Introduction

Grain Trade Review is a publication in which shipping and contractual matters relevant to the international trade with grains, feeds and oilseeds are reviewed.

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- In What Cases The Buyers Of Agricultural Commodities Are Entitled To Reject The Goods

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- The Implications Of The Buyers' Non-Compliance With The Pre-Advice Requirements In The Grain FOB Sale Contracts

- GAFTA Contract No. 49, Edition 2020

- FOSFA Contract No. 4A, Edition 2018

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

In What Cases The Buyers Of Agricultural Commodities Are Entitled To Reject The Goods

by Vlad Cioarec, International Trade Consultant

The Cargo Delivered By The Sellers Does Not Correspond With The Contractual Description

In the English contract law, it is an implied condition of contract that the goods must correspond with their description in the sale contract[1]. In case of misdescription, when the commodity supplied is materially different from the description of goods in the sale contract, the buyers would be entitled to reject the commodity[2].
In **Ashington Piggeries v. Christopher Hill Ltd.**[3], Lord Diplock sought to define the notion of "description" as follows:

"*The "description" by which unascertained goods are sold is, in my view, confined to those words in the contract which were intended by the parties to identify the kind of goods which were to be supplied … Ultimately the test is whether the buyer could fairly and reasonably refuse to accept the physical goods proffered to him on the ground that their failure to correspond with that part of what was said about them in the contract makes them goods of a different kind from those he had agreed to buy. The key to s.13 is identification."*

In the commodity trading contracts, the distinction between the description of goods and quality specifications will depend on the contract terms and the commodity sold. In the English law case **Proton Energy Group S.A. v. Lietuva**[4], Mackie QC J. said that:

"[I]n principle, description and quality are different notions. The key to description is identity [...] The cases show that the distinction between the concepts is sometimes blurred and that they may overlap where, for example, a word of description identifies the quality of the product."

If a quality specification is part of the description of goods in a sale by description, the goods' compliance with that specification is an express condition of contract[5]. The case which established this rule in the English contract law is **Tradax Export S.A. v. European Grain & Shipping Ltd.**[6].
The case was a quality dispute under a contract for the sale of 9,500 metric tonnes of soya bean meal. The contract clause describing the goods had the following provisions:

"Goods in bulk U.S.A. solvent extracted toasted soya bean meal – maximum 7.5% fibre."

The laboratory analysis of cargo sample revealed that the fibre content was 9.28%. The buyers rejected the shipping documents and the goods.
The question in dispute in that case was whether the fibre content provision was a quality specification or was part of the description of goods.

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1 See the Section 13(1) of the Sale of Goods Act 1979.
2 See the English law case Proton Energy Group SA v. Lietuva, [2013] EWHC 2872 (Comm), [2014] 1 Lloyd's Rep. 100
3 [1968] 1 Lloyd's Rep. 457, [1972] AC 441
4 [2013] EWHC 2872 (Comm), [2014] 1 Lloyd's Rep. 100
5 See the English law case Proton Energy Group SA v. Lietuva, [2013] EWHC 2872 (Comm), [2014] 1 Lloyd's Rep. 100
6 [1983] 2 Lloyd's Rep. 100

The English Commercial Court (Bingham J) held that the maximum fibre content provision was not stated amongst the quality specifications but in the clause containing the description of contract goods. Accordingly, the maximum fibre content provision was part of the description of goods and a condition of contract.
By delivering goods not conforming with the contract description, the sellers were in breach of a condition of contract. Therefore, the buyers were entitled to reject the goods.
The distinction between the description of goods and quality specifications would be relevant in a case where the sellers deliver durum wheat instead of common wheat. The durum wheat has better quality characteristics than common wheat in respect of specific weight and protein content but it is suitable for making pasta products or macaroni rather than bread. The durum wheat would not be fit for the purpose that it is required the common wheat: i.e. milling into flour for making bread.
The distinction between the description of goods and quality specifications would not however be relevant in a case involving delivery of the same commodity but with inferior quality characteristics.
In **Toepfer v. Continental Grain Co.**[7], the commodity sold was described in the sale contract as "No.3 Hard Amber Durum Wheat". The quality characteristics of the durum wheat shipped, as stated in the inspection certificate, revealed that the durum wheat cargo was in fact "Amber Durum Wheat", an inferior class of durum wheat, but the inspector who issued the certificate mistakenly described the cargo as "No.3 Hard Amber Durum Wheat" instead of "No.3 Amber Durum Wheat".
The buyers contended that the commodity delivered was not in accordance with the contract description and that the inspection certificate was final and binding only as to the quality and not as to the description of the goods.
The English Court of Appeal (Lord Denning) held that the distinction between the contract description of goods and contract quality specifications was not relevant in that case.
The relevant paragraph of the judgment is quoted below:

"The "description" of goods often includes a statement of their quality. Thus "new laid eggs" contains both quality and description all in one. "Quality" is often part of the description. In this very case the word "hard" is a word both of quality and of description. If a certificate is final as to the quality "hard", it is final as to that description also. The quality and description cannot be separated. Finality as to one means finality as to the other."

In **Gill & Duffus S.A. v. Berger & Co. Inc.**[8], Lord Diplock said that:

"The principle established by Toepfer v. Continental Grain Co. Ltd. is that description and quality may overlap. Where they do, then a certificate which is final as to quality is pro tanto final as to description."

"The words used in a contract of sale that refer to the goods agreed to be sold often include words that describe a characteristic as to quality or condition that they possess which distinguishes them from other goods of the same general kind. What Toepfer v. Continental Grain decided was that where the description of the goods agreed to be sold included a statement as to their quality and provided that a certificate as to quality was to be final, the certificate was final as to the correspondence of the goods with that part of the description of them in the contract that referred to their quality (in casu "No.3 hard amber") notwithstanding that the certificate was proved to have been inaccurate."

7 [1974] 1 Lloyd's Rep. 11
8 [1984] 1 Lloyd's Rep. 227

Gill & Duffus S.A. v. Berger & Co. Inc.[9] was a dispute under a contract for the sale of 500 tonnes of White Argentine Bolitas Beans on CIF terms. The quality determination was to be final at the port of discharge as per SGS certificate indicating that the quality of goods shall conform to the quality of the sealed samples submitted to buyers.
Of the 500 tonnes, 55 tonnes were delivered later so that SGS analysed only the samples drawn from the 445 tonnes initially delivered. The SGS certificate stated that the results of the laboratory analysis indicated that the quality of the parcel of beans discharged from the vessel was equal to the quality of the sealed samples. However, the balance of 55 tonnes subsequently delivered was found to contain 1.8% of coloured beans. The buyers rejected the shipping documents and the goods contending that the goods did not comply with the contract description of goods.
The House of Lords held that the buyers were not entitled to reject the goods. Lord Diplock said that:

"[I]f the admixture of coloured beans was as high as 50 per cent, as it was in The Bow Cedar, or higher, the certificate would not bind. […] In such a case there would be no overlap between quality and description. But here there is; for the presence of a mere 1.8 per cent of coloured beans is plainly something which goes to quality, even if it also goes to description. […] [N]on-compliance with description does not prevent the certificate being final as to quality and description in so far as there was, as here, an overlap between the two."

Another relevant case was **Tradax Internacional S.A. v. Goldschmidt S.A.**[10]. The case was a dispute under a contract for the sale of a cargo of 8,000 metric tonnes of barley on FOB terms. The contract quality specifications provided that the barley cargo should contain maximum 4% foreign matters. The buyers rejected the shipping documents on the ground that the quality certificate showed that the barley cargo contained 4.1% foreign matters.
The question in dispute was whether the buyers were entitled to reject the shipping documents on the ground that the quality certificate showed a percentage of foreign matters a little greater than that specified in the sale contract.
The contract provision that the barley cargo had to contain maximum 4% foreign matters was just a quality specification and not part of the description of goods. The English Commercial Court held that if the contract quality specification not complied with by the seller is not part of the description of goods and is not stated as a warranty either, then it will be deemed to be an innominate term. In such case, the buyers have the right to reject the goods only if there is a serious and substantial deviation from the contract quality specifications. "Where the discrepancy is a minor discrepancy the buyer is bound to accept the goods." In such case, the buyers would only be entitled to a price allowance.
The fact that the barley cargo contained 0.1% more than the maximum of 4% specified in the sale contract for foreign matters was not deemed to be significant. It was a minor breach which would have entitled the buyers to a price allowance only.
Based on the aforementioned cases, it can be said that the buyers of agricultural commodities are entitled to reject the goods in the following cases:
- if the sellers deliver a different commodity than that described in the sale contract;
- if the goods do not comply with a quality specification that is part of the description of goods;
- if there is a serious and substantial deviation from the contract quality specifications. If there is a significant difference between the cargo quality characteristics and cargo quality specifications that amounts to a non-compliance with the contract description of goods, the buyers would be entitled to reject the goods. If there is only a minor breach of contract quality specifications, the buyer would only be entitled to a price allowance.

9 [1984] 1 Lloyd's Rep. 227
10 [1977] 2 Lloyd's Rep. 604

The only contract form that makes a distinction between the situation when the goods supplied do not correspond with the description of goods in the sale contract and the situation when there is only a difference in quality is INCOGRAIN Contract No.13. The Clause IX(b) of INCOGRAIN Contract No.13 provides that:

"Unless the actual nature of the supplied goods does not correspond to the contractual description, [...] a difference in quality shall not give Buyers the right to reject but only that of fixing by arbitration the allowance they may be entitled to."

The Cargo Delivered By The Sellers Is Unfit For The Purpose For Which It Was Bought By The Buyers

The grain cargoes must comply with the maximum acceptable levels of contaminants stipulated in CODEX Alimentarius to be considered safe for human consumption.
For the certification of milling wheat as "fit for human consumption", IFIA[11] require the inspection companies to determine by laboratory analysis the sample content of pesticides (Organochlorine, Organophosphorus, Pyrethroids), heavy metals (Lead, Cadmium), mycotoxins (Ochratoxin A, Deoxynivalenol), poisonous seeds and Ergot fungus[12]. There is a similar procedure for the certification of feed grains and oilseed meals as "fit for animal consumption".
The GIPSA's Federal Grain Inspection Service does not even provide statements indicating that the grain is fit for human/animal consumption, leaving the sellers and buyers to determine themselves the suitability of grain for human/animal consumption based on the test results of the laboratory analysis of cargo sample.
If a wheat or corn cargo has an excessive content of mycotoxins, poisonous seeds and/or Ergot fungus, it is not safe for human consumption and the buyers can reject the cargo.
If the requirement to be fit for purpose is part of the contractual description of goods, e.g. "*Milling Wheat, Fit For Human Consumption*", then it is an express condition of contract in English law that the goods supplied must be suitable for that purpose.
If the requirement to be fit for purpose is not part of the contractual description of goods, there is an implied condition of contract in English law that the goods supplied must be suitable for that purpose. The Section 14 (3) of the Sale of Goods Act 1979 stipulates that:

"Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known –
(a)to the seller ...
any particular purpose for which the goods are being bought, there is an implied term that the goods supplied under the contract are reasonably fit for that purpose …"

To avoid disputes with buyers, the FOB sellers should stipulate in the contract that the health certificate issued by the inspection company at the port of loading shall be final as to the fitness for human/animal consumption[13].

11 International Federation of Inspection Agencies
12 See IFIA Agricultural Committee Bulletin 11-01
13 The clause commonly used in the FOB contracts for sale of milling wheat has the following provisions: "*Weight, quality and fitness for human consumption to be final at loading port as per certificates issued by the independent surveyors appointed by the sellers.*"

The Review Of INCOGRAIN Contract No.13

by Vlad Cioarec, International Trade Consultant

The INCOGRAIN Contract No.13 is a delicacy of French cuisine published by Paris Grain Trade Association (Syndicat de Paris du Commerce et des Industries des Grains) to be used for the FOB sales of grain in bulk.

Settlement Of Price For Contract Quantity Tolerance

In case of a sale of a full cargo, a margin up to 10% more or less of the contract quantity can be granted to the buyers. The buyer's option as to cargo quantity must be declared in the vessel's nomination notice.
In case of a sale of a cargo to be shipped in partial shipments (parcels), the margin of contract quantity shall apply only to the balance available for the last shipment.
A margin up to 2% of contract quantity shall be settled at the contract price. Any excess above 2% of contract quantity shall be settled at the market price on the Bill of Lading date.
If the sale is for a quantity between minimum and maximum limits, the margin of contract quantity shall remain at the buyer's option for each period.

Delivery Terms And Vessel Requirements

The delivery terms are “FOB Spout Trimmed” which means that the buyers should nominate only conventional bulk carriers, i.e. single deck, self-trimming bulk carriers, because the FOB Spout Trimmed delivery is possible only if the buyer nominates and provides a vessel suitable for spout trimming, i.e. a self-trimming bulk carrier.

Vessel Nomination

The FOB buyer must give to seller a minimum 8 days' pre-advice of the expected date of vessel readiness to load and estimated quantity required to be loaded. This notice must reach to the seller not later than the ninth consecutive day preceding the end of the contract delivery period, otherwise the buyer shall be in default. The expected date of vessel readiness to load must be not later than the last day of the contract delivery period.
The buyer must give another pre-advice with minimum 4 days before the expected date of vessel readiness to load stating the exact quantity of cargo required to be loaded. This notice must reach to the seller not later than the fifth consecutive day preceding the end of the contract delivery period, otherwise the buyer shall be in default.

Conditions For The Vessel Substitution

The buyer may substitute the originally nominated vessel provided the substitute vessel will be able to load the same quantity of cargo on the expected date of berthing of the originally nominated vessel.

The Implications Of The Vessel's Failure To Present Ready In All Respects To Load On The Expected Date Of Berthing

The buyer must present the vessel ready in all respects to load at the loading berth on the expected date of berthing pre-advised in the vessel's nomination notice.
Should the buyer's vessel fail to present ready in all respects to load on the expected date of berthing, the buyer shall be liable for any extra storage charges incurred by the seller for the goods after the expected date of berthing, even if the seller will manage to complete loading during the

contract delivery period. If, however, in spite of the seller's compliance with the contractual loading rate the seller will not be able to complete loading before the end of the contract delivery period due to the vessel's late arrival or delayed readiness for loading, the contract price for the quantity of goods loaded after the delivery period shall include an additional charge to be calculated based on the number of additional days required to complete loading: i.e.
- ½ % over the contract price, if the loading is completed within 4 days after the contractual delivery period;
- ¾ % over the contract price, if the loading is completed within 5 or 6 days after the contractual delivery period;
- 1% over the contract price, if the loading is completed within 7 or 8 days after the contractual delivery period.
These charges shall apply only if the contractual loading rate has been respected. In case of loading delays caused by the seller's failure to load the goods at the contractual loading rate, there will be no carrying charges due by the buyer to seller for the time used by the seller in excess of the laytime and the seller shall have to reimburse to buyer "all proven expenses resulting from the breach of the freight contract", i.e. demurrage and extra berth charges.

Extension Of The Delivery Period

If the buyer will not be able to present the vessel ready in all respects for loading during the contract delivery period, the buyer can give notice to the seller not later than the last day of the contract delivery period claiming extension of the delivery period with an additional period of 8 consecutive days.
Provided the buyer's vessel presents ready in all respects for loading during the extension period, the seller shall if necessary complete loading even after the 8 days' extension period.
For the quantities loaded after the extension period, the contract price will be increased with an additional charge of 1.50%.
For the quantities loaded during the extension period, the contract price will be increased with an additional charge to be calculated based on the number of days required to complete loading, in accordance with the following scale:
- ½ % over the contract price, if the loading is completed within 4 days after the contractual delivery period;
- ¾ % over the contract price, if the loading is completed within 5 or 6 days after the contractual delivery period;
- 1% over the contract price, if the loading is completed within 7 or 8 days after the contractual delivery period.
These charges shall apply only if the contractual loading rate has been respected. In case of loading delays caused by the seller's failure to load the goods at the contractual loading rate, there will be no carrying charges due by the buyer to seller for the time used by the seller in excess of the laytime and the seller shall have to reimburse to the buyer "all proven expenses resulting from the breach of the freight contract", i.e. demurrage and extra berth charges.
These provisions will prevent disputes like in the English law case **Rich Co. International Ltd. v. Alfred C. Toepfer International GmbH (The "Bonde")**[1].
In that case the dispute arose out of a contract for the sale of 30,000 MT of wheat basis FOB terms.
The contract delivery period was 20 April – 20 May 1988.
The buyer failed to present the vessel ready to load within the contract delivery period and requested extension of the delivery period with 21 days.
The seller agreed with the extension of the delivery period but failed to load the goods at the contractual loading rate of 3,000 MT per day and the time used for loading exceeded the 10 days allowed for loading. Nonetheless, the seller claimed the reimbursement of carrying charges for the

1 [1991] 1 Lloyd's Rep. 136

entire period after the expiry of the contract delivery period until the date of completion of loading. The amount of carrying charges claimed by the seller exceeded the amount of demurrage charge owed by the seller to buyer for the time used in excess of the laytime.
The buyer denied liability for the carrying charges accrued during the period of time used in excess of the 10 days allowed for loading.
The seller's claim for the reimbursement of carrying charges was upheld by the English Commercial Court.

Nomination Of The Loading Port

In sale transactions that require the seller to nominate the loading port, the seller's obligation to nominate the loading port within the contractual time limit is a condition of the contract. INCOGRAIN Contract No. 13 gives the FOB buyer an express right to terminate the sale contract in case of breach of the port nomination provisions by the seller.

Nomination Of The Loading Berth

The seller must nominate the loading berth upon the receipt of the vessel's NOR.
If the loading berth is occupied by another vessel at the time of the vessel's arrival at loading port, the buyer shall automatically be allowed a free charge extension of the contract delivery period equivalent to the period of time spent by the vessel waiting for berth. No carrying charges or other expenses shall be charged on account of this delay whether the vessel arrives within the contract delivery period or during the extension period. Furthermore, if the time allowed for loading under the sale contract is exceeded due to the time lost while the vessel was waiting for berth, the seller cannot claim dispatch money from the buyer for any time saved due to loading at a faster rate than the contractual loading rate.
These provisions will prevent situations like in the English law case **Miserocchi v. Agricultores Federados Argentinos SCL and Bunge A/G (The "Sotir" and "Angelic Grace")[2].**
In that case the buyers were required to present the vessel ready for loading at the nominated berth within the contract delivery period but their vessel could not proceed due to congestion to the nominated berth until after the expiry of the contract delivery period.
The seller claimed the reimbursement of carrying charges incurred for the goods after the expiry of the contract delivery period.
The English Commercial Court held that in case of contracts which require the vessel to present ready for loading at the nominated berth within the contract delivery period, the buyers bear the risk of delay to vessels caused by congestion at loading port.

The Seller's Obligation To Have The Goods Ready For Loading

The seller must have the goods ready for loading on the vessel's expected readiness date pre-advised by the buyer, not sooner, not later or at least, not later than the contractual time limit. The seller would be liable for any delay resulting from his failure of having the goods available for loading at the end of the pre-advice period[3]. Furthermore, if the seller does not commence loading within 3 working days following the day on which the vessel is in all respects ready to load at the loading berth, he shall be in default, save in case of force majeure.
If the seller commences loading but fails to load the goods at the contractual loading rate, the seller shall have to reimburse to buyer *"all proven expenses resulting from the breach of the freight contract"*, i.e. demurrage and extra berth charges and shall be precluded to claim any price increase resulting from the loading delays, that is, the extra storage charges for the time used in excess of the laytime.

2 [1982] 1 Lloyd's Rep. 202
3 See Kurt A. Becher GmbH v. Roplak Enterprises; Roplak Enterprises S.A. v. Tradax Ocean Transportation S.A. (The "World Navigator"), [1991] 2 Lloyd's Rep. 23.

The seller's obligation to commence loading shall be subject to
- the buyer's compliance with the obligation to provide evidence of insurance cover for the goods, if requested by the sellers; and
- the buyer's compliance with the obligation to arrange the opening of L/C not later than 5 working days prior to the first day of the delivery period.
In case of late opening of L/C, the seller shall have the right to postpone the delivery of goods until the receipt of the bank's confirmation of L/C opening. In such case, any expenses arising from the delays in opening of L/C, e.g. demurrage charge and extra storage charges for the goods, shall be for the buyer's account.

Weight Determination
The contract stipulates that the weight of cargo shall be ascertained on the shore weighing devices at the place of loading and the weight figure resulted therefrom shall be final.

Condition Of Goods At The Time Of Delivery
Sub-Clause III(a) has the following provisions:

"*Goods must be delivered dry, without abnormal odour, without smell, free from alive parasites of the goods, and meet all current trading standards."*

Any defect in the condition of goods which the seller is unable to remedy immediately shall give the buyer the right to reject the goods.

Quality Determination
Clause III provides 3 options for the determination of quality:
a) the goods must conform to a reference sealed sample; In case the goods do not conform to the sample, the buyer may either reject or accept delivery subject to a price allowance to be fixed by arbitration, depending on the extent of non-conformity.
b) the goods must conform to a type sample; If the difference is within 1%, the goods shall be accepted without a price allowance. If the difference exceeds 1%, the price allowance shall be fixed by arbitration, the buyer having the right to reject the goods in case the difference exceeds 5%.
c) the goods' quality characteristics must be within the minimum and maximum limits stated in the contract quality specifications.
INCOGRAIN Contract No.13 makes a distinction between the situation when the goods supplied do not correspond with the description of goods in the sale contract and situation when there is only a difference in quality. In the former case, the buyer shall be entitled to reject the goods. In the latter case, the buyer shall only be entitled to claim a price allowance.
The sampling of goods for the determination of quality and condition shall take place latest at the time of loading on the quay, dock area, terminal elevator or barges from which the goods will be shipped into the vessel's holds. But the rejection of goods will only be possible before loading into the vessel's holds. The buyer cannot reject the goods after they have been loaded into the vessel's holds on the grounds of difference in quality and/or condition. The only thing the buyer can do after the goods have been loaded into the vessel's holds it is to reserve his rights concerning the goods to claim later a price allowance to be fixed by arbitration.
Any claim for arbitration shall be notified to the other party not later than 7 working days after the recognition of goods (i.e. determination of quality and condition). Not later than 14 working days after the notification of the arbitration claim, the buyer shall refer the dispute to the Chambre Arbitrale de Paris and send them the cargo samples.

Payment Options

INCOGRAIN Contract No.13 provides two options for payment:
- seller sends the commercial and shipping documents through a bank for collection;
- L/C.

In case of documents sent for collection, the Clause XIII paragraph A of the INCOGRAIN Contract No.13 stipulates that the payment must be effected "without discount on first presentation". However, the sale contract and collection instruction should state the exact period of time within which the payment must be effected. The art.5(b) of the ICC Uniform Rules for Collection (ICC Publication No.522) stipulate that:

"The collection instruction should state the exact period of time within which any action is to be taken by the drawee. Expressions such as "first", "prompt", "immediate", and the like should not be used in connection with presentation or with reference to any period of time within which documents have to be taken up or for any other action that is to be taken by the drawee. If such terms are used banks will disregard them."

Force Majeure

Within 3 working days of the occurrence of an event of force majeure, the affected party must notify to the other party the reasons causing the delay of fulfillment of his contractual obligations.
If required by the other party, the affected party shall provide evidence that the occurrence of the event of force majeure prevented the performance of his contractual obligations.
The contract delivery period shall be extended with minimum 14 consecutive days if the event of force majeure occurred within the last 14 days of the contract delivery period.
If the event of force majeure occurs before the last 14 days of the contract delivery period, the delivery period shall be extended, from the cessation of the event of force majeure, to as much time that was left for delivery under the contract prior to the occurrence of the force majeure event.
Should the force majeure event continue for more than 60 consecutive days, the contract shall be considered null and void for the delivery/ies that had been postponed.

NOR And Time Counting

Clause VI paragraph 4 stipulates that the time shall count according to the general terms of the SYNACOMEX Charter Party form. This means that NOR tendering provisions of SYNACOMEX Laytime Clause would also be incorporated.

Settlement Of Disputes

The disputes arising out of or under the INCOGRAIN Contract No.13 shall be referred to arbitration arranged by the Chambre Arbitrale de Paris in accordance with their rules.

The Implications Of The Buyers' Non-Compliance With The Pre-Advice Requirements In The Grain FOB Sale Contracts

by Vlad Cioarec, International Trade Consultant

In the grain FOB sale contracts, the purpose of the pre-advice period for the nomination of vessel is to give the sellers the necessary time to procure and/or bring the required quantity of goods to the loading port and have them ready for loading on the expected date of vessel readiness to load pre-advised in the vessel's nomination notice.

If the buyers nominate an unsuitable vessel or a suitable vessel but in less than the required numder of days stipulated in the sale contract, the sellers will be entitled to reject the nomination. If there is sufficient time left until the end of the contract delivery period, the buyers can make a new nomination subject to the compliance with the contract pre-advice requirements. If there is not sufficient time left until the end of the contract delivery period, the buyers can request extension of the contract delivery period.

The GAFTA Contract No.38 provides that if the 10 days' pre-advice period expires after the contract delivery period, the extension shall be deemed to have been claimed and the cargo carrying charges will accrue from the first day after the expiry of the contract delivery period until the Bill of Lading date. Therefore, if the buyer nominates the vessel in less than 11 days before the expiry of the contract delivery period, he shall bear the cargo carrying charges accrued after the expiry of the contract delivery period. There are similar provisions in the ANEC FOB Sale Contract form No. 43.

The ANEC FOB Sale Contract form No.43 stipulates that the buyers must send the vessel's nomination notice with minimum 15 days before the vessel's ETA at loading port. If the buyer nominates the vessel in less than 16 days before the expiry of the contract delivery period, he shall bear the cargo carrying charges accrued after the expiry of the contract delivery period until the date of completion of loading, even if the vessel arrives and tenders valid NOR by 17:00 hours of the last day of the contract delivery period. The seller's obligation to commence loading will be on the 16th day, at 08:00 hours, after the vessel's nomination date, not sooner.

If the buyer requests extension of the delivery period but fails to nominate a suitable vessel in due time, i.e. with the minimum pre-advice required in the contract before the last day of the extension period, the seller shall be entitled to terminate the contract.

The same rule applies in case of FOB contracts with no extension period. If the buyer fails to nominate a suitable vessel in due time, i.e. with the minimum pre-advice required in the contract before the last day of the delivery period, the seller shall be entitled to terminate the contract.

Case study: Bunge Corporation (New York) v. Tradax Export S.A. (Panama), [1981] UKHL 11

The case was a dispute related to a contract for the sale of 15,000 long tons +/-5% of US soya bean meal basis FOB one United States Gulf port at seller's option, to be delivered in three instalment shipments of 5,000 long tons in May, June and July 1975. The sale contract incorporated the terms and conditions of GAFTA Contract No.119.

The GAFTA Contract No.119 Edition in force at that time allowed the extension of the delivery period with one calendar month. The buyer claimed one month extension so that the shipment that had to be delivered in May 1975 was to be delivered during June 1975.

The sale contract required the buyer to give at least 15 consecutive days' notice of the expected date of vessel readiness to load. On 17 June 1975, that is, in less than 15 consecutive days before the end of the extended delivery period, the buyers nominated the vessel “Sankograin” with ETA in US Gulf 23/25 June 1975. The late nomination of vessel was due to the late nomination of vessel by on-

buyers in the string.
On 20 June, the sellers replied that the vessel's nomination notice was late and thereby terminated the contract, declaring the buyers in default.
The FOB contract price was USD 199,50 per metric ton. By the time of the buyer's default the market price had fallen by over USD 60 per metric ton. The seller claimed damages for the difference.
The question raised in appeal to the House of Lords was whether the FOB buyer's obligation under the sale contract to give at least 15 consecutive days' notice of the expected date of vessel readiness for loading was a condition of contract or not. The House of Lords held that the minimum 15 days' preadvice requirement was a condition of contract so that the FOB seller was entitle to terminate the contract. Lord Wilberforce said that the question had to be "*whether this delay [vessel's late nomination] would have left time for the seller to provide the goods*". Lord Wilberforce said that:

"It would make it, at the time, at least difficult, and sometimes impossible, for the supplier to know whether he could do so."

The buyer's performance of the obligation to nominate the vessel in due time was the necessary condition for the performance by the seller of his obligation to nominate the loading port and have the goods ready for loading on the expected date of vessel readiness for loading.
Lord Roskill provided the following arguments:

"in a mercantile contract when a term has to be performed by one party as a condition precedent to the ability of the other party to perform another term, especially an essential term such as the nomination of a single loading port, the term as to time for the performance of the former obligation will in general fall to be treated as a condition.
Until the 15 consecutive days' notice had been given, the [sellers] could not know for certain which loading port they should nominate so as to ensure that the contract goods would be available for loading on the ship's arrival at that port before the end of the shipment period."

Case study: Ramburs Inc. v. Agrifert SA, [2015] EWHC 3548 (Comm)

The case was a dispute related to a contract for the sale of a cargo of 25,000 metric tonnes of maize basis delivery FOB Stowed/Trimmed/Fumigated one safe berth/one safe Panamax suitable port in Ukraine to be declared by the sellers upon the vessel's nomination.
The pre-advice clause of the sale contract required the FOB buyer to serve the vessel's nomination notice to the seller not later than 10 days before the vessel's ETA date at loading port.
The sale contract incorporated the terms and conditions of GAFTA Contract No. 49, Edition 2012.
The contract delivery period was 15 – 31 March 2013, without the possibility of extension.
On 20 March 2013, the FOB buyer served a notice nominating the vessel M/V "Puffin" giving an ETA at loading port of 26/27 March 2013, that is, less than 10 days before the vessel's ETA at loading port.
On 26 March 2013, the FOB buyer sent another notice nominating the vessel M/V "Sea Way" in place of the vessel M/V "Puffin", giving an ETA date of 28 March. Later that day the seller rejected both nominations for the buyers' failure to comply with the contract pre-advice requirements.
The dispute went to arbitration.
Referring to the first nomination notice, the GAFTA Board of Appeal held that the vessel's late nomination meant only that the sellers were not obliged to commence loading before the expiry of the 10 days' pre-advice period. As regards the nomination of substitute vessel, the GAFTA Board of Appeal held that since the Clause 6 of GAFTA Contract No.49 stipulated that the sellers had to have the goods "ready to be delivered to the Buyers at any time within the contract period of delivery"

and that the buyers had the right to substitute the nominated vessel provided the contract delivery period shall not be affected thereby, it would be “bizarre” for the right to substitute the nominated vessel to be subject to the same pre-advice requirements as the original nomination.
The English High Court did not accept these reasons. The Court held that it would be more “bizarre” to give the Clause 6 of the GAFTA Contract No.49 the interpretation that the FOB buyers are only required to give a pre-advice about a vessel that would not ultimately be used for loading. Since the Clause 6 of the GAFTA Contract No.49, Edition 2012 did not stipulate a time limit for the submission of the vessel substitution notice, then the pre-advice requirements for the nomination of vessel would equally apply to the nomination of any substitute vessel.
The implications of the English High Court's decision were that whenever the FOB buyers would have nominated a substitute vessel pursuant to the provisions of the Clause 6 of GAFTA Contract No.49, they had to comply with the same pre-advice requirements as for the nomination of the original vessel. The sellers would have considered the vessel substitution notice as a new nomination and would have started counting a new pre-advice period.
In the FOB commodity 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 the estimated time of arrival (ETA).
The ETA of the substitute vessel should not be earlier than the ETA of the originally nominated vessel because the sellers' obligation to commence loading and therefore, the commencement of laytime are in function of the ETA of the originally nominated vessel. The FOB sellers must have the goods ready for loading as from the ETA of the originally nominated vessel, not sooner.
The most commodity contracts stipulate that the vessel substitution notice can be served with a shorter pre-advice than the pre-advice period stipulated in the sale contract for the nomination of the original vessel provided that the ETA of the substitute vessel is not earlier than the ETA of the originally nominated vessel.
For instance, the Clause 8 of the NAEGA FOB Export Contract No.2 provides that:

“The nomination of the substituting vessel shall be subject to the preadvice requirements of this clause, regardless of any preadvice previously given, unless the estimated time of arrival of the substituting vessel is the same as the estimated time of arrival of the original vessel when nominated.”

Another example is the Clause 6 of the FOSFA Contract No.4A which stipulates that:

“Buyers are allowed to substitute the nominated ship/s provided that the substitute ship is expected to load approximately the same quantity no earlier than the original ship and not more than 5 consecutive days later unless otherwise agreed by Sellers. Buyers shall notify their Sellers of such substitution as soon as possible but not later than 2 business days before the expected arrival of the original ship/s.”

Following the English High Court's decision in **Ramburs Inc. v. Agrifert SA,** in September 2017 GAFTA included similar provisions in the Clause 6 of the GAFTA Contract No.49 and the GAFTA Contracts No. 64 and 119. The revised Clause 6 stipulates now that the nomination of any substitute vessel will not be subject to the pre-advice requirements for the originally nominated vessel provided that the substitute vessel does not arrive earlier than the ETA of the originally nominated vessel and the vessel substitution notice is given not later than one business day before the ETA of the originally nominated vessel.

The Review Of GAFTA Contract No.49, Edition 2020

by Vlad Cioarec, International Trade Consultant

The GAFTA Contract No.49 is a contract form published by the Grain and Feed Trade Association (GAFTA) to be used for FOB sales of grain in bulk by the grain traders from the Central and Eastern Europe, particularly by the grain shippers from the Black Sea region.

Vessel Nomination

The Clause 6 of GAFTA Contract No. 49 does not stipulate any requirements to be complied with by the vessel to be nominated by the buyers.
There is no pre-advice period for the nomination of vessel and no deadline for the submission of the vessel's loading plan.

The Sellers' Potential Liability For The Cargo Carrying Charges

The buyers must nominate the vessel with the minimum pre-advice period agreed in the sale contract.
The sellers must have the goods ready for loading as from the expected date of the vessel readiness to load originally pre-advised by the buyers in the vessel's nomination notice.
Provided the buyers have complied with the contract pre-advice requirements, they may present the vessel for loading at any time within the contract delivery period, even on the last day. 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.
These provisions are obviously unfair for the Black Sea shippers and led to disputes in cases involving vessel's late nomination or late presentation for loading. The 2010 English law case **Soufflet Negoce S.A. v. Bunge S.A.**[1] is a relevant example.
The case was a dispute arising out of a contract for the sale of 15,000 MT of feed barley.
The sale contract stipulated that the cargo of 15,000 MT of feed barley was to be loaded by the sellers *"at the rate of 5,000 MT per WWD of 24 consecutive hours SSHEX even if used"*, which meant that loading was to be completed in about three days.
The contract delivery period was 9 – 22 October 2006, without the possibility of extension. When the nominated vessel presented for loading on 22 October, the last day of the contract delivery period, it was rejected by the government and private surveyors appointed by the sellers on the ground that the holds and hatches contained residues of coal. Nonetheless, the buyers called upon the sellers to load the barley cargo based on the provisions of the Clause 6 of the GAFTA Contract No.49 incorporated into the sale contract which oblige the sellers to complete loading even after the contract delivery period, if necessary.
What probably happened there was that the sellers did not wait for the vessel and delivered the goods to another buyer before even the vessel's arrival. Had the sellers waited for the buyers' vessel, they would have incurred the cargo carrying charges accrued on the next days following the contract delivery period that would have made the sale less profitable for the sellers. Based on these considerations, the sellers refused to deliver the goods.
In the Court proceedings that followed, the sellers contended that:

1 [2010] EWCA Civ 1102

"If a vessel could be presented which was not ready to load in all respects, the Buyers although not wanting to commence loading until the vessel was rendered fit to load would be able by presenting an unfit vessel to trigger an extension of the delivery period during which the seller would be saddled with the carrying charges[2]."

This is just one case that shows the difficulties that the Black Sea shippers have in the FOB sales based on the terms of the GAFTA Contract No. 49.
Another example is the English law case **Ramburs Inc. v. Agrifert S.A.[3].**
The case was a dispute under a contract for the sale of a cargo of 25,000 MT of maize.
The contract delivery period was 15 – 31 March 2013, without the possibility of extension.
On 20 March 2013, the FOB buyers served a notice nominating the vessel M/V "Puffin" giving an ETA at loading port of 26/27 March 2013, that is, less than 10 days before the vessel's ETA at loading port.
On 26 March 2013, the FOB buyers sent another notice nominating the vessel M/V "Sea Way" in place of the vessel M/V "Puffin", giving an ETA date of 28 March.
The sellers rejected both nominations for the buyers' failure to comply with the contract pre-advice requirements[4]. In the rejection notice, the sellers contended that:

"[...] the nominated vessel should have arrived at a loading port at such time so as to enable us to ship the cargo within the shipment period.
Second, as regards your purported substitution [...] it is obvious that even if the vessel arrives at the loading port on 28th March which is highly unlikely, the Sellers will not be able to complete the loading within the shipment period ending 31/03/2013 12:00 P.M. given the loading rate of 8,000 mts per weather working day SSHINC."

Comments:
In the GAFTA Contract No. 49, the delivery period is a period for the presentation of vessel for loading. The buyers' vessel can arrive and tender NOR at any time up to 24:00 hours on the last day of the delivery period. This is so even in cases where the sale contract that incorporates the terms of GAFTA Contract No. 49 excludes the extension option.
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, as in Ramburs Inc. v. Agrifert S.A. case.
The FOB sale contracts incorporating GAFTA Contract No. 49 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, Edition 2020 which stipulates that the vessel presentation at the loading port in readiness to load *"shall allow at least 36/..... consecutive hours remaining prior to*

2 See Soufflet Negoce v. Bunge SA, [2009] EWHC 2454 (Comm)
3 [2015] EWHC 3548 (Comm)
4 The English High Court held that the sellers were right in doing so and that when an FOB buyer nominates a vessel pursuant to the provisions of the Clause 6 of the GAFTA Contract No.49, he is required to comply with the terms of the contract of sale as to nomination and pre-advice notwithstanding the provisions of Clause 6 of the GAFTA Contract No.49, Edition 2012 stipulating that the sellers must have the goods *"ready to be delivered to the Buyers at any time within the contract period of delivery."* The Court held that: *"It is true that the sellers are to have the goods "ready to be delivered to the Buyers at any time within the contract period of delivery", but that does not mean that they would not be interested in receiving information about when the vessel that was to carry the cargo would probably be ready. Similar considerations apply to the pre-advice provisions in the confirmation of contract: for example, the sellers might want the dimensions and draft of the vessel to arrange a safe berth."*

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:

For quantities up to	*4000 tonne*	-	*36 consecutive hours*
For quantities between	*4001 - 8000 tonne*	-	*48 consecutive hours*
For quantities between	*8001 - 12000 tonne*	-	*72 consecutive hours*
For quantities in excess of	*12000 tonne*	-	*96 consecutive hours."*

The vessel's expected readiness date should allow to sellers sufficient time for the completion of loading between the next day following the expected readiness date 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 that will allow the sellers sufficient time to load the cargo in the days following expected readiness date 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 size, de-ballasting capacity and expected readiness date.
The substitute vessel must be a vessel of similar 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 6 of GAFTA Contract No.49 has no provisions in this regard. Therefore, the sellers using the GAFTA Contract No.49 should stipulate in their sale contracts that the substitute vessel must comply with the same requirements as the originally nominated vessel in respect of 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 based on the terms of GAFTA Contract No.49, 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.49 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 6 of GAFTA Contract No.49 requires the FOB buyers to present the vessel at the loading port *"in readiness to load within the delivery period"*.
The question of the vessel readiness to load the grain cargo could lead to disputes in case of the vessel's late arrival 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.
In the English law case **Soufflet Negoce S.A. v. Bunge S.A.**[5] the sale contract stipulated that the cargo of 15,000 MT of feed barley was to be loaded by the sellers *"at the rate of 5,000 MT per WWD of 24 consecutive hours SSHEX even if used"*, which meant that loading was to be completed in about three days.
The contract delivery period was 9 – 22 October 2006, without the possibility of extension. When the nominated vessel presented for loading on 22 October, the last day of the contract delivery period, it was rejected by the government and private surveyors appointed by the sellers on the ground that the holds and hatches contained residues of coal. Nonetheless, the buyers called upon the sellers to load the barley cargo based on the provisions of the Clause 6 of the GAFTA Contract No.49 incorporated into the sale contract which oblige the sellers to complete loading even after the contract delivery period, if necessary.
The sellers refused to load the goods. The sellers' refusal to load the goods was treated as repudiatory by the buyers who brought a claim in arbitration for damages for the sellers' failure to load the goods.
One question in dispute was whether the 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 fifth phrase of the Clause 6 of GAFTA Contract No.49 has the following provisions:

"Provided the vessel is presented at the loading port in readiness to load within the delivery period, Sellers shall if necessary complete loading after the delivery period and carrying charges shall not apply."

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.
David Steel J. held that the phrase *"the vessel is presented at the loading port in readiness to load within the delivery period"* means 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"*. There is no requirement for the tender of a valid NOR.
The English Court of Appeal held that:

"The phrase "in readiness to load" does not expressly say that a Notice of Readiness must have been (or at least be capable of being) given. If that was the intention the form would have said so and not left it to implication."

"The fact that the holds may have needed some cleaning on arrival does not mean that the Sellers can throw up the sale contract on the basis that no vessel has arrived during the period fixed for delivery."

"If the state of cleanliness of the holds were to be a legitimate concern of the Sellers, it would probably be necessary to have some provision entitling the Sellers to inspect the holds[6] *in addition*

5 [2010] EWCA Civ 1102

6 For an example of such provisions, see the Clause 8 of SYNACOMEX 2000 grain charterparty which stipulates that: *"At loading port Shippers/ Charterers or their Agents have the privilege to inspect Vessel's holds and reject the notice [of readiness] when holds are not clean, dry, odourless and in all respects ready to receive the cargo."*

to whatever rights the Buyers might have under the charter but no such provision appears in this contract."

The problem with the Court decision in **Soufflet Negoce S.A. v. Bunge S.A.** is that in the major grain exporting countries the state of cleanliness of the holds is a legal requirement. The port authorities require the inspection of holds after berthing and in some countries even before berthing. The port authorities' permit for the vessel to start loading will be subject to the approval of holds by the surveyors and/or government inspectors so that even if the buyers call upon the sellers to load the port authorities will not allow them to do that.
To avoid disputes like in **Soufflet Negoce S.A. v. Bunge S.A.,** the FOB sale contracts should define the meaning of the words "readiness to load" and stipulate that if the buyers' vessel fails to pass the inspection of holds and hatch covers, then the vessel shall not be considered ready for loading. An example of such provisions can be found in the GTA Voyage Charter – AusGrain 2015 which stipulates that:

"the Vessel will not be ready if the result of any survey or inspection […] is that the Vessel is not ready and available for immediate loading."

In the FOB sale contracts incorporating the terms of GAFTA Contract No.49, the sellers should stipulate that the buyers must present the vessel ready in all respects in all the holds required for loading under the contract and that the buyers' vessel must tender valid NOR at loading port within the contract delivery period.

Conditions For Extension Of The Contract Delivery Period

The Clause 8 of GAFTA Contract No.49 stipulates that the buyers have the right to request extension of the contract delivery period with maximum 10 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**[7]**.** 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, on the basis 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 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

7 [2014] EWHC 2013 (Comm)

by the sellers.
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.

Comments:
In the GAFTA Contract No.49, the Clause 8 does not have corresponding provisions with the Clause 6.
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 buyers' 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, ..."

Deadline For Giving Notice Of Extension

The Clause 8 of the GAFTA Contract No.49 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.

Case study: Soufflet Negoce SA v. Fedcominvest Europe SARL, [2014] EWHC 2405 (Comm)
The case was a dispute under a contract for the sale of 38,000 MT of feed barley on FOB terms, which incorporated the terms of GAFTA Contract No.64.
The contract delivery period was 10 November – 10 December 2010.
The buyers' vessel encountered unexpected delays on the approach voyage to the loading port and could not arrive within the contract delivery period. The buyers tendered notice claiming extension at 17:09 hours on the next business day following 10 December 2010.
The sellers contended that the buyers' notice of extension was late because it was served after 16:00 hours and therefore, it was deemed to have been received the following day.
When the buyers' vessel arrived at loading port, the sellers refused to deliver the goods. The dispute went to arbitration to GAFTA.
The question in dispute was whether the provision in GAFTA Notices Clause that notices received after 16:00 hours are deemed to have been received the following day apply to all contracts or only in case of resales/repurchases.
The GAFTA Board of Appeal held that the FOB buyers had until midnight on 13 December (the next business day following the last day of contract delivery period) to serve notice claiming extension. Therefore, the notice served by the buyers at 17:09 hours on 13 December 2010 was valid.
The requirement to serve notice by 16:00 hours was applicable only in case of contracts that are themselves resales/repurchases. Since the contract in dispute was not itself a resale/repurchase, the deadline for giving notice did not apply in that case. The relevant paragraph of the Award is quoted below:

"the provision "resales/repurchases" [in GAFTA Notices Clause] could only apply in cases where the goods had been resold on similar terms, and this is well understood by the Trade. If Buyers had resold the goods to Saudi Arabian receivers on FOB terms then they would, on the facts of this case, have been in a position where they would have been passing on a Notice of Extension received from their buyers."

The English Commercial Court upheld the GAFTA Board of Appeal Award and held that the deadline for giving notice do not apply to all contracts but only in case of resales/repurchases.
The Court decision would equally apply in case of any other contract containing the GAFTA Notices Clause, including GAFTA Contract No.49.

Comments:
In case of FOB resales contracts, the buyers must serve the notice of extension by 16:00 hours on the next business day following the last day of the contract delivery period.
Where there are no resales contracts, the buyers must serve the notice of extension not later than 24:00 hours on the next business day following the last day of the contract delivery period.
To avoid uncertainty, the FOB sellers could insert in the sale contract the requirement that the buyers give notice of extension to sellers not later than 16:00 hours on the next business day following the last day of the contract delivery period. An example of such requirement is in the Clause 9 of GAFTA Contract No.38 which has the following provisions:

"Should Buyers not tender vessel(s) in readiness to load within the specified contract period for delivery, they shall be in default unless they give notice to Sellers not later than 16:00 hours on the next business day following the last day of the contract period for delivery that an extension is claimed, notwithstanding cases of resale's and/or provisions of the non-business day clause."

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;

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 vessel readiness to load. If the buyers fail to provide such evidence to sellers at least 5 days prior to the expected date of vessel readiness to load, the sellers shall have the right to obtain such insurance cover for the buyers' account and expense.

The Review Of FOSFA Contract No.4A, Edition 2018

by Vlad Cioarec, International Trade Consultant

The FOSFA Contract No. 4A is a contract form issued by FOSFA to be used for the FOB sales of European oilseeds in bulk.

Price Settlement For Quantity Tolerance

In case of sales of parcels, a margin up to 5% more or less of the contract quantity can be granted to buyers at contract price.
In case of a sale of a full cargo, a margin up to 10% more or less of the contract quantity can be granted to buyers, of which a margin up to 5% of the contract quantity shall be settled at the contract price and any excess over 5% shall be settled at the FOB market price on the last Bill of Lading date.
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.

Nomination Of The Ship

The pre-advice period for the nomination of ship is minimum 3 days prior to the expected date of ship readiness to load.
In case of re-sales (i.e. FOB back-to-back contracts), the ship's nomination notice must be sent by the last FOB buyer not later than 10:00 hours on a business day. The ship's nomination notice must be confirmed by any means of rapid written communication on the same day, if received not later than 17:00 hours or not later than 10:00 hours on the next business day, if received after 17:00 hours or a non-business day.
The FOSFA Contract No. 4A does not stipulate any requirements to be complied with by the ship to be nominated by the buyers, but says that the tankers and ore/oil carriers are excluded.
There is no contractual time limit nor any reference to the Master's obligation to submit to the seller's port operators the ship's loading plan.

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 size, de-ballasting capacity and expected readiness date.
The substitute vessel must be a vessel of similar 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. In this regard, the Clause 6 of FOSFA Contract No.4A provides that the substitute ship must be able to load *"approximately the same quantity"* as the originally nominated ship. The sellers should also stipulate in their sale contracts that the substitute ship must comply with the contract requirements in respect of the 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 and not later than the contractual time limit. 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 oilseeds based on the terms of the FOSFA Contract No.4A, the buyers may

substitute the originally nominated vessel provided that they give the vessel substitution notice not later than two business days before the expected readiness date of the originally nominated vessel and the expected readiness date of the substitute vessel will not be earlier than the expected readiness date of the originally nominated vessel and not later than 5 consecutive days.
The FOB sale contracts incorporating the terms of the FOSFA Contract No.4A 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. The sellers should also stipulate what will happen if the substitute ship does not present ready for loading within the 5 days' time limit after the expected readiness date of the originally nominated ship.

Ship Presentation For Loading

The Clause 7 of FOSFA Contract No.4A provides that the ship must be presented at loading port in *"readiness to load"* not later than 14:00 hours on the business day preceding the last working day of the contract delivery period.
In the English law case **Soufflet Negoce S.A. v. Bunge S.A.**[1]**,** there was a dispute as to the meaning of the words "readiness to load" used in the Clause 6 of GAFTA Contract No.49.
The buyers' vessel presented for loading on the last day of the contract delivery period but failed to pass the holds' inspection on the ground that the holds and hatches contained residues of coal. Nonetheless, the buyers called upon the sellers to load the barley cargo based on the provisions of Clause 6 of GAFTA Contract No.49 incorporated into the sale contract which oblige the sellers to complete loading even after the contract delivery period, if necessary.
The sellers refused to load the goods. The sellers' refusal to load the goods was treated as repudiatory by the buyers who brought a claim in arbitration for damages for the sellers' failure to load the goods.
The question in dispute was whether the 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.
David Steel J. held that the phrase *"the vessel is presented at the loading port in readiness to load within the delivery period"* means 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"*. There is no requirement for the tender of a valid NOR.
The English Court of Appeal held that:

"The phrase "in readiness to load" does not expressly say that a Notice of Readiness must have been (or at least be capable of being) given. If that was the intention the form would have said so and not left it to implication."

"The fact that the holds may have needed some cleaning on arrival does not mean that the Sellers can throw up the sale contract on the basis that no vessel has arrived during the period fixed for delivery."

"If the state of cleanliness of the holds were to be a legitimate concern of the Sellers, it would

1 [2010] EWCA Civ 1102

probably be necessary to have some provision entitling the Sellers to inspect the holds[2] *in addition to whatever rights the Buyers might have under the charter but no such provision appears in this contract."*

The problem with the Court decision in **Soufflet Negoce S.A. v. Bunge S.A.** is that in the major grain exporting countries the state of cleanliness of the holds is a legal requirement. The port authorities require the inspection of holds after berthing and in some countries even before berthing. The port authorities' permit for the vessel to start loading will be subject to the approval of holds by the surveyors and/or government inspectors so that even if the buyers call upon the sellers to load the port authorities will not allow them to do that.
To avoid disputes like in **Soufflet Negoce S.A. v. Bunge S.A.,** the FOB sale contracts should define the meaning of the words "readiness to load" and stipulate that if the buyers' vessel fails to pass the inspection of holds and hatch covers, then the vessel shall not be considered ready for loading. An example of such provisions can be found in the GTA Voyage Charter – AusGrain 2015 which stipulates that:

"the Vessel will not be ready if the result of any survey or inspection […] is that the Vessel is not ready and available for immediate loading."

In the FOB sale contracts incorporating the terms of FOSFA Contract No.4A, the sellers should stipulate that the buyers must present the vessel ready in all respects in all the holds required for loading under the contract and that the buyers' vessel must tender valid NOR at loading port not later than 14:00 hours on the business day preceding the last working day of the contract delivery period.

Time Counting and Demurrage Rate shall be as per charter party. Therefore, the time counting provisions of SYNACOMEX Charter Party shall apply to the sale contracts incorporating the terms of FOSFA Contract No. 4A, unless provided otherwise in the sale contract.

Extension Of The Delivery Period
The buyers have the right to request extension of the contract delivery period with maximum 8 days *"in which to provide suitable freight"*.
The buyers must give notice to sellers requesting extension of the delivery period not later than the last day of the contract delivery period.
If the buyers nominate the ship within the extension period, the pre-advice period for the nomination of ship is minimum 3 days before the expected date of ship readiness to load.
If the buyers' vessel tenders valid NOR at loading port within the extended period, the sellers shall be obliged to load the goods even if it shall be necessary to complete loading after the expiry of the 8 days' extension period.
If the buyers' vessel fails to tender valid NOR at loading port within the extended period, the buyers shall be in default.

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.

2 For an example of such provisions, see the Clause 8 of SYNACOMEX 2000 grain charterparty which stipulates that: *"At loading port Shippers/ Charterers or their Agents have the privilege to inspect Vessel's holds and reject the notice [of readiness] when holds are not clean, dry, odourless and in all respects ready to receive the cargo."*

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.

Conclusive Determination Of Cargo's Quality And Condition

The oilseeds are perishable commodities and have been subject to claims for deterioration during the sea carriage due to their condition at the time of shipment[3].

The Clause 3 has been modified in the 2018 Edition of FOSFA Contract No. 4A to stipulate expressly that the goods must be of good merchantable quality and comply with the contractual description and quality specifications at the time of delivery at loading port when the risks and title passes to the buyer.

In **KG Bominflot Bunkergesellschaft Für Mineralöle mbh & Co Kg v. Petroplus Marketing AG**[4], the English Court of Appeal held that in a sale contract providing that the quality specifications have to be met at the time of delivery and that the quality determined at the time and place of delivery shall be conclusive evidence, the statutory implied condition of satisfactory quality stated in section 14(2) of the Sale of Goods Act of the United Kingdom applies only at the time of delivery. If the goods are of satisfactory quality at the time of delivery, the implied condition of satisfactory quality is fulfilled.

In **KG Bominflot Bunkergesellschaft Für Mineralöle mbh & Co Kg v. Petroplus Marketing AG** the question in dispute was whether, in addition to the statutory implied term of satisfactory quality that applies only at the time of delivery, there is to be implied a further term at common law extending the contract requirement that the cargo's characteristics comply with the quality specifications also upon arrival at the destination. The English Court of Appeal held that the alleged implied term at common law which would put the seller in breach in the event of subsequent deterioration of the goods during the sea carriage cannot be implied into a contract providing that the quality specifications have to be met at the time of delivery and that the quality determined at the time and place of delivery shall be conclusive evidence.

Settlement Of Disputes

Disputes arising out of the sale contracts incorporating the FOSFA Contract No. 4A shall be referred to arbitration in accordance with the FOSFA Rules of Arbitration and Appeal.

3 See Priminds Shipping (HK) Co Ltd v. Noble Chartering Inc, [2020] EWHC 127 (Comm)

4 [2010] EWCA Civ 1145