

## Coronavirus outbreak: how to deal with its potential impacts on business contracts in Asia?

### A comparative analysis in four Asian countries

The recent outbreak of 2019-nCoV (coronavirus), declared a Public Health Emergency of International Concern (PHEIC) by the World Health Organization on 30 January 2020, has had, and is expected to have for months, significant impact on global operations. The outbreak but also the measures taken by several governments to contain it result, or may result, in business disruptions in Asia and globally.

What would be the legal implications of such disruptions (especially if the execution of a contract is rendered commercially impractical or impossible) and how to deal with them?

#### ■ Could an affected party rely on a force majeure clause?

Most of the commercial contracts contain a force majeure clause. Although force majeure provisions vary depending on the jurisdictions (civil law countries typically have a specific definition of force majeure in law) and the contractual definition itself, a force majeure clause generally provides for what happens in the event of specified event or events, generally exempting the contracting parties from fulfilling their contractual obligations when performance is rendered impossible or commercially impractical for causes that could not be anticipated and/or are beyond their control.

Would the outbreak of coronavirus be deemed a force majeure event?

There is no straight answer. As mentioned, the concept of force majeure will differ across jurisdictions and contracts. As such, parties need

to carefully review their contracts to assess the existence of a force majeure clause, which events would constitute a force majeure event under applicable law or the contract and the potential consequences of not performing the contract by reason of the coronavirus.

Overview of the situation in four major Asian countries:

#### ■ Force majeure in the People's Republic of China

The concept of force majeure in the PRC is defined both in Article 153 of the "General Principles of the Civil Law of the PRC" and in Article 117 of the "Contract Law of the PRC" as a situation which on an objective view, is unforeseeable, unavoidable and is not able to be overcome.

Where one of the parties to a contract is unable to perform the contract due to a force majeure event, the said party shall immediately notify the other party in order to reduce the potential losses sustained by the other party, and the said party shall also provide evidence of the force majeure event within a reasonable time (Article 118 of the Contract Law of the PRC).

According to the relevant laws, regulations and interpretation of the Supreme People's Court, the legal consequences of force majeure events include mainly the following:

- claim to modify the contract;
- claim to delay the performance of part of all the obligations of the Contract;
- claim to terminate the contract (for example, if the objectives can not be realised anymore) and be exempt of any liability.

Would the outbreak of coronavirus be deemed a force majeure event in the PRC?

If the specific circumstances of epidemic diseases have been included in the force majeure clause of the commercial contract, the situation could easily be identified as force majeure. On the contrary, a case by case analysis should be conducted.

From a legal perspective, the novel coronavirus outbreak seems similar to the Severe Acute Respiratory Syndromes (SARS) outbreak in 2003. The Supreme People's Court has confirmed in its "Notice on Handling the Trial and Enforcement of People's Courts during the Prevention and Control of SARS" (published on 11th June 2002) that SARS outbreak shall be dealt with the principle of fairness as stipulated in article 5 of the Contract Law of the PRC and handled properly as a force majeure event pursuant to articles 117 and 118 of the same law.

In conclusion, it seems by reference of the SARS practice, that depending of the duration of the epidemic duration, the contents of the national regulations and local orders and circulars and the detailed provisions of each contract, the coronavirus outbreak may be judged in China as a force majeure event.

#### ■ Force majeure in Indonesia

The concept of force majeure is prescribed under Indonesian law and is therefore applicable even if the parties did not set out a force majeure clause in the contract (save in some specific sectors where the law deems a force majeure clause to be a mandatory provision).

The provisions in Indonesian law regarding force majeure are set out in articles 1244 and 1245 of the Indonesian Civil Code (ICC) and refers to a performance that has become impossible because of an unforeseeable event that is not imputable to the affecting party. According to this definition, there are three elements for force majeure under the ICC:

- the existence of unforeseen events;
- the affecting party shall not have caused such event; and
- the good faith of the affecting party.

Relying on the principal of good faith, Indonesian law expects the party responsible for the non performance to notify the other party about such an event and its consequences on the contract.

Parties to a contract are however entitled to design the force majeure clause by setting out certain circumstances that can be deemed a force majeure event, although in such a case, it is important that the parties consider the relevant regulatory requirements (industry-specific or not) when drafting such a clause to ensure it complies with Indonesian law.

Would the outbreak of coronavirus be deemed a force majeure event in Indonesia?

If the contract sets out a valid force majeure clause, whether or not the coronavirus could be deemed a force majeure event will depend on the terms of the clause read with any applicable regulatory requirement. In the absence of clause, the ICC would apply and the courts would need to interpret whether circumstances in case constitute a force majeure event or not. Nowadays Indonesian courts tend to adopt a wider view of the implementation of force majeure in light of the increasingly prevalent concept of subjective force majeure (which is closer to difficulty to perform than impossibility).

If circumstances are deemed a force majeure event, the contract will be discharged.

#### ■ The Singapore position

The concept of force majeure does not exist per se in Singapore law. As such, save specific contractual provisions, Singapore law will not by default protect a party from liability due to events beyond their control (except in case of frustration discussed below).

As a consequence, in a contract governed by the laws of Singapore, force majeure can only be invoked if it is a contractual right agreed by the parties and its precise meaning and effect will depend on the specific wording of the clause and its interpretation.

*'The most important principle with respect to force majeure clause entails, simultaneously, a rather specific factual inquiry: the precise construction of the clause is paramount as it would define the precise scope and ambit of the clause itself'.*(i)

Parties should therefore consider the following:

- Does the contract contain a force majeure clause?
- Is the outbreak of coronavirus a force majeure event under the clause?
- Is the affecting party subject to any obligation such as a duty to mitigate?
- Does the clause include any other provision to be complied with?
- What will be the impact of invoking such a clause compared to its alternative(s), if any?

But what if a contract does not contain a force majeure clause?

A party to a contract governed by the laws of Singapore may be able to rely on the doctrine of frustration if the supervening event is unforeseeable and unexpected. *'A contract is considered frustrated when a supervening event (which has not been expressly provided for in the contract) takes place, the consequence of which*

*is that the natures of the parties' obligations is so fundamentally or radically altered that the contract can no longer justly be said to be the same as that which was originally entered into by the parties'.*(ii)

When frustration applies, the contract will automatically come to an end and the parties will be excused for further performance. However the standard to rely on the doctrine of frustration is usually much higher than force majeure clauses as it requires the nature of the obligations to be fundamentally or radically altered.

#### ■ Force majeure in Vietnam

The Vietnamese Civil Code (Article 161.1) defines force majeure as an event *'which occurs objectively and unpredictably and cannot be overcome though all possible necessary and admissible measures have been taken'.*

According to the Commercial Law 2005, consequences of a force majeure event will be as follows:

- the party suffering the force majeure event shall be exempted from liabilities and obligations owed to the other party (Article 294.1.b), and
- the parties may agree to extend the time limit for performing their respective contractual obligations. If they do not or cannot agree, that time limit shall be extended for the duration of the force majeure event plus a reasonable time not exceeding five months for a contract with a performance period of less than 12 months from the date of execution, or eight months if the performance period is more than 12 months. After those time limits, parties are free to refuse performing the contract without any consequence (Article 296).



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The party suffering the force majeure event shall notify the other party and bear the burden of evidencing the *force majeure* event.

outbreak could trigger force majeure in case of non performance of an obligation as well as its effects and consequences.

Would the outbreak of coronavirus be deemed a force majeure event in Vietnam?

Vietnamese courts tend to have a wide interpretation of what an event of force majeure is as long as it is objective, as for naturally occurring events, and to not demand a lot from the suffering party about the measures taken to preserve itself from consequences of such event.

As such, the coronavirus pandemic could be admitted as a force majeure event. However, it should be appreciated case by case.

Furthermore, parties enjoy contractual freedom in Vietnam as long as the contract does not violate the law (Civil Code, Article 4).

So, to avoid uncertainty about whether an event would be qualified as a force majeure event, it is recommended that the contract provides for a exhaustive list of events (such as epidemic) that would constitute cases of liability exemption even if not qualified as a force majeure event, as permitted by Article 294.1 of the Commercial Law 2005.

## ■ Conclusion

Force majeure clauses are meant to deal with situations that are beyond the control of one or both of the parties as well as situations that are unforeseen and which renders the performance of the agreement either impossible or radically different from that which had been contemplated.

In the wake of the coronavirus outbreak and its potential impact on business, parties should initiate review of their contracts to assess the applicable force majeure provisions, if any, whether such

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(i) RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and another appeal [2007] 4 SLR (R) 413

(ii) Glahe International Expo AG v ACS Computer Pte Ltd and another appeal [1999] 1 SLR(R) 945