Principles of force majeure clauses explained

Shipping has been fraught with perils, danger, and uncertainty since the days of the very first ships setting sail. Nearly every year, the industry encounters new challenges and hardships and the far-reaching impact of COVID-19 has been one of the worst of a generation. There has been the obvious and immediate impact on individual ships and sectors, *i.e.* the inability to change crews timely, the shut-down of the cruise industry, and the drop in demand for goods and products occasioned by the global pandemic. As everyone has settled into the 'new normal' brought on by COVID-19 for the foreseeable future, owners and charterers have included new clauses to attempt to address and allocate the many risks of COVID-19. This article will address the historic principles of force majeure clauses (and their interpretation) by U.S. courts and also raise some of the open questions for consideration.

Historic Application of the *Force Majeure* Doctrine

Force majeure clauses, especially in shipping contracts, were born out of necessity. During the 19th century, U.S. courts regularly excused a party from performance of a "duty or charge" which was prevented by an act of God, without fault of the party sought to be charged. *Herter v. Mullen*, 159 N.Y. 28, 43, N.Y. Ct. of Appeals (April 18, 1899). However, "where a person absolutely and by express contract binds himself to do a particular thing which is not at the time impossible or unlawful, he will not be excused, unless through the fault of the other party. The reason given for the latter portion of this rule is that he might have provided by his contract against inevitable accident or the act of God." *Id*. Expressed in another way, U.S. law has always drawn a distinction between contractual duties, which could include a necessary contractual clause to deal with the foreseeable act of God and legal duties, for which there has always been an "unwillingness of the law to at once create, impose and exact the performance of an obligation forbidden or rendered impracticable by the interposition of Providence." *Id*.


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It is with this background that the modern jurisprudence interpreting and governing force majeure clauses developed in U.S. admiralty law. Generally, the primary purpose of a force majeure clause is to "relieve a party from its contractual duties when its performance has been prevented by a force beyond its control or when the purpose of the contract has been frustrated." *Phillips Puerto Rico Core, Inc. v. Tradax Petroleum, Ltd.*, 782 F.2d 314, 319 (2d Cir 1985). The burden of demonstrating the application of force majeure is on the party who seeks to have its performance excused. *Id*. "Mere impracticability or unanticipated difficulty is not enough to excuse performance." *Phibro Energy, Inc. v. Empresa de Polimeros de Sines Sarl*, 720 F. Supp. 312, 318 (S.D.N.Y. Aug. 28, 1989). Said in another way, while the phrase has come to mean a general inability to perform, it has no common definition or scope as a matter of law and therefore courts and arbitration panels will review the language of the contract to determine if the clause is applicable to excuse non-performance or not.

Force Majeure clause terms

As the term force majeure has no uniform meaning as a matter of law, the precise contractual clause will govern whether the doctrine applies to a particular case. It is standard practice to name events that may constitute force majeure events, as well as having a catch-all provision covering events beyond a party's reasonable control or expectation. *Phibro Energy, Inc.*, 720 F. Supp. at 318. Especially for contracts which predated parties' general knowledge of COVID-19 (and therefore would not name the pandemic by name),

the list of relevant events may include 'epidemic,' 'pandemic,' 'virus,' 'bacteria,' 'infectious disease,' and quarantine.' In addition, clauses will also likely include reference to 'national emergency,' 'governmental order,' and 'any law or any action taken by a government or public authority,' (provided the action is sufficiently proximate to the event relied upon). It is similarly common for a force majeure clause to contain a statement that the force majeure event is one which is not reasonably foreseeable. The consequences of a force majeure event are usually to suspend performance or to have the time for performance extended, although there may also be on-notice termination provisions. Critically, there is considerable potential for overlap between force majeure clauses and other clauses in the charterparty or bill of lading.

Force Majeure in practice as a matter of U.S. law

While an actual event like a storm or pandemic may be an obvious opportunity for the use of the force majeure defence, it is more difficult to identify with precision the application of the doctrine for various follow-up and knock-on effects. For example, in *Toyomenka Pacific Petroleum Inc. v. Hess Oil Virgin Islands Corp.*, the district court was tasked with determining whether demurrage was due and owing as a result of a delay in the discharge of a cargo of crude oil following Hurricane Hugo. 771 F. Supp. 63 (S.D.N.Y. 1991). Toyomenka, the seller, argued that since vessel cargo operations had resumed at the terminal on October 2, 1989 (following the storm's destructive path across the Virgin Islands), the delay of the vessel for the period of October 28 – November 9, 1989 entitled the seller to contractual demurrage at a rate of $17,500 per day. The Court granted summary judgment in favour of the terminal buyer and rejected the demurrage claim consistent with the parties' force majeure clause and holding that the delay was directly caused by the lack of available storage tanks due to the loss of 6,000,000 barrels of storage capacity as a result of the hurricane.

In *Towle v. Kettell*, the Supreme Court of Massachusetts held that a charterer was not liable for demurrage incurred in Haiti as the vessel had been ordered to quarantine by customs house officials as a result of an infectious disease onboard. *Id.*, 59 Mass. 18, 5 Cush. 18 (Nov. 1849). The Court found that since it was the local officials which caused and directed the delay of the discharge of cargo, there was no demurrage owed to the owners under the charterparty agreement. Owners argued that cargo operations could have (and should have) occurred from the vessel's quarantine position. However, the Court rejected the argument as unreasonable, as it would have cost more to engage the discharge of cargo under such conditions than was occasioned by the delay of the government authority imposed quarantine. The Court rejected the claim for demurrage and upheld the act of God defence.

As more claims involving the coronavirus come into focus, U.S. courts and arbitration panels will be tasked with assessing the facts underlying the claim of force majeure, the contractual obligations, the notice provided, and the reasonable efforts taken by the parties to perform and/or mitigate damages. The interplay between a standard time charter party obligation of the owner to provide a seaworthy vessel and the duty to exercise reasonable due diligence to maintain the vessel compared with the availability and access of an owner to his ship in the time of COVID-19 is one such conundrum that parties (and soon courts) are trying to resolve. For sure, even where the declaration of force majeure may be available in the first instance, there is not an ability to rest on that declaration if subsequent and/or supplemental efforts can be taken to perform the contract. This is especially the case in most charterparty agreements which have additional clauses which require the exercise of due diligence and the parties will be judged on a 'reasonableness' standard.

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