

Contracts for trade in fishery products

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Fish and fishery products comprise a significant proportion of the international trade in food products with values traded of US\$55 billion in 1998. However, fishery products are one of the most difficult products to trade. The variety of products is vast, with several hundred species used for international trade. Furthermore, being a hunted product producers have limited control over the volumes and characteristics (such as size, colour, flavour) of the fishery products, which are subject to environmental influences and can vary significantly between regions and seasons.

Fish is often produced in remote locations or packed at sea, which does not afford the buyer an opportunity to inspect the goods. Fishery products are generally very perishable and highly sensitive to mis-handling, which can occur anywhere along the distribution chain. The advent of remote auctions, and internet trading of fish means that more and more fish is traded "sight unseen". On the other hand buyers and consumers want a product which is consistent and of good quality. As a result fish traders are placing more and more reliance on descriptions and specifications. Reconciling the inherent conflict between the features of the production system and consumer demand is the great challenge of fish marketing.

At the centre of this conflict is the contract for sale of fishery products. This provides an opportunity for both buyer and seller to protect their interests, by ensuring that both parties consider and agree in advance the desired outcome of defined situations where the transfer of goods and monies does not proceed as expected. The contract of sale is a crucial part of international trade. Litigation is expensive and time consuming, and best minimised by having contracts which assist the parties towards mutually satisfactory conclusions. However in the case of fish trade, the contract is frequently only considered at the last stage of the negotiation process, almost as an afterthought. Such contracts are less likely to meet even the basic requirements. The purpose of this article is to provide a short overview of what both buyers and sellers of fishery products should be looking for in their supply contracts.

What is a contract?

A contract is an agreement between two parties which is binding in law. Contracts for the supply of goods (including fishery products) should comprise of an offer (for example to supply a quantity of fish at a stated price) and an acceptance of that offer. The parties must have intended to enter into a contract. Contracts must have consideration, in other words there must be some exchange of value between the parties. Contracts may be both verbal or written, and the terms of the contract may be either expressed or implied.

Written contracts and capacity

Contracts do not need to be written, but in international trade it is certainly advisable. Parties to the contract need to have "legal" capacity to enter into a contract, otherwise the contract will be void. Fish is frequently traded via agents, who may or may not have authority to contract on behalf of their clients. Even if a supplying company is trading fish in its own right, it must be empowered to do so by the "objects" clauses of the memorandum of association or company constitution, otherwise any contracts entered into may be considered to be outside its powers.

Consideration

At the core of all contracts is a description of the consideration. This describes the nature of the exchange between the parties, and in contracts of sale it involves money in exchange for goods. However it is not unusual for fishery products to be bartered for fuel, provisions and other fisheries inputs, and the law of contract applies equally well to such situations.

Whether the contract is for sale or barter, there is an obvious need to describe the goods in as much detail as is required to ensure that important characteristics are subject to contract. In the case of fishery products one of the key requirements is to specify the species name (since common names can vary from place to place). The description should also include a specification of the goods. This may include form, for example, "headed and gutted" or "fillets" and the state in which it is to be supplied such as "fresh" or "dry salted".

The total quantity of goods which are the subject of the contract should also be described, usually in terms of weight, net of packaging. Due to difficulties in determining exact quantities available, the contract may specify a range which can be supplied "at the sellers option", along with a method of determining the exact quantity specified. Alternatively long-term supply contracts may be for multiple consignments over a period of time, with the specific quantities supplied in each consignment, along with other contractual details, described in subsequent purchase orders which are then signed off by both parties.

The price also needs to be stipulated. Often with fishery products, it is not possible to determine the full price of a consignment, due to difficulties in weighing at sea or uncertainties on total weights of different grades. Unit prices may therefore be expressed, along with a means of calculating the final price. Prices should state whether it includes distribution costs i.e. FOB, C&F or CIF basis and in the case of the latter the port of destination.

Description of the goods

Most contracts for the supply of fishery products contain some terms relating to quality. This is one area which frequently gives rise to dispute, and the descriptions used are critical. The quality descriptions should cover all of the parameters which are considered to contribute to quality. This would include, amongst others, size of individual items, colour, shape, texture and flavour. It should be noted that quality descriptions may also include criteria which are essential for effective processing steps. One example is the size specifications for white fish fillet blocks, which are designed to enable mechanical processing. Although this is not of particular relevance to the quality as determined by the final consumer, it is a vital product characteristic for industrial buyers of this type of product. The descriptions should attempt to describe the quality parameters in terms which are as objective as possible. Dimensions and weight are easy to specify, but colour, flavour and texture are more difficult and contracts often revert to terms such as "typical of good quality examples of the species" or "characteristic of fresh quality". These often ambiguous terms give rise to many problems and their interpretation is frequently the cause of disputes.

Contracts may also refer to compliance with legal limits where these are defined by regulations. This would cover parameters such as mercury in swordfish, or histamine in canned tuna. Another option is to refer to voluntary industry standards, where they exist. Examples are the US National Marine Fisheries Service "US Standards for grades of fishery products" (available at <http://seafood.nmfs.noaa.gov/standards.html>), which cover a range of products including frozen raw headless shrimp, cod, halibut and a wide range of processed and breaded products. For fresh fish another option would be to use the EU freshness ratings for fishery products (defined as "Extra", "A" and "B" grades), as described in Council Regulation 2406/96 of 26 November 1996 "Laying down common marketing standards for certain fishery products". Few contracts for sale of fishery products use such devices.

To further complicate the matter, the biological origin, along with relying on hunting for production means that any consignment will inevitably contain individuals which vary in salient characteristics. Without uneconomic margins of error, it is frequently technically impossible for every individual unit within a consignment to meet all aspects of a detailed specification for a single grade. As a result, a specification within a contract may admit the supply of different quality grades of product, and contain information about how those grades are to be defined. This is frequently applied in contracts where a mixed consignment is to be supplied, for example direct from a fishing vessel. Again, because of the practicalities of ensuring accurate grading, especially at sea, each grade should also have a tolerance specified (that is a permissible amount of material within each grade, which falls outside that grade specification). Tolerances may be set at either or both of the upper and lower limits.

Technical specifications in the contract may also relate to packaging, pack weights and variance, glazing in frozen fish products, labelling and temperature at delivery.

Legal validity of quality descriptions

Contract law distinguishes between representations, which are statements made prior to entering into the contract which may have induced the contract, and the terms, which are specific promise or undertakings which form part of the contract. Misrepresentations not incorporated in the contract (whether verbal or written), for example about the quality of the products, may still result in a breach of the contract, or a separate claim for damages outside the contract.

Technically, the description of the goods within a contract are terms of that contract. Contract law in most jurisdictions provides rules on how these terms are to be interpreted. English law, for example, requires that contracts should be construed according to the measure of what a reasonable person would understand the term to mean. However, interpretation of a contract may also be subject to custom where this is known to both parties (such as in the acceptance of certain types of quality defects), and also the intent of parties when they formed the contract.

Contractual terms may further be classified as either conditions or warranties. Breaking a condition of a contract results in breach of contract, whereby the injured party may treat himself as released from the contractual obligations. This would occur for example when pollack is supplied instead of cod, or when material supplied for human food is unfit for consumption, when the buyer may reject the goods completely. Other terms of the contract are considered to be warranties – where the aggrieved party may claim damages only to the extent of the losses incurred, whilst the contract generally remains valid. This might cover a situation in which part of a consignment did not meet quality specifications, where a claim is made for the loss in value of that part.

Whether a particular term is a condition or a warranty is dependent on the circumstances. This issue is frequently at the centre of legal disputes in the fish trade, over the “right to reject”, where a receiver has rejected an entire consignment of fishery products because they do not comply with the contract specification, and claims a complete refund and loss of profits due to a breach of contractual condition. The seller on the other hand may claim that the terms containing the specifications were warranties and offer compensation for the losses associated with the specific parts of the consignment which did not comply. In such cases the interpretation of the contract is a matter for the courts, and there are no clear rules. It is up to the aggrieved party to establish that the quality-related contract terms which are breached, are so central to the contract, that he is deprived of the whole benefit of the contract.

Even if explicit terms are not written in a contract, terms may sometimes be implied. Under English law for example, the Sale of Goods Act 1979 (as amended by Sale and Supply of Goods Act 1994) usually insert implied terms into contracts for the sale of goods, that such goods should be “fit for the purpose for which they are required”. This term may however be over-ridden by the express agreement of the parties. In addition, where sales are based on samples, there is an implied term that the bulk corresponds with the sample. This would apply to occasions when fishery products are sold by reference to a sample which is submitted in advance – a common practice in the fishmeal industry.

Other terms and conditions

Contracts for the supply of fishery products often contain terms relating to other aspects of the transfer than that of the goods and payment.

Fish which is traded internationally is shipped by air, sea or road freight. Where the seller is responsible for shipping, the buyer may wish to specify freight conditions, including temperature controls and transshipment rates since these are frequently critical for maintaining quality. Where technical conditions are specified, there may also be a requirement that monitoring

systems are installed, for example, by the use of temperature logging equipment. Similarly, the contract may specify who is responsible for variations in freight costs (demurrage) caused by delays, with some level of detail on how the variations are to be calculated.

Finally terms of payment need to be specified, so that the agreed amount (in the agreed currency) is transferred at the expected stage of the process of shipping and delivery. The method of payment should be specified, along with the conditions under which the transfer takes place. Typically an irrevocable letter of credit may be issued, payable at sight of documents such as the Bill of Lading, health certificates and confirmed packing list.

Exclusion clauses

Exclusion clauses are often used to define the limits of liability for breach of contract, misrepresentation or negligence. These are often used to protect parties where external events can act to prevent them from meeting obligations. To be effective, an exclusion clause should be fair and reasonable having regard to the circumstances which were known or ought to have been known to the parties when the contract was entered into. In particular exclusion clauses are used to exclude or limit liability with regard to consequential loss or loss of profit.

Force majeure is often included in exclusion clauses, since external factors can often affect supplies of fisheries products. *Force majeure* may be defined as any event, occurrence or circumstance reasonably beyond the control of the party, including in English law, delays caused by or resulting from "acts of God". Given the uncertainties of the fishing industry, it would appear that in some circumstances, stock collapse or bad weather, a *force majeure* exclusion clause could provide some measure of protection. *Force majeure* has been used as a defence in at least one recent arbitration regarding failure to supply fishery products according to contract, where the amount available was significantly lower than expected due to a collapse of catches. However, here the buyer was able to show that the supplier could have fulfilled the contract by buying supplies from other regions, albeit at a higher price, and this defence therefore failed.

Jurisdiction and Dispute Resolution

One very significant issue to consider in the negotiations is which law should govern the contract. This is of particular importance to the fish industry where so much trade takes place across jurisdictional borders.

The parties may also wish to use the contract to specify ways (other than litigation) in which disputes can be resolved. This might provide a facility for quicker and cheaper means to sort out problems, such as arbitration, mediation or negotiation. It might also be useful to specify time limits within which an action for breach of contract may take place. The contract may also cover technical approaches to resolving disputes, such as the assessment of quality aspects by the submission to the opinion of a specified independent surveyor, appointed and operating according to a defined procedure, for example in the drawing of samples and their testing. To reduce costs arbitration clauses may limit the arbitration process to a set number of days.

Remedies

The remedy will depend on the nature of the breach of the contract. Usually remedies are in the form of damages which are a financial compensation for the losses incurred. For a claim to succeed, there must be an actual loss incurred. If for example, there was a breach of a quality warranty, but this had no financial effect on the buyer, then there is not likely to be any basis for a claim.

The principle of an award of damages in a breach of contract is normally to place the injured party in the same financial position as if the contract had been properly performed, that is to say, compensation for loss of bargain or loss of expectations under the contract.

In respect of claims for damages, there may be a duty on the injured party to take reasonable steps to mitigate any losses. In another recent arbitration a receiver rejected a consignment of squid on arrival at his home port. Delays in transfer to the cold store resulted in a partial thaw of the consignment which then sustained damage. In the subsequent claim for damages against the supplier, it was successfully counter-claimed that by failing to take reasonable care of the cargo, the receiver had breached his duty to mitigate the losses, and therefore lost his claim for damages.

Conclusion

In conclusion, international trade in fishery products is a high risk business at the best of times. The process of preparing a properly drafted contract helps draw the attention of traders to situations other than the immediate desired outcome, so that they may then consider the “what if...?” questions. A carefully drafted contract which takes into account the informed wishes of the parties with respect to unforeseen events, as well as the underlying law of contract, provides an essential basis for successful trade.

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