

## The Impact of COVID-19 and Other Extraordinary Events on Contractual Performance

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The dawn of the new decade brought with it familiar expectations of prosperity in global and regional commerce. This expectation has resonated throughout the ASEAN region and Thailand in particular, an historical favorite in the region for tourism and business investment. By the close of 2019 tourism numbers were at historic highs and investment in business and infrastructure were on the rebound, with parties to contracts in the region from both within and outside Thailand committing substantial resources to existing or contemplated commercial contracts.

But extraordinary events can disrupt even the most favorable of economic pictures. COVID-19 and its rapid escalation into a global pandemic has had a significant impact, not only on the global economic outlook, but also on regional operators' business plans. The Thai government, following the lead of the WHO and other regional and global players, has employed measures to limit travel and public gatherings and in some cases has even restricted access to government functions. These measures, along with measures implemented by other countries, have caused unprecedented business disruptions affecting business operators in ways that may significantly impair their ability to meet their commercial contract obligations. But does this and similar global shocks constitute an excuse for nonperformance of commercial contracts? The answer lies largely in an analysis of the law of *force majeure* and impossibility.

### Force Majeure and Business Disruptions

*Force majeure* is defined broadly as an event that could not have been reasonably anticipated and is otherwise beyond a party's control. This is codified in Thailand's Civil and Commercial Code. Thai statutory law does not provide a list of specific instances that constitute *force majeure*, but the Thai Supreme Court has found that a party may be excused from certain contractual obligations in instances of widespread fire, flooding, extreme natural disruptions, extraordinary acts of government, and in periods of significant unrest. What is certain, however, is that the Thai Supreme Court has historically taken a conservative stance and has ruled that a party is excused from performance obligations in only a minority of *force majeure* disputes. For this reason, parties wishing to avoid the uncertainty of the courts' interpretation of *force majeure* should consider including specific *force majeure* clauses in their contracts.

Many commercial contracts, particularly in construction and supply of goods, contain some form of standard *force majeure* clause. These clauses typically include a specific but limited list of events that are not within the control of the contracting parties. These may include events such as acts of God, war, and terrorism; but epidemics or pandemics, while increasingly common, are still not included in many *force majeure* clauses. That said, specific *force majeure* provisions are typically more inclusive than statutory

*force majeure* law and, as such, provide more certainty to contracting parties in the case of extraordinary events covered by the provision. While a specific *force majeure* provision is preferred, it should be noted that statutory *force majeure* law will be applied even where the contract is silent.

## Impossibility

Thai statutory law further provides that if a contractual obligation becomes impossible to perform due to a future circumstance for which the party is not responsible, then that party may be excused from performance. For example, if performance becomes impossible due to a *force majeure* or similar event, then a party would not be at fault for failure to perform under the contract. Neither would that party be entitled to compensation under the contract.

While there exist exceptions to the rule of impossibility, such as for certain specially ordered and manufactured products, the general rule may apply, provided that a party has done all that is reasonable under the circumstances, has not contributed to the breach, and could not have reasonably anticipated the events resulting in the impossibility of performance.

## COVID-19

While the Thai Supreme Court has not specifically addressed the case of a healthcare pandemic as a basis for *force majeure*, it is widely believed that, given the extraordinary impact COVID-19 has had to date, the pandemic may indeed constitute a *force majeure* event on which a party could rely in arguing that it should be excused from its contractual obligations, regardless of specific reference in a contract. The analysis does not end simply with a determination of *force majeure*, however.

Even where an event qualifies as a *force majeure* event under statute or contract, resulting in an impossibility to perform, a dispute must nonetheless be evaluated on a case-by-case basis to determine whether a party should be excused from performance of a given contract. For example, the law requires that a party seeking to avail itself of *force majeure* as an excuse for nonperformance has an obligation to take reasonable care in seeking to limit and otherwise mitigate the effect of the *force majeure* event. This can mean having contingency plans in place, being reasonably adaptive to developing events, and generally doing all that is reasonably necessary to seek to meet its contractual obligations. It is not enough to simply stand by and claim excuse from contractual obligations due to the unforeseen event. In fact, even some global emergencies may not impair a party's ability to find alternative means to meet its contractual obligations, while in others the disruptions may indeed make it impossible to perform. Each situation and contract is unique, and these differences and the reactions of parties are critical in determining whether a court will impose some obligation on a party under the contract even where an event is defined clearly as *force majeure*.

COVID-19 represents an unprecedented shock to the world economy and to individual commercial contract obligations. It also serves as a reminder of the importance of planning, evaluation, and adaptation to limit legal uncertainties for businesses reliant on good-faith agreements with their business partners. This includes regular review of business plans and contractual provisions, such as *force majeure* language, to ensure that business operators are best positioned to deal with legal complications from unexpected business disruptions.

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