buyer has appointed.

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

If the difference between the seller's and buyer's surveyors analysis certificates exceeds any of the above-mentioned percentages, then either party may ask within 30 days from the Bill of Lading date a third analysis of cargo sample. In such case, the average of the two closest analysis results shall be final as to quality of the cargo and shall be settled by a complementary debit note.

However, the seller's surveyor analysis certificate attesting the cargo's quality characteristics at the time and place of loading shall be final, that is, the buyer will have to pay for the cargo based on such certificate, even if the buyer asked a third analysis of cargo sample. The request of the third test shall not entitle the buyers to refuse or delay the payment of shipping documents.

### **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.

If the cargo is delivered from barges and/or the shore tanks figure is not available, the cargo weight figure shall be determined and certified by the independent surveyors appointed by the sellers based on the vessel's tank ullages.

# The Vessel Requirements In Biomass Trade

by Vlad Cioarec, International Trade Consultant



The cargoes of wood pellets are 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 cargo 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 bulk cargoes such as biomass 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 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”.

In CIF sale contracts, the buyers may require the sellers to nominate geared bulk carriers in order to discharge the cargo using the vessel's cranes and grabs operated by local stevedores. In such case, for the 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 vessel's ETA at discharge port.

Another requirement concerning the vessel to be nominated it is that related to the vessel's de-ballasting capacity. The nominated vessel must have sufficient de-ballasting 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 the wood pellets 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.

# Review Of GAFTA Contract Form For FOB Sales Of Biomass



by Vlad Cioarec, International Trade Consultant

The GAFTA Contract No. 202 is a contract form published by the Grain and Feed Trade Association (GAFTA) to be used for FOB sales of biomass in bulk.

## Vessel Nomination

The GAFTA Contract No. 202 does not stipulate any requirements to be complied with by the vessel to be nominated by the buyers. It says just that the tankers and vessels classified as “ore/oil carriers” are excluded.

There is no pre-advice period for the nomination of vessel and no deadline for the submission of the vessel's loading plan. These matters have to be agreed by the contracting parties.

## The Sellers' Potential Liability For The Cargo Carrying Charges

In GAFTA Contract No. 202, the delivery period is a period for the presentation of vessel for loading. The buyers' vessel can arrive and tender NOR at any time within the contract delivery period, up to 24:00 hours on the last day of the delivery period, provided that the buyers have complied with the contract pre-advice requirements for the vessel nomination. This is so even in cases where the sale contract that incorporates the terms of GAFTA Contract No. 202 excludes the extension option.

In GAFTA Contract No. 202 there is no contractual time limit for the presentation of vessel for loading after the expiry of the pre-advice period, as in GAFTA Contract No. 79A. If the buyers present the vessel for loading within the contract delivery period, the sellers shall be obliged to deliver the goods even if it is necessary to complete loading in the next days following the contract delivery period and bear any cargo carrying charges accrued during these days.

If the intention of the contracting parties is that the contract delivery period be a shipment period and loading be completed before 23:59 hours on the last day of the contract delivery period, then they should stipulate this matter clearly in the sale contract and not leave this matter to implication.

In such case the sellers 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 complete loading of the cargo quantity at the contractual loading rate before the end of the contract delivery period.

An example of such provisions can be found in the Clause 7(B) paragraph (a) of the GAFTA Contract No. 79A which stipulates that the vessel presentation at the loading port in readiness to load “shall allow at least 36/..... consecutive hours remaining prior to the end of the contractual delivery period.” More detailed provisions are in the Clause 12 of GAFTA Port Terms No. 129 (Loading Terms For United Kingdom Ports) which stipulates that:

*“In the Delivery Period Clause paragraph (a) GAFTA contract 79A, the following schedule shall determine the number of consecutive hours which must remain from presentation of a contractual vessel to the end of the contractual delivery period:*

<i>For quantities up to</i>	<i>4000 tonne</i>	<i>-</i>	<i>36 consecutive hours</i>
<i>For quantities between</i>	<i>4001 - 8000 tonne</i>	<i>-</i>	<i>48 consecutive hours</i>
<i>For quantities between</i>	<i>8001 - 12000 tonne</i>	<i>-</i>	<i>72 consecutive hours</i>
<i>For quantities in excess of</i>	<i>12000 tonne</i>	<i>-</i>	<i>96 consecutive hours.”</i>

The vessel's expected readiness date and laycan should allow to sellers sufficient time for the completion of loading between the next day following the expected readiness date and cancelling day and 23:59 hours on the last day of the contract delivery period. Therefore, the buyers must nominate a vessel with an expected readiness date and a laycan that will allow the sellers sufficient time to load the cargo in the days following expected readiness date or cancelling day until 23:59 hours on the last day of the contract delivery period.

The sellers should also stipulate in the sale contract the requirement that the vessel's expected readiness date be pre-advised not later than the day before the commencement of the minimum pre-advice period before the contractual time limit for the presentation of vessel for loading.

### **Conditions For The Vessel Substitution**

In the FOB sale contracts, the vessel substitution is usually allowed subject to the compliance with the contract requirements in respect of the vessel's type, size, de-ballasting capacity and expected readiness date.

The substitute vessel must be a vessel of similar type and size and with similar de-ballasting rates as the originally nominated vessel to be able to load the cargo quantity nominated by the buyers within the contractual time allowed for loading. The Clause 7 of GAFTA Contract No. 202 has no provisions in this regard. Therefore, the biomass sellers using the GAFTA Contract No. 202 should stipulate in their sale contracts that the substitute vessel must comply with the same requirements as the originally nominated vessel in respect of type, size and de-ballasting capacity.

As regards the vessel's time of arrival, this should not be earlier than the expected readiness date of the originally nominated vessel. It should not be earlier than the expected readiness date of the originally nominated vessel because the sellers' obligation to commence loading and therefore, the commencement of laytime are in function of this date. The sellers must have the goods ready for loading as from the expected readiness date of the originally nominated vessel, not sooner.

In the FOB sales of biomass based on the terms of GAFTA Contract No. 202, the buyers may substitute the originally nominated vessel provided that they give the vessel substitution notice not later than one business day before the expected readiness date of the originally nominated vessel and the substitute vessel does not arrive earlier than the expected readiness date of the originally nominated vessel.

The FOB sale contracts incorporating the terms of the GAFTA Contract No. 202 should stipulate 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.

### **Conditions For The Vessel Presentation For Loading**

The Clause 7 of GAFTA Contract No. 202 requires the FOB buyers to present the vessel at the loading port "*in readiness to load within the delivery period*", but it does not define the meaning of the words "*readiness to load*". The question of the vessel readiness to load the cargo could lead to disputes in case of the vessel's late arrival or delayed readiness due to the provisions stipulating the sellers' obligation to complete loading even after the contract delivery period if necessary and bear any carrying charges for the cargo.

An example of such dispute was the English law case **Soufflet Negoce S.A. v. Bunge S.A.**<sup>1</sup>.

In that case the buyer's vessel presented for loading on the last day of the contract delivery period, but it failed to pass the holds' inspection. The sale contract did not allow the extension of the delivery period by the buyer. On the next day the sellers had declared the buyers in default "*due to the fact that the vessel was not presented ready to load within the delivery period*".

The buyers brought a claim for damages for the sellers' failure to load the goods.

The question in dispute was whether the buyer's obligation to present the vessel "*in readiness to*

---

1 [2010] EWCA Civ 1102; [2009] EWHC 2454 (Comm)

*load within the delivery period*” stipulated in Clause 6 of GAFTA Contract No.49 imposes an obligation on the FOB buyers to present the vessel ready in all respects for loading, as it would be necessary for the tender of a valid NOR or whether the FOB buyers are only required to present a vessel for loading. The sellers contended that the degree of readiness of the vessel should be that required for the tender of a valid NOR, i.e. vessel’s readiness in all respects to load. The buyers contended that the degree of readiness required was such that it was physically and legally for the sellers to load even if the circumstances did not justify the shipowner giving the NOR.

The English Commercial Court held that the requirement to present the nominated or substitute vessel at the loading port “*in readiness to load within the delivery period*” did not mean that the vessel must tender a valid NOR, but that the vessel must arrive at the loading port, be moored at a suitable berth for loading and “*there are no legal or physical restrictions on the Sellers preventing them from obeying the Buyers orders*”.

Given that the fifth phrase of Clause 7 of GAFTA Contract No. 202 is identical with the fifth phrase of Clause 6 of GAFTA Contract No.49 whose interpretation was in dispute, the English Commercial Court’s decision is equally applicable for the interpretation of the fifth phrase of Clause 6 of GAFTA Contract No. 202.

To avoid disputes like in **Soufflet Negoce S.A. v. Bunge S.A.**, the FOB sale contracts incorporating the terms of GAFTA Contract No. 202 should clarify whether the buyers’ vessel must tender valid NOR at loading port within the contract delivery period (along with the requirements for the NOR validity) or where this is not required, whether the seller shall be entitled or not to terminate the sale contract in case of the vessel’s late arrival or delayed readiness.

### **Conditions For Extension Of The Contract Delivery Period**

The Clause 10 of GAFTA Contract No. 202 stipulates that the buyers have the right to request extension of the contract delivery period with maximum 30 days. The buyers’ right to request the extension of the delivery period is not qualified by any condition. The risk for the sellers is that they could be trapped into a contract from which they cannot escape from.

An example of such case is the English law case **Nidera BV v. Venus International Free Zone for Trading & Marine Services SAE**<sup>2</sup>. In that case the FOB sellers were unable to ship the goods during the contract delivery period due to a resolution published by the Ukrainian government restricting the exports of cereals.

In order to prevent the cancellation of contract by sellers after the expiry of the contract delivery period and be left to bear the vessel demurrage charges, the buyers served notice claiming extension of the delivery period with two days before the end of the contract delivery period, pursuant to the provisions of Clause 8 of GAFTA Contract No. 49 incorporated into the sale contract.

The sellers contended that the buyers’ extension was invalid and ineffective.

The sellers argued that the buyers’ right to request the extension of the contract delivery period is limited only to circumstances in which the buyers are unable to present the nominated vessel ready for loading within the contract delivery period. If the buyers have already presented a vessel for loading, the Clause 8 could not be invoked to give the buyers additional time to do something they have already done.

The sellers argued that the trade meaning of Clause 8 is that if the buyers fear that the nominated vessel may not be presented in readiness to load within the contract delivery period, then the buyers can claim an extension of the delivery period to enable them to present the vessel within the extension period. If the vessel does not reach at the loading port within the contract delivery period, then the buyers shall bear the carrying charges. If the vessel does reach at the loading port within the contract delivery period, then the sellers must load the goods even if it shall be necessary to complete loading after the contract delivery period. In such case, the carrying charges shall be borne by the sellers.

---

2 [2014] EWHC 2013 (Comm)

The English Commercial Court held that although the Clause 8 contemplates a situation where a FOB buyer needs additional time to nominate and present a vessel, it does not follow that this is the only situation in which an extension of the delivery period can be claimed. The first sentence of Clause 8 means what it says:

*“where a timely notice is served, there is an unqualified right of extension under clause 8.”*

There is nothing in Clause 8 of GAFTA Contract No.49 to qualify or limit the buyer's right to extension of the delivery period.

The Court decision would equally apply to the interpretation of Clause 10 of GAFTA Contract No. 202, which, except for the duration of extension period, it is identical with the Clause 8 of GAFTA Contract No.49.

### **Comments:**

In GAFTA Contract No. 202, Clause 10 does not have corresponding provisions with the Clause 7. The buyer's right to request the extension of the delivery period is not qualified by any condition. The risk for the sellers is that like in the case mentioned above they could be trapped into a contract from which they cannot escape from.

It is in the sellers' interest to have a contractual link between the conditions for presentation of vessel for loading and the conditions for extension of the delivery period. For instance, if the sale contract requires the buyer's vessel to arrive and tender valid NOR not later than 17:00 hours on the last day of the contract delivery period, the condition for extension of the delivery period should have the following provisions:

*“Should the nominated vessel's NOR not be validly tendered before 17:00 hours on the last day of the contract delivery period, the Buyers shall be in default unless they give notice to Sellers not later than the next business day following the last day of the contract delivery period that an extension is claimed. Should such extension be timely claimed, the contract delivery period shall be extended by an additional period of not more than 30 consecutive days.”*

### **Deadline For Giving Notice Of Extension**

The Clause 10 of the GAFTA Contract No. 202 stipulates that the buyers must serve notice claiming extension of the contract delivery period not later than the next business day following the last day of the contract delivery period. This means that the buyers may serve the notice of extension at any time until 24:00 hours on the next business day following the last day of the contract delivery period, except in case of FOB re-sales contracts, where the deadline for giving the notice of extension is 16:00 hours on the next business day following the last day of the contract delivery period, pursuant to the provisions of Clause 20<sup>3</sup>.

### **GAFTA Prevention Of Delivery Clause**

#### **1. Deadline For Giving Notice Of Force Majeure**

In case of an event of force majeure such as

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

---

<sup>3</sup> See English law case Soufflet Negoce SA v. Fedcominvest Europe SARL, [2014] EWHC 2405 (Comm).

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

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

## **2. Deadline For Giving Notice Of Cancellation**

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

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

## **3. Notice Of Cessation Of Force Majeure Event**

If the force majeure event ceases before the contract can be cancelled (i.e. that is before the expiry of 21 day period after the end of contract delivery period or if the contract is not cancelled by the buyer after the 21 days' period, before the expiry of 35 (21+14) days' period after the end of the contract delivery period), the sellers must notify the buyers that the force majeure event has ceased.

## **4. Time Allowed For Delivery After The Cessation Of Force Majeure Event**

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

## **Buyers' Obligation To Provide Evidence Of Insurance Cover**

The buyers have the obligation to provide evidence of insurance cover on the terms stipulated in the GAFTA Contract, i.e. insurance covering marine and war risks, plus strikes, riots, civil commotions and mine risks, at least 5 days prior to the expected date of the vessel readiness to load. If the buyers fail to provide such evidence to sellers at least 5 days prior to the expected date of the vessel readiness to load, the sellers shall have the right to obtain such insurance cover for the buyers' account and expense.

# The Price Implications Of The Different Quality Characteristics Of Biodiesel Products



by Vlad Cioarec, International Trade Consultant

The quality characteristics of the biodiesel products vary in function of the chemical properties of the feedstock used for their production.

The most common feedstocks used in the production of biodiesel are rapeseed oil, soybean oil, palm oil, used cooking oil and tallow. From each feedstock is produced a biodiesel with a different chemical composition and different quality characteristics than others.

The fatty acid composition of the feedstock determines the physical and chemical properties of the biodiesel product, including its cold flow properties. The biodiesel products derived from feedstocks with high content of unsaturated fatty acids, e.g. biodiesel produced from rapeseed oil and soybean oil, have a lower CFPP (Cold Filter Plugging Point) than the biodiesel products derived from feedstocks with high content of saturated fatty acids, e.g. biodiesel produced from palm oil and tallow.

CFPP is the lowest temperature at which a given volume of biodiesel can pass through a filter and thus, allows the assessment of the cold temperature performance of the biodiesel products. The lower the CFPP, the better the cold temperature performance of the biodiesel product and therefore, more valuable the biodiesel product will be.

The lowest CFPP is that of rapeseed oil fatty acid methyl esters (biodiesel produced from rapeseed oil) which is in the range of  $-14$  and  $-12^{\circ}\text{C}$ .

The next in line is the CFPP of soybean oil fatty acid methyl esters (biodiesel produced from soybean oil) which is  $-4$  and  $-2^{\circ}\text{C}$ .

The third is the CFPP of used cooking oil fatty acid methyl esters (biodiesel produced from used cooking oil) which is  $0^{\circ}\text{C}$ .

The fourth is the CFPP of palm oil fatty acid methyl esters (biodiesel produced from palm oil) which is  $+13^{\circ}\text{C}$ .

The fifth is the CFPP of tallow fatty acid methyl esters (biodiesel produced from tallow) which varies between  $+12$  and  $13^{\circ}\text{C}$ .

A common feature of biodiesel products is their hygroscopic nature which involves the risk that the biodiesel cargoes can absorb atmospheric moisture during the storage and transportation by sea in case of temperature differences between the ambient temperature and the storage and carrying ship's tanks. The biodiesel products are purchased by European fuel suppliers for blending with petroleum diesel fuel to comply with the quota imposed by the EU Renewable Energy Directive. Given the hygroscopic nature of biodiesel products, the water content of biodiesel cargoes is required to be below the maximum limit stated in EN 14214 specifications<sup>1</sup> (500 mg/kg) in order to avoid that the biodiesel/petroleum diesel blend end up with a water content above the saturation limit.

The lower the water content, the more valuable the biodiesel cargo will be.

The biodiesel product with the lowest water content is rapeseed oil fatty acid methyl ester which has a water content of 300 ppm.

Palm oil fatty acid methyl ester has a water content of 350 ppm.

Used cooking oil fatty acid methyl ester has a water content of 350 ppm.

Tallow fatty acid methyl ester has a water content of 350 ppm.

Soybean oil fatty acid methyl ester has a water content of 400 ppm.

The biodiesel cargoes are sold either as individual products, i.e. rapeseed oil fatty acid methyl

---

<sup>1</sup> The biodiesel products are sold in Europe based on the standard specifications published by the European Committee for Standardization EN 14214, except for CFPP and water content.

esters, soybean oil fatty acid methyl esters, palm oil fatty acid methyl esters, used cooking oil fatty acid methyl esters, tallow fatty acid methyl esters, or as blends of biodiesel products, the type and share of each biodiesel product in the blend being in function of the CFPP and water content required by the buyers (fuel suppliers), which in turn is in function of the season and weather conditions.

The blends of biodiesel products are sold under the generic description “Fatty Acid Methyl Esters”. The most common blends are Fatty Acid Methyl Esters with a CFPP of  $-10^{\circ}$  C and a maximum water content of 350 ppm and Fatty Acid Methyl Esters with a CFPP of  $0^{\circ}$  C and a maximum water content of 350 ppm.