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Port congestion: common issues arising

Congestion and delays at ports and terminals were unwelcome side effects of the global Covid-19 pandemic. When service levels at ports and terminals are reduced due to lockdowns, workforce illnesses or stockpiling of goods that cannot be shipped, 'bottlenecks' within the supply chain are inevitable.

The most significant recent port congestion issue the industry has been confronted with is at Richards Bay Coal Terminal, Africa's largest coal export facility. This article highlights the problems that industry players may face when delays to the supply chain are unavoidable.

Richards Bay

Richards Bay Coal Terminal, which traditionally only accepted coal via trains, has been hit hard by the deterioration in South Africa's rail service. Poor maintenance, a lack of spare parts and theft of copper cable in recent years has led to coal miners opting to truck their product to Richards Bay instead. The exponential increase in trucks travelling to the port has resulted in significant congestion, stockpiling issues and consequential delays to coal exports.

This article will address the following key considerations, which should be borne in mind when congestion or any type of delay occurs at a port/terminal:

- Has the delivery period under the sale contract been and gone / is it likely to be missed?
- Does a termination right arise? If so, does the buyer want to terminate or instead accept late delivery? Has the market declined? Is a replacement cargo available?
- If there a charterparty in place? If so, what obligations arise? Does the buyer have a demurrage liability to the shipowner? Can this be passed on to the seller?
- Does the contract make provision for events of force majeure? Has the seller declared force majeure? Is the delay actually caused by a

force majeure event? Was the event caused by the seller or was it foreseeable?

Failure to deliver the cargo?

The seller's obligation under a sale contract is to deliver the cargo to the buyer. Subject to the terms of the sale contract, failure to deliver within any specified period may be a breach of a condition (time being "of the essence" as regards the delivery obligation). If the cargo is not ready to load to complete delivery within that period, the buyer may be entitled to terminate the contract and recover losses from the seller.

This is a judgement call for the buyer (and one which it may need to take before arriving at the load port), who may otherwise have an empty vessel waiting to load in a declining market. It is a decision to be made carefully even if there may be a cheaper replacement cargo available. As the coal market is currently experiencing a decline, buyers are regularly finding themselves in this precise situation, although obtaining substitute coal may be easier said than done.

Determining whether a delivery obligation can be regarded as "time of the essence" requires all the terms of the sale contract to be considered. Rather than having the right to terminate, the buyer may be entitled only to claim damages and those damages may be by reference to the laytime and demurrage provisions in the sale contract. Additional factors to

be addressed include determining what caused the delay and whether the delay is excused by force majeure (considered further below) or even caused by the buyer. Termination is akin to pushing the nuclear button, so careful legal advice needs to be obtained before any decision is made to terminate a contract.

Even if the buyer has the right to reject for late or non-delivery, it may decide to accept a late delivery of the cargo. The buyer would still have a right to claim damages (albeit waiving the right to terminate), which would be calculated by contrasting the market values of the cargo at the time it was required to be delivered with when it was actually delivered. A buyer may then wish to consider whether the price of the cargo should be renegotiated to reflect the revised value as well as checking whether it has a right of set off against the price by reference to the difference in those two market values. In the case of a declining market, such as that experienced at Richards Bay in recent months, the buyer will likely wish to discuss with its seller how the buyer's losses are to be made good.

Deadfreight?

A key factor to be considered by the buyer (assuming we are looking at an FOB sale contract) is its obligations under the charterparty. Terminating a sale contract and leaving an empty chartered vessel will mean the buyer faces a deadfreight claim, unless arrangements can be made with the vessel owner to minimise its losses (the buyer should address this in any case under its duty to mitigate any losses arising from the termination). Any buyer facing a possible protracted wait in a congested port and considering its rights under the sale contract should think about what impact this might have, legally and commercially on its charterparty.

Demurrage?

Demurrage is the usual remedy that is looked at where there is delay and congestion (assuming an NOR has been tendered).

Once a buyer who is also a charterer of a vessel has tendered the NOR and is then subject to the laytime and demurrage regime under the sale contract, it may be difficult for a buyer to extricate itself from the sale contract unless the contract provides either party with a right to terminate when demurrage has been continuing for a specified period. Otherwise, demurrage may be the only remedy available to the buyer against the seller for delay and of course the buyer will be exposed to a claim for demurrage under the charterparty. The buyer may nonetheless

still look to make a separate damages claim for a separate breach of the sale contract by the seller.

A demurrage clause in a charterparty is intended to incentivise swift cargo operations to enable the vessel to commence its voyage as quickly as possible by stipulating there being liquidated damages payable to the shipowner for delay to cargo operations. If the charterer is a buyer or seller under a sale contract and has served NOR, unless there are any relevant exceptions to laytime, they may be liable to the shipowner for demurrage under the charterparty despite its counterparty to the sale contract being at fault for the delay.

The sale contract, like the charterparty, needs to be checked carefully before any decisions are taken about exercising any available rights.

Force majeure?

Last but not least is the application, if at all, of any force majeure clause. It is inevitable that force majeure will have been declared by most if not all parties: sellers to buyers, buyers to sub-buyers and buyer's shipowners, and indeed the reverse. Whether force majeure applies depends upon a host of factors including the wording of the clause, whether the force majeure events or circumstances were foreseeable or beyond the reasonable control of the party relying upon it, any pre-conditions to an entitlement to claim such as a valid notice and compliance with other requirements. The party relying upon force majeure will have the burden of proving an entitlement to rely upon the force majeure clause. It must demonstrate that the facts were "events" or "circumstances" which the force majeure clause regarded as force majeure events, that those events or circumstances were not caused by the fault of the relying party and, importantly, whether it is that event in question that has impeded the party from performing its obligations under the contract. Those who have sought to rely upon force majeure in instances of congestion will appreciate the difficulties of succeeding in that task. Nevertheless, a declaration of force majeure is almost inevitable and needs to be considered and responded to.

The force majeure clause may give either party under the sale contract the right to terminate the contract if the force majeure event and the specified consequences have been continuing for a specified number of days or weeks. Of course, wrongfully terminating the sale contract on the grounds of force majeure could be treated as a repudiatory or renunciatory breach of the sale contract. Once again, care needs to be taken and the terms of the sale contract and the commercial consequences need to

be considered carefully before any such right is exercised.

In summary, where performance of a sale contract becomes delayed or impossible to perform, the seller may seek to rely on the principle of "force majeure" to absolve themselves of liability for the delay or non-performance. Most sale contracts will include a force majeure clause; however, they are construed narrowly by the courts and therefore need to be reviewed carefully to establish their scope and applicability to the facts and circumstances causing the delay or alleged impossibility. Some force majeure clauses will expressly exclude foreseeable events. If so, and the port was congested at the time that the sale contract was entered into, it is unlikely that force majeure can be relied on.

Stephenson Harwood's Marine and International Trade department is actively advising clients in relation to the issues arising out of the Richard's Bay congestion. Please get in touch if your business has been affected.

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