

## Legal Alert

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## Coronavirus: Crisis Management through *Force Majeure*

On 30 January 2020, the World Health Organization (WHO) declared that the coronavirus (officially named COVID-19) outbreak constituted a public health emergency of international concern. The full impact of the outbreak and the resulting precautionary measures imposed by governments around the world, including Taiwan, remains to be seen.

During this critical period, companies may face various difficulties in fulfilling their existing contractual obligations because of business disruptions, including but not limited to:

- Closures of workplaces and ports;
- Disruptions to supply and distribution channels;
- Disruptions to auditing work;
- Restrictions in the free movement of personnel and shortage of labor;
- Cancellations, suspensions 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.

Below we discuss relevant articles under Taiwan's Civil Code and *force majeure* clauses contained in contracts and what steps companies can take under the current circumstances.

### “Non-attributable” clauses under the Civil Code

Companies may face business disruptions not only from the coronavirus itself but also as a result of government policies for epidemic prevention and control; such as, temporary ban on cross-strait passenger flights with certain airports in China, suspension of the Mini-Three-Links (小三通) including transportation and trade links, employees' right to turn down requests under certain circumstances to travel to epidemic areas, etc. The resulting difficulties in fulfilling companies' existing contractual obligations include delay, impossibility of performance or partial performance.

However, companies may be released from those obligations under Taiwan's Civil Code if the performance or default are caused “by reason of a circumstance to which companies are not imputed” (Articles 225, 230, 266 et seq.), i.e. causes not attributable to the companies.

To determine whether the “non-attributable” clauses under the Civil Code could be deemed applicable is of course reviewed on a case-by-case basis.





## Force majeure clauses in contracts

In addition to the Civil Code, contracting parties have the freedom to adopt or incorporate all forms of clauses so long as they do not conflict or derogate from mandatory provisions, including force majeure clauses.

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.

## Can you invoke the force majeure clause?

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

In the Asia Pacific region, common law jurisdictions such as Hong Kong and Singapore do not have black letter doctrine of force majeure in their legislation and will rely on contract terms. In civil law systems such as Taiwan (Thailand, Japan, China and others), as described above, the Civil Code provides protection under certain circumstances assuming causation can be established. The Civil Code does not provide a clear definition of force majeure, the force majeure clause is thus subject to the usual 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 companies 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:

- Check if the difficulties in fulfilling the contract obligations are attributable to the outbreak or related government policies;
- 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 to performing the contractual obligations (e.g. sourcing from 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.

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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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