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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- Who Bears The Risk Of Deterioration Of Perishable Commodities In FOB, CFR And CIF Sale Contracts

- FOSFA Contract No. 4, Edition 2018

- GAFTA Contract No. 38, Edition 2020

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

Review Of ANEC FOB Contract Form No.41, Edition 2016

by Vlad Cioarec, International Trade Consultant

The ANEC FOB Contract No. 41 is a FOB contract form issued by ANEC (Brazilian Grain Exporters Association) to be used for the FOB sales of parcels of Brazilian soya beans.

Contract Price

The unit price is stated to be *"basis Bulk Carrier, delivered free on board, stowed and trimmed"*.
The Brazilian soya bean exporters should specify in their price quotations and sale contracts what type of bulk carrier would be suitable for such delivery: i.e. a self-trimming bulk carrier or a non-self-trimming bulk carrier.
The loading rate, time necessary for loading and ultimately, the loading costs will be in function of the type of vessel nominated and presented for loading by the buyers and the vessel's characteristics, i.e. the vessel's deck configuration, vessel's hold shape and vessel's deballasting capacity. Should the buyers nominate and present for loading a non-bulk carrier, i.e. a tween deck general cargo vessel, the price will increase with USD 2 per metric ton over the price basis Bulk Carrier, due to the higher costs of loading[1]. The loading of grain and oilseed cargoes in bulk on board a tween deck general cargo vessel takes longer than for any other type of vessel and therefore, the grain terminal operators charge the highest rate for loading such vessels.
Furthermore, there will be extra charges for loading the soya beans in any other space than the main holds. The Sub-Clause 9.2 paragraph (D) has the following provisions:

"Deep/wing/transversal/vertical tanks and/or tonnage wells/holds to be loaded only subject to Port Authorities' agreement and provided Buyer/vessel request such in writing together with Notice of Readiness, stating the quantity required. If due to shore equipment and/or draft Port Authorities order such loading at any other than Seller's berth, expenses and time used for shifting to be for Buyer's account.
For all quantity loaded in deep/wing/transversal/vertical tanks and/or tonnage wells/holds Buyer to pay Seller US$10.00 per metric ton and time used for loading such quantity not to count as laytime."

Vessel Nomination

The pre-advice period for the submission of the vessel's nomination notice is minimum 15 days prior to the expected date of vessel readiness to load. In the vessel's nomination notice the buyers must provide the vessel's name and details (flag, age, ownership) and the quantity required to be loaded which must be in multiples of 500 MT. The minimum nominated quantity must be at least 500 MT.

Conditions For The Vessel Substitution

The Clause 7 of ANEC Contract No.41 provides that the buyers may substitute the originally nominated vessel in the following conditions:
- the ETA of substitute vessel is not more than 5 days earlier or 5 days later than the last reported ETA of the originally nominated vessel;
- if the ETA of the substitute vessel is earlier than the last reported ETA of the originally nominated vessel, the vessel substitution notice must be given to sellers with at least 3 working days prior to

1 See Sub-Clause 9.2 paragraph (I).

the substitute vessel's ETA.
Maximum two substitutions are allowed under ANEC Contracts.
A third substitution is allowed for short shipped quantities.

Conditions For The Vessel Presentation For Loading Bulk Grain 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 holds.
The acceptance of vessels for loading bulk grain cargoes at Brazilian ports is subject to the prior approval of holds by a surveyor of the Brazilian Ministry of Agriculture and a qualified marine surveyor 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 Cargo Hold Inspection Certificate issued by the marine surveyor appointed by the sellers.

NOR And Commencement Of Laytime

The vessel's Master may tender NOR only upon the vessel is ready in all respects to receive the soya bean cargo, i.e. after the vessel was inspected and approved for loading by a surveyor of the Brazilian Ministry of Agriculture and a qualified marine surveyor appointed by the sellers, at the berth ordered by the sellers[2].
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[3].
The laytime will commence to run at 08:00 hours on the next working day following the working day when the vessel tenders the NOR.
The ANEC Contract does not stipulate clearly whether the time lost by the vessel waiting for berth will count or not as laytime or time on demurrage, if after berthing, the vessel fails the holds' inspection. The Sub-Clause 9.2 paragraph (G) provides that:

"Vessel must be ready in all respects to receive cargo. In case vessel is found unsuitable, laytime starts to count only when vessel is declared suitable in all respects to receive cargo."

The only helpful provisions can be found in the Sub-Clause 18 (b) of NORGRAIN-SOUTH CHARTERPARTY 2000, used to charter vessels for the carriage of bulk grain and oilseed cargoes shipped from the South American ports, which provides that:

"If the vessel is prevented from entering the limits of the loading/discharging port(s) because the first or sole loading/discharging berth or a lay berth or anchorage is not available within the port limits, or on the order of the Charterers/Receivers or any competent official body or authority, and the Master warrants that the vessel is physically ready in all respects to load or discharge, the Master may tender vessel's notice of readiness, by telex, fax, radio if desired, from the usual anchorage outside the limits of the port, whether in free pratique or not, whether customs cleared or not. If after entering the limits of the loading port, vessel fails to pass inspections as per Clause 18(e) any time so lost shall not count as laytime or time on demurrage from the time vessel fails inspections until she is passed."

ANEC Contract Options For Counting The Time Spent By The Vessel At Anchorage Waiting For The Goods

The Brazilian farmers lack sufficient storage capacity to handle large crops. This is the reason why after harvest the grains and oilseeds are sent to ports by trucks. This leads to congestion on the

2 See Sub-Clause 9.2 paragraph (G).
3 See Sub-Clause 9.2 paragraph (G).

roads and at the ports. The trucks wait sometimes for days to unload the goods at grain terminals. The slow arrival of grain and oilseed cargoes caused in the past loading delays and long waiting times for the buyers' vessels.
ANEC Contract provides two options for counting the time lost by the vessel waiting for the goods:

The first option is stated in Clause 9.1. In this case, the time lost waiting for the goods shall not count as laytime but the buyer shall be entitled to claim damages for detention for the time lost thereby.
In case of FOB shipments from the port of Paranagua, the calculation of charge for detention is to be made pursuant to the **Contractual Appendix 001 - "Calculation of Detention for shipment of products in Paranagua"**. If the vessel after being entered in the line-up of vessels is removed from the line-up at the request of Brazilian exporters due to delays in the arrival of cargo at the port (i.e. the cargo availability date is later than the expected date of vessel berthing) or congestion in grain terminal, the charge for detention of vessel shall be calculated from the date when the vessel called to enter into the line-up of vessels waiting for berth, provided that the vessel is in all respects ready to load and the pre-advice period has expired, until the day the vessel is re-inserted in the line-up.
In case of contracts for sale of parcels, the charge for detention shall be prorated amongst all shippers based on their parcels' quantity and the number of days that the vessel was retained on the waiting list due to their failure to have the goods ready for loading.

The second option for counting the time lost waiting for the goods is stated in Clause 9.2. In this case, the time lost waiting for the goods will count as laytime or if the laytime is exceeded, as time on demurrage. However, by stipulating a low rate of loading, the Clause 9.2 gives the Brazilian grain exporters a lengthy laytime and thereby protects them against a potential extensive liability for demurrage. Furthermore, if the goods arrive in time at the loading port, the Brazilian exporters can earn despatch money thanks to the port operators' ability to load at an average rate of 1,200 MT per hour.
In case of contracts for sale of parcels, if one or several sellers do not have the goods ready for loading at the berth, then the pro rata counting of laytime shall stop from the moment when all the goods are loaded by the sellers who had the goods ready for loading and the time shall count separately for the 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, after getting the goods ready, those sellers shall be the first to load and any time lost thereby shall be for his/their account up to the moment he/ they have loaded all his/their goods. Thereafter, the time shall count pro rata between the sellers who had their goods ready for loading.
The excepted periods to time counting, including the rain periods, will apply to the time spent by the vessel waiting for berth as in case of the time while the vessel is at berth.
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 grain shipments in function of the vessel's laycan and expected readiness date.
The Clause 7 of ANEC Contract provides that the shipment date will be on the 16th day after the vessel nomination date or vessel substitution date in case of a short shipped quantity.
If the Master will notify the shippers and port agents that the vessel will not be able to present for loading on the expected readiness date due to unexpected delays on the approach voyage to the loading port, the port operators will re-schedule the shipment date usually with no additional costs provided that the vessel will arrive within the contractual time limit after the expected readiness

date.
The Clause 7 of ANEC Contract provides that the contractual time limit for the presentation of vessel for loading is 10 days from the expected readiness date notified in the vessel's nomination notice.
In the event that the originally nominated vessel does not present ready for loading within the 10 days' time limit, the nomination shall be deemed to have lapsed and the buyers will have to make another vessel nomination subject to the minimum 15 days' pre-advice period.
The buyers must present the vessel ready in all respects for loading by 17:00 hours on the last day of the contract delivery period provided that the buyers have complied with the minimum 15 days' pre-advice requirement stipulated in the Clause 7 of ANEC Contract. If the buyers nominate the vessel with at least 15 days before the last working day of the delivery period and the vessel arrives and tenders valid NOR by 17:00 hours on that day, the buyers shall be deemed to have complied with the contract requirement[4] and the sellers will have to bear the cargo carrying charges accrued after the delivery period.

Conditions For Extension Of The Delivery Period

Should the buyers fail to present the vessel in ready in all respects for loading by 17:00 hours on the last day of the contract delivery period, they have the right to claim extension of the delivery period with additional 30 days by notice served to sellers[5].
The extension of the delivery period shall also be deemed to have been claimed in case of the late nomination of vessel. If the buyers nominate the vessel in less than 16 days before the expiry of the contract delivery period, the extension shall be deemed to have been claimed and the buyers will have to reimburse to sellers the cargo carrying charges accrued from the first working day after the expiry of the delivery period until the Bill of Lading date, even if the vessel arrives and tenders NOR by 17:00 hours on the last day of the contract delivery period, because the sellers must have the goods ready for loading on the 16th day after the vessel nomination date (i.e. after the expiry of the 15 days' pre-advice period), not sooner.

Buyer's Obligation To Provide Evidence Of Insurance Cover

The buyer must obtain cargo insurance cover and upon the seller's request, he must confirm by notice to the seller before the commencement of loading that the cargo insurance cover has been effected. If the buyer fails to provide evidence of insurance cover in due time, the seller shall have the right to obtain insurance cover for the buyer's account and expense.

Quality Determination

The quality and condition of the goods ascertained at the time and place of loading by the superintendents shall be final, that is, provided that the samples' analysis certificate evidences that the cargo is within the contract quality specifications, no claim can be made by the buyer for subsequent deterioration. The buyers would only be entitled to reject the parcels found to be defective by the superintendents at the time and place of loading.
The buyers have the option to appoint independent surveyors to sample the cargo jointly with the sellers' surveyors and provide their analysis results of the cargo sample.
If the difference between the sellers' and buyers' surveyors analysis certificates does not exceed 0.5% in respect of moisture content, 0.5% in respect of damaged beans, 0.5% in respect of heat damaged beans, 0.2% in respect of foreign matter, 0.5% in respect of greenish beans, 0.1% in respect of burned beans and 0.5% in respect of mouldy beans, then the analysis results certified by the sellers' surveyors shall be final.
If the difference between the sellers' and buyers' surveyors certificates exceeds any of the above

4 See Clause 10 of ANEC Contract No.41
5 See Clause 10 of ANEC Contract No.41

mentioned percentages, then either party may ask within 45 days from the Bill of Lading date a third analysis of cargo sample. In such case, the average of the two closest analysis results shall be final as to quality of the cargo and shall be settled by a complementary debit note. The timing of payment of shipping documents shall not be delayed thereby.

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 scales.

The ANEC Contract No. 41 stipulates that the cargo weight figure determined based on shore scales shall be the basis for the calculation of price and issuance of commercial invoice, irrespective of any other weight figure resulted from the vessel's draft survey. In fact, it is not irrespective of any other weight figure. Only the shore – ship discrepancies up to 0.3% are deemed acceptable by the Brazilian port authorities.

Settlement Of Disputes

ANEC Contract No. 41 provides two options for the settlement of disputes:

- FOSFA arbitration in accordance with the FOSFA Arbitration Rules; or
- arbitration by Associacao Brasileira de Arbitragem – ABAR, Chamber of Arbitration in Sao Paulo, Brazil.

What Things Can Go Wrong For Soya Bean Cargoes During The Carriage By Sea

by Vlad Cioarec, International Trade Consultant

The soya bean cargoes may deteriorate during the carriage by sea due to mould damage and self-heating.

Mould Damage

The mould damage to soya bean cargoes may occur either due to the condition of soya bean cargoes at the time of shipment (high moisture content) and/or due the conditions of carriage, i.e. outside air temperatures, and the fact that the soya beans are hygroscopic which is an inherent vice.

ANEC Contract forms No. 41 and 42 used for the FOB sales of Brazilian soya beans provide that the soya bean cargoes may have a moisture content of maximum 14% and an amount of mouldy beans of maximum 6%. The problem with the pockets of mouldy beans is that the mould damage may extend in the course of the carriage to the sound beans[1]. The ventilation of cargo holds will only prevent the mould damage to the top layer of the cargo in case of moisture condensation. It cannot prevent mould damage to the lower layers of the cargo if the cargo is shipped with high moisture content or parts of the cargo are mouldy[2].

In the claims for mould damage to soya bean cargoes originating from Brazil, the condition of soya bean cargoes at the time of shipment was often considered to be the most probable cause of their subsequent deterioration[3].

Whether the cargo is within the quality specifications of the sale contract it should be irrelevant to the Master[4]. The Master's responsibility is to determine by visual assessment whether the soya beans loaded on board are in good condition or not. In this regard, a shipment of cream soya beans means that the cargo is in apparent good condition, while a shipment containing portions of white or dark blue soya beans means that they are mouldy and should be rejected to avoid claims from receivers[5].

The mould damage may also occur in case of moisture condensation.

The soya bean cargoes have a natural moisture content and are hygroscopic which means that they will release water vapour in case of rising air temperatures and absorb the humidity from the surrounding air (i.e. the air in the head space above the cargo in the holds).

When the soya bean cargoes are loaded at ports with a warm climate (and humid air), it will release water vapour in the holds after the hatch covers are closed. If the soya bean cargoes are transported from a warm climate through or to a cooler climate, the water vapour released from the cargoes at the time of the commencement of voyage will condense in contact with the underside of the hatch covers and the condensed water will drip down and wet the cargoes.

The greater the cargo's moisture content and the difference between the temperature of the air in the head space of the holds and the temperature of the air outside the holds, the greater the condensation of moisture and resulting mould damage will be, unless the cargo holds are properly ventilated to prevent or at least to minimise this. The hatch covers of bulk carriers have ventilation openings which, if opened, will permit the cool air from outside to enter inside the cargo holds and remove the warm moist air from within the hold headspace to the outside, thereby preventing the formation

1 See Gard INSIGHT 172/2003 - “Soybean claim in China”.
2 See Gard INSIGHT 172/2003 - “Soybean claim in China”.
3 See Gard's Loss Prevention Circular No. 03-13 - “Prevention of soya bean cargo claims” and Gard INSIGHT 172/2003 - “Soybean claim in China”.
4 See London Arbitration No. 12/07 (2007) 719 LMLN 3.
5 See Gard INSIGHT 172/2003 - “Soybean claim in China”.

of condensation water onto the underside of the hatch covers.
There are two recognised methods for determining when the ventilation of the cargo holds is necessary: the “dew point rule” and the “three degree rule”.
Under the “dew point rule” the cargo holds should be ventilated when the dew point temperature of the outside air is lower than the dew point temperature of the air inside the holds.
Under the “three degree rule” the cargo holds should be ventilated when the temperature of the air outside the holds is 3 degrees Celsius or more below the temperature of the air in the head space of the holds (the cargo temperature recorded at the time of loading).
In the event of claims for mould damage to soya bean cargoes evidence showing that the ship's crew ventilated properly the cargo is essential to carriers in defending the claims.
The Article III Rule 2 of the Hague – Visby Rules imposes on the carriers a general duty to take reasonable care of the cargo during the sea carriage.
In the English law case **Volcafe Ltd & Ors v. Compania Sud Americana De Vapores S.A[6].**, the UK Supreme Court held that in case of claims for mould damage to hygroscopic cargoes the carrier has the legal burden of proving that he took due care to protect the goods from damage, including due care to protect the cargo from damage arising from inherent characteristics such as its hygroscopic character and must provide adequate evidence in this regard. If the carrier is unable to provide adequate evidence, he cannot rely on the inherent vice defence and will be held liable for cargo damage.
It the ship's crew uses the “three degree rule” for determining when to ventilate the cargo holds, they should record in the Ventilation Log the cargo temperature at the time of loading, the outside air temperatures during the voyage, the outside air temperatures during the voyage, the wind and sea conditions, the periods when the cargo holds were ventilated and the reasons for this (temperature differences higher then 3 degrees Celsius), the periods when the cargo holds could not be ventilated and the reasons for this (e.g. bad weather).
The failure to keep and provide on request such records will leave no chance to carriers in case of claims for mould damage, notwithstanding the soya beans' inherent propensity to deteriorate.

Heat Damage

The soya beans are prone to deteriorate and self-heat if their moisture content and temperature rise above the limits within which they are biologically stable.
The cargo temperature and moisture content at the time of shipment can provide an indication as to the likelihood of deterioration of a soya bean cargo during the sea carriage due to self-heating.
ANEC Contract forms No. 41 and 42 used for the FOB sales of Brazilian soya beans provide that the soya bean cargoes may have a maximum 4% content of heat damaged and burned beans but maximum 1% content of burned beans. The problem with the pockets of heat damaged and burned beans is that the heat damage may extend in the course of carriage to the sound beans.
Whether the cargo is within the quality specifications of the sale contract it should be irrelevant to the Master[7]. The Master's responsibility is to monitor the cargo temperature during loading and determine by visual assessment whether the soya beans loaded on board are in good condition or not. In this regard, a shipment of cream soya beans means that the cargo is in apparent good condition, while a shipment containing portions of brown and/or black beans means that the soya bean cargo is in a process of self-heating. If a shipment of soya beans contains portions of brown and/or black beans, the Master can either request the replacement of such portions or ask the shippers to state the estimated amount of brown and black beans in the description of cargo in the Bills of Lading.
The failure to properly describe the cargoes that contain heat damaged and burned beans in the

6 [2018] UKSC 61
7 See London Arbitration No. 12/07 (2007) 719 LMLN 3.

Mate's Receipt and Bills of Lading would expose the shipowners to claims from the receivers.

Cases of heat damage to soya beans cargoes were reported in China following prolonged delays at Chinese ports in the berthing of carrying vessels and delivery of the goods caused by the congestion in ports, lack of storage space ashore for the cargo or by the change of regulations in respect of imports of soya beans.

One such case occurred in 2004. On 10 May 2004, AQSIQ (General Administration of Quality Supervision, Inspection and Quarantine of the People's Republic of China), a Chinese government agency in charge of imports of agricultural commodities, imposed quarantine restrictions on the imports of Brazilian soya beans supplied by four trading companies following discovery of fungicide-tainted seeds in a Brazilian soya bean cargo in April 2004. As a result, the vessels carrying Brazilian soya bean cargoes for the four trading companies could not enter the Chinese ports for nearly two months and when they finally did the Chinese buyers who had to settle the demurrage claims sought to recover some money from the shipowners through claims for cargo damage.

Claims for heat damage to Brazilian soya bean cargoes were also reported in 2017 following prolonged delays at Chinese ports caused by the local buyers who sought to take advantage of the reduction of VAT charged on imports of agricultural commodities[8].

The safe storage period of soya bean cargoes on board the carrying vessels depends mostly on their moisture content and temperature at the time of shipment.

For cargoes with 12% moisture content, the safe storage period at a temperature of 26.7ºC is estimated at 70 days[9].

For cargoes with 13% moisture content, the safe storage period at a temperature of 26.7ºC is estimated at 40 days[10].

For cargoes with 14% moisture content, the safe storage period at a temperature of 26.7ºC is estimated at 20 days[11].

The higher the moisture content and cargo temperature and the longer the voyage, the more prone soya bean cargoes will be to damage by self-heating[12]. The ventilation of cargo holds cannot prevent the heat damage to the lower layers of the cargo if the cargo was self-heating at the time of shipment.

8 See Mark Russell, “Soya bean claims due to self-heating on the rise in China”, Gard INSIGHT 2017.
9 See Gard's Loss Prevention Circular No. 03-13 - “Prevention of soya bean cargo claims”.
10 See Gard's Loss Prevention Circular No. 03-13 - “Prevention of soya bean cargo claims”.
11 See Gard's Loss Prevention Circular No. 03-13 - “Prevention of soya bean cargo claims”.
12 See Mark Russell, “Soya bean claims due to self-heating on the rise in China”, Gard INSIGHT 2017.

Who Bears The Risk Of Deterioration Of Perishable Commodities In FOB, CFR And CIF Sale Contracts

by Vlad Cioarec, International Trade Consultant

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[1].
In the sea carriage of perishable commodities such as soya beans the risk of deterioration and the risk of damage refer to different things. The deterioration is caused by the inherent vice of the goods, whilst the damage is caused by external factors such as insufficient ventilation or sea water in case of bad weather if the ship's hatch covers are not watertight.
When a perishable commodity such as soya beans is found damaged at the port of discharge, the cargo insurers will appoint surveyors to assess the damage and determine the proximate cause in order to recover the amount paid to the buyers from the carriers. However, whilst the risk of damage is covered by the insurers, the risk of deterioration due to an inherent vice of the goods is not covered by the insurers[2]. If the deterioration of goods was caused by their inherent vice, the buyers cannot recover the financial loss from the insurers and carriers and the question is whether they can recover instead from the sellers and who should bear the risk of deterioration of goods due to an inherent vice.
In the English law case **Mash & Murrell Limited v. Joseph I. Emanuel Limited**[3], Diplock J. said that:

"It is extraordinary deterioration of the goods due to abnormal conditions experienced during the transit for which the buyer takes the risk. A necessary and inevitable deterioration during transit which will render them unmerchantable on arrival is normally one for which the seller is liable."

"when goods are sold under a contract such as a CIF contract, or FOB contract, which involves transit before use, there is an implied warranty not merely that they shall be merchantable at the time they are put on the vessel, but that they shall be in such a state that they can endure the normal journey and be in a merchantable condition upon arrival."

"[M]erchantability in the case of goods sold CIF or C&F means that the goods must remain merchantable for a reasonable time and that in the case of such contracts a reasonable time means time for arrival and disposal upon arrival."

In the following cases, the English Courts sought to make a difference between the sellers' position in CIF and CFR contracts and the sellers' position in FOB contracts.
In **Navigas Ltd. of Gibraltar v. Enron Liquid Fuels Inc.**[4], the English Commercial Court held that the rule adopted in **Mash & Murrell Limited v. Joseph I. Emanuel Limited** apply to a FOB contract only if the contract involves a specific transit before the goods are to be used. If the contract does not mention where the goods are to be transported, the implication of a term as to suitability of the goods to withstand a voyage should not be made. The English Commercial Court held that:

"whatever may be the position under a CIF or C&F contract the implication of such a term under a

1 See Priminds Shipping (HK) Co Ltd v. Noble Chartering Inc, [2020] EWHC 127 (Comm)
2 See Institute Cargo Clauses, Institute Commodity Trades Clauses, Institute FOSFA Trades Clauses.
3 [1961] 1 Lloyd's Rep. 46
4 [1997] 2 Lloyd's Rep. 759

FOB contract is a very different matter. In the case of a classic FOB contract the seller may well not know the destination of the goods or therefore the duration of the voyage. It may be days or it may be weeks. Unless something in the contract tells him, it is of no concern whatever to him. It is not his duty to know. What the buyer does with the goods after loading on the vessel at the delivery port is entirely a matter for the buyer. He can change his mind about the destination. In these circumstances, I would consider it extremely difficult to imply into such a contract any term as to suitability of the goods to withstand a voyage. In any event, whether such implication should be made might depend on the nature of the goods."

In **KG Bominflot Bunkergesellschaft Für Mineralöle mbh & Co Kg v. Petroplus Marketing AG**[5], the English Commercial Court held that:

"In CIF and C&F contracts, where the seller knows the destination of the goods, Mash & Murrell is accordingly authority for the proposition that the time taken to complete a normal voyage will be the basic measure of what is a reasonable time. However, where the seller does not know the destination of the goods, it is not appropriate in my opinion to adopt the concept of a "normal voyage" as the measure of what is a reasonable time."

Therefore, the question of the sellers' potential liability in case of deterioration of goods due to an inherent vice is more relevant in CFR and CIF contracts rather than in FOB contracts notwithstanding that the section 33 of the Sale of Goods Act provides that:

"Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer must nevertheless (unless otherwise agreed) take any risk of deterioration in the goods necessarily incident to the course of transit."

In **KG Bominflot Bunkergesellschaft Für Mineralöle mbh & Co Kg v. Petroplus Marketing AG**[6] the English Court of Appeal held that the rule adopted in Mash & Murrell Limited v. Joseph I. Emanuel Limited does not apply to contracts 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 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. The relevant passage of the Court decision is quoted below:

"After delivery the buyer "assumes all risks pertaining thereto". All risks are all risks. They include the risk of transport, and they include the risk of cargo instability – unless that risk has already been taken by the seller under a term of the contract which relates to the condition of the cargo pre-delivery."

The problem with the risk of cargo instability is that it is not covered by the insurers under the All Risks insurance cover because the International Conventions for the transport of goods by sea exempt the carriers from liability in case of loss or damage to the goods caused by their inherent vice. As the buyers of perishable commodities cannot recover from the insurers and carriers, the question is whether they could have a remedy against the sellers.

5 [2009] EWHC 1088 (Comm), [2009] 2 Lloyd's Rep 679
6 [2010] EWCA Civ 1145

In **KG Bominflot Bunkergesellschaft Für Mineralöle mbh & Co Kg v. Petroplus Marketing AG** the English Court of Appeal held that if an alleged vice of the commodity is something for which the contract quality specifications and conclusive determination clauses provide, then the buyers cannot claim a breach of the statutory implied term as to satisfactory quality. But if an inherent vice of the commodity could not have been picked up by the cargo surveyors with the tests required in the contract quality specifications, then the surveyors' determination of the condition of cargo is not conclusive (i.e. final and binding) and the buyers may claim in this case a breach of an implied term of satisfactory quality in case of cargo deterioration due to such inherent vice.
By analogy to **KG Bominflot Bunkergesellschaft Für Mineralöle mbh & Co Kg v. Petroplus Marketing AG**, in CFR and CIF contracts for the sale of soya beans a clause for the conclusive inspection and determination of cargo's quality and condition at loading port would make the determination of the amount of heat damaged beans at the time of loading conclusive (i.e. final and binding) and exclude a statutory implied term as to satisfactory quality, unless the buyers can provide evidence that the subsequent deterioration of soya beans during the sea carriage occurred due to their condition at the time of shipment – the cargo temperature and moisture content at the time of shipment – and their inherent vice – the propensity to self-heat at high temperatures.
The cargo temperature and moisture content at the time of shipment can provide an indication as to the likelihood of deterioration of a soyabean cargo during the sea carriage due to self-heating. The ventilation of cargo holds cannot prevent the heat damage to the lower layers of the cargo if the cargo was self-heating at the time of shipment. Given that the cargo surveyors are not required to check the cargo temperature in the contract quality specifications and that the soya beans propensity to self-heat at high temperatures is an inherent vice which the quality specification tests required in the sale contracts would leave undiscovered, in case of deterioration of goods during the sea carriage due to self-heating, the buyers, particularly CFR and CIF buyers, could claim damages from the sellers for the financial loss incurred thereby on the basis that the condition of soya bean cargo at the time of shipment made it a cargo of unsatisfactory quality.
In order to protect the US and Canadian sellers of soyabeans against such claims, the Clause 7 of the NAEGA FOB Export Contract No.2 contains an exclusion clause with the following provisions:

"The commodity is not warranted free from defect, rendering same unmerchantable, which would not be apparent on reasonable examination, any statute or rule of law to the contrary notwithstanding."

If the purpose of this clause is to protect the sellers of soyabeans against claims for subsequent deterioration, then these provisions are inapropriate.
This clause is an old-fashioned clause originally included in the Edition 1938 of the London Corn Trade Association contracts and the London Cattle Food Trade Association Contract Form No.6 and currently is still used in the FOSFA Contract No. 23 (Contract For South American Soyabeans In Bulk – CIFFO terms), FOSFA Contract No. 24 (Contract For Canadian/USA Soyabeans – CIF terms), FOSFA Contract No. 25 (Contract For Soyabeans In Bulk – CIF Delivered Weight) and FOSFA Contract No. 36 (Contract For Canadian Rapeseed – CIF/C&F terms).
In the English law case **Henry Kendall Ltd. v. William Lillico Ltd.**[7], Lord Pearce held that this clause does not protect the sellers in case of a breach of the implied condition as to merchantability of goods, because the exclusions of warranty are not sufficient to exclude conditions of contract. In the same case, Lord Morris said that the words used in the clause *"are wholly inapt to exclude a condition of the contract. They do not refer to a condition. You do not exclude a condition by excluding or purporting to exclude a warranty."* This rule was upheld by the English Court of Appeal in **KG Bominflot Bunkergesellschaft Für Mineralöle mbh & Co Kg v. Petroplus**

7 [1968] UKHL 3, [1969] 2 AC 31

Marketing AG[8], where Lord Justice Rix said that the statutory implied conditions cannot be excluded by reference to warranties but only by provisions which expressly refer to conditions.
Even though the NAEGA FOB Export Contract No.2 is subject to New York law, that Court decision would still be applicable. Therefore, the grain traders using NAEGA FOB Export Contract No.2 and FOSFA Contract forms No. 23, 24 and 25 for CFR and CIF sales of soya beans should consider the necessity of including in their sale contracts a clause excluding the seller's liability for breach of conditions implied by statute and/or common law[9].

8 [2010] EWCA Civ 1145

9 For an example of such provisions see the Sub-Clause 28.1.2 of Shell's General Terms and Conditions for Sales and Purchases of Crude Oil, 2010 Edition, and the Sub-Clause 59.1.1 of BP Oil International Limited General Terms & Conditions for Sales and Purchases of Crude Oil and Petroleum Products – 2015 Edition which stipulate that: *"[S]ave to the extent that exclusion thereof is not permitted or is ineffective by operation of law, all statutory or other conditions or warranties, express or implied, with respect to the description or satisfactory quality of the Crude Oil or Product or its fitness for any particular purpose or otherwise are hereby excluded."*

The Review Of FOSFA Contract No.4, Edition 2018

by Vlad Cioarec, International Trade Consultant

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

Price Settlement For Quantity Tolerance

In case of sales of parcels, a margin up to 2% 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 2% of the contract quantity shall be settled at the contract price and any excess over 2% 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.

Ship Nomination

The pre-advice period for the nomination of ship is minimum 15 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. 4 does not stipulate any requirements to be complied with by the ship to be nominated by the buyers.

There is no contractual time limit nor any reference to the Master's obligation to submit the ship's loading plan to the seller's port operators.

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.4 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.4, the buyers may

substitute the originally nominated vessel provided that they give the vessel substitution notice no 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 10 consecutive days.
The FOB sale contracts incorporating the terms of the FOSFA Contract No.4 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 10 days' time limit after the expected readiness date of the originally nominated ship.

Ship Presentation For Loading

The Clause 7 of FOSFA Contract No.4 stipulates 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.4, 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.

NOR And Commencement Of Laytime

The Clause 9 of FOSFA Contract No.4 provides two options for tendering the ship's NOR and two options for the commencement of laytime to please both sides of Atlantic.
The first option for NOR tendering is probably intended to be used for the incorporation into the contracts for sale of Argentine oilseeds, wherein the buyers' ship is considered to be an "arrived ship" for the purpose of commencement of laytime only after the ship has berthed. In these contracts, the NOR can be given only after the ship has berthed.
The second option for NOR tendering can be used for the incorporation into the contracts for sale of oilseeds from any other origin than Argentina. In the second option, the NOR can be given whether in berth or not, whether in port or not, whether in free pratique or not.
The first option for the commencement of laytime is intended to be used for the incorporation into the contracts for sale of US, Canadian, Brazilian and Argentine oilseeds. In the first option, the laytime shall start to count at 08:00 hours on the next business day after the day when the NOR has been tendered. This provision matches the corresponding provisions of NORGRAIN and NORGRAIN – SOUTH charterparties.
The second option for the commencement of laytime is intended to be used for the incorporation into the contracts for sale of European oilseeds. In the second option, the laytime shall start to count on the day when the NOR is tendered at 14:00 hours, if the NOR is validly tendered before noon (12:00 hours) or on the next business day at 08:00 hours, if the NOR is validly tendered after noon. This provision matches the corresponding provisions of SYNACOMEX grain charter party.
Both options stipulate that the laytime will not commence to count before the expiry of the pre-advice period, unless the sellers agree to commence loading sooner in which case the laytime shall

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."*

start to count from the commencement of loading.

Ship's Turn To Load

The ships are scheduled for loading in function of their expected readiness date to load and the time when the ships tender valid NOR. Once the ship tenders valid NOR, it is entered in the line-up of ships waiting for their turn to load.

The *"proper rotation"* is when the ships are loaded in the order in which they tendered valid NOR. If the buyers' ship is not loaded in the proper rotation but it is bypassed by other ships which had tendered valid NOR after the buyers' ship due to the sellers' failure to have the goods ready for loading, the Clause 7 of FOSFA Contract No.4 stipulates that *"the Sellers shall be liable for any extra expenses incurred"*, that is, the sellers will have to reimburse to buyers *"all extra expenses"* incurred by the buyers under the charter party for the time lost by the ship while waiting her turn to load, either as demurrage charges or as damages for detention[3].

If the load rotation is changed by the port operators to give priority to ships loading a perishable commodity such as soya beans, the time lost by the buyers' ship due to such change will not count. This is the meaning of the words *"unless rotation ordered by the Port Authorities"*.

Extension Of The Delivery Period

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

The buyers must give notice to sellers requesting extension of the delivery period not later than the 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 5 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 15 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 contracts for sale of US or Canadian oilseeds, 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 delivery period 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 after the termination of force majeure event.

In case of contracts for sale of oilseeds from other origins and ports than US and Canada, in case of force majeure event the contract delivery period shall be extended by 60 days. If the force majeure event ends less than 21 days before the end of the extended delivery period, then a further 21 days shall be allowed after the termination of the force majeure event.

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.

3 For similar provisions see Clause 20(c) of NAEGA FOB Export Contract and Clause 4 paragraph 2 of Addendum No.1.

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[4].

The Clause 3 has been modified in the 2018 Edition of FOSFA Contract No. 4 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**[5], 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.4 shall be referred to arbitration in accordance with the FOSFA Rules of Arbitration and Appeal.

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

5 [2010] EWCA Civ 1145

The Review Of GAFTA Contract No. 38, Edition 2020

by Vlad Cioarec, International Trade Consultant

The GAFTA Contract No. 38 is a FOB contract form issued by GAFTA to be used for the FOB sales of Argentinian grain in bulk.

Unit Price

The unit price is stated to be basis delivery FOB buyers' vessel in bulk, but the Clause 8 stipulates that there will be extra charges for loading non-self-trimming bulk carriers and tween deck general cargo vessels due to the additional cost and time spent for performing the trimming. Therefore, the Argentine grain exporters should stipulate clearly in the price quotation and sale contract the type of vessel required to be nominated and presented for loading by the buyers to avoid the situation where the exporters will incur additional charges due to the presentation for loading of an unsuitable vessel.

Furthermore, there will be extra charges for loading grain in any other space than the main holds, e.g. upper wing tanks, deep tanks, if required by the vessel's Master. If the vessel's Master requests loading of grain cargo through the upper wing tanks, this will increase the cost of loading because the terminal operators require payment of an additional charge for doing this.

Quality and Condition

The quality and condition of the goods ascertained at the time and place of loading by the superintendents shall be final, that is, provided that the samples' analysis certificate evidences that the cargo is within the contract quality specifications, no claim can be made by the buyer for subsequent deterioration. The buyers would only be entitled to reject the parcels found to be defective by the superintendents at the time and place of loading.

Weight Determination

The cargo weight figure shall be determined and certified by GAFTA registered superintendents based on shore scales[1].

The cargo weight figure determined based on the shore scales shall be stated in the superintendents' certificate of weight and Bills of Lading and shall be the basis for the calculation of price and issuance of commercial invoice, irrespective of any other weight figure resulted from the vessel's draft survey[2]. However, in 2013 the Argentine Customs Officers have been empowered to decide upon the method to be used for the determination of the weight figure: i.e. shore scales or vessel's draft survey performed by the Customs Officers.

If the difference between the shore scale weight figures and vessel's draft survey results is less than 0.6%, then the shippers will have the option to issue the mate's receipts based on the shore scale figures. If the difference between the shore scale weight figures and vessel's draft survey results exceeds 0.6%, the mate's receipts and Bills of Lading shall be issued with the weight figure determined based on the shore scales.

Vessel Nomination

The FOB buyers must nominate the vessel with minimum 10 days' pre-advice of the vessel's expected time of arrival. The 10 days' pre-advice period will also apply during the extension period.

The vessel's nomination notice must mention the vessel's expected arrival date and the estimated

1 See Sub-Clause 15(a).

2 See Sub-Clause 11(d)(v).

quantity of cargo required to be loaded.

Vessel Substitution

GAFTA Contract No.38 does not provide expressly that the FOB buyers have the right to substitute the originally nominated vessel, but the Clause 6 stipulates that if the originally nominated vessel is unable to proceed to the loading port due to an event outside the buyers' control, the initial nomination can be withdrawn which implies that the FOB buyers can nominate a substitute vessel, provided that the original delivery period and any extension shall not be affected thereby, that is, the substitute vessel must present at loading port *"fit and ready in all respects to receive the cargo"* within the contract delivery period or in case of late nomination, within the extension period.

It does not say whether the nomination of substitute vessel will be subject to the same pre-advice requirements as the original nomination, but in the English law case **Ramburs Inc. v. Agrifert SA**[3], the English Commercial Court held that in the absence of express provisions in the sale contract, the pre-advice requirements for the vessel's nomination would equally apply to the nomination of any substitute vessel. This means that if the FOB buyers will have to nominate a substitute vessel they must comply with the same pre-advice requirements as for the nomination of the original vessel. The sellers will consider the vessel substitution notice as a new nomination and will start counting a new pre-advice period.

Conditions For The Vessel Presentation For Loading

The vessel shall be considered an "arrived ship" once she is alongside the nominated berth. The port authorities' permit for the vessel to start loading will be subject to the approval of holds by the marine surveyors and SENASA[4] inspectors. The buyer must present the nominated vessel fit and ready in all respects to receive the grain cargo. The vessel's holds must be *"clean, dry and fit to receive the cargo"*.

Sellers' Timing Obligations and Time Counting

The bulk of Argentinian grain cargoes is shipped at the ports on the Parana River (e.g. Port of Santa Fe, Port of Diamante, Port of San Martin, Port of San Lorenzo, Port of Rosario, Port of San Nicolas) due to the proximity to the production areas.

Due to the limited space available for vessels waiting for berth, the vessels are sometimes instructed to wait at the Recalada Pilot Station (at Montevideo joint point) or at Zona Comun at La Plata roads.

The trick with the Clause 8 of GAFTA Contract No. 38 is that it gives the Argentinian grain exporters the same advantage as to voyage charterers in berth charterparties. The buyers' vessel shall be considered an "arrived ship" for the purpose of commencement of laytime only after the vessel has entered at the berth nominated by the sellers. The sellers must have the goods ready for loading as from the vessel's expected berthing date pre-advised by the buyers provided that the buyers' vessel has berthed at the nominated berth and has passed the holds' inspection.

By making the sellers' loading obligation and thereby the commencement of laytime subject to the vessel berthing and approval of the vessel's holds, the GAFTA Contract No.38 protects the Argentine grain exporters against the potential liability for demurrage in case of time lost by the vessel waiting for berth due to congestion at the port of loading.

Since the commencement of laytime is conditional upon the vessel berthing, the time lost prior to berthing due to the sellers' failure to have the goods ready for loading or to provide the cargo readiness documents to the port operators in due time shall fall outside the scope of laytime, but the buyers shall be entitled to claim damages for detention of vessel prior to berthing[5] because the FOB

3 [2015] EWHC 3548 (Comm)

4 Servicio Nacional de Sanidad y Calidad Agroalimentaria, i.e. National Health and Agrifood Quality Service.

5 Calculated by reference to demurrage rate.

sellers have an implied obligation not to prevent the buyers' vessel from becoming an "arrived ship"[6].
However, by stipulating a low rate of loading – the minimum average loading rate in GAFTA Contract No.38 is 1,500 MT per weather working day in conditions in which the port operators at Up-River ports are able to load the grain cargoes at an average rate of 2,000 MT per hour – the GAFTA Contract No.38 gives the Argentine grain exporters a lengthy laytime and thereby protects them against the potential liability for detention of vessel prior to berthing or for demurrage after berthing in case the vessels have to wait for the goods due to a supply chain disruption or sellers' failure to have the cargo readiness documents in order in due time.

Case study: Kurt A. Becher GmbH & Co. K.G. v. Roplak Enterprises S.A. (The "World Navigator"), [1991] 2 Lloyd's Rep. 23

The case was a dispute under a contract for the sale of a cargo of 30,000 MT of maize basis FOB Rosario, Argentina in three instalments. One of the instalments was due for shipment in June 1985.
The sale contract incorporated the terms of GAFTA Contract No.64 and Argentine Centro terms.
The relevant Centro clause had the following provisions:

***"Loading Rate**. Once vessel is berthed alongside berth suitable to sellers and ready to load this parcel, sellers guarantee, provided that the vessel is able to receive, a minimum average loading rate of 500 tonnes per weather working day, Sundays, Holidays and Saturday afternoons excluded, according Centrocon, but sellers shall not be responsible for any time lost due to act of God, strikes, lockouts, riots, civil commotions, labour stoppages, breakdown of machinery and/or winches, failure of power, fire or any other cause of Force Majeure. No despatch is due by buyers to sellers."*

The sale contract required the buyers to give the sellers minimum 15 days' pre-advice of the expected date of vessel readiness to load. On 24 May 1985, the buyers nominated the vessel "World Navigator".
The vessel arrived at Zona Comun on 13th June 1985 but because of congestion in Rosario roads was instructed to wait there. The vessel's Master gave NOR from Zona Comun.
If the vessel had kept her turn in the line-up, it would have berthed on 25 June 1985. But the vessel lost her turn to berth due to the sellers' failure to provide the cargo readiness documents in order in due time. The vessel was eventually called to berth on 18 July and between 18 and 22 July the vessel loaded a total of 24,000 MT of maize including the 12,000 MT of maize that was due to be shipped in June.
The buyers had to pay demurrage to shipowners for the time lost between 25 June, when the vessel should have berthed and 18 July, when the vessel berthed. The buyers sought to recover the sums paid to shipowners from the sellers through a claim for damages.
The buyers claimed damages for detention of vessel prior to berthing for the sellers' breach of the obligation to have the goods ready for loading at the time the vessel was ready to load after the expiry of the pre-advice period.
The buyers contended that if the vessel had berthed on 25 June, loading would have been completed some 23 days earlier than 22 July and that the laytime should be regarded as having begun on 26 June as if the vessel had berthed on 25 June.
The buyers based their claim on the provisions of the Clause 7 of the GAFTA Contract No.64 which stipulated that:

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

"Vessel to load in accordance with the custom at port of loading unless otherwise stipulated."

The fact was that the Centro clause did otherwise stipulate.
The buyers contended that if the custom of the port of loading would involve a method of loading which would produce a faster loading rate, then the sellers would be obliged to comply with it, notwithstanding that it would put upon them a higher obligation than that specified in the Centro clause.
Phillips J. in the English Commercial Court and then the English Court of Appeal held that there was an implied obligation on the sellers to have the cargo ready for loading and to do all that was necessary to enable the vessel to berth on the expiry of the 15 days' pre-advice period. As regards the effect of the sellers' breach of that obligation, Parker LJ (English Court of Appeal) held that:

"One must however, consider what are the consequences to the plaintiff [i.e. buyers] of that breach and what is required to put him in the same position as if the breach had not occurred. In that event laytime would have begun to run on June 26. That being so the sellers' obligation would have been to load in the number of counting days arrived at by the application of the Centro terms but no more."

The rule in English contract law is that where a person breached a contract, the damages will have to be assessed based on the minimum which he has contracted to give to the plaintiff. The amount of damages recoverable depend on the extent of the wrongdoer's obligation under the contract. The wrongdoer cannot be held liable for not doing something he is not bound to do.
Although in the 4 days used for loading between 18 July and 22 July the actual rate of loading the cargo of 24,000 MT was about 6,000 MT per day, the Argentinian sellers would not have been in breach if they maintained an average loading rate of minimum 500 MT per day, because that was their minimum obligation under the sale contract. Sir David Croom – Johnson (English Court of Appeal) said that:

"The obligation of the sellers (and the corresponding right of the buyers) was for loading to be at that rate and was in no way dependent on the contingency that loading might be quicker."

The sellers were not bound to load at a faster rate. Parker LJ (English Court of Appeal) said that:

"To accept the buyers' contention would in my judgment be making the sellers pay damages for failing to do that which they were not obliged to do."

Both the GAFTA Board of Appeal and English Court of Appeal held that the sellers were entitled to calculate the laytime on the basis of the loading rate stated in the Centro clause. That is, loading of the cargo of 12,000 MT of maize at an average daily rate of 500 MT would have required 24 consecutive days. That was the contractual time allowed for loading, i.e. the laytime.
Therefore, even if the vessel had berthed on 25 June and laytime would have begun to run on 26 June, the sellers were entitled – once the vessel was in berth – to take up to 24 counting days to load the cargo of 12,000 MT of maize.
The English Court of Appeal held that the damages for detention of vessel prior to berthing would have been recoverable if loading had taken longer than the 24 days allowed for loading by the sale contract, counted from 26 June.
By loading at a higher rate and completing the loading on 22 July, the sellers used less than 18 days of the 24 days allowed for loading and thereby, escaped from liability to pay damages for detention of vessel prior to berthing.
The only consequence of the sellers' breach of contract was that the vessel began loading the cargo

of maize later than would otherwise have been the case.
In the decision of the English Court of Appeal, Staughton LJ confirmed that the buyers' vessel shall be considered an "arrived ship" for the purpose of commencement of laytime only after the vessel has entered at the berth nominated by sellers. Staughton LJ said that:

"The Centro terms make it clear that the time allowed for loading commences only "once vessel is berthed"."

As regards the effect of the vessel's NOR tendered at Zona Comun, in **Glencore Grain Ltd. v. Goldbeam Shipping Inc.**[7] Moore-Bick J (English Commercial Court) explained that:

"The function of the notice of readiness [tendered by the vessel's Master from Zona Comun in The "World Navigator" case] was to enable the seller to make the necessary arrangements for the goods to be loaded, not to inform him that the ship was then at his immediate disposal. That is reflected in the fact that the buyer had to give at least 15 days' notice of the vessel's readiness and in the fact that it was unnecessary for the vessel to have reached any specific point on her approach voyage before such a notice could be given. The seller's obligation under the Centro terms to load the cargo at a minimum daily rate arose only when the vessel had entered berth and was not linked to the giving of notice of readiness to load."

Given that the Clause 8 of GAFTA Contract No. 38 is with minor modifications the former Centro Loading Clause, the decisions of GAFTA Board of Appeal and English Court of Appeal in The "World Navigator" case are equally applicable to the Clause 8 of GAFTA Contract No.38.

Time Counting In Case Of Two Loading Ports

Although it is economical to ship the grain cargoes at the ports on the Parana River due to the proximity to the production areas, the depth of Parana River does not exceed 10 metres. Therefore, only the Handysize Bulk Carriers can load full cargoes. The vessels with a deadweight in excess of 40,000 tonnes, i.e. Supramax Bulk Carriers which have a draft in the range of 12 – 13 meters and Panamax Bulk Carriers which have a draft of 14 meters cannot load full cargoes and must be topped off at the Argentine Sea port of Bahia Blanca.
Therefore, the FOB contracts for sale of Argentine grain cargoes incorporating the terms of GAFTA Contract No. 38 should address the question of time counting at each port and the question of time used for shifting between the Up-River port and Bahia Blanca.

Contractual Time Limit For The Presentation Of The Vessel Ready For Loading

In case of FOB shipments at sea ports, the buyers must present the nominated vessel *"in all respects fit and ready to receive the cargo"* before the expiry of the contract delivery period.
In case of FOB shipments at the Up-River ports (i.e. ports on the Parana River), the buyers must present the nominated vessel *"in all respects fit and ready to receive the cargo"* with minimum 24 hours before the expiry of the contract delivery period. In case of congestion at the Up-River ports, the buyers' vessel shall be considered an "arrived ship" provided that she has arrived at the place where she has been instructed to wait for orders by the Argentine Port Authorities, e.g. Recalada Pilot Station or Zona Comun in Rio de la Plata, with minimum 24 hours before the expiry of the contract delivery period.

Conditions For Extension Of The Delivery Period

The Clause 9 of the GAFTA Contract No. 38 stipulates that if the buyers will not be able to present the nominated vessel(s) in *"readiness to load"*, i.e. in all respects fit and ready to receive the cargo,

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within the contract delivery period, they can claim extension of the delivery period with additional 30 days by notice served to sellers not later than 16:00 hours on the next business day following the last day of the contract delivery period.
The extension of the delivery period shall also be deemed to have been claimed in case of the late nomination of vessel. If the buyers nominate the vessel in less than 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 before the expiry of the 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.

Contractual Time Limit For Giving Documentary Instructions
The buyer must send to seller the confirmation of insurance cover together with the documentary instructions not later than 5 working days prior to the expected date of the vessel readiness to load.

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.

Settlement Of Disputes

Disputes arising out of or under the GAFTA Contract No. 38 shall be referred to arbitration in accordance with the GAFTA Arbitration Rules.