COMMODITIES: COMMON ISSUES IN OIL TRADING CONTRACTS – TIME FOR DELIVERY AND LAYCAN

In the second briefing in our series, we look at three issues in relation to time for delivery and laycan, provide some case examples and give three key takeaways.

Issue 1: Using "Laycan" in sale contracts

The term "laycan" is frequently used in sale contracts to refer to the delivery period of the cargo.

However, "laycan" is a charterparty term, referring to the period during which the vessel must arrive at port. It does not denote the period during which delivery of the goods must take place – unless specifically defined that way in the contract. This distinction can give rise to problems. For example, the buyer will have no right to reject the cargo if it is not loaded within the "laycan".

“ETAs must be given honestly and on reasonable grounds. This is a condition of the contract and a buyer will be entitled to terminate if the seller is in breach.”

Issue 2: Giving an ETA

ETAs must be given honestly and on reasonable grounds. This is a condition of the contract and a buyer will be entitled to terminate if the seller is in breach.

Issue 3: Delivery window is not a guarantee of arrival time.

The seller’s obligation under a CIF contract is to load the cargo on board a vessel within a timeframe that, in the ordinary course of events, would enable the cargo to arrive at its destination within the stipulated delivery window. However, this is not a “guaranteed arrival” window.

This principle applies to CIF and CFR contracts, but not CIF delivered contracts. Where a CIF sale contract provides for “arrival” within specific dates then it is a CIF *delivered* contract with a guaranteed arrival window. In CIF *delivered* contracts, the sellers are entitled to treat the contract as repudiated by the time it is clear that a vessel is going to miss her laycan at the discharge port[1].

Case example 1

The first two issues arose in the “AZUR GAZ”[2] - a case in which a CIF sale contract contained a delivery clause referring to “laycan” without further definition.

It read: *“Laycan Feb 17-19 2003 consequently ETA Gabes Feb 20 am La Goulette Feb 19 pm”*. The contract incorporated both the charterparty terms *“where not in conflict with terms of the main body of this contract”* and Incoterms 2000, meaning the seller had to deliver the goods on board the vessel at the port of shipment within the agreed period.

Bad weather prevented the vessel from berthing at the loadport until 3 March. The buyer cancelled the contract, arguing first that the reference to “Laycan Feb 17-19 2003” was to be construed as reference to a shipment period, and the seller was in breach of its obligation to ship within that period; second, that there was an implied term that the goods would be shipped within a reasonable time under **s. 29(3) Sale of Goods Act** 1979, which had expired; and third, that the seller was in breach of its undertaking that the ETAs given were reached honestly and on reasonable grounds.

The seller claimed the buyer was in repudiatory breach and claimed damages. The court rejected the seller’s claim.

The court held that the term “laycan” did not mean “shipment period”. “Laycan” was intentionally chosen by the parties and should be given its ordinary meaning, consistent with the incorporation into the sale contract of the charterparty (which defined “laycan”). This was not in conflict with the main terms of the sale contract. Further, the use of ETAs at the discharge port to give assurance about arrival would not have been necessary if the shipment period was guaranteed .

In the absence of an expressly agreed shipment period, there was an implied term that the seller would ship the goods within a reasonable time. However, the seller was not in breach of that term.

At this point, despite the late arrival of the goods, the buyer could have found itself liable in damages for terminating the contract. However, the court found that the seller’s ETA for the discharge port was not based on reasonable grounds since it was given without any information as to the berthing prospects at the loadport, a port of which the seller had no experience. It was not reasonable to assume that there would be no problems and to make no enquiries. The seller’s breach entitled the buyer to terminate.

Case example 2

Issue 3 arose in the “WISE”[3], a contract on CFR Melbourne, Australia

1. The Jambur, 14 November 1990, unreported (transcript available on Lexis).
2. SHV GAS SUPPLY AND TRADING SAS V NAFTOMAR SHIPPING & TRADING CO LTD INC. [2005] EWHC 2528 (COMM) (the “Azur Gaz”).

terms with a delivery period of 15 - 30 March 1986. The vessel loaded on or around 6 March 1986 and was expected to arrive at her destination on 27 March. She was hit by an Exocet missile in the Arabian Gulf en route. Whilst the engine room was damaged beyond repair, the cargo was untouched. She was towed to a nearby port and the cargo transhipped to Melbourne, arriving after 30 March 1986.

The buyers claimed frustration of the contract or in the alternative, that they had the right to reject the cargo because it had arrived after the contractual delivery period. The Court of Appeal held that the delivery clause provided for the period within which the vessel was expected to arrive and was not designed to give a guarantee of arrival.

KEY TAKEAWAYS

- Don't use "laycan" to denote the delivery period in your sale contracts unless you expressly define it that way. It may seem like a handy shortcut but can create problems down the line.
- If your contract requires you to give vessel ETAs, make sure you can show that you do so honestly and on reasonable grounds. Document the enquiries you make.
- Understand your contract before you claim: you cannot necessarily rely on late arrival to claim against your seller in a CIF/CFR contract.

If you would like to discuss any of the issues raised in this briefing, please contact:

SARAH HUNT
Partner, Geneva
T +41 (0)22 322 4816
E sarah.hunt@hfw.com

AMANDA RATHBONE
Professional Support Lawyer, Commodities, London
T +44 (020 7264 8397
E amanda.rathbone@hfw.com

3. Vitol SA v ESSO Australia Ltd [1989] 2 Lloyd's reports 451 (the "WISE").

HFW has over 600 lawyers working in offices across the Americas, Europe, the Middle East and Asia Pacific. For further information about our commodities capabilities, please visit www.hfw.com/commodities

hfw.com

Americas | Europe | Middle East | Asia Pacific