Consequences for cargo shipping and seafarers

By JIM WILSON

COVID-19 has imposed a series of adverse impacts on shipping and world trade, ranging from the relatively minor to the extraordinarily serious. Sadly, some Australian States and ports have played their part in making things more difficult than they need to be.

There has been an increase in bureaucracy. Ships' masters and agents have been required to report the status of crew health to various actors, including the Australian Border Force, the Department of Agriculture, port authorities, and pilotage companies. That carries a price of time, cost and work effort. The more serious consequences of COVID-19 are that safety has potentially been compromised, freight has been delayed and crew changes made virtually impossible because of restrictions.

COVID-19 and the early regulatory actions

COVID-19 was first reported to the World Health Organization (WHO) on 31 December 2019. The first Australian case was thought to have occurred in Victoria in late January. By 30 January, the disease was declared by the WHO as a Public Health Emergency of International Concern.

On Saturday 1 February, Australia's Federal Government announced that foreign nationals would not be allowed to enter Australia for up to 14 days after they left or transited through mainland China.

The rationale behind the "14 day rule" is that the median incubation period for SARS-CoV-2 (the virus that causes the COVID-19 illness) is about five days. However, a substantial number of people will develop the illness later than that median point. A tiny minority of people (about one per cent) even develop the illness after 14 days.

Meanwhile, by 6 February, Maritime Safety Queensland had issued a directive (with effect 1 February) instructing ships to not enter Queensland pilotage waters until 14 days had elapsed since the ship's last departure from a Chinese port. That was followed over the weeks, by a series of rule amendments and alterations. On 2 February, the Port Authority of New South Wales issued a prohibition on its maritime pilots from providing services to commercial cargo vessels that had left a Chinese port within the previous 14 days.

There were an immediate number of effects of the 14 day stay-away rules on the eastern coast. Shipping companies were forced to change port rotations and schedules so that their ports of call in Australia would fall outside the 14 day window. Shipping companies were also concerned about incurring days of delay. Shipping companies have considerable bills to pay in terms of wages, stores, supplies and fuel, all of which can come to a cost of about $25,000 per day of delay.

Maritime Safety Queensland quickly amended its policies in response to industry feedback and to evidence about the evolving situation. It progressively eased restrictions on shipping. But that easing was not followed by all port authorities around the country.

Act quickly… amend repeatedly

Governments around the world responded to the escalating threat of COVID-19 by slamming doors shut. Australia's national border was shut on 20 March. Western Australia, the Northern Territory, Queensland, Tasmania and South Australia also closed their borders.

While governments were quick to introduce border restrictions they didn't always allow, or adequately allow, for the essential movement of freight-related workers, especially maritime crew.

Western Australia created a succession of legally complex border-crossing rules. Firstly, the rules were not easy to understand on a simple reading, secondly, they often restricted the vital ability of shipping crew changeovers, and thirdly, they were open to radically different interpretations. Shipping Australia even heard from members that local police forces in remote locations had adopted their own interpretations of rules, which led to increased bureaucracy, complications, costs and delay.

Meanwhile, early one Saturday morning in late March, the New South Wales Health Minister, Brad Hazzard, issued a maritime quarantine order to prevent crew or shore-side personnel from unnecessarily getting on or off ships. Although the order had a broad exemption for anyone carrying out necessary business, local on-the-ground personnel interpreted the order so as to prevent ship agents from going aboard. It took a further maritime order, issued a few days later, to solve that problem. Getting approval for a crew member to visit a doctor became almost impossible.

Quarantines and crew changes

When Federal and State/Territory authorities instituted mandatory 14 day quarantine periods for travellers, domestic and international mariners began to be thrown into quarantine. Crew-changes became difficult, if not impossible.

In a New South Wales incident, a tug crew that delivered a boat from Queensland was put into quarantine, though on appeal they were allowed to travel home. Marine pilots from Tasmania who worked in other States were unable to go home. In New South Wales, an on-signing seafarer was forced into quarantine for 14 days upon arrival at Sydney Airport. By the time the seafarer was let out of quarantine, his ship had already sailed from Australia.

Western Australia produced a lengthy (and complex) seafarer's class exemption to its border closures in early April. However, it had a nasty barb – seafarers have to undergo a 14 day quarantine even when they were merely transiting Western Australia to get to/from their ship or airport. In one case, a full 20-person off-signing crew was forced into 13 days of isolation in a hotel at a near $85,000 cost, even though they had already done 13 days of isolation on their ship. They were intending to leave their ship and near-immediately depart Australia by air.

At the time of writing, it seems that these concerns are beginning to ease, with most jurisdictions in Australia now providing extensive rules allowing for crews to cross their borders without a 14 day quarantine. But it is not a uniform set of rules across the country.

Western Australia still mandates a 14 day quarantine in all circumstances. The Northern Territory has a mandatory 14-day quarantine for seafarers who get off a ship outside of the Territory, and who then travel to the Territory to join a ship.

New South Wales and Victoria have not yet issued any exemptions at all, which is a problem, as most international flights

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terminate in Sydney or Melbourne. Shipping Australia has heard of at least one on-signing seafarer who, upon hearing that restrictions were being eased, rushed to book a flight to join a ship in Queensland. He had to be dissuaded – with some urgency – as his only Australian arrival option was Sydney Airport.

It didn't have to be this way. South Australia is both notable and commendable because it introduced a simple broad-brush exemption for freight workers, and it aligned its rules with the Australian Border Force rules on crew changes.

A global problem

At the time of writing this article, an inability to change crews has become a global problem, with about 150,000 seafarers trapped at sea.

As Shipping Australia has pointed out in letters to State and Territory Premiers, seafarers who are forced to stay for over-long periods at sea may begin to experience family distress, emotional disturbance, mental illness, and personal injury. They are likely to become fatigued, which is concerning because seafarer fatigue is widely recognised as a contributing factor in marine casualties of all kinds.

The legitimate needs of health protection can be provided through sensible control measures such as medical testing prior to getting on a flight to Australia, providing transiting personnel with protective equipment such as facemasks, and physically isolating them from the general public (by, for instance, hiring coaches). In early May, the International Maritime Organization issued an extensive set of framework protocols to governments to cover this exact situation.

Commercial consequences

Although the health crisis has been running for just under six months, we are still in the early days of the economic crisis. Early indications are that global shipping lines are being challenged.

Back in late January and early February, there was a downturn in cargo volumes from China. Production volumes had fallen because COVID-19 had made large numbers of people sick and the Chinese government had locked down large parts of the country. The Chinese New Year holidays reduced volumes too. Blank sailings followed the decline in cargo volumes.

Now liner shipping demand has reduced around the world as economies go into lockdown. Falling volumes of cargo have caused the amount of inactive containership capacity to increase to levels never previously seen. International container shipping analyst Alphaliner, has forecast that the inactive container levels will breach the three million TEU mark.

There are fears that global liner shipping companies are carrying an increased insolvency risk. One predictor of corporate insolvency is the Altman Z-Score, which is said to be highly accurate up to a year in advance. Alphaliner notes that several large carriers now have Z-Scores indicative of a high risk of insolvency, while others could come under pressure if cargo demand is reduced for a long time. Carriers with high debt leverage ratios and high levels of short-term debt, or with track records of negative earnings, are said by Alphaliner to be "especially vulnerable".

Around the world, global carriers have been responding by either suspending services, blanking sailings, or combining loops. Operators have also reduced capacity by returning chartered ships. Some liner companies have begun opting for Asia-Europe route via the Cape of Good Hope, rather than Suez, owing to excess capacity, a lack of demand, cheaper bunker fuel and, of course, no Canal fees.

Looking forward, renowned maritime economics guru Dr Martin Stopford, concluded in a late April white paper that the "pandemic will lead to some sort of recession". In the best case scenario, he predicted a couple of difficult years ahead followed by a return to normal of about 3.2 per cent a year. But don't breathe a sigh of relief. His worst case scenario envisages a deep economic downturn and persistent problems. That would see a 15 per cent fall in seaborne economic trade by 2024, followed by miserly growth for years afterward.

Only time will truly tell how global shipping industry will be affected.


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The economic impact on markets of the coronavirus pandemic

By PAUL BETTANY, Foreign Exchange partner, Collison & Co.

The global 'coronavirus' pandemic has infected people across the world, quickly spreading from Wuhan, China. The virus has not only infected populations around the world but also the economies of the world. Most of the world is in some form of shut-down, preventing the spread of infection by social distancing, in order to gain control and contain the spread. It appears to be working, and Governments are now planning exit strategies from the various lock-downs.

Chronology of events

The epidemic began in Wuhan, China in December 2019 and quickly the epidemic spread. The Chinese authorities shut down Wuhan to the rest of China (but allowed millions of people to leave for destinations around the world). The first cases spread from China to South Korea, Japan and Thailand around 20 January. President Trump imposed a travel ban on China by the end of January. The virus was rampaging through Europe and Iran by the middle of February. By March the virus had spread to both North and South America and the explosion of infections was rapidly translating into a surge in deaths in Italy, Spain and other European nations. This crescendo rapidly spread to US cities, led by New York, with cases across the globe, and including British Prime Minister Johnson and Crown Prince Charles. Most countries were now in some form of lockdown. As countries experience the surge in infections and death, models have predicted a peak and then decline. This is where we are at the time of this article, and now authorities attention has turned to exit strategies to re-open economies around the world.

Government fiscal and central bank monetary policy

Governments around the world have worked in close conjunction with their central banks to provide support and relief packages for people and business, to get them through the economic shutdowns. The lock downs have shut down much of economic activity across the world, so individuals need support, as do businesses, who have been ordered to shut down. The idea is to lock down the population to prevent the spread of the epidemic, while building resources to cope with infections. Modelling has been key to these strategies and now the focus is turning to restarting the economies. This will require massive and unprecedented stimulus, both fiscal and monetary, which vary from one country to the next. The Federal Reserve has led the way, with massive support for business, in the form of debt purchasing from Government Bonds to Junk Bonds! Governments have shipped out unprecedented support packages for people and businesses in an attempt to bridge the gap until economic activity can resume.

Economies and markets

Equity markets collapsed, with the DOW losing more than a third of its value, in less than a month, from late February. Uncertainty and panic quickly destroyed markets and authorities acted quickly to support them and stabilise the situation. Massive intervention, on a scale not seen before, began quickly across global economies. Governments launched massive fiscal support packages to support people and businesses, and funded through debt bankrolled by their central banks. The Australian situation was a similar one to many countries around the world. The PM refused to go into complete lock down, allowing essential businesses to operate, but thankfully allowed a wide definition of 'essential industries'. The Government has launched massive fiscal support packages, while the RBA has acted

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to support debt markets and ensure liquidity.

Authorities have now turned attention to exit strategies and how to return the economy back to work. The shut-down cannot continue. The IMF and various financial institutions are releasing reports warning of the massive economic damage being done. Estimates of contraction of global economic activity of 3 per cent and unemployment rising to 10 per cent or more. If these numbers eventuate, then the global economy will experience a tough recession, the like of which we have not seen since the 'Great Depression'.

The fear and panic overwhelming markets, at the peak of the crises, saw risk aversion spiral and the safe haven of the US Dollar was sought out. This collapsed global equities and bond yields, while currencies were battered. The AUD fell against the US dollar, from pre-crises trading levels of above 0.6700 cents, down to a low of 0.5520 cents. Central banks and government interventions, on a grand scale, stabilised markets. The progress and containment of the 'coronavirus' has allowed authorities to move to planning exit strategies and a return to normal economic activity.

The energy sector has also suffered immeasurably as demand for oil and gas has plummeted. To exacerbate the situation further, a battle erupted between Russia and Saudi Arabia, over supply cuts, and they actually even increased production. President Trump intervened and OPEC PLUS met and reconciled the issue. They have since agreed to cut more than 10 million barrels per day, but the damage was done, with the price of oil collapsing below USD$20/barrel.

Conclusions

The worst of the pandemic appears to be behind us and now planning has begun to return

economies back to normal. The key now is timing. The longer it takes individual economies to return to open markets, the more damage will be done. The longer the 'lock-down', the higher the cost in terms of unemployment, bankruptcies and long-term damage to the economy. It looks as if the early and 'most recovered' countries, may be able to return to the 'new normal' and embrace a 'v-shaped' rebound in the economy. Austria and Germany in Europe, have already started to return to work. The US will follow, with a staged return to normal economic activity. Australia needs to follow the lead of the US to minimise the damage to their own economy. The cost of this pandemic is yet to be finalised and measured, but the recovery can and will take many years. The Australian economy can bounce back quickly, if they can return activity back to full speed, as quickly as possible. There are huge risks and these will be reflected in equity and currency markets.

The COVID-19 pandemic and the contractual force majeure landscape

By MICHAEL WRAY, partner, SVETLANA SUMINA, partner and CHRIS HART, counsel and mariner, Holman Fenwick Willan, Houston

Often considered mere boilerplate, contractual force majeure (FM) provisions are taking on far greater significance in light of the global economic slowdown following the spread of COVID-19. In the last 20 years, the world has been exposed to multiple destructive health crises. SARS in 2002 and 2003, Swine flu in 2009, MERS in 2012, Ebola between 2014 and 2016, Zika in 2015, and now COVID-19.

As the severity of COVID-19 spreads, companies are grappling with an inability to maintain regular business operations. Governments are taking various actions, including shutting down non-essential activities, in an attempt to restrain the novel coronavirus from spreading. The rapid progression of this virus has created a situation where parties are unable keep up with contractual obligations due to a wide range of factors, which include governmental orders, social distancing, the unavailability of critical infrastructure such as ports and terminals, or supply chain issues.

Undoubtedly, in an attempt to excuse contractual non-performance or potentially to terminate a contract, a FM clause will take on far greater significance than originally contemplated.

The force majeure doctrine

The FM doctrine grew out of the common law and is recognised under the general maritime law and state law. Under common law, a party may utilise FM to excuse performance and/or potentially terminate a contract, where performance becomes impossible as a result of a reasonably unforeseeable event outside the parties' control. Such a reasonably unforeseeable event is called a "force majeure".

Over time, the common law FM doctrine was adapted into a standard contract clause, which is often glossed over during negotiations. The FM clause in a contract allows either party to suspend or excuse its performance if certain specified events set forth in the FM clause occur. A FM clause enables parties to be relieved from their contractual duties when performance is prevented by a FM event. If a FM event persists for longer than a specified period of time, a contractual right to terminate may arise. To trigger the FM clause, the party claiming FM bears the burden of proving that: (1) a FM event occurred, and (2) the FM event is the reason that the contract cannot be performed.

A FM clause is found in most maritime contracts. To trigger the FM clause, timely notice must be made by the party claiming FM. There must be a causal link between the FM event and the failure to perform. Some FM provisions may limit the impact of the event by distance or time.

A party may be required to show that it made a reasonable effort to mitigate the effects of the FM event. Texas State law does not, however, require the party invoking FM to demonstrate that it exercised reasonable diligence to avoid the disruption unless such reasonable diligence is expressly stated in the FM clause.

If the FM provision does in fact apply, the non-performing party is excused as long as the event continues, and termination of the whole contract may be possible if the event continues for an extended period of time, as specified in the contract.

Is the Covid-19 Pandemic a force majeure event?

Litigation often centres on whether a FM event exists. A FM clause will set forth a laundry list of specific FM events. Common examples of FM events include: terrorist attacks, typhoons, hurricanes,


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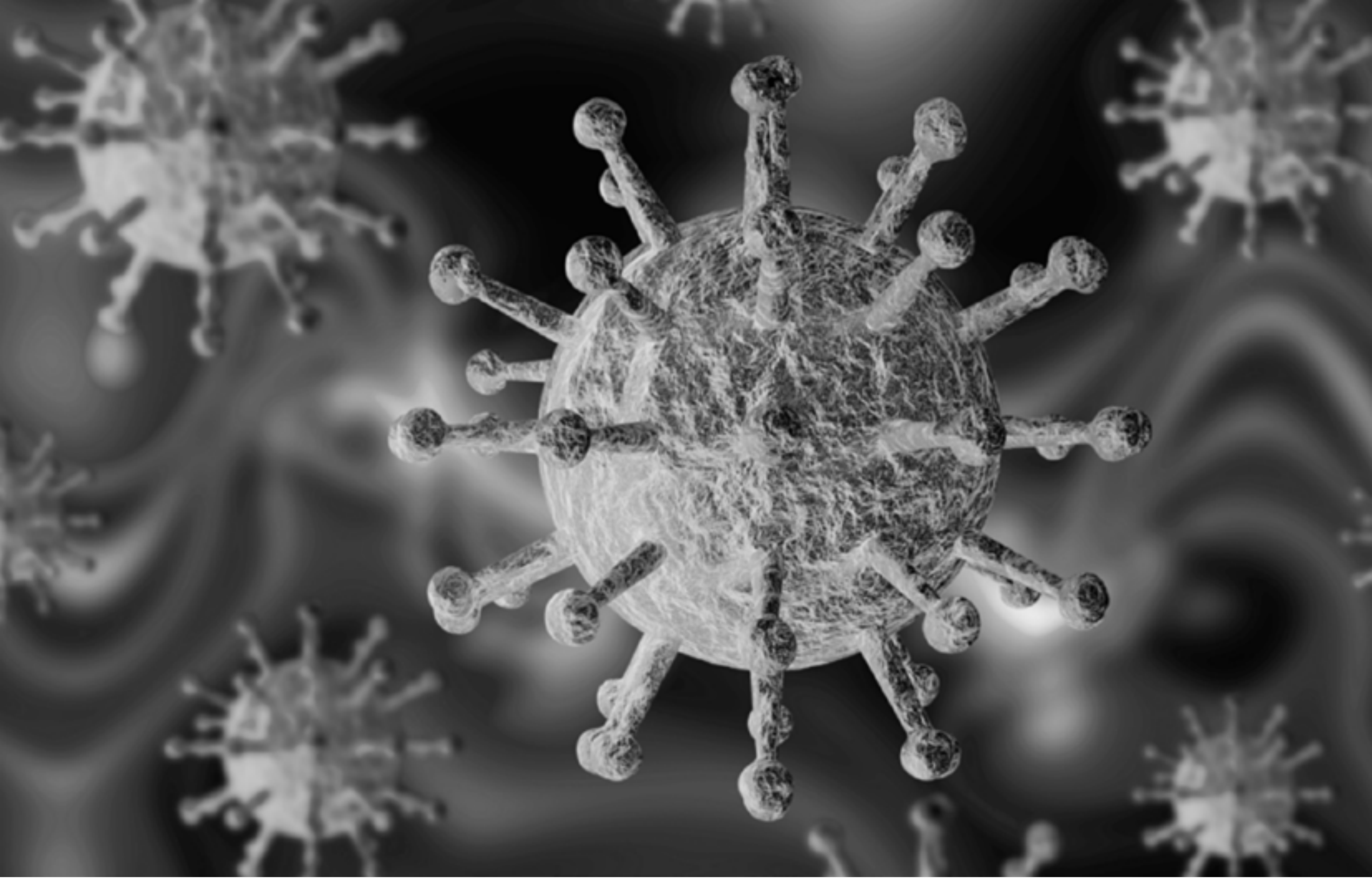

storms of unprecedented magnitude, flood, volcanic eruption, earthquake, explosion or fire, quarantine, piracy, war, and the ubiquitous "act of God." A FM clause will often contain a catchall phrase: "any event beyond the reasonable control of the parties." In relatively recent years, some contracts expressly included "epidemics," such as in the BIMCO Supplytime charter party forms.

Depending on the language of the clause, the COVID-19 virus itself may not necessarily be considered a FM event. The FM landscape may change in light of the declaration of COVID-19 as a "pandemic" by the World Health Organization (WHO) and the ensuing actions taken by governmental entities to contain the spread of the virus, which have a trickle-down effect on a business's ability to perform its contractual obligations. Courts may view governmental action taken to combat the virus as the FM event as opposed to COVID-19.

While the interpretation of the impact of a pandemic on FM clauses may be a novel issue, there are limits to the reach of a FM clause. Courts have held that generalised economic hardship or increased expenses do not constitute a FM event.

Conclusion

It is key to review all FM clauses in contracts. Before triggering the clause, the non-performing party must read the language in the contract carefully. In the COVID-19 context, key language to look for would be references to "epidemics," "pandemics", "infectious diseases," "quarantines," or the catchall phrase of "any event beyond the reasonable control of the parties."

If a FM clause is applicable:

- make sure the event fits within the FM clause,
- remember to give proper notice of a FM event (if the contract requires it), and
- make reasonable efforts to avoid the loss, consider engaging with contractual partners to find amicable solutions to the disruptions caused by COVID-19.

FM scenarios are highly fact specific, and the application of a FM clause carries significant commercial impacts. In this highly fluid time, HFW is committed to assist our clients with the commercial and legal impact of COVID-19. For an English law FM perspective, click on the attached link for an article by HFW Partner Brian Perrott. https://www. hfw.com/Coronavirus-Can-it-be-a- Force-Majeure-event-Feb-2020 and our dedicated COVID-19 Hub https://www.hfw.com/Covid-19, designed to prepare you for what's next. The HFW global team will continue to monitor the legal and business implications and report on further developments.

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