Force Majeure

At a Glance...

By definition, Force Majeure is usually unexpected and sudden. Are you ready? Do you know what to do and when? Was sufficient consideration given to Force Majeure when the relevant sale contracts were made? This alert looks at issues relating to Force Majeure before, during and after the event in the context of sale contracts.

Before/when you make the contract

- There are sale contracts with no Force Majeure clause. However, ‘frustration’ at English common law is a poor and inadequate substitute, so all sale contracts should logically have a Force Majeure clause.

- Is there any standard ‘house’ Force Majeure clause that you use or certain issues you will always try to include? Examples could be:
  - Flexible notice provisions rather than set number of days
  - A ‘trigger’ for notice based on knowledge of the Force Majeure event rather than the event itself
  - A sweep up provision: “any other cause beyond the party’s control”
  - A clear end-point where the Force Majeure terminates the whole contract or part of it in case of an instalment contract

- Is the Force Majeure clause one-sided (seller only) or for the benefit of both parties? While a seller will usually be the likely party to claim Force Majeure, as a buyer you may need it too – particularly if buying FOB.
• Are you back to back? Are there differences between your sale and purchase Force Majeure clauses that might make reliance on Force Majeure ‘in string’ difficult? For example, there are some relevant differences between the BP and Shell GTCs on Force Majeure, and between FOSFA, GAFTA and NAEGA contracts.

• As a seller, how specific are you being as to the description of what is being sold? This is key to deciding how the Force Majeure clause will operate in practice: for example, selling coal from a particular named port is different from selling coal from a particular country origin. The commercial advantage of flexibility indicates a wide definition of what is being sold. However, this impacts very negatively on the use of Force Majeure.

• What is the intention regarding the relief to be granted where Force Majeure applies? For example, suspension of delivery obligation until the event ceases, cancellation of contract? Other? The relief granted depends on the clause itself.

• Have you reviewed other clauses such as ‘Change of Laws’ or ‘Change of Circumstances’ or ‘Hardship’ to check how these interact?

• Have you left in the possibility of ‘frustration’ as well as Force Majeure? Be careful, as the effect of these two is very different. When a contract is frustrated, it is automatically discharged by operation of law.

• Is your Force Majeure clause and the rest of your contract consistent in terminology?

• The ICC Force Majeure standard clause is a useful starting point, but do you have additional needs as a result of your particular contract?

**Once the Force Majeure event occurs**

• Collect all relevant contracts in the contractual chain and review the Force Majeure/Notice provisions. The notices you give must be specific to the relevant contract: timing, content, detail and relief may be different under the various clauses.

• Control communications including all scheduling / logistics, as well as press releases, to avoid conflicting messages.

• Make sure messages to counterparts are consistent and do not appear to prefer one counterpart over another. This can be difficult, given the differing Force Majeure clauses and differing requirements, but an incorrect ‘preference’ of one buyer over another can have ramifications for all the other outstanding affected contracts.
• In general, provide prompt and early warnings to counterparts, even if you are:

a. Not yet sure they will be affected [the notice provisions often require prompt notice after you are aware of the ‘event’, rather than when it is apparent that a contract will be affected by the event. As a result, you may need to notify contract counterparts for future months, even though you presently believe they are unlikely to be affected].

b. Not yet able to provide all the information required by the clause. Our experience is that early warnings often allow counterparts to re-organise their vessels or supplies so as to avoid disputes.

c. Not yet sure you want to rely on Force Majeure rather than deal with disruption to supplies commercially.

• In each new message, refer to earlier messages to ensure they are viewed as cumulative.

• Notices received ‘in string’ should be passed on promptly, but with consideration first of what the differences are between relevant clauses and logical amendments or additional information that may be required. The most important difference between clauses may be timing, so that you cannot await a message ‘in string’ before deciding to send a message under the on-sale.

• Do engage in ‘without prejudice’ practical discussions to re-programme supplies – again our experience is that this will often avoid disputes.

• Strikes and similar events are often difficult – when during the pay negotiations do you first notify buyers that there may be a Force Majeure event? As negotiations turn sour? On the strike vote by workers? On day one of the strike when you can see the likely impact? There may be a tension between commercial relationships (one does not want to be the producer or supplier always sending Force Majeure notices) and the contract requirements of the Force Majeure clause. This can be in part overcome by softer informative messages, but there will come a time when a decision needs to be made to claim Force Majeure or not.

• If the Force Majeure is continuing, review later contracts to see if you need now to include them in messages, because there is a chance that these later contracts will be affected as well.

• Quarantine available supplies that are not subject to the Force Majeure while you consider how to appropriately allocate these between your customers. This part of the exercise is vital. Getting it wrong can make you liable to numerous buyers for the same parcel.
Guiding principles on allocation of limited available suppliers

• The two main approaches are:
  • Pro rata allocation between affected contracts
  • Temporal allocation (the earliest contracts or the earliest deliveries being prioritised)

• Overall, the seller must show that they have acted reasonably in all the circumstances. Logistically, the value of the contract (i.e. highest price) will not be a factor which the seller ought to take into account.

• The seller cannot, under English law, take account of their own needs for the product, nor other usual customers, where there is not yet a binding obligation to supply.

• Occasionally, contracts seek to tackle expressly the ‘available supplies’ question, either by making express provisions for pro rata division, or by giving some hierarchy of disposal (e.g. express priority for products going directly for refining, rather than sold for third party use). Our experience is that express clauses are often difficult to follow or operate in practice and may give rise to inconsistent duties under different clauses.

After Force Majeure and if there is a dispute

• Evidence collection is key, including from the press etc., to show the timing and impact of the Force Majeure event. Arbitrators are often sceptical of internal evidence or certificates from a local chamber of commerce, so be prepared to dig deeper to find convincing evidence. Consider sending someone independent to investigate at the relevant port or location.

• Trace and be able to account for the allocation of available supplies: you may have to disclose your book of business to explain and defend that allocation.

• Remember, some Force Majeure clauses require ‘end’ notices, as well as start notices.

• Collect evidence of the ‘knock-on’ effects: often the Force Majeure ends, but either full production or full operation of a port/mine/refinery takes a considerable time to build back up.

Further reading

• https://www.reedsmith.com/en/perspectives/2014/05/combined-prevention-of-shipment-clause-replaces-pr