Risk Mitigation and Allocation Strategies in Contract Drafting for Terminal Services Agreements

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A terminal services agreement (TSA) is a contract for a mining producer/shipper to warehouse and through-put its product en route to its customers. There are a number of ways TSAs can be drafted to allocate and mitigate risks for a shipper.

One, defining the product and the services

The product should be defined as broadly as possible to cover anything the shipper can reasonably foresee as requiring through-put or storage capacity during the term of the TSA. Tying the definition of the product to a specific place it has been mined/produced should be resisted. However, if there is a valid commercial reason for the product to be defined as originating from a particular site, the shipper may include provisions for "substitute products" from its other sites or proposed new sites.

The TSA should be clear as to the ownership rights of the product; specifically, that the shipper owns the product and if the product can undergo chemical or other inherent changes while in storage (such as increased volume due to moisture), that it retains ownership in the "changed" product. Similarly, the TSA should address ownership rights to any residual Product at the expiry of the TSA.

Consideration should be given to delineating between the "services" the shipper requires, "Excluded Services" that the terminal will not provide, and potential "Additional Services" the shipper may request. The most common types of required terminal services are:

- Receiving and unloading product from truck or unit trains;
- Discharging / devanning of cargo from sea containers;
- Removing lashing and dunnage;
- Repackaging, freight forwarding, delivery;
- Placing and storing product in warehouse, stockpiles, or containers;
- Blending or rotating the product;
- Providing berths to vessels;
- Loading vessels, trucks, trains or sea containers; and
- Preparing import / export documentation in some cases.

The TSA should include a minimum standard of care in the performance of the services, such as the care and diligence that a careful and vigilant owner would exercise in similar circumstances.

Two, guaranteed minimum through-put capacity

A shipper will often wish to negotiate a guaranteed minimum volume of through-put for each year or quarter and, in exchange, the terminal will usually require "deficiency payments" if the shipper fails to utilize that capacity. In such circumstances, the shipper should consider whether those payments should be the terminal's exclusive remedy.

The shipper should also consider negotiating a cap on the amount of deficiency payments in any year and / or during the TSA term. As well, if, in a given year, the shipper has a deficiency in one quarter (and makes a deficiency payment) and then provides excess tonnage in another quarter, it would be appropriate to include an adjustment clause that credits the shipper at a set future date.

Three, term and renewal options

A shipper needs to give careful consideration to the initial term of the TSA and any renewal(s), particularly in light of any "guaranteed volume / through-put" and "deficiency payment" clauses. A shorter initial term with renewal options may be prudent if the shipper has shorter term offtake agreements.

The renewal clause should provide that the new rate is retroactive to the commencement of the renewal term (without interest), and that during negotiations or pending arbitration over the renewal rate, the rate for services remains the previously effective rate.

Four, Force Majeure clauses

The concept of Force Majeure (FM) does not arise at common law but rather exists by virtue of the contract language. It is not equivalent to "frustration" at common law, which occurs when an event so significantly changes the nature of the contract from what was contemplated, that both parties are discharged from the whole of the contract. By contrast, an FM clause only excuses non-performance or a delay, such that neither party is in breach as a result of an FM event.

A shipper will also want to replicate the specific FM events in the TSA in its offtake agreements.

An FM clause may provide that the party relying on it cannot be negligent, or may require mitigation by the party claiming FM. The parties should also consider whether a lengthy FM event (ie., six consecutive months) should permit either party to terminate the TSA. Finally, a shipper will want to consider whether the minimum annual quantity of through-put and deficiency payment provisions should be adjusted if an FM event persists for a certain period of time.

Five, access to records

The TSA should include requirements for the terminal to keep accurate accounts and records relating to its performance under the TSA. A shipper should be provided with a reasonable opportunity to access and audit the terminal's records both during the term and for a reasonable period after its expiry. The cost of an audit is typically borne by the shipper, unless the audit reveals a material error or breach of the TSA by the terminal. M

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