

## MHM Asian Legal Insights

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### **The impact of the novel coronavirus on Asian legal practice ~Force majeure clauses and related doctrines in typical situations (Part II)**

\* This newsletter is Part II of our article entitled "[The impact of the novel coronavirus on Asian legal practice ~ Force majeure clauses and related doctrines in typical situations](#)"

#### **2. Force majeure clauses and related doctrines in typical situations**

There have been an influx of queries relating to the impact of the novel coronavirus on contractual relationship and the application of force majeure clauses. We set out 2 case studies below based on typical scenarios where the issue on force majeure has arisen due to the outbreak, and to illustrate how the force majeure clause work in these circumstances under Japanese law and Singapore law. The purpose of this article is to provide some pointers to deal with the effect of the novel coronavirus on legal relationship and existing contracts.<sup>1</sup>

##### **(1) Case 1: Disputes related to construction work**

[Scenario]

Company A has received an order from Company B for the construction of a building for a commercial complex in Singapore. The construction was nearing the end of the project, but due to the spread of the novel coronavirus and the self-restraint orders by the governments of Singapore and its neighboring countries, it became difficult for Company A to secure the necessary labor and materials, making the completion by the deadline unrealistic. Being informed of this, Company B notified Company A that "if you missed the due date, we will charge the delay damages." Company A is now considering whether it is entitled to avoid such delay damages based on the force majeure clause in the contract with Company B. The force majeure clause provides as follows:

##### **Definition of Force Majeure**

In this clause, "Force Majeure" means an exceptional event or circumstances: (a)

<sup>1</sup> The case studies illustrated in this article are based on queries we have received with substantial modification to the facts and contract provisions of the individual cases.

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which is beyond a Party's control, (b) which such Party could not reasonably have provided against before entering into the Contract, (c) which, having arisen, such Party could not reasonably have avoided or overcome, and (d) which is not substantially attributable to the other Party. Force Majeure may include, but is not limited to, exceptional or circumstances listed below:

(i)~(iv) [omitted]

(v) natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity.

### Consequences of Force Majeure

If the Contractor... suffers delay and/or incurs costs by reason of Force Majeure, the Contractor shall be released from the damages arising from such delay.

[Analysis]

#### (i) Force majeure clause

When a contract contains a force majeure clause, then naturally the starting point is to ascertain whether the outbreak of the novel coronavirus and the governments' orders fall under the definition of "force majeure" in the contract. The definition of force majeure illustrated above not only described what is a force majeure (sub-clauses (a) to (d)), it also provided a non-exhaustive list of force majeure events (sub-clauses (i) to (v)).

The first step is to examine whether the outbreak of the novel coronavirus falls under sub-clause (v) as "natural catastrophes". Even if not, then it is necessary to consider whether the outbreak and the governments' orders satisfy the description of "force majeure" in sub-clauses (a) to (d)." It is necessary to note that even if the spread of the novel coronavirus and the governments' orders constitute a force majeure, the delay in the construction must have been caused by such outbreak and the consequential governments' orders. (see Part I, Section 1.(1) of this Article)

Although omitted in the clause, it should be also noted that force majeure clauses often impose certain procedural requirements, such as timely notice to the other party. Where such procedural requirements are imposed, it must be complied with or else one may lose the right to enforce the force majeure clause.

Another point to note is the duty to mitigate loss. Even if a force majeure clause is successfully invoked, and the party relying on the force majeure clause is entitled to relief from delay damages, such party has a general duty to mitigate the delay and loss caused by the force majeure event to the extent possible, even if such duty to mitigate is not expressly provided in the contract.

#### (ii) Contractual measures other than force majeure clause

In the event that the force majeure clause is not applicable, it is necessary to check whether there are any other provisions in the contract that can be relied upon to seek

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relief for delay damages. For instance, extension of time (**EOT**) clauses are common in construction contracts but the circumstances in which an EOT can be invoked varies and must be considered based on the exact wording of the EOT clause itself.

### (iii) General laws and regulations

When Company A thinks that there is uncertainty in whether the force majeure clause can be relied upon, Company A also needs to consider solutions under general laws and regulation.

#### (a) Japanese law

In Section 1.(2)a) of Part I of this article, we explained that under the Civil Code, the obligor's negligence is a general requirement for damages claims based on default. This means that in order to claim damages against Company A, Company B must show that the delay was caused by Company A's negligence. Hence, if Company A was not negligent or responsible for the delay in the construction work caused by the outbreak and governments' orders, Company B cannot rely on the Civil Code to claim damages for the delay.

Even if there are no other express contractual or statutory provisions available which entitles Company A to claim for damages, Company A may still rely on the principle of change of circumstances to request cancellation of the contract or a change in the time of performance. However, as mentioned in 1.(2)d) of Part I, it should be noted that the doctrine is applied only in exceptional situations.

#### (b) Singapore law

If the contract is governed by Singapore law, Company A may seek exemption from its obligations under the doctrine of frustration to discharge its obligation entirely (see 1.(3)(ii) of Part I). Based on the scenario set out above, the difficulty lies in proving that the outbreak and the government's orders have caused the performance of the contract by Company A to be "impossible, illegal, or radically different from what was originally contemplated". If the outbreak caused mere hardship or additional costs to Company A, Company A would not be able to rely on the doctrine of frustration. In any event, this may not be appropriate where Company A is only seeking temporary relief from the effect of the outbreak and not discharging all its duty under the contract.

In addition, the COVID-19 (Temporary Measures) Act 2020, a novel coronavirus special measures law, was passed on 7 April 2020 and partially came into force on 8 April 2020. Under Part 2 of the Act (which will come into force on a date to be appointed), if the novel coronavirus event caused a party to be unable to perform its

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contractual obligations that is to be performed on or after 1 February 2020 under certain types of contracts<sup>2</sup> (including construction contracts) entered into before March 25, 2020<sup>3</sup>, the counterparties are prohibited from taking certain legal actions to enforce its rights under the contract for up to 6 months by giving notice to that effect to the other party. Additional relief for inability to perform construction contract are also provided under the COVID-19 (Temporary Measures) Act regarding the calling performance bonds and the calculation of delay damages. Companies facing similar predicament as Company A may seek protection under the Act which is accessible [here](#).

### **(2) Case 2: Dispute over cancellation of an event**

[Scenario]

Company C was planning to organize a large-scale event in Japan, and had outsourced the transportation and installation of the equipment required for the event to Company D. The Japanese government issued an advisory requesting companies to postpone or cancel large-scale events due to the outbreak, Company C announced the cancellation of the event and notified Company D of the cancellation. Company D demanded compensation on the grounds that the cancellation was for the convenience of Company C. Company D says that they can perform their contract in accordance with the terms of the contract. The contract entered between Company C and Company D provides, amongst others, the following.

#### X.1 (Employer's obligation)

The Employer shall, throughout the Project, keep the Venue appropriate and practicable for the Contractor to deliver and install the Equipment.

#### Y.1 (Consideration)

The Fees shall be payable to the Contractor in the following instalments:

Instalment	Date
10% of the Fees	On January 1, 2020
50% of the Fees	On or before June 1, 2020
40% of the Fees	On Completion of Work

#### Z.1 (Force Majeure)

If, by reason of any event of force majeure (any cause or event outside the reasonable control of the parties), either of the parties to this Agreement shall be delayed in, or prevented from, performing any obligation under this Agreement, such delay or non-performance shall not be deemed to be a breach and no loss or damage shall be claimed by either of the parties hereto from the other by reason

<sup>2</sup> These are known as "scheduled contracts" under Act, which include (i)certain secured-loan facilities granted by a bank or a finance company to small- to medium-sized enterprises, (ii)performance bonds or equivalent that are granted pursuant to construction or supply contracts, (iii)certain hire-purchase agreements or conditional sales agreements, (iv)event contracts, (v)tourism-related contracts, (vi)construction or supply contracts, and (vii)Leases or license for non-residential immovable property.

<sup>3</sup> Contracts automatically renewed on or after such date are included.

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thereof.

[Analysis]

(i) Force majeure clause

Some of event contracts contain provisions which allow the organizer to cancel the event and the rights and obligations of each party upon such cancellation. In such a case, we would first consider relying on such provision to cancel the event. If the contract does not contain such provisions, we need to address force majeure clauses.

As to force majeure clause, unlike Case 1, the force majeure clause for Case 2 describes force majeure generally as “any cause or event outside the reasonable control of the parties,” but does not list any example of individual events constituting such force majeure. For this type of force majeure clause, it needs to be examined whether the outbreak of the novel coronavirus and the government’s request fall under the overarching definition of “force majeure.” In doing so, one of the factors to be considered is whether the request from the authorities is mandatory or merely advisory.

Further, although Company C wants to argue that their obligation (to keep the Venue appropriate and practicable for the Company D to deliver and install the Equipment) is prevented because of the occurrence of force majeure event, it needs to be further examined if (i) such obligation is truly prevented considering that Company C may be able to keep the Venue appropriate and practicable, since the request from the authority is just to postpone or cancel large-scale events and if (ii) force majeure clause is applicable when the obligation prevented is only an ancillary obligation (namely to keep the Venue appropriate and practicable), as opposed a main obligation (namely, the payment of the fees).

Because Company C has already announced the cancellation of the event, the termination of the contract would be the best option for Company C. However, the force majeure clause above does not provide for the right to terminate the contract. Therefore, Company C will have to consider whether other provisions of the contract or the general law of contract provide such right of termination if they want to terminate the contract.

(ii) General laws and regulations

(a) *Japanese law*

In this scenario, there is no breach by Company D, since it states that it can perform its obligation. Therefore, regardless of whether the Former or the New Civil Code applies, Company C cannot terminate the contract based on the Civil Code.

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In this case, Company C may consider applying the principle of change of circumstances to terminate the contract (see 1.(2)d) of Part I).

### *(b) Singapore law*

If the contract is governed by Singapore law, it may be possible to terminate the contract and seek relief from performing the obligation under the contract by invoking the doctrine of frustration (see 1.(3)(ii) of Part I). The test for applying the doctrine of frustration is set out in 1.(3)(ii) of Part I.

In any event, because “event contract” is one of the categories of contracts that are subject to the COVID-19 (Temporary Measures) Act, the protection under the statute may be available when the relevant provisions come into force. However, as mentioned in Case 1, the Act does not permit termination of the contract. Therefore, even if Company C can avail itself of the protection under the COVID-19 (Temporary Measures) Act, the real advantage which Company C could enjoy is that it may be able to avoid liability for breach of contract caused by the outbreak during the prescribed period.

### 3. Summary - Checklist in corporate practice

As a summary of this article the following is a list of take-aways that companies should generally keep in mind in cases where a force majeure clause and/or related doctrine are at issue.

**Step 1:** Check the governing law. The application and effect of force majeure clauses and the relevant laws and doctrines may vary from country to country. It is important to seek legal advice of local counsels when such issue arose.

**Step 2:** Check if there is a force majeure clause in the contract. If yes, follow Step 3. If not, go directly to Step 4.

**Step 3:** Analyze the force majeure clause and carefully check the existence and wording of the provisions in relation to the following matters:

- a) the definition of “Force Majeure”
- b) effects of the force majeure clause (e.g., termination, discharge of a specific liability)
- c) procedural requirements (e.g., timely notice to the other party)
- d) exclusions (e.g., not applicable to monetary obligations)
- e) mitigation duty

**Step 4:** Check if there are any contractual provisions that can be relied upon other than force majeure clauses (e.g., extension of time clause mentioned in 2(1)(ii))

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above).

**Step 5:** In case a force majeure clause or other contractual provision may not be sufficient to resolve the issue, consider the relevant doctrines and/or statutory reliefs, depending on the governing law (e.g., termination by default of an obligation under Japanese law, the doctrine of frustration under Singapore law).

**Step 6:** Prepare a carefully drafted documents to comply with any applicable contractual provisions, doctrines and/or statute on which you are relying (e.g., notice required under a force majeure clause, notice to the other party under the COVID-19 (Temporary Measures) Act.)

We expect the case laws relating to force majeure to develop rapidly in light of COVID-19 and it is important to observe this space carefully. For further queries, please feel free to contact our team below.

\* Mori Hamada & Matsumoto (Singapore) LLP is licensed to operate as a foreign law practice in Singapore. Where advice on Singapore law is required, we will refer the matter to and work with licensed Singapore law practices where necessary.

### **Editorial Team** 編集責任者



Kana Manabe 眞鍋 佳奈  
Partner パートナー  
Tel: +65-6593-9762 (Singapore)  
[kana.manabe@mhm-global.com](mailto:kana.manabe@mhm-global.com)



Chong Chia Chi チョン・チア・チー  
MHM Singapore Counsel  
MHM シンガポールカウンセラー  
Tel: +65-6593-9759 (Singapore)  
[chiachi.chong@mhm-global.com](mailto:chiachi.chong@mhm-global.com)



Ryo Kawabata 川端 遼  
Associate アソシエイト  
Tel: +65-6593-9758 (Singapore)  
[ryo.kawabata@mhm-global.com](mailto:ryo.kawabata@mhm-global.com)

(Contacts)  
Public Relations  
[mhm\\_info@mhm-global.com](mailto:mhm_info@mhm-global.com)  
[www.mhmjapan.com](http://www.mhmjapan.com)