



Force Majeure during COVID – 19 in Thailand

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Force Majeure and Invocation of Force Majeure (1 / 2)

- ❖ Force majeure is provided in Civil and Commercial Code of Thailand (“CCC”).
- ❖ Force majeure
 - Event could not be reasonably anticipated;
 - Event is beyond control of any person;
 - Event could not be prevented.
- ❖ Is COVID -19 a force majeure ?
 - It depends upon facts and circumstances on a case by case basis.
- ❖ Force majeure and COVID -19 may be divided into
 - A question of facts; and
 - A question of law.

Force Majeure and Invocation of Force Majeure (2/2)

- ❖ Even COVID -19 pandemic occurs in Thailand, not all areas of Thailand are inflicted by Covid-19.
- ❖ Because of Covid-19 , force majeure could be invoked by any business which is closed down by an order of any government authorities.
- ❖ Affected businesses include airlines , airports, hotels , leisure business , departments stores.
- ❖ Food business and pharmacy business are still open.
- ❖ A force majeure is interpreted by courts of Thailand in limited way in case a force majeure must not be avoided.
- ❖ In the context of the avian flu (bird flu) outbreak occurring in the past, if the disease outbreak heavily affect the ability of a debtor to perform contractual obligations, the outbreak can be considered as the Force Majeure incident. COVID-19 event should be construed to be analogous.
- ❖ Contract may or may not provide for a force majeure clause.
- ❖ In the case of no force majeure clause on a contract, provisions of force majeure in the CCC shall be applicable

Invocation of Force Majeure by the counter party

- ❖ It depends on the definition of the provisions of 'Force Majeure Clause' and Termination Clause' in relation to Covid-19 in the contract.
- ❖ It can be argued against the counterparty party that there is no clause giving the right to the counter party to terminate the contract because of the COVID - 19.
- ❖ On the other hand, if the Force Majeure clause and the Termination clause stipulate 'COVID-19' as one of the unforeseeable events which could result in termination of the contract, the other party can argue that the counter party is not prevented by COVID - 19 to perform the obligations of the counter party in the contract.
- ❖ The counter party shall also prove how much endeavour the counter party had tried to mitigate the damage occurring from COVID-19 which prevented the counter party from performing the contractual obligations.

Matters to be thought in mind when entering into a contract at the time of COVID-19 (1/2)

- ❖ Apparently, Force Majeure definition is broadly varied on case-by-case basis.
- ❖ Even though, health pandemic or global outbreak is included in the definition of Force Majeure clause, there is still likely to have a dispute to be evaluated to determine whether a party should be excused from contractual obligations or not.
- ❖ This is one of the controversial issues that the court will consider a case based on the facts of each case.
- ❖ The parties should provide additional conditions for both parties to continue performing duties and obligations during the uncertain events in order to avoid the default which might lead to terminate the contract.
- ❖ In addition, there should be a clause stating what the parties should do if the related party of the contract cannot perform the duty.

Matters to be thought in mind when entering into a contract at the time of COVID-19 (2/2)

- ❖ The Termination clause should provide for situations or incidents which could be construed to give the right to one party to terminate a contract.
- ❖ For example, whether COVID-19 or the post-incident of COVID-19 can cause the default which leads to termination contract or not.
- ❖ One party to the contract may consider to have insurance to cover risks if the other party could raise Covid-19 as a force majeure from preventing the other party from performing obligations of the other party.



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