

从英国法视角看新冠状病毒和不可抗力条款适用

Coronavirus and Force Majeure in English Law

新冠状病毒对供应合同意味着什么？

当事人能否以因疫情引起的低需求为由而免除合同的相关履行义务？

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TAKEAWAYS

- ② 根据英国法，当发生合同约定的特定极端情形时，合同中的不可抗力条款可能会免除合同当事人双方的履行义务。
Under English law, force majeure clauses in contracts may allow parties to avoid their performance obligations in certain extreme circumstances, as defined by the contract.
- ② 根据英国法，中国对液化天然气的低需求不太可能达到可触发适用在长期《液化天然气供应合同》中常见的不可抗力条款所需的极端情形标准。
It is unlikely that a low demand for LNG in China would reach the level of extreme circumstances required to invoke a force majeure clause of the type we are used to seeing in long term LNG supply contracts under English law.
- ② 不可抗力条款通常要求当事人尽合理努力以避免受到该极端情形的影响。
Force majeure provisions usually contain requirements to use reasonable endeavours to avoid the effects of the extreme circumstance.

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过去几周，有新闻报道称中海油（CNOOC）和中石油（PetroChina）已援引其长期《液化天然气供应合同》中的不可抗力条款以免除某些履行责任，且中石化（Sinopec）和中国石油（China National Petroleum Corporation）正考虑也这样做。据报道，中石油此举是因为没有足够工人前往油库和中转站等设施，以致无法满负荷运转。据报道，中海油援引不可抗力条款是由于工厂和其他行业的暂时停工所引起的中国液化天然气需求下降，以及航空和汽车燃料的需求下降。壳牌（Shell）和道达尔（Total）拒绝了上述该等不可抗力情形的通知，并威胁进行索赔。上述情形在法律上应如何看待呢？

In the last fortnight there has been news in the press that CNOOC and PetroChina have invoked force majeure clauses in their long-term LNG supply contracts to avoid certain performance obligations and that Sinopec and China National Petroleum Corporation are considering doing likewise. In the case of PetroChina, it has been reported that this is due to an inability to get enough workers to its terminals to run them at full capacity. In the case of CNOOC, it is reported that force majeure has been invoked because of lower demand for LNG in China due to

factories and other industry being temporarily suspended and a lower need for aviation and motor fuel. Shell and Total have rejected the force majeure notices and are threatening compensation claims. But what is the legal position?

在英国法下，在长期合同中加入不可抗力条款赋予了当事人在遇到极端情形下可以暂停履行其合同义务或者终止合同的一种途径，该条款将合法免除当事人对合同的履行义务。典型极端情形如自然灾害、战争或者天灾。

Under English law, force majeure clauses are included in long-term contracts as a way for the parties to take a break in their performance obligations or to terminate the contract in extreme circumstances, typically a natural disaster, war or “act of God”, which would legitimately excuse their performance of the contract.

首先，英国法不承认默示的不可抗力条款，即在英国法下，不可抗力条款只有在合同各方明确同意设立并就条款的内容和条件协商一致时才成立。因此，如在上述疫情情况下能援引不可抗力条款来免除合同履行义务，则在该合同中须有明确因“与中国发生的疾病或病毒爆发有关的产品需求不足”为由而免除当事人履行义务的不可抗力条款。然而，如果该不可抗力条款仅宽泛地规定因“自然灾害、洪水、战争和其他天灾”或甚至因“世界性流行病”而免除当事人的履行义务，此次新冠病毒的爆发也未必明确属于该条款所预期的适用范围。

A force majeure provision is never implied under English law and will only arise in contracts where the parties have specifically agreed to it and on the terms that they have negotiated. So, if a contract included a force majeure provision excusing the performance by the parties of their obligations due to “failure of demand for the product relating to the outbreak of a disease or virus in China”, that would likely be invoked in the current circumstances. However, if the clause excused performance because of “natural disaster, flood, war and other acts of God” or even of “worldwide epidemics” generally, it is less clear that the outbreak would fall within the contemplated use of the clause.

此外，大多数不可抗力条款要求事件在合同订立时是不可预见的，这导致一些人评论认为，如果在非典（SARS）爆发后订立包含此类条款的合同，则类似病毒可能再次出现就是具有可预见性的，则当事人可能无权获得救济。

Furthermore, most force majeure clauses will require that the event was unforeseeable at the time the contract was entered into, leading some commentators to suggest that if a contract with this type of clause was entered into after the SARS outbreak, it may have been foreseeable that a similar virus could occur again and the parties may not be entitled to relief.

需注意的另一因素是，主张不可抗力的当事人必须证明是不可抗力事件（而不是其他因素）导致该方无法履行其义务。不可抗力条款通常还要求援引该条款的一方尽到合理努力尽可能避免不可抗力所带来的影响。这些观点在海钻加纳运营有限公司（*Seadrill Ghana Operations Ltd*，“海钻”）诉图洛加纳有限公司（*Tullow Ghana Ltd*，“图洛”）一案中得到体现，本案中图洛被认定无权援引不可抗力条款。图洛与海钻签订了一份钻井设备租用合同，计划用于两块油田和另一块随后开发的较大油田。加纳政府实施的暂停命令中止了图洛的钻探，图洛声称上述行为使得其不可能开展钻探计划。政府也因为其他原因拒绝批准另一较大油田的开发计划。法官认为，图洛无权依据不可抗力条款终止协议，因为尽管暂停命令属于不可抗力事件，但拒绝批准新油田不是不可抗力事件而是图洛无法实施钻井计划的实际原因（事实上，是主要的原因）。法官还指出，图洛有合同责任尽其合理努力以避免暂停命令阻止其履行指示开始钻井的义务，且图洛有机会指示在不同地点开展钻井。图洛未这样做，导致图洛无法援引不可抗力条款，因为其没有尽到合理努力避免不可抗力事件所带来的影响。

A further factor that will need to be borne in mind is that a party claiming force majeure must show that it was the force majeure event (and not some other factor) that caused the party to be unable to fulfil its obligations. A force majeure clause also generally requires the party invoking the clause to use reasonable endeavours to avoid the effects of force majeure to the extent possible. These aspects can be seen in the case of *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd*, where Tullow was not entitled to invoke a force majeure clause. Tullow had entered into a hire contract for a drilling rig with Seadrill which it intended to use in two fields and later in a wider field it planned to develop. A moratorium imposed by the Ghanaian government stopped Tullow from drilling, which Tullow claimed made it impossible to provide a drilling program. The government had also refused to approve the plan for the wider oil field for other reasons. The Judge held that Tullow was not entitled to rely on the force majeure provision to terminate the

agreement because, although the moratorium was a force majeure event, the refusal to approve the new field was not force majeure and was an effective cause (and, in fact, the greater cause) of Tullow not being able to provide a drilling program. The Judge also stated that Tullow had a contractual duty to use its reasonable endeavours to avoid the moratorium stopping it performing its obligations to provide drilling instructions, and Tullow had the opportunity to provide drilling instructions in different locations. Not doing so would have meant that Tullow was unable to utilise the force majeure clause because it had not used its reasonable endeavours to avoid the effects of the event.

海钻加纳运营有限公司 诉 图洛加纳有限公司一案的判决和附带意见表明了 在适用英国法的合同中，不可抗力事件或情形必须是合同违约的原因，且一方当事人必须已经尽合理努力避免不可抗力所带来的影响（假设合同条款没有另作约定）。例如，液化天然气的低需求不太可能构成无法接收货物的充分原因，因为接收实际上仍然是可能的。当事人寻求不可抗力条款救济的困难在于证明其已经尽到合理努力以避免低需求所带来的影响（如，其本可以将液化天然气供应运送到其他经销商或加工厂）。

The decision and obiter discussion from *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd* show that the force majeure event or circumstance must be causative to the contractual breach and that a party must have used reasonable endeavours to avoid the effects of the force majeure (assuming that a clause does not say otherwise) in an English law contract. It is unlikely, for example, that low demand for LNG would be sufficient cause to not accept the shipments because acceptance is still physically possible. Parties seeking to rely on force majeure clauses would have difficulty establishing that they had used reasonable endeavours to avoid the effects of low demand. (For example, they could have shipped LNG supplies to other distributors or processors.)

泰晤士河流域电力有限公司 (*Thames Valley Power Ltd*, “泰晤士”) 诉道达尔天然气电力有限公司 (*Total Gas & Power Ltd*, “道达尔”) 一案的判决展示了一个不可抗力事件并不导致违约的例子。本案中，双方签订了道达尔向泰晤士提供天然气的协议。天然气的市场价格急剧上涨，道达尔试图寻求不可抗力条款的救济以中止对天然气的供应直至价格再次下跌。法官认为，不能仅因为合同的履行成本变高或利润变低，一方当事人就以不可抗力为由免除合同义务。

An example of an event not being causative to the breach of contractual obligations is seen in the decision in *Thames Valley Power Ltd v Total Gas & Power Ltd* in which, the parties had entered into an agreement for Total to provide gas to Thames Valley Power. The market price of gas rose sharply and Total sought to rely on a force majeure clause to cease supplying until prices fell. The Judge held that a party could not be relieved from its contractual obligations on the grounds of force majeure merely because the contract had become more expensive, or less profitable, to perform.

我们建议，在当前情况下，如果对类似合同中表述相似的不可抗力条款有争议，液化天然气的低需求并不妨碍买方接收液化天然气，或在接收液化天然气后再出售给其他经销商或加工厂。当事人为接收货物所付出的成本可能更高，但这并不足以使其可以借口不可抗力免除自身的义务。如果因合同中指定的港口关闭或因买方不可能做出替代安排以接收液化天然气，进而导致无法接收货物，才更有可能被解释为不可抗力事件。

We would suggest that it would follow that if a similar contract with a similarly worded force majeure clause was disputed in the current circumstances, low demand for LNG would not preclude purchasers from accepting shipments of LNG, or accepting shipments and then selling the LNG on to other distributors or processors. It may become more expensive for them to accept shipments, but that would not allow them to be relieved from their obligations on the grounds of force majeure. If it became impossible to accept shipments because a port specified in the contract is closed or because the purchaser could not possibly make alternative arrangements to accept the LNG, that would more likely be interpreted as a force majeure event.

相关条款的措辞也决定了当事人可以采取的补救措施。这是因为不可抗力事件的结果根据合同的不同而不同，与合同谈判结果息息相关。有的合同允许暂时中止双方的义务，其中有可能包括一个固定的时间期限，在此期限之后，合同可能因长期不可抗力事件而终止。有的允许从不可抗力事件发生时就终止合同。其他合同则只允许特定义务中止（如在出现不可抗力事件时，付款义务仍可继续履行）。各个不可抗力条款可能存在共同之处，即规定合同方援引不可抗力条款时所需遵守的程序。例如，要求免除义务的一方可能须发出通知并提供发生不可抗力事件的证据，或者可能须合同方一致确认发生了不可抗力事件。

The wording of the clause in question also determines the remedies available to the parties, as the consequences of a force majeure event will differ between contracts, depending on what has been negotiated. Some allow for a temporary suspension of the parties' obligations, possibly including a set time period after which the contract may be terminated for a long-term force majeure event. Some will allow for termination of the contract because of the force majeure event from the outset. Others will only allow for certain obligations to be suspended (so payment obligations may still continue in a force majeure event). What such clauses are likely to have in common is that they will set out a process to be followed. For example, the party claiming exemption from their obligations may have to issue a notice and provide evidence of the force majeure event or both parties may have to agree that a force majeure event is occurring.

事件的进一步发展是在 1 月底，中国国际贸易促进委员会确认中国将向因冠状病毒爆发而无法履行合同义务的本土公司出具不可抗力证明，作为证明其无法履约的一种方式。此类证明可能为想援引不可抗力条款而须提供证据证明其无法履行的当事人提供帮助，且可能在受中国法律管辖的合同中具有重要作用。然而，在国际语境下，尽管该证明可能会增强合同无法履行的证明，但除非适用英国法的合同所含的不可抗力条款在起草时所约定的范围足以涵盖目前阻止一方履行合同的情况，否则此类证明的作用有限。

In a further development, at the end of January the China Council for the Promotion of International Trade confirmed that China would offer force majeure certificates to local companies which were not able to fulfil contractual obligations because of the outbreak of coronavirus as a means of evidencing their inability to perform the contract. Such certificates may be helpful for parties which have to provide evidence of their inability to perform to invoke a force majeure clause and may be of significant value in contracts governed by the laws of the PRC. However, in an international context, while a certificate may lend weight to the suggestion that a contract cannot be performed, unless an English law contract contains a specific force majeure clause excusing performance which is drafted widely enough to cover the circumstances which are stopping the party performing the contract, a certificate is unlikely to mean much.

值得注意的是，即使在没有不可抗力条款的情况下，英国法的合同落空原则（frustration）可能得到适用。合同落空原则规定，如果合同非因任何一方的过错而履行不能，其可能自动终止。履行不能的标准较高，且英国法院指出，成本增加或履行困难并不等同于履行不能，但如果供应链崩溃，在某些情形下，合同落空原则可能得到相关适用。

Even where there is no force majeure clause, it is also worth noting that the English law doctrine of frustration may apply. The doctrine of frustration states that if a contract becomes impossible to perform through no fault of either of the parties it may be automatically terminated. Impossibility of performance is a high bar to establish, and the English courts have stated that increased costs or difficulty of performance is not the same as impossibility, but there may be circumstances in which frustration becomes relevant if supply chains collapse.

随着新冠病毒的持续爆发，我们可见中国的进出口将会持续受到影响，不仅因为港口无法使用，还由于工厂工人被要求居家隔离以避免病毒的传播，形势如何发展还有待观察。在援引不可抗力条款延迟交货后江南造船厂现已重新开工，一些私营造船厂仍未复工。菲亚特克莱斯勒（Fiat Chrysler）发出通知称其在塞尔维亚的一家工厂将被迫停产，因为该公司无法从中国获得零部件，现代（Hyundai）和起亚（Kia）因中国的零件短缺而暂停了在韩国的生产。同样地，技术产品的制造商也可能因零部件未从中国发货而受到影响，苹果公司提示因新冠病毒的影响其将无法完成销售目标。大豆是中国的一项重要进口产品，巴西和美国的供应商担心需求会远远低于预期。病毒除了对人体造成严重影响之外，其造成的影响在商界和法律界处处可见。我们预计随着疫情的持续发展，无论在中国境内还是境外，受英国法管辖的合同中的不可抗力条款会被持续引用。

As the outbreak of coronavirus continues we can see that it is likely that imports to and exports from China will continue to be affected, not only because of the unavailability of ports but also because factory workers have been asked to stay at home to avoid the spread of the virus. How the situation develops remains to be seen. The Jiangnan shipyard has now recommenced work after invoking force majeure clauses to delay deliveries and certain private shipyards are still suspending their normal operations. Fiat Chrysler has warned that one of its plants in Serbia will be forced to halt production because it is struggling to obtain parts from China. Hyundai and Kia paused production in

South Korea due to shortages of components from China. Manufacturers of technology products may similarly be affected by parts not leaving China, and Apple has warned that it will miss sales targets due to disruption related to coronavirus. Soybeans are a significant import to China, and Brazilian and U.S. suppliers are concerned that demand will be much lower than expected. Aside from the tragic human impact of the virus, the consequences are being seen throughout the business and legal world, and we expect that force majeure clauses in contracts governed by English law will continue to be invoked both within and outside of China as the outbreak continues.

如果您希望就本报告中提到的与英国法律合同相关的问题获得建议或帮助，请联系我所伦敦、北京和上海办公室的下列人员：

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If you would like advice or assistance on issues mentioned in this briefing in relation to English law contracts, please contact James Campbell or April Lord in our London office.