

Relief for Government Contractors (from page 1)

For contracts that have not yet reached their maturity date, the Ruling Committee granted relief measures by directing the relevant government authorities to count the number of days that COVID-19 has affected performance of the contract, and use this number as the basis for determining an extension of the timeframe for performing the contractual duties. For contracts that have already reached their maturity date, the contractual party that failed to perform according to the contract would normally be subject to an assessed fine for their non-performance. In these cases, the relevant authorities are to likewise count the days that performance was affected by COVID-19, and exempt or reduce the fine for the contractual party accordingly.

The days to be counted in the above scenarios are defined as “the number of days of the actual occurrence”—that is, the number of days for which COVID-19 and related measures actually impacted performance. These will be considered by the government authority based on the government’s various pandemic-related regulations and restrictions, such as closure orders, prohibitions on certain activities or movements, and other relevant orders up until the date on which the business re-opened, resumed business operations, or resumed normal operations (whichever is most appropriate for performance of the obligation in question).

When a *force majeure* event obstructs contractual performance under a standard procurement contract in Thailand, the private party must notify the relevant government party of the delay, within 15 days of the end of the *force majeure* situation, in order to request an extension of the timeframe for contractual performance, or a reduction

or exemption of the fines incurred. In the present situation, however, the *force majeure* event is still taking place, and it is not yet known when the situation will end. Therefore, the Ruling Committee has ruled that, instead of following these requirements, the contracting party must notify the government authority about COVID-19’s impact on the project, regardless of whether or not that impact has ended, and provide documentary evidence demonstrating that the contracting party was affected by the COVID-19 pandemic. Examples of this documentation could include the government’s announcement of the state of emergency due to COVID-19, closures or other limitations issued by the government agencies, or evidence showing that suppliers cancelled their production runs.

In addition to the above relief measures, the Ruling Committee has provided options for cases in which a procurement contract has not been fully executed because of a problem in the delivery or investigation of the relevant products or services. This could occur, for instance, when a contracting private party may have performed the actions required by the contract, but disruptions from COVID-19 intervened before the contracting government agency was able to investigate the products or services in order to ensure that the work had been appropriately completed.

The various relief measures that have been issued by the Public Procurement and Supplies Administration Ruling Committee in the last six months provide a number of helpful options for businesses whose involvement in government procurement has been negatively affected by the COVID-19 pandemic. By taking advantage of the alternatives outlined by the committee, and by working in concert with the relevant government agencies, businesses can mitigate their losses and delays due to the global disruption and chart a course back to profitability. 🏡



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Impact of COVID-19 on Commercial Contracts in Thailand: Force Majeure

C COVID-19 has had an economic impact across a wide range of industries, including hospitality, airlines, automotive, construction, logistics, and more, and many performance obligations on contractual parties have been rendered impossible. However, many others—while certainly more difficult, complicated, or expensive—remain literally or legally possible.

While COVID-19 will continue to have a devastating impact on health and economies globally, governments—including Thailand’s—have implemented preventive and responsive measures in an attempt to mitigate that impact. On May 24, 2020, for example, the Committee for Government Procurement and Supplies Management circulated guidelines for the administration of contracts

between private parties during the COVID-19 pandemic, announcing that the COVID-19 pandemic qualifies as a *force majeure* event. The specific period of *force majeure* in Thailand began with the government’s announcement of a state of emergency on March 26, 2020. See the previous article for more details on this measure.

As market circumstances continue to evolve along with the impact of COVID-19, companies in Thailand are paying special attention to the role *force majeure* plays in navigating the various legal implications of commercial contracts during the outbreak.

Force Majeure Clauses under Thai Law

In the midst of the COVID-19 pandemic many are wondering whether parties will be excused from performance under the doctrine of *force majeure*, by which parties can be excused from contractual performance that becomes impossible due to an extraordinary or exogenous event.

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Thailand: Force Majeure (from page 2)

For contracts that have no *force majeure* clause, the definition of *force majeure* under section 8 of the Civil and Commercial Code will automatically be applied. However, parties may negotiate a *force majeure* clause and establish a course of action to follow in such events of *force majeure*. This clause can also pertain to things like excuse of liability, right to terminate or revise the contract, and distribution of damages due to *force majeure*.

Every *force majeure* clause should be considered and interpreted separately and in light of the contract as a whole, as the precise terms of that clause will control the outcome. It may be easier to argue COVID-19 has triggered a *force majeure* clause if the clause expressly includes a pandemic, epidemics, or quarantines as examples of events giving rise to the clause. For example, the WHO categorizing COVID-19 as a pandemic should lend support to parties seeking to enforce *force majeure* clauses in contracts that contain the term. In the absence of these examples, a party claiming the benefit of a *force majeure* clause would first have to demonstrate that COVID-19 is a circumstance that falls within the language of the provision.

Application of Force Majeure

When a company invokes a *force majeure* clause to excuse its contractual nonperformance, it must show that the contractual obligation in question cannot be performed due to unforeseeable, extraordinary circumstances beyond the company's control. However, Thai law does not explicitly state that *force majeure* excuses a contractual party from liability when they cannot perform an obligation.

The party who invokes *force majeure* will need to establish the following facts:

- ▶ The event that prevents the party from performing the contractual obligation is *force majeure* and is not caused by the non-performing party;
- ▶ It is not possible to perform the obligation during the *force majeure*; and
- ▶ After the *force majeure* event concludes, performance is not possible.

Fulfilling these three factors would make a non-performing party likely to be excused from liability under *force majeure*. However, *force majeure* clauses are strictly and narrowly construed, and even if the COVID-19 pandemic or a government order under the state of emergency qualifies as a *force majeure* event, a party would only be excused if the pandemic or a subsequent order actually delayed or prevented the party from performing.

For example, in Supreme Court Case No. 5353/2552, the defendant purchased chicks and food for chicks from the plaintiff, and agreed to sell the grown chickens back to the plaintiff. The court considered that there were two contracts—one for the sale of chicks and food (with the defendant obligated to pay the price for these items), and the second for the sale of grown chickens from the defendant to the plaintiff. However, the outbreak of avian flu caused the government to order the culling of all chickens in the defendant's possession. The court considered the avian flu to be a *force majeure* event, and the culling of

the chickens made the defendant's contractual performance impossible. Thus, the defendant was excused from the contractual obligation to sell the chickens to the plaintiff. However, the defendant's obligation to pay the price of the chicks and food for chicks (or the monetary obligation) had not been made impossible, so the defendant was held liable for the outstanding price for chicks and their food.

Where performance would likely not be prevented, but merely rendered more difficult or expensive, it would not be excused. Often, the relevant question is whether the additional expense or difficulty would be so great as to make it effectively impossible for the party to perform. From the Thai court's perspective, having insufficient funds to carry out an obligation is likely not reasonable grounds for releasing a party from a contractual obligation, and raising the issue of *force majeure* would not help. The court has ruled in many cases that shortage of funds cannot be considered *force majeure* because the funds should be prepared in the normal course of business.



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The Importance of Timing

If *force majeure* can be demonstrated, the question of when it began will then need to be addressed, but that may not be as simple as one might expect, thanks to the dynamic evolution of COVID-19 and the differences in restrictions across the globe. For example, if performance was to take place in Wuhan, China, the *force majeure* would commence January 23, 2020, when the central government imposed a lockdown in Wuhan and other cities in Hubei in an effort to quarantine the center of an outbreak. However, if performance was based in Thailand on the same date, it may not be considered impossible because, at that time, the WHO had not yet declared the coronavirus disease a pandemic.

In summary, it is not enough to simply establish *force majeure* in order to excuse the non-performing party's liability, as *force majeure* does not automatically release parties from their contractual liability unless they can establish that the contractual obligation is impossible—something that can have a high burden of proof, and be subject to variation depending on a range of factors. 🐔