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Commodities & Shipping Update:

Force Majeure and Material Adverse Effect – A Reminder of the Key Points

Last weekend, the US and Israel launched coordinated strikes on Iran, prompting widespread regional retaliation and significant disruption across the Middle East.

The result has been significant. Energy prices are driving sharply upward. There are disruptions to transport routes, cargo availability, production and delivery schedules impacting significantly on the shipping, commodities and energy sectors. Indeed, on 2 March, the Strait of Hormuz – one of the world's most critical choke points – was announced as "closed" by Iran's Islamic Revolutionary Guard Corps (IRGC).

Against this backdrop, clients are already asking a familiar question: does this conflict constitute a *force majeure* event or a material adverse change (MAC)?

Force Majeure

What do we mean by *force majeure*?

Under English law, the term is simply a label for a type of contractual provision designed to address unexpected, disruptive events. In practice, a *force majeure* clause typically allows for the delay, suspension or even termination of contractual performance when a specified event occurs.

By contrast, in some other jurisdictions, statutory provisions may in certain circumstances excuse or suspend performance even without an express *force majeure* clause.

Key Considerations

No Implied Protection

Absent specific contractual wording, English law does not automatically excuse nonperformance due to external events. If parties want *force majeure* protection, they must have expressly drafted it into the contract. The scope, triggers and consequences of *force majeure* relief depend entirely on the particular drafting the parties agreed.

Wording Is Everything

Unlike many other common legal phrases ("time of the essence", "reasonable endeavours", "material breach", etc.), there is no generally accepted or implied definition of "*force majeure*" in English law.

In general, to rely on *force majeure*, a party must demonstrate that:

- **The event falls within the categories set out under the clause** – Many clauses cover war, hostilities, government restrictions or unsafe transport conditions – all of which may be relevant in the current circumstances. In shipping, commodity and energy contracts, the following may be captured if expressly provided for:
  - Blocked routes or unsafe ports (e.g. Hormuz closures or restrictions)
  - Refinery/terminal shutdowns or export bans
  - Upstream or LNG terminal disruption that renders performance impossible (not just uneconomic)
- **The event meets the required contractual threshold** – It is common for terms such as "prevented" or "hindered" to be used. The exact phrase used can denote different evidentiary threshold levels for the purposes of relying on the *force majeure* clause.

Causation and Evidence Are Critical

A party must be able to show a direct causal link between the event and their inability to perform. A party cannot use contractual *force majeure* protection to escape liability for a breach that would have occurred in any event or that was not actually caused by a *force majeure* event.

Examples that may qualify include:

- Vessels unable to lawfully or safely transit a conflict-affected route
- Inability to lift cargo due to physical terminal shutdown
- Government measures halting upstream production

Price volatility alone, however severe, is unlikely to meet the required threshold of a *force majeure*.

Mitigation Is Mandatory

Many *force majeure* clauses require the affected party to take reasonable steps to mitigate the impact of the unforeseen event on their contractual performance. Under English law, there is also an implied duty to mitigate.

Therefore, where alternative options are available, a party must show they took reasonable steps to minimise the impact of the event. For instance, exploring alternative supply routes or substitute suppliers, or using different loading or discharge points.

Notice Requirements Matter

Force majeure clauses often require prompt, formal notice, sometimes with strict procedural requirements, including the requirement for notice to be served as soon as that party becomes aware of the existence of a potential *force majeure* event. These are especially common in charterparties, commodity sale contracts and energy supply agreements (including take-or-pay).

Failure to comply with these prescribed processes can invalidate an otherwise valid *force majeure* claim.

Actions Have Consequences

Invoking *force majeure* does not simply exclude a party's liability – it may trigger significant counterparty rights, such as:

- Termination rights after prolonged nonperformance
- Suspension of exclusivity or supply commitments
- Obligations to implement contingency measures

The short-term benefit of *force majeure* may be outweighed by long-term contractual or commercial risks. Parties must consider whether invoking *force majeure* could inadvertently give a counterparty a strategic advantage. For example:

- Enabling a customer to exit an otherwise profitable long-term agreement
- Triggering obligations (such as activating disaster recovery processes or securing alternative supply chains) that are more expensive than temporarily maintaining performance through costlier local substitutes

Businesses affected by the current conflict should therefore undertake a careful review of their *force majeure* provisions and assess not only whether the threshold is met, but also the commercial implications of pulling that lever.

Parties would also be wise to take steps to collate the relevant factual evidence required to support their reliance on the *force majeure* clause.

MAC Clauses

MAC clauses generally provide that if a party claims hardship or material adverse change in circumstances, notice may be given and the parties will negotiate a solution in good faith. Some provide for termination if a solution cannot be found; others allow for expert determination, or trigger dispute resolution provisions.

The ability to trigger a MAC clause will depend entirely on the exact text and context of the clause.

Key Considerations

The "Durational Significance" Test

English courts will look for a change that is substantial and enduring, and that affects the value or financial position of the target or contract on a long-term basis.

Short-term volatility, such as temporary spikes in energy prices or disruptions that are likely to subside within weeks or months, is unlikely to qualify. This is particularly relevant for shipping, trading, and energy sector borrowers facing margin calls or volatility – lenders typically cannot rely on short-term disruptions to invoke a MAC clause.

The Burden of Proof Is High

Invoking a MAC clause generally requires a party to demonstrate a material deterioration that is:

- Sustained
- Not within the ordinary commercial or geopolitical risk allocation of the deal

This imposes a heavy evidential burden, and courts apply MAC clauses narrowly, making successful reliance rare.

Carve-outs Often Exclude Market-wide Events

MAC clauses can contain explicit carve-outs designed to prevent parties from invoking a MAC based on changes that affect the wider market rather than the specific counterparty. These carve-outs can exclude:

- General economic downturns including recessionary conditions, macroeconomic instability or tightening credit markets that affect the broader economy rather than the specific contracting party
- Market-wide shocks such as geopolitical crises, commodity-price volatility, currency fluctuations or supply-chain disruption that impact entire industries
- Sector-wide impacts; for example, disruptions to freight markets, energy-price surges or shipping bottlenecks that influence all market participants operating in the same sector

Because these events are treated as systemic – not party-specific – disruptions caused by the current US-Iran conflict (including rising energy prices, regional transport instability or broad commodity-market volatility), consideration needs to be given if the contractual carve-out applies.

Practical Actions for Businesses To Take Now

Review Key Contracts Immediately

- Focus on provisions relating to *force majeure* and MAC clauses, and how these might be exercised both by you and your counterparties.
- A contract that is silent or unhelpful on *force majeure* may well contain other helpful general provisions, such as termination for convenience and nonexclusivity clauses. If considering termination, ensure any termination complies with contractual provisions to avoid the risk of repudiatory breach.
- In the absence of applicable contractual clauses, parties may wish to consider whether any contracts have been frustrated. Frustration is a separate, and more onerous, legal doctrine that allows a party to set aside a contract in its entirety if an unforeseen event renders that contract impossible to perform or radically changes its underlying purpose. However, the threshold for a successful frustration claim is high and the fact that a contract has simply become more difficult or expensive to perform is unlikely to be sufficient.
- Even when considering your legal options, ensure you continue to mitigate any potential losses.

Maintain Evidence/an Audit Trail

- It is all too easy to forget record keeping and admin during a potential *force majeure* event. However, creating and maintaining a proper evidence/audit trail can be invaluable in the event of a subsequent dispute or litigation.
- This will include evidence of the impact of the conflict on the party's day-to-day operations and finances (e.g. delays, port advisories, shutdown notices and safety restrictions).

Consider Engaging Counterparties Early

- Commercial resolution often remains the fastest and least disruptive approach, particularly where the disruption may be temporary.

Monitor Developments Closely

- Given the geopolitical stakes, additional sanctions or export-control measures may follow quickly in the coming weeks. Continued monitoring of the situation is key to anticipating and preparing for any additional commercial or operational impacts.

Please feel free to contact the author for any additional questions on this topic.