

Client Alert

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Coronavirus: Crisis management through force majeure – a Hong Kong law perspective

On 30 January 2020, the World Health Organization declared that the coronavirus outbreak constituted a public health emergency of international concern. The full impact of the outbreak and the resulting precautionary measures imposed by the PRC and Hong Kong governments, as well as other countries, remains to be seen.

During this critical period, companies may face various difficulties in fulfilling their existing contractual obligations because of business disruptions, including:

- closures of workplaces and ports;
- disruption to supply and distribution channels;
- disruption to auditing work;
- restriction in free movement of personnel and shortage of labor;
- cancellation, suspension or postponement of events; and
- weakened regional demand.

Multinational companies are implementing, or will soon be implementing, measures to manage the impact on their businesses in the region and beyond. We also see companies evaluating potential exposure to the possible consequences of the outbreak, including the possibility of invoking the **force majeure clause** in their contracts.

Our alert discusses force majeure clauses in contracts governed by Hong Kong law and what steps clients can take under the current circumstances.

Can you invoke the force majeure clause?

In short, it **depends on the wording of your contract**.

Generally, the force majeure clause gives parties the right to be excused from performance or to revise the contract upon the occurrence of unforeseen events beyond the parties' control which prevent, hinder or delay performance of the contract. Unlike civil law systems such as the PRC, there is no doctrine of force majeure under Hong Kong legislation. The force majeure clause is therefore subject to the usual common law principles and rules of contractual construction and interpretation.

Some key questions to consider when reviewing your force majeure clause include:

1. How is "force majeure" defined?
 - a. Does it expressly include pandemics, epidemics or other similar crisis situations?
 - b. Does it include events which are beyond the parties' reasonable control?





2. What kind of failure of performance does the clause cover?
 - a. Does the clause cover non-performance in whole or in part?
 - b. Does the clause cover hindrances and delays to performance?
3. Does the clause require any steps to be taken to invoke it?
 - a. Does the clause require you to establish the cause and effect between the supervening event and the party's failure to perform its contractual obligations?
 - b. Does the clause require written notice to the other party?
 - c. Are there mitigation measures specified?
4. Are there other clauses in the contract providing alternative ways of performance?

What are the consequences of invoking the force majeure clause?

The consequences **depend on what is provided in the contract**.

Common types of relief include the right to:

- suspend contractual obligations;
- be excused from liability for non-performance or delay;
- terminate the contract;
- launch an extension of time to target dates;
- renegotiate the terms of the contract; and
- instigate remediation and/or contract governance measures.

As to compensation, parties usually contract to bear their own costs arising from any losses due to a “force majeure” event. There may be stipulations in contracts as to the timing for payment of compensation.

What should you do right now?

As the situation develops and the impact of the coronavirus outbreak remains uncertain, we recommend taking the following steps at this stage:

- Review your contracts to consider whether you can rely on the force majeure clause or some other provision;
- Check whether the force majeure clause stipulates the prescribed form and time limitations for giving notice of a “force majeure” event after it occurs, and if so, ensure that timely notice is given in the prescribed form;
- Where non-performance of a contract has occurred, make a record of the event in as much detail as possible, including the timing of the occurrence, the parties involved and any facilities impacted by the event;
- Consider whether there are alternative ways of performing the contractual obligations (e.g. sourcing another supplier);
- Consider whether there are ways to mitigate the effects of the present situation;



- If entering into new contracts, draft provisions clearly and comprehensively so as to cover eventualities such as the present coronavirus outbreak; and
- Monitor the announcement of any new governmental or regulatory policies in response to the coronavirus outbreak, which may lead to changes in the applicable law, the options for relief and the assessment of compensation.

Above all, maintaining operational continuity lies at the heart of all crisis management and emergency response strategies. The exercise of force majeure, or extended periods of force majeure, may give rise to the right of a party or both parties to terminate the contract.

If parties wish to maintain business relations and achieve a “win-win” result, it may be useful to have a without-prejudice discussion with the counterparty at the earliest opportunity so that the joint effort may hopefully lead to a resolution of any issues.

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