COVID-19: What are the implications for shipping disputes?

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Overview

In this article we consider some of the implications of the Covid-19 pandemic in the shipping context, with a particular focus on force majeure issues.

Quarantines, Coronavirus and Charterparties

The practice of quarantine can be traced back to medieval Venice. The then prosperous maritime republic was a gateway for the bubonic plague's path into Europe. Vessels arriving there from infected ports were required to sit at anchor for 40 days (*quaranta giorni*), which later came to be known as quarantine.

A traditional Venetian quarantine would be most unlikely to amount to a frustrating event in the charterparty context. A delay of just 40 days would seldom render the performance of a charterparty impossible or radically different from anything contemplated by the parties. Such a quarantine might render performance more expensive or more onerous, but that will not suffice for the purpose of frustration.

There must, as the Court of Appeal put it in ***The 'Sea Angel"***, be a "*break in identity between the contract as provided for and contemplated and its performance in the new circumstances*". The doctrine operates within narrow confines.

But the effect of the Coronavirus pandemic and the measures introduced to prevent and delay its spread will doubtless lead parties to invoke exceptions, force majeure provisions and, if all else fails, the doctrine of frustration.

We consider some of the issues that are already arising, and will continue to arise.

Time Charters

Many of the disputes stemming from the present pandemic should be capable of resolution by reference to the terms of the contract. There will be questions about whether the charterers are in breach of the safe port warranty, whether the vessel is off hire (due to crew illness or restrictions imposed by the authorities), and whether any force majeure provisions or exceptions are engaged. The answer to many of these questions will turn on the application of well-known tests to novel factual circumstances.

Where the charter incorporates the BIMCO Infectious or Contagious Diseases Clause, the vessel is not obliged to proceed to or remain at any place which would expose the vessel or crew to "highly infectious or contagious diseases that is seriously harmful to humans" or to a risk of quarantine or other restrictions being imposed in connection with the disease. Covid-19 would almost certainly fall within that definition. If the vessel nevertheless proceeds to an affected area, the risk of additional costs, expenses and liabilities are for the charterers' account and the vessel is to remain on hire.

There is unlikely to be a major role for the doctrine of frustration, especially if the parties have contemplated or anticipated the possibility of disruption arising from a virulent disease. The pandemic has caused and will continue to cause significant disruption to the shipping industry. There is also considerable uncertainty over how long it will take for the restrictions to be lifted and life to return to normal. Yet the measures introduced to combat the virus rarely preclude commercial shipping operations. Terminals and stevedores may be operating under much stricter conditions, but are generally still operating. The chief consequence of the restrictions is therefore likely to be delay.

To amount to a frustrating event, a delay would have to be so dramatic that the performance is really in effect that of a different contract. One of the most important factors is the probable length of the total deprivation of the use of the chartered ship compared with the unexpired duration (***Bank Line v Capel***). Unless the anticipated delay is substantial (measured in months, rather than days or weeks), it would be unlikely to amount to a frustrating event. Deciding whether or not to invoke the doctrine will require a difficult judgment call, since the length and extent of the disruption must be assessed as soon as the event occurs, without the benefit of hindsight (***The 'Nema"***).

Voyage Charters

Voyage charters throw up a different set of issues. The impact of restrictions in place at load and discharge ports might well prevent the vessel from tendering valid NOR. The deferral or refusal of free practique – usually a mere formality – could preclude or seriously delay cargo operations. Vessels may be placed under quarantine or have to deviate from the contractual voyage to allow sick crewmembers to seek medical treatment. In most cases, the terms of the charterparty will allocate the risk of such delays. The deviation clause in the Gencon charter, for example, would almost certainly allow the vessel to call at a port for the purposes of obtaining medical treatment for the crew.

There may be more difficult issues if restrictions bite whilst the vessel is on demurrage. Clause 8 of the Asbatankvoy form, for instance, sets out a limited number of exceptions that result in the demurrage rate being reduced to half. There is no express reference to disease or quarantines, but one of the exceptions - "*stoppage or restraint of labor or by breakdown of machinery or equipment in or about the plant of the Charterer, supplier, shipper or consignee of the cargo*" – could conceivably be triggered by the effects of the pandemic on the shoreside operations of one of the listed parties.

There may be more scope for the operation of the doctrine of frustration than in the time charterparty context. If the effect of the pandemic is to prevent loading at the agreed port or to so delay it as to defeat the commercial purpose of the contract, frustration could prove a neat solution which frees the vessel for further trading. Yet frustration would be a very different and riskier proposition with a laden vessel given the practical difficulties that would arise (principally, what to do with the cargo) and the continuing duties that the shipowner would owe as bailee.

Shipbuilding Disputes

The Covid-19 pandemic raises acute problems for parties to shipbuilding and ship repair contracts. China, along with South Korea, is responsible for the majority of the world's shipbuilding. There are reports of Chinese yards running 60 days behind schedule because of labour shortages caused by the pandemic and, as it spreads, the shipbuilding supply chain and the buyers are increasingly affected as well.

Whether a yard is excused for delays by reason of the epidemic will turn on the wording of the particular force majeure clause. Following the SARS and MERS outbreaks, more contracts now contain wording that excuses delays caused by epidemics, as do the SAJ, Norwegian and Newbuildcon standard forms. It seems likely that the epidemic would also fall within a general clause excusing delays outside the parties' control, but many shipbuilding contracts specify the force majeure events, and yards may find that delays are not excused by their shipbuilding contracts. For example, the definition of force majeure in ***Adyard Abu Dhabi v SD Marine Services*** does not include a catch-all or a disease / quarantine category of force majeure provision.

Assuming that a force majeure clause is capable of applying, a yard (or perhaps a buyer responsible for approving drawings or supplying parts and materials) faces further hurdles before it is relieved of its obligations. One difficulty is likely to be causation and the need to demonstrate an impact of the pandemic on the critical path. Recent authority suggests that the force majeure event must be the sole operative cause of the inability to perform (***Seadrill Ghana v Tullow***). The delay attributable to the pandemic may be obvious, for example if the yard is forced to close, but the impact of labour or part shortages are likely to be harder to quantify in a complex construction process.

Another difficulty is likely to be giving effective notice. Shipbuilding contracts often require a yard to give notice of delays caused by an event beyond its control within short time limits, including notice of when the event started and ended and the resulting delay caused by the event. These clauses are generally given effect, as in ***Adyard*** (supra), although only if they can properly be read as conditions precedents to delays being treated as permissible.

The notice periods in clauses of this type can be very short, such as the 7-day period in ***Zhoushan v Golden Exquisite***. In the midst of the pandemic, it could be very challenging for a yard to ensure timely and accurate force majeure notices are given. However, the strict approach of the English Court in cases like ***Adyard*** would seem to give yards little room to manoeuvre by arguing that the force majeure event made giving notice impractical. These notice provisions are just one example of how the parties' contractual regime does not fit easily with the unprecedented disruption caused by the pandemic.

Practical tips to bear in mind in the shipbuilding context include:

» Review notice provisions and stand ready to issue notices with the calculation of time lost promptly;

» Check the force majeure wording and do not assume that your contract will respond to the pandemic as an event of force majeure;

» Keep records of how the Covid-19 pandemic has impacted upon construction work;

» Consider how the effects of the pandemic can be mitigated to avoid delay;

» Ensure future contracts contain express provision for epidemics and quarantine.

Lateral thinking and new arguments

Covid-19 presents the world with an unprecedented challenge. However, in terms of its impact on legal disputes, the main differences are likely to be ones of scale and magnitude, rather than ones of principle.

That said, there will be many areas where lateral thinking may be required and new law may be made.

To take one example, most of the articles that have been written about the impact of Covid-19 in the shipping context refer to the excepted causes of "Arrest or restraint of princes, rulers or peoples, or seizure under legal process," and "Quarantine restrictions" in the Hague Rules and suggest that these will operate to protect shipowners against claims in respect of damage to or delay in delivery of cargo.

But is that necessarily so? The exceptions in Article IV(2) of the Rules only protect against liability under Article III(2), and do not protect against a breach of the carrier's Article III(1) obligation to exercise due diligence to make the ship seaworthy and ensure she is properly manned and equipped. Will a vessel be considered unseaworthy if she has a crew-member suffering from Covid-19 on board? Will she be unseaworthy by reason of a recent call at a port with a particular infection problem leading to quarantine restrictions (as in the pre-Hague Rules case of ***Ciampa v British India Steam Navigation Company***)? Questions such as these will raise the issue whether unseaworthiness must relate to an "attribute" of the ship, and if so, what is meant by an "*attribute*" (an issue discussed in, but left unresolved by, the Court of Appeal in the recent decision in The "CMA CGM LIBRA" (see The CMA CGM LIBRA – defective passage planning and unseaworthiness - John Russell QC and Benjamin Coffer). Equally, how will the concept of due diligence operate in this context? It is trite that the carrier is liable for a failure to exercise due diligence on the part of any person to whom it has delegated responsibility for making the ship seaworthy. What does that mean in practice? Can it be argued that each individual crew member has an obligation in relation to seaworthiness to self-report symptoms (or even a risk of exposure) and that the carrier is fixed with responsibility if she or he fails to do so, and the ship is subsequently detained as a result?

The lesson is that in any case we need to avoid a purely mechanistic application of existing principles, and ensure that all possible angles are explored.

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John Russell QC is an experienced and determined commercial advocate and has acted as lead Counsel in numerous Commercial Court trials, international and marine arbitrations and appellate cases, including two successful appearances in the Supreme Court, including the landmark shipping decision in ***Volcafe v CSAV***. He has also appeared as counsel in inquests and public enquiries.

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Ben Gardner has a busy commercial practice, focussing on shipping, commodities and international trade, energy, insurance and conflict of laws. He was shortlisted for 'Shipping Junior of the Year' at the 2018 Chambers Bar Awards and he is consistently ranked as a leading junior by Chambers UK and the Legal 500 for his shipping and commodities work. He is also recognised for his Energy work in the Legal 500. Recent comments include "*very clever and a very good advocate*", "*has an exceptional understanding of both the business and legal aspects of a case*", "*quickly processes a high level of technical detail and works extremely hard*", "*very smart and focuses immediately on the issues*", "*an excellent barrister, who is precise, commercial and practical in his focus and forceful and effective in his arguments*", "*thorough, diligent and very personable*", "*easy to work with and respected by clients*" and "*mature beyond his years*" .

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