

POLITICAL UNREST AND THE IMPACT ON OBLIGATIONS IN COMMERCIAL CONTRACTS

Recent political events in Thailand have affected the lives of many, some in tragic and permanent ways. The unrest, which led to a near complete shutdown of Bangkok's commercial centre, culminated in chaos and physical destruction, affecting many business operators. Basic public utility services such as electricity, water, and telephones were not available in many areas. For security reasons, banks were forced to close, roads were blocked, and businesses could not operate or were otherwise forced to implement emergency plans to continue operations. Under these unique circumstances are parties to commercial contracts still required to perform some or all of their obligations? Can the concept of force majeure offer a legitimate excuse for nonperformance?

In our May 7, 2010 column introducing the concept of force majeure, we defined force majeure as any event that is unforeseeable and unavoidable. Force majeure, which is codified in Thailand's Civil and Commercial Code, allows for relief from contractual obligations or liabilities for one or both parties when an extraordinary event or circumstance beyond the control of the parties takes

place. Force majeure typically offers relief for "acts of God", such as earthquakes, unpredictable weather events and volcanic eruptions. It may also apply in situations of war, political unrest and similar unpredictable and unavoidable events.

At the time of the recent protests there were several events that were unforeseeable, unavoidable and beyond the control of private citizens. Under Thai law, it may be reasonably argued that for some business operators the events had an unexpected and unavoidable impact on their ability to perform in accordance with their contractual obligations. The occupation and blockade of roads, heated battles between protesters and government forces and arson attacks may have had a significant impact in preventing some businesses from fulfilling some contractual obligations, even with their best efforts to mitigate the damages or otherwise avoid the disruption.

For example, when certain roads were closed and arson attacks broke out in buildings outside the immediate protest sites, it may have been impossible for a seller to deliver time-sensitive products

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to his customers in certain areas. As a result, the products may have become unfit for their intended purpose or otherwise useless. Since such an event can be argued to have been beyond the seller's control, the seller may be excused for failing to meet his or her obligation under contract. A question may arise, however, of whether the buyer would still be required to pay for the undelivered products in this case. This is addressed in Thailand's law regarding impossibility of performance.

Thai law provides that in general, if an obligation becomes impossible to perform by a cause not attributable to either party, the seller has no right to receive the counter-performance. Basically, if delivery of products becomes impossible due to force majeure, the seller would not be at fault for failure to

deliver the products. At the same time, the seller is not entitled to receive payment for the products from the buyer.

There are exceptions to this general rule. One exception is that if the products were designated with the buyer's consent and the seller did everything required for the delivery of such products, then the products would be classified as "specific". In this case, although the products may be worthless after delivery became impossible, such loss falls upon the buyer. This essentially means that the buyer is still required to pay for the products though undelivered and damaged.

Consider an alternative scenario. If the products were designated without the buyer's consent and if it appears that the seller can reasonably substitute new products for the buyer, the seller would still be obligated to deliver new products to the buyer in order to replace the worthless products that were unable to be delivered to the seller due to force majeure events.

The foregoing is an example showing that parties to a contract cannot always excuse themselves from obligations in an event of force majeure. Force majeure

is not necessarily applied in all situations. For example, parties would not be excused from liability for their own negligence, where events are the consequence of natural forces (such as grass fires during the dry season) or where parties should have reasonably contemplated the possibility of the force majeure event.

Avoiding uncertainties is one of the primary goals of most business operators. While force majeure offers statutory relief in certain unforeseen circumstances, Thai courts have a conservative reputation in reviewing such claims and do so case-by-case.

Parties seeking to avoid reliance on the courts for interpretation of force majeure should therefore regularly review their force majeure contractual language and update to reflect current risks. This could go a long way to reducing cost and uncertainty.

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