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FORCE MAJEURE REVISITED

August 28 2017 *Nau Newsletter* *M. Jagannath*

The Indonesian Coal Mining Association and the Singapore Chamber of Maritime Arbitration jointly conducted a seminar on 15th Aug 2017 at Jakarta focusing on Coal Mining and Trading. The seminar was very well attended with speakers / participants discussing on various topics including dispute resolution. One of the speakers briefly touched on "*Force Majeure*" in Indonesian law. In our earlier article "Frustration and *Force Majeure* in Liner Contracts" we had commented on *force majeure* based on "English Law". As we had not considered *force majeure* in civil law, we are writing this note to consider the effect on this basis.

1. We can broadly classify legal systems into two main types and which are as follows:
   a. Common Law: Common law develops through precedents i.e. decisions set by the senior courts and followed by junior courts till such time the senior court decides to overrule its earlier decision or the legislature enacts laws overruling the effect of earlier case laws. Common law jurisdictions include United Kingdom, Singapore, Malaysia, India, USA.
   b. Civil Law: Consists of jurisdictions which have an an all-inclusive system of written rules / codes (commercial, civil and criminal). Civil law has its roots in Roman law and more than 80 countries of the world, including Germany, France, Japan, Russia, Latin America, China, Taiwan and South Korea operate with this system. The courts in Civil System rely upon the detailed written legal codes rather than the previous judgements i.e. there is no binding system of precedent as is applicable in the Common Law system, although a senior courts judgement may be persuasive to a junior court.
2. *Force majeure* in Civil Law countries: The concept of *force majeure* (superior force) has its origins in Roman law. Under the name "*vis major*" or "*vis divina*", Roman law designated unforeseeable and irresistible events which excused a party of performance. There are three requirements which are as follows:
   a. The event must be external.
   b. The presence of an unforeseeable and an irresistible event (If a party could have foreseen the event at the time of contracting, they should have provided for it in the contract and in which case, this event would not be considered as a *force majeure* event).
   c. Irresistibility of the harm causing event (renders performance under the contract impossible and not merely onerous or burdensome).
3. A party in a civil law jurisdiction has the right to plead a *force majeure* event as of right. However, if parties have contemplated what constitutes a *force majeure* event and what its consequences may be, then the parties must consider the effect in the contract (as mentioned in 2 b above). There is therefore no requirement for incorporating a *force majeure* clause in contracts issued in civil law jurisdictions.
4. *Force Majeure* in common law countries: There is no similar concept of *Force Majeure* in common law countries although the defence of frustration has developed to ameliorate this gap. As mentioned in our earlier article, Frustration and *Force Majeure* in Liner Contracts, in order for a party to plead "*force majeure*", the contract must define what a *force majeure* event is.

5. Shipping and International Trade Contracts are between parties of various jurisdictions and who may be of different legal orders. In order to avoid uncertainty in the interpretation of contracts, they would generally provide for a governing law clause. The governing law clause is an explicit manifestation of the parties intent and therefore respected. The interpretation of the contract moves under the specified governing law, even though the matter may be heard by courts at another jurisdiction. However, there are two situations in which courts may not respect a governing law clause and which are as follows:
   a. When the chosen jurisdiction has no substantial relation to the parties.
   b. When applying the chosen law would violate public policy interests of another jurisdiction with material interests in the case.
6. Accordingly, if the contract provides for a civil law country (say for instance, Indonesia) to be the law of the contract, then Indonesian law would apply to interpret the contract. Parties would therefore be entitled to the defences available under Indonesian Law including events which could be considered *force majeure* to excuse their performance (which they may be unable to do under similar circumstances in a Common Law jurisdiction unless it falls within the ambit of the *force majeure* clause, if any).
7. Carriage Conventions: Invariably, Bills of Lading and / or Charterparties incorporate the Hague or Hague-Visby Rules to govern the contract of carriage, either by force of law or by incorporation into the contract.Art 4(2)(a) – (q) deal with the exclusions available to the carrier. The exclusions include:(d) *Act of God* and
   (q) *Any other cause arising without the actual fault or privity of the carrier, or without the actual fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.*As the Hague / Hague Visby Rules have provisions for *force majeure* events, it is submitted that the Courts (both in common and civil law jurisdictions) should hold parties to what they contemplated (as mentioned in 2 above). The application of the Hague / Hague Visby Rules as defined in the Rules is *from the time when the goods are loaded on to the time they are discharged from the ship* (Art 1 e). Hence, it is submitted that a party may still be able to raise *force majeure* defence, if applicable, outside this period. Examples of these may be failure of the carrier to release the cargo after discharge of the cargo, damage to the cargo, etc.
8. Given that the container liner companies provide services involving usage of both their own and chartered tonnage and / or purchased slots (which may be on "use" basis), there would be contracts with various parties such that situations may arise when back to back (underlying and overlying) contracts have different choice of law clauses. This may lead to a gaps i.e. a party in the overlying contract may be entitled to "*force majeure*" defence whereas the underlying party may not be entitled to with its counterpart. These gaps could be avoided by ensuring that the law of the contract (governing law clause) is similar in both the contracts. However, given that these contracts are generally boiler plate contracts, they may not be negotiable such that the gaps must be factored in the risk management process.
9. Conclusion:
   a. What is *force majeure* would depend on the choice of law together with the contractual provisions of the contract.
   b. When parties are involved in boiler plate contracts, there may be gaps due to the system of law being used as the choice of law.
   c. The mapping of risks under the risk management process should consider these risks and ameliorate it by considering appropriate insurance cover.

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