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Force majeure clauses in turbulent times

Introduction

Force majeure (FM) clauses typically address circumstances outside a contracting party's control that affect the ability to perform, and provide for the relevant obligations to be suspended and/or the contract to be cancelled.

FM clauses have been the subject of considerable focus in the light of disruption arising from the pandemic. An aspect that has received less attention is the application of FM clauses to political instability and civil unrest or conflict. There are, very sadly, numerous recent incidences of this, from riots in Washington DC and Northern Ireland to armed conflict in Nigeria and Mozambique.

Force majeure clauses in commodities contracts

FM clauses usually have two parts: (1) a list or description of triggering events; and (2) the operative provisions, setting out what a party must do to rely on the clause and its effect when relied upon.

In many of the widely-used standard terms, events in the nature of political instability and civil conflict or unrest are specifically listed in the FM clause as triggering events:

- BP GTCs: "*civil war, riots and revolutions*"
- FOSFA: "*riots, civil commotion*"
- GAFTA (prevention of delivery/shipment clause): "*hostilities*" and "*riot or civil commotion*"
- SAL (Sugar Association of London): "*rebellion, insurrection, political... disturbances, civil commotion*"

An FM clause will often include "sweep-up" wording, for example the BP GTCs refer to "events such as [the listed triggering events], this enumeration not being exhaustive", and GAFTA refers to "any other event comprehended in the term force majeure".

Such wording is usually interpreted subject to the *eiusdem generis* principle, meaning that a sweep-up phrase following a list of examples is generally limited to examples of the same type. In the example of the BP GTCs, the sweep-up wording would thus likely capture a major event of civil unrest, even if this could not strictly be described as a "*civil war, riot or revolution*".

Some FM clauses do not list specific triggering events at all, and instead give only a general description of what constitutes force majeure. An example is the SCoTA (Standard Coal Trading Agreement) GTCs, which refer simply to "*any event which affects or is likely to affect the ability... to perform*".

The meaning of "riot" and "civil commotion"

Amongst the terms most commonly used in FM clauses are "*riot*" and "*civil commotion*".

What constitutes a "*riot*" is defined in English criminal law. The definition requires the involvement of at least three people with a common purpose, and the use of force or violence to accomplish that purpose, in a manner that would cause alarm.

The meaning of "*civil commotion*" is discussed in case law relating to insurance policies. It is described as "*tumult and violence on a large scale*", "*disturbances*" with "*sufficient cohesion to prevent them from being the work of a mindless mob*" and involving a "*really substantial proportion of the populace*".

It is possible that these meanings would be applied in the context of an FM clause in a commodity

contract, on the question of whether a relevant triggering event had taken place.

Principles applicable to force majeure clauses

There is no general doctrine or precise definition of force majeure in English law. Whether a party can rely on an FM clause will therefore always depend on construing the words of the clause itself in the context of the facts of the case. Guiding principles include the following.

- Words such as “prevented” do not cover a change in circumstances affecting a contract’s profitability or how easy it is to perform. What is needed is a physical or legal prevention of performance.
- Words such as “hindrance” on the other hand refer to performance becoming more difficult, but not impossible. Here too a change in a contract’s profitability is in itself unlikely to be sufficient: a rise in the price of goods, arising as a result of war, was held not to be a hindrance to delivery (*Tennants v Wilson*).
- If one means of performance is prevented or hindered, the party relying on the clause usually needs to show that there were no other modes of performance available, or at least no other reasonable ones. In sale of goods cases, the availability of alternative sources of supplies and methods of delivery are often particularly relevant.
- There must be a causal connection with the triggering event, i.e. the triggering event must have the actual effect of preventing, hindering or delaying performance. A recent example is a case in which a party was unable to rely on the disruption caused to their business operations by the civil operation in Thailand, where they were unable to show that this had been the cause of their failure to perform (*Triple Point Technology v PTT*).

Evidence and notices

A party seeking to rely on an FM clause will have the burden of proving that its requirements have been met. It will be therefore be very important to gather any available evidence: (1) relating to the triggering event and its effect; and (2) to show that there were no other modes of performance available. For example, in the case of a seller with an obligation to deliver at a port in a place of civil unrest, this could be evidence to show both that discharge at the port was not physically possible (e.g. because the

terminal had suspended operations) and that any other means of delivery, such as procuring contractually-compliant goods from a different source and transporting them by road, had been investigated and were not viable.

Force majeure clauses often have prescriptive requirements as to notice(s) that must be served by the party relying on the clause. These should always be strictly complied with. Any failure to do so could deprive a party of the protection of the clause.

Frustration

A contract can be discharged on the grounds of frustration when an event renders it physically, legally or commercially impossible to perform, or changes an obligation into a radically different one from that undertaken when the contract was concluded. Civil conflict or unrest is in principle capable of frustrating a contract, subject to the proviso that if an event is covered by a contract’s FM clause then it is unlikely to also be capable of frustrating the contract. Taking the example of BP GTCs, an attempt is made to address this through the FM clause providing that “nothing in this Section shall be taken to limit or prevent the operation of... the doctrine of frustration...”.

That said, frustration will usually be a high bar to meet. In the sale of goods context, civil conflict or unrest may often result in increased cost or delay in performing an obligation, but such problems have (in the circumstances of the particular case) been held by the English court to be insufficient to frustrate a contract.

Contact us



Emma Skakle

Partner, London

T: +44 20 7809 2335

E: emma.skakle@shlegal.com



David Brown

Senior associate, London

T: +44 20 7809 2843

E: david.brown@shlegal.com