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Attention: Mr. Dave Quist (by Email)

Re: General Opinion on Enforceability of Grain Contracts

INTRODUCTION

You have requested a legal opinion on the enforcement of futures/commodity contracts relevant to your membership. The heat and lack of precipitation in the Prairie provinces this season have created conditions where most, if not all, of your members will be unable to deliver grains as contracted. Quality and quantity will be deficient or non-existent.

You have provided 14 sample contracts or parts thereof. Most contain the "terms and conditions", which clearly are documents drafted by the buyers.

By design, this opinion can only address legal issues common to all contractual relationships here and each member ought to seek independent legal advice about his/her contract for grain delivery if considering options due to poor growing conditions. Thus, the purpose of this opinion is to guide members with respect to overarching issues; issues that may be common and in the context of this growing season.

To provide this opinion, the Association provided sample contracts and researched relevant issues. Readers of this opinion should seek independent legal counsel concerning their own contracts and circumstances. There will always be strategic decisions to be made in each case. There will be the relationship with the buyer(s) to consider and, perhaps, collateral evidence to consider (communications with the buyer(s). The latter can affect the interpretation of the contract language.

SAMPLE CONTRACTS

The sample contracts all appear to be drafted by buyers and are heavily tilted in their favour. When the buyer cannot perform there are delay and extension provisions, generally leaving the seller with some storage compensation. If the buyer cannot perform for reasons beyond its control, there is usually a force majeure clause as an escape or delay mechanism.

Most of these contracts include an "entire agreement" clause which states that all terms are contained in the document and there can be no amendment except in writing. Therefore, things said before signing the contract or during its existence may not be tendered as evidence contrary to the written terms.

A couple of contracts contain language requiring the seller to deliver "unconditionally"; in one case, regardless of crop failure or whether grain is grown. Others say, "if producer fails to deliver for any reason whatsoever" (or similar language) then liquidated damages apply as defined.

Liquidated damages are usually defined, and most clauses have some language stating that they are a genuine pre-estimate of damages. This language is to avoid the court finding the specified amount(s) being penalties, which the court won't sanction. The language, however, does not guarantee that the court will not find the amount(s) to be penalties.

Further on liquidated damages and fees to be paid on default, these must be set out in the contract. If fees are being charged on some pretense, they must be spelled out or defined clearly enough to be within the parties' contemplation. Attempts to charge fees not contemplated will not be enforced by the court. Some contracts give the buyer the right to set-off against other monies it owes the seller. This puts the seller further on the defensive if expected funds are not received and makes it harder to fund litigation amongst other things.

One important issue to consider with counsel is whether the contract is ambiguous or contradictory in relevant areas. If so, the doctrine of *contra proferentem* may apply when a court is interpreting the language. Simply put, the contract will be construed against the favour of the author if two interpretations are possible. Here, all contracts appear to be drafted by the buyer (usually a large entity). Factors such as whether the seller had legal advice or acknowledged in the contract that he/she had the opportunity to obtain same are relevant. Further, failing to read the contract before signing is not an excuse at law.

ISSUES

Force Majeure

Force majeure is likely the first issue that will pop into legal minds in this scenario. Of course, there must be a force majeure clause in a contract for the concept to operate. In the sample contracts provided, there is one even-handed force majeure clause (Viterra Canada Inc. – CMI Territorial JV – Feb. 2021) and the rest, where the clause exists, are drafted only to the buyer's favour.

There is one other force majeure clause that is even-handed but refers to force majeure "as that term is commonly known in the industry" (AGT Foods Sask.). The writer is not familiar with any such industry standard and cannot comment on same.

The wording of a force majeure clause is key to any analysis as it will set out the events which give rise to it and the consequences of invoking it (deferral of performance or extinguishment). Some contracts have "catch all" phrases after itemizing the events and the interpretation exercise will be to determine whether an unnamed event occurring falls into the type of events listed or contemplated. It all depends on the language as to its specificity or generality.

The last Supreme Court of Canada decision was in 1975 and refers to the unforeseeable change being so radical as to strike at the root of the contract. Courts and arbitral panels have strictly interpreted force majeure clauses.

Generally, one must show that there was no reasonable way to perform the contract once confronted with the event. Analysis will also look at whether the other side could mitigate its position when notified. Force majeure clauses often contain notification requirements and may relieve the non-defaulting party from mitigating, as is the case in some samples.

The costs of performing having risen is not an excuse for invoking force majeure. The question this year is likely, can one perform at all?

Mitigation is required at common law. Thus, if the seller notifies the buyer that he/she cannot deliver, the buyer should make reasonable attempts to lessen its losses by procuring elsewhere.

This raises the obvious question, if the conditions are so dire that the western producers cannot deliver for the most part, how can the buyers mitigate? This leads to the next contract law issue, frustration.

Frustration

If an event has occurred after entering into the contract, which makes the contract impossible to perform, it may be frustrated. The event must go to the root of the contract and must be something not contemplated in the contract. If the court finds a contract frustrated, the parties are relieved from performing. This doctrine has a high burden in our courts for the party seeking to rely upon it. It would apply where the contract does not speak to force majeure and where there is no other language present that would speak to delivery being affected by weather.

In the sample contracts, as mentioned above, most do not have a force majeure clause or, at least, one in favour of the seller or including the seller. Query, does the existence of a force majeure clause on the buyer's behalf imply that there can be no force majeure clause for the seller (yes), but also no frustration of the contract? The writer thinks it would not be likely that a court would bar a seller from arguing frustration and it seems quite trite that being able to grow a crop in the normal reasonable manner would be at the root of the contract. The bulk of the contracts show that the buyers have protected themselves and hung the sellers out to dry in the contract language. The events of this growing season are extreme and that should be easy to demonstrate historically. Further, any case would be argued against the background "noise" in the public discourse concerning climate change.

INTERPRETATION DOCTRINES

Ejusdem Generis

This doctrine would come into play in analyzing a clause such as force majeure in a contract. The contract lists events that give rise to the invocation of the clause. The list is not exhaustive by definition or contains language such as "… and any other event beyond its reasonable control". In such case, the court must decide how wide open that is when looking back at the preceding list of events. If the court determines there is a theme (common class) to the list, it will follow same.

Contra Proferentem

Here, the court will determine whether the contract was drafted by one party and there has been no reasonable opportunity for the other party to obtain legal advice. This analysis, by definition, gives rise to assessing the bargaining power of the parties. To the writer, it seems that, post Wheat Board, we are in a situation where sellers have been dealing with myriad contract documents proffered by large entities and the documents have been set in the buyers' favour. Regardless of how 2021 concludes, the sellers need to level the playing field.

Jurisdiction

While not strictly an interpretation doctrine, where the dispute will be argued and under what law is important to note. Some sample contracts specify arbitration under NGFA Rules and place of arbitration. Others specify which law, usually the province where the contract is made. Suffice to say, the above-mentioned doctrines will apply unless specifically ruled out (not seen by writer).

CONCLUSION

Members of the Association should review their contracts carefully and see their local lawyer. It will likely be necessary to consult with a seasoned litigator to receive advice on one's own situation. Whether to comply with any of the contract, say notification of default clauses, and/or when and how to do so is important. Strategy can be key. How one liaises with the buyer and its representatives is also important and seeking litigation advice earlier than later is key. It can be important to stake out one's position early in writing particularly if the buyer is threatening fees and set-off. If insolvency is possible, that brings in other issues/tactics to discuss.

One may have a good frustration argument now, but that may change if it becomes known that one is growing in a risky region as time passes.

It is the writer's opinion that this is not just a poor year, but an extreme event which may portend future seasons. It is time to improve the contractual relationships. Producers, en masse or in groups, should have clout. With ever increasing climate change data, it will become hard to argue that extreme drought is unforeseeable in certain regions (*vide* California for the last five years). Thus, it is important to draft new contracts that are fair and reasonable in apportioning risk.

Yours Truly,

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BARRISTER & SOLICITOR
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