

ANAVE – Circular de Régimen Interior

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Asunto: Coronavirus y cláusulas de Fuerza Mayor en los contratos.

Muy Srs. nuestros:

Varias de nuestras empresas nos han consultado sobre la posibilidad de aplicación de las cláusulas de fuerza mayor en contratos de fletamento, de transporte o de construcción naval, cuando no sea posible cumplir lo acordado, en los plazos o de la forma prevista, debido a los efectos de la epidemia de coronavirus.

En las últimas semanas se han publicado en diversos medios marítimos varios artículos de interés sobre este asunto. Hemos recopilado algunos de ellos en el repositorio de información de la zona de socios de nuestra página web y que les **adjuntamos**.

Resumimos a continuación, de forma puramente orientativa, las principales conclusiones que hemos extraído de estos artículos:

- La aplicación de una cláusula de fuerza mayor depende en gran medida de la legislación aplicable al contrato en cuestión. Los artículos que hemos recopilado se refieren todos a la ley inglesa.
- En la “common law” inglesa no existe el concepto de “fuerza mayor” ni una definición general de la misma por lo que, para aplicar este concepto a un contrato, debe figurar en el mismo una cláusula específica. El mero hecho de que un determinado Estado o la OMS declare una emergencia sanitaria o incluso emita un certificado de dicha situación no hará que los tribunales británicos acepten la concurrencia de fuerza mayor.
- La redacción concreta de esa cláusula en cada contrato resulta fundamental para su aplicación y los tribunales tenderán a interpretarla literalmente y de forma restrictiva.
 - Por ejemplo, si la epidemia produce un retraso en las operaciones que hace que el buque entre en demoras, los jueces no lo considerarán fuerza mayor si no se indica así expresamente en la cláusula del contrato.
 - No obstante, aunque la cláusula no se refiera expresamente a “epidemia” o “cuarentena”, puede ser que incluya alguna expresión muy general como “Act of God” o similar, que se pueda considerar que abarque la crisis del coronavirus.
 - En general es necesario que un especialista en la jurisdicción de que se trate analice detenidamente la redacción concreta de cada cláusula.
- Con carácter general, en la mayor parte de los casos, la parte que invoque una cláusula de fuerza mayor deberá demostrar que:
 - Ha ocurrido un suceso de fuerza mayor entendido como uno que está “fuera de su control”. La empresa debe aportar las pruebas documentales del suceso y de sus consecuencias de una parte oficial o independiente como puertos, gobiernos, autoridades, etc.
 - Este suceso ha impedido, dificultado o retrasado su cumplimiento del contrato. El suceso en cuestión (la epidemia) debe ser la causa del retraso o incumplimiento.
 - Y que ha tomado “todas las medidas razonables para minimizar el suceso o sus consecuencias”. ¿Pudo hacer más la compañía para evitar la influencia de la crisis del

coronavirus? Por ejemplo, algunas cláusulas admiten la posibilidad de descargar en un puerto seguro alternativo en determinados supuestos.

- El hecho de que debido a un suceso de fuerza mayor (en este caso, la epidemia) la ejecución del contrato, siendo posible, resultase más costosa (incluso mucho más costosa), no se considerará en general fuerza mayor.
- La empresa deberá poner la máxima atención en cumplir los requisitos, de notificación o de otro tipo, que en la mayor parte de los casos se incluyen en la cláusula en cuestión. Por ejemplo, algunas cláusulas prevén la notificación en un máximo de 48 h. En general, en esa notificación ya se deberán aportar pruebas del suceso.
- También la cláusula suele establecer lo que suceda en caso de fuerza mayor, y no siempre tiene que ser la cancelación del contrato, sino que puede ser la suspensión del mismo durante cierto tiempo, posposición de fechas, etc.
- Una vez invocada la cláusula de fuerza mayor, puede ser que ésta le conceda a la otra parte el derecho a rescindir el contrato. En muchos casos será preferible intentar una solución acordada (posposición, por ejemplo) que evite litigios.
- Junto con el análisis detallado de estas cláusulas, las compañías deberían revisar también sus pólizas de seguros.

Muy atentamente,

Manuel Carlier
Director General



CORONAVIRUS: CAN IT BE A FORCE MAJEURE EVENT?

The human cost of the novel coronavirus outbreak has been widely reported and the tragic consequences continue. In the commercial sector, we are also seeing an impact on our clients: China is the world's largest importer of crude oil, iron ore and soybeans and the largest exporter of steel; the impact of the virus on supply chains, production and transport has been and may continue to be significant.

“Disputes affecting declarations of Force Majeure arising from the impact of the coronavirus seem inevitable.”

Some companies, evidently including LNG importer CNOOC, have begun to declare Force Majeure (FM) in response to the difficulties they face, and the Chinese government is issuing FM certificates to companies unable to meet their contractual obligations in an attempt to protect them from breach of contract claims.

The question arises - will this work? Will declarations of FM, or even government issued FM certificates, be effective to protect Chinese (or other) companies struggling to meet their contractual obligations?

Many international trading contracts are governed by English law, and it is hard successfully to rely on an FM clause to avoid contractual responsibility under English law.

There is no guarantee that a government certificate will make any difference - in fact, it might give Chinese companies a false sense of comfort, resulting in them claiming FM when in fact they are not contractually entitled to do so, and then facing a claim for breach of contract anyway.

FM clauses require careful consideration for a number of reasons:

- A party to a contract will only be able to consider FM to excuse non-performance if there is a FM clause

in the contract. Apart from the concept of “frustration”, English common law has no general concept of “force majeure”, and FM cannot be implied into an English law contract.

- Even if the contract does contain a FM clause, it is still not certain that a party will be able to rely on it to protect against claims for non-performance as a result of the difficulties caused by the coronavirus outbreak. Because of their serious impact on the parties’ rights and obligations, FM clauses are interpreted strictly by the English courts - so it will be necessary to consider the precise terms of any given clause.
- Typically, a party will have to show that:
 - an FM event has occurred which is beyond its control; and
 - it has prevented, hindered or delayed its performance of the contract; and
 - it has taken all reasonable steps to avoid or mitigate the event or its consequences.
- Deciding whether the virus outbreak is an “FM event” will depend on the contractual clause. If “disease” or “epidemic” is not expressly included, it may be that

another term such as “act of God” (once described as “an irresistible act of nature”), or some other catch-all provision, will suffice - but that will require careful consideration.

- Next the question of prevention, hindrance or delay must be addressed. How has the virus prevented, hindered or delayed performance? The English courts are particularly alive to attempts to use FM clauses to avoid performance for economic reasons. English case law clearly demonstrates that just because a contract has become more expensive - or even uneconomic - to perform, that will not constitute FM.
- Related to this question of performance is precisely what performance has been impacted. What if performance involving some other supplier remains possible? In most cases this will undermine reliance on a FM clause, but there may be situations where what is relevant is the effect on performance by the contract parties.
- There may also be knock-on consequences of an FM event, including so far as concerns the tender of notice of readiness,



cancellation rights, and the operation of laytime and demurrage provisions. There may equally be issues affecting costs incurred as a result of an FM event, such as quarantine costs, and who, as between the parties to the contract, must then bear these.

- FM clauses frequently require evidence to be served in support of any claims and contain notice provisions which must be complied with to the letter. Claims for FM have been rejected by the courts as a result of non-compliance with notice provisions.
- Assuming all relevant hurdles are cleared to trigger an FM Event, the FM clause will usually set out what then happens next - and an FM Event may not mean the end of the contract. The obligation to perform may be suspended for a period of time, rather than conferring an immediate entitlement to terminate. But a declaration of FM can lead to the recipient of the notice of FM ultimately acquiring an entitlement to terminate, so care needs to be taken as to the possible longer term consequences of reliance on an FM event.

- There is also an obligation to mitigate the consequences of the FM event and performance must typically be resumed as soon as the effects of the FM event have passed.

Disputes affecting declarations of Force Majeure arising from the impact of the coronavirus seem inevitable. We are ready to assist with any queries clients may have.

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Practical and contractual considerations arising from the Novel Coronavirus outbreak in China

The coronavirus outbreak [has caused over 2,619 deaths](#) and a major disruption to global trade, since it evolved in late 2019. The following article by Chris Moxon, Senior Claims Executive, and Jamie Wallace, Legal Director at Standard P&I Club, explain the key practical and contractual considerations for shippers arising from the [coronavirus outbreak](#) in China.

[JAMIE WALLACE](#) | [OPINIONS](#) | 25/02/20



Members will be aware of the recent novel coronavirus outbreak in China, which has been declared a global emergency by the World Health Organization (WHO).

Although the following information is believed to be accurate at the time of writing, the situation is evolving rapidly and new measures are frequently being put into place. Members are advised to check with their agents and the local correspondents (contact details can be found on the club's website) well in advance of any call to a country affected by the virus, particularly ports in China.

The Standard Club is guided by the views and recommendations issued by the WHO in respect of this outbreak and advises members to remain vigilant and fully updated with regards to the spread of the virus. More information on the virus itself and the developing situation are available from the WHO [website](#).

Practical considerations

Members proceeding to a port affected by the coronavirus, or to a Chinese port generally, can expect the following issues to arise:

Crew

- Need for health declarations before berthing.

- Monitoring of crew.
- Restrictions on substitution of crew.
- Restrictions on crew disembarkation.
- Need for preventative measures to be taken by crew.
- Supply of provisions may be affected.

Ship repair

- Impacted by lack of workers.

Cargo preparation

- Port congestion / port operation.
- Slow loading and discharging.
- Unavailability / delays in provision of cargo by truck or river.
- Delays in or impossibility of delivering cargoes to the loading ports.
- Delays at port or subsequently, e.g. due to quarantine issues.
- Inability of stevedores to attend on board vessel to assist with cargo operations.

Contractual considerations: existing time charters

Owner members whose vessels are ordered, or charterer members who order vessels, to proceed to load or discharge at a port affected by the coronavirus, or at a Chinese port generally, should consider the following charterparty issues:

Force majeure clauses

The clause needs to be reviewed carefully. Unless there is an express reference to epidemics or quarantines in the charter or a suitable “catch all” provision, issues arising from the coronavirus will not provide an excuse for non-performance of contractual obligations.

For load and discharge port issues, please see the section on voyage charters below.

General points to be kept in mind include:

- Does the force majeure clause at issue specifically reference diseases, epidemics or quarantines as triggering events? If so, the chances of enforcement are greater.
- Did the outbreak of the coronavirus cause the party’s inability to perform? If a party would not have been able to perform even in the absence of the outbreak, it is unlikely that the party will be able to rely on force majeure as an excuse, even if the event falls within the force majeure provisions.
- Note that the question of whether there is a force majeure event may therefore not be the end of the matter, as damages for breach will be to put the innocent party in the position it would have been in if the contract had been performed.
- Is the party able to avoid or overcome the effects of the coronavirus through alternative means? The ability to mitigate the effects of the coronavirus through alternative means cuts against the application of force majeure as a valid defence.
- Did the party comply with any notice requirements? Even if all other elements establishing a force majeure defence are met, it is unlikely that a court or arbitrator will excuse a party’s failure to give timely notice that a force majeure event has been triggered.

By way of example of the treatment of force majeure events by major time charter forms:

- The NYPE 1946, 1993 and 2015 exceptions clauses make no reference to epidemics or quarantine.
- Clause 14(a) of the BALTIME form provides that the vessel shall not be ordered to, and is not bound to enter, “any place where fever or epidemics are prevalent”.
- Clause 27 of the Shelltime 4 form refers to neither party being liable for “loss or damage or delay or failure in performance hereunder arising or resulting from”, amongst other things “quarantine restrictions”.
- The BIMCO sample force majeure clause for time charters lists “epidemics”.
- Action points to be taken:
 - Review contracts to determine rights, obligations and remedies in the event of diseases, epidemics or quarantines. Particular attention must be paid to any notice requirements.
 - Promptly provide notice of a force majeure event to counterparties. Failure to do so can have a severe impact on the ability to invoke the defence.
 - Take (and document) reasonable steps to mitigate the impact of the coronavirus. While these steps may prove futile, they are essential if a force majeure defence is to succeed.

Frustration of the charter

At present, the likely consequence of the coronavirus is, at maximum, a 14 day period of quarantine. Whether that could amount to a frustrating event will need to be considered on the facts, including the length of the charter concerned, but it is thought to be highly unlikely.

The position may change if there is a permanent closure of a port or series of ports.

Frustration is, however, historically difficult to argue as a matter of English law.

Unsafe port issues

If the charter terms are standard, such that the charterers’ obligation is to nominate a safe port (either express or, in certain circumstances, implied), then the question of whether that nomination is a legitimate one depends on whether the vessel is able to reach, use and depart from the port without being exposed to danger which cannot be avoided by good navigation and seamanship.

In theory, a port affected by the coronavirus could be legally unsafe, but consideration needs to be given to the facts, the risks to which the vessel is exposed, and the contractual provisions.

If an order were to be given today to proceed to a port that is already significantly affected by the coronavirus (such as Wuhan), an owner should consider:

- (i) the safe port provisions in the charter; and
- (ii) whether the owner can refuse to call there if deemed unsafe under those provisions. Then, depending on the assessment of (i) and (ii),
- (iii) the alleged danger to which the vessel is exposed; and
- (iv) what steps can be taken to avoid such danger.

Whether or not a port is unsafe is likely to depend on the extent to which the crew is exposed to real danger, taking into account precautions that can be taken. Although there is an argument that exposure to the coronavirus renders the vessel unseaworthy, for example if subsequently

quarantined, which could lead to an argument that the port was unsafe, this is thought to be tenuous.

It is more likely that a quarantine period of, for example, 14 days would be deemed a form of delay incidental to visiting an affected port. That would not in itself render the port unsafe.

In short, the position is not clear cut, and will depend on the facts at the time and the charter terms. An owner should not assume that they can assert an unsafe port argument.

Off-hire

Possible relevant provisions will relate to “epidemics” or similar.

The standard off-hire clauses in NYPE 1946 (clause 15) and 1993 / 2015 (clause 17) refer variously to deficiency of men, or officers or crew. If a large number of crew / officers were ill, and this prevented the full working of the ship, this may be considered as an off-hire event.

Additional wording would be required in the NYPE form to place the vessel off-hire due to quarantine measures taken due to the sickness of the crew, but members should look out for wording such as “any other cause whatsoever” as well as any specific reference to quarantine.

The Shelltime 4 form (clause 21), as well as including deficiency of personnel as an off-hire event, also refers to medical advice or treatment and “any delay in quarantine arising from the master, officers or crew having had communication with the shore at any infected area without the written consent or instructions of Charterers or their agents, or to any detention by customs or other authorities...”.

Absent any specific wording, the vessel will not be off-hire during periods of quarantine caused by a call at an infected port.

If the vessel were to deviate to obtain medical assistance for its infected crew, this may be within the scope of the “deviation” or “put back” provisions in a NYPE charter. Under a Shelltime 4 charter, charterers may be able to put the Vessel off-hire under clause 21(a)(iii).

In all cases, the question of whether charterers are entitled to place the vessel off-hire is likely to depend on the extent to which events arose as a result of charterers’ orders. It is difficult to see how such clauses could apply where the crew member became infected as a result of charterers’ orders, in which case the deviation may not give rise to off-hire unless the owner is deemed to have accepted the risks of calling at an infected port. Where charterers put the vessel off-hire, owners may have a claim for an indemnity for losses arising from charterers’ instructions, but will need to show causation.

Charterers’ position will be stronger where the vessel’s call at an infected port took place before entering into the subject charter.

Liability under bills of lading

In terms of bills of lading that have already been issued, for discharge at Chinese ports, the biggest risk which owners appear to be facing would be the Chinese receivers not being in a position to accept delivery of the cargo due to lack of manpower, or other events at the port caused by the coronavirus, which they are likely to assert constitute force majeure.

In those circumstances, owners will be looking to their charterers for alternative instructions, and will be seeking compensation or an indemnity from charterers for any loss which they may face as a result of a claim by the cargo interests.

Contractual considerations: entering into new time charters

Failure to meet laycan due to quarantine or unexpected delay at previous port due to the coronavirus

This may give rise to a right of the charterers to cancel the charterparty, and/or to bring a claim for breach of contract, depending on the charterparty provisions.

Some charters, such as the BALTIME form (clause 12), provide owners with a wide exemption from liability, including delay in delivery, except where this has been caused by want of due diligence on their part, or that of their manager in making the ship seaworthy, or by any other personal act, omission or default.

This will not, however, protect owners against all delays in the delivery of the vessel, and, in particular, it will not apply to delays arising out of prior contractual arrangements to which the charterers were not a party, unless it is clear that the charterers should bear the risks of such delays. So, for example, in a situation where the vessel is delayed in delivery due to quarantine under a previous charter, owners could not rely on clause 12 of the BALTIME form (or a similarly worded clause).

Express clauses

The BIMCO Time Charter Clause for Infectious or Contagious Diseases makes express provision for what will happen in the event of such diseases occurring, and the recommendation is that the clause is incorporated into any new fixtures.

We anticipate, however, that a key issue will be determining what is meant by the term "Affected Area". This is defined as being any port or place where there is a risk of exposure to the vessel, crew or other persons on board to the Disease (being "a highly infectious or contagious disease that is seriously harmful for humans") and / or to the risk of quarantine or other restrictions being imposed in connection with the Disease.

Whether or not the coronavirus constitutes a "Disease" within the scope of the clause may also be disputed.

In terms of what is meant by an "Affected Area" it will be necessary to consider:

- (i) whether the steps currently implemented in the affected ports are sufficient to ensure that the risk of exposure to vessel, crew or other persons on board is minimised; and
- (ii) the extent to which other jurisdictions decide to quarantine any vessel which has been to an affected port, going forward.

The BIMCO Time Charter Clause for Infectious or Contagious Diseases, however, gives the owners a wide discretion as to whether to proceed to, continue to, or remain at, any area which the Master or owners deem to be an Affected Area, in which case they should notify the charterers and may leave immediately with or without cargo on board, after notifying the charterers.

Charterers then have only 48 hours to issue alternative voyage orders, and the owners may discharge any cargo already loaded "at any port or place". There is an indemnity for owners from charterers, and even if the vessel does proceed or continues to remain at an Affected Area, there is deemed to be no waiver of any rights under the charter, and any additional costs, expenses or liabilities, will be for charterers' account. It is expressly stated that nothing done in compliance with the clause will be deemed to be a deviation or give rise to an off-hire event.

In addition to considering the inclusion of the BIMCO Time Charter Clause for Infection or Contagious Diseases, members should review the proposed charterparty terms carefully to ensure that any force majeure clause adequately allocates the risk of non-performance in the

event of a currently unforeseen spread of the coronavirus. Off-hire provisions need to be reviewed closely as well.

If the coronavirus situation continues, and depending on how other jurisdictions are treating vessels from affected ports, it may become more common or necessary to include warranties that the vessel has not called at an affected area.

Liability under [bills of lading](#)

The BIMCO Time Charter Clause for Infectious or Contagious Diseases requires a similar clause to be incorporated in any bill of lading.

Contractual considerations: existing voyage charters / COAs

Force majeure clause

See the general points regarding force majeure above.

Laytime / demurrage issues

Unless a general exceptions or force majeure clause makes express reference to laytime / demurrage obligations, such a clause will not apply to them.

Where cargo is not available, charterers will not be able to avail themselves of the exceptions to laytime provisions, although some charters, such as Amwelsh 1979, may provide some assistance to charterers at the loadport if they can show that time is lost due to “any cause whatsoever beyond the control of the Charterer affecting mining, transportation, delivery and / or loading” .

ASBATANKVOY is also potentially helpful in quarantine situations, in that clause 17(a) provides that “should the Charterers send the Vessel to any port or place where a quarantine exists, any delay thereby caused to the Vessel shall count as used laytime; but should the quarantine not be declared until the Vessel is on passage to such port, the Charterers shall not be liable for any resulting delay”. It will therefore be important to determine exactly what the position is at any potentially affected ports when orders are given and when the vessel starts on its passage to the port.

In most ports a vessel can be considered to be ready for the purposes of tendering NOR, notwithstanding that free pratique will be required at the port (even where the charter does not provide WIFPON), on the basis that the obtaining of free pratique is a mere formality. See, however, the [club's article](#) dated 31 January 2020, referring to delays in obtaining free pratique. If obtaining free pratique ceases to be a mere formality, and moves more in line with some of the arrival obligations at US ports where the restrictions are more complicated, and delay is likely, it may no longer be considered a mere formality with the result that a vessel will not be deemed to be ready prior to obtaining free pratique so as to be able to tender an NOR at anchorage.

Frustration

See above.

Unsafe port issues

See the general points regarding unsafe port issues in the context of time charters, above.

Owners will generally be considered to have accepted risks relating to a port named or identified by area in a voyage charter at the time of entering into the charter, subject to any express reference to safety.

Under a voyage charter, unless accompanied by a clause permitting deviation, a refusal to proceed to a named port can amount to a breach of contract or repudiation, and in certain circumstances frustration.

The parties should consider the extent to which a change of circumstances may mean that an owner can assert that the port is no longer safe, and whether any transshipment or lightering clauses may assist owners in meeting their obligations.

Deviation

An owner's obligation is to proceed on the "usual and customary course" – usually the direct geographical route.

Liberty clauses – permitting, for example, "any port or ports in any order" and specifying situations in which deviation is allowed – may apply. The Gencon form, the Asbatankvoy form, the Hague / Hague-Visby Rules and the BIMCO Liberty and Deviation Clause all include provisions relating to deviations for the purpose of saving life. In instances where emergency treatment is required for a crew member who has contracted coronavirus, those clauses may be deemed to apply. Where the clause applies only in situations of saving life, however, deviations for treatment that are short of life-saving would probably require more extensive wording.

The parties should also bear in mind that delay in performance (for example when under quarantine) can constitute deviation.

Any deviation must be reasonable, which includes being geographically reasonable. Any change of load or discharge port has to be considered in light of this.

A deviation in breach of contract will give rise to exposure under bills of lading, loss of reliance on Hague Rules exceptions and loss of club cover. The position under the Hague Visby Rules exceptions is less clear, but will likely give rise to legal arguments and additional costs at the very least.

Unlawful deviation is a breach conferring the right on charterers to elect whether to affirm or rescind the charter. If charterers rescind, issues relating to cargo on board arise. If Charterers affirm, there is still usually a breach giving rise to a claim in damages, and will possibly result in being unable to rely on exclusion clauses, as referred to above.

Contractual considerations: entering into new voyage charters

On-going single voyage charters are likely to have been entered into with an awareness of the coronavirus, and will need to be construed with that in mind.

Express clauses

For Owners, the BIMCO Infectious or Contagious Diseases Clause for Voyage Charterparties is of potential assistance. See the comments above on the equivalent clause for time charters.

Note, however, that the clause for voyage charters states that the "Vessel shall not be obliged to proceed to or continue to or remain at a place which, in the reasonable judgment of the Master / Owners, becomes an Affected Area after the date of this Charter Party" (our emphasis). It therefore does not mean that Owners can fix voyage charters, knowing that the load or discharge port is affected by the coronavirus, and then seek to rely upon the clause.

Deviation

See general points above.

Liberty clauses should be considered. Members should check the scope of any proposed liberty clauses and the circumstances in which they apply.

Force majeure and laytime / demurrage exceptions

See the general points regarding force majeure above.

Members should consider force majeure and laytime / demurrage exceptions, and ensure that any force majeure clauses and exceptions provisions adequately allocate the risk of a currently unforeseen spread of the coronavirus.

The applicability of a force majeure or exceptions clause is likely to require a sudden worsening of the impact of the coronavirus at the relevant port.

Frustration

See the general points regarding frustration above.

It is difficult to see how charters entered into with an awareness of the coronavirus could be frustrated by it.

Unsafe ports

See the general points regarding unsafe ports above.

Contractual considerations: delays under shipbuilding contracts

The impact of the coronavirus on the Chinese workforce could adversely affect operating schedules at Chinese shipyards.

Yards / sellers are seeking to rely on the force majeure provisions of the standard form shipbuilding contracts to excuse delays in the construction of newbuild vessels (as well as scheduled ship repairs and upgrades, such as the fitting of scrubbers and ballast water management systems, under other contracts). Standard wordings in shipbuilding contracts will likely be broad and of assistance to the yard. Commonly, the wording will refer to:

- “plague or other epidemics, quarantines”
- “or other causes beyond the control of the Builder or of its sub-contractors, as the case may be”
- “or by force majeure of any description, whether of the nature indicated by the forgoing or not”.

If the yard seeks to rely on force majeure provisions, the usual considerations for all force majeure events will apply, including:

(i) Did the outbreak of the coronavirus cause the party’s inability to perform?

If the yard would not have been able to perform even in the absence of the coronavirus, it is unlikely that it will be able to rely on force majeure as an excuse.

(ii) Is the yard able to avoid or overcome the effects of the coronavirus through alternative means?

The ability to mitigate the effects of the coronavirus cuts against the application of force majeure as a valid defence. Clauses are likely to provide that they only apply where the yard could not, for example, have protected against the delay or event (although where limited to “at the day of signing this Contract or reasonably thereafter” this may not apply to older contracts); and to require the yard to take immediate steps to overcome the delay and to use “all [their] best efforts” to minimise any delay.

(iii) Are there any deadlines for responding to the notice of the alleged force majeure event?

In some contracts a failure to acknowledge the yard’s notification of a claim for extension of the delivery date under the contract within a specified number of days of receipt amounts to waiver of any right to object to such extension.

(iv) Is there a right to cancel for prolonged periods of delay, either in relation to the force majeure event on its own, or when combined with other periods of delay?

Any right to refunds will likely be dependent on the basis for cancellation.



With the outbreak of the Coronavirus, the Club has been receiving enquiries on Force Majeure (FM) and we have produced a Q&A that provides answers to the most frequently asked questions.

What is FM?

Force Majeure excuses a party from not performing its contractual obligations that become impossible or impracticable, due to an event or effect that the parties could not have anticipated or controlled.

Does English law recognise FM?

FM is not an implied term under English law unlike many civil law countries and China. There is no established definition, instead FM is entirely contractual.

The provisions of a FM clause incorporated in a charter party determine the scope and consequences of a FM event between the parties and English Courts adopt a strict and narrow approach to its construction.

When can FM be declared?

FM can only be declared if the event delaying or preventing performance is expressly listed as an FM event in the FM clause incorporated into a charter party.

FM clauses are likely to list several events and there is usually reference to “epidemics”, “quarantine” etc. that may be sufficient to address the Coronavirus situation currently affecting a number of ports. There may be other provisions in the definition which can also be relied upon but we suggest including reference to “epidemics” and “quarantine” when agreeing your FM Clause to put the matter beyond doubt.

Does the FM event delay or prevent performance?

The party relying on the FM event will need to prove that the FM event is in fact delaying or preventing the performance of its obligations under a charter party.

In relation to Coronavirus, the party relying on the FM clause must be able to prove the issues at the relevant load port, discharge port, closure of associated banks that prevent trade etc. which is delaying or preventing the performance.

Is it beyond reasonable control?

Most FM clauses will expressly provide that the FM event should be beyond the reasonable control of the party declaring FM. In the context of Coronavirus and its effect on ports, bank closures, etc. there has so far been no argument on whether the event is beyond reasonable control or not.

However, parties should consider the charter party description of the cargo and range of ports for loading and discharge. If it is possible to perform the charter party with an alternative cargo/nominated port even if this is not the preferred option, the requirements of the FM clause may not be satisfied.

What about supporting evidence?

The party declaring FM is often contractually required to provide independent documentary evidence of the FM event which is affecting the performance of their obligations under a charter party. Evidence may also be required if the facts behind the FM declaration are disputed. Efforts should be made to procure supporting evidence from ports, government authorities and other independent sources.

How is FM declared?

The FM clause may set out notice provisions i.e. the party affected by an FM event may be required to give notice within 48 hours and provide timely updates. The notice provisions have to be adhered to strictly. If there are no notice provisions, then it is recommended to give notice within a reasonable time.

Some FM clauses expressly state that the notice provisions should include documentary evidence of the FM event.

What are the rights and remedies of the party affected by an FM event?

Very often, the FM clause provides that the party affected by the FM event can delay performance, suspend performance or suspend that part of the charter party that is affected and/or cancel the shipment. It is important to understand that the only rights and remedies are the ones that are expressly stated in the FM clause.

What is the impact on laytime/demurrage?

Laytime and demurrage is only excepted if the FM clause expressly provides that time shall not count as laytime or demurrage.

Can one rely on the FM clause when there are other specific clauses in the charter party?

Charter parties often have express clauses dealing with contagious diseases such as the BIMCO Infectious or Contagious Diseases Clause. Under English law, specific clauses take precedence over general clauses. It may, therefore, be that the provisions of a contagious disease clause take precedence over the FM clause incorporated in a charter party with regards to delays caused by the Coronavirus outbreak.

Conclusion:

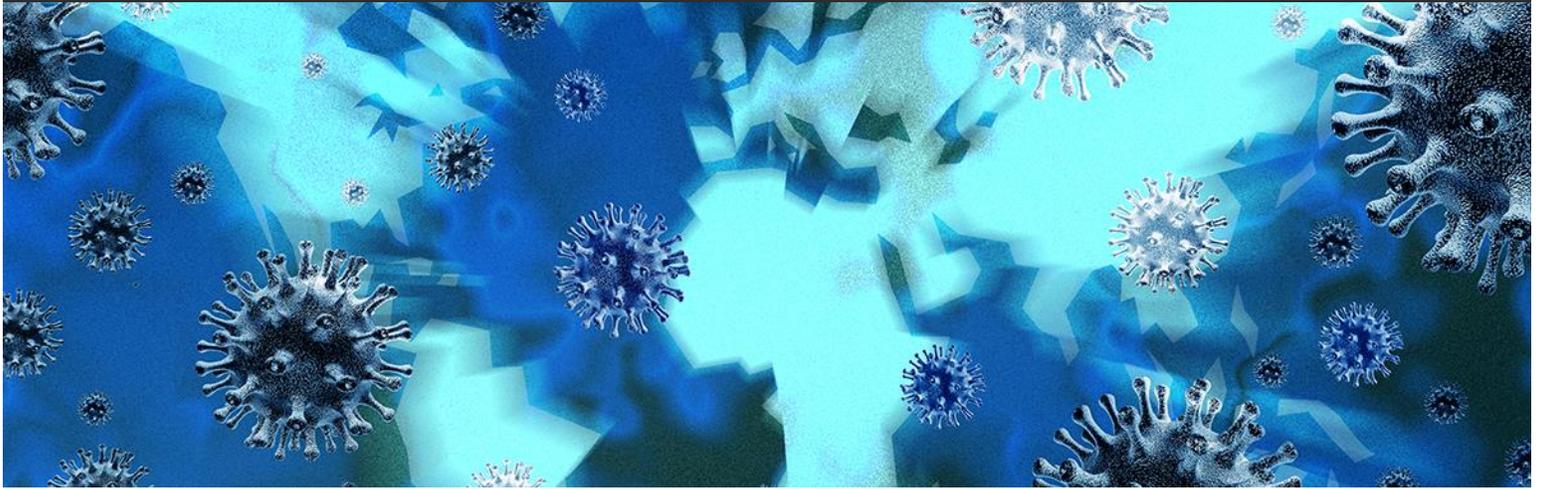
To summarise, the provisions of the FM clause dictate what an FM event is, and the rights and remedies available to the party relying on the FM clause.

Assureds are invited to contact the claims department in London, Dubai or Shanghai should they have any questions arising from this bulletin.

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**Alert | Health Emergency Preparedness Task Force:
COVID-19 (Coronavirus)**



March 2020

Coronavirus and Force Majeure Contract Clauses

It's been a month since the Department of Health and Human Services (HHS) – **declared a public health emergency** due to the continued spread of COVID-19 (Coronavirus). News over this past weekend that several people in the United States are infected despite having no known connection to previous cases, so called “community spread,” is beginning to have a ripple effect on markets and leading to what seem to be ever-increasing travel restrictions. Supply chain disruptions are touching consumers all over the globe, and widespread media coverage is stoking general public fear, causing consumers to rethink travel, and businesses to consider canceling long-planned meetings and conventions. On Friday, Feb. 28, the 90th Annual Geneva Motor Show was cancelled after the Swiss government banned gatherings of 1,000 or more people, in the hopes of containing the spread of the virus. Speculation of moving or canceling the 2020 Olympics in Japan is beginning to swirl.

While it is too early to predict how long the coronavirus will disrupt everyday life, or whether its spread will continue to pandemic levels, it isn't too soon to **proactively consider your potential risk** and understand both potential consequences and benefits of the legal landscape when planning for or dealing with the coronavirus outbreak. It is important to note that the HHS emergency declaration can last for the duration of the emergency, or 90 days, but the secretary has discretion to extend as necessary, and the World Health Organization (WHO) has the power to declare the outbreak a pandemic, which it has been reluctant to do to date.

Of course, economic considerations are secondary to the protection of human health; they should not be ignored. Companies often allocate the risk for unanticipated business interruptions through their contracts and insurance policies. Whether you are considering recovery options or are defending against breach of contract claims, there are some important concepts to consider.

Greenberg Traurig is advising clients on numerous legal issues relating to the coronavirus and its effects, such as the **invocation and enforceability of force majeure clauses in contracts**, employment matters on the effects to your workforce, negotiating commercial agreements in light of world events, and risk mitigation, among other issues.

Simply put, **a force majeure clause is a contract provision that excuses a party's performance of its obligations under a contract when certain circumstances beyond their control arise, making performance inadvisable, commercially impracticable, illegal, or impossible.** These clauses are fairly common in contracts, yet in times like this, can prove to be a valuable resource in determining how to navigate performance **when there are issues affecting performance that are outside the parties' control.** However **not all clauses are alike**, and in the aftermath of the terrorist attacks of Sept. 11, 2001, as well as recent storm and flood damage caused by Superstorm Sandy, the details of force majeure clauses have taken on increasing importance when negotiating contracts. Force majeure clauses afford parties the opportunity to draw a roadmap of the implications to the parties if the otherwise remote or unplanned catastrophe occurs. That roadmap may allow for decision making in times of uncertainty, informed underwriting as well as proactive crisis planning.

Some courts have in the past interpreted force majeure clauses **narrowly**; that is, excusing performance in limited situations and/or events within the scope of the clause, but courts may also consider the factors around the listed events. For example, **while "disease" might be a specified force majeure event in your contract, adverse parties may contend that a party's performance is not excused due to the coronavirus' potential impact, especially if your business is solely in the United States.** However, **if your business is solely in China, or areas most impacted** by the global health concerns posed, excused performance at this stage could be more plausible.

Insurance

There are myriad issues relating to insurance for COVID-19. While there is **form language** in many policies, there may be situations where **manuscript language** is in place that will affect the general coverage grants that are summarized below.

Business interruption coverage is the most logical place to start. Business interruption coverage is typically provided if there is a direct physical loss such as a fire, flood or earthquake. In certain cases, the policy may require that a loss is designated, while in other policies there is no such requirement. **In the case of COVID-19, a direct physical loss may not be readily apparent**, although there are certain situations that could trigger a physical loss if a factory or other workplace becomes contaminated and therefore unusable due to a COVID-19 outbreak. There is also a possibility that business interruption coverage could apply in the event that a supplier suffers a shutdown due to COVID-19 that affects the operations of a primary insured (often defined as "Dependent Property," which is "property operated by others whom you depend on to . . . deliver materials or services to you . . . accept your products or services . . . manufacture products for delivery to your customers . . . attract customers to your business").

Another possible source of coverage relates to coverages triggered by the **actions of a civil or military authority**. If access to a property is impaired by order of a civil or military authority in connection with an insured peril – or a non-specified causes of loss coverage grant – there is a potential for recovery. Often these coverages last for four weeks.

As brokers or the insurers themselves may be reluctant to acknowledge coverage, it may be necessary to have a specialist closely examine policies to see if they may be applicable.

Consider the following when evaluating plans to **assert your rights under a force majeure clause**:

1. Understand and evaluate the **individual facts and circumstances the outbreak may have on your business and your ability to perform your obligations under a contract**. Consider the other party's obligations, and whether they too may be adversely affected. Is an event or service impossible to perform? Understand, that **mere poor performance** (such as decreased anticipated attendance at a conference) or **increased cost to perform alone may not be a sufficient basis to excuse performance and invoke a force majeure clause**.
2. Monitor the situation. The current situation is fluid, meaning facts and circumstances can change quickly, and often do. While conditions today, for example, may not allow for the invocation of a force majeure clause depending on where you are located, if the crisis worsens, and additional U.S. government or WHO declarations may add significant restrictions on travel or force event cancellations, it's more likely a force majeure invocation would prevail. Within the United States, consideration should also be given as to **whether various states have declared states of emergency tied to health conditions or imposed their own separate restrictions on travel in and out of the state** and popular areas within the state itself such as public buildings and facilities in order to prevent the potential spread of any communicable virus.
3. **Each contractual clause governing performance is different and can be interpreted differently depending on the law that governs**, so it is important to discuss with your counsel your situation and whether you are seeking to enforce and/or excuse performance. Also, be mindful of any notice provisions under the contract as well as specific additional obligations you have to either compel performance or mitigate damages should the virus interfere with your business expectancy.
4. **Keep detailed records that include the scope of the interruption to your business, and detail the factors leading to impossibility**. Track any costs that you may have or anticipate, and be aware of the other party's costs if force majeure were to be invoked.
5. **Review your insurance coverages**. Understand whether you carry business interruption insurance or other relevant insurance.
6. **Consider whether there are alternative means to perform contractual obligations**. Realize that the other party to the contract may be amenable to potential ways to mitigate, or adjust each party's performance obligations, including but not limited to partial performance.
7. **Consider business solutions to legal issues, such as a mutual agreement, to move your event to a time after the crisis is over**. Both parties likely want to encourage full performance (and maximum attendance), and sitting back down at the bargaining table to negotiate a compromise often leads to the best results.

Greenberg Traurig attorneys stand ready to assist with questions regarding force majeure clauses and potential related commercial litigation.

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