
Covid-19 – A Force Majeure Event From Vietnam’s Legal Perspective

The respiratory disease caused by a new strain of virus, Covid-19, is a global pandemic spreading over 200 countries and territories, with hundreds of thousands of infections and deaths without any sign of the situation easing.

The Covid-19 outbreak has severely affected the global supply chain of goods and the operations of enterprises in numerous sectors from manufacturing to services. Many enterprises are currently unable to perform their executed contracts due to the shortage of labour and raw materials supply, as well as the administrative measures and/or decisions of the state agencies to isolate persons who are infected with the disease.

It is a legal concern of many enterprises whether the Covid-19 outbreak constitutes a Force Majeure event that would warrant an exemption from liabilities or penalties in the event of a breach of a contract.

This article provides an overview of the concept of a Force Majeure event, and a legal analysis of the Covid-19 outbreak from Vietnam’s legal perspective.

Defining Factors of a Force Majeure Event

A Force Majeure event is defined under the Civil Code 2015 as an event which occurs in an objective manner which is unforeseeable and insurmountable even if all necessary measures and available abilities have been applied (*Article 156.1*).

Some specialised legal documents expressly stipulate specific factors which would render an event as a Force Majeure event for the purpose of applying them in some particular situations, such as natural disaster, fire, enemy sabotage, and epidemic. In general, an event is considered a Force Majeure event if it satisfies the following conditions:

Firstly, it occurs objectively;

Secondly, it is unforeseeable; and

Thirdly, it is insurmountable.

The first element can be interpreted to mean that the event occurs in objective circumstances independently from the intention of the parties to the contract.

The ability of a party to perform a contract and the measures taken to fulfil its contractual obligations would be relevant in determining whether the second and third factors are satisfied. Hence, the satisfaction of these two factors is possibly dependent on the intention of the parties.

Force Majeure Clause in Contracts

A Force Majeure clause is generally a fundamental clause in standard contracts. It is especially used in contracts with considerable value, or those that involve complex transactions and prolonged work, or the performance of which is subject to natural factors.

A Force Majeure clause can be drafted in different ways without the need for complying with a prescribed format. In practice, contracts normally stipulate the principles for determining a Force Majeure event in accordance with the Civil Code 2015, and further specify the scope of specific Force Majeure events.

For example, a contract may stipulate as follows: *“A Force Majeure event is an event which occurs in an objective manner which is unforeseeable and insurmountable even if all necessary measures and available abilities have been applied. A Force Majeure event shall include, but not limited to, natural disaster, enemy sabotage, epidemic or war”*.

The determination of a Force Majeure event is subject to the contractual provisions and the specific intention of the parties. However, although the principles of freedom of contract and voluntary agreement are recognised by law, the contractual agreement of the parties on what constitutes a Force Majeure event may also be challenged subsequently by the dispute settlement body if such an agreement is not consistent with the statutory principles.

For instance, some contracts may only specify specific events as Force Majeure events. Alternatively, they may stipulate the principles for determining a Force Majeure event under the Civil Code 2015, together with a listing of specific events providing for a limitation within such listed events. Here, while it is the parties' intention to limit the application of the Force Majeure clause to specific events stipulated in the contracts in order to limit the liability of the affected party in the event of the occurrence of a Force Majeure event, such agreement aiming to limit or exclude an event that fully satisfies the statutory requirement of a Force Majeure event from the scope of the Force Majeure clause may possibly be challenged subsequently by the dispute settlement body.

Covid-19 Pandemic

Given the nature of the Covid-19 outbreak and the extent of its spread so far, the Covid-19 outbreak appears to satisfy the factors that constitute a Force Majeure event. Nonetheless, the determination of whether the Covid-19 outbreak itself or the subsequent events occurring in connection with the Covid-19 outbreak (e.g. border closure, visa suspension, lockdown and/or quarantine by the state agencies for the purpose of preventing the spread of the epidemic) would be considered as a Force Majeure event between the relevant parties of a contract is subject to the relevant context of a transaction and contractual provisions.

For enterprises, whether the Covid-19 outbreak can be considered a Force Majeure event further depends on several factors such as:

- Whether the employees responsible for performing the contracts are infected with Covid-19 and are subsequently quarantined
- Whether the remaining employees and the whole enterprise are subject to mandatory quarantine and lockdown that prevent them from performing the contracts
- Whether the issuance and application of administrative decisions of the State authorities directly affect enterprises
- Whether the suppliers of raw materials that are directly used by the enterprises to fulfill their obligations under the contracts are faced with similar predicaments.

The parties who are unable to fulfill the obligations under the relevant contracts also bear the burden of proving that they could not predict and remedy the event within their capacity despite putting in place the necessary measures to avert the situation, such as using best endeavours to find alternative raw materials, changing the modes of work of the employees, and/or introducing other work arrangements.

Contractual Performance

Compensation and penalty against contract violations

Pursuant to the Civil Code 2015, where an obligor fails to perform a civil obligation due to an event of Force Majeure, it shall not be subject to civil liability, unless otherwise agreed or otherwise provided by law (*Article 351.2*).

The Law on Commerce 2005 also stipulates that a party that breaches a contract shall be exempted from liability in case of occurrence of a Force Majeure event (*Article 294.1(b)*).

The non-compliant party may also be exempted from liability against a breach of contract if the non-compliance is proven to be due to the implementation of the competent state authorities' decisions that the parties could not forecast when the contract was concluded.

Extension of the term of contract performance

Pursuant to Article 296 of the Law on Commerce 2005, in case of a Force Majeure event, the parties are entitled to agree to extend the term for performing the contractual obligations. If the parties do not have any agreement to this effect or cannot reach an agreement on such an extension, the term for performing contractual obligations will be extended for a period of time that is equivalent to the period of such Force Majeure event's occurrence plus a reasonable period for remedying its consequences. However, the time extended should not exceed the following statutory timeline, except for contracts for purchase and sale of goods or contracts for provision of services with fixed term for goods delivery or service completion:

- five months for goods or services for which the agreed time limit for their delivery or service provision does not exceed 12 months from the date of contract execution;
- eight months for goods or services for which the agreed time limit for their delivery or service provision exceeds 12 months from the date of contract execution.

Termination of contract

A contract would normally stipulate that any party to a contract is entitled to terminate the contract in the event that the Force Majeure event lasts for more than a certain period of time. If the contracts contain such a termination provision, the enterprises may rely on such a provision to terminate the contract.

In the absence of an agreement to the contrary, the party that does not comply with a contract due to the occurrence of a Force Majeure event is generally not entitled to unilaterally terminate the contract. It must continue to perform its contractual obligations after the cessation of the Force Majeure event. Meanwhile, the other party will have the right to cancel or terminate the contract if the purpose for which the contract was concluded could no longer be achieved, such as where the non-compliant party fails to complete and hand over the work due to the Force Majeure event.

What Should Enterprises do?

The party that breaches a contract due to the occurrence of a Force Majeure event must immediately make a written notice of such an event to the other party. The written notice must be supported by evidence to prove the occurrence of the event and its potential consequences. The party must also state the time when the event will likely end.

Apart from relying on Covid-19 (or relevant arising events) as a Force Majeure event, the parties may consider initiating a negotiation to revise the contract terms on the basis that there was "a change of fundamental circumstance" from the initial circumstance when the contract was concluded to adjust the parties' interests with reference to the changed circumstances. In addition, the parties in a contract may

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make a petition to the dispute settlement body to request for termination of contract due to the change of fundamental circumstance.

Affected enterprises must gather evidence to prove that they have faced an event that amounts to a Force Majeure events that made it difficult or impossible for them to comply with their contractual obligations. They must also prove that they have put in place necessary measures within their capacity to fix loss and damages.

For further queries, please feel free to contact our team below.

For more articles and updates from our teams across the region on COVID-19 and related legal issues, please visit [Rajah & Tann Asia's COVID-19 Resource Centre](#).

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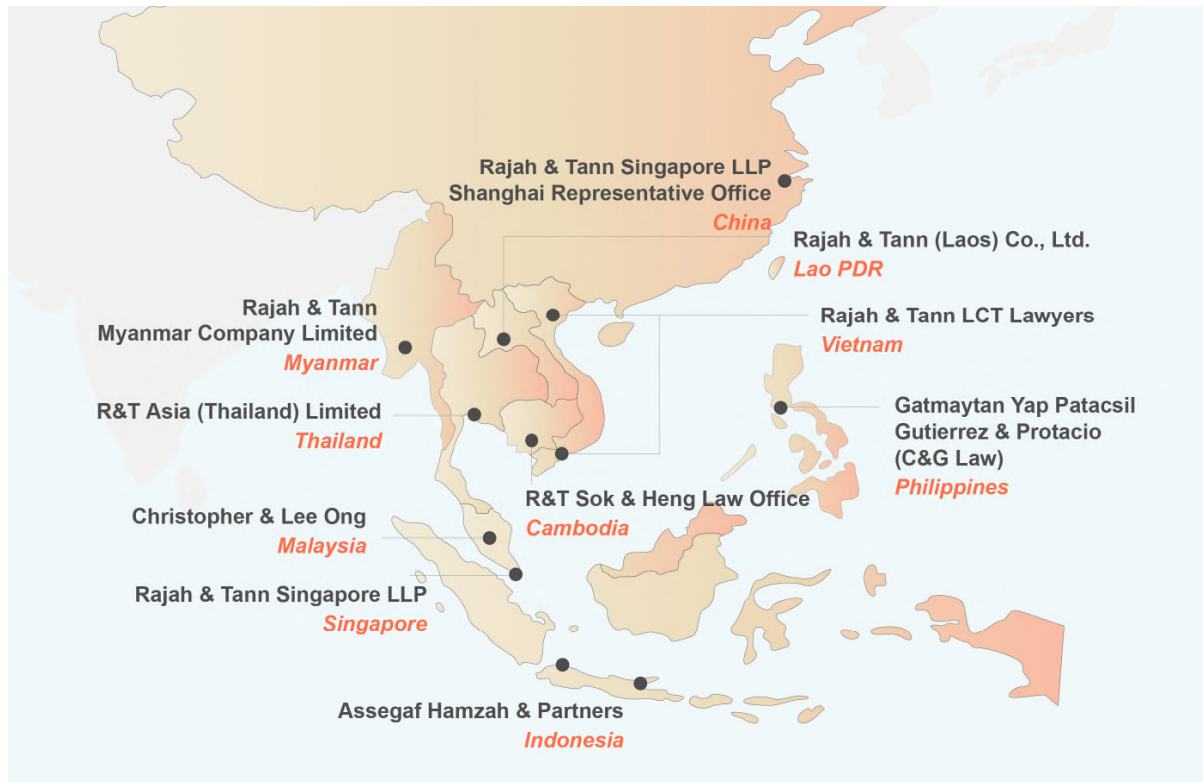
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