

Coronavirus Outbreak - The Effect of A Force Majeure Event Under Vietnamese Law

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1. Introduction

1.1. This is our final post relating the force majeure event in Vietnam. In this post, we will cover the effect of a force majeure event after the existence of a force majeure event is confirmed (see our earlier post [here](#)). This post is written by Nguyen Quang Vu and Tran Thuy Tien.

2. Summaries of discussion

2.1. A party affected by a force majeure event will be exempted from contractual liabilities. It is not necessary for a contract to have a separate force majeure clause for the affected party to claim force majeure.

2.2. The Commercial Law 2005 is not clear whether the default of an affected party must be caused by the force majeure event.

2.3. The law does not clearly allow a contract to be terminated on the basis of a prolonged force majeure. However, in case of a prolonged force majeure event, the Commercial Law 2005 allows the parties to refuse to perform the contract.

2.4. The affected party must notify the other party of the occurrence of a force majeure event, the possible consequences of such an event, and the cessation of such an event. The Commercial Law 2005 is silent about the consequences of the affected party's failure to notify the occurrence of a force majeure event or to prove the existence of a force majeure event.

2.5. Even if the coronavirus outbreak may not qualify as a force majeure event, a party to Vietnamese law commercial contracts may still refuse performance of the contract on the ground that such party must comply with the instructions which are given by the authorities under the Law on Prevention and Control of Infectious Diseases to deal with the outbreak.

2.6. The coronavirus outbreak could qualify as a "fundamental change" under Article 420 of the Civil Code 2015. This could allow the parties to a contract signed before the outbreak to request the court to terminate or amend the contract. Unfortunately, Vietnamese courts have temporarily suspended all hearing and proceedings to contain the outbreak.

3. Exemption from liabilities

3.1. A party who is affected by a force majeure event (the **Affected Party**) and fails to perform its obligations under a contract will be exempted from liabilities. In

addition, it is not necessary for a contract to have a separate force majeure clause for the Affected Party to be exempt from liabilities. This is because:

3.1.1. Article 351.2 of the Civil Code 2015 provides that where an obligor fails to perform correctly an obligation due to a force majeure event, it will not have civil liability unless otherwise agreed or otherwise provided by law; and

3.1.2. Article 294.1 of the Commercial Law 2005 provides that a defaulting party will be exempt from liability upon occurrence of a force majeure event.

3.2. It is not clear from the wording of Article 294.1 of the Commercial Law 2005 whether there needs to be a causation relationship between the force majeure event and the default of the defaulting party. In other words, the Commercial Law 2005 is not clear whether the default must be caused by the force majeure event. Logically, in order to be exempt from liability, the default should be caused by the force majeure event. However, the lack of clear wording in the Commercial Law 2005 could allow a defaulting party to argue otherwise.

4. No termination but only “refusal to perform”

4.1. The Civil Code 2015 does not allow a contract to be terminated on the basis of a prolonged force majeure. The Commercial Law 2005 also does not clearly provide for a termination of contract due to a prolonged force majeure. However, in case of a force majeure event, the Commercial Law 2005 allows the parties to “extend” the time limit for performance of the contract, and, in case of a prolonged force majeure event, to refuse the performance of a contract which has the effect similar to termination of the contract. In particular, the Commercial Law 2005 provides that:

4.1.1. the parties to a commercial contract could agree to extend the time limit to perform the contract obligations (the **Agreed Extended Period**);

4.1.2. if the parties fail to agree to extend the time limit, then the time limit will be extended by a period equal to the duration of the force majeure and a reasonable amount of time to remedy the force majeure’s consequences *provided that* the extended time will not exceed the following periods (**Maximum Extended Period**):

(a) five months for contracts of which the time limit required to deliver goods and services is no more than 12 months from the signing date; or

(b) eight months for a contract of which the time limit required to deliver goods and services is more than 12 months from the signing date;

4.1.3. After the Maximum Extended Period or the Agreed Extended Period, either party may refuse to perform (*từ chối*) the contract and no party can request the other party to compensate for damages.

4.2. It seems that a refusal to perform a contract pursuant to Article 296 of the

Commercial Law 2005 has a similar effect to termination of the contract. This is because the party refusing to perform the contract will not have to perform its obligations under the contract without having to compensate for damages. The Commercial Law 2005 does not make clear about the period during which the refusal remains effective. However, from the structure of Article 296, it appears that the refusal to perform may remain effective indefinitely.

5. Required procedures

5.1. The Commercial Law 2005 requires the Affected Party to notify:

5.1.1. the other party immediately of the occurrence of a force majeure event and of the possible consequences of such event; and

5.1.2. the other party as soon as the force majeure event ceases to exist.

In addition, the party which refuses to perform the contract due to a prolonged force majeure event must notify the other party of its refusal to perform the contract:

5.1.3. within a time-limit not to exceed ten days from the date of expiry of the extended time limit for performance of the other party's obligation; and

5.1.4. prior to commencement by the other party of performance of its contractual obligations.

5.2. If the Affected Party fails to notify the other party of the cessation of a force majeure event, it will have to compensate the other party for damages. The Affected Party also has the obligation to prove that a force majeure event exists. However, the Commercial Law 2005 is silent about the consequences of the Affected Party's failure to notify the occurrence of a force majeure event or to prove the existence of a force majeure event.

6. Alternatives to force majeure events

Complying with decision of Government authorities

6.1. The Commercial Law 2005 exempts the breaching party from liability if the breach is due to the implementation of a decision of a competent State administrative body of which the parties could not have known at the time of entering into the contract. To contain the coronavirus outbreak, the Vietnamese authorities have issued various instructions (e.g., [Directive 15](#) of the Prime Minister) some of which were made in accordance with the Law on Prevention and Control of Infectious Diseases. Under the Law on Prevention and Control of Infectious Diseases, in case of epidemics, the state competent agency may adopt one or more of the following measures:

6.1.1. Temporarily suspending the operation of public food and drink

establishments likely to transmit the epidemic disease in an epidemic zone;

6.1.2. Imposing a ban on trading and consumption of foods which have been identified by competent health agencies; and

6.1.3. Prohibiting mass gathering or suspending activities and services in public places in epidemic zones.

6.2. Accordingly, even if the coronavirus outbreak may not qualify as a force majeure event, a party to Vietnamese law commercial contracts may still refuse performance of the contract on the ground that such party must comply with the instructions given by the authorities under the Law on Prevention and Control of Infectious Diseases.

Hardship

6.3. Article 420 of the Civil Code 2015 regulates the performance of a contract under a fundamental change of condition (a **Fundamental Change**), which is similar to a hardship clause in other civil jurisdictions. The conditions used to determine whether an event could be considered as a Fundamental Change include:

6.3.1. The condition changes as a result of an objective cause occurring after the contract is executed. The coronavirus outbreak satisfies this condition;

6.3.2. At the time of execution of the contract, the parties cannot foresee the change. In general, contracts signed before the coronavirus outbreak should satisfy this condition;

6.3.3. There is such a fundamental change in circumstances that the contract would not have been entered into or would have been entered into with completely different contents if the parties had foreseen such change. Given the serious impact of the coronavirus outbreak on the whole society, it is likely that this condition is also satisfied;

6.3.4. The continuance of performing the contract without a change in the contract's content will cause significant damage to one party. Depending on the specific situation, this condition could be satisfied; and

6.3.5. The party whose interest is affected has adopted all necessary and capable measures in accordance with the nature of the contract but it still cannot prevent, mitigate the impact on its interest. Again, the affected party should comply with good prevention practices in order to satisfy this condition.

6.4. Although the conditions of a Fundamental Change are similar to those of a force majeure event, it appears that the coronavirus outbreak could qualify as a Fundamental Change as long as the outbreak continues.

6.5. Upon the occurrence of a Fundamental Change, the affected party has the

right to request the other party to re-negotiate the contract within a reasonable period of time. Where the parties are unable to reach agreement on amendment of the contract within a reasonable period, either party may request a court to:

6.5.1. terminate the contract at a definite time; or

6.5.2. amend the contract to balance the legitimate rights and benefits of the parties due to a Fundamental Change.

6.6. The court is only permitted to make a decision on the amendment of the contract in a case where termination of the contract will cause loss and damage of an amount higher than the costs for the performance of the contract if the contract is amended. Unfortunately, Vietnamese courts have decided to [suspend](#) all court hearings or proceedings during the coronavirus outbreak to prevent its spread. Accordingly, Vietnamese businesses may not be able to utilise Article 420 of the Civil Code 2015.

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