

GAFTA contracts in Ukraine: force majeure clauses

Introduction

1. Peculiarities of English law on force majeure clauses
2. Force majeure in the contracts with Ukrainian suppliers
3. Cooperation procedure of the parties
4. Communications in the force majeure clause procedure
5. Nota Bene

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Because of the large-scale invasion of Ukraine by Russian forces on 24 February 2022, sea traffic from Ukrainian ports was completely blocked. These circumstances had a critical impact on the grain export from Ukraine. In a legal sense, businesses faced the practical necessity of applying a force majeure clause in contracts, in particular in the international grain delivery contracts.

1. Peculiarities of English law on force majeure clauses

Standard GAFTA contracts are currently the main tool in the trade operations of Ukrainian agricultural companies in the international grain market. These contracts have their peculiarities, including the application of a force majeure clause. It is important to take into account not only the industry specifics of the GAFTA contracts but also the fact that their application and dispute resolution is subject to English law.

Updated article on the subject: Force majeure in agreements during the war in Ukraine

English law offers many advantages and opportunities, especially in terms of impartial and fair handling of disputes within the GAFTA arbitrations. However, for the effective application of a force majeure clause in the GAFTA contracts, the specifics of the latter should be taken into account.

There is no doctrine of force majeure in English law. Force majeure can only be cited if it is provided for by the contract.

GAFTA standard contracts use a combined control over the failure of a counterparty to fulfil its obligations. The section of a GAFTA contract (if such a standard contract contains such clauses) is usually called "Prevention of fulfilment" (GAFTA Contract No.78UA, "Contract for goods by rail and/or road", as amended on 01 January 2022), "Prevention of shipment" (GAFTA Contract No. 48 " Contract for the shipment of goods from Central and Eastern Europe in bulk parcels or cargoes tale quale -CIF/CIFFO/C&F/C&FFO terms", as amended on 01 January 2022) or "Prevention of delivery" (GAFTA Contract No. 49 "Contract for the delivery of goods Central and Eastern Europe in bulk or bags FOB terms", as amended on 01 January 2022).

In the eye of English law, the term "combined" means that force majeure events include not only devastating factors but also the actions of governmental authorities aimed at restricting the parties' ability to fulfil their obligations under a contract (e.g. by 2014 the actions of governmental authorities, in particular, the ban or the export restriction have been regulated by the separate clauses in the GAFTA contracts, i.e. prohibition clauses ("prohibition"). Due to the varying interpretations of the procedures for applying such prohibitions, GAFTA unified the crisis risk management procedures under the contracts and introduced the concept of "prevention of" "preclusions". In essence, GAFTA has simply expanded the list of force majeure events in the contracts in force and attached a unified resolution procedure to them.

2. Force majeure in the contracts with Ukrainian suppliers

In the GAFTA contracts (GAFTA No. 48 CIF and similar delivery bases, GAFTA No. 49 – FOB, GAFTA No.78, and GAFTA No. 78UA – delivery by a rail or a road transport) the force majeure clauses that are the most commonly used for the grain export from Ukraine structurally consist of two parts:

- 1) a list of the triggering events;
- 2) the rules that shall be complied with by the party citing such clauses must act, and the consequences for the performance of obligations by the parties to the contract if such clauses are implemented.

The list of the triggering events includes:

- an export ban or other acts of executive or legislative authority issued by the government (or on behalf of the government) of the country of origin or the country where a port or ports mentioned in the contract is/are located, a partial or another export restriction; or
- a blockade; or
- acts of terrorism; or
- hostilities; or
- a strike, a lockout, or conjoint actions of the workers; or
- a riot or a civil commotion; or
- a mechanical breakdown; or
- fire; or
- or glaciation; or
- an Act of God; or
- unpredictable or unavoidable (more precisely, "such preclusions that cannot be avoided". This translation makes it easier to understand and apply these contractual provisions. This is an important nuance. One of the qualifying peculiarities of the circumstances, which may be considered force majeure, is the failure to prevent their occurrence. The party which is citing force majeure will have to prove that it has done whatever it takes to prevent the occurrence of the force majeure circumstances but has not had a sufficient opportunity to do that effectively) preclusions for transportation or navigation; or
- any other event, which is implied by the term "force majeure".

The last clause is extremely important. English courts restrictively interpret force majeure clauses. If a list of force majeure circumstances is exhaustive in the contract then the court will not consider any other event outside this list as force

majeure.

In GAFTA contracts, the wording "any other event which is implied by the term 'force majeure'" provides a seller with an opportunity to cite the relevant clause even if the factual circumstances are not included in the list specified by the clause.

In separate GAFTA contracts (e.g., GAFTA Contract No. 49 for delivery of goods Central and Eastern Europe in bulk or bags FOB terms, as amended on January 01, 2022) the events are separately detailed concerning the glaciation of:

- a loading port or any access route for the delivery of goods to such a port (or ports) – if the FOB terms call for loading of the goods or any part thereof in a deep-water port;
- a loading port or any route for the ships to access a port of loading if the FOB terms provide for loading in an upstream port.

3. Cooperation procedure of the parties under the force majeure events

The cooperation procedure of the parties under the force majeure events is typical for the contracts mentioned.

If force majeure is the cause of the seller's inability to fulfil the contract, the latter shall be suspended for the duration of the force majeure. To meet the condition for such a suspension, a seller shall give a notice to a buyer within 7 days from the moment of the occurrence of such an event or at least 21 days before the beginning of the delivery period.

The practice for the application of force majeure clauses in the GAFTA contracts (in particular, in the *Bunge SA v Nidera B.V.* case [2013] EWHC 84 (Comm)) shows that such a contractual provision does not solely impose a deadline for notification of force majeure circumstances. Notification on the occurrence of a force majeure circumstance before its factual occurrence is considered a violation.

Example: a seller has become aware that export restrictions will be imposed in a fortnight, and notification of the restrictions has been officially made by the authorized state bodies. Even in such circumstances, the seller cannot cite force majeure before the factual export ban (the entry into force of the act of an authorized state body or the occurrence of the date when the prohibition takes effect as determined by this act).

The force majeure clause application procedure allows a buyer to turn down the unfulfilled part of a contract if the force majeure lasts 21 consecutive days after the expiration of the delivery period. At the same time, a seller shall notify a buyer at least on the first working day after the ending of the 21 days. If a buyer does not apply this termination option, a contract remains in force for an additional period of 14 days.

In the event of the termination of force majeure before the cancellation of a contract, each party shall notify the other one about it immediately. In such a case, the term of delivery shall be extended for the period that the affected party has at its disposal remained to fulfil its obligations which had been subject to fulfilment before the force majeure event. By that, it shall be taken into account

that if at the time of the occurrence of the force majeure event 14 days or less remained before the expiration of the delivery period then the latter shall be extended for 14 days after the termination of the force majeure.

GAFTA Contract No. 49, which contains the specification of the events concerning glaciation, provides for a separate procedure. It differs from the standard procedure in terms of the notification to the parties and the period for which the contract can be prolonged.

In particular, where FOB – a deep-water port is the term of delivery, then both glaciation of that port and also any glaciation which prevents the delivery of the goods to that port shall be considered a force majeure circumstance. It means that glaciation shall prevent the delivery or loading of the goods, or any part thereof, within the last 30 days of the delivery period (or any other period if it is shorter than 30 days).

If such circumstances occur after the ice has melted, a seller shall be entitled to deliver the goods to such a port within the period remaining before the contractual delivery date before glaciation. The delivery period after the ice melting shall not exceed 21 days. If there are less than 14 days left before the delivery date at the time of glaciation, the delivery period shall be extended for at least 14 days after the ice has melted.

If glaciation continues to prevent the delivery/loading of the goods when applying the aforementioned extension of the delivery period, the additional prolongation period shall be limited to the factual duration of glaciation.

Where FOB – an upstream port is the terms of delivery, glaciation of a loading port or any route for ships to access a loading port shall be considered a force majeure circumstance.

Due to paragraph 13(b) ("Ice") of GAFTA Contract No. 49, the same procedure as in the case of FOB – a deep-water port is implemented when such circumstances occur. Interestingly, in the standard pro forma of GAFTA Contract No. 49 published on the organization website (as amended on 01 January 2022), the clauses on the glaciation of the upstream ports entitle a buyer instead of a seller to cite this circumstance. This contradicts both the principle of force majeure regulation procedures in the GAFTA contracts and the content of the clause itself.

Clear regulation of an obligation to prove the existence of force majeure is typical for the indicated contracts. Such an obligation is imposed on a seller to provide a buyer with evidence of force majeure circumstances, which are to satisfy the buyer.

It shall be borne in mind that force majeure circumstances are not of a predetermined nature at all. By requiring precise evidence "to satisfy a buyer", the contractual provisions oblige a seller to prove not only the existence of force majeure but also the connection between them and the inability to fulfil the contract. Court practice, among other things, confirms that.

Example: in case of *Seagrain LLC v Glencore Grain B.V.* [2013] EWHC 1189 (Comm), the court agreed with the conclusions of the arbitral tribunal and the

GAFTA Board of Appeals that the Ukrainian Customs Service's demands on the provision of the KSRIFE (Kyiv Scientific Research Institute of Forensic Expertise) conclusion could not be considered as the ban on the export in principle.

In case of the Public Company Rise v Nibulon S.A. [2015] EWHC 684 (Comm), the court pointed out that the export prohibition clause is not exceptionally applied provided there is a total ban on the export. If the ban does not exclude and only restricts the exports, a causal connection shall be established between the export restrictions and the inability to fulfil the contract. For example, if export quotas are imposed, a supplier has to demonstrate that he has tried but failed to obtain export licenses.

The need to prove force majeure circumstances does not exclude the fact that their existence can be certified by the relevant competent authority.

In Ukraine the existence of the force majeure circumstances, in particular, the contracts concluded with non-residents under the GAFTA form, is certified by the Ukrainian Chamber of Commerce and Industry through the issue of a certificate. It should be taken into account that the competence of the regional Chambers of Commerce and Industry of Ukraine does not allow them to issue such certificates about the foreign economic contracts, and consequently to the contracts concluded by the Ukrainian companies with non-residents under the GAFTA form accordingly.

4. Communications in the force majeure clause procedure

Timely and correct notification of another party is important for the application of the force majeure clauses under the GAFTA contracts. An incorrectly formalized notification may deprive a party of the right to cite the force majeure circumstances.

The order of notifications is also standard as a rule. To meet the requirements of a contract, a notification shall:

- be sent in due time (within the term established by a contract, but not before the occurrence of the event instance (circumstances) constituting force majeure);
- be sent by e-mail or another method mutually recognized by the parties to ensure prompt communication;
- have evidence of sending the notification. By that, it is always the sender's responsibility to prove the fact of sending the notification.

The basic rule for the application of the force majeure clauses means that force majeure does not automatically waive a party from the fulfilment of the liabilities. The application of a force majeure clause waives a party from the liability for the delay in the performance of a contract and allows a party to extend the term of the contract fulfilment. However, such a waiver and a possibility to extend the terms are temporary only for the duration of the force majeure circumstances or for another period of time specified by the clause of the relevant contract.

The contract can be terminated but at the will of the parties (or a party, if it is provided for by the contract). In the GAFTA contracts, an option to cancel the contract on the grounds of force majeure belongs to a buyer and he may fulfil it

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within the term of existence of the force majeure circumstances.

In any case, the occurrence of the force majeure events does not automatically terminate the contract.

5. Nota Bene

According to all abovementioned, the procedures for applying the force majeure clauses in the GAFTA contracts are formulated in favour of a buyer. Specifically, a buyer can decide to turn down a contract. A seller shall, in his turn, prove the existence of the force majeure circumstances and the causal connection between the circumstances of force majeure and his inability to fulfil the contract. By that, he shall only be waived from the liability for the delay in the performance of the contractual obligations and shall have the possibility of prolonging the term of the performance. The extension of the term of the contract fulfilment is also subject to the restriction, and a seller is obliged to fulfil the contract once the force majeure has ended.

The only provision, which is to a buyer's benefit, is an open ("catch-all") list of the force majeure circumstances. This allows a buyer to be more flexible when applying a force majeure clause. The important thing is that the circumstances preventing a seller from fulfilling the contract shall meet the above criteria and be supported by proper evidence.