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Indonesian coal export ban

There are reports that, as of 6 January 2022, a select group of 25 coal producers in Indonesia had been allowed to resume exports of thermal coal.¹

The problems began on 31 December 2021 when the Indonesian Ministry of Energy and Mineral Resources (ESDM) issued a policy temporarily prohibiting all Indonesian coal mining companies from exporting thermal coal throughout January 2022² to avoid outages in domestic energy production.³

Nevertheless, *"the underlying problem will not have gone away and will, inevitably, reoccur ... so long as international coal prices remain high"* comments Bill Sullivan, Senior Foreign Counsel at Christian Teo & Partners in Jakarta, an associated law firm of Stephenson Harwood.⁴

Mr Sullivan's view is that *"the cause of the problem"* is *"the requirement that coal producers supply coal to PLN⁵ at US\$70 per ton when the international market price for coal is currently more than \$150 per ton. The government is, in reality, forcing the private sector, "for profit" coal producers to subsidize the loss-making operations of PLN by supplying coal to PLN at a gross undervalue."*⁶

When the ban came into effect some reports suggested that there were more than 100 bulk carriers in ports and anchorages of Kalimantan, with some ships already fully laden.⁷ While some ships

have reportedly started leaving ports,⁸ the risk of disruption remains and in this bulletin we have outlined various legal issues that participants in the coal supply chain may potentially face.

Sale contracts

Force majeure (FM) clauses typically address circumstances outside a party's control that affect the ability to perform and provide for the relevant obligations to be suspended and/or the contract to be cancelled.

Whether a party can rely on an FM clause will require construing the words of the clause itself in the context of the facts of the case. It is worth noting that if one means of performance is prevented or hindered, the party relying on the clause usually needs to show that there were no other modes of performance available, or at least no other reasonable ones. In the context of the Indonesian export ban, the availability of alternative sources of supplies and methods of delivery will be particularly relevant.

Certain standard form contracts also include terms that entitle a party to elect to terminate transactions where it has become illegal to perform after the agreement has been entered into (see, for example, Clause 14.10 SCoTA Version 8 GTCs), although whether the ESDM's policy constitutes illegality will be a matter of debate.

It is also worth noting in the context of sale contract chains that while intermediate parties will typically have back-to-back contractual terms, the terms of the contract between the ultimate buyer and the coal exporter concerned may be more rudimentary, and not include the terms mentioned above.

Letters of credit

Letters of credit may have been issued but the underlying transaction may be delayed beyond the

¹<https://lloydlist.maritimeintelligence.informa.com/LL1139429/Indonesia-partly-lifts-coal-export-ban>

² <https://www.tradewindsnews.com/bulkers/indonesian-coal-export-ban-confirmed-but-will-it-last-/2-1-1138342>

³ <https://www.reuters.com/markets/europe/indonesia-warns-coal-supply-crunch-not-over-china-prices-rally-2022-01-04/>

⁴ The Jakarta Post, 7 January 2022

⁵ PT Perusahaan Listrik Negara (Persero), Indonesia's state utility company

⁶ See no. 4

⁷ <https://www.tradewindsnews.com/bulkers/agonising-wait-as-more-than-100-bulkers-caught-out-in-indonesias-coal-export-ban/2-1-1138341>

⁸ See no. 1

validity of the documentary credit. This may give rise to a situation where bills of lading or other documents may need to be amended to meet the requirements of the documentary credit.

Port safety

Delays caused by dangers or obstructions may render a port unsafe if the delays are of sufficient duration, and the nature of the "*danger*" need not be physical but may be political or legal. However, while it is arguable that the ESDM's policy is a political or legal measure, any delay will only result in a finding that a particular port is unsafe if the delay is "*inordinate*". The legal meaning of inordinate delay is that the period must be for such time as would frustrate the charter.

A charter will be frustrated if fulfilment of the charter by one or both parties becomes radically different from that which had been contemplated at the time the charter was entered into. While much will depend on the facts of each case, it is unlikely that the present suspension of one month will be sufficient to frustrate a charterparty.

Demurrage

Assuming a valid notice of readiness has been tendered laytime will (absent some fault on the shipowner) run continuously until loading operations have completed unless there is an interruption or an exception to laytime applies.

Many charterparties contain an all-embracing exceptions clause (as well as specific exceptions clauses) which limit liability for failure to load cargo resulting from "*restraint of princes, rulers or people*" (see, for example, Clause 8 AMWELSH93). However, the language must be precise and clear that the exceptions clause also applies to laytime, otherwise it is doubtful that a charterer will be entitled to rely on it.

Hire

There are reports that some ships, despite being fully laden, have been denied sailing permits.⁹ Depending on the terms of the charterparty, the full working of a ship may be prevented by third party interference, for example through legal or administrative action. However, a shipowner will most likely argue that any delay is a natural and inevitable result of complying with charterers' orders, and that the ship should, consequently, remain on-hire.

⁹ See no. 7

Bills of lading

Under the Hague Rules, the carrier is under an obligation to care for the cargo onboard the ship. This may present practical as well as legal issues, particularly if the coal onboard any laden ships has harmful or corrosive characteristics.

A term is implied at common law into the contract of carriage that the shipper undertakes not to ship goods that are liable to cause delay to the voyage. Such goods can be said to be "*legally*" dangerous if their shipment may lead to "*legal obstacles*". However, given that the ESDM's move has been referred to by some commentators as "*unprecedented*",¹⁰ it is unlikely that a shipper will be in breach of contract: mere likelihood that cargo shipped will cause delay is not sufficient.

Conclusion

While the ESDM's policy is intended to last for one month, market participants will be anxiously awaiting developments, and will be hoping that it does not transition into a prolonged trade ban as happened with the importation of Australian coal into China, an issue which this firm handled on behalf of a carrier and shipowner.

A number of financial institutions are already pulling out of thermal coal due to its environmental impact and are looking towards more sustainable initiatives. It will therefore come as no surprise that the volume of transactions (including prepayment agreements) will likely take a knock, particularly since Indonesia is one of the world's largest exporters of thermal coal.

We recommend that anyone involved in the coal supply chain review their contracts carefully and keep abreast of developments, and we would of course be happy to provide specific advice.

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¹⁰ <https://www.argusmedia.com/en/news/2288208-indonesia-bans-january-coal-exports-update>