

ICE Futures Europe (the "Exchange")

Decision of the Delivery Panel (the "Panel")

regarding a dispute in relation to the delivery of Low Sulphur Gasoil under the ICE Futures Low Sulphur Gasoil Futures Contract (the "Contract") during October 2017 (the "Dispute")

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|--------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------|
| Delivery month: | October 2017 |
| Seller | Glencore Commodities UK Ltd. either itself or acting for ICE Clear Europe Selling Member, Societe Generale International Limited, as the context requires |
| Buyer: | Vitol SA either itself or acting for ICE Clear Europe Buying Clearing Member, Mizuho Securities USA LLC, as the context requires |
| Location: | Antwerp |
| Installation: | Sea-tank Q510 |
| Delivery Range: | 16-22 October 2017 |
| Vessel(s): | <i>Zuidzee</i> |
| No. of lots: | 1,941 |
| Nature of dispute: | Quality of product |

1. The Panel has received submissions from the parties to the Dispute (the "Parties"). These disclose two matters in dispute: (i) a dispute as to liability – the Buyer alleges that the Seller breached the Contract and the Seller denies any breach; and (ii) in the event that the Seller is liable, a dispute as to the loss suffered by the Buyer as a result, it being the Buyer's position that it has suffered a loss and the Seller's that the Buyer suffered no loss or damage.
2. The following facts appear, from the Parties' submissions, not to be in dispute:
 - a. On or around 12 October 2017, the Seller and the Buyer were matched for the sale of 1,941 lots of Low Sulphur Gasoil (the "Product") and the Contract, incorporating the Contract Rules: ICE Futures Low Sulphur Gasoil Futures Contract (the "Contract Rules"), was formed.
 - b. The Contract Rules include the following provision –

11.1 QUALITY

(a) *Low Sulphur Gasoil*

For the January 2012 and subsequent contract months, under the ICE Futures Europe Low Sulphur Gasoil Contract, gas oil shall be delivered in the contract month, in bulk and free of all liens and claims, be of merchantable quality conforming to the following specification:

| <i>Specification</i> | <i>Summer</i> | <i>Winter</i> | <i>Test Method</i> | |
|----------------------|-------------------|---------------|-------------------------------------|--------------------|
| | | | <i>EN</i> | <i>ASTM</i> |
| <i>Sulphur (ppm)</i> | <i>Max. 10ppm</i> | | <i>EN ISO 3675 EN ISO 12185</i> | <i>ASTM D 4052</i> |

- c. Between 16-22 October 2017, the Product was delivered on-board 41 barges at Antwerp. The Inspector tested the Product loaded onto each barge and found that it was on-specification including as to sulphur content. In particular, the Product loaded onto the barge, *Zuidzee*, was found to have a sulphur content of 9.3 ppm.
- d. On 23 October 2017, the Buyer requested a second inspection of the Product loaded onto three barges – *Karbouw*, *Noordkaap* and *Jeanine* to which the Seller agreed. The retests, undertaken by Intertek, showed that Product to have a sulphur content of less than or equal to 10 ppm and therefore be on-specification.
- e. On 25 October 2017, the Buyer sent a message to the Exchange copied to the Inspector requesting a retest of the sulphur content of the Product loaded onto 14 barges including *Zuidzee*. The Seller rejected the request on the basis that the Product had already been accepted by the Buyer and the Buyer had provided no justification for a retest.
- f. On 2 November 2017, the Exchange confirmed that the Buyer's request for a retest of the Product loaded onto *Zuidzee* was valid. This decision was reached on the basis that an independent test, the results of which were evidenced by the Buyer, had shown the sulphur level of the Product loaded onto *Zuidzee* to be 11 ppm. On 6 November 2017, the Seller released the relevant sample for retesting by SGS as nominated by the Buyer.
- g. On 8 November 2017, the Exchange informed the Seller that it was allowing a second inspection of the Product loaded onto three other barges from the same tank as *Zuidzee*. On 9 November 2017, SGS reported the sulphur content of the samples to be 8.8 ppm in two cases and 8.9 ppm in the third – and therefore all on-specification.
- h. On 9 November 2017, SGS issued its report showing a sulphur level of 10.3 ppm in the sample of Product from *Zuidzee*.
- i. On 27 November 2017, the Exchange notified an Amicable Settlement Period of 27 November to 2 December 2017. The Parties having not reached an amicable

settlement, on 4 December 2017, the Exchange referred the dispute to a Delivery Panel.

The liability issue

3. The Buyer, in its submissions, alleges a breach by the Seller of Contract Rule J1.1 in that the Product was off-specification, specifically, that *Zuidzee* retest showed that the Product loaded onto that barge (the "*Zuidzee* Cargo") had a sulphur content in excess of that stipulated in the Contract.
4. The Seller's position is that the *Zuidzee* Cargo was on-specification in all respects and it did not breach the Contract. The Seller relies on the following:
 - a. The original test showed the *Zuidzee* Cargo to be on-specification as to sulphur content and retests of other cargoes supplied from the same tank also showed on-specification levels of sulphur.
 - b. The Contract Rules specify three permissible test methods. One of these provides that for sulphur results of 10 and above, the result should be reported to the nearest mg/kg such that a result of 10.3 is to be reported as 10 – and therefore on-specification.
 - c. Though accepting that quality is determined on a barge by barge basis, if the whole delivery (or the portion of the delivery of which the *Zuidzee* Cargo was part) had been tested as one, the result would have been on-specification.
 - d. The test method reproducibility limits must be considered and, taking those into account, the sulphur test result of 10.3 ppm is "statistically...equivalent" to the original result of 9.3 ppm such that the original test result cannot be said to have been erroneous and, as is customary in the industry, the original result is binding as to quality.
5. It is the Panel's view that the Contract Rules provide the answer to the questions raised as to determination of the quality of the Product. Specifically:

J1.10 DETERMINATION OF QUALITY AND QUANTITY

(a) Generally

A panel of inspectors shall be listed by the Exchange as authorised to determine the quality and quantity of product delivered.

The Inspector shall be selected by the Seller from two of the panel proposed by the Buyer, provided that if the Seller objects to both of the Buyer's preferences and the parties cannot agree upon an alternative, the Exchange shall nominate an Inspector and this nomination shall be binding on the parties.

(b) Delivery into barge

The quality and quantity of product delivered shall be determined by the Inspector upon loading by in-line samples taken, and by metering, between the shore tank and the barge's flange.

...

(c) ***Delivery in tank without movement of the product***

The quality and quantity of product delivered shall be determined by such means as the Seller and Buyer may agree, provided that any independent inspection shall be by the Inspector. If the Seller and Buyer cannot agree on a means of determination, the means shall be determined by the Inspector.

(d) *Save fraud or manifest clerical error and subject to any second inspection under paragraph (f) below, the Inspector's determination shall be final and binding on all parties. If the product is found to meet the quality specification, the Seller and Buyer shall share equally the cost of inspection. If it is not, the Seller shall pay the cost of inspection. ...*

(e) *The Inspector shall seal and retain samples in accordance with local practice. Before samples are disposed of a party may request a second inspection with regard to quality. In such event the party requesting the second inspection shall select a second Inspector and immediately notify the other party and the Clearing House of the requirement for a second inspection and the name of the second Inspector. The second Inspector shall examine samples retained by the first Inspector and shall determine their quality. The party requesting the second inspection shall immediately advise the other party and the Clearing House of the quality of the samples. Save fraud or manifest clerical error, this determination shall be final and binding on all parties. If the first Inspector's determination is in all material respects upheld the party who requested the second determination shall bear the costs thereof. If the first Inspector's determination is in a material respect varied, the costs of the second inspection shall be borne by the Seller if the product is found by the second Inspector not to meet the quality specifications or by the Buyer if the product is found by the second Inspector to meet the quality specification.*

6. It is clear from the above that where a second test takes place, the results of that test are final and binding. In addition, the test results from other cargoes do not determine the question of whether the *Zuidzee* Cargo was on-specification or not. As to test methods, the specifications of a permitted test method that was not the permitted test method chosen for the second test are not relevant. Typically, the second Inspector selects the second test method, however, the requesting party can specify the test methodology it would like the second Inspector to use. It is then for the second Inspector to conduct that test and issue a result. The existence of industry practices which may suggest that the test in fact should be regarded as producing some other result is therefore also not relevant.
7. The Panel's determination as to liability is therefore that the Seller breached the Contract in that the *Zuidzee* Cargo, having a sulphur content of 10.3 ppm from the second test, was off-specification.

The loss issue

8. Having determined that the Seller was in breach of the Contract, the Panel must address the question of any loss suffered by the Buyer as a result of that breach.

9. The Buyer, in its submissions, claims that it suffered loss calculated as the difference between the Contract price which it paid for *Zuidzee* Cargo and the market value of the off-specification product it actually received. The Contract price was, basis FOB, USD 528.25/MT. The Buyer states that, during a similar period, it purchased low sulphur gas oil with a sulphur result above 10 ppm, basis CIF, for USD 518.50 MT which it equates to market value for the off-specification Product delivered by the Seller. The difference between these two figures – USD 9.75/MT – plus an additional freight cost of EUR 2.30/MT produces a total claimed loss of USD 47,205.54. The Panel notes that the off-specification market value put forward by the Buyer was in fact a price as at the date three weeks after the breach of the Contract, which the Panel does not consider to be the relevant date. The Panel therefore does not accept that the reference price used is an accurate proxy to determine the loss value for which the Buyer claims to have suffered.
10. Further, the Buyer acknowledges that it mitigated its loss by blending the off-specification *Zuidzee* Cargo with other product in its possession producing a blend that was on-specification but did not provide any detail of this process or indicate that there was any associated cost to it.
11. However, the Buyer's position is that the Seller should not be absolved from its obligations under the Contract because the Buyer was able to mitigate its loss and submits that it should, nevertheless, be entitled to the difference between the value of the Product at the time of delivery and the value if the Product had not been off-specification. This appears to the Panel to be an argument that there is an entitlement to damages simply because the Seller delivered off-spec Product, whether an actual loss was incurred or not. The Panel does not find support for this position in the IFEU rules or otherwise.
12. The Seller denies that the Buyer has suffered any loss. It does so on the basis that the Buyer has confirmed that it absorbed the off-specification *Zuidzee* Cargo into a pool of on-specification product (without any identified expense) and therefore dealt with the *Zuidzee* Cargo as it were on-specification. As such, the Buyer did not suffer any loss and is not entitled to any damages from the Seller.
13. It is the Panel's view that the appropriate measure of damages in this dispute is the difference between the value of the product delivered and the value of the product which should have been delivered pursuant to the Contract. However, it is, further, the Panel's view that the Buyer cannot recover damages in respect of a loss that it has successfully – and by its own admission – mitigated. Further, the Buyer has not, in its submissions, identified any cost to it associated with the mitigation of its loss.
14. The Panel therefore does not award any sum of damages to the Buyer in respect of the off-spec Product on the basis that it has not evidenced any actual loss.
15. The Panel determines that the costs of the retest of the *Zuidzee* Cargo shall be paid by the Seller, in accordance with the terms of Contract Rule J1.10(f).

Previous Delivery Panel Decision

16. The Panel notes the February 2010 Delivery Panel decision involving a dispute between Newedge Group and JP Morgan Securities over quality of product. The facts of that dispute were different from this one in a number of respects and it is therefore of little relevance to the present matter.

Additional Matters

17. Under Contract Rule I.18(h)(iii), the Panel may direct any of the Parties to pay to the Exchange costs in an amount to be determined in its discretion. These costs may include the fees and expenses of the Chairman; the expenses of members of the Delivery Panel or any expert; any legal costs; and expenses which the Exchange or the Clearing House may incur or be subject to. In this dispute, such costs amount to £21,102.16. The Panel determines that these costs shall be borne by the Parties, 50:50. The Panel has decided to exercise its discretion in this way because, although it has found that the Seller breached the Contract, the Buyer has failed to evidence any loss. Please note that this excludes the Exchange fee of US\$2,500 (set out under IFEU Rule I.18(b)) due from each Party, which the Parties were notified of by email in December 2017.
18. In addition, the Panel would like to express its disappointment that the Dispute was not resolved without recourse to a delivery panel. In the view of the Panel, the Parties ought to have resolved a dispute of this nature and size through the amicable settlement process.