

Egypt in turmoil – the practical and legal implications for trade and shipping

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The widespread rioting and civil unrest in Egypt has been extensively reported by the world's media. But how have the week's events affected trade and what are the legal implications for traders? This article aims to provide an overview of the situation at the time of writing and will address some of the important legal issues that traders are likely to face in the immediate future.

Background

In the past week, Egypt has been struck by increasingly violent public disturbances, in commercial centres such as Cairo and throughout the country.

Aside from the obvious damage to life, property and infrastructure, these disturbances have had a serious impact on trade and shipping.

In particular, fear of violence, widespread disruption to public transport and on Egypt's roads, a curfew between 5 p.m. and 7 a.m. and organised strike action mean that many Egyptians either cannot or will not go to work. As a consequence, essential public and commercial services have been disrupted and/or rendered unavailable.

Specifically:

1. Whilst Egypt's ports remain officially open, operations have been hampered by a lack of stevedores, pilots and machine operators as well as port and customs officials. As a result, loading and discharge operations are seriously delayed, vessels cannot obtain necessary supplies and essential import and export licences are not being issued.

At the time of writing, the worst-affected port appears to be Alexandria, which handles more than 60% of Egypt's foreign trade, although severe delays have been reported at all

of Egypt's ports, including Ports Said and Damietta. The disruption has mainly affected bulk and container operations, however, and so far Egypt's oil and gas terminals are said to be fully operational. The Suez Canal has remained open under military supervision throughout the week's disturbances (although transiting vessels are subject to some delays) but overland transit by road and rail has been badly affected so that goods cannot easily be moved to and from the ports.

2. Payment and communications systems have been disrupted, due to a lack of manpower but also as a result of systems outages and widespread interference with telephone and internet services

Inevitably, events in Egypt will interfere with some traders' ability to fulfil their contractual obligations and those traders may look to force majeure provisions in their contracts to excuse their non-performance.

Below we look at:

- Whether force majeure ("FM") clauses are likely to cover the issues arising out of the Egyptian unrest;
- Payment problems;
- Shipments to and from Egypt;
- Notices;
- Vessel issues/ port safety.

FM Clauses

Traders will only be afforded force majeure protection to the extent that their sale contract includes a provision under which violence, riots and civil commotion constitute a force majeure event, or where there is a wide wording which excuses performance in case of events outside the affected party's control.

Surprisingly, many FM clauses will not assist in the present case - either because they are too narrow, because they are drafted to deal with loadport rather than discharge port issues or because they do not excuse a failure to pay/pay on time, even if the local banking system is not

operating. In general, where the FM clause does not cover the situation, the non performing party will find themselves in breach and liable to damages and potentially in default.

If the sale contract does include a force majeure provision which is wide enough to cover the matter in hand, the party who wants to rely on it can only do so if:

1. The force majeure event has **caused** the party's failure to perform to the extent specified in the force majeure provision (so, collection of detailed evidence of the situation on the ground is key, although obtaining such evidence is proving difficult at present); and
2. The procedure specified for claiming force majeure (for instance, in respect of notices and timing) is strictly followed.

With regard to point (1), some clauses will provide that the force majeure event must "prevent" performance. Under wider provisions, performance may be excused if performance is hindered or otherwise delayed. The difference is important, particularly where a contract provides for alternative methods of performance.

With regard to point (2), the affected party will need to be sure that it has complied with all the procedural requirements of the force majeure clause, by giving notice of the force majeure within a fixed time, for example, or giving notice in a specified manner such as by email. Standard GAFTA clauses, for example, require two notices to be given at specific times after the force majeure event.

Traders who have received a force majeure declaration from their counterparty should look at the sale contract carefully and decide whether the counterparty is actually excused from performance and whether all the procedural obligations set out in the force majeure clause have been properly complied with. If in doubt, the declaration should be challenged and rights reserved.

In string contracts, buyers and sellers should check the provisions of their own sales contracts before a force majeure declaration is passed up and down the line as contracts in the string may be different and will not necessarily contain identical force majeure and notice provisions. Traders should not simply wait for a notice from their buyer/seller - often the timing requirements for notices are different and you may have to give a notice in a string even though you have not yet received one.

For more detailed guidance on force majeure provisions, please see our previous client alert number 06-045.

There is also a separate concept of "frustration" under English law, which can absolve a party from liability in certain cases. In general it is narrower than FM, however, and in the present situations would usually require a more extended period of riots or unrest.

Payment

The unrest in Egypt is not only affecting the physical/logistical aspects of the sale of goods. In the past week, communications and banking services in Egypt have been severely impacted by the crisis. At the time of writing, internet and telephone services had been restored in part but banks are expected to remain closed until Sunday 6 February. This has had an effect on payments for goods, both on cash against documents and letter of credit sales, and release of goods for discharge when the seller remains unpaid. We also understand that courier services are disrupted, with most postal operators restricted to providing a limited service in Cairo and the greater Cairo region. As a result, many discharge documents or payment documents are simply not arriving in Egypt.

A failure to pay is very rarely excused by FM clauses. The usual position is that payment does not contractually need to be made from an Egyptian bank and so a buyer is obliged to make suitable alternative arrangements for payment through a bank outside Egypt. If payment is not made within the time set out in the contract, there may be a default (depending on the provisions of the sale contract in respect of time for payment). There are reports in the media that some sellers have ordered their vessels to wait outside Egypt because they do not want to part with physical possession of the goods in circumstances where it will be difficult to get paid. Sellers, however, should take care that any such order is not a breach of their own delivery obligations.

Where the sale contract provides for payment by letter of credit and the issuing/opening bank is in Egypt, sellers may not be able to present documents (because banks have been closed) or obtain payment. In these circumstances, the issuing/opening bank's failure to pay is not likely to be a breach of the bank's undertaking to pay as under Article 36 of the UCP 600 banks assume no responsibility for the consequences of any interruption to their business services as a result of riots, civil commotion or any other cause beyond their control. Buyers and sellers should also

be aware that upon resumption of business, banks will not honour or negotiate credits which have expired whilst their services have been disrupted.

If, however, the contract provides for a confirming or negotiating bank outside Egypt, the seller should be able to obtain payment on presentation of documents to these banks.

If the issuing/opening bank is in Egypt and the advising bank is outside Egypt, the seller will not be able to obtain immediate payment, although (if the documents are presented to the advising bank on time) the issuing/opening bank will be obliged to honour the credit once the force majeure event has terminated.

If on the other hand, the issuing/opening bank is outside Egypt but the confirming or negotiating bank is within Egypt and the seller is unable to present documents due to the disruption of services, the seller must either (1) present the documents directly to the issuing/opening bank before the credit expires or (2) negotiate an extension of time with the buyer/the opening bank. Option (1) will not always be practical (especially where there is only a short time left before the L/C expires) although if the contract provides for electronic transmission of documents rather than physical delivery this may be less of a problem. With regard to option (2) it is important that such negotiations are started as quickly as possible.

Delivery Obligations to and from Egypt

In a **C.I.F.** contract under which goods are being shipped to Egypt, the seller will have fulfilled his physical delivery obligations when the goods passed the ship's rail at the loadport. He must, however, also obtain shipping documents for the relevant Egyptian port, and may at present experience difficulties obtaining a bill of lading for Egyptian discharge ports, due to ship owners' reluctance to go to Egypt (an issue we look at further below). Many FM clauses do not cover this problem at all, or, even if they do, sellers would have to show that owners' reluctance could not be overcome by extra freight/more advantageous terms, since an increase in cost of performance will not trigger FM.

Sellers' next obligations usually relate to notices/appropriation and the obligation to present documents promptly (under Article 14 of the UCP 600, an obligation to present original transport documentation no later than 21 calendar days after the date of shipment arises under the **sale contract** as soon as the letter of credit is correctly issued). If the contract requires notices or documents to be sent to Egypt, the seller must consider how this can be achieved given the

current problems facing courier and postal services into and throughout Egypt. Again, FM clauses are rarely drafted with these issues in mind.

Where the goods are due to be discharged at an Egyptian port, but discharge is delayed by the unrest, the buyer will usually be liable for demurrage under the sale contract or charterparty. Again, it will depend on the terms of the FM clause and any relevant laytime exceptions set out in the sale contract or incorporated into the charterparty under which the buyer can avoid paying for the delay. In many cases, however, the contract will not "excuse" the delay and the buyer will be liable once the vessel has given a valid Notice of Readiness. Delays outside the port or outside Egyptian waters will be more difficult to allocate.

In a C.I.F. or FOB contract under which goods are due to be loaded at an Egyptian port, sellers may find that they cannot fulfil their delivery obligations because they cannot get the goods to the port due to the disruption of loading operations. This is much more likely to be covered by standard force majeure or similar provisions within the sale contract. For instance, the GAFTA 100 form (a widely used C.I.F. contract for sale of feedstuffs in bulk) provides that in the case of specific events including riots, strikes and lock-outs at the loadport, sellers are entitled to an extension of time for delivery of the goods.

Notices

Disruption to internet and postal services has the potential to create further issues as between contract parties, particularly where a notice is required under the contract and failure to give notice is a breach/ waiver of rights.

If you are required to give a notice, check the notice provisions in the contract. If there is more than one means of giving notice under the contract it will be best practice to adopt more than one of these methods. If you have difficulties, keep detailed records of your attempts to send the notice and the alternatives used.

Also check whether it is possible under the contract to serve notice on a third party such as an intermediary broker or the counterparty's agent. Some standard form contracts will also permit notice validly to be given to the broker.

If you think you will have difficulty complying with any of the notice provisions under a contract (including FM notices), consider coming to an arrangement with your counterparty under which

notices can, for the time being, be given by a method which is not provided for in the contract, by fax or by telephone for instance, or via a third party. Alternatively, you may try to agree to extend the time for giving notice.

Vessel Issues

The general rule is that a vessel cannot refuse charterers' orders to sail to a particular port for so long as that port remains a "safe port". Once a port becomes "unsafe", a master is entitled to refuse to enter it and any subsequent order to sail there is illegitimate. Under both time and voyage charters, a specific war risks clause will often provide that fresh instructions must be given. The vessel should not normally sail immediately to an alternative port without a renomination from charterers or agreement on an alternative. Under a time charter, the vessel will continue to be on hire and hire will be for charterers' account unless there is a relevant exceptions clause in the charterparty. With a voyage charter there is unlikely to be a liability for delay on the voyage unless Charterers are late with a renomination, but the same war risks clause may provide for an adjustment to the freight.

It is a well-established principle that a port is safe provided a vessel can reach, use and return from the port without being exposed to a danger which cannot be avoided by ordinary good seamanship and navigation. The fact that a vessel is likely to be delayed or may encounter difficulties is not enough to make a port unsafe.

At the time of writing, although the situation in Egypt remains serious, the level of violence does not appear to be so grave that a vessel entering an Egyptian port would be in danger of physical damage (for instance by gunfire or rioting) or seizure. For the time being, therefore, vessels should probably not be refusing orders to sail to Egyptian ports.

Once the vessel arrives at the port, under a voyage charter laytime will usually commence once a valid NOR has been tendered i.e. when the vessel is in all respects ready to commence loading/discharge operations. It may not matter that loading/discharge operations cannot be carried out due to events on the ground. As a consequence, parties that have chartered vessels to load or discharge goods at one of Egypt's affected ports may find themselves facing large demurrage liabilities or cancellation of vessels. Similarly, buyers and sellers may be liable to charterers under the laytime and demurrage provisions of their sale contracts.

However, many voyage charters may contain a strikes clause which stops time counting during delay in loading or discharging owing to strikes or civil commotion. The charter terms therefore need to be checked carefully. Charterers under a time charter are less likely to have such protection.

Conclusions

For the time being, there are no signs that the situation in Egypt is easing. Although steps have been taken to protect trade so far as possible, essential services continue to be severely disrupted and this disruption is likely to continue for some time after the violence and protests dissipate.

Ports, for instance, are likely to suffer from vessel congestion for some time and there will also be a backlog of goods to be dealt with.

Similarly, it may take some time for Egypt's banks to resume ordinary service and in the intervening period payment obligations may go unfulfilled.

Practical Guidance

For so long as the situation in Egypt persists, traders should take steps to ensure they comply with their obligations under sale contracts and decide with care how to respond to their counterparties' inability to perform.

- As a starting point, follow events as closely as possible and liaise with counterparties so that both parties understand the situation on the ground.
- Check your sale contract for force majeure provisions, notices, laytime exceptions, payments etc. If you want to rely on force majeure, make sure you comply with all the procedural obligations. If your counterparty declares force majeure, make sure that you challenge this and reserve your rights, if the contract FM clause may not cover the problem.
- If possible, talk to your counterparty and consider diverting vessels to alternative ports. Make sure that you agree how any additional expenses will be dealt with before diverting a vessel.

- Discuss payment options with your counterparty. If payment has been or is likely to be disrupted you may be able to make alternative arrangements. If you have not been paid, consider carefully before any declaration of default and familiarise yourself with your own rights and obligations before parting with or withholding possession of the goods.
- Remember that notices sent to the broker or agent may, under some contracts, be valid notice even if you cannot at present give notice in Egypt. Also consider agreeing temporary alternative notice arrangements with your counterparty.
- CIF sellers/FOB buyers with vessels going to/from Egypt should check charterparty terms on port options/safety.

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