

Client Alert

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Coronavirus: Precautionary measures through force majeure

On 01 February 2020, Prime Minister Nguyen Xuan Phuc issued a decision declaring the novel Coronavirus (nCoV) an epidemic in Vietnam. This comes just two days after the World Health Organization (WHO) declared nCoV as a Public Health Emergency of International Concern (PHEIC). While the full impact of the outbreak and the resulting precautionary measures imposed by other countries remains to be seen, the Vietnamese Government has taken precautionary measures to provisionally halt certain air travels to China and may temporarily stop issuing visas for foreign visitors who come from areas that are affected by this epidemic, especially from China.

During this critical period, such safeguards may impact business operations in Vietnam. Such disruption on businesses may include:

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

In response to this, we see companies evaluating their potential exposure to the possible consequences of the epidemic, including the possibility of invoking the force majeure clause in their contracts. Our alert discusses force majeure under Vietnam law as well as the regulation of force majeure clauses in contracts governed by Vietnam law, and what steps clients can take under the current circumstances.

Force majeure events under Vietnamese law:

Under Vietnamese law, an event of force majeure is defined in accordance with Article 156.1 of the Civil Code as an event which objectively cannot be foreseen and cannot be remedied although all permissible and necessary measures have been applied.

Based on the above, an event would only be considered as force majeure if the following elements are satisfied:

1. the event is objective and unforeseeable; and
2. it is impossible to remedy although all necessary measures have been applied.

Further, under the Commercial Law, upon the occurrence of an event of force majeure, a party otherwise in breach of contract may temporarily be





exempted from liabilities and obligations owed to the other party, if certain conditions are met by the breaching party. Particularly, they must (i) immediately notify the other party in writing of the event of force majeure and of the possible consequences of such event; and (ii) promptly notify the other party when the force majeure event terminates.

Accordingly, in order to determine whether an event (e.g., the coronavirus outbreak) is an event of force majeure under Vietnamese law, and thus temporarily exempting the breaching party from liabilities and obligations to the other party, the above requirements must be met.

Force majeure clause in contract under Vietnamese law:

Vietnamese laws allow parties to include force majeure provisions in their commercial contracts that enumerate more specifically the kinds of force majeure events that would excuse performance under their agreement. These clauses are valid under the principle of freedom of contract recognized under Vietnamese law.

Companies which have force majeure provisions and have been disrupted by the recent coronavirus outbreak should review the force majeure provisions in all relevant contracts to ensure whether a PHEIC or outbreak of an epidemic is considered to be an event of force majeure. It is also necessary to comply with the standard of proof and terms regarding notice and timing provided under the contract. Additionally, affected companies should collect all available evidence as needed to support their claim that the disruption was indeed an event of force majeure that directly caused the delay/non-performance under the contract.

Consequences of invoking the force majeure clause

Overall, the consequences for invoking a force majeure clause would depend on the terms of the contract. Common types of relief include the right to:

- suspension of contractual obligations;
- exclusion from certain liability for non-performance or delay;
- termination of contract;
- extension of deadlines/target dates;
- renegotiation of the terms of the contract;
- imposition of remediation and/or certain contract governance measures; and
- exemption from compensation.

Other relevant considerations

In addition to Force Majeure clauses, businesses should also consider "material adverse change" clauses when reassessing their contractual terms amidst this critical period. Generally, a material adverse change is a contractual provision usually present in finance contracts, merger and



acquisition agreements, and lending agreements that gives the acquiring or funding parties, buyers or sellers, the right to withdraw from the agreement, or amend the terms of the agreement when there is a substantial adverse change in the company or its prospects or business condition affecting the parties to the agreement.

While Vietnam law does not provide explicit regulations on “material adverse changes” similar regulation on the “[p]erformance of contract in the event of a basic change of circumstances” was introduced in the 2015 Civil Code (Article 420). Specifically, the law allows an affected party to re-negotiate contract terms with the other party within a reasonable timeline if there is a basic change in the circumstance after contract execution. If the parties cannot re-negotiate the contract terms, either party may requests the court to (i) terminate the contract at a specific time; or (ii) amend the contract to balance out the lawful rights/interests of the parties under the contract, in response to the basic change of circumstances.

The party whose business operations have been affected by the recent coronavirus outbreak may want to consider the above-mentioned clause when reassessing their contract terms. Lenders in Vietnam have been reported to be invoking "MAC" clauses or similar contractual conditions in view of the current PHEIC.

Precautionary measures - next step recommendations

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 to suspend impracticable obligations;
- 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 to 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.

If you would like to discuss these issues further, as well as additional ways to



protect your business during this critical period, please feel free to reach out to us at the contact information in this alert.

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