

# CHANDLER MHM

## Newsletter

### COVID 19 - understanding the applicability of force majeure in Thailand

In the wake of the unprecedented impacts being felt around the world in response to the outbreak of the COVID-19 virus, businesses have been left scrambling to assess the consequences of the pandemic on their operations. One issue that needs to be well-understood is the applicability of force majeure to each business' particular circumstances. Many are now realizing that force majeure is not a "one-size fits all" concept, and understanding its relevance requires a nuanced understanding of the specific facts and the governing legal system.

Broadly speaking, the premise of force majeure is that a contracting party may be excused from performing its obligations if it is prevented from doing so due to an exceptional event beyond its control. The source of this obligation can either be based in law (depending on the jurisdiction) or by contract. Thailand has codified the principle, though many jurisdictions have no statutory concept of force majeure in their legal systems.

#### Statutory provisions in Thailand

In Thailand, the doctrine of force majeure is understood to include the following key elements regarding the event in question:

- the event and its consequences must not be preventable by the affected party;
- it is unforeseeable;
- it is not caused by the affected party; and
- it permanently renders the performance impossible.

The concept of force majeure is codified at section 8 of the Civil and Commercial Code ("CCC"):

*"Force majeure"* denotes any event the happening or pernicious results of which could not be prevented even though a person against to whom it happened or threatened to happen were to take such appropriate care as might be expected from him in his situation."

In addition to section 8, section 219 of the CCC also outlines the consequences where performance is impossible:

"[1] The debtor is relieved from his obligation to perform if the performance becomes impossible in consequence of a circumstance, for which he is not responsible, occurring after the creation of the obligation. [2] If the debtor, after the creation of the obligation, becomes unable to perform, it is equivalent to a circumstance rendering the performance impossible."

Thai courts, like those in many other jurisdictions, tend to read these requirements fairly narrowly. The courts have interpreted "preventability" and "foreseeability" in strict terms; for instance, seasonal flooding, in an area where there is regular, annual high tide (Supreme Court Decision No. 1194/2531) and a general economic downturn (Supreme Court Decisions No. 5564/2551 and 842-844/2553) were rejected as qualifying as force majeure in the context of previous disputes. It is worth noting that in the two latter cases, the "1997 Asian Financial Crisis" (aka the "Tom Yum Kung Crisis") was cited as force majeure. But the court rejected such claim on the ground that more caution could have been exercised to avert the disaster. Additionally, the economic meltdown and its impacts were foreseeable.

#### Key Contacts



David Beckstead  
TEL + 66-2-009-5000 Ext. 3112  
[david.b@mhm-global.com](mailto:david.b@mhm-global.com)



Kiratika Poonsombudlert  
TEL + 66-2-009-5000 Ext. 3321  
[kiratika.p@mhm-global.com](mailto:kiratika.p@mhm-global.com)

#### CHANDLER MHM

Chandler MHM Limited  
36th Floor, Sathorn Square  
Office Tower  
98 North Sathorn Road  
Silom, Bangrak, Bangkok 10500  
Thailand  
[www.chandlermhm.com](http://www.chandlermhm.com)

## Contractual clauses addressing force majeure

It is common practice for parties to sophisticated commercial agreements to include explicit provisions addressing force majeure. It is not always clear whether these provisions are intended to replace the statutory provisions under the CCC, or whether they act as an overlapping remedy in addition to the statutory provisions.

Generally speaking, definitions of force majeure events can be divided into two broad categories: closed-list definitions, and open-ended definitions. A closed-list definition will explicitly indicate circumstances which qualify (e.g. "Force Majeure means natural disasters, wars, Acts of God, etc."), whereas an open-ended definition will provide the general elements to be satisfied for the event in question to qualify (e.g. "Force majeure means an unforeseeable event or circumstance which is beyond the reasonable control of the affected party and prevents that party from performing its obligations under this Agreement.").

The initial threshold question, therefore, is whether the event in question qualifies under the contractual definition of "force majeure". Obviously, this requires a case-by-case analysis of the contractual language and the relevant facts in question. It is important to read the language strictly and carefully in order to render the appropriate assessment. It is also important to have a clear understanding of what particular event is apparently rendering performance impossible. What is the event or circumstance? What obligations, if any, cannot be performed as a direct consequence of that event? Have any other events or circumstances caused performance to be hindered? Is performance impossible, or merely impractical?

The language of the contract will also usually include provisions relating to applicable relief in the event of force majeure. This will generally involve a mutual suspension of obligations, up to a specified number of days. A key point to confirm is which party will bear the costs for the force majeure event. In many contracts, the parties are responsible for their own costs. In other contracts, however, one party may be entitled to claim its costs as a consequence of the force majeure event.

The contract will typically allow for either party to terminate the agreement if the event of force majeure is continuing after a set number of days.

## COVID-19 and Force Majeure

There are many opinions circulating as to whether COVID-19 constitutes an event of force majeure; this line of reasoning may be somewhat flawed. An event can only constitute force majeure if it meets the requisite definition and it prevents a party from performing an obligation. COVID-19 (and in particular, the governmental action in response thereto) may constitute force majeure in certain sectors (e.g. travel, tourism, etc.) while having less of a negative impact on other industries (e.g. retail food, web-based services, etc.). It may be dangerous to assume, therefore, that COVID-19 on its own has passed a threshold of now qualifying as a force majeure event.

There are few cases in Thailand involving epidemics being used as the basis for a force majeure claim. In 2009, the Supreme Court ruled on an event related to the H5N1 "bird flu". In that case (Supreme Court Decision No. 5353/2552), due to the outbreak of the novel flu virus, a farmer was ordered by the relevant authorities to slaughter his chickens; after complying with this order, the farmer was unable to deliver the chickens to his customer under an existing supply agreement.

The court agreed with the farmer's position that the governmental order in response to the epidemic constituted an event of force majeure under the circumstances, meaning he was lawfully excused from performing his contractual obligation. However, it is important to note that the farmer was directly ordered by the relevant authorities, and as a consequence of complying with this order, performance was rendered impossible (not merely impractical). It would not be fair to say that the Supreme Court will automatically view an epidemic as constituting force majeure simply by virtue of this case.

## Final thoughts

Force majeure is rarely a material issue during contract negotiations, though the first quarter of 2020 has seen this principle take on a significance which it is not usually afforded. Understanding the implications of force majeure on any particular agreement requires a detailed analysis and understanding of the relevant circumstances.