



## BExA Commentary Contract Frustration

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*Preparing for an event of frustration of export contracts, for political or natural reasons*



Current events in the Middle East and North Africa (MENA) and the earthquake and tsunami in Japan that followed the earthquake in New Zealand and floods in Queensland have highlighted the need for effective terms and conditions of sale in export contracts. These events also serve as a reminder that if it is not possible to perform the contract, you may be left with part-made goods, which could be difficult to re-sell.

### **Preparing for contract frustration in the export contract**

Under English Law<sup>1</sup>, it is rare for a party successfully to demonstrate that a contract has been frustrated. To do so would require the party alleging frustration to establish that circumstances have changed to such a radical extent since the contract was concluded that the contractual obligation in question can no longer be performed, or if performed, would be very different to the obligation which was originally undertaken. Mere inconvenience, hardship, additional expense or delay will not generally amount to sufficiently frustrating factors. It is therefore advisable to include a 'force majeure' clause in export contracts.

A robust force majeure clause can protect you should, post-contract signature, an export licence be revoked or become mandatory and not granted, a trade embargo is introduced, a natural disaster occurs or riots, strikes or war take place which prevent contractual fulfilment.

A force majeure clause can remove or suspend liability from parties to a contract when an extraordinary event occurs which is beyond either's control. Any period of suspension needs to relate to the period of *disruption caused by* the force majeure event, not just the period of the event itself. There is no standard force majeure clause. You and your customer need to decide on a list of events upon which the contract will be suspended or actually stop, yet not allow the customer to avoid the contract when it is performable. Exporters recommend you include the methodology for establishment of and agreement to any settlement in a 'termination account'.

### **Extending export credit insurance to contract frustration**

Traditional export credit insurance for non-payment risks can be adapted to cover the risk that the contract is frustrated for political reasons, such as government intervention, war or natural disaster, sometimes described as "Acts of God". Standard cover is for non-payment. If goods have been made to order, cover can start at date of contract when the claim will be for your costs of design, supply and manufacture of the work-in-progress. Export credit insurance cover requires that exporters have robust contract terms.

### **Terms and conditions review**

The ICC has a number of wordings for force majeure. Lawyers and credit insurers can conduct a review of your "Ts & Cs". A review of Ts & Cs in 2011 would be timely:

- Incoterms 2010 came into force on 1 January 2011 and includes changes such as new terms DAT and DAP, Free Carrier becoming the norm for land transport, and the rules being available for domestic trade.
- Bribery Law comes into force July 2011, is more stringent than previous laws, and there is a new offence "failure to prevent bribery".

BExA's Guide to Export Compliance 2011 provides management tips in relation to these issues and a range of other export compliance aspects of trade.

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DISCLAIMER: You are advised to undertake your own research and take professional advice

<sup>1</sup> Lawyer Ince & Co report "[The Japanese natural disaster and its consequences](#)"