



Soundings

Coronavirus and Force Majeure

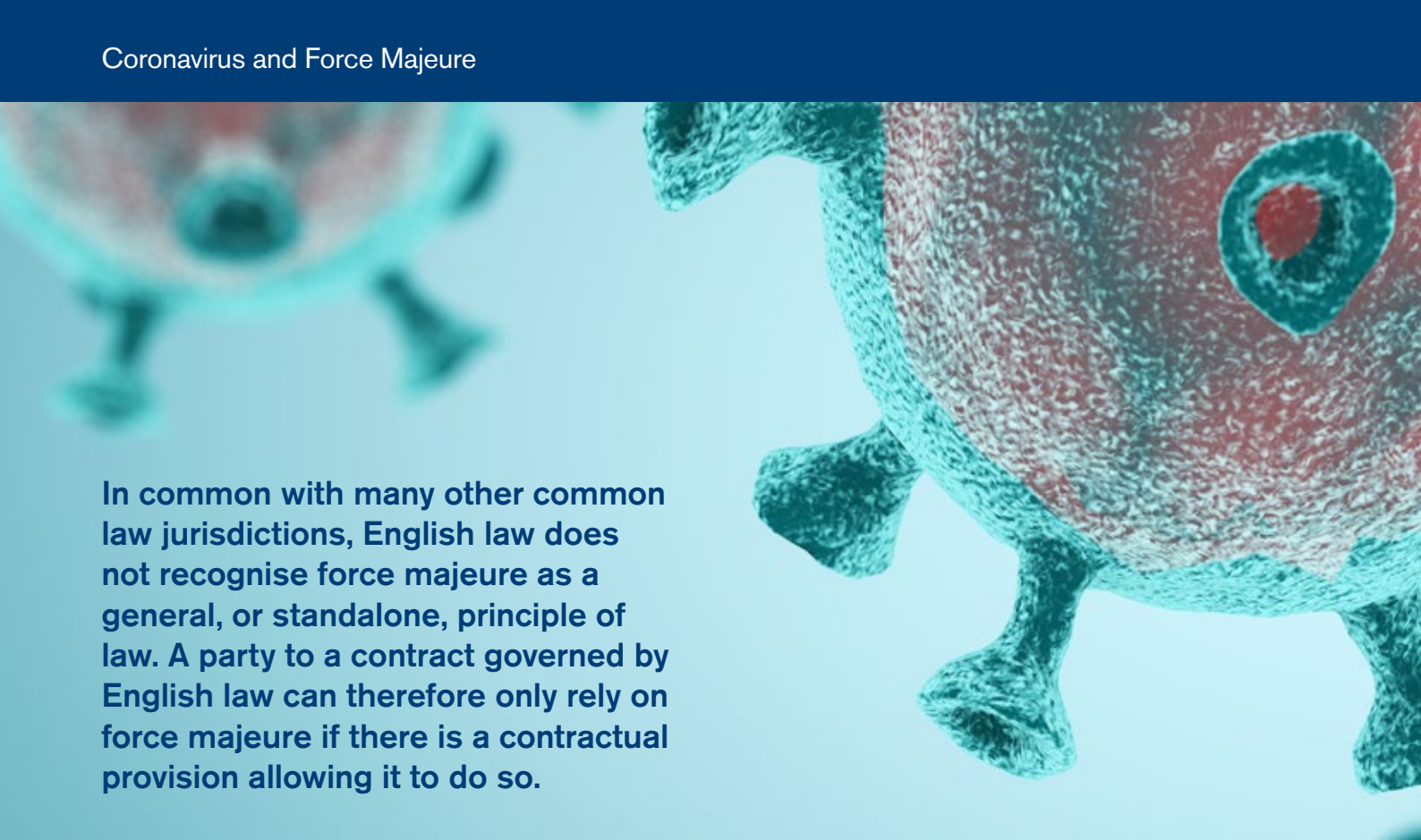
The rapid escalation of the COVID-19 outbreak is having a huge impact on the shipping industry. Many parties are having to review their contractual obligations in light of the developing situation. In this article, we focus in on force majeure provisions in the context of COVID-19.

On 30th January, 2020 the World Health Organization declared that the outbreak of the new coronavirus COVID-19 was a Public Health Emergency of International Concern. On 11th March, 2020 it labelled the outbreak a “pandemic”. Measures adopted by governments aimed at containing or delaying the spread of COVID-19 are causing widespread disruption to international trade and shipping. As a result, companies in the maritime sector may find themselves

unable to perform their contractual obligations. Where the relevant contract contains a force majeure clause, the question arises as to whether the affected party can rely on the provision to provide relief from liability.

What is force majeure?

Broadly speaking, force majeure events are unexpected circumstances outside a contracting party’s reasonable



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control that prevent it from performing its contractual obligations. In common with many other common law jurisdictions, English law does not recognise force majeure as a general, or standalone, principle of law. A party to a contract governed by English law can therefore only rely on force majeure if there is a contractual provision allowing it to do so. This means that the protection afforded depends on the precise drafting of the relevant force majeure clause. Typically, force majeure clauses will give the affected party the right to suspend, extend or cancel the contract upon the happening of a specified event beyond its control.

Impact of the coronavirus on the shipping industry

The shipping industry is likely to be impacted by the coronavirus in a number of ways including delay in delivery of cargo, the need to discharge cargo at alternative or interim ports and delays as a result of quarantine and port checks due to cases, or suspected cases, of the coronavirus amongst crew on board.

The legal consequences of those impacts will be governed by a number of familiar express or implied clauses including off hire, laytime and demurrage, safe port, implied indemnity, crew sickness and deviation clauses ([see our "COVID-19 outbreak - Contractual FAQs" document](#)). Many charterparties will also incorporate BIMCO Infectious or Contagious Disease Clause, produced in response to the Ebola outbreak of 2014, which may apply to COVID-19.

The COVID-19 pandemic is also likely to cause delays in the construction of newbuildings, scheduled ship repairs and upgrades. Indeed, there have already been reports that Chinese shipyards have issued force majeure notices under

some of their shipbuilding contracts said to be the result of delays caused by the coronavirus outbreak.

Force majeure clauses

Few of the major charterparty forms make express reference to "force majeure". Such forms do, however, make provision in "exceptions" clauses for extraneous events (e.g. act of God, fire, restraint of princes, rulers and people, quarantine restrictions) that prevent performance (see e.g. clause 16 of the NYPE 1946 time charter form and clause 27 of the Shelltime 4 form, etc).

In addition, some charterparties, contracts of affreightment and shipbuilding contracts invariably include force majeure clauses. The potential application of such clauses to the consequences of the COVID-19 pandemic are addressed below.

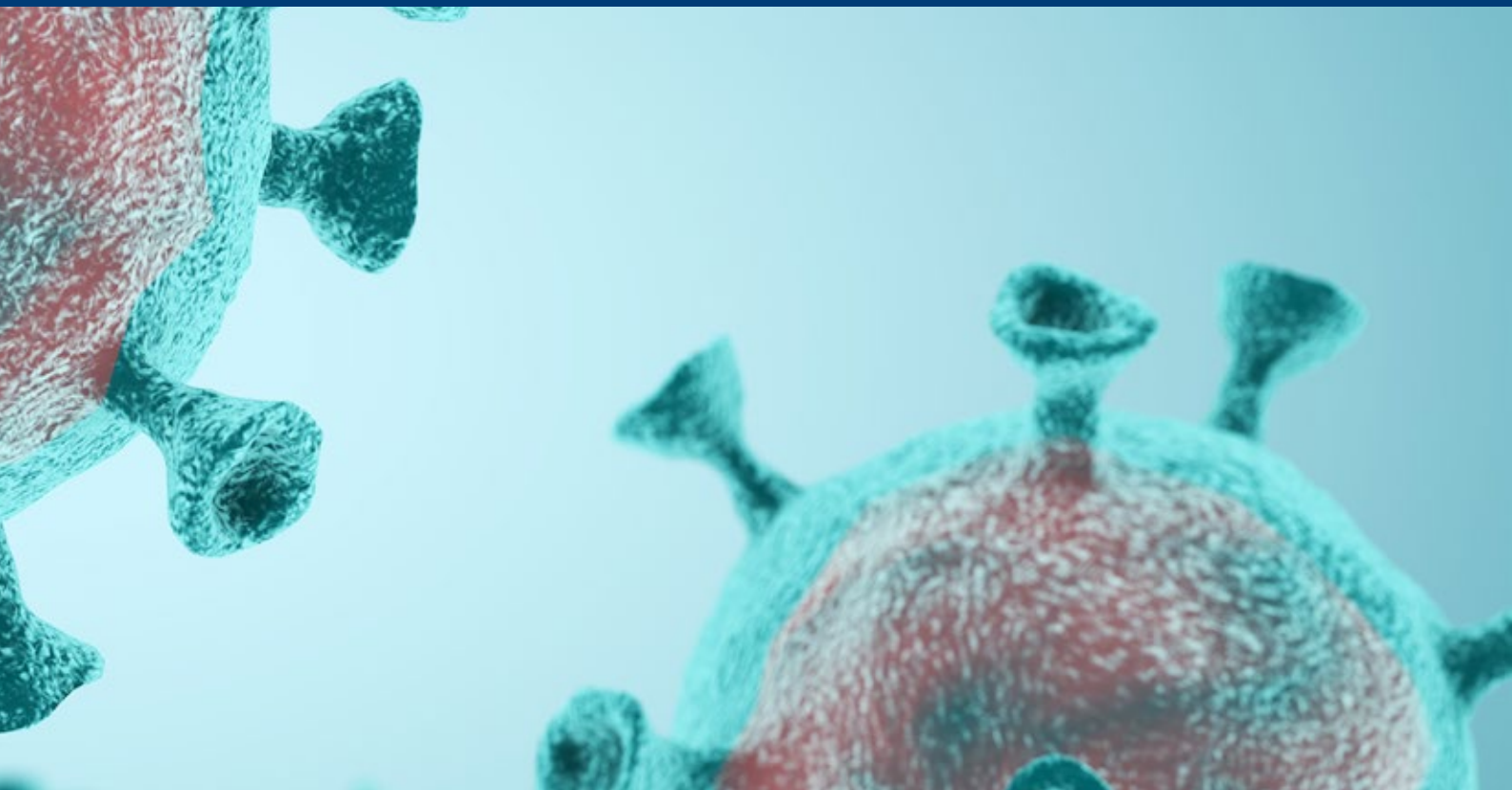
The burden of proof

A party seeking to rely on a force majeure clause bears the burden of proving the facts bringing the case within the clause. This requires proof of the occurrence of one of the events specified in the clause and satisfaction of all other requirements in the clause.

Qualification requirements

Most force majeure clauses define the term "force majeure" or supplement it with a series of specific events which trigger its operation. Common events are act of God, flood, fire, war, civil commotion and strikes.

In the context of COVID-19, specified events to look out for are "epidemic", "disease" and "quarantine restrictions" all of which, read in context, may apply. "Act of God" usually



denotes events due to natural causes, such as extreme weather events or natural disasters that occur without human intervention. As such, it is unlikely to cover the spread of COVID-19 and action taken by governments to contain or delay its spread. However, its potential application cannot be ruled out depending on how the threat to human health posed by the virus develops.

Where the inability to perform is the result of government restrictions imposed in response to COVID-19, it may be possible to rely on “restraint of princes, rulers and people” provisions. Many force majeure clauses refer to generally applicable government action. For example the Shipbuilders' Association of Japan (SAJ) form of shipbuilding contract refers to “acts of princes or rulers; requirements of government authorities; ... plague or other epidemics; quarantines; ... embargoes ...”. Similarly the NEWBUILDCON form refers, in addition to “epidemics”, to “any government requisition, control, intervention, requirement or interference”. Further, some force majeure clauses include a sweep-up provision (e.g. “any other cause of a similar nature”) which may, read in context, apply.

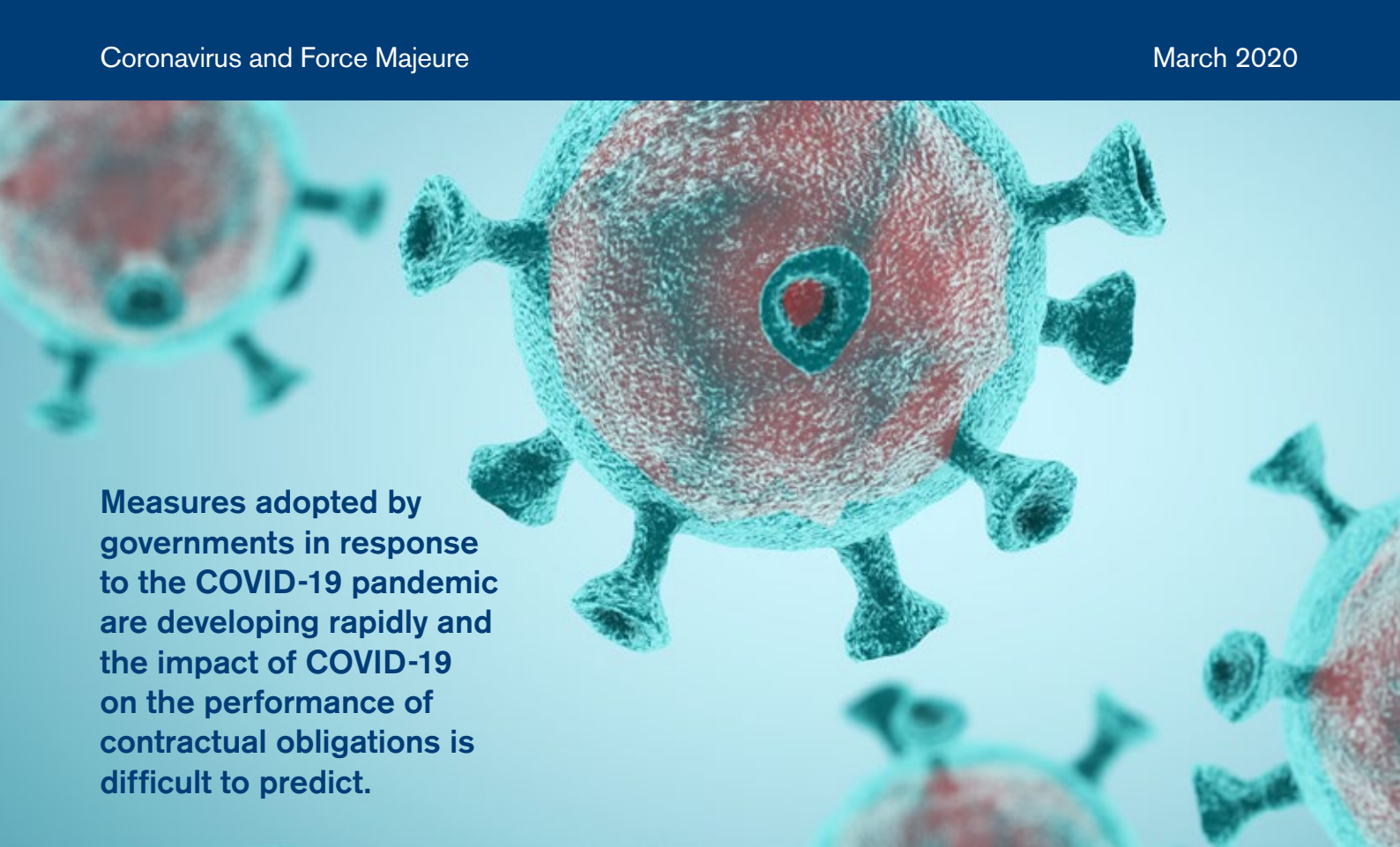
Causation requirements

Force majeure clauses invariably require a causal link between the force majeure occurrence, on the one hand, and inability to perform on the other. Typically, a force majeure clause will apply where performance of the contract has been “prevented”, “hindered” or “delayed” due to a defined event, so a causation requirement is inherent within the clause. The causation requirement is strictly applied and will often be difficult to satisfy. Since the enquiry is highly fact and evidence specific, the scope for disputes is high.

Parties seeking to rely on, or being faced with the invocation of, a force majeure clause as a result of restrictions imposed in response to COVID-19 should therefore take care to analyse all the relevant facts and to gather and preserve all evidence of, for example, quarantine orders or local operating or production restrictions to prove the chain of events leading to their inability to perform. Certificates issued by government authorities – such as those that have reportedly been issued by the China Council for the Promotion of International Trade to Chinese businesses affected by the COVID-19 outbreak – may not be sufficient, on their own, to satisfy the causation requirement in a force majeure clause governed by English law.

There are also legal subtleties to watch out for. In two important recent cases, the English courts have clarified the approach to the interpretation of force majeure clauses and causation. In *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd* the High Court held that where there are concurrent causes of a failure or inability to perform contractual obligations, one being force majeure and the other not, the force majeure clause could not be relied on. In other words, the force majeure event had to be the sole effective cause of the failure or inability to perform.

In *Classic Maritime v Limbungan Makmur*, the Court of Appeal held that a force majeure clause required the charterers to show not only that the force majeure event made performance of the contract impossible, but also that “but for” the event, the charterers would have been able to perform (i.e. provide a cargo). The force majeure clause in that case was interpreted as an “exceptions clause” rather than a contractual frustration clause and the court held that



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a “but for” test for causation applied to the former type of clause, but not the latter.

Many force majeure clauses also require parties to use “reasonable endeavours” to avoid or overcome the force majeure event. In *Seadrill Ghana* the court held that a party that is subject to the obligation to use reasonable endeavours is bound to consider the interests of his counterparty, as well as his own. It would be prudent, therefore, for a party relying on force majeure to make a contemporaneous note of such consideration having been given.

Notice requirements

Relief from liability for force majeure will not always apply automatically. Relief may be dependent on fulfilling notice requirements. Whether or not performance of such notice obligations is a condition precedent to the availability of force majeure relief is a matter of the particular drafting but, in the absence of clear words, compliance with such requirements are unlikely to be interpreted as a condition precedent. Where notice is not a condition precedent, the sanction for non-compliance will be damages for breach of the obligation to provide the relevant notice.

Force majeure distinguished from frustration

Finally, it is important to distinguish force majeure from frustration. Under English law, if a contract becomes impossible to perform or if its performance is made

radically different as a result of measures taken to combat COVID-19, it may be frustrated. The financial consequences of a contract being frustrated are complex, but its effect is to automatically discharge the parties from further performance of their obligations. Frustration is very difficult to establish but, in a rapidly developing environment, cannot be ruled out. For present purposes, however, it should be noted that frustration cannot be relied on where the parties have contractually agreed the consequences of the supervening event. The existence of a force majeure clause may, therefore, make frustration a non-starter.

Conclusion

Measures adopted by governments in response to the COVID-19 pandemic are developing rapidly and the impact of COVID-19 on the performance of contractual obligations is difficult to predict. Some of the more predictable impacts will be regulated by the application of, for example, off-hire or laytime provisions. More fundamental consequences, such as inability to provide a cargo, to discharge at a named port (or range of ports), to re-delivery under a time-charter trip or to comply with a shipbuilding delivery schedule, may require recourse to applicable force majeure clauses. Where that is the case, parties need to take care to comply with the exacting requirements of such clauses.

Please contact the Managers for further advice in relation to any of the issues discussed above.

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