

Client Alert

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Would the novel coronavirus constitute a force majeure event in contracts governed by Singapore law?

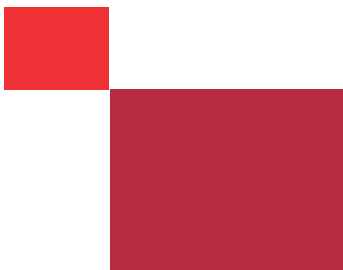
The World Health Organisation recently declared the novel coronavirus a public health emergency of international concern. The Ministry of Health has announced that from 1 February 2020 all new visitors with recent travel history to mainland China within the last 14 days will not be allowed entry into Singapore, or to transit through Singapore. The Immigration and Checkpoints Authority also suspended the issuance of all forms of new visas to those with PRC passports as well as Singapore's status as a visa-free transit facility for those with PRC passports.

This announcement along with other international government responses to the novel coronavirus will likely have several implications on business operations, particularly for manufacturing facilities and supply chains. Companies will need to consider their obligations in response to government announcements, the level of business disruption and other commercial risks arising from the novel coronavirus, as well as the options available under their contracts, including force majeure.

Where a contract contains a force majeure clause, the touchstone is whether the novel coronavirus outbreak falls within the scope of the clause. If the contract does not include a force majeure clause or if the novel coronavirus outbreak falls outside the scope of that clause, the parties may have to ascertain whether the common law doctrine of frustration is applicable to discharge them from their contractual obligations. However, the threshold for the doctrine of frustration to apply under Singapore law is high in that it must constitute a supervening event which results in the performance of a contract being physically or legally impossible or fundamentally different from those originally undertaken.

How can force majeure be invoked?

Generally, contracts will include a force majeure clause that will give parties to a contract the option to suspend, terminate or limit performance under the contract where circumstances beyond their control make performance impractical or impossible. The availability of force majeure as an option will largely depend on the construction of the force majeure clause, which will usually consider a number of events that may affect performance of the obligations under the contract. Force majeure clauses will likely include general language that considers events beyond the parties' control, such as natural disasters, government actions and circumstances, which disrupt the performance of the contract.





The most straightforward way for the novel coronavirus to, arguably, come within the scope of a force majeure clause would be if the clause includes the term "*epidemic*". An epidemic is a temporary but widespread outbreak of a particular disease and the World Health Organization's classification that the novel coronavirus is a "public health emergency", may substantiate the argument that it qualifies as an epidemic. If the term "*epidemic*" is not listed as a force majeure event in the contract, then a party may have to try to rely on a catch-all provision or a broad definition to the effect that the event is one beyond a party's control.

The burden of proof will likely be on the party seeking to rely on the force majeure clause to prove that they have been prevented or hindered (depending on the wording) from performing the contract as a result of the force majeure event. In other words, there must be a causal connection between the force majeure event and the inability to perform the obligations under the contract.

Several force majeure provisions require a party seeking to rely on a force majeure event to give notice in a prescribed form and within a specified period. A party may be arguably precluded from invoking the force majeure clause if such notice is not given in accordance with the contractual requirements. Therefore, a party ought to ensure that they comply with the relevant notice requirements if they decide to invoke the force majeure clause.

Additionally, where possible, a party seeking to rely on a force majeure event must take reasonable steps to avoid or mitigate the impact of the force majeure event. This may include considering alternative methods of performing their obligations under the contract.

Next steps

The novel coronavirus is closely being monitored with governments responding swiftly to minimise the global impact. It is likely this will continue to impact business operations until the situation stabilises. Therefore, companies need to remain vigilant and amenable to responding to any significant developments or changes.

During this time, it is important for companies to consider in particular:

- Their performance obligations under the contract;
- The impact of the force majeure event on their ability to perform the obligations;
- Whether there are any steps the parties can take to mitigate or minimise the impact of the force majeure event on their obligations, including considering alternative methods of performing their obligations under the contract;

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- Whether the force majeure event falls within the scope of the force majeure clause of the contract and whether it can and should be invoked; and
- If so, what are the requirements, in particular the notice requirements, that must be complied with.

Parties should continue to monitor the government's response to the novel coronavirus to ensure they are able to effectively respond to any significant developments or changes.

If you would like to discuss the impact of the novel coronavirus on your business or any of the issues discussed in this alert, please do not hesitate to contact us.

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