COMMERCIAL LITIGATION UPDATE  
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COVID-19 – FRUSTRATION, FORCE MAJEURE OR SIMPLY FRUSTRATING?

COVID-19 – A GLOBAL PANDEMIC

The COVID-19 virus that has caused governments to quarantine entire cities and close international borders has been declared a public health emergency by the World Health Organisation. As the number of COVID-19 cases continues to rise globally, repercussions in the commercial sector have been felt from the rising caution exercised by governments and the public at large. For example, the outbreak of COVID-19 has affected deliveries of goods through online shopping platforms, where China-based suppliers have had to cancel orders and businesses with factories in affected areas in China have been affected. Tourism has also taken a hit, with people being less willing to travel, forcing airlines to cut flights to certain countries.

In the wake of these problems, businesses are looking to their contracts and agreements to find ways to escape liability for non-performance. One question which businesses continue to be concerned with is this – is COVID-19 a ‘force majeure’ event, a frustrating event, or simply frustrating?

In this update, we provide some insight into the issue.

FRUSTRATION VS FORCE MAJEURE

In Singapore, the term ‘force majeure’ is commonly understood as referring to a specific type of clause which excuses a party from performance in the event of specified categories of neutral events, and its origin is primarily contractual. Strictly speaking, force majeure does not exist as a separate legal doctrine in Singapore, as it is primarily a civil law doctrine. For example, roughly translated, Article 1218 of the French Civil Code provides that force majeure occurs when contractual performance is prevented by an event beyond the control of the debtor, which could not have been reasonably foreseen at the time of contracting and whose effects cannot be avoided by appropriate measures. A temporary impairment suspends the obligation until the resulting delay justifies termination, but if permanent, the contract is automatically terminated.

The closest concept in Singapore is the doctrine of frustration. Broadly speaking, a contract will be automatically discharged upon the occurrence of a frustrating event, that is, an unforeseen event which occurs through no fault of either contracting party, rendering the contractual obligations of parties impossible to perform or radically / fundamentally different from what had been agreed in the contract. Mere hardship or extra cost in contractual performance is insufficient to make an event a frustrating event. Practically speaking, frustration is, as a general rule, more difficult to invoke – mere difficulty in performance is not an excuse as it must be impossible to perform or where performance in such circumstances would be radically different.

In substance, frustration and force majeure are similar in that both doctrines address events which are beyond the control of the parties and render the contractual obligations of parties impossible to perform.

The key difference is that frustration may still be relied upon even if the contract does not contain such a clause, but, at least under Singapore law, force majeure may not be relied upon unless there is a force majeure clause in the contract. In addition, frustration operates to discharge the contract in its entirety, unlike force majeure clauses which often provide for temporary relief with the option of termination in the event of prolonged force majeure.¹

¹ The rights and obligations of parties in the event of a contract being frustrated are also governed by the Frustrated Contracts Act (Cap 115)
FORCE MAJEURE CLAUSES IN STANDARD FORM CONTRACTS

By and large, force majeure clauses in the present day context are often regarded as ‘boilerplate’ or standard clauses. Even though the parties have complete freedom in deciding what events will trigger the clause, what consequences or reliefs are to follow and/or whether parties are required to follow a particular procedure to invoke the clause, not much attention is ordinarily placed on such clauses when negotiating as they are typically triggered only in exceptional circumstances.

Types of force majeure events

There are certain events which appear in most (if not all) standard force majeure clauses, although standard forms for some industries may contain additional events which are more relevant to those specific industries. We consider the events from 4 different standard form contracts below.

- Fédération Internationale des Ingénieurs-Conseils ("FIDIC"): War, hostilities, invasion, acts of foreign enemies, rebellion, terrorism, insurrection, riot, munitions of war or natural catastrophes such as earthquakes, hurricanes, typhoons or volcanic activity.

- Public Sector Standard Conditions of Contract ("PSSCOC"): The term "Force majeure" is specified as a ground for extension of time but not defined in the contract. That said, the PSSCOC forms also specify certain events which are normally considered to be force majeure events as “excepted risks” and/or grounds for extensions of time. The full list of events is quite long and includes unusual grounds such as act of foreign enemies, usurped power, ionising radiations, or contamination by radioactivity from nuclear sources and pressure waves caused by supersonic aerial devices.

- Grain and Feed Trade Association ("GAFTA"): Act of God, strike, lockout, riot or civil commotion, combination of workmen, breakdown of machinery, fire or unforeseeable and unavoidable impediment to navigation.

- International Chamber of Commerce ("ICC") Force Majeure Clause 2003: War, armed conflict, hostilities, invasion, act of a foreign enemy, civil war, acts of terrorism, sabotage, piracy, compliance with any law or governmental order, act of God, epidemic, natural disaster such as cyclone, volcanic activity, landslide, tsunami, flood, blizzard, earthquake, or explosion, fire, destruction of machines, general labour disturbances such as boycott, strike, lockout, go-slow or occupation of premises.

Consequences of force majeure event

The main consequence of triggering the force majeure clause is typically to afford relief to the parties in an even-handed manner, given that such events are ordinarily regarded as ‘neutral’ events independent of the parties’ fault and outside their control. Faithful to the spirit of the ‘force majeure’ concept, the wording of the clause also typically makes it clear that the force majeure event must have prevented fulfilment of some contractual obligation which could not have been reasonably avoided or overcome.

But even within this rubric, the precise form of relief can cover entitlements to additional time and payment for performance, temporary suspension of contractual obligations and relief from inability to perform and/or even termination of the entire contract when a force majeure event has particularly severe effects.

Such relief may also be subject to the affected party providing timely notice and/or other procedures such as the convening of a committee to discuss and work out a response plan.

We once again consider the differences between the 4 standard forms above:

- FIDIC: Subject to the affected party giving timely notice of force majeure, that party may be entitled to an extension of time.
and/or additional payment. In the event that delays due to a specific force majeure event exceed a certain period of time, either party may opt to terminate the contract.  

- **PSSCOC**: Subject to the affected party giving notice within 60 days of the occurrence of the force majeure event, the contractor may be entitled to an extension of time for force majeure (without an automatic corresponding right to additional payment). In addition, where the contractor has been instructed to rectify damage to the works from an ‘excepted risk’, the contractor may be entitled to additional payment for work done in compliance with such instruction.  

- **GAFTA**: Subject to the affected party giving notice within 7 days of the occurrence of the force majeure event, that party may be entitled to an extension of time. Where more than 30 consecutive days of delay are caused by the event, the other party can opt to cancel the delayed portion of the contract. If the option to cancel is not exercised, the delayed portion will be automatically extended for 30 days, at the end of which the contract will be considered void if delivery is still not fulfilled. 

- **ICC Force Majeure Clause 2003**: If a force majeure event occurs and notice of failure to perform is given without delay, the contract is considered void. 

**HISTORICAL EXAMPLES OF Frustrating Events**  
While claims of frustration and force majeure are not common, courts have decided a number of such cases in the past that help to shed some light on what would be considered a frustrating event.  

- **Embargo by Indonesia on exports of sand in 2007**: Singapore courts held that the ban on exports of sand from Indonesia imposed by the Indonesian government constituted a frustrating event, vindicating claims for relief by sand and concrete suppliers (for example, see Alliance Concrete Singapore Pte Ltd v Sato Kogyo (S) Pte Ltd [2014] 3 SLR 857).  

- **Compulsory acquisition of land by Singapore government**: A contract for sale of land was held to be frustrated when the government compulsorily acquired the land before legal ownership passed to the buyers (Lim Kim Soon v Sheriffa Taibah bte Abdul Rahman [1994] 1 SLR(R) 233).  

- **Inability to obtain required regulatory approvals**: The failure to obtain the required regulatory approval to for a change of use of the premises was held to be a frustrating event (Sheng Shiong Supermarket v Carilla Pte Ltd [2011] 4 SLR 1094). That said, this type of event is likely to be the subject of a specific clause in a properly drafted contract if obtaining such approval is regarded as critical for the transaction.  

- **Outbreak of war**: The onset of war was held to have frustrated a contract for delivery of machinery to Poland, which had been invaded by Germany at the time (Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1942] UKHL 4). This also extended to the situation where wartime legislation prohibiting exports of goods to the warring country had been enacted after the contract for export of goods to that country had been entered into (Denny, Mott and Dickson Ltd v James B Fraser & Co Ltd [1944] AC 265).  

**Is COVID-19 a Frustrating Event or a Force Majeure event?**  
**Frustrating event**  
Under Singapore law, whether the COVID-19 pandemic would be considered to have frustrated a given contract depends on the nature and severity of its impact on the performance of the contract. Is it impossible to fulfil the contract on the original contract terms, or is it simply more difficult / expensive to do so? The line separating the two is fine and much will depend on whether government orders and restrictions render it
impossible to fulfil contracts (for instance, because of labour or trade restrictions, travel bans or quarantine requirements or if specified goods have been contaminated and destroyed).

An argument might even be made that the complete destruction of the target market for goods renders performance so radically different that it is no longer the same contract – whether such an argument would succeed remains to be seen.

**Force majeure**

On the other hand, whether the COVID-19 pandemic triggers force majeure provisions in contracts depends on the express wording of the force majeure clause in question. Parties with contracts which specifically reference "epidemics" or "pandemics" would stand the best chance of qualifying for force majeure relief, whereas more persuasion may be required for vague terms such as "Act of God".

Equally important is the need to show that the outbreak has somehow affected contractual performance according to the standard set out in the relevant force majeure clause, whether it is the standard of complete ‘prevention’, ‘delays’ or increased cost.

In fact, force majeure relief as a civil law doctrine may even be available where the law governing the contract is not Singapore law. As such, conflicts of laws principles will also have a part to play, particularly where the contract in question has no choice of law clause.

**Frustrated? Seek legal advice**

In the circumstances, much will depend on a careful analysis of the relevant contract provisions and it is recommended that parties seeking to invoke these clauses take legal advice before taking action under the contract.

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