COVID-19 - Are you sure it is a force majeure event?

I wrote recently, in Q&A format, about issues arising from the current COVID-19 pandemic in shipbuilding contracts[1].

We have a number of yacht building and also refit and repair contracts for clients. Do they contain clauses that allow a yard to claim force majeure?

Let's consider the typical force majeure clauses that you'll see in such contracts.

What is it?

It may seem ironic that, post-Brexit, it is the old civil law French concept of "*Force Majeure*" loosely translated as "*Superior Force*" that is being tested.

A *Force Majeure* clause is an exclusion clause that purports to protect one or both parties to a contract from an inability to perform their obligations.

Because it is regarded as an exclusion clause, it is narrowly construed, and if clear words are not used, the clause might not offer the protection its drafter had intended. And that is a real issue because, so often, *Force Majeure* clauses are included in contracts in the (mistaken) belief that the mere words "*Force Majeure*" carry with them the right to claim any event that prevents or delays work is covered.

They are dismissed as "*boiler plate*" provisions that don't need amendment. Is that the right approach with regard to a high value contract, such as a yacht building contract, that will run for maybe 3 or 4 years or more?

I don't think it is.

[1] Guidance note: Coronavirus (COVID-19)

So what risks specific to yacht building, for example, need to be captured in an effective *Force Majeure* clause. Are there issues you should make sure are addressed?

To answer that, you need clarity on typical issues. We rarely get that.

Does the wording used matter?

I have undertaken a review of a number of typical *Force Majeure* clauses in yacht building contracts. Some will expressly include words such as:

"*..acts or directives of government authorities, …, epidemic, quarantine,*"

This justifies a claim to *Force Majeure*. But not all do.

A "*trade restriction*" might impact the build, but a strike or lockout, usually covered, won't usually help a builder if it only affects its own workforce.

Of course, where a restriction on work is the result of an "*act of government,*" it's likely to be covered, but that is not as clear as including an express term that refers either to delay consequent upon the effect of COVID-19, and/or language that refers to delay caused by "*quarantine*".

Every clause appears to be different and the language used in *Force Majeure* clauses is changing in response to events.

The exceptional circumstances surrounding the COVID-19 pandemic would appear to be a classic example of a *Force Majeure* event that would suspend the performance of the contractor's obligations, but the language used needs to be checked to see if that is the case. A lot may ride on the clause.

You must therefore check carefully the exact wording used, remembering that the clause will be construed narrowly, and against the party seeking to rely upon it.

So yes, to answer the heading to this section – the wording used matters!

<u>Foreseeability</u>

Many think that an event must not be foreseeable for *Force Majeure,* but in general that is not the case[2].

[2] See e.g. *Great Elephant Corp v Trafigura Beheer BV (The Crudesky) [2013] EWCA Civ 905*

On the other hand, if performing a contract is no longer economically viable – and this may well be the case with some complex contracts affected by COVID-19 – that will not amount to *Force Majeure*, so an aircraft sale affected by an economic downturn was not covered by a *Force Majeure* clause[3].

COVID-19 might affect the viability of a major project, such as a construction or shipbuilding project, but unless very clear words are used, it won't automatically amount to a *Force Majeure* event.

And of course economic arguments can cut both ways; it may be a purchaser, or a builder, who wishes to cancel.

Sole cause, not a cause

A further key point to consider is whether *Force Majeure* is just one of a number of causes preventing or delaying performance or is the only cause of the same.

This may well be key in a COVID-19 situation. In general, the relevant *Force Majeure* event must be the sole cause of the inability to perform, not merely one of several competing causes[4].

So, a party will not be excused performance of its obligations under the contract because of an exceptional, or *Force Majeure* event if that party is not able and willing to perform its obligations in the absence of the *Force Majeure* event.

Each *Force Majeure* claim will need to be assessed against the relevant factual background. There can be no doubt just how serious COVID-19 is or its devastating impact on many businesses and lives, but it is not of universal application.

Finally, most *Force Majeure* clauses include a provision allowing the innocent party to cancel the contract if the *Force Majeure* event continues for longer than a certain time, possibly including a right to money back. The time varies depending on the type of contract. Generally, it will be not less than one month, but could be much longer.

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[3] *Tandrin Aviation Holdings Ltd and Aero Toy Store LLC and others [2010]* EWHC 40 (Comm)

[4] *Intertradex v Lesieur [1978] 2 Lloyd's Reports 509,* a decision of the Court of Appeal

I suggest a few questions are kept in mind when assessing a claim to *Force Majeure*:

1) Is the event expressly referred to in the *Force Majeure* clause?
2) If not, does it clearly fall within a list of similar exceptions?
3) Is the real cause of a claim to *Force Majeure* purely or mainly economic?
4) Is it the only cause preventing performance? What other causes might there be? Look at recent history and earlier communications as these might tell a different story.
5) Has notice been promptly given?
6) What steps have you/the other party taken to mitigate the effect of *Force Majeure*?

As a lawyer, I am bound also to say that you should never take a claim to *Force Majeure* lightly, or accept a claim, or make one, without proper legal advice.

COVID-19 is not the only unexpected event that has given rise to issues with some contracts, nor is it likely to be the last. *Force Majeure* might be a French civil law concept, but it is now invariably used in complex contracts of all kinds governed by English law too.

Take it seriously; it should not be an afterthought, as it so often is.

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Check back soon for further updates from our superyacht team at Bargate Murray.

Further information

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