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JUNE 2018

# FORCE MAJEURE

First Edition by HFW & 20 Essex Street

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If you have any questions please refer to our Contributors page.

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01

# FORCE MAJEURE



# INTRODUCTION

Recent "extraordinary events" such as U.S. sanctions on Russia and Iran, railway line derailments in South Africa, and the closure of an oil pipe in Nigeria have highlighted the importance of well-drafted force majeure clauses to allocate liability in unfortunate circumstances successfully.

Force majeure, taken from the French for 'superior force', is a common clause in contracts that can limit a party's liability when an extraordinary event or circumstance outside the party's control prevents or hinders that party from fulfilling its obligations under the contract. Generally the clause allows, on the occurrence of certain events, for one (or both) of the parties to cancel the contract and/or be excused from performance of some or all of its obligations for a period of time. The purpose is to allow parties to contractually allocate their risk in relation to the occurrence of future events in circumstances stipulated by the clause.

Legal systems across the globe have developed various ways of dealing with the concept of force majeure. In many civil law countries and China, force majeure is an implied term into a contract when an unforeseeable and unavoidable event makes performance impossible. Although, it still remains popular within these countries to include a definitive force majeure clause to ensure specific risks are provided for.

Under English law, the doctrine of force majeure is more elusive and no precise common law definition has been agreed. Instead, force majeure is regarded as a creature of contractual innovation with case law acting as a guide to its application and effect. Traditionally, force majeure clauses were intended to deal with acts of God such as hurricanes, floods, and volcanic eruptions. More recently, force majeure clauses are being drafted to cover a wider range of events, such as cyber attacks, cobalt shortages, or a collapse in market. Furthermore, it is now common for force majeure clauses to not only include events that make performance impossible, but also events that make performance impractical or not commercially viable.

This Force Majeure Pack will focus on English law and will cover:

- General principles of force majeure
- Recent case law
- The relationship between force majeure and the doctrine of frustration
- Contemporaneous events (e.g. Brexit) and whether they can be classified as force majeure
- General guidance

# GENERAL PRINCIPLES OF FORCE MAJEURE

The party relying on the force majeure clause must show that the relevant event falls within the scope of the clause. Generally, the party must show:

- a. It was prevented, hindered or delayed (depending on the requirements of the clause) from performing the contract due to the relevant event.
- b. Inability to perform was beyond its control.
- c. There were no reasonable steps the party could have taken to avoid the event or the consequences.

However, the application of any force majeure clause will always be subject to the specific terms of the contract.

## "Hindered" or "prevented"

The extent to which a party's performance must be affected by a relevant event in order to rely on a force majeure clause will be determined by the wording of the clause.

A clause which requires performance to be "hindered" by a relevant event is easier to satisfy than a requirement for the event to "prevent" performance (such as that contained in FOSFA CIF Contract No. 25 which requires "*shipment of the goods...be prevented...?*").

For a party to be "prevented" from undertaking its obligations performance must have become physically or legally impossible. Circumstances affecting a particular supplier will often not be considered as "preventing" performance if a seller can obtain the goods from another supplier. However, interpretation of the clause must be considered in light of the contract as a whole. For example, in *Tradax Export SA v Andre & CIE SA* [1976] 1 Lloyd's Rep 416, CIF sellers in a 'string' were able to rely on such a clause when other sellers in the string could not ship the goods due to a prohibition on export, notwithstanding that they could have bought goods afloat.

A requirement for a party to be "hindered" is broader in scope and is arguably satisfied if performance will be significantly more burdensome (although not simply more costly). In *Tennants (Lancashire) Ltd v CS Wilson & Co Ltd* [1917] A.C. 495, the court stated: "*Preventing* delivery means...rendering delivery impossible; and "*hindering* delivery means something less than this, namely, rendering delivery more or less difficult, but not impossible". It also stated that hindering delivery can mean "*interposing obstacles which it would be really difficult to overcome*". However, the courts have not provided a comprehensive definition and there is scope for argument as to what constitutes performance being "hindered".

Other terms can be used which limit or widen the scope for a party to rely on the force majeure clause.

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<sup>1</sup> Although, performance must be prevented "at any time" during the period specified in the clause. For example, if performance is impossible for 2 days during that period due to a relevant event, this should allow the seller to rely on the clause, irrespective of whether the seller could still have performed by the end of the contract period. The clause also provides for an extension to the shipment period of 30 days beyond the termination of the relevant event preventing performance (unless the contract shipment period is less than 30 days in which case the extension is limited to the original number of days allowed for shipment). Therefore, where performance becomes possible again, the seller will have an obligation to perform within the extended shipment period. However, the contract may be cancelled if the relevant event exists for a period of 60 days beyond the contract shipment period.

## **Which Buyer?**

It is possible that, following a force majeure event, a seller has a sufficient quantity of goods to fulfil some contracts but not others. Does this still count as force majeure?

The case law suggests that, even where performance must be "prevented", if a seller can fulfil some contracts but not all of them, he can rely on the force majeure clause for the contracts that cannot be fulfilled. However, the seller must deliver the goods available in a reasonable manner, such as in the order that the contracts were entered into.

## **Foreseeability**

It seems that there is no strict requirement that the event which triggers the force majeure clause should be unforeseeable. However, if an event is foreseeable then it is more likely that a party will be unable to rely on the clause as he could have taken steps to avoid or mitigate the consequences of the event.

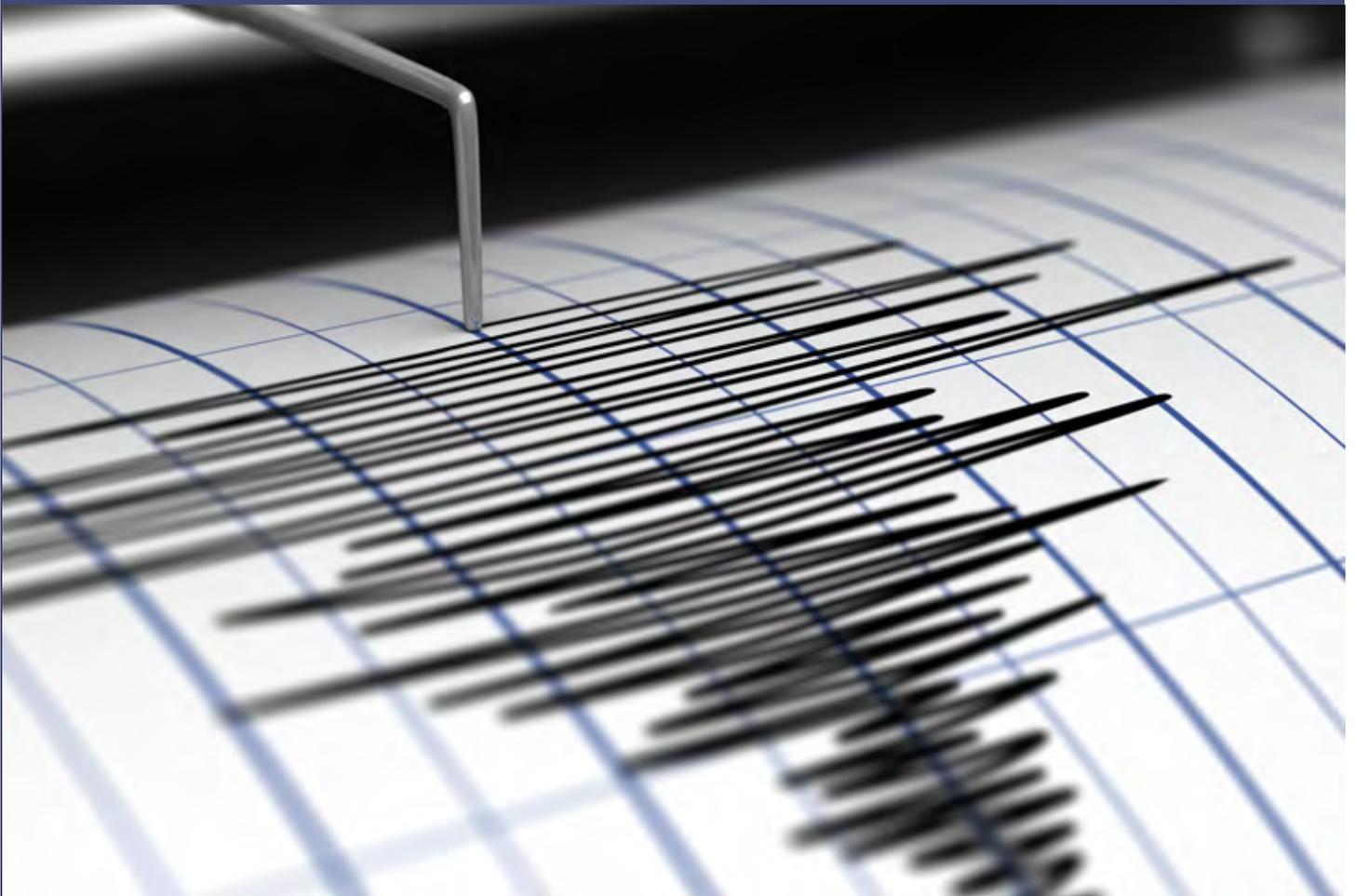
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# FORCE MAJEURE AND FRUSTRATION



# FRUSTRATION

Like the doctrine of force majeure, frustration is concerned with the liability of 'innocent' parties, following an event which affects the performance of the contract. However, unlike force majeure, frustration in English law is an established doctrine and does not require terms to be included in the contract for it to operate.

The doctrine of frustration was introduced into the common law to mitigate the harsh effect of the absolute contracts rule which required performance by a party even if that performance was more difficult or impossible. Frustration is used by the courts as a means of dealing with circumstances after the conclusion of the contract that render the agreement impossible, illegal or commercially pointless.

In assessing whether there has been a frustrating event the courts generally take into account whether:

- a. Performance of the contract has become impossible, illegal or radically different from that initially contemplated (not merely more expensive or onerous).
- b. The supervening event is due to the default of either party – if so the contract will not be frustrated.
- c. The contract makes provision for the event (e.g. by means of a force majeure clause) – if so the contract will not be frustrated.

Examples of frustrating events can include:

- a. A change in law making performance illegal.
- b. Requisitioning by a government of a vessel fixed under a charterparty.
- c. If the UK is at war and the named port of shipment becomes an enemy port.

In sale of goods contracts, the property in the goods must generally have not passed to the buyer if frustration is to operate, although there are exceptions to this (e.g. the passing of risk may sometimes be a determinative factor).

Following frustration the contract is brought to an end automatically and both parties are released from further performance although, under the common law, obligations which accrued prior to the frustrating event must still be performed. Loss will lie where it falls unless there has been a total failure of consideration (e.g. payment has been made for goods in advance and no goods have been received or other value received by the buyer) or which fall within the Law Reform (Frustrated Contracts) Act 1943, which, if applicable, allows monies paid prior to the frustrating event to be recovered subject to certain limitations. However, the Act does not apply to all contracts e.g. voyage charterparties and contracts set aside by virtue of section 7 of the Sale of Goods Act 1979<sup>2</sup>.

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<sup>2</sup> This section makes provision for frustration for specific goods: "where there is an agreement to sell specific goods and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is avoided." Section 61(1) of the Act defines "specific goods" to mean: "goods identified and agreed on at the time a contract of sale is made and includes an undivided share, specified as a fraction or percentage, of goods identified and agreed on..."

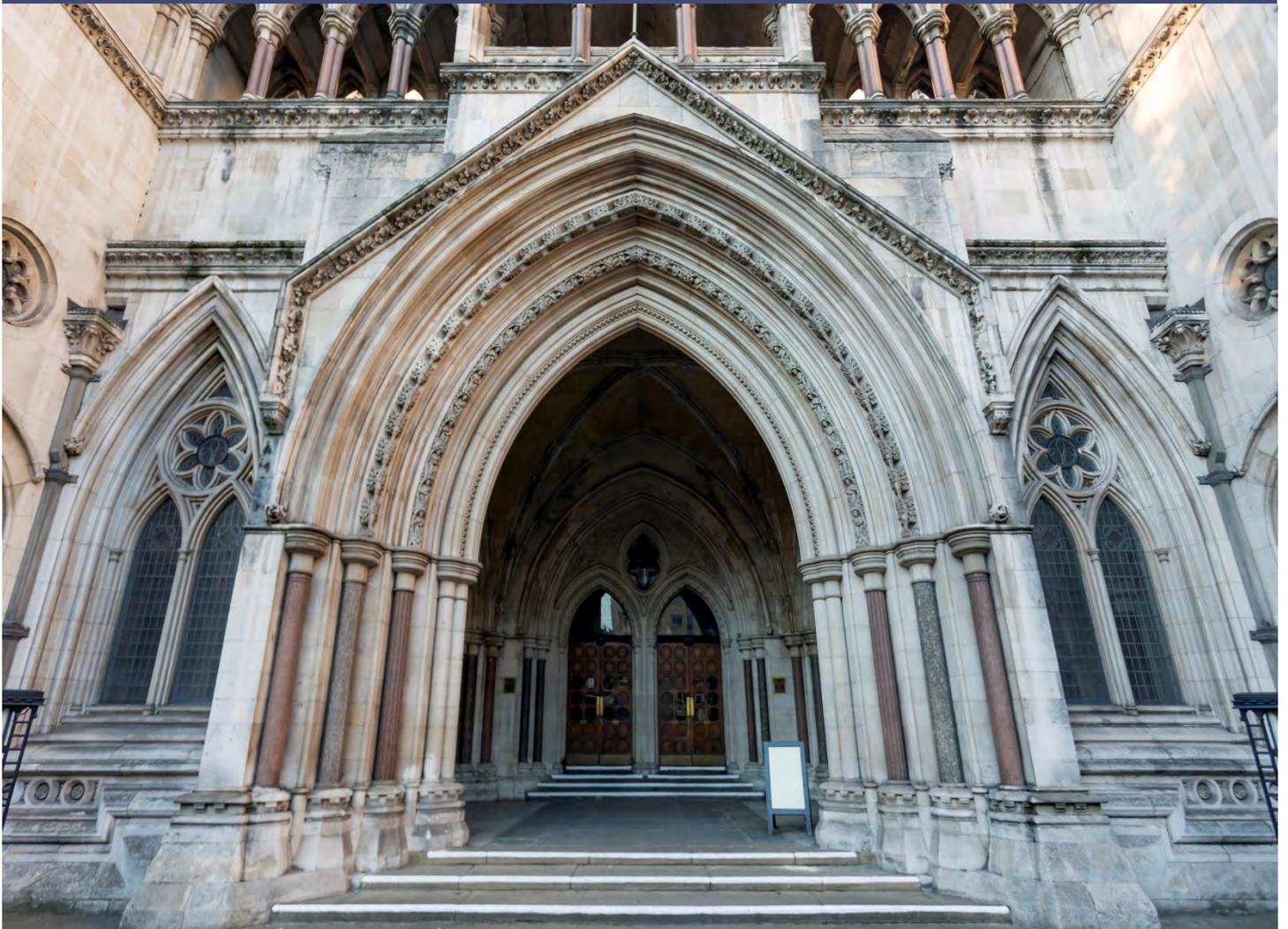
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# RECENT CASE LAW



# TRIPLE POINT TECHNOLOGY & TANDRIN AVIATION HOLDINGS

## Triple Point Technology

In *Triple Point Technology Inc v PTT Public Company Limited* [2017] EWHC 2178 (TCC), the court considered whether civil unrest in Thailand between November 2013 and May 2014 constituted a force majeure event which suspended the claimant's obligations under a contract for the provision of a commodities trading, risk management and vessel chartering and operations system.

The relevant clause of the contract provided that the parties' obligations would be suspended by reason of force majeure "upon giving notice and full particulars" and only to the extent that a party was "unable in whole or in part . . . to perform". The critical issue was therefore whether the civil unrest in Thailand during the period of the contract had had any impact on the ability of the parties to perform the project.

There was evidence that the claimant had been forced to vacate its offices for substantial periods of time, moved meetings from Thailand to Singapore, worked remotely on the project and agreed a 90 day extension of time with the defendant for performance.

Nevertheless, the court concluded that (i) no proper notice of force majeure had been given which explained the basis for the inability to perform by reference to the civil unrest; and (ii) in any event, it was not possible to say on the evidence that the civil unrest had made the claimant unable to perform during the period of unrest.

## Tandrin Aviation Holdings Ltd

In *Tandrin Aviation Holdings Ltd v Aero Toy Store LLC* [2010] EWHC 40 (Comm), the Court considered whether what was termed an "unanticipated, unforeseeable and cataclysmic downward spiral of the world's financial markets" by the defendant constituted a force majeure event for the purposes of a contract for the sale of a new executive jet aircraft.

The court affirmed the well-established position under English law that a change in economic or market circumstances, affecting the profitability of a contract or the ease with which the parties' obligations can be performed, is not to be regarded as a force majeure event. Further, the court concluded that the words "any other cause beyond the Seller's reasonable control" in the force majeure clause should be construed narrowly and did not include the purchaser's inability to pay due to credit market conditions.

It followed that any inability on the part of a purchaser to obtain finance could not properly be construed as a "cause beyond the Seller's reasonable control". Such a clause only covered matters which would (or would be expected to) have a causal connection with the performance of the seller's own obligations, i.e. a matter which, because the seller has no reasonable control over it, causes the seller to fail to perform one of its own obligations.

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# CONTEMPORANEOUS EVENTS



# BREXIT AND WAR

## Brexit

Following the 2016 referendum, the UK voted to leave the EU and it is scheduled to depart in March 2019. It is possible that the UK's departure from the EU may affect a party's performance under a sale of goods contract e.g. if the UK leaves the customs union and exporters face higher tariffs or other trade barriers. A party may wish to terminate the contract if, as a consequence of Brexit, customs duties, taxes or excise payable under the contract become radically more expensive.

If Brexit is not specifically mentioned in a force majeure clause, it is difficult to see how it will fall within the events covered by the clause. It is unlikely that a catch-all provision covering "other causes beyond the control of the parties", which is generally construed narrowly, would cover the changes in circumstances due to Brexit. Further, many of the consequences of Brexit will simply make the contract more expensive to perform, which is generally insufficient to qualify as a force majeure event (see above).

Parties currently negotiating long term contracts should consider whether certain consequences of Brexit may affect their agreement sufficiently to merit including a force majeure clause which recasts obligations or allows termination in certain specified circumstances following Brexit.

## War

Unfortunately it is still possible that a party's obligations in an agreement may be affected by war. For example the seller's supply lines may be cut off or the intended place of delivery of the goods may no longer be accessible due to consequences of war.

Force majeure clauses often specify war or related circumstances within the list of events to be covered by the clause. For example, GAFTA CIF Contract No. 41 refers to "hostilities". This is probably broader than the meaning of "war", which arguably only covers where a formal declaration of war has been made by one state against another (if there is no further qualification in the contract). A reference to "hostilities" should cover acts of violence between states short of an official war and would potentially also cover civil unrest which has escalated to a high level of violence.

The meaning of war was also discussed in the Court of Appeal in *The Northern Pioneer* [2003] 1 Lloyd's Rep. 212 in the context of whether leave to appeal was validly denied. The arbitrators (referred to by the court as "*eminent commercial arbitrators*") had considered by a majority that, in relation to interpretation of a war cancellation clause under a time charter: (1) there is no technical meaning of the word "war". It must be construed in a common sense way as stated in *KKKK v. Bantham Steamship Co.*, [1939] 2 KB 554; (2) "War" is to be distinguished from "warlike activities and hostilities short of war" [which was referred to elsewhere in the charter]. "War" means a war between nation states. The tribunal had concluded that a businessman applying common sense to interpretation of the clause would not regard German participation in military operations in Kosovo as part of NATO, as a war involving Germany. The Court of Appeal did not consider the validity of this reasoning, although the reasoning of the arbitrators may be of influence to tribunals.

Even where war (or a similar term) is not referred to in the force majeure clause, it is likely that war would still be classified as a force majeure event within general wording which refers to "*other causes beyond the control of the parties*" as the courts have previously indicated that war is a cause beyond the control of either party (*Zinc Corp Ltd v Hirsch* [1916] 1 KB 541).

# CYBER ATTACKS AND HEALTH & SAFETY CONCERNS

## Cyber attacks

Major cyber attacks have recently become common occurrences. The risks posed by such attacks include a risk of financial loss, loss of intellectual property, business disruption and reputational loss caused by damage to or corruption of a company's IT systems by third parties infiltrating the systems.<sup>3</sup>

Whether a cyber attack will be a force majeure event depends on the specific wording of the contract.

A cyber attack will often fall within broad, general wording such as that contained in the Rules Relating to Contracts of the Refined Sugar Association (RSA) which lists the force majeure events for CIF contracts as follows: "...ice in the shipping port, war, strikes, rebellion, insurrection, political or labour disturbances, civil commotion, fire, stress of weather, Act of God or any cause of force majeure (whether or not of like kind to those before mentioned) beyond the Seller's control..." A cyber attack is likely to be considered as a cause beyond the seller's control.

The RSA provisions also set out the obligations which must be affected in order to rely on the clause, including the seller's obligation to deliver. The buyer's payment obligation is not listed so the buyer will be unable to rely on the force majeure clause in the event of a cyber attack which prevents, for example, a letter of credit being opened. However, a contract could provide for a payment deadline to be postponed in the event of a cyber attack and buyers should consider whether to include such a provision in order to protect themselves.

## Health and safety concerns

It is possible that certain products, including types of food, may become a severe health risk which leads to either government bans or a significant decrease in consumer demand. Would these constitute force majeure events?

As always, the scope of force majeure is dependent on the wording of the clause. If a state imposed a ban on the export of goods following the contract being entered into it is possible that this could constitute a force majeure event.

For example, GAFTA CIF Contract No. 41 includes "*prohibition of export*" in its list of relevant events so a ban on export of food with severe health risks should be covered by the force majeure clause. However, a prohibition on imports is not specifically mentioned and it is unlikely that a ban on the goods by the country of discharge specified in the contract would fall within the general wording "*any other event comprehended in the term force majeure*", the meaning of which is likely to be influenced by the preceding events listed. However, it is possible that a ban on import of the relevant goods by the country of discharge would amount to frustration of the CIF contract if it applies to the entire period allowed for performance.

A significant decrease in consumer demand is highly unlikely to constitute a force majeure event unless expressly included in the contract.

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<sup>3</sup> See our "Cyber Attacks" pack for further details on this point and the topic in general (<http://www.hfw.com/cyber-pack>).

# ECONOMIC ISSUES, E.G. COLLAPSE IN MARKET; HIGH INTEREST RATES

Contracts typically do not contain force majeure clauses which expressly cover economic difficulties like a collapse in the market, increased interest rates or a drastic change in exchange rates. In most cases, parties seeking to rely on economic difficulties as force majeure events would therefore need to demonstrate that those economic difficulties came within the general meaning of “*force majeure*”. Typical wording, as in GAFTA Contract No 111 and FOSFA 26A, makes provision for “*any other event comprehended*” in or by “*the term force majeure*”.

An argument that economic difficulties come within the scope of this general force majeure wording is, however, likely to prove extremely difficult.

First, general force majeure wording is typically construed narrowly to include only the same kind of events as the other events listed specifically in the clause (known as the *ejusdem generis* principle). Ultimately, the applicability of the *ejusdem generis* principle will depend on the precise wording of the force majeure clause. The words “*any cause beyond the Seller’s reasonable control*”, for example, have been held to have a broader meaning than “*any other cause*” (*Tandrin Aviation Holdings Ltd v Aero Toy Store LLC* [2010] EWHC 40 (Comm)), although the court in that case was still heavily influenced by the fact that none of the specific force majeure events listed in the relevant clause was even remotely connected with economic circumstances.

Secondly, it is well-accepted that the general meaning of “*force majeure*” does not include economic difficulties. In *Thames Valley Power Ltd v Total Gas & Power Ltd* [2005] EWHC 2208 (Comm), the Court rejected an argument that a considerable rise in gas prices, which made a gas-supply contract dramatically more expensive and burdensome for the supplier, meant that it was “*by reason of force majeure unable to carry out any of its obligations under this agreement*”. In *Tandrin Aviation Holdings Ltd v Aero Toy Store LLC* [2010] EWHC 40 (Comm), the court affirmed at [40]: “*it is well established under English law that a change in economic / market circumstances, affecting the profitability of a contract or the ease with which the parties’ obligations can be performed, is not regarded as being a force majeure event. Thus a failure of performance due to the provision of insufficient financial resources has been held not to amount to force majeure . . . and likewise a rise in cost or expense*”.

Thirdly, force majeure clauses generally release parties from their obligations only when it has become impossible to perform them in part or in whole. The court will not relieve a party from the consequences of entering into a bad bargain or one which has become difficult to perform. In *British Movietonews Ltd v London and District Cinema* [1952] AC 166 at 185, Viscount Simon indicated that “*a wholly abnormal rise or fall in prices*” or “*a sudden depreciation of currency*” would not frustrate a contract and in *Wates Ltd v GLC* (1987) 25 Build LR 1, the court found that inflation in the order of 20-25% was not a frustrating event: “*inflation increased, not at a trot or at a canter, but at a gallop . . . that difference in degree or tempo was not so radical a difference from the inflation contemplated and provided for as to frustrate the contract*”.

However, the categories of force majeure event are not set in stone. Lord Roskill in *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 at 712, for example, appeared to leave open the possibility that extreme inflation might in certain cases discharge performance obligations and Denning LJ indicated in *Brauer & Co (Great Britain) Ltd v James Clark (Brush Materials) Ltd* [1952] 2 All ER 497 at 501 that a seller might not be liable for failing to obtain an export licence if the cost of getting it increased by 100 times the contract price. But it is likely that only the most extreme case could give rise to an arguable case of force majeure based on a change in economic circumstances.

# SANCTIONS AND TRADE TARIFFS

## Sanctions

The impact of sanctions, like those imposed against Iran, North Korea, Qatar and Russia in recent years, depends on the wording of the force majeure clause and the presence or absence of other related clauses in the contract, such as specific sanction or prohibition clauses (e.g. clause 46 of the NYPE 2015 form). It may also depend on the timing of the sanctions and the date that the contract was entered into. For example, the sanctions and blockade imposed by Saudi Arabia, the UAE and Bahrain on Qatar<sup>4</sup> were first introduced last year. A party's ability to rely on a force majeure clause may be limited in circumstances where it can be argued that reasonable steps could have been taken to avoid the consequences (e.g. by using other trade routes), particularly where the contract was entered into recently.

Although it is possible for sanctions to be considered force majeure events (GAFTA Contract No 111, for example, expressly refers to "*action by any Government*" as a force majeure event), it is more likely that the court or tribunal will deal with sanctions under the doctrines of illegality or frustration, or by the construction of specific sanction, prohibition, or other clauses which expressly relieve a party from performance in the event that sanctions are imposed which prohibit certain trading activities.

For example, the Shelltime 4 form provides at clause 4 that "*Owners agree to let and Charterers agree to hire the vessel . . . for the purpose of carrying all lawful merchandise*" and at clause 28 that "*no voyage shall be undertaken, nor any goods or cargoes loaded, that would expose the vessel to capture or seizure by rulers or governments*". In *The Greek Fighter* [2006] EWHC 1729 (Comm), it was held that charterers had breached those clauses by directing the vessel to load cargo in the UAE that had been exported from Iraq in breach of UN sanctions, thereby exposing the vessel to seizure.

There are likely to be better contractual routes to a discharge of performance obligations on the basis that sanctions have been imposed than reliance upon the force majeure clause.

## Tariffs, e.g. US - China trade war

The recent imposition of US tariffs under the US Trade Expansion Act of 1962 has included a 25% tax on steel and a 10% tax on all aluminium imports. The latest response from China's Foreign Ministry is that China will take firm and powerful measures to safeguard its own legitimate interests.

Despite the serious consequences this trade war may have on affected buyers and sellers, these tariffs are unlikely to amount to force majeure events in the absence of clear and express contractual wording to that effect or an actual impossibility of performance. In short, tariffs are likely to be treated in the same manner as other economic factors which affect price and profitability.

It is, of course, possible that a tariff might be so exceptionally high that it makes trading practically impossible. In those circumstances, there may be an argument that the scope of force majeure wording such as a "*cause beyond the Seller's reasonable control*" is apt to cover a seller's inability to reasonably obtain goods on the market. However, even the latest 179% tariff on American sorghum is likely to fall short of those circumstances and a finding of force majeure on account of trade tariffs would require exceptional circumstances.

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<sup>4</sup> This included the closure of air space, territorial waters and the land border with Saudi Arabia. Certain ports in the region also blocked Qatari-flagged vessels, along with other vessels heading to and coming from Qatar.

# EXTREME SHORTAGE OF COMMODITIES E.G THE CURRENT ISSUES WITH COBALT

Supply shortages of cobalt and palladium in recent years have brought into focus the question whether, and if so when, an extreme shortage of commodities can amount to a force majeure event. Much will depend on the circumstances of each case and the particular contract terms which have been agreed.

If the source of the goods is expressly specified in the contract, a failure of supply will usually discharge or partially discharge performance, at least in the absence of fault on the part of the seller. Such partial discharge cases are, strictly speaking, not cases of force majeure at all but should be understood, in the context of a sale of goods, either as the imposition of a condition precedent to the seller's performance obligation or as a species of partial frustration.

However, if a contract is for goods from an unspecified source it will normally be held that the seller has undertaken an obligation to procure the delivery of the contractual goods and taken the risk of a supply failure. In *Atisa SA v Aztec AG* [1983] 2 Lloyd's Rep 579, the court held that a contract for the sale of 13,000-14,000 tonnes of Kenyan white crystal sugar had not been discharged by a shortage of supply. The sellers' (sole) supplier did not wish to supply (partly for financial reasons and partly to preserve the build-up of stocks, having been advised that their contract with the seller was not binding). The court considered that if that advice were correct the sellers had failed to make a proper supply contract and must bear the risk of a supply failure but if that advice were incorrect the sellers could enforce the supply contract and so could not rely upon a lack of supply in any event. It could not be said that delivery was "*prevented or delayed directly or indirectly by . . . any cause of force majeure (whether or not of like kind to those before mentioned) beyond the Seller's control*" for the purposes of clause 18(a) of the RSA contract.

If, on the other hand, the contract is for goods from an unspecified source but both parties contemplate that the goods will be taken from a particular source and that source fails, the position is less certain. There is no clear authority on this point but there are some suggestions that a failure of supply might discharge performance obligations in these circumstances. In *Blackburn Bobbin Company Ltd v TW Allen & Sons Ltd* [1918] 2 KB 467, the court emphasised that the buyer had been unaware of the seller's need to source the Finnish timber from abroad and in *Re Badische Co* [1921] 2 Ch 331 a contract for the supply of chemicals was found to be discharged by illegality after the outbreak of the First World War in circumstances where both parties intended to the goods to be obtained from Germany.

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# ISDA MASTER AGREEMENT



# FORCE MAJEURE UNDER THE ISDA MASTER AGREEMENT (1992 AND 2002)

The standard wording of the 1992 ISDA Master Agreement contained no force majeure provision, such that parties had to fall back on the common law rules of frustration or additional clauses specifying force majeure events.

The 2002 ISDA Master Agreement was the first ISDA contract to include standard force majeure provisions (s.5(b)(iii)), prompted by the destruction of the World Trade Centre. The clause generally defines any “*force majeure or act of state*” which renders performance “*impossible or impracticable . . . so long as the force majeure or act of state is beyond the control of such Office, such party or such Credit Support Provider, as appropriate, and such Office, party or Credit Support Provider could not, after using all reasonable efforts (which will not require such party or Credit Support Provider to incur a loss, other than immaterial, incidental expenses), overcome such prevention, impossibility or impracticability*”.

Although the scope of this type of clause is yet to be determined by the English courts, and no specific examples of force majeure are given in the 2002 ISDA Master Agreement, it is understood to cover events such as a change in law, natural forces such as earthquake or hurricane, armed conflict, terrorism, labour disputes or any other circumstances beyond the control of the parties or their Credit Support Provider.

Again, however, the mere fact that the transaction has become dramatically more expensive is very unlikely to be sufficient to trigger force majeure, notwithstanding that the 2002 ISDA Master Agreement contemplates events giving rise to “*impracticability*” as well as “*impossibility*” of performance.

The 2002 ISDA Master Agreement defines force majeure as a termination event rather than an event of default, and if the event has existed for eight business days (or involves a collateral payment which has become due), either party will be entitled to terminate the affected transaction.

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# INSURANCE



# PROTECTING BUSINESSES

Force majeure, due to its broad scope for contractual variation is a category of risk that is not specifically covered by the insurance sector. Instead, a number of policy options are available to protect a business in a force majeure event such as those discussed below.

## **Disaster Risk Insurance & Business Interruption Insurance**

The most obvious protection available to a business for a likely force majeure event is Disaster Risk Insurance. The policy insures business property in the event of damage arising from geological, metrological, hydrological, climatic, oceanic, biological and man-made events, or a combination of these. When it comes to insuring business property against natural disasters, it is essential to evaluate the disaster risks the property is susceptible to. Obvious examples, include whether the business is located on a flood plain, within a volcanic region or vulnerable to extreme weather. Taking such factors into consideration will help adapt the policy to cover events and disasters particular to the business location.

Business interruption insurance is often bought in parallel with disaster risk insurance, as it covers financial losses, such as loss of profits or extra expenses, arising from damage to the property, but not the property itself. It also typically covers losses related to local government orders preventing or restricting access to property. Usually, business interruption policies include an 'indemnity period' that limits the duration a policy holder can claim business or profit losses. It is important when taking out this insurance to consider factors such as, the type of business, time to replace machinery, and type of customers. This will help ensure that the 'indemnity period' is properly tailored to sustain a business in the event of a disaster.

## **Political Risk Insurance**

In the wake of growing global tensions and a further tightening of international sanction regimes, businesses operating in high-risk locations can seek protection through purchasing political risk insurance. Political risk insurance is a policy that protects against confiscations, nationalisation, contract repudiations, trading risks and other foreign government actions which have the effect of depriving a business of its rights of ownership or control.

The frequency of political risk claims is usually low, but the severity can be extreme. For example, expropriation is usually a total loss, such as the \$1.4 billion losses suffered by Exxon when Venezuela re-nationalised its oil sector. More recent examples, include the U.S. sanctions on Oleg Deripaska and the fallout for shareholders, traders and long-term service contract providers to En+, Rusal, and Gaz Group. These risks could have been insured under the branch of political risk insurance titled 'trading risks' that cover financial losses incurred in relation to embargos or sanctions. Political risks is a sophisticated market and as with all insurance policies remains dependant on the sector, jurisdiction and global sphere of the business being insured.

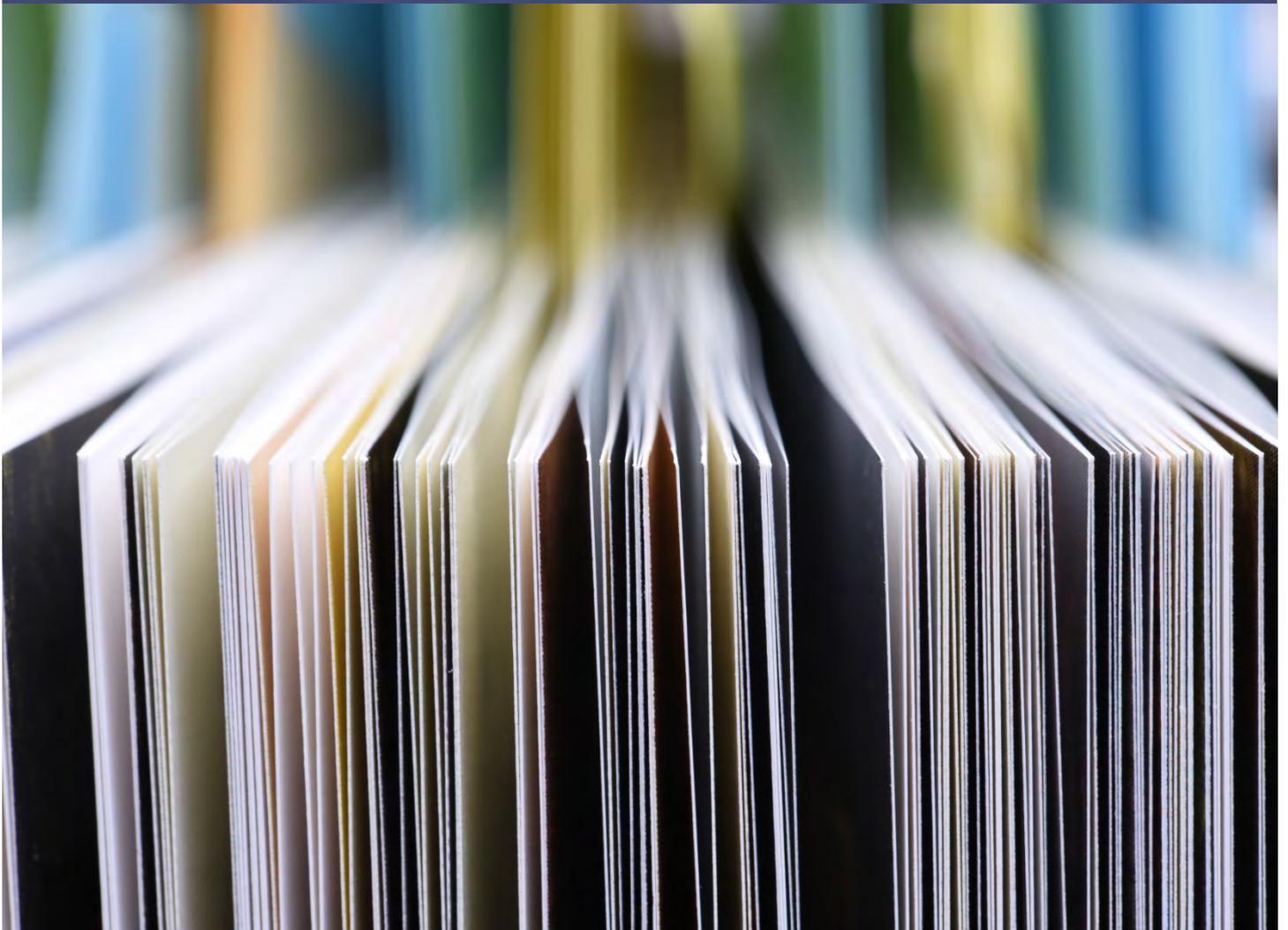
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# GENERAL GUIDANCE



# TOP TIPS TO CONSIDER

We set out below some general points of advice in relation to the drafting and operation of force majeure clauses.

The term 'force majeure' does not have a clear meaning in English law and therefore parties should avoid relying on this term to define when a party should be relieved of liability. A clause which is too vague may be void for uncertainty. In *British Electrical and Associated Industries (Cardiff) Ltd. v Patley Pressings Ltd* [1953] 1 WLR 280, it was held that a clause which stated that the contract was "subject to force majeure conditions..." was not effective. Whilst the courts have held certain events to fall within force majeure clauses (e.g. war, strikes, abnormal storms) the clause should clearly set out what events, either specifically or in general terms, are covered.

- If parties wish to have the benefit of a force majeure provision if certain events occur, such events should be specifically set out in the clause to ensure that they are covered. For example, a seller may wish to include industrial action as a specific event, otherwise a buyer may argue that the seller could have avoided the event by acceding to the demands of the workforce e.g. by increasing wages.
- Problems obtaining goods from a supplier may be one of the more common events which affect a seller's performance but may not be covered by a force majeure clause (see above). Sellers should consider whether a failure or default by their supplier should be specifically included as a force majeure event in the contract. As an example, the BP General T&C's for Sales and Purchases of Crude Oil and Petroleum Products (2015) includes "Any curtailment, reduction in, interference with, failure or cessation of supplies of Crude Oil or Product from any of the Seller's or the Seller's suppliers' source of supply or by any refusal to supply Crude Oil or Product whether lawful or otherwise by the Seller's suppliers..." within the list of relevant force majeure events.
- Consider the threshold which should trigger the force majeure clause – should performance by a party merely be "hindered" or should it be "prevented"? The parties could also use different terminology which limits or widens the scope for a party to rely on the clause.
- Ensure that any notice provisions in the force majeure clause are complied with as non-compliance may be a condition precedent to reliance on the clause.
- Insurance should be considered as an additional form of protection for circumstances beyond a party's control, particularly if it those circumstances may not be covered by the force majeure provisions in the contract.

Whilst every care has been taken to ensure the accuracy of this information at the time of publication, the information is intended as guidance only. It should not be considered as legal advice.

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