

Coronavirus outbreak - Definition of Force Majeure Events under Vietnamese law

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1. Introduction

1.1. In the last few months, the Coronavirus (Covid 19) outbreak has adversely affected the health and lives of millions of Vietnamese people and billions of people all over the planet. The outbreak also hurts the commercial life of hundreds of thousands of Vietnamese companies. Inevitably, parties to commercial contracts will now have to consider whether they can be exempt from liabilities on the ground of force majeure if they cannot perform contracts due to Coronavirus outbreak.

1.2. In a series of posts, we will now discuss the force majeure regime under Vietnamese law and its connection with Coronavirus outbreak. The first post will address how a force majeure event is defined under Vietnamese law and whether the coronavirus outbreak could qualify as a force majeure event.

2. Summaries of discussion

2.1. On its face, the definition of force majeure event under Vietnamese law contains three usual elements of a force majeure event which are objectivity, unforeseeability, and irresistibility. However, it is not clear if the coronavirus outbreak could satisfy all the elements of a force majeure event under the Civil Code 2015.

2.2. In Vietnamese, “objectivity” (*khách quan*) means (1) something which cannot be controlled by people’s mind, or (2) something which is based on factual events. Accordingly, a self-induced event may still qualify as an event, which occurs in an objective manner.

2.3. A force majeure event should be unforeseeable by the person affected by such an event (not by a “reasonable person” or “any person”). A force majeure event could be unforeseeable during the performance of the contract not just at the time of execution of the contract. It may not be necessary that all facts relating to a force majeure event need to be unforeseeable. Accordingly, parties to contracts signed

after the outbreak may still be able to claim force majeure depending on the circumstances.

2.4. Human contact and human interaction contribute greatly to the growth of the coronavirus outbreak. Therefore, if a company does not follow good prevention practices (e.g., social distancing, and remote working) then such company may be considered as not taking all possible necessary and capable measures to remedy the force majeure event.

2.5. The Civil Code 2015 does not have a list of specific events that could be considered as force majeure events. However, examples of force majeure events are provided in various legislations. And only a few definitions include pandemic or quarantine as a type of force majeure event.

3. Definition

3.1. Article 156 of the Civil Code 2015 provides that:

“The period during which one of the following events occurs shall be excluded from limitation periods for initiating legal action for civil cases ...:

1. An event of force majeure which renders the person with the right to initiate legal action for a civil case..... not able to do so within the limitation period.

A force majeure event is an event that occurs in an objective manner which is not able to be foreseen and which is not able to be remedied by all possible necessary and capable measures having been taken.”

3.2. On its face, the definition of force majeure event under Vietnamese law contains three usual elements of a force majeure event in other civil law countries, which are objectivity, unforeseeability, and irresistibility. However, as discussed below, Vietnamese law is not clear on how to determine whether each criteria is satisfied.

3.3. In addition, it is quite unusual that the definition of “Force Majeure event” (*sự kiện bất khả kháng*) is provided in Article 156.1 of the Civil Code 2015 which deals

with the calculation of time limitation period. Due to its location in the Civil Code 2015, it is not clear how a force majeure event should be interpreted in the context of contract performance. Accordingly, it is not clear if the coronavirus outbreak could satisfy all the elements of a force majeure event under the Civil Code 2015.

4. First criteria - Objectivity

4.1. Regarding the first criteria (i.e., objectivity), the Civil Code 2015 does not define what objectivity means. According to the [Vietnamese Dictionary](#), “objectivity” (*khách quan*) means (1) something which cannot be controlled by people’s mind, or (2) something which is based on factual events. The coronavirus outbreak seems to satisfy both (1) and (2) as provided in the Vietnamese Dictionary. However, if the definition of “objectivity” under the Vietnamese Dictionary (which seems to be different from the concept of “[exteriority](#)” in French law) is applicable then a party affected by an event which is caused by such party itself could still claim that such event occurs in an objective manner. It is not clear if that is the intention of the draftsman of the Civil Code 2015.

5. Second criteria – Unforeseeability

5.1. Regarding the second criteria (i.e., being unforeseeable), it is more difficult to determine whether the coronavirus outbreak is not [foreseeable](#). This is because the law does not clarify:

5.1.1. **Issue (1):** by whom a force majeure event is not foreseeable;

5.1.2. **Issue (2):** at what point in time the event is not foreseeable; and

5.1.3. **Issue (3):** what is not foreseeable.

5.2. Regarding Issue (1) (by whom a force majeure event is not foreseeable), the Civil Code 2015 does not make clear whether a force majeure event is not foreseeable by:

- the specific person who is affected by the relevant event (i.e., a subjective test); or
- a reasonable person (i.e., an objective test); or

- any person (i.e., an absolute test). For example, a normal person may not be able to foresee the coronavirus outbreak. But, for an epidemiologist, the coronavirus outbreak could be predictable.

5.3. The definition of force majeure event is introduced in Article 156 of the Civil Code 2015, which determines the length of the time limitation period during which a specific person could initiate a court claim. In addition, Article 156 also refers to “all possible necessary and capable measures” which can only be determined based on the circumstance of a specific person, not any person or a reasonable person. Therefore, logically, the person who cannot foresee a force majeure event should be the person whose right to initiate a court claim is affected by the force majeure event. If this approach applies to the performance of a contract, then the person who could not foresee a force majeure event should be the person whose obligations are affected by the force majeure event.

5.4. Regarding Issue (2) (at what time the event is not foreseeable), in the context of the performance of a contract, the Civil Code 2015 is not clear whether a force majeure event cannot be foreseen (2.1) at the time of performance of the relevant contractual obligations, or (2.2) at the time of execution of a contract. Interpretation (2.1) could make it more difficult for a contracting party to claim force majeure even for contracts signed before the coronavirus outbreak.

5.5. The definition of force majeure is provided in the context of determining the limitation period during which a person can initiate a court claim. Therefore, interpretation (2.1) seems to be more consistent with the structure of Article 156 of the Civil Code 2015. However, interpretation (2.2) is more consistent with international practice and is supported by the definition of force majeure under the old Commercial Law 1997 and the provision of the Convention on International Sale of Goods (CISG) of which Vietnam is a party.

5.6. Regarding Issue (3) (what is not foreseeable), let’s take the following example of a force majeure event affecting a company (A) in Vietnam:

- *Fact 0*, the coronavirus outbreak occurs in Wuhan, China;

- *Fact 1*, first coronavirus cases arrive in Vietnam but do not arrive in the province where A operates;
- *Fact 2*, Vietnamese authorities apply certain measures to prevent or contain the coronavirus outbreak;
- *Fact 3*, more coronavirus cases occur in Vietnam and arrive in the province where the A operates;
- *Fact 4*, Vietnamese authorities apply stricter measures to prevent or contain the coronavirus outbreak in the province where A operates; and
- *Fact 5*, coronavirus cases occur near or at the location of A and the Vietnamese authorities apply direct measures to A such as closing the facility or mandatory isolation or quarantine.

5.7. It is not clear that for A to claim force majeure, (3.1) all Facts 0 to 5 need to be unforeseeable to A, or (3.2) only Fact 5 need to be unforeseeable to A. In other words, if, for example, Fact 3 or Fact 4 is foreseeable to A, it is not clear whether A can claim that Fact 5 is unforeseeable and qualifies as a force majeure event. If interpretation (3.1) applies then parties to contracts signed after Fact 0 may not be able to claim force majeure. If interpretation (3.2) applies then parties to contract signed after Fact 0 may still be able to claim force majeure if it can prove that Fact 5 is still unforeseeable to it.

5.8. Again similar to the discussion above regarding the context where the definition of force majeure event is introduced, one could argue that only Fact 5 needs to be unforeseeable to A. This is because according to the wording of Article 156 of the Civil Code 2015, the force majeure event should prevent the relevant person from making a claim within the time limitation period. Among Facts 0 to 5, only Fact 5 has a direct impact of preventing A from performing the contractual obligation. Accordingly, logically, only Fact 5 needs to be unforeseeable to A. In practice, due to the unpredictable of the coronavirus and how it spreads, even if A is aware of Fact 3 or Fact 4, it may still be not able to foresee with reasonable accuracy

about the timing and the potential impact of Fact 5.

6. **Third criteria – Irresistibility**

6.1. Similar to the discussion of foreseeability, to determine whether a force majeure event under Vietnamese law is irresistible, one would need to consider it based on the circumstances of the specific person being affected by the force majeure event (not a “reasonable person” or “any person”). Since Article 156 uses the words “has taken” (*đã áp dụng*), the person affected by a force majeure event should actually take the measures to remedy the event even if such remedies cannot overcome the measures.

6.2. Human contact and human interaction contribute greatly to the growth of coronavirus outbreak. Therefore, it is more difficult to determine whether a person has taken all possible necessary and capable measures to remedy the coronavirus outbreak. On the one hand, one can argue that since there is no cure or vaccine to the coronavirus outbreak, no measures can remedy the situation. On the other hand, one can argue that even with no cure or no vaccine, there are measures preventing the spread of the coronavirus and limit its impact (such as social distancing). In the above example, if A does not follow good prevention practices (e.g., social distancing, and remote working) then A may be considered as not taking all possible necessary and capable measures to remedy the force majeure event.

7. **Specific examples of force majeure events**

7.1. The Civil Code 2015 does not have a list of specific events that could be considered as force majeure events. However, examples of force majeure events are provided in various legislations. And only a few definitions include pandemic or quarantine as a type of force majeure event.

7.2. In particular,

- Article 38 of the Labour Code 2012 of the National Assembly provides that “if as a result of a natural disaster, fire or for any other reason of force majeure as

prescribed by law, the employer...". This suggests that fire and natural disaster can qualify as a force majeure event;

- Article 19.1 of the model Petroleum Contract issued by the Government defines force majeure event to include natural disasters such as fire, explosion, floods, and earthquake, and other events such as wars, blockade, embargo, occupation, civil war, riots, sabotages, or other civil disorder, strike other labour disturbances, or any future applicable law;
- Decree 37/2015 of the Government relating to construction contracts provide that the time for completion of a construction contract will be adjusted in case of "earthquake, storm, floods, tsunami, fire, wars and other force majeure events". This suggests that earthquake, storm, floods, tsunami, fire, and wars could be force majeure.
- Circular 2/2019 of the Ministry of Industry and Trade on model power purchase agreement defines force majeure events to include natural disaster, fire, explosion, floods, tsunami, **pandemic**, earthquake, riots, unrest, war, sabotages, blockade, embargo, war (whether declared or not)
- The standard form contract issued by Ministry of Planning and Investment for use in public tender for procurement of goods defines a force majeure event to include wars, riots, strikes, fire, floods, pandemic, and quarantine.

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