

The Thailand floods: Can force majeure excuse your liability?

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Force majeure is an event that occurs beyond your reasonable control or anticipation. When that event prevents you from performing your contractual obligations, you are ordinarily released from liability for damages caused by that breach. The rationale is that it would not be just to blame you for breach of contract when the contract became impossible to perform through no fault of your own.

The massive flood arriving in early October from northern Thailand has attacked at least seven industrial estates, including Saha Rattana Nakorn, Rojana, Hi-Tech, Bang Pa-in, Factoryland, Nava Nakorn, and Bangkok in Ayuthaya and Pathum Thani. The Ministry of Industry estimated that the flood affected 9,859 factories in eight provinces, with the total value of damages amounting to approximately 237 billion baht as of Nov 21. The floods have upset supply chains worldwide, and made it difficult or even impossible for many businesses to perform their ordinary contract obligations.

After the flood recedes, a large amount of litigation may ensue over the damages caused directly and indirectly by the flooding and the resulting contract liabilities. A typical defendant may have failed to deliver goods or services to the plaintiff in time because the defendant's facility was directly affected by the flood, or perhaps because the defendant's own supply chain was interrupted by the floods that hit its suppliers. Whether or not the defendant's contract with the plaintiff has a force majeure clause, it may be possible to avoid liability on grounds of force majeure, but the outcome is not a foregone conclusion and will depend on the facts surrounding each situation.

Meaning of Force Majeure: Many commercial contracts contain force majeure clauses that include an itemised list of events that the parties have agreed will constitute force majeure. Oftentimes "floods" or other "acts of God" are included in that list. A typical force majeure clause might read as follows: "A party's failure to perform any term or condition of this Agreement as a result of conditions beyond its control such as, but not limited to, war, strikes, fires, floods, terrorism, power failures, or damage or destruction of any network facilities or servers, shall not be deemed a breach of this Agreement." A clause of this nature provides a contractual definition of force majeure, plus a contractual allocation of risk when such an event prevents performance.

It is always preferable to have a clear force majeure clause in a contract, but the general principle of force majeure also applies even when the contract is silent. Under Section 8 of the Civil and Commercial Code (CCC), force majeure is defined as "any event the happening or pernicious result of which could not be prevented even though a person against whom it happened or threatened to happen takes such appropriate care as might be expected from him in his situation and in such condition." Thereafter, Sections 205 and 219 of the CCC provide that a debtor is relieved from his contractual obligations if performance becomes impossible because a circumstance for which he is not responsible occurs after creation of the obligation.

These provisions (and others scattered throughout the CCC) relieve a party of liability for many breaches of contract if the breach is caused by force majeure, even if the contract does not include a force majeure clause. That said, force majeure is not always a magic wand that will prevent a party's liability for failure to perform an obligation.

Force majeure necessarily includes two important conditions: (1) the event cannot be prevented; and (2) the use of proper care. To examine whether these conditions existed at the time of breach, the breaching party needs to assemble information, evidence, and witnesses to confirm that he had professionally-appropriate mitigation plans in place before, during, and after the flood arrived. If he can establish that he had appropriate plans in place and that he implemented those plans, he can reasonably argue that the speed and size of the flood could not have been anticipated and was overwhelming even in the face of such measures.

Once a particular flood situation is proven to be force majeure, the breaching party still needs to prove that the flood prevented him from performing the contractual obligation. Inconvenience is probably not an excuse. For example, if flooding prevented a supplier from delivering parts to a manufacturer, the supplier might be forgiven on grounds of force majeure, but it is unlikely the manufacturer will be released from its downstream obligations unless the manufacturer tried without success to obtain the same inputs elsewhere. While the Thailand flooding has affected supply chains worldwide, it is unlikely that all parties in the supply chains will be able to blame the floods in Thailand if there was any reasonable means available to mitigate the disruption.

Thai court interpretations regarding floods: The Thai courts do not agree that every flood is considered an event of force majeure. In Supreme Court Case 1194/2531, a contractor sued an owner to recover the late fees that the owner withheld due to the contractor's failure to complete a pipeline project on time. The contractor argued that one day delay occurred because heavy rains caused damage to a bridge en route to the construction site, interrupting the delivery of machinery and materials. The contractor argued that another delay occurred when rains made the river level too high to complete construction.

The Court agreed that the bridge incident was an event of force majeure because it could not be reasonably anticipated and prevented. But the Court did not agree that high water level during the rainy season constituted force majeure, because one should anticipate that water levels will rise dramatically during the rainy season. The Court dismissed the contractor's claim.

In Supreme Court Case 237/2542, an insurance company sued a warehouse for damages caused to cargo that the insurer's customer was storing in the warehouse at the Bangkok port. A heavy rain caused flooding at the warehouse and flood damage to the cargo inside. The Court ruled that the flood was not an event of force majeure, because the warehouse was engaged in a professional service and bore a warehouseman's duty to provide facilities that keep its customers' cargo in good condition. The defendant should have designed and constructed safeguards against this particular type and magnitude of flooding at its facility, and the Court ordered the warehouse to pay for the flood damage to the cargo.

When contracts do not include a force majeure clause, a party arguing that the recent Thailand flooding is an event of force majeure will bear the burden of proving that he took preventive measures at an appropriate level considering the person's profession, and in spite of these measures the floods were too sudden and extreme to be prevented. That party will need to establish that it planned and implemented preventive measures before and during the flooding, plus mitigation efforts after the flooding. All of these issues will be considered when determining whether a party is relieved of liability due to the recent Thailand floods or other catastrophes that arguably amount to force majeure.