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.

In this issue, the Editor reviews the following topics:

- Shipping Regulations For Oilseed Meal Cargoes

- GAFTA Contract No. 119, Edition 2020

- ANEC FOB Contract Form No. 71, Edition 2016

- GAFTA Contract No. 39, Edition 2020

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

Shipping Regulations For Oilseed Meal Cargoes

by Vlad Cioarec, International Trade Consultant

The bulk cargo shipping name of oilseed meals in the IMSBC Code is “seed cake”. There are five types of “seed cake” currently listed in the IMSBC Code[1]:

1. Seed Cake, containing vegetable oil UN 1386 (a) - residue remaining after the oil has been expelled mechanically from oilseeds, containing more than 10% of oil or more than 20% of oil and moisture combined.

This type of seed cake presents the highest risk of self-heating of all types of seed cake cargoes.
It is assigned to the IMDG Code Class 4.2 (spontaneously combustible substances) and classified in the IMSBC Code as Group B cargo (cargo with chemical hazards).
This type of seed cake shall be accepted for loading only if the cargo temperature at the time of loading is not higher than 10ºC over the ambient temperature or 55ºC, whichever is lower.
The vessel carrying this type of seed cake must have on board a Certificate of Fitness for the Carriage of Solid Bulk Cargoes listing this type of seed cake as a permitted cargo and a Certificate of Fitness for the Carriage of Dangerous Goods and must be equipped with systems for injecting inert gas or carbon dioxide (i.e. with a nitrogen or a carbon dioxide generator) in the event that the cargo temperature exceeds 55ºC.

2. Seed Cake, containing vegetable oil UN 1386 (b) - residues remaining after the oil has been extracted by solvent or expelled mechanically from oilseeds, i.e. solvent extractions and expelled seeds, containing not more than 10% of oil and when the amount of moisture is higher than 10%, not more than 20% of oil and moisture combined.

It is assigned to the IMDG Code Class 4.2 (spontaneously combustible substances) and classified in the IMSBC Code as Group B cargo (cargo with chemical hazards).
This type of seed cake shall be accepted for loading only if it is substantially free from flammable solvent and a certificate stating the oil and moisture content is provided to the vessel's Master by a person recognised by the competent authority of the country of shipment.
The solvent-extracted rape seed meal, rape seed pellets, soya bean meal, cotton seed meal and sunflower seed meal that contain not more than 4% oil and not more than 15% oil and moisture combined will be exempted from the conditions of carriage stipulated by the IMSBC Code for seed cake UN 1386 (b), if the shippers provide prior to loading a certificate issued by a person recognised by the competent authority of the country of shipment stating that the provisions for the exemption from the conditions of carriage for seed cake UN 1386 (b) are met and that the cargo does not need to be carried as “hazardous seed cake”.
During the sea carriage, the cargo temperature must be measured regularly at a number of depths in the cargo holds and recorded by the ship's crew. If the cargo temperature reaches 55ºC and continues to increase, the mechanical ventilation shall be stopped and then carbon dioxide or inert gas shall be introduced in the cargo holds.
The vessel carrying this type of seed cake must have on board a Certificate of Fitness for the Carriage of Solid Bulk Cargoes listing this type of seed cake as a permitted cargo and a Certificate

1 See 2019 Edition of the IMSBC Code adopted by the IMO Maritime Safety Committee on 13 June 2019 by Resolution MSC.462(101), IMO document MSC 101/24/Add.3 at IMODOCS.

of Fitness for the Carriage of Dangerous Goods and in case of voyages exceeding five days must be equipped with systems for injecting inert gas or carbon dioxide (i.e. with a nitrogen or a carbon dioxide generator) in the event that the cargo temperature exceeds 55ºC.

3. Seed Cake UN 2217 - residue remaining after the oil has been extracted by solvent from oilseeds, with not more than 1.5% oil content and not more than 11% moisture content.

It is assigned to the IMDG Code Class 4.2 (spontaneously combustible substances) and classified in the IMSBC Code as Group B cargo (cargo with chemical hazards).
This type of seed cake shall be accepted for loading only if it is substantially free from flammable solvent and a certificate stating the oil and moisture content is provided to the vessel's Master by a person recognised by the competent authority of the country of shipment.
The solvent-extracted rape seed meal, rape seed pellets, soya bean meal, cotton seed meal and sunflower seed meal that contain not more than 1.5% oil and not more than 11% moisture are exempted from the conditions of carriage stipulated by the IMSBC Code for seed cake UN 2217, if the shippers provide prior to loading a certificate issued by a person recognised by the competent authority of the country of shipment stating that the provisions for the exemption from the conditions of carriage for seed cake UN 2217 are met and that the cargo does not need to be carried as “hazardous seed cake”.
During the sea carriage, the cargo temperature must be measured regularly at a number of depths in the cargo holds and recorded by the ship's crew. If the cargo temperature reaches 55ºC and continues to increase, the mechanical ventilation shall be stopped and then carbon dioxide or inert gas shall be introduced in the cargo holds.
The vessel carrying this type of seed cake must have on board a Certificate of Fitness for the Carriage of Solid Bulk Cargoes listing this type of seed cake as a permitted cargo and a Certificate of Fitness for the Carriage of Dangerous Goods and in case of voyages exceeding five days must be equipped with systems for injecting carbon dioxide or inert gas (i.e. with a carbon dioxide or nitrogen generator) in the event that the cargo temperature exceeds 55ºC.

4. Seed Cake Cargoes With Self-Heating Risk (Seed Cakes and Other Residues Of Processed Oily Vegetables, i.e. residues remaining after the oil has been mechanically expelled or extracted by solvent or other chemical processes from oilseeds.)

It refers to the seed cake cargoes that do not meet the criteria for classification as dangerous goods in the IMDG Code but present significant self-heating risk when shipped in bulk.
The seed cake cargoes with self-heating risk are classified in the IMSBC Code as MHB (Materials Hazardous Only In Bulk) cargo and Group B Cargo (cargo with chemical hazards).
Solvent-extracted seed cake shall be accepted for loading only if it is substantially free from flammable solvent and the cargo temperature at the time of loading is not higher than 10ºC over the ambient temperature or 55ºC, whichever is lower. During the sea carriage, the cargo temperature must be measured regularly at a number of depths in the cargo holds and recorded by the ship's crew. If the cargo temperature reaches 55ºC and continues to increase, the mechanical ventilation shall be stopped and then carbon dioxide or inert gas shall be introduced in the cargo holds.

5. Non-Hazardous Seed Cake (Seed Cakes and Other Residues Of Processed Oily Vegetables, i.e. residues remaining after the oil has been mechanically expelled or extracted by solvent or other chemical processes from oilseeds.)

It refers to the non-hazardous seed cake cargoes that do not meet the criteria for classification as dangerous goods in the IMDG Code nor present self-heating risk when shipped in bulk. The solvent

extracted or mechanically expelled meals exempted from Seed Cake UN 1386 (b) or Seed Cake UN 2217 and any other oilseed meals that do not present a hazard during the carriage can be declared as non-hazardous seed cake cargoes.
The shippers must provide prior to loading a certificate issued by a person recognised by the competent authority of the country of shipment stating that the requirements for exemption from the conditions of carriage for seed cake UN 1386 (b) or UN 2217, whichever is applicable, are met and that the cargo does not present self-heating risk when shipped in bulk.
The non-hazardous seed cake is classified in the IMSBC Code as Group C cargo.

The shippers of oilseed meals in bulk must give the vessel's Master before loading a cargo declaration in which to provide all the relevant cargo information to allow the Master to prepare the vessel for loading and safe carriage. In the cargo declaration the shippers must provide the bulk cargo shipping name, state whether the cargo is classified as dangerous goods or MHB or whether is non-hazardous seed cake, state Group of the cargo, UN Number, cargo quantity, moisture content, stowage factor, trimming requirements and self-heating properties of the cargo.
Provided the oilseed meal cargo is properly declared, the shippers shall not be held liable in case of incidents occurring during or after loading or during the sea carriage or discharge, because the English Courts consider that in such case the carrier accepted the risks known to be associated with such cargo[2]. If however, the vessel is damaged due to cargo's hazardous characteristics unknown to the vessel's Master at the time of shipment which the shippers should have known, the shippers will have to indemnify the carrier.

2 See The “Athanasia Comninos”, [1990] 1 Lloyd's Rep. 277

Review Of GAFTA Contract No.119, Edition 2020

by Vlad Cioarec, International Trade Consultant

The GAFTA Contract No. 119 is a contract form published by the Grain and Feed Trade Association (GAFTA) to be used for FOB sales of oilseed meal in bags or bulk.

Vessel Nomination

The GAFTA Contract No.119 does not stipulate any requirements to be complied with by the vessel to be nominated by the buyers. It says just that the tankers and vessels classified as "ore/oil carriers" are excluded.

There is no pre-advice period for the nomination of vessel and no deadline for the submission of the vessel's loading plan.

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 unfair for the 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]."

Given that the Clause 6 of the GAFTA Contract No. 119 has the same provisions as Clause 6 of the GAFTA Contract No. 49, the case is also relevant for the shippers of oilseed meals.
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 Contracts No. 49 and 119, 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. 119 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 sellers should stipulate a time limit for the buyers to present the nominated vessel ready in all respects for loading and tender valid NOR taking into consideration the time necessary to complete loading of the cargo quantity at the contractual loading rate before the end of the contract delivery period.
An example of such provisions can be found in the Clause 7(B) paragraph (a) of the GAFTA Contract No. 79A, Edition 2020 which stipulates that the vessel presentation at the loading port in

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."*

readiness to load *"shall allow at least 36/..... consecutive hours remaining prior to the end of the contractual delivery period."* More detailed provisions are in the Clause 12 of GAFTA Port Terms No. 129 (Loading Terms For United Kingdom Ports) which stipulates that:

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

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 and laycan should allow to sellers sufficient time for the completion of loading between the next day following the expected readiness date and cancelling day and 23:59 hours on the last day of the contract delivery period. Therefore, the buyers must nominate a vessel with an expected readiness date and a laycan that will allow the sellers sufficient time to load the cargo in the days following expected readiness date or cancelling day until 23:59 hours on the last day of the contract delivery period.
The sellers should also stipulate in the sale contract the requirement that the vessel's expected readiness date be pre-advised not later than the day before the commencement of the minimum pre-advice period before the contractual time limit for the presentation of vessel for loading.

Conditions For The Vessel Substitution

In the FOB sale contracts, the vessel substitution is usually allowed subject to the compliance with the contract requirements in respect of the vessel's 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.119 has no provisions in this regard. Therefore, the sellers using the GAFTA Contract No.119 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.119, 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.119 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.119 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 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 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 to whatever rights the Buyers might have under the charter but no such provision appears in this contract."*

Given that the fifth phrase of Clause 6 of GAFTA Contract No.119 is identical with the fifth phrase

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."*

of Clause 6 of GAFTA Contract No.49 whose interpretation was in dispute, the Court decision is equally applicable for the interpretation of the fifth phrase of Clause 6 of GAFTA Contract No.119.
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.119, 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 9 of GAFTA Contract No.119 stipulates that the buyers have the right to request extension of the contract delivery period with maximum 30 days. The buyers' right to request the extension of the delivery period is not qualified by any condition. The risk for the sellers is that they could be trapped into a contract from which they cannot escape from.
An example of such case is the English law case **Nidera BV v. Venus International Free Zone for Trading & Marine Services SAE**[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 by the sellers.

7 [2014] EWHC 2013 (Comm)

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

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

There is nothing in Clause 8 of GAFTA Contract No.49 to qualify or limit the buyer's right to extension of the delivery period.
The Court decision would equally apply to the interpretation of Clause 9 of GAFTA Contract No.119, which, except for the duration of extension period, it is identical with the Clause 8 of GAFTA Contract No.49.

Comments:
In GAFTA Contract No.119, Clause 9 does not have corresponding provisions with the Clause 6.
The buyer's right to request the extension of the delivery period is not qualified by any condition. The risk for the sellers is that like in the case mentioned above they could be trapped into a contract from which they cannot escape from.
It is in the sellers' interest to have a contractual link between the conditions for presentation of vessel for loading and the conditions for extension of the delivery period. For instance, if the sale contract requires the buyer's vessel to arrive and tender valid NOR not later than 17:00 hours on the last day of the contract delivery period, the condition for extension of the delivery period should have the following provisions:

"Should the nominated vessel's NOR not be validly tendered before 17:00 hours on the last day of the contract delivery period, ..."

Deadline For Giving Notice Of Extension

The Clause 9 of the GAFTA Contract No.119 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[8]
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

8 [2014] EWHC 2405 (Comm)

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.119.

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

Quality

The inspectors' certificate attesting the quality of goods at the time and place of loading shall be final as to quality of goods.
The Clause 5 stipulates that the cargoes of oilseed meals can be taken at a price allowance in case of non-conformity with the contract quality specifications referring to oil, protein, sand and/or silica. It contains a warranty with regard to these quality specifications and a scale of allowances to be applied in case of deficiency in oil and protein content or excessive sand and/or silica content.
In the English law case **R G Grain Trade LLP (UK) v. Feed Factors International Ltd.**[9], the English Commercial Court held that the price allowance to be agreed by the sellers and buyers or settled by arbitration shall be in function of:
(a) the amount of cargo to which the price allowance is to be applied;
The lines 36 – 37 of the Clause 5 provide that:

"Should the whole, or any portion, not turn out equal to warranty, the goods must be taken at an allowance to be agreed or settled by arbitration ..."

Therefore, it may only be a "portion" of the goods which does not comply with the warranty rather than the "whole".
(b) how deficient it is the cargo compared to the warranted quality specifications;
(c) the contractual rate of allowance to be used.

9 [2011] EWHC 1889 (Comm)

Review Of ANEC FOB Contract Form No.71, Edition 2016

by Vlad Cioarec, International Trade Consultant

The ANEC FOB Contract No.71 is a FOB contract form issued by ANEC (Brazilian Grain Exporters Association) to be used for the FOB sales of Brazilian soyabean meal.

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.71 provides that the buyers may substitute the originally nominated vessel in the following conditions:
- the ETA of substitute vessel is not more than 5 days earlier or 5 days later than the last reported ETA of the originally nominated vessel;
- if the ETA of the substitute vessel is earlier than the last reported ETA of the originally nominated vessel, the vessel substitution notice must be given to sellers with at least 3 working days prior to the substitute vessel's ETA.

Maximum two substitutions are allowed under ANEC Contracts.
A third substitution is allowed for short shipped quantities.

Conditions For The Vessel Presentation For Loading Oilseed Meal Cargoes At Brazilian Ports

The acceptance of vessels for loading oilseed meal 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.
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.

NOR And Commencement Of Laytime

The vessel's Master may tender NOR only upon the vessel is ready in all respects to receive the oilseed meal 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[1].
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[2].
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'

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

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 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 cargoes of soya bean meal are sent to ports by trucks. This leads to congestion on the roads and at the ports. The trucks wait sometimes for days to unload the goods at grain terminals. The slow arrival of grain cargoes caused in the past loading delays and long waiting times for the buyers' vessels.

ANEC Contract provides two options for counting the time lost by the vessel waiting for the goods:

The first option is stated in Clause 10.1. In this case, the time lost waiting for the goods shall not count as laytime but the 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 10.2. In this case, the time lost waiting for the goods will count as laytime or if the laytime is exceeded, as time on demurrage.

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 8 of ANEC Contract provides that the shipment date will be on the 16th day after the vessel nomination date.
If the Master will notify the shippers and port agents that the vessel will not be able to present for loading on the expected readiness date due to unexpected delays on the approach voyage to the loading port, the port operators will re-schedule the shipment date usually with no additional costs provided that the vessel will arrive within the contractual time limit after the expected readiness date.
The Clause 8 of ANEC Contract 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 8 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[3] 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[4].
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

3 See Clause 11 of ANEC Contract No.71
4 See Clause 11 of ANEC Contract No.71

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 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.

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 certificates as to protein and fat combined does not exceed 0.5% individually, then the sellers' surveyors quality certificate shall be final.

If the difference between the sellers' and buyers' surveyors certificates exceeds the above mentioned percentages, then within 45 days from the Bill of Lading date, a third test shall be carried out by a mutually agreed independent laboratory. In such case, the average of the two closest analysis results shall be final 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 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. 71 provides two options for the settlement of disputes:

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

Review Of GAFTA Contract No. 39, Edition 2020

by Vlad Cioarec, International Trade Consultant

The GAFTA Contract No. 39 is a FOB contract form issued by GAFTA to be used for the FOB sales of Argentine oilseed meals 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 oilseed meal 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 oilseed meals 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 oilseed meal 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 buyers 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 Clause 5 stipulates that the oilseed meal cargoes can be taken at a price allowance in case of non-conformity with the contract quality specifications referring to oil, protein, sand and/or silica. It contains a warranty with regard to these quality specifications and a scale of allowances to be applied in case of deficiency in oil and protein content or excessive sand and/or silica content.

In the English law case **R G Grain Trade LLP (UK) v. Feed Factors International Ltd.**[1], the English Commercial Court held that the price allowance to be agreed by the sellers and buyers or settled by arbitration shall be in function of:

(a) the amount of cargo to which the price allowance is to be applied;

The lines 32 – 33 of the Clause 5 provide that:

"Should the whole, or any portion, not turn out equal to warranty, the goods must be taken at an allowance to be agreed or settled by arbitration ..."

Therefore, it may only be a "portion" of the goods which does not comply with the warranty rather than the "whole".

(b) how deficient it is the cargo compared to the warranted quality specifications;

(c) the contractual rate of allowance to be used.

Weight Determination

The cargo weight figure must be determined and certified by GAFTA registered superintendents

1 [2011] EWHC 1889 (Comm)

based on shore scales[2].
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[3]. 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 quantity of cargo required to be loaded.

Conditions For The Vessel Substitution

The Clause 6 provides 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 and the FOB buyers can serve a new nomination notice provided that the substitute vessel's expected arrival date is not later than 5 working days after the expected arrival date of the originally nominated vessel.
GAFTA Contract No. 39 does not stipulate a time limit for the submission of the vessel substitution notice before the expected arrival date of the originally nominated vessel, like it does FOSFA Contract No. 4. In the English law case **Ramburs Inc. v. Agrifert S.A.**[4], 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[5] inspectors. The buyer must present the nominated vessel fit and ready in all respects to receive the cargo. The vessel's holds must be *"clean, dry and fit to receive the cargo"*.

Sellers' Timing Obligations and Time Counting

The bulk of Argentine oilseed meal 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 limited space available for vessels waiting for berth, the vessels are sometimes instructed

2 See Sub-Clause 15(a).
3 See Sub-Clause 11(d)(v).
4 [2015] EWHC 3548 (Comm)
5 Servicio Nacional de Sanidad y Calidad Agroalimentaria, i.e. National Health and Agrifood Quality Service.

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.39 is that it gives the Argentine oilseed meal 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[6], the GAFTA Contract No. 39 protects the Argentine oilseed meal 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[7] because the FOB sellers have an implied obligation not to prevent the buyers' vessel from becoming an *"arrived ship"*[8].
However, by stipulating a low rate of loading – the minimum average loading rate in GAFTA Contract No.39 is 1,500 MT per weather working day in the 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.39 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")[9]

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".

6 GAFTA Contract No.39 does not say anything about the mandatory inspection of holds by the marine surveyors and SENASA inspectors.
7 Calculated by reference to demurrage rate.
8 See the English law case Sociedad Financiera de Bienes Raices v. Agrimpex (The "Aello") [1960] 1 Lloyd's Rep.623.
9 [1991] 2 Lloyd's Rep. 23

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:

"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 Argentine 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.**[10] 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. 39 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.39.

Time Counting In Case Of Two Loading Ports

Although it is economical to ship the feed 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

10 [2002] EWHC 27 (Comm)

off at the Argentine Sea port of Bahia Blanca.
Therefore, the FOB contracts for sale of Argentine oilseed meal cargoes incorporating the terms of GAFTA Contract No.39 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 Nominated Vessel Ready For Loading

The buyers must present the nominated vessel *"in all respects fit and ready to receive the cargo"* with at least 5 days before the expiry of the contract delivery period. This means that the vessel's laycan at loading port must not extend beyond the time limit set for the presentation of vessel for loading.
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 at least 5 days before the expiry of the contract delivery period.
If the buyers fail to present the nominated vessel *"in all respects fit and ready to receive the cargo"* with at least 5 days before the expiry of the contract delivery period, that is, in case of the vessel's presentation for loading during the final 5 days of the contract delivery period, and therefore the sellers have to load the goods after the expiry of the contract delivery period, the buyers shall have to reimburse to sellers the cargo carrying charges accrued from the first day following the expiry of the contract delivery period until the Bill of Lading date.

Conditions For Extension Of The Delivery Period

The Clause 9 of the GAFTA Contract No.39 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, 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 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.39 shall be referred to arbitration in accordance with the GAFTA Arbitration Rules.