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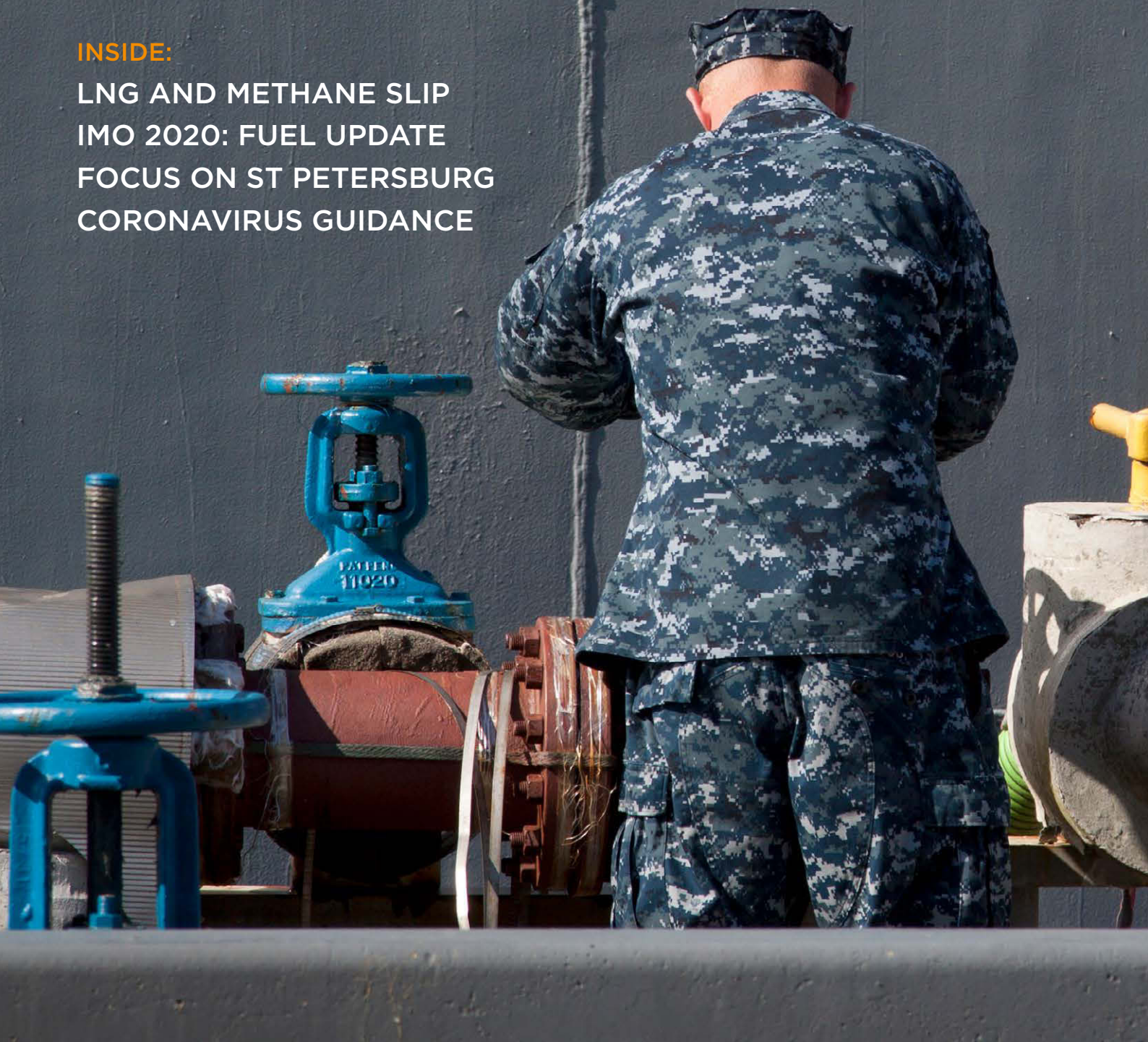

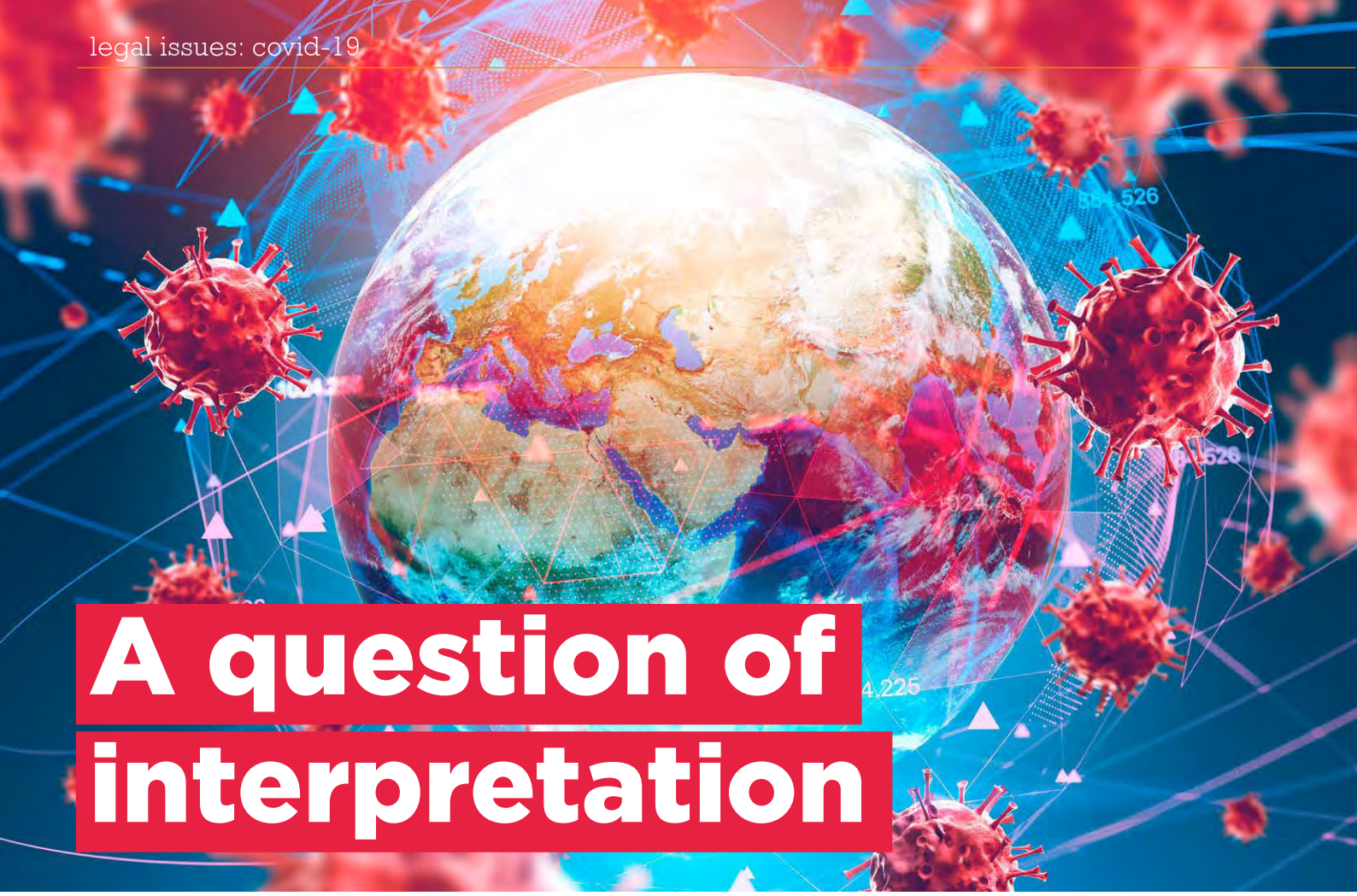

A question of interpretation

The coronavirus outbreak is making it increasingly difficult for companies to fulfil their contractual obligations. As such, **Alison Weal** and **James Turner** of Winston & Strawn London consider the use, scope and application of *force majeure* clauses in shipping contracts

Alison Weal

English law does not define the concept of *force majeure* either in statute or in case law and it will not imply the concept into a contract. Therefore, in order for COVID-19 to be considered a force majeure event under an English law shipping contract, there must be a force majeure clause present in the contract itself.

Assuming such a clause has been included in a contract, whether or not COVID-19 will fall under its remit will depend on a number of matters. Firstly, COVID-19 will need to be included as one of the *force majeure* events in that contract, either specifically or in a broader catch-all manner. A specific reference to an epidemic or pandemic will almost certainly be sufficient on the basis that on 11 March 2020 the World Health Organization declared COVID-19 to be a pandemic.

Additional to the outbreak of the virus itself, the government actions since the virus started sweeping the world, such as lockdowns, quarantines and travel restrictions may, subject to the drafting of the *force majeure* clause in question, also be considered *force majeure* events. Often clauses will set out 'governmental actions or omissions' in the list of *force majeure* events, and so lockdown measures may also constitute *force majeure* events.

If it is clear that either COVID-19 itself or any related circumstances may be considered as *force majeure* events for the purposes of the relevant clause (whether specifically or defined more broadly), consideration then needs to be given to how the contractual obligations are affected. Again, the wording of the clause itself is relevant. Clauses will often use words such as 'hinder', 'delay' or 'render impossible to perform' and the relevant circumstances will need to be scrutinised

very carefully to assess whether the obligations have been affected in this way. Merely making obligations more difficult or expensive to perform will likely not be sufficient.

Following on from this, the party seeking to rely on the *force majeure* clause must then establish that its inability to perform the contract was caused by the claimed *force majeure* event. This is likely to be the area that invokes the most debate over the coming months and years to come. Did the outbreak of the virus itself cause the inability to perform, or was it the later governmental restrictions and general economic downturn? The *force majeure* event must be the sole cause and so if, for example, a company was in any event experiencing general financial difficulties resulting in inability to pay, or had not received relevant permits required to perform the obligations, the existence of the *force majeure* event in addition to those other circumstances will likely not be sufficient for invoking the *force majeure* clause.

COVID-19 CLAUSES IN CONTRACTS

As was the case after previous outbreaks such as SARS and Ebola, parties entering into new contracts such as charterparties are considering the inclusion of specific COVID-19 clauses, aimed at dealing with some of the issues that may arise out of the crisis, including whether or not a vessel can call into port where there may be a risk of exposure to the virus and how to deal with the continuous assessment of the risk upon approach to, and stay in, port.

INTERTANKO has published its form of COVID-19 clause, and BIMCO already has its usual form of infectious and contagious diseases clause that can be utilised.

Under the INTERTANKO clause, the parties specifically agree that '*the outbreak of Coronavirus virus shall not be considered as force majeure or as a frustrating event of the charterparty*'. Intertanko has provided guidance to the effect that the issues surrounding whether an event can be classed as a *force majeure* or frustration event give rise to much debate (as discussed elsewhere in this article), and so to avoid such discussion and provide certainty as to the position, the parties agree that the outbreak of the virus is not a *force majeure* event. The following points can be noted from this:

- If the parties wish to include COVID-19 or related governmental actions as a *force majeure* event and are using the INTERTANKO Clause in their English law governed charterparties, not only must a specific *force majeure* clause be included as per the discussion above, but also, paragraph 4 of the INTERTANKO Clause must not be included.
- Does paragraph 4 of the INTERTANKO Clause go far enough in removing any debate as to whether a *force majeure* event would exist? It refers solely to '*the outbreak of the Coronavirus virus*' as not constituting a *force majeure* event. However, as discussed above, it may be the case that the actions of the relevant governments in light of COVID-19, such as quarantines, travel restrictions and lockdowns, rather than the virus itself, are the relevant events for the purposes of invoking the *force majeure* clause, and yet the INTERTANKO Clause arguably does not extend this far.

> 'Additional to the outbreak of the virus itself, the government actions since the virus started sweeping the world, such as lockdowns, quarantines and travel restrictions may, subject to the drafting of the *force majeure* clause in question, also be considered *force majeure* events'

WHAT IF THERE IS NO *FORCE MAJEURE* CLAUSE IN THE CONTRACT?

As discussed above, in the event that an English law contract does not contain a *force majeure* clause, the concept will not be implied into the contract and *force majeure* will not be able to be invoked.

Instead, a party may seek to rely on the English law doctrine of frustration of contracts which allows a contract to be discharged when an event or circumstance arises after the formation of a contract that renders its performance physically or commercially impossible or transforms the obligation to perform into a radically different obligation than that to which the party originally agreed. However, there is a very high threshold level in establishing frustration and it is unlikely that the courts would hold that the performance of many shipping contracts would be frustrated as a result of COVID-19.

Another potential alternative is a claim under a hardship clause / change of circumstances clause, which allows a party to renegotiate or terminate a contract as a result of a change in circumstances which gives rise to an economic hardship. However, these clauses are less frequently seen in English law shipping contracts and, where they are used, they will need to have been drafted in a sufficiently certain manner given the general principle under English law that an agreement to agree is not enforceable. Careful drafting must have been used in order to delineate the events that would oblige the parties to renegotiate the contract and/or give a right to terminate the contract. The clause would also need to contain clear guidance on how the renegotiated terms are to be objectively assessed.

The COVID-19 crisis has certainly given rise to many queries as to whether concepts such as *force majeure* and frustration can be used in connection with the inability of parties to perform their contractual obligations, and we expect to see many further such queries arising as the crisis continues.

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