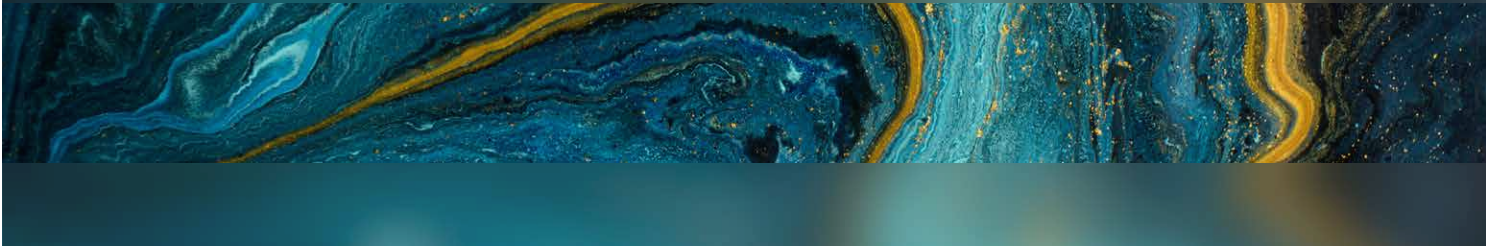


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## **CORONAVIRUS: LEGAL ISSUES FOR THE MARITIME INDUSTRY**

The outbreak of Coronavirus (Covid-19) is having a significant impact on the maritime industry as demand for the transportation of goods in and out of China falls, ships and their crews are stuck at sea, ports may be closed and vessels delayed by being quarantined. This is having a knock-on effect in many other areas, including for example the construction industry. In this briefing we look at some of the areas for consideration.

### **Force majeure claims**

A “force majeure clause” is normally used to describe a contractual provision under which one or both of the parties to the contract is excused from performance, in whole or in part, or is entitled to suspend performance or to claim an extension of time for performance, following a specified event or events beyond its [or their] control. We have produced a 10-point checklist on force majeure (FM) which you can access [here](#).

There have been a number of instances where shipowners have tried to invoke a force majeure clause where they have not been permitted into port. Some shipyards are also claiming FM for vessels under construction in China. Whether or not the Coronavirus outbreak will constitute an FM event will depend on the proper construction of the force majeure clause and of the contract generally. It will be necessary to establish “causation” i.e. that the FM event (in this case the Coronavirus outbreak) has prevented or hindered the affected party from performing the contract. So, for example, even if the Coronavirus outbreak is an FM event, the party seeking to invoke the clause will have to establish that the shipment/delivery of the cargo was prevented, hindered or delayed because of the outbreak.

Where contracts do not include force majeure provisions, the doctrine of “frustration” could be another form of relief available, but the threshold for a successful frustration claim is high.

Other contractual considerations could include for example the effect of quarantine restrictions in the event of an infection on board a vessel, for example on laytime and demurrage under a time charter party. Or if shipowners are affected by the virus would they be justified in deviating from or not proceeding with utmost dispatch obligations, or in failing to comply with the charterer’s order for employment of the vessel?

### **Force majeure certificates – China**

The China Council for the Promotion of International Trade (CCPIT), a Chinese international trade promotion agency, has said that it will offer “force majeure certificates” to companies affected by the epidemic to provide to their overseas trading partners. The force majeure certificates can be applied for on proof that the local government has suspended business operations or imposed quarantine restrictions. These certificates are intended to establish the fact of a force majeure occurrence rather than establishing a legal entitlement to claim force majeure. Whether or not such a certificate can of itself satisfy the force majeure definition in a contract remains untested.

### **Safe ports**

An issue that has arisen is whether the coronavirus could render a port “unsafe”, such as to justify a ship-owner ignoring charterer’s instructions to attend the port. At this stage, the answer is unclear, but the issue raises operational and contractual issues.

### **Impact on back to back contracts**

An example of such contracts is where a buyer enters into a shipbuilding contract for the construction (or refit) of a vessel, and then on-charters that vessel to a third party. Delayed construction and delivery of the vessel under the shipbuilding contract will almost certainly have consequential or “knock-on” effects under the charter party. If the force majeure provisions under the shipbuilding contract and the charter party are not aligned, an event that qualifies as a force majeure event under the shipbuilding contract (and excuses late delivery or suspends performance under that contract), may nonetheless constitute a breach of the charter party. Whether back-to-back contracts provide the necessary relief or protection depends largely on the wording in the contracts and the governing law of the contracts.

### **Impact on financing arrangements**

Similar back-to-back issues arise in the context of the purchase of a newbuild which is being financed. How will any force majeure event under the underlying construction contract or the back-to-back charter party agreement (the “project contracts”) affect the credit agreement? Credit agreements will typically contain representations, undertakings and events of default in relation to the underlying project contracts – the possibility of breach or default may arise if something happens to those project contracts. In such circumstances, the credit agreements might give the financiers consent rights to any variations or waivers of terms under the project contracts. Consequently, even if the borrower/vessel-owner agrees a permissible delay in delivery of the vessel, the financier’s consent may still be required.

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