GARRIGUES

Transport and Shipping

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Legal challenges for shipping posed by COVID-19: force majeure and *rebus sic stantibus* doctrine

COVID-19 is particularly and adversely affecting shipping, in a similar way to events in many other industries. We examine what key legal issues need to be addressed by the shipping industry, the legislation approved on this subject in recent weeks, and whether force majeure and the *rebus sic stantibus* doctrine could potentially operate.

Carriage of goods by sea is considered an essential activity in the laws of Spain and of most of our neighboring countries, to ensure that transport services themselves operate adequately and to procure necessary supplies of goods and products, especially essential products (health and pharmaceutical supplies, protective equipment, food, energy, and others). Consequently, cargo transport services have not been legally restricted or temporarily halted, as has happened with non-essential activities.

Despite this, it is evident that COVID-19 is creating a terrible worldwide crisis that is inevitably affecting shipping. Obviously, if fewer goods are produced and sold as a result of the economic crisis, they are more difficult to finance, and as a result, fewer goods are being and will be carried, which affects freight generally under law of supply and demand.

And all of this is taking place in an international context in which COVID-19 is hugely hindering the normal operations of shipping and other related activities (other modes of transport such as air or land carriage, multi-modal transport, short-sea shipping, logistics, port operations, customs, cargo loading and unloading, passenger boarding and alighting, sales of the goods that are to be carried, payment methods, among others).

Passenger sea carriage (cruises and ferries mainly) has been affected by various legal prohibitions and restrictions on their normal operations, including, for example, the reduction imposed on minimum calls for modes of transport subject to public service obligations, or the requirement not to fill every passenger slot (fewer passengers allowed) on passenger ships to comply with existing social distancing rules for avoiding contagion among passengers and crew. Moreover, for various other reasons, operating cruise lines have almost disappeared in Spain and in a few of our neighboring countries, and the number of passengers on shipping services (ferries, above all) is falling sharply being confined, in practice, to essential travel mainly (health, work, studies, family, among others). The other reasons mentioned above include:

- Closures of some ports (quarantine, etc.) and shipping terminals (for cruises and passengers) or restrictions on their normal operations;
- Border closures, notably the Morocco border due to being particularly sensitive for Spanish maritime shipping (Annual Strait of Gibraltar Passage Operations, etc.).
- Restrictions by certain immigration authorities in relation to allowing the entry of the citizens of a few specific countries; and
- Suspension or restriction of a large part of the services habitually used (planes, hotels, etc.) for the connections by passengers and crews, especially for cruises.

Force majeure and *rebus sic stantibus* as possible legal remedies

All these factors are meaning that in relation to a few specific types of contracts (various types of charterparties, carriage under bills of lading, COAs, consignments, cargo handling, bunkering, provisioning, manning, shipbuilding, and, especially, insurance policies for all types of transport, etc.), some of the main players in the shipping industry (shipping companies, terminal operators, consignment agents, providers of bunkering services, forwarding agents, and others) are seeking to rely, as a possible legal remedy, on the existence of force majeure and on the so-called *rebus sic stantibus* doctrine, a creature of case law.

In fact, when faced with the described circumstances, in a few specific cases parties are seeking to rely on the existence of:

- Force majeure to try to be excused from performing contractual obligations as a result of supervening impossible performance caused by an unforeseeable and unavoidable event; and

- The so-called *rebus sic stantibus* case law doctrine to try to change contractual obligations because a completely extraordinary, unforeseeable and supervening alteration of circumstances has occurred since the contract was concluded.

This is having the effect that in some cases the various types of contracts signed by shipping industry players are being studied to try to clarify what has been defined, in each case, as force majeure, how frustration of the contract's purpose has been stipulated, for which risks each contracting party is liable or the potential types of compensation for breach, damages or delay covenanted between the contracting parties.

Moreover, where contracts have early termination clauses that may be applicable, they are similarly being analyzed to assess whether and in what cases parties can rely on them, whether they include any events other than those stipulated and the required procedure in each specific case. Similarly, in some scenarios the implications of events triggering impossibility or difficulty to perform contractual obligations are being assessed and studied.

In relation to all of these cases, a proper distinction needs to be made between force majeure and the *rebus sic stantibus* case law theory generally, and in particular, their potential scope, operation and effects for the shipping industry.

Force majeure generally

One of the key issues in relation to the contracts is a supervening impossibility to perform the parties' obligations due to the existence of an event of force majeure. The first thing needing to be examined is whether the contract contemplates that event. Even if it is not provided for in the contract, the Civil Code (article 1105) refers to this event by stating "*outside the cases expressly mentioned in the law, and those in which the obligation so states, nobody shall be liable for events that could not have been foreseen or that, if foreseen, were inevitable*". It will be necessary in every case to analyze the circumstances of each contract, identify the specific obligation or obligations that the party is seeking to be excused from performing due to force majeure, and assess whether force majeure exists in relation to the performance of that specific obligation. Force majeure due to Covid-19 cannot be discussed in abstract terms, instead it has to be viewed in connection with a specific contractual obligation. Moreover, force majeure cannot be attributable to the person owing the obligation and a causal link is required between the force majeure event that is sought to be relied on and the impossibility of performing the obligation.

Note that, even in a force majeure scenario, there is a duty to mitigate the damage because force majeure only operates after the company has used all the means at its disposal (in addition to alternative ones) for performing the stipulated obligations. The typical effect of force majeure is to relieve the party unable to perform its obligation of liability for compensation for the damage/loss caused to the other party. The parties may, however, stipulate the effects of force majeure in the contract in which case the terms of the contract apply, although the person seeking to be excused from performing an obligation due to force majeure cannot be in default with respect to the performance of that obligation.

Similarly, and for the purposes of analyzing the meaning of force majeure and its scope, it is essential to determine the law applicable to each contract, because the legal definition of force majeure and its legal implications may vary depending on the applicable law in each case.

In fact, unlike other Roman law countries (including Spain), where force majeure operates even if it is not mentioned in the applicable contracts because the concept is envisaged in general law (article 1105 of the Civil Code in Spain's case), in the United Kingdom and countries governed by common law, force majeure only operates if contracts specifically refer to it, although, in some cases, general references may be relied on (lockdowns, pandemics, epidemics, etc.), and Covid-19 does not have to be expressly mentioned. The effects of force majeure as an event outside the parties' control are determined on a case by case basis in common law countries. They may be temporary effects, including suspension (the obligation is suspended until the force majeure event ends), or extension (time periods for performing the obligation are extended while the force majeure event lasts), or lastly, termination of the contract is held frustrated. In any event, as we have already discussed, the parties concerned also have the obligation to mitigate the damage in common law countries.

Note that in shipping a broad range of contracts (charters, salvage, towing, insurance, consignment and others) expressly refer to English law and these contracts are largely standard forms which, with a few exceptions, are usually accepted as they are by the various shipping players. Moreover, almost every contract mentioned above has very detailed clauses on force majeure, its effects and other matters.

Rebus sic stantibus generally

Unlike in Germany, Italy and other countries, this concept is not defined in Spanish statutes and is a creature of case law. The *rebus sic stantibus* doctrine allows changes to contractual obligations if supervening circumstances affecting the basis of the business transaction in a contract upset the balance of the contract and for one of the parties performance becomes impossible, extremely costly or requires too much effort. The requirements are:

- The existence of a completely extraordinary alteration of circumstances when the contract is to be performed with respect to when the contract was concluded;

- Extremely disproportionate obligations for the contracting parties which upsets the balance between those obligations; and

- This must have occurred due to the appearance of supervening circumstances that are radically unexpected at the time the contract was concluded.

The typical effect of a court upholding the *rebus sic stantibus* case law doctrine is a fair rebalancing of the obligations established in the contract concerned, and if this is not possible, termination of the contract.Notwithstanding the aforesaid the parties may reach different agreements in this respect , as they have to negotiate in good faith.

The courts have until now applied this clause very cautiously and restrictively in Spain, although there have been varying trends. The specific characteristics of each case must also be looked at in this COVID-19 scenario to determine whether it is applicable, and if so with what scope.

Ad hoc and extraordinary legal provisions on the impact of COVID-19 on certain shipping and port matters

In view of the situation created by COVID-19, various legal provisions are being approved in Spain which are applicable during the state of emergency. Notably:

- The occupancy fee may be reduced by up to 60% for passenger station and terminal concessions, based on the sharp drop in passenger traffic. For all other concessions, it may be reduced by up to 20%, on a reasoned basis.

- Ship owners and shipping companies that have been hit hard by the COVID-19 crisis, with ships that have been forced to dock or anchor in a port as a result of an order by the competent authority may be exempted from the duty to pay that fee.

- Various reductions apply for ships with extended stays that have been rendered inactive (as in the case of cruise ships), as well as for ships that provide services, which are also affected, and those providing short-sea services. In the particular case of ships that provide regular passenger or roll-on/roll-off cargo services, they may qualify for reductions of 50% provided that they guarantee the continuity of their services.

- These exemptions and reductions in relation to port fees, defined in Royal Decree-Law 15/2020 adopting urgent additional measures to support the economy and employment, apply at public-interest ports (*puertos de interés general*). For other ports, the provisions adopted by the autonomous communities with powers over these matters will apply.

- There is a 70% reduction in passenger shipping services falling within the central government's powers regardless of whether they are subject to a public contract or public service obligations, which implies, in principle, that they would only have to comply with 30% of the minimum calls. This applies to shipping services between mainland Spain, Ceuta and Melilla, the Balearic Islands and the Canary Islands. For routes between islands falling within the powers of the Canary Island and Balearic Island governments, the provisions established by the respective autonomous community governments apply (for information on this subject, see Royal Decree 463/2020 declaring the state of emergency and its amendments).

- Extension of the periods of validity of the following instruments where they end during the state of emergency (for information on this subject, see Order TMA/258/2020 delivering provisions on administrative instruments and inspection activities of the shipping authorities):

    - Certificates, professional cards and certificates or proficiency or competence under the STCW Convention and Spanish legislation.

    - Certificates and documents required by the international instruments drawn up by the IMO, the ILO and the EU for the provision of ships' services.

- Suspension (with a few exceptions) of the conduct of scheduled inspections and recognition procedures on ships (see Order TMA/258/2020).

- Extension of the validity period of clearances covering a fixed time period for vessels (see Order TMA/258/2020).

- Express recognition of the right to free movement of ships' crew members so that they can be relieved and repatriated in view of the impossibility or difficulty of changing ships' crews for various reasons (port, border and hotel closures, travel restrictions, suspension of flights, etc.). This is how it appears in Order TMA 374/2020, although it had previously been defined for carriers in Royal Decree 463/2020 and Order TMA 277/2020.

In view of the ad hoc rules described above, it is questionable legally whether the parties concerned (ship owners, shipping companies, terminal operators, among others) are allowed to go further by bringing civil action to seek to rely on force majeure and *rebus sic stantibus* in Spain, because this issue is unresolved legally.

Lastly, it needs to be mentioned, generally, that other national and international rules already exist, which, for example, allow the shipping company/carrier, in some cases, to be relieved of liability for not delivering the goods or delivering fully or partially damaged cargo or delivering cargo with a delay on the ground of force majeure, which could potentially apply to COVID-19 (see letters (d), (g) and (h) of article 4.2 of the Hague-Visby Rules, and Maritime Shipping Law 14/2014 which expressly refers to those rules).

Potential force majeure and *rebus sic stantibus* scenarios in shipping

In principle, parties can rely on force majeure and the *rebus sic stantibus* case law doctrine in a few specific cases. Among others, depending on the particular circumstances of each case (contracts -the terms expressly stipulated in charter parties are very important-, applicable law, among others), and without limiting any agreements that the parties may reach on the matter, the general scenarios potentially arising in this respect could be:

- Deviation of vessels or places of refuge for them at ports/berths that were not originally scheduled due to being unable anchor/operate at the planned ports/births because they are no longer considered safe.
- Unloading and leaving carried goods at ports or terminals that were not originally scheduled for the reasons mentioned in the preceding paragraph.
- Off-hire.
- Demurrage and delays.
- Breach of the minimum safe manning levels to ensure safe operation due to the inability to relieve any crew member falling ill with COVID-19 (which could also result in the ship's crew having to isolate), together with other potential infringements of maritime safety rules, although the mandatory provisions in public law will also apply.
- Prolonging seafarers' enrolment periods beyond the initially scheduled length (subject to the ILO's Maritime Labour Convention -MLC-, 2006, basically, applicable collective labor agreement and employment agreement) due to being prevented from changing ships' crews for various reasons (port, border, or hotel closures, travel restrictions, suspension of flights, etc.). Any prolongation of enrolment periods will also involve the special compensation (economic and others) to which seafarers are entitled in each particular case (ship owner company, law and applicable collective labor agreement, etc.).
- Delays in carriage of goods by sea caused by an earlier delay in the handing over or delivery of the cargo that the ships are going to carry, as a result of various reasons (stock shortages in production, supply of spare parts, logistics, among others).
- Suspended, stalled or delayed shipbuilding operations and off-shore projects in progress.

- Revision of the terms and conditions (amounts/prices mainly) in various shipping agreements such as:
  - Hires and charters arranged in the various contracts for hiring, chartering, carriage under bills of lading, COAs, among others;
  - Insurance premiums (hull/machinery and cargo) and the membership fees/contributions payable to P&I Clubs;
  - Bunkering of ships' various fuels; and
  - Cargo handling (loading, unloading, stowage, demurrage, horizontal movements, etc.).

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Garrigues, a multidisciplinary team of specialists facing COVID-19

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