CORONA: WHO WILL COMPENSATE FOR THE LOSS? (CARRIAGE BY SEA)

On the 30th of January 2020 the Director General of the World Health Organization declared the break out of the Corona virus (COVID-19) as a PUBLIC HEALTH EMERGENCY OF INTERNATIONAL CONCERN. A summary of the recommendations/directives directed to all countries of the world as to measures to reduce the risk of infection to persons, the prevention of transmission of the virus and for international co-operation (primarily by transmitting information).

Fourty days have elapsed and hundreds of thousands tests have taken place and on 12 March, 2020 the Director General of WHO issued a press release that COVID-19 can be described as a Pandemic, the announcement, as explained to the press, was issued for two reasons; one being that 125,000 infections had been reported and that 118 countries had been affected and had reported a large increase (excluding China) during the last two weeks, the other reason being that despite previous warnings, there were countries that were not attending to the matter with the necessary political commitment required in order to attend to the threat.

On hindsight, the announcement and the explanation given, appear to be bordering on naivety.

In the framework of the above press release, the Director General stated that each country would have to find the balance between protecting health, preventing economic and social decline and the protection of civic rights. In order to preserve life, it was necessary to prevent transmission – which means to detect to the maximum extent possible instances of infection and to isolate those infected and those who had been in contact with them.

At the same time, on 2 February 2020, Israel promulgated an emergency order, "The Public Health Order" ("The New Corona" Order) (Home Isolation Instructions) under which a person returning from abroad during the past 14 days preceding his return has to enter into isolation. and further instructions were issued including those precluding gatherings exceeding 100 participants.

On 15 March 2020, the Ministry of Health, prohibited all gatherings in excess of 10 participants, the closing of commercial enterprises, places of entertainment and of various other enterprises, on the need to put in place arrangements to enable working from home and distancing of 2 meters at work places and of the closure of all educational institutions. After a further week further regulation were issued (The New Corona – Limitation of Activities) Regulations, 18 march 2020. It is not unlikely that the limitations and preventative measures will be further widened to include also limitations of movements and work activity. It is more than likely that the limitations and restrictions under the Regulations will be increased by administrative orders further limiting movement and work activity and accordingly on 18 march 2020 the Minister of Transport signed an executive order – "Port Regulations" (Safety of Navigation) extending the period for renewal of Navigation Licenses for a period until 30 days after 19 April.

The picture which emerges until now, both on a national and international level is "isolation", "isolation" "isolation" and limitations on transport and traffic, and resulting therefrom, a general slow-down in economic activity including international trade and carriage by sea. The two main features of the aforegoing, being an absence of economic activity and an organizational framework to comply with purchases or supplies including a "lock down" of ships or cargo in ports.

In relation to the limitations stated above, the Israel Contracts Law cause 18 (Remedies For Breach Of Contract) provides that a breach of contract resulting from a situation which the

party in breach did not know of in advance and could not prevent and the performance of the contract is not possible or would result in a substantial change from what was agreed between the parties, then in these events, the party in breach will not be subject to enforcement or liable for damages as a result of the breach.

On the other hand, as discussed by us in our article "Force Majeure and The Division Of Risks" ["Cargo", Edition no. 218], English Law shows a more limited approach in recognizing exemptions.

For example, when a ship left port because of an impending hurricane, fearing that if it did not leave, there would not be an anchorage space for it outside the port, or when a cargo of soya intended for loading onto a barge was damaged as a result of a hurricane these instances were not regarded as Force Majeure circumstances under English Law as the hurricane itself did not directly affect the vessels leaving port, but rather the "fear" of losing an anchorage spot, and in the second above example, as the cargo of soya was not specifically defined, but was described generally as "soya", and the damaged soya was not specifically defined or described the contract.

In another matter concerning damage to a mine intended for the supply of lead billets which could not be supplied following the collapse of a dam connected to the mine, the supplier was not exempted from liability because the supplier could not prove that the collapse of the dam did not prevent the supplier from performing the obligation to supply, and the refusal of an alternative mine to supply the supplier could not be regarded as the reason for the non-supply .

In the specific context of closure of ports and the "holding up" of ships and cargoes, Article IV of the Hague-Visby Rules, refer to the carrier's exemptions and immunities, for example "any other cause arising without the fault or privity of the carrier or fault or neglect of the agents or servants of the carrier" or "arrest or restraint of princes" or "quarantine restrictions."

The above provisions encompass government instructions, preventing the export or import of goods, quarantine, embargoes, naval blockades and boycott of ships. For example, in 1915 a ship sailed from Mombasa which had been declared as a "plague" area – to Naples where it loaded a cargo of lemons destined for London. At Marseille the cargo was fumigated with Sulphur by order of the French Authorities as a result of which the cargo was damaged. The Court held that the damage was caused by "Restraint of Princes." In 1872, it was held that the captain is entitled not to enter an area of blockade and detention and if a result the ship is delayed and the voyage extended (resulting in cargo damage) such damage is "covered" by the exemption available to the carrier (Carver, "Carriage By Sea").

Accordingly, cargo owners whose cargoes are delayed as a result of government directives which prevent the discharge of the cargo or which cause shipowners to change the routes of the voyage in order to avoid the closure of the intended discharge port will not be entitled to compensation from the

shipowners for damage caused to the cargo. This situation is especially relevant to cargoes which are subject to deterioration and their commercial value is depreciated as a consequence of a delay in discharge and delivery. With that, however instances of government closures of ports or navigation routes, referred to in insurance policies as "restraint and detainments of all kings" (being the wording appearing in the schedule to the English Marine Insurance Act, 1906) is a circumstance capable of being insured against in a Marine Insurance policy.

For example, in an English case of 1903 (Miller vs. Law accident) it was decided that a shipment of cattle from England to Buenos Aires which was refused discharge after an inspection by the local authorities revealed that they had been infected by a contagious disease during the voyage – was held by the court to be a "restraint" giving the cargo owners the right to be compensated by the insurers for the expenses of carriage to another destination and the discharge of the cargo there (Carver, as above).

Although a similar situation has not yet come before the Israel Courts, it appears that maritime law would recognize the difference between the liability of carriers by sea and insurers.

Not every circumstance preventing the performance of the contract will be recognized as "Force Majeure" under English Law. However, there are numerous circumstances relating to carriage by sea which by law do not attract the liability of the "carrier" in carriage by sea.

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