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WHAT COUNTS AS A FORCE MAJEURE EVENT

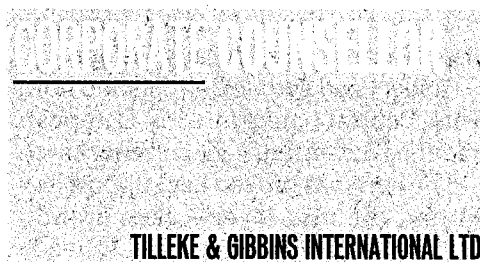
Unexpected, uncontrollable events have dominated news headlines of late, such as the recent volcano eruption in Iceland, an earthquake in China, and political unrest in Bangkok. These types of events can continue into the unforeseeable future, leaving people to wonder when they will end. Each event undoubtedly caused tremendous loss and damage, thus raising important legal questions: Do these events constitute force majeure? And under what circumstances is it possible for a party to be held responsible for obligations stemming from these events?

Section 8 of the Thai Civil and Commercial Code (CCC) provides that force majeure amounts to any event that could not be prevented, even if a person were to take such appropriate action as may be expected in such a situation or under such conditions.

In consideration of whether a person would be able to claim against or excuse himself from any obligations in an event of force majeure, there are two major qualifications that must be met under Thai law:

1. The event occurred through no fault of such person or through no fault of any person to which such person is liable. For example, a fire in a factory building caused by a short circuit might constitute a force majeure event; but if the fire was caused by the factory owner's own negligence or that of its employee, the factory owner could not claim it as a force majeure event.

2. The event could not have been



prevented, or would have occurred regardless of whether appropriate care had been taken, as might be expected from an ordinary person in his situation and under such conditions. For example, a flood is clearly an Act of God and would most likely be considered a force majeure event; however, if the flood could have been foreseen, as such flooding happens on a regular basis at a certain time and place, it may not be deemed a force majeure event.

Section 219 of the CCC provides that a debtor is relieved from an obligation to perform if an event that is not his responsibility makes it impossible to carry out the obligation, with such event occurring after the creation of the obligation. And if after entering into the obligation, the debtor cannot perform as obligated, this would be deemed an event rendering performance impossible.

There also exist specific provisions under the CCC which expressly indicate which types of force majeure events can be raised as an excuse or an argument. However, Sections 643, 660, 675, and 760 of the CCC list events in which a defendant is still liable, even if constituting force majeure, unless it can be proven that the loss or damage would

have happened in any case:

- ◆ If a borrower uses property lent for purposes other than as intended, lets a third person take possession of the property, or keeps the property longer than as intended (Section 643);
- ◆ If a depositary uses property deposited or lets a third person use or take possession of the property (Section 660);
- ◆ In the case of a proprietor of a hotel or such other place of lodging, if loss or damage occurs to the property of a traveller or guest, even if caused by a stranger entering or exiting the premises (Section 675);
- ◆ If a pledgee uses pledged property or lets a third person use or take possession of the property without the consent of the pledgor (Section 760).

In our experience, we tend to find that major businesses are willing to take certain responsibility to maintain their reputation in force majeure events, even if they could legally claim or excuse themselves by using force majeure as a reason to avoid obligations or responsibilities. Still, we generally suggest that events of force majeure should be clearly discussed between parties to any contract. As part of this discussion, it is advisable for the parties to agree on the scope of what constitutes force majeure, as well as how to proceed with the performance of the contract if it occurs.

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