

“Good” Contract Language Related to Specs and Governing Law

September 2011

Specs

Guaranteed Properties

Seller agrees to supply and Buyer agrees to purchase Petcoke meeting the following specifications in each delivery by vessel to Buyer. Any property falling outside of the min or max specified below allows the Buyer the sole option of accepting or rejecting such delivery.

Guaranteed Properties

Property	Units	Basis*	Min	Max	ASTM
Moisture	%	AR	8.30	10.00	D4931
Sulfur	%	AR		4.00	D4239-B
Ash	%	AR		1.00	D4422

*Basis: Ar = As received, Dry = after moisture removed,

Reported Properties

The following properties of each delivery by vessel to Buyer will be reported only and cannot be used by either Party to accept or reject such delivery.

Reported Properties

Property	Units	Basis*	ASTM
Volatile Matter	%	AR	D6374
HGI			D409
Size			D5709
CV	BTU/lb	GAR**	D5865

**Basis GAR = Gross As Received

As a service to Buyer, Seller may from time to time provide Buyer with historical range or recent analysis of Reported Properties from production or deliveries to others. If any property of the Reported Properties table above falls outside the range of such information, it expressly shall not constitute rejection of such delivery.

Sampling, Preparation and Analysis;

An Independent sampling agency or lab agreeable to the Parties (“Collection Agent”) with costs borne by xxxxxx shall collect the gross sample(s) in accordance to ASTM D2234 or D2234M at a safe point nearest the location of change of ownership using the highest preference condition possible as detailed in the Standard Practice.

An independent preparation lab or agency agreeable to the Parties (“Prep Lab”) with costs borne by yyyyyy shall prepare the gross collected samples for analysis in accordance with ASTM D2013. Four (4) equal splits of the prepared analysis samples each representing the entirety of the cargo (composite, weighed average) which shall be prepared and labeled as follows:

“Analysis”- whereby an independent testing lab agreeable to the Parties (“Test Lab”) with costs borne by zzzzz determines the actual physical and chemical analysis for those properties listed in the Guaranteed Properties and Reported Properties tables above per the respective ASTM standards, and provides a Certificate of Analysis (“COA”) promptly upon completion of all tests to the Parties

“Seller’s Retain” held for 6 months by the Test Lab to be analyzed by Seller at Seller’s option and Seller’s cost by any lab of Seller’s choosing

“Buyer’s Retain” held for 6 months by Test Lab to be analyzed by Buyer at Buyer’s option and Buyer’s cost by any lab of Buyer’s choosing

“Referee Sample” held for 6 months by Test Lab to be used only if any of the properties in the COA are disputed by either Party within 30 days of respective receipt of the COA. In such case, the Parties shall appoint a mutually agreeable independent testing lab (“Referee Lab”) to analyze the Referee Sample, with costs borne by disputing party, and whose result is final and binding on the Parties. Chain of custody of the Referee Sample shall be established to include:

- Test Lab seals and documents that the sealed Referee sample was transferred to the courier, and notifies Referee Lab with courier tracking information
- Referee Lab documents receipt of sealed Referee sample and notifies Test Lab and the Parties of such receipt
- Referee Lab then tests Referee Sample for the disputed property per the respective ASTM standard and promptly reports results to the Parties

No other sample or analysis, other than the Referee Sample tested as shown above by Referee Lab, regardless of where, who or how taken or tested, can be used to settle quality disputes.

Governing Law

This Agreement and all claims and disputes (whether in contract or tort) arising out of, or related thereto, shall be governed by, interpreted and construed in accordance with the laws of the state of New York, USA, without regard to any conflict of law principles. The Parties submit to the exclusive jurisdiction of the courts in the state of New York, with any action, claim, dispute or proceeding relating to this Agreement that was not resolved under the terms of this Agreement.

Why this is Good

1. Clear definition between what is guaranteed and what is merely reported

2. Seller can provide Buyer with historical ranges or recent test results (by email outside the contract) without fear they may be used against the Seller as a guaranteed spec range.
3. Allows for up to 3 different agencies in the collection, prep and analysis which can happen in the developing world as there may be no single agency or lab in the area qualified to do all 3.
4. Specifies a dispute resolution process based on a split of the original sample only (i.e., the Referee Sample) , and conducted by a Referee Lab. Although the Buyer may take their own composite or grab samples, and have them analyzed, the Parties agree that such results cannot be used to dispute the cargo .
5. NY law and NY court specified. Obviously the Parties may choose different venues, e.g.,. UK law in a UK court, Texas law in a Texas court, etc., but the principle is that the law and court must be the same.

Disclaimer and other comments:

This is suggested contract language only between a pet coke Buyer and Seller for specs and governing law. . Buyers and Sellers are to use at their own risk and the authors specifically advise Buyers and Sellers not to use all or any portion without their own legal counsel review. Users of all or any portion of these suggestions acknowledge, by their use alone and not requiring any formal written agreement, the release of the authors from any claims or liability that may arise for these suggestions.