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COMMODITIES

ADAPTING TO CHANGES IN THE INDONESIAN REGULATORY REGIME

At Coaltrans Asia, we talked about recent changes in the Indonesian regulatory regime for coal trading and shipping, the effects these changes might have on your sale contracts, and some practical steps parties can take to protect against changes in the regulatory landscape.

Coaltrans Conferences

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Changes to the regulatory regime in Indonesia

Changes in any regulatory regime can be fast paced, unpredictable and often implemented at short notice, and that is certainly the case in Indonesia.

In 2018, the Minister of Energy and Mineral Resources (MEMR) issued two decrees which affect the sale of coal by Indonesian sellers.

With effect from 1 January 2018, all coal producers are obliged to sell 25% of their planned production for the year into the domestic market. Producers can only apply to the Minister to export coal after meeting the domestic market obligation ("DMO"). Producers that fail to meet the DMO will be subject to sanctions such as production cuts for the 2019 Work Plan and Budget and reductions in export quotas. It is not clear how this will work in practice, for example, whether producers must sell 25% of their planned production domestically before they can sell any coal at all to foreign buyers, or whether they can meet the 25% requirement progressively.

Further, from 9 March 2018 to 31 December 2019, the pricing of coal used for electricity generation is set at US$70 per metric ton Free on Board Vessel. The set price will apply to coal of the following specifications: 6,322kcal/kg GAR; total moisture of 8%; total sulphur of 0.8%; and ash of 15%. For coal with different specifications, if the coal reference price is greater than or equal to US$70 per metric ton, the relevant decree contains a formula to adjust the price. For coal with a reference price of less than US$70 per metric ton, the coal will be sold at the coal reference price. Producers who comply with this decree can apply for a 10% increase in production volumes.

Aside from the two decrees discussed above, the Minister of Trade (MOT) also issued a regulation (Regulation 82) imposing an absolute obligation on coal exporters to (a) utilise sea transportation controlled by a national sea transportation company and (b) procure cargo insurance from a national insurance company to insure export goods. The regulation stated that exporters may only utilise sea transportation controlled by a foreign company if vessels controlled by a national sea transportation companies are limited in availability or unavailable. The implementation date was initially delayed, and it has now been announced that Regulation 82 is being scrapped. It nonetheless remains an example of the unpredictability of regulations and the uncertainties they can throw up, for example, would the requirement that a national sea transportation be used have meant that the vessel must be Indonesian flagged? Or would it have meant that the vessel must be owned or even simply chartered by an Indonesian company?

How to protect against such changes in coal sales contracts

There are a number of contract clauses that parties may look to rely on where there is a change in regulations which affects their ability to perform a contract. These may include force majeure clauses, change in law clauses and price review clauses.

Provided that the contract contains a force majeure clause, changes in law such as those discussed above may relieve the parties from all or part of their contractual obligations. The most important point to understand about force majeure is that as a matter of English law, there is no freestanding principle of force majeure. As such, the meaning of the term "force majeure" and the effects of a force majeure event are whatever your contract says they are.

In order to invoke the force majeure clause, it must generally be proven that (i) the event falls within the force majeure clause; (ii) the event arises from circumstances beyond all parties' control; (iii) the event was not foreseeable at the time the contract was concluded; (iv) no reasonable steps could have been taken to avoid or mitigate the event or its consequences; and (v) the event prevented, hindered or delayed performance, although it will depend on the clause in question.

A 'change in law' clause may also be used to protect one or both parties against changes in law affecting the performance of the contract. The clause can be drafted such that when it is invoked, parties can avail of measures such as further negotiations, termination of the contract or price adjustment in order to adapt to the changes in law. The key point to bear in mind with such clauses is that they should be as specific as possible to avoid being interpreted as "agreements to agree", which are unenforceable as a matter of English law. An agreement to agree would be, for example, a clause simply providing that upon a change in law, the parties will agree suitable amendments to the contract. The problem is that if the parties fail to agree on such amendments, the clause (and possibly the entire contract) fails as a court/tribunal has no clear obligations to enforce. Thought should be given to: which changes in law and which legal systems will the clause cover; what constitutes a change in law; and what are the consequences of the change in law (are the parties obliged to negotiate? Can one or both of the parties terminate? Is there a price review?).

Finally, parties may also consider the use of a 'price review' clause which provides that a particular event (such as a change in the law, or the expiry of a fixed period) will cause parties to review the price of the contract. Again the key is to avoid a clause which is an unenforceable agreement to agree. Thought should be given to: when the price review will occur (is it periodical? Is it triggered by a particular event?); which elements of the price are effected; and, most importantly, how is the new price determined (is it by negotiation? By reference to a formula? By an expert or by arbitration?).

It is not possible to provide for every eventuality in a contract and there will inevitably be events which the parties did not foresee or otherwise provide for in their contract. However, there are steps that can be taken at the contracting stage to limit the scope for potential disputes in the future, whether foreseeable or not.

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