BARGEHIRE 2008 and force majeure

This article, which was written by Simon Tatham and David High of Maritime Law Firm, Tatham & Co., discusses the main practicalities of invoking clause 20 of the BARGEHIRE 2008 contract which is a force majeure clause. This might be because a shutdown in the field of operation means that it cannot be manned or loaded, that the cargo destined to be carried is very seriously delayed or simply that the charterers' business is in such stress that there is no cash to pay ongoing hire.

Clause 20 of BARGEHIRE is a standard BIMCO clause which has also found its way into SUPPLYTIME and WINDTIME and so this article will be relevant to these contracts as well.

Why invoke clause 20?

Where a party can successfully invoke clause 20 the clause provides them with a shield against "loss damage or delay" caused by a force majeure event or conditions. In other words potentially a complete defence to an otherwise good claim.

The clause does not provide a right to terminate the contract and neither does it provide a right to suspend performance. So, for example, if hire is outstanding the Owner will still have a right to withdraw the vessel per clause 15 and claim the unpaid hire as a debt, but will not be able to recover any related losses caused by this.

The formula to invoke clause 20

To invoke clause 20 you would need to prove: (a) an event or condition listed in the clause has occurred; (b) the event or conditions have prevented or hindered your contractual performance; (c) that prevention or hinderance was beyond your reasonable control to avoid or mitigate and; (d) you have given notice of the event. We will look at each element of this formula in turn.

An event or condition

The clause contains a list of specific events or conditions and also states it will respond to any other "similar cause" which is beyond the control of the parties.

It is not enough that such an event has occurred. You will need to be able to produce evidence to show that the event or conditions have actually prevented or hindered your contractual performance.

If the cause of the prevention or hinderance is not a listed situation then you will need to

consider if it is “similar” to the listed events; if it is then it will be relevant. For example a third party arresting a barge for a routine commercial claim is not similar to any of the listed events and so is not a relevant event for this clause whereas a meteor strike is similar to the other natural phenomena listed in the clause, and so would be.

You will also need to show the event and the disruption it has caused was beyond the reasonable control of the parties. You should consider this aspect when negotiating new contracts for if a force majeure event and its effects can be predicted with accuracy at the time a contract was entered into it may be the case that such predictable events are not deemed beyond control. If a specific event can be accurately predicted it would be better to deal with it and its potential effects specifically in the contract rather than trying to rely on clause 20, which may not assist you. For example a bespoke Covid-19 clause may be prudent in new contracts.

Prevented or hindered

Prevention is the more straightforward of the two; you cannot do it and there is no viable alternative which would allow you to either.

Hindered requires a judgment call. If there is a viable alternative but to choose it will cause you significant disruption then this will likely be enough to qualify as hindering your performance; you are not likely to be held to have had to rob Peter to pay Paul.

Beyond Control

Clause 20 also requires that you should make all reasonable efforts to avoid, minimise or prevent the effects of the event. There is overlap here as we have already seen that to qualify as a force majeure event it must have been beyond reasonable control and must have at least significantly hindered performance.

Reasonable efforts to avoid, minimise or prevent will also be required of any third party to whom you have delegated part or all of your performance. If such a person can act to reduce or avoid the effects then they must do so.

A reasonable effort to avoid or mitigate would include steps which incur costs or losses. Again it is a judgment call as to how costly such steps must be before they can be said to be unreasonable, and of course to hinder performance.

It is recommended that if it looks like your performance will be prevented or hindered you make all sensible enquiries to establish there was no, or no reasonable, alternative way you could have got around this problem, even if you know the answers to these enquiries will be no. You should retain records of these enquiries as you may need to later prove this.

Notice

Almost as an afterthought, clause 20 provides that you must give your contractual counterpart

notice of the force majeure event or condition within two days of it occurring.

The clause does not state that if you do not give two days' notice then you cannot rely on force majeure. It is debatable whether this would be implied. For example if the effects of a force majeure event ripple on for significant amount of time there may have been no sensible reason to have given notice when the event first occurred. In which case it would be odd if the right was actually lost by not giving notice at a time when it was not foreseen that you would need it.

Another way of looking at this is that rippled effects of the original event may amount to a force majeure condition of itself if it falls into one of the specified circumstances or the "any other similar cause" provision. In which case notice is to be given within two days of the actual, relevant effect. An example would be if a port is recently closed by the authorities on account of the Covid-19 crisis the relevant event may be the port closure amounting to Government interference rather than epidemic.

The use of the word "condition" in the clause may also be relevant here. An event must occur at a certain point but a condition is a continuing or developing state of affairs. In this sense the port closure in the above example may be said to have arisen from the conditions caused by Covid-19. The inability to change a crew may not be arising from a single event but may well be a condition consequent upon the force majeure situation. It may be a little harder to prove.

No-one is realistically going to consider the need to rely on a force majeure clause until they are aware that a force majeure event or condition may affect their ability to perform the contract. As soon as this seems likely it would be prudent to notify your contractual counterpart despite the potential ambiguity over where the two days should be counted from.

The clause does not require that in the notice you must give any details of the effect of the force majeure event or condition. It is unlikely to be a good idea to put into writing that you cannot perform your side of the contractual bargain unless and until you can be confident you can actually rely of the force majeure clause. In this case: less is more, and the content of any notice would be best kept to a brief description of the situation that may amount to force majeure with a comment that further details to follow once the situation is clear.

Closing remarks

Our main recommendation is that if it looks likely that force majeure will affect your contractual performance you begin to keep careful records so that you can prove every one of the required elements of clause 20. A well-ordered paper-trail may well be the difference between being able to rely on clause 20 to shield you from liability or having to face it.

This article has been written from the viewpoint of a party seeking to rely on force majeure. It should also serve equally well as a guide to the other party against whom force majeure is being invoked; has your counterpart shown all the elements of the formula? The non-invoking party should also keep in mind their other potential contractual remedies such as those provided by clause 15 (suspension or withdrawal by the owners), some of which may be outside the

protection offered by the force majeure clause.

Simon Tatham, Partner at Tatham & Co

David High, Senior Associate at Tatham & Co