Shipment/Delivery Periods in FOB Contracts: confusion explained

Commercial trends in FOB contracts have changed over the years, creating more sophisticated contract clauses to satisfy traders’ needs and requirements.

Although these changes have some benefits and merits, they can also create confusion among the contractual parties in case of dispute. The confusion arises when there are no clear provisions in respect of all of the relevant time limits and a mismatch of parties’ obligations. This Alert seeks to highlight the problems for traders and suggest some answers.

Traditional v Modern Approach

In a traditional approach in an FOB contract, the term “shipment period” is used in order to create obligations on the Seller to ship the goods during a specific period, i.e. by the end of the period. This guarantees a Bill of Lading dated no later than the final day of the shipment period. The Buyers’ obligation is to give “effective shipping” instructions, i.e. to nominate and present for loading a vessel which can load at the contractual rate by the end of the shipment period.

The more modern approach is to use “delivery period” and “laycan” or “laydays” to create tight obligations on the Buyer to make the vessel available for loading at the loading installation within a particular (usually short) period.

Shipment Period: who does what?

- It is the duty of an FOB Seller to put the goods on board a ship nominated or designated by the Buyer;
- The Buyer must nominate and present a suitable vessel which is capable of completing loading within the shipment period;
- The shipment period is usually a “condition” of the contract. Failure to load within the contractual shipment period usually gives the opportunity to the Buyer to reject the documents and goods.
- Similarly, the timing obligations of the Buyer for nomination and presentation of the vessel are usually conditions. The Seller can reject a vessel which is too late.
- Time of shipment is generally at Buyer’s option, meaning the Buyer can nominate a vessel for loading at any time during the shipment period. The Seller will then pay demurrage if loading is not completed within the laydays.
- A Seller is not in breach of condition for failing to load promptly on arrival of the vessel. A vessel arriving very early in the shipment period can often therefore be kept waiting by Sellers on payment of demurrage and the Buyer cannot withdraw the vessel.

Delivery Period/Laycan

What then are the obligations if the FOB contract does not provide for a shipment period?

The “Delivery Period” in an FOB sale can be a period for presentation by the Buyer of the vessel – see for example, GAFTA FOB contracts:

“Provided the vessel is presented at the loading port in readiness to load within the delivery period, Seller shall, if necessary, complete loading after the delivery period …
Alternatively, many traders use “shipment” and “delivery” periods interchangeably to mean the same thing. As a result, the various other terms of the contract must be scrutinized to see what the intention of the parties was.

One way in which traders have made clear that the period is for presentation of vessel, not completion of loading, is the adoption of charterparty wording “laycan” or “laydays” in the sales contract e.g. “Delivery within period February 2008, buyer will narrow such period to a two day laycan ..” or “Laycan: 17-19 Feb 2008”. See also, for example, BP GTCs 2007, Section 5 “The Buyer shall ensure that by no later than 2400hrs on the last day of the Laydays the vessel has arrived and tendered NOR”.

The danger of the FOB contract specifying a period for arrival of the vessel is that there is then the unanswered question of when exactly does the Seller have to load?

The quick answer is at the agreed loading rate, otherwise Seller will pay demurrage for late loading. The more difficult issue is when is the LATEST the Seller must load? When can the Buyer withdraw his ship for failure to load?

It is this issue that demonstrates a potential problem with this method of defining FOB obligations.

This arose in ERG RM v. Chevron [2007] All ER 364 and SHV Gass v. Naftomar [2006] 2 All ER 515. In both cases it was clear that “laycan” was the period for arrival and NOR of Buyers’ vessel. In both cases, the Seller delayed/was not able to load immediately. In both cases, the Buyer tried to terminate for late loading and the Court held they were not entitled to do so. The time for presentation of the vessel by the Buyer was a condition of the contract, meaning the Seller could terminate for non arrival of the vessel. There was no similar absolute deadline for Sellers’ performance.

The result of these decisions is:

- “Laycan” or “laydays” does not mean the same as shipment period;
- This wording makes the contract a “non-traditional” FOB contract;
- The Buyer runs the risk of the contract being terminated if the vessel does not arrive in time;
- The Buyer is entitled to present the vessel at any time up to 2400 hours on the last day of the laycan spread;
- The Seller would be in breach giving rise to damages (usually demurrage) if he did not load within the laydays but would not be in breach of condition;
- Other losses (e.g. market losses) would not be recoverable by the Buyer for the failure of the Seller to load promptly, demurrage is usually the only remedy;
- The Buyer would only be entitled to terminate for non-loading and remove his vessel after a “frustrating time” based on charterparty cases. “Frustrating” period is ill defined and unhelpful to most Buyers seeking a clear date when they may withdraw the vessel.
- Sellers’ late loading may have substantial consequences for Buyers, particularly if pricing is B/L date dependent but demurrage is the only recovery the Buyer can usually recover.

**Letter of Credit: What period?**

This type of FOB contract also complicates the L/C to be opened if the contract provides for a L/C. Almost always, the L/C will provide for a shipment date and the L/C will not respond if the B/L is dated after that period. In the alternative type of FOB contract, what date should the Buyer insert in the L/C?
This issue arose in *Cereal Investment v. ED & F Man Sugar* [2007] All ER 100. The FOB contract provided:

“One vessel only presenting October 2006 shipment at Buyer’s option …”.

The Buyer opened an L/C providing for shipment latest 31 October 2006. The Seller objected and required that the L/C to be amended to cover November B/Ls. The Buyer refused (saying that they would extend if later required).

A preliminary issue in the case determined there was no shipment period in the sale contract and the Judge said “in a case where the contract itself does not identify a fixed deadline the buyer will have to make a reasonable estimate of when shipment will be complete …”. The Judge admitted that this gave rise to uncertainty and we agree. There is significant scope for disagreement concerning whether the L/C is compliant or not.

**Conclusions**

We have had a number of cases recently where the Buyer was keen to withdraw a vessel for non loading by the Seller but contract terms did not permit this, so the Buyer then runs the risk of himself being in default. The simple question “How long do I have to wait” had no simple answer.

We have also had cases where Traders assume that they have made back to back FOB sales where, on analysis, one is a traditional FOB sale, one is a contract providing for delivery of the vessel not loading within the contract period, giving a serious mismatch of obligation. Care must therefore be taken to look at which type of FOB contract is made.

Ideally, a latest date for loading should be inserted, even on these non-traditional FOB contracts. For example, the Exxon Mobil FOB terms provides for time of delivery of the vessel not to be a condition but permits Buyer to withdraw and cancel if there is no completion of loading within 10 days of NOR or 10 days of the end of the “Accepted Date Range”.

Traders’ checklist for all FOB contracts should therefore include identifying what type of FOB contract they are making and consideration of insertion of a final date for loading.