



ARMA Update: 20 January 2022

(English Version)

The Implication of the Coal Export Ban to Shipping Contract

The Directorate General of Mineral and Coal (“**DGMC**”) of the Ministry of Energy Mineral Resources of Indonesia (“**MEMR**”) issued a policy to ban Indonesian mining companies from exporting coal. This prohibition is set out in the DGMC letter No. B-1605/MB.05/DJB.B/2021 regarding the Fulfilment of Coal Energy for Public dated 31 December 2021 (“**DGMC Letter 1605/2021**”).

DGMC Letter 1605/2021 prohibits Indonesian coal producers from exporting coal for the period between 1 January 2022 to 31 January 2022. DGMC Letter 1605/2021 also requires coal which has been loaded and placed at the loading port and/or loaded onto vessels, to be immediately redirected and delivered to Indonesia's state-owned power company in order to fulfil Domestic Market Obligation (DMO).

The above export ban raises an issue of dispute on the shipping activities that carries coal on the vessel. Not only for the exporters or sellers, but legal problems may also arise to the shipowners under charterparties.

Seller's Risk of Default

In accordance with the Ministry of Trade Regulation No. 65 of 2020 regarding Amendment of Ministry of Trade Regulation No. 40 of 2020 regarding Terms of Use of National Sea Transport and National Insurance for Exports and Import Certain Goods (“**MOT 65/2020**”), Indonesian exporter has an obligation to export coal, using national flag vessel with carrying capacity maximum 10.000 DWT. The main purpose of the issuance of MOT 65/2020 is to encourage the use of Indonesian flagged vessels as well as national insurance for an exporter, which also a part of the Indonesian maritime cabotage policy.

Under the principle of common International Commercial Terms (“**Incoterm**”) condition, the above-mentioned requirement may falls under Cost Insurance Freight (“**CIF**”) type of transaction. In CIF principle, the seller or the exporter is the party that procures for shipment and appoint their own vessel. However, every CIF type of transaction is also subject to specific terms and conditions of each sale and purchase of coal agreement. In short, generally, the procurement of Indonesian flagged vessels and national insurance are deemed to be a prerequisite condition regarding exporting coal from Indonesia.

With the issuance of DGMC Letter 1605/2021, any Indonesian flagged vessel carrying coal may be prevented from leaving Indonesian ports rendering the seller to temporary stop the delivery. Also, in the event where the vessel that carry the coal already arrived at the port of discharge, the seller prone to a risk where the coal could not be released from the area of discharging port. Both



situations may cause a significant delay in the shipment period and potentially trigger an event of default under the sale contract.

Consequently, parties under international sale of coal contract should be aware of the provision regarding: (i) the period of delivery; (ii) late delivery penalty clause; (iii) termination clause especially on the advance payment that already paid; (iv) demurrage provision; (v) any remedy provided under the sale contract.

Risk under Charterparties

Based on charterparties, the charterer/seller, assuming the sale contract is under the CIF seller transaction, may pose the risk of being terminated by the shipowners due to the issuance of DGMC Letter 1605/2021. This situation may occur if the vessel has not yet arrived or has already arrived but not yet departed from the loading port. As such, the charterer/seller may also bear the risk of demurrage due to the charterer's/seller's inability to complete the loading process.

Suppose the vessel has just commenced the voyage after the loading is completed. In that case, the shipowner should be preparing for the possibility of deviation to another port. Accordingly, the shipowner may need to re-calculate for any incidental operational cost that may occur, which may reflected to the freight rate and therefore should be communicate or re-negotiate with the charterer.

Parties under charterparties should be aware on the provision regarding: (i) laytime and demurrage; (ii) early termination or cancellation clause; (iii) deviation.

Force Majeure Provision

The issuance of DGMC Letter 1605/2021 indeed has the potential to trigger a Force Majeure clause. However, the relevant parties shall carefully review the terms of the contract the whether the Force Majeure clause contains specific events (i.e: government policy) that may trigger the provision. In such a case, the parties may require determining whether the ban can excuse the parties' performance entirely, terminate automatically, or (depends on the wording in the contract) extend the period of the contract.

Typically under Force Majeure Clause, there are requirements to be taken by each party when the event has arisen. Both parties must carefully follow such requirements in good faith if both parties intend to mitigate further damage. Be careful that some party may use the Force Majeure event to exclude its obligations or terminate the contract unilaterally. Having the agreement carefully drafted, especially the condition of the Force Majeure event, is necessary.

Re-Negotiating the Contract



The only good news coming out from the DGMC Letter 1605/2021 is that the prohibition period is relatively short, which is until the end of January 2022. Perhaps, suppose this prohibition of coal export policy is continued, in such case, it will create distrust from the international buyer, and the risk of hampering the national coal market as well ship charter market could be severe.

Business actors may take advantage of this situation to re-negotiate the terms and conditions in the international sale contract and or in the charterparty and further make amendments to each sale agreement or in the charterparties.

Please contact Aryo Baskoro (aryo.baskoro@arma-law.com) for further information.

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