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Expert Analysis

COVID Meets Maritime: Strange Bedfellows

There's a port on a western bay
And it serves a hundred ships a day
Lonely sailors pass the time away
And talk about their homes
—"Brandy" by Looking Glass

By **James E. Mercante**

And **Kristin E. Poling**

COVID-19 stopped the world, particularly transportation … many ships were not being "served" in port at all and many a lonely sailor couldn't get ashore or even relieved of duty. Recently, it led many to inquire: Is the COVID pandemic a force majeure?

Extraordinary Circumstances

Force majeure is an unusual and extraordinary circumstance that was not envisioned when a contract was made. Indeed, even if a shipment contract does not contain a force majeure defense, the Carriage of Goods by Seas Act (COGSA) steps in and provides the functional equivalent that says: "A carrier and the vessel are not liable for loss or damage arising from—dangers of the sea or other navigable waters … acts of God … seizure under legal process … public enemies … saving or attempting to save life or property at sea, including a deviation in rendering such a service." 46 U.S.C. §30706.

That said, the force majeure defense is strictly construed and evaluated pursuant to the precise terms set forth in the clause. Thus, even when an event may rise to the level of being a force majeure, courts are reluctant to cancel the contract. *TGI Office Automation v. Nat'l Elec. Transit Corp.*, 2014 U.S. Dist. LEXIS 189880 (E.D.N.Y. 2014) (finding "act of God" defense did not apply to destroyed shipment because flooding from Hurricane Sandy was not completely "unforeseeable," and in order to invoke the "act of God" defense, human activities cannot contribute to the loss in any degree). Like any defense, the burden of proving a force majeure rests with the party asserting it, with the "added burden of establishing lack of fault in order to be exonerated from liability." See James E. Mercante, *Hurricanes and Act of God: When the Best Defense is a Good Offense*, 18 U.S.F. Mar. L.J. 1, 17-18 (2005-06).

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A typical marine force majeure clause sounds something like this: "Neither [vessel owner] nor the [vessel] shall be responsible for

JAMES E. MERCANTE *heads the Admiralty, Transportation and Marine Insurance practice team at Rubin, Fiorella, Friedman & Mercante.* KRISTIN E. POLING *is associate at the firm.*

any loss or damage, or delay or failure in performing hereunder arising from: act of God, act of war, act of public enemies, pirates or thieves, arrest or restraint of princes, rulers, dictators, or people, or seizure under legal process … or riot or civil commotion." *Tug Blarney v. Ridge Contr.*, 14 F. Supp. 3d 1255 (9th Cir. 2014) (finding issue of fact existed as to whether vessel sinking constituted "force majeure"). Note that the clause does not contain "pandemic," "virus" or similar wording.

The Supreme Court recently made clear that additional wording will not be read into a maritime contract. "Where the words of a contract in writing are clear and unambiguous, its meaning is to be ascertained in accordance with its plainly expressed intent …. In such circumstances, the parties' intent can be determined from the face of the agreement and the language that they used to memorialize [that] agreement." *CITGO Asphalt Ref. Co. v. Frescati Shipping Co*., 140 S.Ct. 1081 (Mar. 20, 2020) (internal citations omitted). In *CITGO*, a disastrous oil spill from the tanker ATHOS I, the Supreme Court held that a centuries old "safe berth" clause contained in a charter party form contract unambiguously established an absolute warranty of safety for the ship. The court refused to read the clause as imposing a lesser obligation of "due diligence" absent specific wording.

The basic premise of a force majeure clause is to relieve a party from its contractual duties when the purpose of the contract is frustrated by extraordinary circumstances. Mere impracticality or unanticipated difficulty is not enough to excuse performance. The Second Circuit determined that the event must not only be one included in the force majeure wording, but must be unforeseeable as well. *Phillips Puerto Rico Core v. Tradax Petroleum*, 782 F.2d 314 (2d Cir. 1985) (finding that Coast Guard detention of cargo ship did not constitute a force majeure as defined in the agreement).

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Impact on Shipping

Courts are already grappling with the extent of COVID-19's effect on commercial shipping. In *D'Amico Dry D.A.C. v. McInnis Cement,* 2020 U.S. Dist. LEXIS 114749 (S.D.N.Y. June 30, 2020), the Southern District of New York upheld a Rule B attachment against a cement cargo distributor. Rule B attachments are particular to maritime law. The attachment is issued against property within a court's district under Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims of the federal rules of civil procedure. The court may attach a defendant's property up to the value of the claim as security for a judgment.

In *D'Amico*, the cement company entered into a four-year contract with plaintiff, guaranteeing regular shipments of cement. Shortly into the COVID-19 pandemic, the cement company stopped shipments, claiming force majeure prevented it from performing the contract. The plaintiff argued that the cement company's inability to perform existed prior to the COVID-19 pandemic and was not a result of force majeure. It appears that the cement company could not perform the contract at a profit, and that its continued performance would cause financial hardship. The case will be arbitrated, but in the meantime, the New York federal court upheld the Rule B attachment on the cement company's property. A lesson that financial troubles will not be a force majeure lifeline.

In *The Matter of the Arbitration between Seascape Shipping and Trading v. Metalex 2000 S.A.*, S.M.A. No. 4390 (Jul. 15, 2020), the Society of Maritime Arbitrators determined that the charterer breached a contract by failing to load certain cargo aboard claimant's vessel. The charterer argued that the cargo could not be loaded due to restrictions put in place by the Venezuelan government. Citing to a force majeure clause in the charter contract, which

included "arrest and/or Restraints of Rulers, Princes and People," the charterer took the position that it was excused from performing and not liable for any breach. The arbitrators disagreed, finding that the cost of the cargo changed during loading operations and for that reason, the charterer would not load. The panel found in favor of the claimant vessel owner which included damages incurred by the vessel sitting at its berth for several days during the stand-off between the parties.

Lonely Sailors

In addition to the business implications of this viral pandemic, there is the marine employment aspect as well. Many sailors from a wide range of countries have been on lock down aboard cargo ships, cruise ships and the like, with no return date in sight. This is a result of travel restrictions implemented as the pandemic began to spread rapidly throughout the world. Essential crewmembers wound up quarantined aboard ship waiting to be repatriated. While thousands of other crewmembers remained ashore without pay awaiting approval for a crew change.

Recently, a shipping company was fined under 33 CFR §160.215 for failing to report that a crewmember had coronavirus before the vessel entered the Port of New York. That federal regulation requires a vessel bound for the United States under force majeure to report "any hazardous condition" to the captain of the port. The virus quickly spread to other crewmembers forcing the ship to anchor and be delayed for several days.

The expense of a ship under charter laid up idle even for a few days can be enormous. While such ship will lay dormant to clear COVID, both sides will have already laced up their gloves with maritime counsel over who is responsible and whether force majeure offers an escape hatch.

On Aug. 4, 2020, a class action lawsuit was filed in Florida against a cruise line by seamen allegedly trapped onboard the ship and required to work, some without pay. In their complaint, the crewmembers allege that when the COVID pandemic halted all sailings, defendants required all crewmembers aboard the ship to sign a document stating they were voluntarily staying onboard without pay. *Janicijevic, et al. v. Bahama Paradise Cruise Line, et al.*, 20-cv-23223 (S.D. Fla. Aug. 4, 2020). This will be an interesting case to follow.

Strikingly hard to believe, and somewhat reminiscent of the book *The Man Without a Country* written by Edward Everett Hale, hundreds of cruise ship employees remained stuck at sea with nowhere to go during the crisis.

On the Horizon

COVID-19 may be an act of bat (or originated with some animal virus), but so far it has not been described as an act of God. It could be a "restraint of princes" (being locked out of a port by government mandate, for example). What is certain, these unique defenses will be in the lineup for some interesting maritime litigation due to COVID-19. However, "pandemic" is not a word specifically included in the present day force majeure clause, so there is a bit of an uphill battle that courts, arbitrators, marine insurers and maritime lawyers will have to grapple with. Negotiating the inclusion of the word "pandemic" in maritime contracts will likely become the new normal, not unlike wordings that surfaced for terrorism in the wake of Sept. 11, 2001, and "cyber" attacks thereafter.

On the somewhat positive side of things, while most maritime clauses and laws are ancient and steeped in history (like the "safe berth" clause in the ATHOS I case), we may be on top of the wave of a brand new clause, the COVID 2020 Force Majeure clause. Something to think about over a "Brandy" and that song!