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:

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- English Jurisprudence On The Effect Of NORGRAIN And SYNACOMEX Charterparty Provisions Relating To The Loading And Discharging Operations

- How The Chinese Maritime Courts Apportion Liability In The Claims For Damage To Soya Bean Cargoes

- Charterparty Provisions Concerning The Liability For Claims In The Event Of The Deterioration Of Soyabean Cargoes As A Result Of Prolonged Delays In Berthing The Ship At Discharge Ports

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

English And French Jurisprudence On The Effect Of FIO, FIOS And FIOST Terms In The Contracts Of Carriage

by Vlad Cioarec, International Trade Consultant

The contracts of carriage by sea for grain cargoes commonly state the sea freight on FIO (Free In and Out), FIOST (Free In and Out Spout Trimmed) or FIOSGT (Free In and Out Spout and Grab Trimmed) basis. The owners and disponent owners of the bulk carriers charge the sea freight without the costs of loading and discharging because they do not want to assume the responsibility for the acts of the ports operators and take the risks related to loading and discharging operations.

In order to protect themselves against the potential claims for cargo shortage, the shipowners and disponent owners of bulk carriers provide in the grain voyage charterparties and the contracts of affreightment that in the event that the seals of the hatch covers are found intact upon the vessel's arrival at the discharge port and the comparison of the cargo weight figures resulting from the vessel's draft survey reports at loading and discharge port show no or only an insignificant difference, the shipowners/disponent owners shall not be responsible for any shortage claim lodged by the cargo receivers and that it is the charterers' obligation to settle themselves any shortage claim lodged by the cargo receivers or to indemnify the shipowners/disponent owners in the event of a claim settled by the latter[1].

The effect of FIO, FIOS and FIOST terms was discussed over the years by the London maritime arbitrators, the English Commercial Court, the French maritime arbitrators and the French Commercial Courts in the numerous cases of shortage claims arising from the discharge of grain cargoes at Algerian, Tunisian and Moroccan ports.

The common cause of the cargo shortages in those claims was the cargo leakage from the grabs provided by the port operators appointed by the cargo receivers. The non-tight grabs leaked out the cargo on the ship's deck, on the sea water and on the quay.

In the arbitration and Court proceedings, the carriers contended that the effect of FIO, FIOS and FIOST terms is to allocate the contractual responsibility for loading and discharging operations exclusively to the charterers, shippers and cargo receivers and to exonerate the carriers from the liability in respect of the cargo losses arising during the discharging operations, since such losses occurred at a time when the cargo was not under the carrier's control.

The English and French Courts have a different opinion on this matter.

The English Courts consider that the FIO, FIOS and FIOST terms are concerned only with the allocation of cost[2]. In the English jurisprudence the FIO/FIOS/FIOST clause is considered just a financial provision related to the calculation of the sea freight that transfers to the charterers only the costs of loading, stowage, trimming and discharging operations.

In **Sea Master Shipping Inc v. Arab Bank (Switzerland) Ltd. & Anor**[3], the English Commercial Court held that a provision that transfers the responsibility for the cost of discharge to a charterer or cargo receiver will not have the effect of also transferring the obligation to carry out the task of discharge from the shipowner to the paying party.

In **Jindal Iron and Steel Co. Ltd., TCI Trans Commodities AG and Hiansa S.A. v. Islamic Solidarity Shipping Co. Jordan Inc. (The "Jordan II")**[4], the English Court of Appeal held that if

1 See CAMP Award no. 1158/2008

2 See Jindal Iron and Steel Co. Ltd., TCI Trans Commodities AG and Hiansa S.A. v. Islamic Solidarity Shipping Co. Jordan Inc. (The "Jordan II"), [2003] EWCA Civ 144; [2003] 2 Lloyd's Rep. 87. The English Court of Appeal held that FIOST is simply a "who is to pay" provision. The word "Free" means free of expense and not free of expense and responsibility.

3 [2020] EWHC 2030 (Comm), [2021] Lloyd's Rep Plus 21.

4 [2003] EWCA Civ 144; [2003] 2 Lloyd's Rep. 87.

the charterer or receiver has agreed to pay for the discharging operation, there is no presumption that it has also agreed to carry it out or be liable if it is done badly.

In **Societe De Distribution De Toutes Merchandises En Cote D'Ivoire (t/a "SDTM-CI") & Ors v. Continental Lines N.V. & Anor**[5], the English Commercial Court held that:

"FIOST terms do not, without more, transfer responsibility for performance of the loading, stowage, trimming and discharge operations to the charterers or the cargo interests."

Therefore, the English Courts require clear words for the transfer of responsibility for loading operation to the voyage charterer and/or the shippers and for discharging operation to the voyage charterer and/or the cargo receiver.

In the French jurisprudence it is considered that the concept of FIO/FIOS/FIOST is not limited to the financial aspects of the cargo handling during the loading and discharging operations, but it also implies that the carrier does not assume the responsibility for such operations[6].

The French Courts and maritime arbitrators consider that the FIO clause does not allow to imply "a contrario" that the absence of specific words for the transfer of responsibility for the cargo handling during loading and discharging of cargo distorts the nature of the contract of carriage to retain only the financial aspect of the FIO clause[7].

Thus the simple mention that the sea freight was agreed on FIO basis is sufficient to establish that the shipowner, except in case of any fault on his part, will not incur any responsibility for the consequences of the improper handling of cargo during the discharging operations. Therefore, the charterers have to bear not only the costs but also the risks relating to the cargo handling at the discharge port, including the risk of cargo spillage due to improper handling.

When it comes to the third party holders of the Bills of Lading, the French Courts and maritime arbitrators consider that the FIO/FIOS/FIOST terms should be mentioned on the front page of the Bills of Lading in order to be opposable to the third party holders and their subrogated underwriters.

If the FIO/FIOS/FIOST terms of the charter party are not mentioned in the Bills of Lading, they are not opposable to the third party holders and their subrogated underwriters because the French Courts and maritime arbitrators consider that the third party holders and their subrogated underwriters could not have known the charter party terms[8].

By contrast, the FIO/FIOS/FIOST terms mentioned in the Bills of Lading are opposable to the third party holders of the Bills of Lading without being necessary for the latter to have specifically expressed their willingness to accept it[9].

In the French jurisprudence it is considered that the purpose of FIO/FIOS/FIOST clause mentioned on the front page of the Bills of Lading is to state that the carrier will not assume the responsibility and liability for the loading and discharging operations and to make the shipper responsible for the loading operations and the consignee for the discharging operations[10]. The "Free Out" clause shifts to the consignee not only the cost of discharging operations but also the responsibilities arising from the task[11]. Therefore, it exonerates the carrier from liability for any part of the cargo lost or damaged during the discharging operation.

By mentioning the FIO/FIOS/FIOST terms on the front page of the Bills of Lading, the carriers of grain cargoes comply with the rule adopted in the French jurisprudence. In order to comply with both French and English rules, the carrier's agents should mention in the Bills of Lading in addition to the FIO/FIOS/FIOST terms that the carrier's responsibility for the cargo shall cease at the time

5 [2015] EWHC 1747 (Comm), [2015] 2 Lloyd's Rep. 395
6 See CAMP Award no. 999/ 2 February 1999 and CAMP Award no. 1240/ 19 September 2018.
7 See CAMP Award no. 1240/ 19 September 2018.
8 See CAMP Award no. 1157/ 8 November 2008 and CAMP Award no. 1211/ 9 August 2013.
9 See CAMP Award no. 1123/ 24 December 2005.
10 See CAMP Award no. 1123/ 24 December 2005.
11 See the 1996 decision of the Marseilles Commercial Court in The "World Apollo" case.

when the stevedores appointed by the consignee begin the discharging operation and that the stevedores at the discharge port are the servants of the consignee or at least include such provisions in the charter party incorporated in the Bills of Lading.

English Jurisprudence On The Effect Of NORGRAIN And SYNACOMEX Charterparty Provisions Relating To The Loading And Discharging Operations

by Vlad Cioarec, International Trade Consultant

In English law, there is no special requirement for the incorporation into the Bill of Lading contract of carriage of the charter party terms referring to loading, stowage and discharge of the cargo. Such terms can be incorporated into the Bill of Lading contract of carriage by general words of incorporation[1].

The carrier's liability in claims for cargo damages and shortages depends upon the terms of the voyage charter party setting the responsibility for performing the loading and discharging operations and the terms of the Bill of Lading, particularly the Charterparty Incorporation Clause of the Bill of Lading.

If the charter party terms incorporated into the Bill of Lading contract of carriage stipulate expressly that the responsibility for performing the loading, stowage and discharge operations and related risk thereto is upon the charterers, shippers and receivers, then the carrier cannot be held liable by the third party holders of the Charter Party Bills of Lading for the manner in which other parties carry out the loading, stowage and discharge of the cargo.

Although at common law, the responsibility for loading, stowage and discharge operations is upon the carrier, it could be transferred by agreement to the cargo interests[2]. What constitutes such an agreement depends upon the words used in the contract of carriage for the transfer of these responsibilities.

In **Jindal Iron and Steel Co. Ltd., TCI Trans Commodities AG and Hiansa S.A. v. Islamic Solidarity Shipping Co. Jordan Inc. (The "Jordan II")**[3], the Bills of Lading incorporated the terms of the voyage charter party which provided that:

"Shippers/charterers/receivers to put the cargo on board, lash, secure and dunnage, and discharge the cargo free of expense to the vessel."

The English Court of Appeal held that these provisions when incorporated in the contract(s) of carriage contained in the Bills of Lading were intended to relieve the carrier of all responsibility for cargo operations and transfer the responsibility for the proper performance of these activities to the shippers and receivers. The Bills of Lading represent the contracts originally made between the shipper and the carrier (the shipowner as carrier). By the terms of these contracts of carriage, the shipper agreed with the carrier that the shipper will carry out the loading and be responsible for it and that the consignee will carry out the discharge and be responsible for it. By taking out the Bills of Lading, the consignee as third party holder of the Bills of Lading becomes a party to the contract of carriage and must accept the contract terms stipulating who has the responsibility for loading and who has the responsibility for discharge.

The English Courts distinguish between the effect of Clauses 10 and 11 of NORGRAIN 89 charterparty form and the effect of Clause 5 of SYNACOMEX 2000 charterparty form when it comes to the responsibility for the loading and discharging operations.

1 The general words of incorporation are considered sufficient to incorporate the charter party terms setting the responsibility for performing the loading and discharging operations into the Bill of Lading contract of carriage. See Garbis Maritime Corporation v. Philippine National Oil Co., [1982] Lloyd's Rep. 284

2 See Jindal Iron and Steel Co. Ltd., TCI Trans Commodities AG and Hiansa S.A. v. Islamic Solidarity Shipping Co. Jordan Inc. (The "Jordan II"), [2003] EWCA Civ 144; [2003] 2 Lloyd's Rep. 87.

3 [2003] EWCA Civ 144; [2003] 2 Lloyd's Rep. 87.

The relevant provisions of NORGRAIN 89 charterparty form are as follows:

"10. Cost of Loading and Discharging

(a) Cargo is to be loaded and spout trimmed and discharged (to Master's satisfaction in respect of seaworthiness) free of expense to the vessel.*
(b) Cargo is to be loaded and trimmed at Owners' expense.*
Cargo is to be discharged free of expense to the vessel (to Master's satisfaction in respect of seaworthiness).

11. Stevedores at Loading Port(s) and Discharging Port(s)

Stevedores at loading port(s) are to be appointed by Charterers/Owners* and paid by Charterers*/ Owners*.*
Stevedores at discharging port(s) are to be appointed and paid by Charterers/ Receivers*.*
In all cases, stevedores shall be deemed to be the servants of the Owners and shall work under the supervision of the Master."

In **Sea Master Shipping Inc v. Arab Bank (Switzerland) Ltd. & Anor**[4], the English Commercial Court held that a provision that transfers the responsibility for the cost of discharge to a charterer or cargo receiver will not have the effect of also transferring the obligation to carry out the task of discharge from the shipowner to the paying party.
In **Jindal Iron and Steel Co. Ltd., TCI Trans Commodities AG and Hiansa S.A. v. Islamic Solidarity Shipping Co. Jordan Inc. (The "Jordan II")**[5], the English Court of Appeal held that if the charterer or receiver has agreed to pay for the discharging operation, there is no presumption that it has also agreed to carry it out or be liable if it is done badly.
Clauses 10 and 11 of NORGRAIN 89 charterparty form stipulate that the charterer or alternatively the cargo receiver has only the obligation to pay for discharge and in connection with that obligation it has to appoint the stevedores who are then to carry out the discharging operation on behalf of the shipowners. When the charter party provides for the stevedores to be the shipowner's servants, the discharging operations remain the responsibility of the shipowner represented by the Master and the shipowner shall be liable for any damage and/or shortage caused to cargo due to bad stevedoring operations. The obligation of the charterer/shipper and the receiver to engage and pay for the stevedores for loading and discharging the cargo does not, without more, impose responsibility for the performance of loading and discharging operations.
The relevant provisions of SYNACOMEX charterparty form are as follows:

"Clause 2
[At loading port] Owners shall provide and install at their risk and expense and on their time all that is required for safe stowage of grain according to local and international regulations."

"Clause 5
Cargo shall be loaded, spout-trimmed and/or stowed at the risk and expense of Shippers/ Charterers ...
Cargo shall be discharged at the risk and expense of Receivers/Charterers ...
Stowage shall be under Master's direction and responsibility."

4 [2020] EWHC 2030 (Comm), [2021] Lloyd's Rep Plus 21.
5 [2003] EWCA Civ 144; [2003] 2 Lloyd's Rep. 87.

In **Societe De Distribution De Toutes Merchandises En Cote D'Ivoire (t/a "SDTM-CI") & Ors v. Continental Lines N.V. & Anor**[6], the buyers of two cargoes of 453,089 bags of rice made claims under the contracts of carriage contained in the Bills of Lading for mould damage, loss of cargo from torn bags and short delivery of bags. The Bills of Lading incorporated the terms of a voyage charter party on the SYNACOMEX form.

The English Commercial Court held that to the extent that the mould damage was caused by the way in which the bags were stowed, then, by virtue of the provisions of Clause 2 and 5 setting the shipowner's responsibility for the stowage of bags, the shipowner as carrier shall be responsible for such bad stowage. But if the loss or damage to the cargo was caused by the improper loading or discharging, then, by virtue of the provisions of Clause 5, that loss or damage is the responsibility of the shippers and receivers who cannot recover in respect of such loss or damage from the shipowner.

The English Commercial Court held that the words in Clause 5 of SYNACOMEX charterparty form are sufficiently clear to impose the responsibility for the operations of loading and discharge and for any shortcomings in those operations on the charterers and, by incorporation into the Bills of Lading contracts of carriage, on the shippers and consignees.

Unlike NORGRAIN 89 and NORGRAIN SOUTH 2000 forms, SYNACOMEX 2000 and GRAINCON provisions would protect the carriers of grain cargoes in case of claims under contracts that are subject to English law. But in order to avoid ambiguity, the shipowners should add a provision in the voyage charter party (ship's fixture note) and the Bills of Lading stating that the charterers, respectively the shippers and receivers in the case of Bill of Lading contract of carriage, are to perform the loading and discharging operations on their risk and expense. An example of such clause is Clause 5(a) of Gencon Charter Party form which stipulates that:

"The cargo shall be brought into the holds, loaded, stowed and/or trimmed, tallied, lashed and/or secured and taken from the holds and discharged by the Charterers, free of any risk, liability and expense whatsoever to the Owners."

6 [2015] EWHC 1747 (Comm), [2015] 2 Lloyd's Rep. 395

How The Chinese Maritime Courts Apportion The Liability In Claims For Damage To Soya Bean Cargoes

by Vlad Cioarec, International Trade Consultant

At the Chinese ports it is not uncommon for the ships carrying soya bean cargoes in bulk to be required to wait sometimes even for prolonged periods either due to the late completion of the import formalities by the cargo receivers or as a result of a change of the import regulations, the change of import tariff[1], the change of VAT on the imports of soya beans, the congestion in ports or the lack of storage space ashore.

The prolonged delay in berthing caused in the past twenty years the partial deterioration of several soya bean cargoes and the cargo receivers sought to recover the financial loss incurred thereby from the shipowners.

Among the first cases of this kind reported by the Chinese maritime courts were the 2004's cases of Henan Cereals Oils and Foodstuffs Import and Export Group Co. Ltd. v. Saint Vincent Shipping Inc. and of Ping An Insurance v. Hanjin Shipping Co..

Both cases were related to the quarantine restrictions imposed by AQSIQ[2] on 10 May 2004 on the imports of Brazilian soya beans that prevented the ships carrying the Brazilian soya bean cargoes to enter into the Chinese ports.

In the case of Henan Cereals Oils and Foodstuffs Import and Export Group Co. Ltd. v. Saint Vincent Shipping Inc., a cargo of 60,000 MT of soya beans in bulk was loaded between 14 and 17 April 2004 on board the bulk carrier “Seafarer” at the port of Paranagua, in Brazil for transport to the port of Chiwan, in China. The cargo consisted of 11 parcels shipped by 11 different shippers. The Brazilian shippers sold the parcels on FOB terms to Noble Grain.

Noble Grain sold on the entire cargo shipped on board on CFR basis under two contracts, one for a quantity of 35,000 MT +/-10% and the second for a quantity of 20,000 MT+/-10% to a Chinese importer. The ETA date for the two cargoes at the port of Chiwan was 24 May 2004.

The payment of the two cargoes was to be made by letters of credit.

While the soya bean cargo was en route to China, on 10 May 2004, AQSIQ, a Chinese government agency in charge of imports of agricultural commodities, imposed quarantine restrictions on the imports of Brazilian soya beans prohibiting Noble Grain and other trading companies from exporting soya beans to China following the discovery by the Chinese authorities of soya beans treated with seed coated agent in a Brazilian soya bean cargo.

Subsequently, on 23 June 2004, AQSIQ issued a new Circular informing the local CIQ[3] branches that the import prohibition was lifted subject to the condition that if red beans (soya beans treated with seed coated agent) were found in the Brazilian soya bean cargoes, they had to be picked up and disposed of before discharging and the costs arising from the pick up and disposal of the red beans were to be borne by the suppliers (exporters).

The quarantine restrictions imposed by AQSIQ on the imports of Brazilian soya beans prevented the Chinese buyers to obtain the necessary documents for the import of soya bean cargo on board the vessel “Seafarer” between 10 May and 23 June 2004. Unable to import the soya bean cargo, the Chinese buyers asked the L/C issuing bank not to accept the documents submitted for payment by Noble Grain and refused to pay for the cargo during the quarantine restrictions.

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1 In June 2018 while the US-China trade war has gradually unfolded, the ship “Peak Pegasus” loaded a cargo of 70,000 MT of soya beans in Seattle and then rushed in a race against clock to reach the port of Dalian in China before noon on 6 July 2018 when the 25% tariff on the imported goods from USA took effect. The ship missed the noon deadline by 30 minutes and then had to wait for over a month off the port pending a settlement over the import tariff.

2 General Administration of Quality Supervision, Inspection and Quarantine of the People's Republic of China.

3 China Entry-Exit Inspection and Quarantine Bureau.

Due to the quarantine restrictions and the Chinese bank's refusal to accept the documents and pay under the letters of credit, Noble Grain instructed the vessel trough the time charterer Noble Europe initially to stay off Singapore for 4 days from 21 to 25 May 2004 and then to stay off Hong Kong waters for nearly one month from 29 May to 25 June 2004. Then on 26 June 2004, after the import prohibition was lifted, the vessel proceeded to the port of Chiwan and on 2 July 2004 arrived at the quarantine anchorage of the port of Chiwan. CIQ inspected the cargo on board the vessel and found red beans in the cargo. Then, CIQ issued a Notice to Noble Grain whereby the red beans had to be picked up and disposed of before discharging.

On 19 July 2004, Noble Grain reached an agreement with a local port operator to berth the vessel "Seafarer" and pick-up the red beans from the soya bean cargo. Finally, the vessel berthed at the port of Chiwan on 21 July 2004, which was nearly two months later than the ETA date pre-advised upon the departure from the loading port.

The discharging operations commenced on 22 July 2004, but due to the requirement to pick-up the red beans found in the cargo, there were delays in discharging the cargo which was completed on 12 August 2004. During the discharge it was discovered that a small part of the cargo was damaged, a quantity of 9.85 MT of soya beans was mouldy and a quantity of 258.777 MT of soya beans was damaged by self-heating.

CIQ issued a Damaged Cargo Inspection Certificate stating that:

- the mould damage to the quantity of 9.85 MT was caused by the ingress of sea water from the gap of the hatch covers when the vessel encountered bad weather during the voyage;
- the heat damage to the quantity of 258.777 MT was caused by the prolonged storage of soya beans in the cargo holds, insufficient ventilation and the delay in discharging due to the search for the red beans.

The cargo receivers claimed compensation from the shipowners for the cargo damage.

In respect of the heat damage to the quantity of 258.777 MT, the shipowners provided evidence that the fumigation instructions prevented the ship's crew to open the hatch covers' vents (ventilation openings) within 10 days after the date of fumigation. Then the vessel encountered bad weather and could not ventilate the cargo holds until 13 May 2004. After that date the ship's crew had carried out ventilation according to the dew point rule during the voyage and no abnormal change of temperature in the cargo holds had been found. The shipowners provided evidence in this regard with the Temperature and Cargo Ventilation Logbook.

Nonetheless, the Guangzhou Maritime Court held that the heat damage to the quantity of 258.777 MT was caused not only by the prolonged storage of the cargo in the ship's holds but also by the insufficient ventilation of the ship's holds. Therefore, the damage occurred partially due to the improper care of the cargo by the carriers and partially due to the late completion of the import formalities by the cargo receivers. Since it was difficult to determine to what extent the insufficient ventilation of the ship's holds and to what extent the prolonged storage of soya bean cargo in the ship's holds caused the heat damage to the quantity of 258.777 MT of soya beans, the Guangzhou Maritime Court decided that the shipowners had to bear a share of 50% of the loss arising from the heat damage and had to compensate the cargo receivers for the value of that share.

In respect of the mould damage to the quantity of 9.85 MT, the Guangzhou Maritime Court held that the damage was caused by the improper care of the cargo by the carriers who had to compensate the cargo receivers for the full value of the loss.

In the case of Ping An Insurance v. Hanjin Shipping Co., the loading of a 60,000 MT cargo was completed on 7 May 2004. The cargo was loaded at the port of Santos on board the bulk carrier "Hanjin Tacoma" for transport to the port of Zhanjiang in China.

The cargo was procured on FOB terms from the Brazilian shippers by Louis Dreyfus Asia Pte. Ltd. for on-sale on CFR terms to a Chinese importer, Guangdong Fuhong Edible Oil Co. Ltd.

The vessel arrived at the port of Zhanjiang and tendered NOR on 19 June 2004 but, due to the quarantine restrictions, it had to wait until the end of July 2004 for the cargo receivers to obtain the necessary documents for the import of soya bean cargo.
The discharging operations commenced on 1 August 2004 and were completed on 3 September 2004 due to the delays caused by the requirement to pick-up the red beans.
During the discharge of cargo, it was discovered that a quantity of 5,868.428 MT of soya beans was mouldy or damaged by self-heating. The cargo insurers, Ping An Insurance claimed compensation for the cargo damage from the shipowners.
Like in the case of Henan Cereals Oils and Foodstuffs Import and Export Group Co. Ltd. v. Saint Vincent Shipping Inc., the Guangzhou Maritime Court held that the damage occurred partially due to the improper care of the cargo by the shipowners and partially due to the late completion of the import formalities by the cargo receivers, but taking into consideration the extent of the damage to cargo compared to the previous case and the shipowners' failure to provide “satisfactory evidence” that the ship's crew had monitored the cargo temperature and properly ventilated the cargo during the voyage and during the time spent waiting for berth, the Court considered that the shipowners were the main ones responsible and therefore, they had to bear a share of 70% of the liability, the balance of 30% being the receivers' share of liability.
It looks like the Chinese maritime courts apportion the liability for the cargo damage taking into consideration the time spent by the vessel waiting for berth, the extent of the cargo damage and the documentary evidence provided by the shipowners. The greater the extent of the cargo damage, the greater the chances that the shipowners will be held the main ones responsible. The longer the time spent by the vessel waiting for berth, the greater the chances that the liability for the cargo damage will be shared 50/50 by the shipowners and the cargo receivers.

Charterparty Provisions Concerning The Liability For Claims In The Event Of The Deterioration Of Soyabean Cargoes As A Result Of Prolonged Delays In Berthing The Ship At Discharge Ports

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 the lack of storage space ashore for the cargo, the receivers' failure to complete the import formalities in due time, the change of import regulations, congestion in ports or quarantine restrictions. 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].
In the event that a soya bean cargo or a part of it deteriorates as a result of prolonged delays in berthing the carrying vessel and the cargo receivers make a claim against the shipowners as carriers under the Bills of Lading, the shipowners have to settle the claim with the cargo receivers.
The shipowners' legal remedy against the charterers will depend on whether the vessel was in a time charter party or in a voyage charter party and on the charter party indemnity provisions, if any.

The Shipowners' Legal Remedy Under Time Charters: The Apportionment Of Liability For Cargo Claims Under The Inter-Club Agreement

In the event of claims for deterioration of cargo caused by prolonged delays in berthing the vessel, in time charters are applicable the provisions of the Sub-Clause 8(d) of the Inter-Club New York Produce Exchange Agreement, commonly referred to as the Inter-Club Agreement or ICA, which stipulates that the cargo claims shall be apportioned 50/50 between the charterers and shipowners *"unless there is clear and irrefutable evidence that the claim arose out of the act or neglect of the one or the other (including their servants or sub-contractors) in which case that party shall then bear 100% of the claim"*.

In the English law case **Transgrain Shipping (Singapore) PTE Ltd v. Yangtze Navigation (Hong Kong) Co Ltd & Anor**[2], the time charterers of a ship carrying a cargo of soya bean meal gave instructions to Master to wait off the discharge port for over four months. After the ship berthing, it was found that part of the cargo deteriorated due to self-heating. The shipowners had to settle the claim of the cargo receivers and then sought to recover the sum paid to cargo receivers from the time charterers on the ground that the receivers' claim for cargo deterioration was the consequence of an act of time charterers, the order to wait off the discharge port for over four months, and therefore, the time charterers were 100% liable pursuant to the provisions of Sub-Clause 8(d) of the Inter-Club Agreement.
The time charterers contended that their share of liability should have been limited to 50% of the cargo claim and not be held liable for 100% of the cargo claim on the ground that the term "act" in the provisions of Sub-Clause 8(d) of the Inter-Club Agreement means a "culpable act" in the sense of fault.
The LMAA tribunal held that the cause of the damage to cargo was a combination of the inherent vice of the cargo together with the prolonged period of storage in the ship's holds while the ship waited off the discharge port. The charterers' instructions for the Master of the vessel to wait outside the discharge port knowing the cargo's inherent vice was considered an "act" falling within the scope of Sub-Clause 8(d) of the Inter-Club Agreement and therefore, the charterers had to bear

1 For more on this matter see Gard's Loss Prevention Circular No. 03 – 13 – "Prevention of soya bean cargo claims".
2 [2016] EWHC 3132 (Comm)

100% of the consequences. The LMAA tribunal held that any act, whether culpable or not, is sufficient to constitute an “act” for the purposes of Sub-Clause 8(d) of the Inter-Club Agreement.
The time charterers made an appeal against the arbitration award, contending that the word “act” meant only culpable acts and the LMAA tribunal was wrong to hold that any act, whether culpable or not, is sufficient to constitute an “act” for the purposes of Sub-Clause 8(d) of the Inter-Club Agreement.
The English Commercial Court dismissed the time charterers' appeal and held that the word “act” in Sub-Clause 8(d) of the Inter-Club Agreement does not mean only culpable acts but any act, whether culpable or not. The purpose of the Inter-Club Agreement is to enable the apportionment of liability for cargo claims between the shipowners and the time charterers on a “more or less mechanical” basis without regard to questions of fault[3].

The Shipowners' Legal Remedy Under Voyage Charters

In voyage charters, the shipowners or the time charterers as disponent owners should either include an express indemnity clause or ask the voyage charterers to provide a letter of indemnity covering the potential liabilities that might be incurred by the shipowners/disponent owners in the case of cargo deterioration for reasons outside the shipowners/disponent owners' responsibility including, but not limited to, the soya beans' pre-shipment condition (excess moisture content), prolonged storage on board the ship at or off the discharge port due to the failure of charterers/receivers to complete the import formalities in due time and/or to provide a berth upon the ship's arrival.
The charter party indemnity clause or the voyage charterer's letter of indemnity should contain the voyage charterer's undertaking to pay to the shipowners/disponent owners:
- the contractual damages for the detention of vessel, that is, for the time spent by the vessel off the port limits in the event that this is not covered by the charter party demurrage provisions;
- the legal costs for defending the receivers' claim;
- the sums paid for the settlement of the receivers' claim;
- any other costs, including the additional discharge costs incurred for the segregation of damaged part of the cargo.

The shipowners/disponent owners should also stipulate in voyage charter parties that the demurrage is intended to cover only the direct losses resulting from the detention of ship beyond the contractual laytime and not the liability that the shipowners/disponent owners might incur due to the cargo deterioration for reasons for which the shipowners/disponent owners are not responsible.
The failure to address this matter in voyage charterparties and to ask for an express indemnity covering the potential liabilities that might be incurred by the shipowners/disponent owners in the case of cargo deterioration would expose the shipowners/disponent owners to the risk of claims from the cargo receivers without the possibility to recover from the voyage charterers.
An example of such case was the English law case **K-Line Pte Ltd. v. Priminds Shipping (HK) Co. Ltd. (The “Eternal Bliss”)[4]**. 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.

3 The decision of the English Commercial Court was upheld by the English Court of Appeal. See Transgrain Shipping (Singapore) Pte Ltd v. Yangtze Navigation (Hong Kong) Co Ltd., [2017] EWCA Civ. 2107
4 [2021] EWCA Civ 1712

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 cargo receivers brought a claim against the shipowners for cargo damage. The shipowners (in fact, the ship's P&I Club) had to pay $1.1 million to the cargo receivers 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 shipowners' claim was a claim for detention of the ship and whether the demurrage is liquidated damages for all the consequences of the charterers' failure to unload the cargo within the contractual laytime or only some of them.
In a decision from 2020, the English Commercial Court held that the financial loss incurred by the shipowners 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 shipowners were entitled to recover the sum of $1.1 million paid to settle the claim of the cargo receivers 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:
- 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 charterers agreed that the shipowners 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 charterers' 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 charterers' 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 charterers 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.”