Trading and force majeure in a time of COVID-19

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Introduction

Whilst the coronavirus pandemic has ravaged normal life and left large sections of the world's population cowering in lockdown, international trade has continued, albeit under difficult circumstances. Countries have adopted various precautions to protect their populations, including port workers, while still allowing vital commodities to be imported and exported. For example, South Africa imposed a partial lockdown of its ports as part of its national lockdown in late March 2020, and certain Bangladeshi ports imposed a 16-day quarantine on vessels arriving from China.

It is primarily such governmental actions – rather than the COVID-19 disease itself – that have severely disrupted the performance of commodity trading contracts, leading to large potential losses. The question is – as it always is when contracts don't go to plan – which of the parties bears the loss?

Force Majeure Clauses Generally

This is where force majeure clauses come into play. Though such clauses are ubiquitous in trading contracts, their terms vary greatly. Being products of the parties' agreement – and not imposed on the parties by rules of law, like the common law doctrine of frustration – their effect is governed by the words actually chosen by the parties. The exercise in all cases is to determine the proper construction of the force majeure clause in question and then apply it to the facts of the case (***Tennants (Lancashire) Ltd v CS Wilson & Co Ltd*** [1917] A.C. 495 (HL); ***Tandrin Aviation Holdings Ltd v Aero Toy Store*** [2010] 2 Lloyd's Rep. 668 (Hamblen J)).

However, the courts have developed the following general principles of construction applicable to all force majeure clauses absent contrary wording (***The Crudesky*** [2014] 1 Lloyd's Rep. 1 (CA); ***Channel Island Ferries Ltd. v. Sealink UK Ltd*** [1988] 1 Lloyd's Rep. 323 (CA)):

1. The burden is on the party relying on the force majeure clause to bring itself squarely within terms of that clause, with any ambiguity being resolved against that party;
2. That party must show that the force majeure event was beyond its reasonable control; and
3. It must show that it took all reasonable steps to avoid the force majeure event and mitigate its effects.

Consequently, in every case, the following questions must be answered to determine whether a party has a force majeure defence or not:

1. Has there been a force majeure event?
2. Has that event interfered with performance in the required way?
3. Was the event beyond the party's reasonable control?
4. Did that party take all reasonable steps to avoid the event and mitigate its effects?

Has there been a force majeure event?

As explained above, whether a particular occurrence amounts to a force majeure event depends on the proper construction of the words of the applicable clause. Such clauses vary greatly as to their structure, formulation and breadth.

Some of the broadest clauses are to be found in standard terms for the sale of oil and oil products. For example, the force majeure clauses in the BP 2015 Terms[1] and the Shell 2010 Terms[2], which are substantially identical, lay down a broad

1 The BP Oil International Limited General Terms & Conditions for Sales and Purchases of Crude Oil and Petroleum Products, 2015 Edition.

2 The Shell International Trading and Shipping Co. Limited General Terms & Conditions for Sales and Purchases of Crude Oil, 2010 Edition.

overarching test requiring the party's failure to perform to be due to "an impediment beyond its control". They then set out a non-exhaustive list of events likely to fall within that definition (e.g. war, natural disasters, fire, strikes, etc.). Although disease, epidemics and pandemics are not listed, they would clearly amount to impediments beyond the parties' control satisfying the overarching test.

The ICC Force Majeure Clause 2003 adopts the same "impediment beyond its control" test and then lists events which are rebuttably presumed to satisfy that requirement, including war, terrorism, act of God, plague and epidemic.

Governmental actions such as lockdowns and discharge port quarantines based on a vessel's recent ports of call will generally satisfy the "impediment beyond its control" test. But that might not always be the case. Consider, for example, a CIF seller who appropriates to its sale contract a cargo shipped from a country that is already listed in the quarantine operated at the discharge port. Would that seller be able rely on this provision if cargoes shipped from non-quarantined countries were available to be appropriated to the contract at the time?

The force majeure clause in the Repsol 2017 Terms[3] is slightly narrower in scope, applying to failures by a party to perform arising out of "any occurrence or circumstance reasonably beyond the control of that Party which could not be foreseen the moment of the contract formation." As can be seen, this clause requires the party claiming force majeure to establish the additional requirement that the alleged force majeure event was unforeseeable. Whilst that may be easily established in relation to contracts concluded before coronavirus-related governmental actions started to be taken in March 2020, it must be questionable whether it can be said that such actions "could not be foreseen" from late March onwards. That means that parties seeking to rely on this clause in contracts concluded after late March may experience difficulty.

The force majeure clause appearing in a number of GAFTA standard form contracts[4] are structured differently. That clause first lists specific force majeure events (prohibition, blockade, terrorism, Act of God, etc.) and ends with two catch-all categories of "unforeseeable and unavoidable impediments to transportation or navigation" and "any other event comprehended in the term 'force majeure'." Force majeure clauses in certain FOSFA standard form contracts[5] are similarly structured, and also employ "any other event comprehended in the term 'force majeure'" as the final catch-all category.

Again, whilst the coronavirus-related lockdowns and quarantines would amount to "unforeseeable and unavoidable impediments to transportation or navigation" for contracts concluded before the pandemic and up to early/mid-March 2020, they might not do so in relation for contracts concluded after such measures started to be implemented in late March 2020.

As regards the phrase "any other event comprehended in the term 'force majeure'," though the courts have stressed that "force majeure" is not a term of art (***Tandrin Aviation Holdings Ltd***, id.), that term will likely be construed broadly as encompassing "circumstances independent of the will of man, and which it is not in his power to control". (***Lebeaupin v Richard Crispin & Co*** [1920] 2 K.B. 714 (McCardie J).)

Has that event interfered with performance in the required way?

Most force majeure clauses require the party relying on them to prove a causal connection between the party's non-performance and the force majeure event. Whether a particular clause does or does not require proof of such a causal connection is a question of the proper construction of that clause (***Classic Maritime Inc v. Limbungan Makmur Sdn Bhd*** [2020] 1 Lloyd's Rep. 178 (CA)).

Each force majeure clause also sets out the degree of interference with the performance of the contract that the party must prove to trigger the relief provided by the clause.

Some clauses require proof of nothing less than prevention. To establish that the force majeure event "prevented" it from performing the obligation in question, the party relying on the clause must prove that the event rendered its performance

3 The Repsol Trading General Terms & Conditions for Sales and Purchases of Crude Oil & Petroleum Products, 2017 Edition.

4 E.g. GAFTA Contract Nos. 64, 88 and 49, dated 7 September 2017, 1 September 2018 and 1 January 2020, respectively.

5 E.g. FOSFA Contract Nos. 11, 23 and 60 all dated 1 January 2015.

physically or legally impossible; proof that performance has become more difficult or unprofitable is insufficient (In ***Re Comptoir Commercial Anversois*** [1920] 1 K.B. 868 (CA); ***Tandrin Aviation Holdings Ltd***, id.). Consequently, a failure only of the seller's intended source of the goods will not generally amount to "prevention" for the purposes of a force majeure clause. For the same reason, an export prohibition will not be held to have prevented the seller's performance unless it covers the entire shipment period (***Bunge SA v Nidera BV*** [2014] 1 Lloyd's Rep. 404 (CA)).

On the other hand, a force majeure clause that applies where performance is merely "hindered" imposes a much lower threshold on the party relying on it. It is not necessary for a party alleging that its performance has been "hindered" to prove impossibility, as that would be "prevention," and not "hindrance". To prove that it has been "hindered" in its performance, a party need only show that the event has "interpos[ed] obstacles which it would be really difficult to overcome" or affected to "an appreciable extent" the "ease of the usual way of supplying the article" (***Tennants (Lancashire) Ltd***., id.).

Depending on the context it appears in and the other terms in the contract, "delayed" in a force majeure or extension of time clause will similarly not require proof of prevention, and proof of mere hindrance will generally be sufficient. The court will not generally construe "shipment be delayed" in a force majeure clause was meaning "shipment be prevented" (***Fairclough, Dodd & Jones Ltd v. J H Vantol Ltd*** [1957] 1 W.L.R. 136 (HL)).

Was the event beyond the party's reasonable control?

Whether or not a particular force majeure event was beyond the control of the party relying on the clause is a question of fact in every case; and a party will not be entitled to avoid performance in reliance on a force majeure event with it has procured (***Mamidoil-Jetoil Greek Petroleum Co. S.A. v. Okta Crude Oil Refinery A.D.*** (No. 2) [2003] 2 Lloyd's Rep. 635).

Further, in ***The Crudesky*** [2014] 1 Lloyd's Rep. 1, a case in which the author appeared for the successful claimant, the Court of Appeal ruled that:

1. Where the party claiming force majeure is a company, proof that the event was beyond that company's control sets a comparatively high hurdle since corporations usually do have a significant measure of control over their own business; and
2. Where a chain of sale contracts is involved, it will generally not be sufficient for the party to prove that the event or its effects were beyond its own control; instead, it must go further and also prove that it was beyond the control of those down the line to whom it had delegated performance of the contract.

The COVID-19 pandemic itself will obviously satisfy the requirement of being beyond the reasonable control of the party claiming force majeure. The governmental actions taken in response to the pandemic will also satisfy that requirement, unless it can be shown that the party claiming force majeure had successfully lobbied the authorities concerned to extend those actions to cover its performance under the contract.

Did that party take all reasonable steps to avoid the event and mitigate its effects?

As with the question of control considered above, whether the party claiming force majeure took all reasonable steps available to avoid the force majeure event and mitigate its effects will be a question of fact in every case. As explained above, a seller might arguably run afoul of this requirement if, for example, it appropriates to a CIF contract a shipment from a quarantined country when shipments from non-quarantined countries were available and could reasonably have been appropriated to the contract instead.

Conclusion

This once-in-a-century COVID-19 pandemic has already raised numerous difficult legal questions for producers, traders and consumers of commodities, and will undoubtedly throw up many more. The applicability and effect of force majeure clauses will be key among them and will likely give rise to numerous disputes requiring the application and further elucidation of the principles summarised above. Resolving such disputes is likely to keep international arbitrators and the courts busy for some time. The best way to avoid such disputes – or failing that, to ensure that you are on the winning

elucidation of the principles summarised above. Resolving such disputes is likely to keep international arbitrators and the courts busy for some time. The best way to avoid such disputes – or failing that, to ensure that you are on the winning side – is to seek legal advice at the very beginning, as events unfold.

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Chirag Karia QC is a leading commercial silk with a broad commercial, international arbitration, energy, shipping and international trade practice. He appears regularly in the Commercial Court, the Court of Appeal and international arbitrations. He is listed as a 'Leading Silk' for Shipping and Commodities disputes by Chambers UK, Chambers Global, The Legal 500 UK, The Legal 500 Asia Pacific and Who's Who Legal and for Commercial disputes by Legal 500 EMEA.

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