Introduction

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

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

Charterparty Conditions That Would Enable The Charterers To Change The Destination Of Soya Bean Cargoes

by Vlad Cioarec, International Trade Consultant

One feature of the maritime trade with soya bean cargoes shipped from Brazil to China is the practice of the commodity traders to charter bulk carriers and accumulate on board these vessels soya bean parcels supplied by various Brazilian shippers on FOB terms and then on-sale the full cargoes carried on board the vessels on CFR or CIF terms to Chinese buyers.

Since the actual destination of soya bean cargoes is not known at the time of chartering the vessels and not even before the shipment of the individual parcels, the soya bean traders state the destination in voyage charterparties and Bills of Lading[1] as a range of possible discharge ports, often with a safe port warranty[2], so that they can order the shipowners in the course of the voyage to instruct the Master to proceed to any of the ports within the range.

The soya bean traders should also provide in the voyage charterparties an option to change the discharge port(s) initially nominated, if this becomes necessary for other reasons than war risks.

An example of such case was provided in the London Maritime Arbitration Case No. 20/21.

In that case a soya bean trader chartered a vessel for the carriage of a soya bean cargo from one of a range of ports in Brazil to one or two ports in China. The Bills of Lading issued for the soya bean cargo stated the destination as “China Port(s)”. The voyage charter party provided that the charterer had the obligation to nominate the discharge port *“10 days prior to vessel passing Singapore”*.

On 20 June, while the vessel was on the route to Singapore, the charterer notified by email the shipowner that the cargo receivers have nominated Zhoushan and Taixing as discharge ports. Then two weeks later on 3 July the charterers sent another email message asking the shipowner to re-direct the vessel to the port of Tianjin.

For the shipowner the change of destination was disadvantageous in that the freight for the carriage of cargo to the port of Tianjin was lesser than the freight for voyage to Zhoushan and Taixing and therefore, the shipowner's representatives informed the charterer's representatives that they could not change the nominated ports. Accordingly, the vessel sailed to the port of Zhoushan and upon it arrived there, the shipowner's representatives sent to the charterer's representatives a freight invoice for the voyage to Zhoushan and Taixing.

The charterer refused the freight invoice and asked the shipowner to instruct the Master to sail to the port of Tianjin and discharge the cargo there. To overcome the situation, the parties agreed to settle the dispute by arbitration. The charterer paid the disputed freight charges into an escrow account and the vessel sailed to the port of Tianjin.

In arbitration, the charterer's representatives contended that since the voyage charter party and Bills of Lading stated the destination as a range ports in China, they had the right to change the discharge ports initially nominated. The charterer further contended that the shipowner could not claim a freight for a voyage (the voyage to Taixing) that was not performed.

In turn, the shipowner contended that the initial nomination by the charterer on 20 June of Zhoushan and Taixing as discharge ports had the effect of writing them into the charterparty as if these two ports had been declared at the time of the vessel fixture. Therefore, the charterer had no right to change the two ports initially nominated.

1 The shippers prepare the Bills of Lading based on the documentary instructions given by the soya bean traders as FOB buyers.

2 On the effect of the Bills of Lading with safe port terms see the article “The Potential Liability Of CFR And CIF Buyers When Accepting Bills Of Lading With Safe Port Warranty And War Risks Clause” in Oil Trade Review Edition No. 3 / August 2020.

The LMAA tribunal held that once the voyage charterer's representatives made a valid nomination, they could not change it in the absence of an express provision in the charter party giving the charterer the right to change a valid nomination and therefore, the shipowner was entitled to the freight based on the initial nomination of Zhoushan and Taixing as discharge ports.

This case shows the importance of inserting provisions in voyage charterparties that it will enable the charterers, upon the commodity buyer's request, to change the destination of soya bean cargoes during the voyage in the same way as the oil traders do. The voyage charterparties for the carriage of soya bean cargoes should include a “Change of Destination Clause” stipulating that:

- after nominating the discharge port(s), the charterers shall have the right to change the nomination of the discharge port(s) and issue revised order(s) and the shipowners shall have the obligation to issue the instructions necessary to the Master to make such change(s), provided that the port(s) subsequently nominated are within the ranges stated in the charter party;
- the charterers shall have the right to make as many changes to destination as they deem necessary until the deadline provided in the charter party, that can be related either to the vessel's ETA at a destination for orders, as in the London Maritime Arbitration Case No. 20/21, or to the vessel's ETA at the discharge port initially nominated;
- the freight shall be based on the voyage actually performed;
- any additional period by which the steaming time taken to reach the discharge port(s) to which the vessel is finally ordered exceeds the time which would have been taken if the vessel had been ordered to proceed to such port(s) in the first instance shall count as laytime or, if the vessel is on demurrage, as demurrage. Such additional period shall be the time required for the vessel to steam the additional distance at the average speed actually achieved by the vessel during the voyage or the charter speed, whichever is the higher[3]. In addition, the charterers shall pay to shipowners the extra bunkers consumed during such additional period at the price paid by the shipowners for the last bunkers lifted.

The soya bean traders should provide in their CFR/CIF sale contracts a corresponding option to the Chinese buyers in order to be able to recover the costs of the deviation time and the costs of the extra bunkers they will pay to the shipowners under the voyage charter party, in the event that the Chinese buyers wish to change the discharge port(s) initially nominated.

3 See the Sub-Clause 22.3 of BPVOY4.

What Should Be The Obligation Of The Soya Bean Carriers In Respect Of The Cargo Description In The Bills Of Lading

by Vlad Cioarec, International Trade Consultant

Over the last twenty years, the cargoes of Brazilian soya beans have been the subject of numerous claims for mould and/or heat damage in China. Many of these claims were based on the evidence provided by the discharge port surveyors that the mould and/or heat damage was caused by the condition of soya beans at the time of shipment. The claims have been upheld by the Chinese courts on the ground that the carriers had failed to properly describe the condition of soya bean cargoes in the Bills of Lading[1].

Apparently, the Chinese maritime courts do not distinguish between the actual condition and the apparent condition of the goods in the case of soya bean cargoes.

The carrier's obligation to ascertain the actual condition of the goods would require in the case of the soya beans to take samples and analyse the moisture content. The crews of the bulk carriers that transport soya bean cargoes have no possibility of analysing the moisture content of the soya beans on board. This can only be done by local surveyors specialised in soya beans.

Under the Hague Rules, Hague-Visby Rules and Hamburg Rules, the carrier's obligation is to ascertain only the apparent condition of the soya beans that is based on their external appearance and not on their quality characteristics. Therefore, in the contracts of carriage that are subject to such rules, the carriers of soya bean cargoes should not be required to sample the cargo and analyse its moisture content nor they should be held liable in the case of failure to do that because the moisture content does not relate to the apparent condition of the soya beans.

The carrier's obligation to ascertain the apparent condition of a soya bean cargo would require the vessel's crew only to visually inspect the cargo at the time of loading, take pictures of the cargo and notice if there are any portions of the cargo that visibly differ from the cream colour of the sound soya beans. For instance, a visible change in the colour of the soya beans from cream to dark blue is a sign that the respective beans are mouldy. A visible change in the colour of soya beans from cream to brown is a sign that the respective beans have been damaged by heat. At high temperatures, soya beans become black.

ANEC Contract forms No.41 and 42 used for the FOB sales of the Brazilian soya beans provide that the soya bean cargoes may have a maximum 6% content of mouldy beans and a maximum 4% content of heat damaged and burned beans of which the content of burned beans must be maximum 1%. However, the Master of a vessel is not concerned with the quality specifications for the cargo but with its apparent condition and the way this is described in the Bills of Lading. Whether the cargo is within the quality specifications of the sale contract, it should be irrelevant to the Master.

Therefore, if the Master considers that a soya bean parcel contains an abnormal quantity of mouldy and/or burned beans, he is entitled to ask the replacement of the respective parcel or, if the unloading of the cargo is not possible, instruct the carrier's local agents to add a remark to the shipper's description of cargo specifying the nature and estimated quantity or proportion of the visibly damaged beans.

1 See the English case Priminds Shipping (HK) Co Ltd v. Noble Chartering Inc, [2020] EWHC 127 (Comm), [2020] 2 Lloyd's Rep 333.

The Necessity Of A Charter Party Indemnity With Regard To The Soya Beans' Moisture Content

by Vlad Cioarec, International Trade Consultant

The carrier's obligation to ascertain the apparent condition of a soya bean cargo would require the vessel's crew only to visually inspect the cargo at the time of loading, take pictures of the cargo and notice if there are any portions of the cargo that visibly differ from the cream colour of the sound soya beans. However, the colour of the soya beans will change only when they are already in an advanced stage of deterioration. If the soya beans are in the initial stage of deterioration, there will not be a visible change in colour.

In a cargo of 60,000 MT of soya beans which consists of parcels loaded by different shippers, a parcel of soya beans with 11% moisture content will look the same as a parcel of soya beans with 14% moisture content, and thus, even if the average moisture level for a full cargo stated by the cargo surveyors in the Analysis Certificate is within the safe transportable limit, that figure may not necessary be accurate if the moisture content of one or more parcels is higher than the average moisture content of the entire cargo, because a parcel with 14% moisture content, whilst it is within the specification of ANEC Contract form No. 41 for moisture content, it could affect the rest of the cargo in a vessel's hold.

Over the last twenty years, the cargoes of Brazilian soya beans have been the subject of numerous claims for mould and/or heat damage caused by parcels with high moisture content. The Chinese receivers made these claims against the shipowners for the alleged failure to properly describe the condition of soya bean cargoes in the Bills of Lading.

The Chinese maritime courts do not distinguish between the actual condition and the apparent condition of the goods in the case of soya bean cargoes and blame the shipowners for the cargo damage. The shipowners and, if the vessel was in a chain of charters, time charterers, as disponent owners, will ask the voyage charterers to indemnify them for the amounts paid to the Chinese receivers. An example of such case was the English case **Priminds Shipping (HK) Co Ltd v. Noble Chartering Inc**[1].

In that case the vessel “Tai Prize” loaded a cargo of 63,366.150 MT of soya beans at the port of Santos in Brazil for delivery at the port of Guangzhou in China.

Upon the vessel's arrival at the port of Guangzhou, the cargo was inspected in all the holds of the vessel and no visible damage was noticed on the top of the cargo stows. The local stevedores commenced discharging the cargo. When the stevedores reached towards the lower layers of the cargo stows, the surveyors discovered that in two of the vessel's holds part of the cargo was affected by mould and heat damage. The fact that the deterioration damage was found within the lower layers of the cargo stows and not on the top of the cargo stows was an indication that the respective part of the cargo had a high moisture content at the time of loading on board the vessel.

Based on the evidence provided by the local surveyors, the Chinese receivers asked a local maritime court to order the arrest of the vessel “Tai Prize” until the shipowners provided a security for their cargo claim. In order to obtain the release of the vessel, the vessel's P&I Club provided a Letter of Undertaking stating that the claim would be subject to Chinese law and the exclusive jurisdiction of the Chinese courts.

Unsurprisingly, the receivers' claim against the shipowners was upheld by the Chinese maritime courts on the grounds that the cargo damage was of pre-shipment origin and the shipowner's agents had failed to properly describe the soya bean cargo in the Bills of Lading.

The shipowners had to pay to the Chinese receivers an amount equivalent to US $ 1,004,385.61.

1 [2020] EWHC 127 (Comm), [2020] 2 Lloyd's Rep 333.

The vessel “Tai Prize” was at the time it carried the soya bean cargo to China in a chain of two charters: a head charter party between the shipowners and time charterers Priminds Shipping and a sub-charter for the voyage from Santos to Guangzhou between the time charterers Priminds Shipping and voyage charterer Noble Chartering.

The shipowners commenced arbitration in London against the time charterers for a contribution under the Inter-Club Agreement of 50% to the sum the shipowners had to pay to the Chinese receivers. By a settlement agreement the time charterers agreed to pay US $ 500,000 to shipowners and then started arbitration in London to recover this sum from the voyage charterers.

The voyage charter party contained no express term entitling the disponent owners (time charterers) to be indemnified against their share of liability to the Chinese receivers as a result of the voyage charterers providing a cargo with excessive moisture content.

One question in dispute was whether in the absence of express terms in voyage charter party allocating the risk of liability in the case of an inaccurate description of the cargo condition by the shippers in the Bills of Lading is there any legal basis on which the voyage charterers could be liable to the disponent owners for the consequences of any inaccuracy.

The disponent owners contended that where the voyage charterers require the Master or his agents to sign a Bill of Lading which misdescribes the condition of the cargo and that misdescription cannot reasonably be discovered by the Master, the voyage charterers are liable to indemnify the shipowners or disponent owners against the consequences. Since the Brazilian shippers were acting as the voyage charterer's agents for the purposes of supplying the cargo and presenting the Bill of Lading to the shipowner's agents for signature, the voyage charterers were obliged to indemnify the disponent owners in respect of their share of liability for the cargo claim brought by the Chinese receivers under the Bill of Lading, pursuant to an implied contractual term in the voyage charter party.

The LMAA Arbitrator found that the cargo damage occurred because the relevant parts of the cargo were loaded with an excessive moisture content and with pre-existing heat damage. The pre-existing damage in the soya bean cargo was not visible to the ship's crew upon a reasonable examination during loading. The timing and speed of loading did not allow the ship's crew to notice if there were any portions of cargo with discoloured beans. But the shippers who prepared and presented the Bills of Lading to the shipowner's agents for signature on behalf of the voyage charterers would have been able to discover the defective condition of the part of the cargo that was damaged. (In fact, the port operators prepared the Bills of Lading, and not the shippers, and they would have had the possibility to ascertain the quality characteristics of the soya beans at the time of receiving them in storage at the port silos.)

On that basis, the LMAA Arbitrator held that the shipper's description of the soya bean cargo in the Bills of Lading as being in apparent good order and condition was not accurate. Given that the disponent owners incurred liability towards the head owners due to the instructions given by the voyage charterers to load what turned out to be a partially damaged cargo, they were entitled to be indemnified by the voyage charterers against the consequences of the Bills of Lading being inaccurate as to the apparent condition of the cargo.

The Arbitration Award was appealed by the voyage charterers to the English Commercial Court.

The Judge of the English Commercial Court held that pursuant to the Article III Rule 3 of the Hague-Visby Rules, it is the carrier's responsibility to assess the apparent order and condition of the goods.

“In making that assessment, the master does not act on the basis of the information provided to him by the shipper but makes his own independent assessment … [of the apparent order and condition of the goods].”

The Hague-Visby Rules, incorporated in the voyage charter party by the Paramount Clause, do not stipulate that the information provided in the Bills of Lading in respect of the apparent order and condition of the goods is deemed to be guaranteed by the shipper. In such circumstances there is no room for an implied guarantee or warranty in respect of the apparent order and condition of the goods.
Therefore, the shipowners and time charterers who conclude charterparties for voyages with soya bean cargoes from Brazil to China should include in such voyage charterparties an express indemnity clause to enable them to recover from the voyage charterers any sums they may have to pay to the Chinese receivers in the event that the soya bean cargoes deteriorate during the voyage due to their pre-shipment condition (excessive moisture content). If the voyage charter party would include an express indemnity clause, the charterer's obligation to indemnify the shipowners or disponent owners, as the case may be, will depend on the facts of the case in question and the provisions of the express indemnity clause.
The case **Priminds Shipping (HK) Co Ltd v. Noble Chartering Inc.** showed that unlike the Chinese courts which do not distinguish between the actual condition and the apparent condition of the goods, the English courts do this.
The Judge of the English Commercial Court held that since the pre-existing damage in the soya bean cargo was not visible to the Master or the ship's crew upon a reasonable examination, the Bill of Lading was not inaccurate as a matter of law.

"It contained no more than a representation of fact by the Master as to apparent condition that was not inaccurate because the Master did not and could not reasonably have discovered the relevant defects because they were not reasonably visible to him or any other agent of the claimant [disponent owners] at or during shipment."

The English Court of Appeal held that in cases such as that of **Priminds Shipping (HK) Co Ltd v. Noble Chartering Inc.**, the shipowners should not be held liable to the receivers under a Bill of Lading contract of carriage that is subject to the Hague-Visby Rules[2].

2 See Noble Chartering Inc. v Priminds Shipping Hong Kong Co Ltd. ("Tai Prize"), [2021] EWCA Civ. 87

The Chinese Rules On The Law Applicable To Cargo Claims Under The Bill Of Lading Contract Of Carriage

by Vlad Cioarec, International Trade Consultant

In claims for mould and/or heat damage to soya bean cargoes, the Chinese buyers frequently force the foreign shipowners to stand trial in Chinese maritime courts.
The Articles 15 and 21 of the Special Maritime Procedure Law of the People's Republic of China provides that a maritime claimant can ask a local maritime court to order the arrest of the ship that carried the cargo to which the claim relates until the shipowners will provide a security in the amount required. However, there is no requirement in the Chinese law that the security provided by the shipowners to the claimants should mention the Chinese law as the law applicable for the settlement of claims.
The Article 75 of the Special Maritime Procedure Law of the People's Republic of China provides that:

"The type and amount of the security provided by a person against whom the claim is made shall be determined through consultation by the maritime claimant and the person against whom the claim is made; if consultation fails, the matter shall be determined by the maritime court."

Provided that the Bill of Lading has specific provisions on the law applicable to contractual disputes, the shipowners may file an objection to the claimants' requirement that the security should mention that the claim be subject to the Chinese law. The Article 17 of the Special Maritime Procedure Law of the People's Republic of China provides that the shipowners may apply for review of the Court's order for the preservation of the maritime claim, if they are dissatisfied with such an order.
As regards the Bill of Lading provisions in respect of the law applicable to the contractual disputes, these should be specific.
The Article 269 of the Maritime Code of the People's Republic of China provides that the parties to a contract involving foreign elements may choose the law applicable to the settlement of their contractual disputes. The Chinese maritime courts held that the parties to a contract of carriage should choose in an explicit manner the law applicable to their contractual disputes[1].
Even though the Bills of Lading issued for soya bean cargoes transported to the Chinese ports incorporate the voyage charter party terms, the Chinese maritime courts held that the acceptance of the Bills of Lading by the Chinese buyers (claimants) shall not be deemed an implied consent to choose the applicable law specified in the charter party to govern the disputes arising from the Bill of Lading contract of carriage[2]. However, the acceptance by the Chinese buyers (claimants) of the Bills of Lading that stipulate expressly the law applicable to contractual disputes would be deemed an implied consent to choose the applicable law. Therefore, the Masters of the ships loading soya bean cargoes in Brazil for transport to ports in China should give instructions in the Letter of Authorization to the charterer's agents at loading ports to mention on the front page of the Bill of Lading or amongst the conditions of carriage stated on the following page(s) that the law applicable to contractual disputes shall be the English law.

1 See the Article 3 of the Rules of the Supreme People's Court on the Relevant Issues concerning the Application of Law in the Trial of Civil or Commercial Cases.

2 See The Case of Dispute over Contract of Carriage of Cargo by Sea Filed by Henan Cereals Oils and Foodstuffs Import and Export (Group) Co. Ltd. against Saint Vincent Shipping Inc. and Noble Europe Limited, (2004) GHFCZ No. 312.

In the absence of such clause in the Bills of Lading, the Chinese maritime courts consider that the parties to the Bill of Lading contract of carriage have not made a choice of the law applicable to their disputes[3]. In such case the applicable law shall be the law of the country having the closest connection with the contract of carriage. Since the discharging ports of the soya bean cargoes are in China, China is considered as the country having the closest connection with the contracts of carriage of the soya bean cargoes and the law of the People's Republic of China shall apply.

3 See The Case of Dispute over Contract of Carriage of Cargo by Sea Filed by Henan Cereals Oils and Foodstuffs Import and Export (Group) Co. Ltd. against Saint Vincent Shipping Inc. and Noble Europe Limited, (2004) GHFCZ No. 312.

In What Conditions The Chinese Buyers Of Soya Bean Cargoes Would Be Bound By The Arbitration Clause Of The Contract Of Carriage

by Vlad Cioarec, International Trade Consultant

China is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958[1]. The Article II paragraph 3 of the New York Convention has the following provisions:

"The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

The relevant provisions of the Arbitration Law of the People's Republic of China are quoted below:

Article 5
"If the parties have concluded an arbitration agreement and one party institutes an action in a people's court, the people's court shall not accept the case, unless the arbitration agreement is null and void."

Article 16
"An arbitration agreement shall include arbitration clauses stipulated in the contract and agreements of submission to arbitration that are concluded in other written forms before or after disputes arise.
An arbitration agreement shall contain the following particulars:
(1) an expression of intention to apply for arbitration;
(2) matters for arbitration; and
(3) a designated arbitration commission."

Article 18
"If an arbitration agreement contains no or unclear provisions concerning the matters for arbitration or the arbitration commission, the parties may reach a supplementary agreement. If no such supplementary agreement can be reached, the arbitration agreement shall be null and void."

The Chinese maritime courts consider that an arbitration clause of a contract can bind only the parties to it, in the case of a Bill of Lading contract of carriage, the carrier (shipowner) and the lawful holder of the Bill of Lading, notwithstanding that the Article 95 of the Maritime Code of the People's Republic of China provides that the legal relationship between the carrier and the third party holder of a Charter Party Bill of Lading shall be governed by the clauses of the Bill of Lading contract of carriage, including the clauses of the voyage charter party that are incorporated into the Bill of Lading contract of carriage.
Even though the Bills of Lading issued for soya bean cargoes transported to the Chinese ports incorporate expressly the London arbitration clause of the voyage charter party, the Chinese maritime courts held that the acceptance of the Bills of Lading by the Chinese buyers (claimants) is

1 The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted at New York, June 10, 1958.

not deemed an implied consent to choose the London arbitration for the settlement of disputes arising from the Bill of Lading contract of carriage.
This is the reason why the Masters of the ships loading soya bean cargoes for transport to the Chinese ports should give instructions in the Letter of Authorization to the charterer's agents at loading ports to mention on the front page of the Bill of Lading or amongst the conditions of carriage stated on the following page(s) an explicit arbitration clause drafted in compliance with the requirements stipulated in the Article 16 of the Arbitration Law of the People's Republic of China. The Bill of Lading clause should mention at least that the parties to the Bill of Lading contract of carriage agree to solve their contractual disputes by arbitration in London and that the arbitration shall be conducted by a Tribunal consisting of members of the London Maritime Arbitration Association.