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Armed conflict and force majeure



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Armed conflict can cause disruption to the operation of cross-border contracts and the remedies available. We examine the remedies which may be available under force majeure in these circumstances.

On 25 February 2022, following the invasion by the Russian Federation's armed forces, the Swiss-based commodity trading and mining company Ferrexpo, operating primarily in Ukraine, suspended exports from the Pivdennyi port in southwest Ukraine. The company announced that it had sent force majeure notices to certain customers waiting to receive products that were scheduled to be shipped. In light of the unfolding events in the region, such notices are likely to multiply over the coming days, significantly disrupting the operation of many contracts.

Claims of force majeure in situations of armed conflict

The doctrine of force majeure excuses liability for non-performance, where an unforeseeable, unsurmountable, and irresistible event makes such performance impossible.^[1] While force majeure is a general principle of law applicable in most legal systems, there are significant differences among national laws regarding the application of the doctrine, including:

- the nature of events that may qualify;
- the degree of impossibility that may be required; and
- the extent to which liability may be excluded.

Under common law, for example, there is no extra-contractual application of force majeure, so it must be included in a contract to be invoked as defense by one of the parties. In cross-border contracts for the sale of goods, the United Nations Convention on Contracts for the International Sale of Goods ("CISG") will govern the requirements for force majeure unless the CISG's application is contractually excluded, provided that the parties' places of business are in Contracting States.

Nevertheless, cross-border contracts for the provision of goods or services almost invariably include force majeure clauses. These typically include a list of events, which can be exhaustive or non-exhaustive, that are presumed to qualify as unforeseeable, unsurmountable, and irresistible. These qualifying events usually include:

- natural disasters;
- fires or explosions;
- epidemics;
- acts of terrorism;
- acts of government authority (such as sanctions and similar governmental measures disrupting performance); and
- armed conflict.

However, the presumption that such events are unforeseeable, unsurmountable, and irresistible can be overcome based on evidence to the contrary. In the case of armed conflict, contracts concluded at a time when the relevant conflict is reasonably foreseeable may not – unless there is specific language in the contract to the contrary – permit a party to successfully invoke force majeure as a result of the foreseeable conflict.

Moreover, for a party to successfully assert force majeure, it must show that the conflict made performance of its contractual obligations impossible. While the presumption of irresistibility regarding armed conflicts can facilitate such a showing, documenting attempts of performance – and how these were frustrated – can ensure that liability is excluded where a dispute arises.

Claims of force majeure for parties further down the supply chain

Armed conflicts can significantly disrupt entire supply chains. The extent to which non-performance by a third-party supplier can be invoked by a party as the basis for force majeure is usually determined by contract. [2]

However, in the absence of any such specific clauses, a case-by-case analysis will determine whether liability can be excluded. Depending on the law of the contract, parties may be required to secure an alternate supplier – even at a significantly greater cost – to perform their obligations. This makes invoking force majeure much more difficult when the affected supplies are freely traded commodities, whereas disruption in the supply of non-fungible goods may provide greater justification. This is because a party invoking force majeure must demonstrate that it is legally or physically impossible for it to perform its contractual obligations, and not simply unprofitable or more difficult to do so.

Claims of force majeure due to the imposition of sanctions

Armed conflicts often result in the imposition of sanctions or restrictions on one or both belligerents, widening the collateral economic impact of the conflict beyond the immediate area affected by the hostilities. These measures could suddenly:

- render illegal the sale of specified goods or services;
- restrict methods of payment; or
- prohibit transactions with certain parties;

all of which could greatly disrupt the normal operation of a contract. Whether or not sanctions would constitute force majeure clause will vary, depending on:

- the wording of the clause;
- the subject matter of the contract; and
- the effect of the sanctions in question.

When the contract itself has been made illegal due to imposition of sanctions, in most legal systems the appropriate relief would not be force majeure, but rather a termination of the contract following a claim of impossibility or frustration of purpose.

Even if the imposition of sanctions falls within a force majeure clause, the party asserting force majeure must still demonstrate that the sanctions were not foreseeable at the time that the contract was concluded. If sanctions were foreseeable, it could be argued that a supplier should have lined up an alternative source of supply, in anticipation.

Takeaway points

- Disruptions due to armed conflict are usually presumed to be unforeseeable, unsurmountable, and irresistible.
- A party opposing a claim of force majeure can overcome these presumptions if it can show that the conflict was not unforeseeable at the time the contract was signed, or that the conflict did not in fact render impossible the performance of its counterparty's obligations.

- A party seeking to invoke force majeure in situations of armed conflict should document its attempts to perform its obligations and the impediments that it encountered.
 - Unless there are contractual provisions to the contrary, the disruption of third-party suppliers will usually not qualify as an event of force majeure if such goods can be obtained from another source.
 - Whether or not sanctions can constitute an event of force majeure depends on whether they were foreseeable, as well as a case-by-case analysis of the impact of sanctions on performance.
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References

[1] See, e.g., the definition of force majeure in the model ICC Force Majeure Clauses, Clause 1, available at <https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf>

See also United Nations Convention on Contracts for the International Sale of Goods, Article 79(1), available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09951_e_ebook.pdf

See also UNIDROIT Article 7.1.7(1), available at <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010/chapter-7-section-1/#1623699423674-aca9ca91-b496>.

[2] See CISG Article 79(2)

See also ICC Force Majeure Clauses, Clause 2