COMPLEXITIES OF FORCE MAJEURE

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Force majeure is a term rarely used, often overlooked and almost never clearly understood by shippers until it is declared. Unfortunately, at that point it is too late to take appropriate steps to avoid additional expenses or mitigate risks.

Force majeure is a contractual term that frees service providers from obligation when extraordinary circumstances beyond the control of the parties prevent them from fulfilling those obligations. Such circumstances include war, strikes, riots, crime or acts of God.

Its application to transportation is most often in the context of the bill of lading or contract of carriage. The terms and conditions printed on the back of the document include a force majeure clause that states that if an extraordinary situation prevents the carrier from delivering cargo to the destination named in the bill of lading, the carrier may declare force majeure, deliver the cargo to an alternate port of convenience and terminate carriage at that location. From there, it is the responsibility of the cargo owner to get the cargo to the ultimate destination.

Force majeure was recently declared by ocean carriers in the aftermath of Hurricane Sandy at the Port of New York and New Jersey. Because cargo could not be discharged, imports were diverted to alternate ports of Baltimore and Norfolk, Va., where the contract of carriage/bill of lading was terminated. From there, cargo owners were forced to arrange on-carriage to the ultimate destination and bear the additional costs and risks associated with the transit.

Other notable force majeure events in the recent past include Hurricane Katrina, the tsunami in Japan and the 2002 International Longshore and Warehouse Union strike.

While trucking cargo from Norfolk, Va., to destinations in the Northeast U.S. after Hurricane Sandy was inconvenient, one can only imagine the additional expenses and challenges that would be associated with thousands of containers discharged throughout Mexico, the Caribbean and Canada in the event of an ILA work stoppage.

When force majeure is declared, cargo owners often mistakenly assume their cargo insurance will pay the additional costs incurred. But cargo insurance is not intended to address this type of situation. Cargo insurance is predicated on physical loss or damage to cargo.

Costs associated with delay, loss of use or market, rejection, demurrage or other additional charges are expressly excluded by most policies.

It is also important to remember that only physical damage to cargo is covered by the "strikes, riots & civil commotions" endorsement to most policies. Some policy language narrowly defines the "duration of risk" so that coverage ceases when cargo is taken out of the "due course of transit," or when the cargo owner takes "control" of the cargo.

In these cases, coverage may terminate when the cargo is discharged at the alternate port of convenience and the cargo owner may be left uninsured for the remainder of the transit. Alternatively, policy terms may require that the insured notify the insurer of deviations in transit in order to maintain coverage. The insured may have to pay additional premiums or accept more restrictive limits, conditions and deductibles as a result.

For example, many insurers exclude losses occurring in Mexico or resulting from transport on barges; therefore, cargo discharged at alternate ports in Mexico or the Caribbean may result in additional premiums or excluded transits.

One potential area of relief for insured parties involves their policies' "sue and labor" clauses. Most policies include language stating that the insured has an obligation to actively avoid or minimize additional loss or damage to cargo in the event of a loss or imminent loss. The costs associated with this requirement are a recoverable component of a valid insurance claim.

The ability to recover force majeure-associated costs under the sue and labor clause is rare. However, it is certainly an avenue worth pursuing with the assistance of a knowledgeable insurance broker.

Force majeure is a complicated concept with myriad consequences, including uninsured exposures to loss in transit. It is incumbent upon each cargo owner to anticipate potential loss scenarios, understand how their insurance policy would respond to those situations and work with their insurer to develop an appropriate risk management program.

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