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In a sticky situation? Force majeure under sugar contract rules

The sugar market has recently experienced a rally and for those hoping that the price will fall the outlook is not expected to sweeten any time soon. One factor which is expected to continue to affect the price is weather, and the El Niño climate pattern which has started unfolding in the Pacific Ocean has caught the market's attention. But when will weather be considered an event of force majeure entitling parties to suspend or exempt performance? We consider the force majeure clauses under the Refined Sugar Association Rules and Regulations (the RSA Rules),¹ the Sugar Association of London Rules and Regulations (the SAL Rules),² and the ICE Futures U.S. Inc. Sugar No. 11 Rules (the No. 11 Rules)³ generally and offer guidance on selected issues that may arise under contracts incorporating these standard terms.

Issue 1: Which rules apply?

It is not unusual for a sale contract to incorporate the terms of more than one set of standard form rules. For instance, a clause providing for the parties' arbitration agreement may state that disputes are to be referred to arbitration before the Sugar Association of London in accordance with the Rules Relating to Arbitration while a different clause elsewhere in the contract incorporates the terms of the No. 11 Rules by reference.

Each set of industry standard terms contains distinct force majeure clauses with unique requirements. Caution and careful contractual analysis will be required to ascertain which standard form terms are incorporated into the contract with regards to force majeure. Only then can it be ascertained which force majeure clause applies and whether it can be relied upon in the particular circumstances.

Issue 2: Which clause applies?

Under each of the three sets of standard terms considered here, there are different force majeure provisions depending on the party seeking to rely

upon the clause (Seller/Deliverer or Buyer/Receiver). The force majeure provisions under the RSA Rules and the SAL Rules are also distinguished based on whether the relevant contract has been agreed on FOB/FAS or CFR/C&F/CIF terms and under the RSA Rules the applicability of the force majeure clause is further dependent upon whether the material has been sold in containers or in bulk. Therefore, it is important to review each of the force majeure clauses to determine the clause applicable to the contract as the requirements and effect of each clause differs.

For example, to rely on clause 11(a) of the RSA Rules (which provides for FOB/FAS terms in bulk) the seller must be prevented within the contract delivery period from supplying to or delivering at the shipment port the sugar which it has allocated against the contract. Whereas clause 11(c) of the RSA Rules (which provides for FOB/FAS terms for container shipments) sets out more prescriptively what the force majeure event must have prevented the seller from doing. Specifically, to rely on clause 11(c) the seller must have been prevented from:

¹ Effective 2 March 2021.

² Effective 31 July 2019.

³ Effective 26 April 2021.

- Collecting from the designated container depot the empty containers released by the buyer;
- Transporting the containers to the stuffing location;
- Stuffing the containers with the sugar allocated by the seller against the contract; and
- Delivering the stuffed containers to the designated container terminal within the delivery period specified in the contract.

Issue 3: What is a Force Majeure Event?

As the concept of "force majeure" does not exist in English common law the operation of such clauses is a question of construction and the party seeking to rely upon the provision bears the burden of bringing themselves within the scope of the clause.

Therefore, consideration must be given to whether a force majeure event, as defined in the clause, has occurred.

RSA

The RSA Rules contain five separate force majeure provisions. Each clause defines a force majeure event as:

"ice in the shipping port or elsewhere, war, strikes, rebellion, insurrection, political or labour disturbances, civil commotion, fire, stress of weather, Act of God or any cause of force majeure (whether or not of like kind to those before mentioned)".

However, a nuance between clause 11(b) and the other clauses should be noted. Under clause 11(b), which governs the buyer's right to claim force majeure, it is not sufficient for a force majeure event merely to prevent the buyer from accepting delivery within the contractual period (as it is for a seller that is prevented from delivering under clause 11(a)). Instead, this clause requires the identified force majeure event to cause "loss or delay of the vessel/s and/or trucks and/or wagons" which thereby prevents the buyer's performance.

SAL

The SAL Rules contain three separate force majeure provisions. Each clause defines a force majeure event as:

"war, strikes, rebellion, insurrection, political or labour disturbances, civil commotion, fire, stress of weather, act of God or any cause of force majeure (whether or not of like kind to those before mentioned)".

No. 11 Rules

A force majeure event is defined under the No. 11 Rules as:

"government intervention, war, strikes, rebellion, insurrection, civil commotion, fire, act of God, or any other such cause beyond a party's control".

As will be clear from a comparison of the above, the parties' agreement as to what will constitute a force majeure event is often uniquely and precisely defined. Unless a party can establish that the event it seeks to rely upon to excuse performance is identified in the clause it will not be entitled to invoke the force majeure provision.

Some clauses offer the parties an alternative gateway to the benefits of the provision by way of 'sweep-up' language such as "or any other cause". Variations of this drafting can be seen in the above clauses. However, not every event will be swept up by this language and the application of the *ejusdem generis* principle will exclude events which are not of the same kind as those specified in the clause. The RSA and SAL clauses seek to disapply the *ejusdem generis* principle by including the words "(whether or not of like kind to those before mentioned)".

Issue 4: How do I provide notice?

The party seeking to rely on force majeure must provide notice that they are doing so. Failure to comply with the requirements of the clause may invalidate the notice and prevent a party from relying on the force majeure provision (thereby potentially putting it in breach of contract).

It is therefore important to give proper attention to the notice requirements of the applicable clause as these may differ. For example, under the SAL Rules the party whose performance has been prevented must immediately notify the other party of that fact (and, if it is the seller whose performance has been prevented, also the quantity affected) by courier, telex, facsimile or electronic mail, and provide evidence of those facts within 14 days of the notice. The No. 11 Rules have an additional requirement that notice must also be given to the Exchange.

Comment: Weather and Force Majeure

The return of El Niño is expected to disrupt sugar production and harvest in key producing countries such as India, Thailand, and Brazil. It is anticipated that lower yields will have an impact on an already volatile market causing sugar prices to continue to rise.

Whether a seller will be entitled to rely on El Niño as an event of force majeure will depend on the drafting of the force majeure clause and the specific fact pattern, however, the following general observations are worth considering:

1. The fact that a contract has become more expensive to perform will not amount to force majeure unless the terms of the force majeure clause so provide. The clauses in the standard terms considered here do not provide as such and, therefore, a seller will not be entitled to invoke force majeure merely because El Niño has caused the market price to increase such that the seller cannot, or no longer considers it profitable to, perform the contract.
2. Generally, normal bad weather will not be considered an event of force majeure unless specifically agreed in the clause. The SAL and RSA Rules expressly include "*stress of weather*" in the definition of a force majeure event (the No. 11 Rules do not). However, while this may strengthen an argument that El Niño could operate as an event of force majeure it does not provide unequivocal certainty as the precise scope of the parties' intended meaning of "*stress of weather*" will likely be up for debate.
3. Finally, the force majeure provisions of the SAL and RSA Rules only apply where "*the contract specifies the place of origin of the sugar and, in the case of any other contract, once the Seller has declared an origin*". Therefore, if the origin has not been identified at the time the seller wishes to invoke the force majeure provision, the seller will not be entitled to rely upon its provisions even if the seller intended to supply the contract with sugar from an origin which no longer has sufficient supply due to the effects of El Niño. In such circumstances performance is unlikely to be prevented as the seller will be expected to allocate sugar from an alternative origin.

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