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:

- ANEC FOB Contract Form No. 41, Edition 2020

- Timing Obligations In FOB Sale Contracts

- Who Should Bear The Liability For The Deterioration Of Soybean Cargoes On Board The Carrying Ships In The Event That Upon Arrival At The Ports Of Discharge The Ships Are Required To Wait At Anchorage For Prolonged Periods Due To Reasons For Which The Carriers Are Not Responsible?

- Implications Of The Carrier's Failure To Provide Adequate Evidence In Claims For Mould Damage

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 2020

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 soybeans.

Contract Price

The unit price is stated to be *"basis Bulk Carrier, delivered free on board, stowed and trimmed"*.
The Brazilian soybean 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.

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 ETA date, IMO Number, flag, age and ownership and the quantity required to be loaded which must be in multiples of 1,000 MT. The minimum nominated quantity must be at least 1,000 MT.

Conditions For The Vessel Substitution

The Clause 8 of ANEC Contract No.41 provides that the buyers may substitute the originally nominated vessel in the following conditions:
- the originally nominated vessel is unable to proceed to loading port due to a force majeure event or the seller agrees the vessel substitution;
- the buyers must give written notice of substitution of the vessel to seller with at least 3 working days prior to the substitute vessel's ETA at loading port;
- the notice of substitution must include all the information required about the substitute vessel, i.e. IMO number, flag, age, ownership;
- the ETA date of substitute vessel is not more than 5 days earlier or 5 days later than the last ETA date reported by the Master of the originally nominated vessel.

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

Conditions For The Vessel Presentation For Loading Bulk Grain Cargoes At Brazilian Ports

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.
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 soybean 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 a.m. on the next working day following the working day when the vessel's NOR becomes effective, that is, after the expiry of the 15 days' pre-advice period. NOR tendered after 17:00 hours local time (Brazilian local time) on a regular working day or after 11:00 a.m. on Saturdays or Sundays and Holidays shall become effective only from 08:00 a.m. on the next working day.

If the Master tenders NOR upon arrival at the anchorage place and after berthing the vessel fails the holds' inspection, the time lost by the vessel waiting for berth will not count as laytime or time on demurrage. In such case, the laytime shall start to count upon the vessel is declared ready in all respects for loading. These provisions are in line with 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 stipulates 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 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 11.1. 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. The detention shall be payable at the rate stated in the vessel nomination.

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

1 See Clause 10.

2 See Clause 10.

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 11.2. In this case, the time lost waiting for the goods will count as laytime or if the laytime is exceeded, as time on demurrage. However, by stipulating a low rate of loading, the Clause 11.2 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, the faulty sellers will be jointly and exclusively responsible for the time lost by the vessel until berthing.
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 loading obligation date will be on the 16th day after the vessel nomination date or the first day of the contract delivery period, whichever is later.
If the Master will notify the shippers and port agents that the vessel will not be able to present for loading on the expected readiness date due to unexpected delays on the approach voyage to the loading port, the port operators will re-schedule the shipment date usually with no additional costs provided that the vessel will arrive within the contractual time limit after the expected readiness date.
The Clause 8 of ANEC Contract 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 loading obligation date shall be postponed with another 10 days.
The buyers must present the vessel ready in all respects for loading by 17:00 hours local time (Brazilian local time) on the last business day of the contract delivery period provided that the buyers have complied with the minimum 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 local time (Brazilian local time) on the last working day of the delivery period, the buyers shall be deemed to have complied with the contract requirement and the sellers shall, if necessary, complete loading after the delivery period[3].

3 See Clause 5.

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

If the buyer nominates the vessel with at least 15 days before the last working day of the delivery period and the nominated or substitute vessel arrives and tenders valid NOR by 17:00 hours on the last working day of the delivery period but the seller cannot commence or complete loading during the delivery period, the sellers shall, if necessary, commence and/or complete loading after the delivery period and bear the cargo carrying charges accrued after the delivery period.

Should the buyers fail to present the vessel ready in all respects for loading by 17:00 hours on the last day of the contract delivery period, they have the right to claim extension of the delivery period with additional 30 days by notice served to sellers not later than the last day of the contract delivery period.

In case of late nomination of vessel, that is, when the buyers nominate the vessel in less than 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 cargo's quality characteristics (specified in the sale contract) must be determined and certified by a FOSFA member superintendent appointed by the seller, based on a composite sample.

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

If the difference between the 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 and binding.

If the difference between the seller's and buyer's surveyors analysis certificates exceeds any of the above-mentioned percentages, then either party may ask within 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.

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

Weight Determination and Certification

The cargo weight figure determined and certified by the independent surveyors appointed by the sellers based on the official shore scales shall be the basis for the calculation of price and issuance of commercial invoice.

Timing Obligations In FOB Sale Contracts

by Vlad Cioarec, International Trade Consultant

Timing Obligations Of FOB Buyers

1. Timely Provision Of A Conforming Letter Of Credit

In FOB sale contracts the buyer's obligation to provide a letter of credit conforming with the contract terms is a condition of the contract. The buyer's failure to comply with such obligation shall entitle the seller to terminate the contract and claim damages.
The buyer's obligation to provide a conforming L/C is stated either subject to a deadline or in general terms.
If there is an express term in the sale contract that a conforming L/C has to be provided to sellers latest by a certain date, the FOB buyers must provide a conforming L/C by that date. In the absence of a deadline in the sale contract for the provision of a conforming L/C, the FOB buyers must provide a conforming L/C at the latest by the earliest date of the contract shipment period[1].
In the event of delays in the opening of L/C or in the case of provision of a non-conforming L/C, the FOB sellers may postpone delivery of the cargo, without prejudice to their right to terminate the sale contract.
In the English law case **Kronos Worldwide Ltd. v. Sempra Oil Trading SARL**[2], the question in dispute was when the laytime starts in the case of delays in delivery due to the late opening of L/C.
The FOB buyers had the obligation to secure the payment of a gasoil cargo through a letter of credit *"to be opened promptly through a first class bank"*.
The contract delivery period was 25 – 30 June 2001.
Before the vessel nomination the FOB seller sought to postpone the shipment of gasoil cargo from 25 – 30 June to 1 – 5 July 2001 due to a change in the refinery schedule. The buyers did not agree.
The nominated vessel arrived at loading port on 28 June 2001 and tendered NOR from the customary anchorage. The L/C was not issued until 5 July when the FOB seller asked for it. The loading commenced on 9th July and was completed on 11th July.
The FOB buyer claimed demurrage for the time spent by the vessel at anchorage between 30 June, when laytime expired, and 11th July when loading was completed. The English Court of Appeal rejected the claim holding that the provision of a conforming L/C was an implied condition precedent to any obligation on the part of the seller to perform any aspect of the loading operation which was the seller's responsibility, including the provision of a free berth.
The late provision of L/C by FOB buyer prevented the commencement of laytime notwithstanding the vessel's NOR tendered from the customary anchorage. The laytime did not commence until a reasonable time after the provision of letter of credit and on that basis not before 9 July 2001, after which the cargo was loaded on the vessel within the permitted laytime, so that no demurrage was due.
The question of when the laytime starts in the case of late opening of L/C or delays in the provision of a conforming L/C should be addressed in the sale contract. One option is to stipulate that in such case the laytime starts upon berthing of vessel.

---

1 See Ian Stach Ltd. v. Baker Bosley Ltd. [1958] 2 Q.B. 130; [1958] 1 Lloyd's Rep. 127; Glencore Grain Rotterdam BV v. Lebanese Organisation For International Commerce, [1997] EWCA Civ 1958; [1997] 2 Lloyd's Rep. 386; Kronos Worldwide Ltd. v. Sempra Oil Trading SARL, [2004] EWCA Civ. 3, [2004] 1 Lloyd's Rep. 260.
2 [2004] EWCA Civ. 3, [2004] 1 Lloyd's Rep. 260.

INCOGRAIN Contract No. 13 Clause XIII (C) stipulates that:

"in case of late opening of the letter of credit, Sellers may postpone the fulfillment of the open contract until receipt of the bank confirmation that the letter of credit has been opened;
[…] Sellers may after having given a formal notice of minimum two working days cancel the tonnage still to be fulfilled on the whole contract without prejudice to their rights to claim damages as provided for in clause XV "Default".
Any expenses arising from delays in payment and/or opening of the letter of credit shall be for the account of defaulting Buyers."

2. Timely Nomination Of A Suitable Vessel

Where an FOB sale contract requires the buyer to nominate a vessel by a particular date (including by stipulating a pre-advice period and a shipment period), then it is (subject to any contrary intention expressed in the contract) a condition of the contract that the buyer must provide a valid nomination by the relevant deadline, because that is a stipulation as to time in a mercantile contract in relation to which the contracting parties should be taken to have intended that the time to be of the essence[3].
The buyer has the obligation to nominate a vessel that complies with the contract requirements not later than the day preceding the commencement of the minimum pre-advice period before the contractual time limit for the vessel presentation for loading.
The contractual time limit for the vessel nomination is in function of the pre-advice period for vessel nomination and the contractual time limit for the vessel presentation for loading.
In the case of sale contracts that give buyers the right to request extension of the contract delivery period, the buyers requesting extension of the delivery period have the obligation to nominate a suitable vessel not later than the day preceding the commencement of the minimum pre-advice period before the last day of the extension period[4].
In the case of sale contracts that do not allow the buyers to request extension of the contract delivery period, the timing obligation of the buyer to nominate the vessel will be in function of the contractual time limit for the vessel presentation for loading.
If the contract delivery period is stated as a vessel presentation period, the buyers have the obligation to nominate a suitable vessel not later than the day preceding the commencement of the minimum pre-advice period before the last day of the delivery period.
INCOGRAIN Contract No. 13 gives the FOB seller an express right to terminate the sale contract in the event that the buyer fails to provide the required ETA notice and the vessel nomination notice by the contractual deadlines. Clause V of INCOGRAIN Contract No. 13 stipulates that:

"In a provisional notice of not less than eight consecutive days, Buyers shall state the date from which they shall be able to present a vessel for loading, together with the estimated tonnage required.
Under penalty of default, this provisional notice must be compulsorily followed by a definite notice from Buyers of not less than four consecutive days, advising the name of the vessel (and if possible vessel's agents), the tonnage required and the expected date of berthing; such date to fall within the seven consecutive days from the date stated (included) in the provisional notice and shall under no circumstances exceed the last day of the shipment period.
At all events, Buyers are in default if the provisional notice does not reach Sellers on the ninth consecutive day preceding the end of the shipment period. The same shall apply if the definite

3 See Bunge Corporation (New York) v. Tradax Export S.A. (Panama), [1981] UKHL 11; A v. B, [2021] EWHC 793 (Comm).
4 See Bunge Corporation (New York) v. Tradax Export S.A. (Panama), [1981] UKHL 11.

notice does not reach Sellers on the fifth consecutive day preceding the end of the shipment period."

If the contract delivery period is stated as a shipment period, the buyers have the obligation to nominate a suitable vessel with the minimum pre-advice period stipulated in the sale contract and with an ETA and/or expected readiness date that will give to the seller sufficient time to complete loading of the nominated contract quantity at the contractual loading rate before the end of the contract delivery period[5]. The sellers should stipulate in such sale contracts a time limit for the buyers to present the nominated vessel ready in all respects for loading taking into consideration the time necessary to complete loading of the cargo quantity at the contractual loading rate before the end of the contract shipment period[6].

If the buyers fail to nominate a suitable vessel in the required number of days stipulated in the sale contract as the pre-advice period before the contractual time limit, this will be considered a breach of condition of the contract which would entitle the sellers to reject the vessel nomination and terminate the contract[7]. However, the sellers can terminate the sale contract for breach of condition only if the vessel nomination notice is transmitted by the buyers too late for the sellers to perform their delivery obligation. If the buyer makes initially an invalid nomination (e.g. nominates a vessel that does not comply with the contract requirements or a vessel with an ETA or expected readiness date beyond the contractual time limit) but there is sufficient time left until the contractual time limit for the vessel presentation for loading to make a new vessel nomination with the pre-advice period stipulated in the sale contract, the buyer's initial failure to provide a valid nomination will not be considered a breach of condition of the contract provided that the buyer will make a new vessel nomination in time and with the pre-advice period required in the sale contract[8].

The seller's remedy in the case of an invalid nomination would be to reject the nomination[9] but the seller will not be entitled to terminate the contract after the receipt of an invalid nomination if the buyer has further time to make a new valid nomination with sufficient pre-advice before the contractual time limit[10].

In the event that the buyer provides a vessel nomination notice with an ETA date earlier than the expiry of the pre-advice period stipulated in the sale contract, this would not make the vessel nomination invalid if there is sufficient time left until the contractual time limit for the vessel presentation for loading. The vessel nomination remains valid, but the seller's obligation to load will be on the next date after the expiry of the pre-advice period, and not sooner, irrespective of vessel's

5 See Bremer Handelsgesellschaft M.B.H v. J. H. Rayner & Co. Ltd., [1978] 2 Lloyd's Rep 73; Mocatta J. stated that: "If the contract names a date for shipment of the goods, there is an obligation upon the buyers to tender a ship on which the sellers can place the goods by such a date as would enable the sellers to complete putting the goods on board by the end of the period named in the contract of sale. Furthermore, as common sense demands, the buyers must give adequate notice to the sellers of at least the expected readiness date at the named port of shipment of the vessel nominated by the buyers to lift the goods which he has agreed to purchase from the sellers." See also ERG Raffinerie Mediterranee SPA v. Chevron USA Inc (t/a Chevron Texaco Global Trading), [2007] 2 Lloyd's Rep 542, [2007] EWCA Civ 494; Ramburs Inc. v. Agrifert S.A., [2015] EWHC 3548 (Comm).

6 For an example of such provisions see the Clause 7 of GAFTA Contract No. 79A and Clause 12 of GAFTA Port Terms No. 129.

7 See Bunge Corporation (New York) v. Tradax Export S.A. (Panama), [1981] UKHL 11; A v. B, [2021] EWHC 793 (Comm); ERG Raffinerie Mediterranee SPA v. Chevron USA Inc (t/a Chevron Texaco Global Trading), [2007] 2 Lloyd's Rep 542, [2007] EWCA Civ 494.

8 "Subject to any contractual provisions to the contrary, a buyer who has nominated a vessel to load the cargo is entitled to withdraw the nomination and replace it with another, provided that the second nomination is in time to allow the vessel so nominated to fulfil the buyer's contractual obligations and is otherwise in accordance with the contract." See Ramburs Inc. v. Agrifert S.A., [2015] EWHC 3548 (Comm). "A valid nomination may be preceded by an initial nomination that is or becomes invalid due to subsequent events." See A v. B, [2021] EWHC 793 (Comm).

9 See A v. B, [2021] EWHC 793 (Comm).

10 See Bremer Handelsgesellschaft M.B.H v. J. H. Rayner & Co. Ltd., [1978] 2 Lloyd's Rep 73.

ETA date pre-advised by the buyer[11]. Therefore, in the event of the vessel's early arrival, any time lost by the vessel at loading port until the loading obligation date shall be for the buyer's account.

3. Timely Submission Of Documentary Instructions

In FOB sale contracts the buyers must provide the documentary instructions with sufficient time before the vessel's ETA to enable the seller to arrange the Customs clearance of the goods in due time prior to the expected date of the vessel readiness for loading. However, the time stipulation as to the submission of documentary instructions is not considered a condition of the contract because it is not an obligation that has to be performed by the buyers as a condition precedent to the seller's ability to perform an essential term. The delay in the submission of documentary instructions will not prevent the seller to deliver the goods and get the payment.
If the buyer fails to send the documentary instructions within the contractual time limit, the seller may either reserve the right not to deliver the documents in accordance with the buyer's instructions or alternatively, choose to delay loading to be able to comply with the buyer's instructions. In the latter option, the seller shall be entitled to delay loading by the number of days the documentary instructions are late with no responsibility for the time spent on demurrage by the vessel and claim any extra costs incurred thereby.

4. Timely Notification Of The Vessel Substitution

In FOB sale contracts the vessel substitution is usually allowed subject to the substitute vessel's compliance with the contract requirements in respect of the vessel type, size, de-ballasting capacity, with the originally pre-advised ETA and with the requirements of the SOLAS Convention Chapter XI – 2 and the ISPS Code[12].
Some contracts require that the ETA of the substitute vessel to be not later than the ETA of the originally nominated vessel. Examples of contract forms with such provisions are NAEGA FOB Export Contract[13] and INCOGRAIN Contract No. 13[14].
Other FOB contract forms require that the ETA of the substitute vessel to be not later than a specific number of days after the ETA of the originally nominated vessel.
The vessel substitution should be communicated in time to seller in order to arrange the Customs clearance of the goods and to inform the port operator to schedule the substitute vessel for loading.
If the sale contract does not provide a time limit for the submission of the vessel substitution notice and has no other conditions concerning the vessel substitution, the English Commercial Court held that the pre-advice requirements for the vessel nomination would equally apply to the nomination of

11 See Thai Maparn Trading Co Ltd. v. Louis Dreyfus Commodities Asia Pte Ltd., [2011] EWHC 2494 (Comm).

12 The buyer may substitute the originally nominated vessel only with a vessel complying with the requirements of the SOLAS Convention Chapter XI – 2 and the ISPS Code. The substitute vessel must provide the security information required by the SOLAS Convention Chapter XI – 2 Regulation 9 paragraph 2.1 (i.e. the security level at which the vessel operates at the time, whether the vessel has on board a valid International Ship Security Certificate) and other security-related information such as the location of the vessel and ETA in time before the vessel's ETA at loading port for the loading port authority and the national authority for maritime security to determine whether the substitute vessel complies with the requirements of the SOLAS Convention Chapter XI – 2 and the ISPS Code. The time limits for the provision of security information are established by the Governments in function of the security level set for the loading port and the security level at which the coming vessel operates.

13 The Clause 8 of NAEGA FOB Export Contract stipulates that: *"Buyer shall be allowed to make one substitution of a vessel, provided the substituting vessel is of the same type and approximately the same size and position. […] The nomination of the substituting vessel shall be subject to the preadvice requirements of this clause, regardless of any preadvice previously given, unless the estimated time of arrival of the substituting vessel is the same as the estimated time of arrival of the original vessel when nominated."*

14 INCOGRAIN Contract No. 13 stipulates that the buyer may substitute the originally nominated vessel provided that the substitute vessel will be ready for loading on the ETA date of the originally nominated vessel and will be able to load the cargo quantity originally nominated.

any substitute vessel[15]. 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. If at the time of the vessel substitution notice there is sufficient time left until the end of the vessel presentation period, the sellers will consider the vessel substitution notice as a new nomination and will start counting a new pre-advice period. If at the time of the vessel substitution notice the time left until the end of the vessel presentation period is shorter than the contractual pre-advice period, the buyer's non-compliance with the pre-advice requirements for the vessel substitution will be considered a breach of condition of the contract which would entitle the sellers to reject the vessel substitution notice and terminate the sale contract[16].

If the sale contract stipulates a time limit for the submission of the vessel substitution notice, the question whether the timely submission of the vessel substitution notice can be considered a condition of the contract depends on the circumstances of the case.

If the circumstances of the case indicate that the precise compliance with such time stipulation would be necessary for the performance by the seller of his timing obligation, then the timely submission by the buyer of the vessel substitution notice could be considered a condition of the contract. For instance, in a case where the contract delivery period is stated as a vessel presentation period and the ETA of the originally nominated vessel is on the last day of such period, the buyer's obligation to give the vessel substitution notice by the relevant deadline can be considered a condition of the contract.

If, however, the ETA of the originally nominated vessel falls on a date that is sufficiently in advance of the last day of the vessel presentation period for the seller to schedule the substitute vessel for loading, a late substitution notice would not entitle the seller to reject the vessel substitution notice and terminate the contract, but only to delay loading by the number of days the vessel substitution notice was late and claim any extra costs incurred thereby[17]. In such case the substitute vessel's NOR shall become effective only after the expiry of the notification period.

5. Timely Presentation And Readiness Of Vessel

In FOB sale contracts the contractual time limit for the presentation of vessel for loading depends on whether the contract delivery period is stated as a period for the presentation of vessel for loading or as a shipment period.

If the contract delivery period is stated as a vessel presentation period, the buyer's obligation shall be to present the vessel ready for loading, after giving the required pre-advice of ETA, within the contract delivery period.

In some contract forms, such as GAFTA Contract No. 49 and GAFTA Contract No. 64, there is no specific requirement in respect of the degree of readiness of the vessel, no requirement for the tender of a valid NOR and no deadline for the presentation of vessel for loading, which means that the buyer must present the vessel for loading, not necessarily ready in all respects[18], not later than 23:59 hours on the last day of the contract delivery period.

In the contract forms that stipulate a deadline for the presentation of vessel for loading the buyers must present the vessel before the deadline. For instance, FOSFA Contract No. 4A requires the buyers to present the vessel 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. Another example is GAFTA Contract No. 38 that in the case of shipments to be made from the ports on the Parana River requires the buyers to present the vessel ready in all respects for loading with minimum 24 hours before the expiry of the contract delivery period. ANEC FOB Contract No. 41 requires the

15 See Ramburs Inc. v. Agrifert S.A., [2015] EWHC 3548 (Comm).
16 See Ramburs Inc. v. Agrifert S.A., [2015] EWHC 3548 (Comm).
17 See Ramburs Inc. v. Agrifert S.A., [2015] EWHC 3548 (Comm).
18 See Soufflet Negoce S.A. v. Bunge S.A., [2010] EWCA Civ 1102; [2011] 1 Lloyd's Rep 531.

buyers to present the vessel ready in all respects for loading and tender valid NOR by 17:00 hours on the last day of the contract delivery period provided that the buyers have given the minimum 15 days' pre-advice of the vessel's ETA. GTA FOB Contract No. 1 requires the buyers to present the vessel ready in all respects for loading and tender valid NOR by 17:00 hours on the last working day of the contract delivery period.

The FOB sale contracts that state the contract delivery period as a vessel presentation period commonly provide the buyer's obligation to narrow the contract delivery period to a shorter laycan period. In such contracts after the buyer nominates the laycan period his obligation will be to present the vessel for loading by the end of the last day of the laycan period or, if the contract provides a deadline on the last day of the laycan period for the presentation of vessel for loading, by the deadline on the last day of the laycan period stipulated in the sale contract. For example, the Edition 2008 of GTA FOB Contract No. 1 provides that following the laycan fixation, the vessel's NOR has to be tendered *"at latest by 12:00 hours on the last day of the laycan"*. If the buyer's vessel fails to tender valid NOR by the end of the last day of the laycan period or by the deadline on the last day of the laycan period stipulated in the sale contract, the seller is entitled to terminate the contract[19].

If the contract delivery period is stated as a shipment period, the buyers must present the vessel ready in all respects for loading with sufficient time before the end of the contract delivery period to enable the sellers to complete loading of the goods by the end of the contract delivery period.

If it is a condition of the contract for the goods to be shipped on board the vessel by the end of the contract delivery period, it is also a condition of the contract the requirement that the buyers must present the vessel ready in all respects for loading with sufficient time before the end of the contract delivery period to allow the sellers to complete loading of the goods by the end of of the contract delivery period[20].

The sellers should stipulate in such contracts a time limit for the presentation of vessel for loading and not leave this matter to implication. The time limit for the presentation of vessel for loading should be set in the sale contract taking into consideration the time necessary to complete loading of the contractual cargo quantity at the contractual loading rate before the end of the contract delivery period.

Implications Of The Vessel Missing The ETA Or Expected Readiness Date

In FOB sale contracts for grain and oilseed cargoes, the expected date of vessel readiness for loading is the date on which the buyer honestly and on reasonable grounds expects at the time of the vessel nomination that the vessel will be ready in all respects for loading[21].

The buyer's failure to present the vessel ready in all respects for loading on the expected readiness date pre-advised in the vessel nomination notice is not a basis for the termination of the sale contract by the seller provided that the vessel will eventually show up ready in all respects for loading before the contractual time limit, that is the deadline on the last day of the vessel presentation period for the buyer's vessel to tender valid NOR.

19 See ERG Raffinerie Mediterranee SPA v. Chevron USA Inc (t/a Chevron Texaco Global Trading), [2007] 2 Lloyd's Rep 542, [2007] EWCA Civ 494.

20 See ERG Raffinerie Mediterranee SPA v. Chevron USA Inc (t/a Chevron Texaco Global Trading), [2007] 2 Lloyd's Rep 542, [2007] EWCA Civ 494; In Bremer Handelsgesellschaft M.B.H v. J. H. Rayner & Co. Ltd., [1978] 2 Lloyd's Rep 73, Mocatta J. stated that: "If the contract names a date for shipment of the goods, there is an obligation upon the buyers to tender a ship on which the sellers can place the goods by such a date as would enable the sellers to complete putting the goods on board by the end of the period named in the contract of sale."

21 See A v. B, [2021] EWHC 793 (Comm). In grain voyage charterparties the expected date of vessel readiness for loading is the date on which the shipowner honestly and on reasonable grounds expects at the time of the vessel nomination that the vessel will be ready in all respects for loading. See Maredelanto Compania Naviera SA v. Bergbau-Handel GmbH (The "Mihalis Angelos"), [1970] EWCA Civ 4, [1970] 2 Lloyd's Rep 43; Evera S.A. Comercial v. North Shipping Company Ltd., [1956] 2 Lloyd's Rep. 367.

The seller would only be entitled to claim reimbursement of the additional costs charged by the port operators due to the vessel's late presentation or late readiness for loading.
The port operators schedule the grain shipments in function of the expected readiness dates of the nominated vessels. In the event of the vessel's late arrival or late readiness they charge additional fees. For instance, the Australian port operator CBH Group charges shippers an “Incorrect ETA Fee” for vessels that tender valid NOR five or more clear days after the vessel's ETA date and a “Failed Survey Fee” for vessels that fail the holds' inspection.
Given that the port operators will invoice these additional charges for the shippers' account, the shippers should provide in their FOB sale contracts the buyers' obligation to reimburse the proven expenses incurred by the sellers due to the vessel's late arrival or non-compliance with the holds' cleanliness requirements. This obligation is stipulated only in INCOGRAIN Contract No. 13 which provides that if the buyer's vessel fails to present ready in all respects for loading on the date pre-advised in the vessel's nomination notice as the expected date of berthing, the buyer shall be liable for any proven expenses incurred by the seller for this reason, even if the seller will manage to complete loading during the contract delivery period. If in spite of the seller's compliance with the contractual loading rate the seller will not be able to complete loading before the end of the contract delivery period due to the vessel's late arrival or delayed readiness for loading, the contract price for the quantity of goods loaded after the contract delivery period shall include an additional charge to be calculated based on the number of additional days required to complete loading.

Timing Obligations Of FOB Sellers

1. Timely Nomination Of The Loading Port And Berth

In FOB sale contracts the contractual time limit for the nomination of the loading port and berth by the sellers is set in function of the vessel nomination time and contract delivery period.
The Clause 8 of NAEGA FOB Export Contract provides that:

“Seller shall, if applicable, declare port and berth of loading within a reasonable time (but not later than_____ days) after receipt by seller of the preadvice, except that seller shall not be obligated to make such declaration earlier than (a) the 8th day prior to commencement of the delivery period for port declaration and (b) the 5th day prior to commencement of the delivery period for berth declaration.”

For the nomination to be accepted by the buyers, the nominated port and berth must have sufficient water depth to allow the nominated vessel (or the vessel to be nominated based on the contract requirements as to the type of vessel) to safely reach, stay as far as necessary for the loading of cargo and depart from laden with the contractual cargo quantity at the relevant time[22].
In FOB sale contracts that require the sellers to nominate the loading port within a contractual time limit, the seller's obligation to nominate a suitable port within the contractual time limit is a condition of the contract. The seller's failure to comply with such obligation shall entitle the buyer to terminate the contract and claim damages. An example of contract clause covering this matter is the Clause IV of INCOGRAIN Contract No. 13 that gives the FOB buyer an express right to terminate the sale contract for breach of the port nomination provisions. The clause provides that:

“In the event of a sale calling for a compulsory nomination of the port of shipment, Sellers, under penalty of default, shall notify the name of one single port not later than the first day of the

22 See the contract provisions in the English law case Ramburs Inc. v. Agrifert S.A., [2015] EWHC 3548 (Comm): “1 safe berth 1 safe Panamax suitable port Ukraine to be declared [by Sellers] on vessel's nomination”.

shipment period. If this day falls on a Saturday, a Sunday, a public holiday or another non-working day, the expiry date of the fixed period shall be brought forward to the preceding working day. However, Buyers may require this nomination to be made as from the fifteenth day of the month preceding a monthly shipment period, or fifteen consecutive days prior to the beginning of a shipment period other than a monthly period. In this case, Sellers must thenceforth under penalty of default definitely nominate the loading port within two working days following the date of the request."

2. Timely Provision Of A Free Berth

Upon the vessel's arrival at the loading port, the FOB sellers have the obligation to provide a free berth for loading.
In port sale contracts, if the seller is unable to provide a free berth upon the vessel's arrival at the loading port, the seller shall be liable to pay demurrage charges in the event that the time spent by the buyer's vessel at loading port exceeds the contractual laytime due to the time lost waiting for berth.
In berth sale contracts such as GAFTA Contract No. 38 the buyer's 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. Since the commencement of laytime is conditional upon the vessel berthing, the time lost prior to berthing in case of congestion at loading berth shall fall outside the scope of laytime. But the buyers shall be entitled to claim damages for detention of vessel prior to berthing because the FOB sellers have an implied obligation not to prevent the buyers' vessel from becoming an "arrived ship"[23].

3. Delivery Obligation

The seller's obligation to deliver the goods is in function of whether the contract delivery period is stated in the sale contract as a period in which the seller must deliver the goods or as a period in which the buyer must present a vessel for loading.
If the contract delivery period is stated as a shipment period, the delivery obligation is that loading must be completed within the contract delivery period. The time of delivery is an obligation which is of the essence of the sale contract. The seller's obligation to load the goods by the end of the contract delivery period is considered a condition of the contract.
The seller's failure to load the goods within the contract delivery period will entitle the buyer to claim damages for late delivery based on the difference between the market value of the goods on the last day of the contract delivery period (which is considered the contractual delivery date) and their value on the date when they were actually delivered (Bill of Lading date).
If the contract delivery period is stated as a vessel presentation period, the time of delivery is an obligation which is not of the essence of the sale contract. In the English law case ERG Raffinerie Mediterranee SPA v. Chevron USA Inc[24]., the English Court of Appeal held that:
- If the buyer's vessel can serve NOR until 23:59 hours on the last day of the contract delivery period, it cannot be a condition of the contract that loading has to be completed by that time, irrespective of the time when the vessel actually gives NOR at loading port.
- Even if the buyer's vessel arrives at loading port and tenders valid NOR when there is sufficient time left for the completion of loading by the end of the last day of the contract delivery period, the seller is not contractually obliged to complete loading by that time. He is not even required to commence loading within a prescribed time. If the loading berth or the goods are not available at

23 See the English law case Sociedad Financiera de Bienes Raices v. Agrimpex (The "Aello"), [1960] 1 Lloyd's Rep. 623.
24 [2007] 2 Lloyd's Rep 542, [2007] EWCA Civ 494

the time of the vessel's arrival at the loading port, the vessel can be kept waiting and the buyer cannot withdraw the vessel until after the expiry of a "frustrating time", that is ill-defined by the English Courts. The seller shall not be in breach of contract for failing to provide a free berth and commence loading promptly after the vessel presentation for loading, unless the sale contract provides otherwise[25].

BP and Shell terms for FOB sales of crude oil, that state the vessel presentation period as "laydays", stipulate that the seller's obligation is to commence and complete loading *"as soon as reasonably practicable"* after the receipt of valid NOR and expiry of 6 hours' Notice time, *"even if this means that loading is effected or completed outside the Laydays"*[26]. In the event of late delivery of the goods due to the unavailability of berth or goods, the demurrage shall be the only remedy for the buyer.

The buyer cannot claim damages for late delivery or anything else than demurrage. BP and Shell terms for FOB sales of crude oil stipulate that in the event of any delay arising from the scheduling of the vessel's turn to load, the provision of a berth for the vessel, berthing or loading of the vessel, *"any rights of the Buyer against the Seller […] shall be limited in all circumstances whatsoever to a claim for the payment of demurrage"*[27]. Furthermore, Sub-Clause 7.5.1 of BP Terms for FOB Sales and Purchases of Crude Oil and Petroleum Products, 2015 Edition, stipulates that:

"The Seller shall not be liable (other than for demurrage as aforesaid) for any loss or damage, direct or indirect, which the Buyer may suffer as a result of the Crude Oil or Product not being loaded within the time allowed ..."

25 For instance, Clause VI (5) of INCOGRAIN Contract No. 13 stipulates that if the seller does not commence loading within three working days following the day when the vessel is in all respects ready to load at the loading berth, he shall be in default, save in case of force majeure.

26 See Sub-Clause 6.2.2 of BP Oil International Ltd. General Terms & Conditions For Sales And Purchases Of Crude Oil And Petroleum Products, 2015 Edition; See Sub-Clause 6.2.2 of Shell International Trading and Shipping Company Ltd. General Terms & Conditions for Sales and Purchases of Crude Oil.

27 See Sub-Clause 7.1 of BP Oil International Ltd. General Terms & Conditions For Sales And Purchases Of Crude Oil And Petroleum Products, 2015 Edition; See Sub-Clause 7.3 of Shell International Trading and Shipping Company Ltd. General Terms & Conditions for Sales and Purchases of Crude Oil.

Who Should Bear The Liability For The Deterioration Of Soybean Cargoes On Board The Carrying Ships In The Event That Upon Arrival At The Ports Of Discharge The Ships Are Required To Wait At Anchorage For Prolonged Periods Due To Reasons For Which The Carriers Are Not Responsible?

by Vlad Cioarec, International Trade Consultant

Over the last 20 years the ships carrying soya bean cargoes in bulk to Chinese ports had often been forced to wait at anchorage for prolonged periods either due to quarantine restrictions, congestion in ports, lack of storage space ashore for the cargo or due to the change of import regulations.

If the soya bean cargoes are stored on board the carrying ships in excess of their safe storage period, they may deteriorate due to self-heating[1].

Claims for heat damage to soya bean cargoes due to prolonged storage on board the carrying ships were reported in 2004 following the quarantine restrictions imposed by AQSIQ on 10 May 2004 and in 2017 following the VAT reduction for imports of agricultural commodities.

The carriers in voyage charterparties for the transport of soya bean cargoes to Chinese ports should decline any liability for the cargo deterioration in the event that upon arrival at discharge ports the carrying ships are prevented to proceed to berth due to congestion or other reasons for which the carriers are not responsible.

The carriers should also stipulate that demurrage is intended to cover only the direct losses resulting from the detention of ship beyond the laytime and not the liability that the carriers might incur due to the cargo deterioration for reasons for which the carriers are not responsible. The failure to address this matter in charterparties would expose the carriers to the risk of claims from the Chinese buyers without the possibility to recover from the charterers.

An example of such case was the English law case **K-Line Pte Ltd. v. Priminds Shipping (HK) Co. Ltd. (The "Eternal Bliss")**[2]. In that case the dry bulk carrier "Eternal Bliss" carried a cargo of 70,133 MT of soya beans in bulk from Tubarao, in Brazil to Longkou, in China, pursuant to the terms of a contract of affreightment dated 30 July 2014.

The ship tendered NOR at Longkou anchorage on 29 July 2015 but was kept at anchorage for 31 days before berthing on 30 August 2015 due to congestion in port and lack of storage space ashore for the cargo. Discharge was completed and the ship sailed away from Longkou, on 11 September 2015.

During the time spent by the ship waiting for berth the condition of soya bean cargo deteriorated by self-heating due to the prolonged storage in the ship's holds.

The Chinese buyer brought a claim against the shipowner for cargo damage. The shipowner (in fact, the ship's P&I Club had to pay $1.1 million to the cargo receivers (Chinese buyer) to settle their claim for damage to cargo and then sought to recover the financial loss from the charterers.

The case was submitted for analysis first to LMAA, then to the English Commercial Court and finally to the English Court of Appeal. The questions in dispute were whether or not the shipowner's claim was a claim for detention of the ship and whether the demurrage is liquidated damages for all the consequences of the charterer's failure to unload the cargo within the contractual laytime or only some of them.

In a decision from 2020, Mr. Justice Andrew Baker sitting in the English Commercial Court held that the financial loss incurred by the shipowner for the settlement of claim for cargo damage was a distinct kind of loss than the loss incurred due to the detention of the ship and therefore, the shipowner was entitled to recover the sum of $1.1 million paid to settle the claim of Chinese buyer in addition to the amount due for demurrage. This decision was overturned by the English Court of Appeal in a decision from November 2021 based on the following reasons.

---

1 For more on this matter see Gard's Loss Prevention Circular No. 03 – 13 – "Prevention of soya bean cargo claims".

2 [2021] EWCA Civ 1712

- In English contract law, the demurrage is liquidated damages for breach by the charterer of the obligation to complete the cargo operations within the laytime. It is not just an amount due for the detention of ship beyond the contractual laytime.
- The charterer agreed that the shipowner incurred an additional expense as a result of the ship detention at discharge port but contended that the additional expense was not caused by the charterer's breach of a separate obligation than the obligation to discharge the cargo within the contractual laytime. If a shipowner seeks to recover damages in addition to demurrage arising from delay, it must prove a breach of a separate obligation.
- In the absence of any contrary indication in the charterparty, the demurrage liquidates the whole of the damages arising from the charterer's breach of charterparty in failing to complete the cargo operations within the laytime and not merely some of them.
- If the demurrage is liquidated damages for all the consequences, the shipowners cannot recover by way of an implied indemnity rendering the charterer liable for one of those consequences but only on the basis of an express provision in the charterparty.
- It is open to the shipowners and disponent owners to stipulate in voyage charterparties that a liquidated damages clause such as the demurrage clause covers only certain stated categories of loss flowing from breach of the obligation to unload within the laytime. In the contract of affreightment concluded by K-Line Pte Ltd. with Priminds Shipping (HK) Co. Ltd., the demurrage clause did not indicate whether the demurrage was intended cover all or only some of the losses flowing from a failure to complete the cargo operations within the laytime. If the contracting parties intended demurrage to cover only some of the losses, they should have stated expressly which losses were intended to be covered and which were not.

“[I]t was within the reasonable contemplation of the parties when entering into the contract that a failure to discharge within the laytime might cause the shipowner to incur liability for cargo damage.”

Implications Of The Carrier's Failure To Provide Adequate Evidence In Claims For Mould Damage

by Vlad Cioarec, International Trade Consultant

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**[1]., 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. This rule was upheld by the English Commercial Court in a recent case.

In **Alianca Navegacao E Logistica LTDA v. Ameropa S.A.**[2], the bulk carrier "Santa Isabella" was voyage chartered by the grain trading company Ameropa for the carriage of a cargo of maize in bulk from Topolobampo, in Mexico to Durban and Richards Bay, in South Africa.

Upon loading of cargo at Topolobampo the disponent owners of the ship (time charterers) instructed the Master to proceed to Durban via Cape Horn, a route with predictably and significantly colder ambient temperatures than the cargo temperature from the time of loading at Topolobampo.

The maize 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 maize 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 maize 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 of condensation water onto the underside of the hatch covers.

In the case of maize cargo carried on board the ship "Santa Isabella" it was predictable that the differences between the cargo temperature and the temperature of the air outside the holds will lead to condensation and the ventilation will be necessary to prevent the formation of condensation within the cargo holds.

Upon the ship's arrival at Durban, the first port of discharge, on 1 August 2016, it was discovered that the cargo had been severely and very extensively damaged by mould caused by moisture condensation. The cargo contained significant quantities of mould that had to be removed in order to recover the sound cargo. The skimming operations delayed the discharge of sound cargo at Durban with three months. There was a further delay in the discharge of the remaining cargo at Richards Bay.

1 [2018] UKSC 61

2 [2019] EWHC 3152 (Comm)

The disponent owners of the ship (time charterer) claimed demurrage for delays at Durban and Richards Bay. The voyage charterer (Ameropa) contended that it should not be held liable for demurrage because the discharge of cargo was delayed due to the fault of the ship's crew who failed to properly ventilate the cargo during the transportation by sea.
The case was a dispute as to whether the delays at discharge ports (Durban and Richards Bay) were caused by the carrier's breach of the Article III Rule 2 of the Hague – Visby Rules incorporated into the voyage charterparty whereby the carrier had a duty to properly care for the cargo.
Under the Article III Rule 2 of the Hague – Visby Rules, incorporated into the voyage charterparty, the disponent owners of the ship as carrier had a duty to properly care for the cargo during the voyage, that including the obligation to properly ventilate the cargo when it was necessary to do so.
In the event of claims for mould damage to hygroscopic cargoes evidence showing that the ship's crew ventilated properly the cargo is essential to carriers in defending the claims.
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).
One question in dispute in **Alianca Navegacao E Logistica LTDA v. Ameropa S.A.** was whether the maize cargo was properly ventilated in accordance with a sound system, given the degree and extent of mould damage.
A sound system of ventilation for a hygroscopic cargo would involve the use of either the dew point rule or the three degree rule. There was no evidence describing the nature of the ventilation system (whether based on dew point rule or on three degree rule) on board the ship “Santa Isabella”.
The Chief Officer of the ship “Santa Isabella” during the voyage with maize cargo said that the crew ventilated the cargo holds using the three degree rule but he was unable to adduce any evidence that the crew actually measured and recorded the cargo temperature during loading or the outside air temperatures during the voyage.
The voyage from Topolobampo, in Mexico to Durban, in South Africa took 39 days. Of these, there were 792 hours (the equivalent of 33 days) during which, in the absence of ventilation, there were conditions conducive to condensation occurring in the cargo holds. Excluding the periods when the cargo holds were sealed for fumigation and when the weather conditions did not permit the ventilation and taking into consideration the safety concerns about ventilation during the night, the judge said that it was safe to ventilate the holds for an aggregate period of 308 hours (the equivalent of 12.8 days). According to the Ventilation Log entries, the actual ventilation of the cargo holds was carried out for 107 hours (the equivalent of 4.5 days, roughly one third of the time during which the ventilation was required and, subject to the night ventilation concerns, safe).
The Ventilation Log provided for the voyage showed that the ventilation did take place between 09:00 hours and 16:00 hours but it contained no remarks explaining why the ventilation was or was not being carried out and no records of the cargo temperature and the outside air temperatures during the voyage. For these reasons the Ventilation Log entries were considered unreliable.
Even if the Ventilation Log entries were accepted at face value that meant that the maize cargo was not ventilated for more than 7 hours a day.
The Chief Officer of the ship “Santa Isabella” during the respective voyage said that the vents were opened only during the day between 09:00 and 16:00 hours and were closed during the night for the safety of the crew (to avoid the risk of injury to crew members if it was necessary to close the vents).

The P&I Clubs' bulletins produced in evidence by Ameropa stated that ventilation should also occur at night if the temperature readings indicate that ventilation is necessary and weather permitting. The judge said that:

"to refrain, without sufficient reason, from ventilating at night in circumstances where the application of the accepted dew point and three degrees rules indicate that ventilation should occur could not, as a matter of logic, be described as a sound system."

Furthermore, there were periods of daylight between 06:00 and 09:00 hours and between 16:00 and 18:00 hours when the ventilation could have been done and it was not done with no reason.
The judge said that had the crew ventilated the cargo at all times when it was necessary and safe to do so including at night, the degree and extent of mould damage would have been far less than was sustained. There would have been between 6 to 12 inches of dried crust at the top of the cargo but no greater type or degree of level of cargo damage.
Accordingly, the judge held that the carrier was in breach of its duties to properly care for the cargo by failing to properly ventilate the cargo in accordance with a sound system. The carrier's breach was the cause of damage to the cargo. That in turn was the cause of the long delays in discharging at Durban.
But for the carrier's breach, the discharge process would have been completed within the laytime.