



Chapter 12

Form Over Substance: Potential Pitfalls in Coal Trading Form Contracts

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§ 12.01. Introduction.

The advent of coal trading through the New York Mercantile Exchange (NYMEX), the Over the Counter (OTC) market and other platforms has ushered in a new era to the realm of coal supply contracting. Participants in these new markets typically utilize commodity-style trading terms that represent a significant departure from more traditional coal supply agreements. Frequently taking the form of lengthy master agreements with transaction “confirmations” used to memorialize specific deals, these agreements are replete with trading-style terms that largely eschew reliance on the Uniform Commercial Code (U.C.C.) in establishing “events of default,” the calculation of damages for non-delivery or non-receipt, “termination” damages based on “gains” and “losses” as calculated by the non-defaulting party, and the right to demand “financial assurance.”

This chapter will explore potential pitfalls associated with these commodities trading terms and conditions, both when used in the context of coal trading and in the setting of a more traditional supply contract. This chapter will also examine the calculation of damages under Article 2 of the U.C.C., address arguable gaps in the Code’s treatment and determination

of such damages, and examine whether and to what extent the typical coal trading terms and conditions address or solve any such ambiguities.

§ 12.02. Usage of “Commodity” Trading Agreements for Coal Transactions.

[1] — The Coal Trading Association’s “2006 Master Coal Purchase and Sale Agreement.”

The context for this chapter’s analysis largely will be the Coal Trading Association’s (CTA) “2006 Master Coal Purchase and Sale Agreement.”² The CTA Master Agreement contains provisions which are characteristic of terms and conditions that are increasingly being utilized in coal trade transactions. The CTA Master Agreement appears to be loosely based on the “Master Power Purchase and Sale Agreement”[©] (hereinafter, the “Master Power Agreement”) promulgated by the Edison Electric Institute (EEI) and the National Energy Marketers Association, which is available at EEI’s website.³ This likelihood may be significant because there are important distinctions between coal and other more homogenous energy products like natural gas and electricity.

While this chapter was being written, the EEI promulgated its “Coal Annex to the EEI Master Power Purchase and Sales Agreement,”^{©4} the contents of which reinforce the appearance of connections between the CTA Master Agreement and the EEI Master Power Agreement (the two forms include several nearly identical provisions).⁵

Like the CTA Master Agreement, the EEI Coal Annex lacks the balance and fairness inherent in the U.C.C.—a detailed body of uniform law prepared by an objective body (the EEI is an association of U.S. investor-owned electric companies).

² Hereinafter, the “CTA Master Agreement,” which can be found at CTA’s website (www.coaltrade.org).

³ The Edison Electric Institute’s website is <http://www.eei.org>.

⁴ Coal Annex to the EEI Master Power Purchase and Sales Agreement,[©] Version 1.0, April 2, 2007 (hereinafter, the “EEI Coal Annex”).

⁵ It has been reported that “EEI’s drafting committee worked closely with CTA to ensure the language of the two agreements meshed.” *SNL Energy Coal Report*, Volume 3, Issue 17 (Monday, April 30, 2007), p. 27.