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CORONAVIRUS: BEWARE OPPORTUNISTIC CLAIMS OF FORCE MAJEURE

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In addition to its toll on human lives, the outbreak of the COVID-19 coronavirus is causing increasingly significant economic disruption across the world. As a result of this, a number of companies are considering their legal options, and we are advising on an increasing number of asserted force majeure claims in the IEN sector (including in countries that have not yet been materially affected by COVID-19 infections). It is likely that such claims will gain additional pace following the recent increase in the number of infections observed outside of China.

In our recent **publication**, we set out in more detail the key matters which companies should consider when determining whether to make a claim of force majeure or when responding to one.

Since then, a record number of "Force Majeure certificates" have been, and are continuing to be, issued by the China Council for the Promotion of International Trade in an effort to bolster contractual claims of force majeure being pursued by Chinese companies.

These certificates (and anything similar in respect of other jurisdictions) should be treated with caution: whilst they may equate to factual evidence that a specific event has arisen, they will not enable parties to disregard or override contractual rights and obligations under English law contracts. Whether a claim of force majeure can legitimately be made will depend on the precise terms of the contract between the parties (including, obviously, the contractual definition of "Force Majeure", if any), and not merely on any external assertions or certifications.

In practice, it can be the case that claims of force majeure which may at first appear very strong are, in fact, illegitimate under the terms of the relevant contract.The Court of Appeal's guidance as restated last year in the *Classic Maritime*[1] case provides a salutary reminder of this fact.

In *Classic Maritime* a charterer was required to effect a number of shipments of iron ore pellets from Brazil. Following a dam burst in November 2015, which rendered the shipment of iron ore pellets impossible, the charterer sought to rely on the force majeure provisions of its contract to avoid liability for its failure to effect the required shipments. However, as is often the case, the force majeure provisions of the contract required the charterer to demonstrate that the claimed event of force majeure (the dam burst) was the direct cause of its failure to perform its obligations under the contract. The judge at first instance concluded that the charterer had no intention of effecting the required shipments (because it was financially advantageous to the charterer to default under the contract). As a result, the Court of Appeal ruled that the dam collapse did not entitle the charterer to seek relief, even though it made performance of the contract impossible.

Whilst there are likely to be justifiable force majeure claims resulting from COVID-19, it is also the case that opportunistic parties may seek to bring unwarranted claims in an attempt to avoid adverse consequences for their own breaches of contract or to walk away from onerous contracts which they no longer wish to perform.

Therefore, parties seeking to assert a claim of force majeure, or in receipt of one, should carefully consider the requirements of their contracts: if, as is often the case, their contracts require force majeure events to be causative of a party's default for it to be entitled to relief, that party will need to prove it was "able and willing" to perform its contractual obligations but for the claimed event of force majeure (which will be particularly difficult to do where other factors have affected its performance of the contract), and may also need to evidence the steps it took to mitigate the impact of that force majeure event.

[1] [2019] EWCA Civ 1102