AN EPIDEMIC OF UNCERTAINTY – THE CORONAVIRUS AND FORCE MAJEURE

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Do the effects of the coronavirus give rise to legitimate force majeure claims in connection with shipbuilding contracts (which similarly apply to offshore construction contracts), particularly those underway in China? In general terms, a force majeure event is an unforeseeable one that is outside a contracting party's control and prevents that party from performing its contractual obligations.

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If a shipbuilding contract becomes impossible to perform, the builder may seek to invoke the English law doctrine of frustration, which exists independently of any contractual provisions. Frustration is invoked in fairly extreme circumstances and delay alone will not generally suffice. In contrast, under English law, for a force majeure claim to have any chance of success, there needs to be a force majeure clause in the contract. The scope of a force majeure claim is therefore limited to how it is defined in the contract.

TWO THRESHOLD CONSIDERATIONS FOR FORCE MAJEURE

The ability to make a valid claim of force majeure due to the coronavirus depends on two considerations:

1. whether there is a force majeure clause in the shipbuilding contract that covers the effects of the coronavirus (the "qualification criteria"); and
2. whether the coronavirus causes "critical delay" beyond the control of the builder that results in an entitlement to and extension of time (the "causation criteria") – this would normally be demonstrated by a "critical path analysis" (discussed in greater detail below).

SATISFYING THE QUALIFICATION CRITERIA

Many shipbuilding contracts and standard form contracts (see below) contain force majeure clauses that arguably cover delays caused by the coronavirus or the government intervention policies that have been implemented to curb the outbreak.

For example, under the 2003 SAJ Form of shipbuilding contract, force majeure events include delays caused by “requirements of government authorities” and “labour shortage; plague or other epidemics; quarantines [and] embargoes”. Similarly, the NEWBUILDCON form of shipbuilding contracts refers to “epidemics” and “government requisition, control [and] intervention”. Some of these contracts contain a “sweeping-up” provision that may appear broad enough to cover such an outbreak.

However, despite the fact that (a) on a “plain English” reading, force majeure clauses arguably cover the coronavirus, (b) the World Health Organization (WHO) has declared the coronavirus a public health emergency of international concern and (c) the Chinese authorities have issued a number of “force majeure certificates”, none of these factors, whether taken in isolation or together, is likely to be sufficient to qualify the coronavirus as a force majeure event.

It remains uncertain whether these factors would be enough to meet the qualification criteria given that:

1. the WHO declaration is arguably not proof, or evidence, *per se*, that a force majeure event has occurred;
2. it is questionable whether the force majeure certificates issued by the Chinese authorities have force of law; and
3. in view of the above, it is strongly arguable that an English law tribunal should not give significant evidentiary weight to either.

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SATISFYING THE CAUSATION CRITERIA

In addition to satisfying the qualification criteria, a necessary component of any successful force majeure claim is satisfying the causation criteria. To do so, the builder would need to show that the force majeure event caused critical delay to the completion of the vessel, notwithstanding all reasonable attempts by the builder to avoid delay (i.e. the causation criteria).

By way of an example, we mention a case we recently handled where equipment in a yard was damaged during a typhoon and this (allegedly) caused delay to the construction of a series of ships. The yard referred to the force majeure provisions in the shipbuilding contracts which provided for typhoons as a force majeure event. However, we successfully argued that the damage to the equipment was caused by the failure to store it properly in advance of the typhoon striking. Thus, the “legal” (or proximate) cause of the delay was the failure to store properly, not the typhoon. The yard ultimately discontinued its force majeure claim and agreed to pay liquidated damages for late delivery.

Unprecedented measures have been taken by the Chinese government to control the spread of the coronavirus. These measures include mandatory quarantines, production bans and even city-wide lockdowns. Yards may seek to rely upon these as a basis to allege force majeure delay to construction schedules and supply chains, as employees are "prevented" from attending work. However, those yards will face possible counter arguments that a virus outbreak is not entirely unforeseeable, and builders should have taken measures to reduce or avoid the risks of business disruption in the event of an epidemic, given the painful experience from the SARS outbreak in 2003. It remains to be seen how courts or tribunals will view this, and each case will have to be considered on its merits. On balance, we believe that the coronavirus has the potential to cause more disruption than SARS, and it appears to be doing so. If this sad suspicion is realised, then force majeure claims will also likely increase, but whether or not such claims would succeed would very much depend on the facts of each claim.

IN PRACTICE, IF A BUILDER WISHES TO RELY ON AN "EPIDEMIC" AS THE GROUND FOR A FORCE MAJEURE CLAIM, IT WOULD NEED TO SHOW HOW THE SAID EPIDEMIC ITSELF CAUSED THE CRITICAL DELAY.

CRITICAL PATH ANALYSIS

Assuming that the coronavirus does constitute a force majeure event causing "permissible delay" entitling the builder to an extension of time ("EOT"), that builder will still be required to demonstrate "causation" and thus be required to support its claim with adequate evidence. In a legal setting this means by documents and expert evidence. It is generally accepted nowadays, and advocated in the Society of Construction Law Delay and Disruption Protocol (2nd Edition 2017) (SCL Protocol), that the most acceptable method of proving delay in construction contracts is through a "critical path analysis" ("CPA"). A CPA details all the time-critical events leading up to a particular point, be it physical completion, the contractual completion date, or any interim period. Courts and tribunals now commonly accept CPAs as the best mechanism for presenting evidence of delay and its causes.

In practice, therefore, if a builder wishes to rely on an "epidemic" as the ground for a force majeure claim, it would need to show how the said epidemic itself caused the critical delay. This may require evidence of building programmes, employment records, medical records, manhour requirements, personnel attendance records, mitigation efforts or jobs complete reports, to name but a few types of document. A general reference to the coronavirus and its effects will probably be insufficient. A tribunal is not likely to accept secondary evidence, such as force majeure certificates issued by the Chinese authorities, as determinative.

FORCE MAJEURE AND EXISTING DELAYS

"On top of the coronavirus, there may be a pre-existing or concurrent delay attributable to the negligence or breach by the builder, which is not uncommon in the shipbuilding industry."

The issue may be further complicated by the fact that, on top of the coronavirus, there may be a pre-existing or concurrent delay attributable to the negligence or breach by the builder (for example, materials used by the builder were found to be non-compliant with the planned specifications), which is not uncommon in the shipbuilding industry. In the case of the former, it may be open for the buyer to argue that, had the builder completed the contract and delivered the vessel as scheduled, production would not have been hampered by the subsequent coronavirus outbreak and therefore the builder should not be entitled to an EOT on the ground of force majeure. In contrast, for concurrent delays, authorities have indicated that where there are two concurrent causes of delay, one of which is a force majeure event and the other is not, the contractor may still be entitled to an EOT for the period of delay caused by the force majeure event notwithstanding the concurrent effect of the other event[1]. This is consistent with the approach in the SCL Protocol. The exact effects of a prior or concurrent delaying event will, however, depend on the wording of the force majeure provision in question. Further, it should be noted that the award of an EOT may be granted on a contiguous basis, i.e. starting on the previous due date for completion, regardless of whether there is a time gap between the previous due date and the occurrence of the event qualifying for an EOT[2]. This may be an important point for the builder if the contract provides for progressive rates of liquidated damages in the event of delay, or if there is no liquidated damages regime at all (which is unlikely), in which case the builder's liability for delay may be the actual loss suffered by the buyer as a result of the delay.

PRACTICAL STEPS

1. Builders wishing to assert a force majeure claim should retain documents in anticipation of claims being resisted.
2. Conversely, buyers wishing to resist claims, should put builders to strict proof and not be intimidated by apparent compliance with the qualification criteria.
3. Force majeure notice provisions should be strictly adhered to by builders. These will generally provide that notice of the force majeure event must be provided within a relatively short period of its occurrence (typically between 7 and 14 days). This may place yards in some difficulty if they are not able to identify when the claimed event occurred, and the delay started. It may be open to buyers to allege that notice periods have been missed, which generally results in permissible delay claims being vulnerable to challenge on the basis of time-bars.
4. If buyers receive a force majeure notice, which is not accepted, this should be rejected within the relevant contractual timelines or the entitlement to defend the claim might be lost.

CONCLUSION

The social misery caused by the coronavirus looks set to continue for the time being, as do the legal problems that it is giving rise to. Parties to a shipbuilding contract should closely monitor the situation and seek professional legal advice to ascertain their contractual and common law rights when necessary.

[1] See *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848 (Comm)

[2] *Carillion Construction Ltd v Emcor Engineering Services Ltd and Emcor (UK) Ltd* [2017] EWCA Civ 65

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