STEPHENSON HARWOOD

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WHEN SUGAR GETS GRITTY: MITIGATING AND MANAGING THE RISK OF SAND-CONTAMINATION IN SUGAR CARGOES FOR SELLERS AND BUYERS

There is a sense of déjà vu amongst sugar traders involved in Brazilian trade: the fraudulent practices of 2006-2010 involving criminal actors deliberately substituting sugar cargoes with sand are reportedly having a comeback, affecting both sellers and buyers alike. In the wake of such criminal incidents, this article briefly explores the legal implications of sand-contaminated sugar shipments and outlines practical measures which can be taken by sellers and buyers of Brazilian sugar to mitigate and manage their risks, allocate liability, and protect their interests.

LEGAL IMPLICATIONS AT A GLANCE

In the context of sale and purchase agreements, the substitution of sugar cargoes with sand may give rise to claims for breach of contract. In English law contracts, the breach will likely relate to the terms governing the quality, condition, description, fitness for purpose, and/or quantity of the sugar.

In addition to contractual claims discussed above, buyers of contaminated sugar may also be able to pursue claims in misrepresentation or fraud, practically where falsified shipping documents or quality certificates have been issued and relied upon.

In the aftermath of the 2006-2010 frauds, our team was involved in a number of disputes arising from those events. While the detailed analysis of the various contractual and non-contractual claims arising from the sand-contamination is outside the scope of this article, please feel free to contrat us if you would like to discuss any potential and/or existing claims.

MITIGATION AND MANAGEMENT OF RISKS

Considering the legal risks involved, and the immediacy of the problem, we now focus on practical measures that parties can implement both proactively—acknowledging the increasing occurrence of sand contamination—and reactively, to mitigate or manage these risks effectively.

The contract: While there is no legal requirement under English law for sale and purchase contracts to be in writing, or signed and executed, it is always best practice to have written evidence of the terms agreed. This is particularly crucial in international trade, where parties operate across different jurisdictions, and even more so in

scenarios where prevalent issues, such as cargo contamination, may impact contractual rights and obligations.

Certificate final clause: Most sugar contracts will contain quantity and quality determination clauses. The majority of contracts also feature a certificate final clause which makes the quantity and/or quality of the sugar final on loading or at discharge as per the certificate issued by the relevant surveyor. In cases where quantity and quality are to be final on shipment, buyers should ensure that: (i) the certificate final clause explicitly includes the exception for fraud (and manifest error)[1]; (ii) a credible and reputable surveyor is named in the contract, or the contract specifies that the certificate must be issued by such a surveyor; and (iii) their own surveyor is present at the load port[2]. In cases where quantity and quality are to be final as per landed/outturn figures[3], sellers should ensure a credible and reputable surveyor is present at the discharge port to inspect the sugar being unloaded[4]. If a contract is already in existence, any changes to the terms should be recorded in a formal addendum, signed and executed by the parties. With those contracts still under negotiation, the parties can negotiate, agree, and incorporate appropriate terms in their contracts.

Back-to-back contracts: For those sellers and buyers in a chain, they should ensure that their sale contract and purchase contract terms are, as far as possible, back-to-back[5]. Where there is a risk of contamination, special attention should be given to clauses concerning quantity, description, quality, condition, specification, quantity and quality determination (weighing, sampling and testing), and supervision as well as law and jurisdiction. It is also important to pay attention to notification requirements, ensuring that any strict timelines for claims notification under the sale contract allow adequate time for the intermediary party to meet notification requirements under its purchase contract.

Supervision: Adequate supervision is essential to minimise the chance of criminal incidents occurring in the first place. While sugar contracts generally contain provisions on supervision[6], these can be fine-tuned to match the parties' exact requirements in circumstances where fraud at the loading port is prevalent. By way of example, the parties could discuss and agree the identity of a credible and reputable surveyor, whether the parties should have a joint surveyor or each party should have their own surveyor, the allocation of costs, the instructions to be given to surveyors, and the powers of the surveyor(s).

Evidence: As soon as an issue is identified, parties should begin gathering and preserving evidence to support their claim or defence. In addition to interparty communications, sellers/CIF sellers should retain communications with the terminal, surveyors, and vessel, while buyers/FOB buyers should retain communications with their surveyor and vessel.

Communication: Parties should expressly reserve rights in any (ideally written) communication to prevent future disputes on waiver of rights. It is important to remember that admissions and concessions made in open communications could be interpreted as waivers of rights. Additionally, not all internal communications are privileged, so parties should be cautious about admissions or concessions in non-privileged internal communications.

[1] While it is likely that the fraud exception will be read into the contract by a court/tribunal, it is best to include it expressly.
[2] See comments further down on supervision.
[3] For example where Rule 106 of the SAL Rules applies.
[4] Any CIF sellers who are themselves FOB buyers, should also have surveyors present on loading.
[5] However, please note comments on notification timings further below.
[6] See for example Rule 301 of the SAL Rules.

Notification and pre-claim formalities: Parties should be mindful of any notification requirements or pre-claim formalities expressed in the contract or applicable by virtue of the incorporation of standard terms. The contract may contain express terms as to the specific addressees of notices (in general or relating to legal claims), the method of serving a notice, the deemed time for receipt of notice, and any applicable time restrictions. For those contracts incorporating the SAL Rules, unless stated otherwise, any claims with respect to "*weight, condition and/or quality*" must be notified by the buyer to the seller within seven days after completion of discharge[7] and such notification should be made by courier "*to the usual or last known address or place of business of the relevant party*"[8]. There are also specific sampling rules to follow.[9] Further, if matters cannot be commercially resolved, under the SAL Rules, a seven-clear-days' notice of an intention to commence arbitration is required prior to commencement of any such arbitration.[10]

Time bar: Under English law, claims for breach of contract should generally be brought within six years of the breach[11]. Setting aside the notification requirements set out above, the SAL Rules do not contain any time limits for bringing claims. Accordingly, the general six-year time limit also applies to contracts incorporating the SAL Rules. However, this does not preclude parties from agreeing shorter time limits in their contracts. As such, parties should: (i) when entering into contacts, consider whether a shorter time limit would be beneficial to their commercial interests; and (ii) when issues arise, be mindful of any time limits for bringing claims.

AUTHORS

EMMA SKAKLE
Partner
+ 44 20 7809 2335
emma.skakle
@stephensonharwood.com

NAZ TAJBAKHSH
Managing Associate
+ 44 20 7809 2180
naz.tajbakhsh
@stephensonharwood.com

[7] Rule 308
[8] See Rules 129 and 227 of the SAL Rules.
[9] See Rule 308 of the SAL Rules.
[10] Rule 502
[11] Section 5 of the Limitation Act 1980