



## 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:

- **Legal Test For Remoteness In Indemnity Claims For Losses Occurred Up In The Contractual Supply Chain**
- **The Legal Nature Of The Port Nomination Provision In FOB Sale Contracts**
- **The Purpose Of The Laycan Narrowing Provision In FOB Sale Contracts**
- **Charterparty Requirements In Respect Of The Timely Submission Of NOR**

If you have any comments about the matters reviewed in this edition, please address them to [editor@commoditylaw.eu](mailto:editor@commoditylaw.eu)

# The Legal Test For Remoteness In Indemnity Claims For Losses Occurred Up In The Contractual Supply Chain

by Vlad Cioarec, International Trade Consultant



In **Mitsui & Co (USA) Inc. v. Asia-Potash International Investment (Guangzhou) Co. Ltd.**<sup>1</sup>, a cargo of 60,000 MT of Brazilian Soyabeans was sold along a chain of sellers and buyers on FOBST terms. The sale contracts in the chain incorporated the terms of FOSFA Contract No.4 and ANEC Contract No. 41 forms. The last contract in the chain was concluded with a Chinese buyer and included the Chinese purchase terms that were different from the terms of the other contracts in the chain in respect of the quality specifications, loading terms, payment terms, futures give-up, cargo surveyors, safe port/berth warranty and minimum draft guarantee at loading port.

The seller in the last contract in the chain claimed indemnities from the Chinese buyer for claims under which it became liable to the shippers and prior sellers in the contractual supply chain as a result of the buyer's repudiation of contract upon the partial shipment of the cargo.

The seller contended that since he became liable for claims made by the shippers and prior sellers up in the contractual supply chain, the buyer must in turn be liable to the seller to the extent that the buyer's breach caused the loss.

In the English law, in the case of contractual claims, it must be considered:

- the legal test for causation, i.e. whether the defendant breached the contract;
- the legal test for mitigation, i.e. whether that breach caused the loss in question;
- the legal test for remoteness, i.e. whether the loss was not too remote.

In **Mitsui & Co (USA) Inc. v. Asia-Potash International Investment (Guangzhou) Co. Ltd.**, the question in dispute was whether the types of loss claimed by the final seller in the chain were not too remote given that some of the contractual terms agreed by the final seller with the Chinese buyer were different from the terms of the other contracts in the chain.

A requirement in string trading is that the terms of each contract in the string must match the terms of the others, except for the price. On that basis the FOSFA Board of Appeal held that since some of the terms in the contract in dispute were different from the other contracts, it meant that the respective contract was a stand-alone contract and was not in a string or even a chain with the purchase contracts between the seller (claimant) and the prior sellers. As a result, the FOSFA Board of Appeal dismissed the seller's indemnity claims considering that they were too remote.

The FOSFA Board of Appeal considered that the fact that the contract in dispute was not in a string was what mattered for remoteness purposes.

In appeal, the English Commercial Court held that:

*“The FOSFA Board of Appeal focused exclusively on the string/back-to-back issue when they ought to have asked themselves whether the indemnities which [Seller] was claiming were of a type or kind which would have been in the parties' contemplation.”*

Even if there were differences between the terms of the contract in dispute and the terms of the other contracts in the chain, the correct remoteness approach would have been to determine:

- first, whether, due to the nature of the buyer's breach, the types/kinds of loss claimed were foreseeable irrespective of any difference of terms between the contracts;
- secondly, which terms in each contract were relevant to those types/kinds of loss and whether such terms differed between the purchase contracts concluded by the seller (claimant) with the prior sellers and the sale contract concluded with the Chinese buyer;

<sup>1</sup> [2023] EWHC 1119 (Comm)

- and thirdly, whether, in any event, the same or greater losses would have flowed had the contracts been 100% back-to-back.

The English Commercial Court remitted the case to the FOSEA Board of Appeal to consider whether the losses incurred by the shippers and prior sellers in the chain were a type of losses which the Chinese buyers ought to have realised, at the time they concluded the purchase contract, that were not unlikely to result in the event of their repudiation of contract.

In the English law, it is not the precise circumstances that occur that must be foreseeable, but the type or kind of loss. The fact that the seller (claimant) would suffer loss in the string in the event that the Chinese buyer in the event that the Chinese buyers refused to perform the contract was entirely foreseeable.

## The Legal Nature Of The Port Nomination Provision In FOB Sale Contracts

by Vlad Cioarec, International Trade Consultant



If the sellers do not know at the time of concluding the FOB sale contract with the buyers at which port they will be able to deliver the cargo, they can indicate a range of ports out of which they will subsequently nominate the actual port of loading. The buyers and shipowners would need to know the loading port in due time before the contract delivery period in order to be able to comply with the requirements of the port operators. This is the reason why the contracts for sale of full cargoes should stipulate a deadline for the nomination of the loading port. An example of such provision is the Clause 7 of the ANEC Contract form No. 42 which stipulates that the loading port must “*be declared at the latest 30 days before first day of Delivery Period*”.

In such case, the seller's obligation to nominate a loading port within the contractual time limit is considered a condition of the contract, because the buyer's compliance with the obligation to nominate a suitable vessel is dependent upon the timely nomination of the loading port by the seller. 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 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.”*

## The Purpose Of The Laycan Narrowing Provision In FOB Sale Contracts

by Vlad Cioarec, International Trade Consultant



In FOB sale contracts where the delivery period is stated as a vessel presentation period, the buyer's obligation is to present the vessel ready in all respects for loading by the end of the last day of the delivery period provided that the buyer gives the required pre-advance of the vessel's ETA. When the FOB buyer nominates the vessel for the loading of cargo, he also has to declare the vessel's laycan at loading port. This is sometimes referred to as the narrowing of the contract delivery period to the vessel's laycan.

The purpose of a laycan narrowing provision in such contracts is to reduce the costs related to the storage of cargo at the loading port. The shorter the laycan will be, the lower will be the costs related to the storage of cargo at the loading port before the shipment on board the vessel.

After the buyer declares the laycan period, this becomes the new presentation period for the vessel, which will have to tender valid NOR by the end of the last day of the laycan period<sup>1</sup>. If the buyer's vessel fails to tender valid NOR by the end of the last day of the laycan period, the seller is entitled to terminate the contract irrespective of the previous period initially agreed in the contract<sup>2</sup>. Alternatively, the buyer may request the extension of the vessel presentation period thereby undertaking the obligation to reimburse the cargo carrying charges incurred by the seller during the extension period.

If the intention of the contracting parties is that the contract delivery period shall be a shipment period during which the loading of cargo must be completed, then they should stipulate this matter clearly in the sale contract. Such contracts should also stipulate not only the shipment period but also a vessel presentation period with a contractual time limit for the vessel tender of valid NOR taking into consideration the time necessary to complete the loading of the cargo quantity at the contractual loading rate and the last day of the shipment period. It should also stipulate that the vessel's ETA must be pre-advanced not later than the day before the commencement of the minimum pre-advance period before the last day of the period for the presentation of vessel for loading. The vessel's laycan to be declared by the buyer must fall entirely within the vessel presentation period stated in the contract.

If the completion of loading before the end of the shipment period is a condition of the contract, then it would also be considered a condition of the contract the requirement that the buyer presents the vessel ready in all respects for loading before the contractual time limit to enable the seller to load the cargo by the end of the shipment period<sup>3</sup>.

The FOB buyers should avoid to use the laycan narrowing provisions with reference to the shipment period. A shipment period cannot be narrowed to a laycan. A laycan narrowing provision in an FOB sale contract will have the effect that the buyer's vessel has to tender valid NOR during the narrowed period and not that the seller has the obligation to deliver the full cargo on board the vessel by the end of that period. If the intention of the contracting parties is to narrow the shipment period, then they should specify this matter clearly in the contract and not use a laycan narrowing provision.

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1 See the GTA Arbitration No. 187/2014 in Grain Trade Review Edition No.2.

2 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.

3 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."



## Charterparty Requirements In Respect Of The Timely Submission Of NOR

by Vlad Cioarec, International Trade Consultant



In the FOB sale contracts where the delivery period is stated as a vessel presentation period, the buyer's vessel must tender valid NOR either before the end of such period (i.e. not later than 23:59 hours on the last day of the contract delivery period) or any subsequently declared laycan period.

The FOB buyers should ensure that the sale contract and voyage charterparty have matching provisions in respect of the deadline for the submission of NOR for laycan purposes.

Similarly, the voyage charterers who sub-charter the vessels should ensure that the head charters and the sub-charters have back-to-back provisions in order to avoid a financial loss in the event of a late submission of NOR. An example of such case was the English law case **Bilgent Shipping Pte Ltd v. ADM International Sarl**<sup>1</sup>. In that case ADM voyage chartered the vessel "Alpha Harmony" from the shipowners Oldendorff for two voyages from Brazil, Argentina or Uruguay to China.

The vessel was sub-chartered by ADM to Bilgent Shipping for a voyage from Brazil to China.

The head charterparty was on an amended Norgrain form and stated two laycan periods: 1-30 April 2015 and 1-31 May 2015.

The sub-charter was on an amended Baltimore Form C Berth Grain form and stipulated a laycan period between 1-31 May 2015.

Both charters had laycan narrowing provisions stipulating the charterers' obligation to narrow the laycan period to a 10 days' spread. On 2 April 2015 the laycan period was narrowed to 1-10 May 2015 by Bilgent Shipping under the sub-charter and then by ADM under the head charter.

The vessel arrived at loading port at 02:50 hours on 10 May 2015 which was a Sunday and tendered NOR by email at 07:04 hours.

The head charter provided that for laytime purposes the NOR had to be tendered between 08:00 and 17:00 hours on the weekdays and between 08:00 and 11:00 hours on the Saturdays. The laytime was to commence at 08:00 hours on the next working day after a valid NOR had been tendered.

However, for laycan purposes the NOR could be tendered at any time before 23:59 hours on the last day of the laycan (cancelling date).

The sub-charter had different provisions. Similarly to the head charter it stated that the NOR had to be tendered between 08:00 and 17:00 hours on the weekdays and between 08:00 and 11:00 hours on the Saturdays but then it provided that if the NOR had not been delivered within the specified office hours was invalid for the laycan purposes.

Bilgent Shipping cancelled the sub-charter at 20:47 hours on Sunday 10 May 2015 and then ADM cancelled the head charter at 05:55 hours on Monday 11 May 2015. The case reached to the English Commercial Court which was asked to decide whether the cancellations were lawful in circumstances where, although the NOR had been tendered before the relevant time on the cancelling date, it had not been tendered during the specified office hours.

The English Commercial Court held that under the sub-charter the NOR was invalid for the laycan purposes because it was not tendered within the specified office hours. Therefore, the sub-charterers were entitled to cancel the sub-charter when they did. Unlike the sub-charter, the head charter created a different NOR regime for the cancellation purposes than that which applied for laytime purposes. There was no requirement for the NOR to be tendered within the office hours for the cancellation purposes. The NOR could be tendered at any time before 23:59 hours on the cancelling date. Therefore, the head charterers were not entitled to cancel the head charterparty.

An example of voyage charterparty form which provides a different time limit for the submission of valid NOR for cancellation purposes than that which applies for laytime purposes is GTA Voyage Charter – AusGrain 2015. It stipulates in Sub-Clause 19.3 that the Master must tender NOR

<sup>1</sup> [2019] EWHC 2522 (Comm), [2020] 1 Lloyd's Rep. 409

between 09:00 and 17:00 hours on the weekdays and then in Sub-Clause 20.1 provides that the charterers shall have the option of cancelling the charterparty if the vessel is not able to tender valid NOR before 24:00 hours on the last day of the final laycan (narrowed laycan).

Another example is Synacomex 2000 grain charterparty form which provides that the NOR has to be tendered between 08:00 and 17:00 hours on the weekdays and between 08:00 and 12:00 hours on the Saturdays and that the charterers shall have the option of cancelling the charterparty if the vessel does not tender valid NOR before 09:00 hours on the cancelling date.