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The Impact of COVID-19 (and the Global Response) on International Trade

By Elizabeth Farrell and Richard Swinburn*

This article discusses—clause by clause—a number of ways in which international commodities sale contracts are likely to be affected, directly or indirectly, by COVID-19.

The impact of the novel coronavirus (COVID-19) on all our lives—professional and personal—is changing day-by-day, if not hour-by-hour. We are in uncharted territory. In trying to anticipate the kinds of issues that may arise from the COVID-19 outbreak and from the global responses to it—political, legal and economic—we have drawn to an extent on experiences with other epidemics, and from the global financial crisis of 2008/2009.

PRIMARY THEMES

Any global shock tends to result in the following themes, though note that these are exceedingly high level, and the list is certainly not exhaustive:

- Ongoing performance of existing contracts, particularly in such volatile markets, becomes increasingly difficult. Frequently there is understandable uncertainty about whether/when/how to invoke contractual provisions of one kind or another which seek to discharge parties from their duties to perform or to apportion the cost of performing in a particular way.
- Those legal teams able quickly to identify common provisions running across their existing contracts are at an advantage. It is then much easier to help support commercial/trade execution/operations/finance teams to:
    - Locate and understand provisions which offer assistance;
    - Identify what the requirements are for any notices which need to be given—from a timing/form/content point of view;
    - Differentiate between types of contract (spot/term/financial/freight), and be alive to the fact that provisions in interrelated/theoretically "back-to-back" contracts may not in fact have the

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same requirements or offer the same protections; and

- Ensure that the various teams in your organization interact with each other even more closely than usual, in order to ensure that left hand and right hand do not inadvertently waive or even amend otherwise helpful rights.

- The initial operational difficulties being encountered in the performance of existing contracts will give way inevitably to greater risk of default and potential insolvency. It makes sense as early as possible to focus on exposures across different products/desks/geographies, analyzing in whichever way each organization (and its systems) is used to. There is no right or wrong way, whether:
  - By size and scale of contract or position by counterparty;
  - By the type of transactions, whether financial, derivatives, physical, long term, short term etc.;
  - By counter party type: financial institution, corporate (public or private, with credit rating or not), state or semi-state organization etc.; and/or
  - By geography and by reference to the spread of COVID-19.
- Having identified exposures, seeking to identify ways of categorizing the risk levels of those exposures and identifying what risk mitigants are available: contractual provisions/rights to seek performance assurance/ rights to seek credit support/availability of insurances etc.
- Having done that, and as mundane as it sounds, ensure that documents and information (including transaction documents) are identified, collated and stored in one place be that by counterparty or by size of exposure, so that precious time to analyze is not lost simply in trying to locate information.
- Ensure that a distinction is drawn between the approach to existing contracts and new ones. Structures, contracts and provisions in those contracts which might have seemed fit for purpose six months ago, might not be as fit for purpose in the current environment. Take as an example Force Majeure provisions. Force Majeure protection is traditionally there to protect the parties against the unforeseeable; something beyond either party's control. The relevant time for testing whether something was or was not foreseeable is the time of contracting. It will be much harder today to argue that an event related to COVID-19 and the responses to it is unforeseeable today than it was six months ago. Specific protections will therefore need to be built in if possible.

This article discusses—clause by clause—a number of ways in which international commodities sale contracts are likely to be affected, directly or indirectly, by COVID-19. Here we seek only to highlight the key issues for commodities sale contracts; the interpretation of the terms of any particular contract should be considered in light of the factual circumstances of each individual case. There is no one answer to any COVID-19 factual situation which might arise. No single clause can legislate for every eventuality associated with COVID-19.

We have focused on the position as a matter of English law, but have highlighted through footnotes some of the key areas in which the position might differ as a matter of U.S. federal or state law.

THE RELEVANCE OF ANY FORCE MAJEURE CLAUSE

The term "force majeure" has no established meaning in English law and force majeure clauses vary significantly between contracts. As general observations, however:

> In all cases, when determining whether COVID-19 could amount to a force majeure event, consider carefully the question of causation, i.e., whether COVID-19 is the direct cause of a party's failure to perform or delay in performance. For example, if a buyer is obliged to take delivery simply by unloading a cargo from a vessel, the fact that its factory has shut down due to COVID-19 and so it no longer requires the goods will not be considered to have affected that buyer's ability to perform its obligation to take delivery and so the buyer will not be able to rely on force majeure. Similarly, if a seller is required to load a cargo with an imprecise origin or from one of a number of ports, e.g., "East Coast USA," the fact that COVID-19 might lead to the closure of a single port would not be considered to have prevented the seller from loading a cargo from another East Coast USA port and so performing its contractual obligation.

A party to an existing contract who wants to rely on force majeure because of COVID-19 should check whether the force majeure clause talks in terms of an event that merely "hinders" as well as one that "prevents or delays" performance. Parties drafting new contracts will need to decide whether they wish to broaden the application of force majeure in this way.

It will be more difficult to argue that COVID-19 is a force majeure event if the force majeure clause in an existing contract states that the force majeure event must be "unforeseen" but that contract has been entered into after the COVID-19 outbreak (i.e., arguably, after the WHO declared a global health emergency on January 30 and, more clearly, after COVID-19 was designated a

pandemic by the WHO on March 11). Parties concluding contracts following the escalation of COVID-19 should therefore be particularly careful when declaring force majeure. Parties who are negotiating/drafting a contract from now on and want to legislate for the impact of COVID-19, should consider stating that an event can be force majeure "whether foreseeable or unforeseeable."

Force majeure clauses usually provide that they apply to circumstances "beyond the control of the relying party" (or similar). As COVID-19 becomes increasingly better understood, attempted reliance on force majeure clauses is likely increasingly to be met by arguments that the relying party could have taken steps to lessen the impact. Inserting the word "reasonable" before "control" in such a clause could make it easier for the relying party to assert that any steps it could take arguably would not be reasonable or proportionate.

Force majeure clauses generally specify named events that constitute force majeure followed by a catch-all provision intended to cover events beyond the parties' reasonable control. The list of named events might include:

- "Epidemic or pandemic." Short of a specific reference to COVID-19, "epidemic or pandemic" is the clearest form of words through which to try to ensure COVID-19 is treated as a force majeure event. However, we stress that there is no "one clause fits all" approach and a party hoping to rely on force majeure should consider in particular whether COVID-19 is in fact prevalent at the place at which performance is to take place.
- A generic reference to disease such as "a highly infectious or contagious disease that is seriously harmful to humans" or similar wording, which is generally likely to capture COVID-19 at present, although this will become more open to debate as COVID-19 is better understood and brought under greater control.
- A reference to action by governmental, local or public authorities. This is likely to capture, for example, a governmental or local authority order that work must stop at a production facility (named in the contract as the origin of the goods) or a port (named as the contractual loading port) due to COVID-19.
- A reference to a reduction or cessation of supplies from the seller's intended sources of supply (where such reduction or cessation is outside of the seller's control) can offer a seller greater protection. One frequently sees language like this in producers' standard terms.[1] These

[1] In the oil sector, see, for example, Section 65.2.1(e) of BP's General Terms & Conditions for Sales and Purchases of Crude Oil and Petroleum Products ("GTCs") (2015 edition).

types of clauses could capture situations where COVID-19 impacts the supply of a particular product allocated from a particular source by a seller for delivery against a particular contract.

Most force majeure clauses require notices to be served (and sometimes updated) that detail actual—or in some cases potential—force majeure impediments and their effect on performance. The notice requirements vary both as to the form and timing of the notice itself and whether any evidence needs to be provided at the same time. The requirements of the particular clause should always be complied with, although giving late or defective notice might, depending on the drafting and the factual circumstances, only result in a potential exposure to damages rather than preventing reliance on the suspension and/or termination consequences of the force majeure clause.

The remedies provided for in the force majeure clause must be considered carefully. A seller might wish to provide that:

- Only the seller (or only "the party affected by the force majeure event," which is likely in most cases to be the seller) can terminate the agreement and/or cancel the shipment (after a certain number of days/weeks);
- The seller has no positive obligation to try to source goods from anywhere other than its intended source of supply; and/or
- Where the force majeure event prevents it from performing some, but not all, contractual obligations, the seller has no obligation to pro-rate the supply of any available goods.

A buyer might wish to provide similar protection linked to its ability to lift goods or to import and use them at the facility it is buying to supply. All contractual clauses are designed to allocate risk. This is certainly the case with force majeure clauses, but the distinction in their case is that the parties are seeking to allocate risk for often unanticipated/unforeseeable events (though see above) beyond the parties' control.

In the current climate, and given the lack of understanding about the possible impact of COVID-19 on commerce, it is probably easier to negotiate a balanced/even-handed clause than it is one that favors only either the seller or the buyer.

FRUSTRATION

As the impact of COVID-19 expands, parties should consider whether it is possible to invoke the doctrine of frustration, especially in the absence of a force majeure clause or where the relevant contract states that "nothing in this

agreement shall limit the operation of the doctrine of frustration" (or words to that effect). If a contract is frustrated, the parties' contractual obligations will be discharged without liability.

However, the doctrine of frustration only arises when an event occurs that is both unexpected and beyond the control of the parties, and which renders performance physically or commercially impossible, or transforms the obligation to perform into a radically different obligation from that undertaken at the moment of entering into the contract. A contract is not frustrated merely because it is more expensive for either party to perform than was anticipated when contracting. As a general statement, frustration has historically been very difficult to establish as a matter of English law, particularly where a contract contains a force majeure clause.

ILLEGALITY

It is possible that as governments develop their responses to COVID-19, parties might raise arguments that performance of their obligations is illegal in the place of performance (e.g., as a result of an export or import prohibition) and so enforcement of their obligations is illegal as a matter of English law. However, as with the doctrine of frustration, illegality has historically been difficult to establish as a matter of English law.

OTHER KEY CONTRACT CLAUSES TO CONSIDER

COVID-19—and governments' responses to it—is likely increasingly to impact parties' ability to meet their obligations. Those obligations will be or could be spread across a wide range of clauses, some of which are dealt with below. As COVID-19 and the governmental response to it develop, we anticipate seeing the introduction of a wide variety of clauses that seek to deal specifically with COVID-19 (or perhaps, more broadly, infectious diseases) independently of any force majeure clause. Parties considering developing COVID-19-specific clauses should bear in mind the issues listed below as each represents an obligation under a sale contract that might be affected by COVID-19.

Origin of the Product/Loading Port

Broadly speaking, a seller should be as specific as possible about the origin of the products (i.e., the particular mine/refinery/factory) and the loading port in case it is necessary to rely on force majeure. If a seller's obligation is to sell product of a generic description and specification from a broadly defined origin or to load at one of a number of ports, it will be difficult for it to rely on force majeure in a situation where just one potential origin or loading port is affected by COVID-19; the buyer could argue that, even if the seller is prevented from performing using its originally intended source of supply/port, it will still be

able to buy in third party products or perhaps load from another port in order to satisfy its contractual delivery obligations. For the same reason, a buyer might wish to leave the description and specification and the origin of the product generic so that it can argue that its seller must source the product from an origin that is not impacted by COVID-19.

Ability to Source Supplies

A seller might wish to provide that where certain circumstances (e.g., government or local authority or port restrictions or quarantines, or shortage of personnel due to illness) prevent it from transporting goods to the port or loading them on board the vessel, it shall be excused from performance or granted additional time to perform.

Ability to Import/Export

Parties should consider whether to expressly allocate or exclude liability for an inability to export or import goods as a result of physical, governmental or legal restrictions resulting from COVID-19.

Vessel Nomination and Substitution

Free on board ("FOB") sellers and cost, insurance, and freight ("CIF")/cost and freight ("CFR") buyers should check (or consider) how their contracts deal with the rejection of vessels (both before and after nominations are initially accepted). Ideally, FOB sellers and CIF/CFR buyers will wish to state that they have discretion to reject vessels at any time before loading commences. That discretion might be absolute or apply in certain COVID-19-related circumstances, for example, where the vessel has called previously at ports in areas affected by COVID-19, where a crew member is unwell, where the vessel is quarantined or where free pratique has not been granted. FOB buyers and CIF/CFR sellers should ideally ensure that they have the ability to cancel voyage charters if such circumstances apply.

The parties should also consider whether they wish to require that the vessel-nominating party substitutes an equivalent vessel or whether the shipment can be cancelled (and by whom) if the originally nominated vessel is rejected. FOB sellers and CIF/CFR buyers should ensure that the costs of any substitution and any delay caused by that substitution are borne by the other party.

Vessel-Related Costs

New clauses might need to be introduced to deal with the allocation of costs in respect of the vessel arising as a result of COVID-19, including the cost of deviation, costs incurred at the loading and discharge ports (e.g., additional towage or pilotage costs due to a shortage of personnel), the costs of cleaning

and/or fumigating the vessel where there is illness among the crew and/or the cost of repatriating crew members who fall ill. Where there are no express provisions to the contrary, it is likely that additional costs relating to the vessel will fall to the party responsible for chartering the vessel.

Safe Port and Safe Berth

Parties should check any clauses that require a party to provide a safe berth and/or safe port. Generally, safe port and safe berth disputes focus on the physical characteristics of the port and berth. However, it is possible that COVID-19 might pose risks to the crew of a vessel, rendering a port or berth unsafe. If the vessel could not avoid exposure to such danger, that might lead to an argument that there has been a breach of an obligation to provide a safe port or safe berth although such an argument is likely to be very fact specific.

Alternative Loading/Discharge Ports

The party that charters the vessel might have a clause in its charterparty that provides expressly that charterers are responsible for nominating a new port if the owners refuse to take the vessel to the original port and also provides that, in the absence of such a nomination by charterers, owners can discharge the cargo at a safe port of their choice at the charterers' cost. Such provisions are included in the COVID-19 clauses proposed recently by Intertanko and BIMCO. It is controversial as to whether, in the absence of an express obligation under a voyage charterparty, a charterer is obliged to nominate an alternative safe port. A CIF/CFR seller might wish to provide in its sale contract:

- For shipment to and discharge at alternative ports at the buyer's cost; and
- That it is entitled to refuse to direct a vessel to undertake a voyage if the vessel would in so doing risk its or its crew's safety.

Notice of Readiness ("NOR")

A sale contract might state expressly that the vessel must tender valid NOR within a particular period, or refer to "laydays" or a "laycan," which will be interpreted (in a sale contract context) to mean a period within which the performing vessel must tender valid NOR.

One potential impact of COVID-19 is that vessels are likely to no longer be granted free pratique (i.e., clearance to enter port/berth upon assurance that the vessel is free of contagious diseases) as a mere formality in certain ports. If the crew do not pass health screening checks and/or are quarantined, it is likely that the vessel will not be granted free pratique. Contracts should be examined to check whether NOR can be tendered (and so a vessel considered to have arrived) without free pratique having been granted.

As a general proposition, if the contract states that NOR can only be tendered once the vessel is "in all respects ready to receive the goods" (or a similar formulation) then NOR cannot be validly tendered until free pratique is granted and the vessel is released from any quarantine. In such a case, the party responsible for chartering the vessel (e.g., the CIF seller or FOB buyer) could be in breach of contract if the vessel is delayed in tendering NOR beyond the arrival period, laydays or laycan, unless it can rely on the force majeure clause.

If, on the other hand, the contract refers only to NOR having to be tendered within a particular period (without qualification that the vessel must be ready to load and/or free pratique be granted), there is a good argument that NOR will be considered to have been validly tendered and that the vessel arrived for the purposes of any laydays/laycan when the vessel arrived on berth, even where the crew have not yet passed health screening checks.

Any party responsible for chartering a vessel could consider providing in its sale contract:

- That NOR can be tendered WIFPON (whether in free pratique or not) as well as WIPON (whether in port or not) and WIBON (whether in berth or not); and
- That a vessel that tenders NOR late due, directly or indirectly, to COVID-19 will not be considered in breach of any obligations as to time of arrival; and/or
- That any laydays/laycan should be extended where there is a delay caused, directly or indirectly, by COVID-19.

Shipment Periods

In addition to, or instead of, a loading window (sometimes referred to in the sale contract context by the terms "laycan" or "laydays"), most international sale contracts will specify a shipment period, i.e., the period within which a FOB or CIF/CFR seller is obliged, as a condition of the contract, to load the goods on board the vessel. A failure to load the goods within the contractual shipment period will usually give the buyer the opportunity to reject the documents and the goods. Similarly, the timing of the obligations of a FOB buyer to nominate and present a vessel that can load at the contractual rate by the end of the shipment period is usually given as a condition, meaning that a FOB seller can reject a vessel that arrives too late.

COVID-19 might prevent loading and/or vessel arrival within the shipment period for a number of reasons (e.g., port shutdown, governmental restrictions, vessel quarantine, stevedore, or pilot or towage shortages). Therefore, unless it

is clearly stated that performance of the shipment period obligations will be suspended under the force majeure clause, the parties should consider providing—outside of and in addition to the force majeure clause—that the shipment period will be extended where shipment and/or vessel arrival is delayed, directly or indirectly, by COVID-19 (or specific events).

Arrival Periods

"Hybrid" versions of a CIF contract might include, instead of or in addition to a shipment period, arrival dates. Given the increased risk that, as a result of COVID-19, there might be delays during the voyage (e.g., the crew becoming unwell leading to diversions), parties selling CIF with arrival dates should ideally state in their contract that the arrival dates are indicative only, given without guarantee. They might also consider stating that delays during the voyage are at the buyer's risk. CIF buyers who wish to have certainty about the vessel arrival dates will, in contrast, wish to ensure that the contract refers to "guaranteed" arrival dates, meaning that delays in the vessel's arrival at the discharge port will be at the seller's risk.

Similarly to the extension of shipment periods referred to above, those parties selling DAP/ex-ship or CIF with guaranteed arrival days should consider providing—outside of and in addition to the force majeure clause—that the arrival period will be extended where shipment and/or arrival at the discharge port is delayed, directly or indirectly, by COVID-19 (or specific events).

Laytime and Demurrage

Sale contracts typically provide that time will start to run for the calculation of laytime (and demurrage) within a certain number of hours after a vessel has tendered valid NOR (as to which, see above). Laytime and time on demurrage will not generally stop running as a result of a force majeure event unless the contract expressly provides so. A party responsible for chartering a vessel (e.g., a CIF seller or FOB buyer) might therefore wish to insert provisions in its contract clauses stating:

- That time will start to run when NOR has been tendered "WIFPON";
- That any time lost as a result, directly or indirectly, of COVID-19 (including but not limited to delays due to vessel quarantine, health screening, a lack of available crew or tugboats pilots, port closure, or governmental, local or port authority restrictions) will be counted or included in the calculation of laytime or time on demurrage; and
- That the other party's liability for laytime and demurrage will be absolute and not subject to qualification by the provisions of the force majeure clause.

Responsibility for the Risk of Deterioration of or Damage to (or by) the Cargo

Sellers of commodities that are likely to deteriorate or perhaps become dangerous if kept on board a vessel for longer than anticipated should ensure that the contract is clear as to which party bears the risk of deterioration of or damage to the cargo or caused by the cargo.

Price

Parties should be alive to and consider legislating for the impact that a COVID-19- related delay to loading or discharge might have upon pricing in the event that pricing is linked to NOR, the bill of lading date, the shipment period or laydays (and, in the case of the last two, what will happen to the price if the shipment period or laydays are extended).

Letters of Credit

Sellers should consider adding a clause to their sale contracts that provides that, if for any reason loading or discharge, as relevant, does not take place within the period referred to in the letter of credit, the buyer must obtain an amendment of the letter of credit or provide a new letter of credit in terms acceptable to the seller.[2] Note that if the buyer fails to provide the amendment, that failure simply provides the seller with a remedy in damages against the buyer. It does not secure the seller payment under the letter of credit or give it a remedy against the letter of credit issuing bank.

Discharge Against Bills of Lading or Letters of Indemnity

Bills of lading might be delayed due to COVID-19's impact on courier services. Therefore, parties might wish to review their policies regarding permitting discharge against letters of indemnity, mindful of the risks inherent in indemnities.

Events of Default

Events of default clauses should be reviewed (alongside the provisions listed above, particularly any force majeure clause) to understand the contractual impact of a failure to perform "because of COVID-19."

Insolvency

Given the financial strain that COVID-19 is already causing, the risk of counterparty insolvency is inevitably increasing. Insolvency clauses should be given close attention. Parties worried about their counterparties' financial status should consider seeking or updating local law advice as to whether the

[2] *See, e.g.*, Section 63.14.8 of the BP GTCs.

description of any insolvency event in their contract is sufficiently broad as to cover typical insolvency events in its counterparty's jurisdiction. Consideration ought to be given to including earlier insolvency "triggers," including material adverse change clauses and/or widening the rights given to one or other or both of the parties to request performance assurance or credit protection.

Hardship/Changed Circumstances/Regulations Clauses

Parties should consider whether any hardship or "changed circumstances"/"changed regulations" clauses might apply as a result of COVID-19. Such clauses usually allow one or both parties to request a renegotiation of the price, with a right of termination (for one or both parties) if a new price cannot be agreed within a particular period.[3]

Position Under Charterparties

One of the key risks to the party to a sale contract who is responsible for chartering a vessel is that of a mismatch between its position under the sale contract and under the charterparty. That exposure is likely to broaden as owners attempt to insert COVID-19 clauses (such as those published by Intertanko or BIMCO) or rely on existing liberties clauses or quarantine clauses that place the costs of diversions and delays due to COVID-19 upon charterers. It is seldom easy for a CIF seller or FOB buyer to extend charterparty rights given to owners by these (generally owner-friendly) clauses to the sale contract.

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[3] *See, e.g.*, Section 64 of the BP 2015 GTCs.