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COVID-19: Force Majeure in Commercial Transactions in the Current Situation

Introduction

The COVID-19 pandemic has caused a substantial impact on business operations in many industries, not only at the domestic level but also at the international level. As the performance of contractual obligations becomes increasingly difficult, contractual parties should consider the potential legal impact and effect of the outbreak on their commercial contracts and agreements. A frequently asked question is what will happen to contracts and whether or not the performance of obligations can be delayed or suspended or would the parties be liable for losses in any event. In assessing these issues, parties should focus on force majeure clauses and how these apply to their contracts, and the options available in the absence of such contractual provisions.

Force Majeure under Thai Law

The following provisions of law are relevant to this issue and would need to be considered:

Section 8 of the Civil and Commercial Code ("**CCC**") provides that:

"Force majeure denotes any event the happening or pernicious results of which could not be prevented even though a person against whom it happened or threatened to happen were to take such appropriate care as might be expected from him in his situation"

Section 205 of the CCC provides that:

"The debtor is not in default so long as the performance is not effected in consequence of a circumstance for which he is not responsible."

Section 219 of the CCC provides that:

"The debtor is relieved from his obligation to perform if the performance becomes impossible in consequence of a circumstance, for which he is not responsible, occurring after the creation of the obligation."

The concept of force majeure is clearly recognised under Thai law.

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Section 8 of the CCC defines the term "force majeure" broadly as an event which could not be prevented with appropriate care of a person invoking such event. The legal provision does not include an exhaustive list of force majeure events. According to previous Supreme Court decisions, force majeure events include severe natural disasters, accidents and riots. However, there is no previous Supreme Court decision ruling on whether the outbreak of an infectious disease constitutes a force majeure event.

In particular, for commercial transactions, where there is the occurrence of a force majeure event, parties to a commercial contract may rely on the specific legal provisions set out in the CCC to be relieved or excused from their obligations under the contract. A party who is unable to perform the contract as a result of a force majeure event may rely on Section 205 or Section 219 of the CCC as the case may be. Where the performance of a party's obligations under a commercial contract becomes impossible as a result of a force majeure event, that party may rely on Section 219 of the CCC in order to relieve it from its obligations to perform the contract. For example, a pianist who is unable to perform a recital at a concert according to his performance contract because he is infected by COVID-19 and is being treated in a hospital, is likely to be entitled to be relieved from his obligation by virtue of Section 219 of the CCC.

On the other hand, consider the case of a seller under a commercial contract. Where the seller's ability to perform the obligations is not entirely impossible but is disrupted or delayed by the event of force majeure, the seller may seek to rely on Section 205 to claim that he is not in default of performance under the contract. In this case, the seller's obligation to perform the contract is not relieved but he would not be liable for damages incurred as a result of the delay in his performance. For example, in the case where a seller is prevented from delivering goods overseas within the period specified in the agreement as a result of a governmental lockdown during the COVID-19 situation, the seller is likely to be entitled to rely on Section 205 to claim that he is not in default of performing the contract. In that case, he would not be relieved from the obligation to deliver the goods after the lockdown is lifted, but the seller would not be liable to pay liquidated damages or damages arising as a result of the delay.

It is worth noting that there is no ruling by the Thai Supreme Court concerning the applicability of Section 219 and Section 205 to the COVID-19 situation. Therefore, each case would have to be considered on a case by case basis.

Invoking a Force Majeure Clause under Thai law

To avoid the uncertainty in the interpretation and the applicability of the above legal provisions which are currently untested, parties to commercial contracts are free to agree on a force majeure clause to discharge their obligations under the contract when there is an event beyond their reasonable control preventing them from performing those obligations. The question frequently asked in the situation of the COVID-19 outbreak is whether a party can rely on the COVID-19 pandemic to trigger a force majeure clause in its commercial contract, and to release itself from its liability under the contract. There is a

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widely-held (albeit untested) view that the pandemic would not be considered as a force majeure event in itself; however, where the pandemic triggers a specific event that prevents a party from performing its obligations under a contract, the party affected may then rely upon that event to invoke and rely upon the force majeure provision under the contract.

For example, in the case where a force majeure clause provides that *"If a party is prevented from performing its obligations under the terms of this agreement because of any cause or event beyond the reasonable control of such party such party shall not be liable for damages to the other for any damages resulting from such failure to perform or otherwise from such causes"*, two main considerations have to be made, which are: (i) whether the COVID-19 pandemic is an event beyond the reasonable control of such party, and (ii) whether the party is prevented from performing its obligations under the terms of the agreement because of the COVID-19 pandemic. In the case where a seller is prevented from delivering goods overseas within the period specified in the agreement as a result of a governmental lockdown order due to the pandemic, the seller would be entitled to argue that the governmental lockdown order (issued as a measure to prevent the spread of COVID-19) is an event beyond the seller's control and has prevented such party from making delivery of goods overseas. As such, the seller should be able to rely on and invoke the force majeure clause. On the contrary, if there is no governmental lockdown but it is simply not convenient for the seller to deliver the goods because of the COVID-19 situation (for example, if the seller has to incur additional transportation costs in doing so), the seller should not be entitled to rely on the force majeure clause because the seller is not prevented from performing its obligation. In any event, this question requires the consideration of the circumstances and facts of each case, the words of the contractual provision and the interpretation thereof.

Parties who wish to avoid conflict in the interpretation of the force majeure clause should agree on a well-drafted force majeure clause and may also, for clarification, include a pandemic in either an exhaustive or non-exhaustive list of force majeure events. In the current COVID-19 situation, it is advisable for parties to commercial contracts to revisit terms in commercial contracts to prepare for an unpredictable event, the occurrence of which may prevent them from complying with or performing their contractual obligations.

Visit our [COVID-19 Resource Centre](#) for views from our lawyers across the region on common issues and legal implications brought about by COVID-19. For specific inquiries, please reach out to your relationship partner or send an email to our [COVID-19 Legal Team](#).

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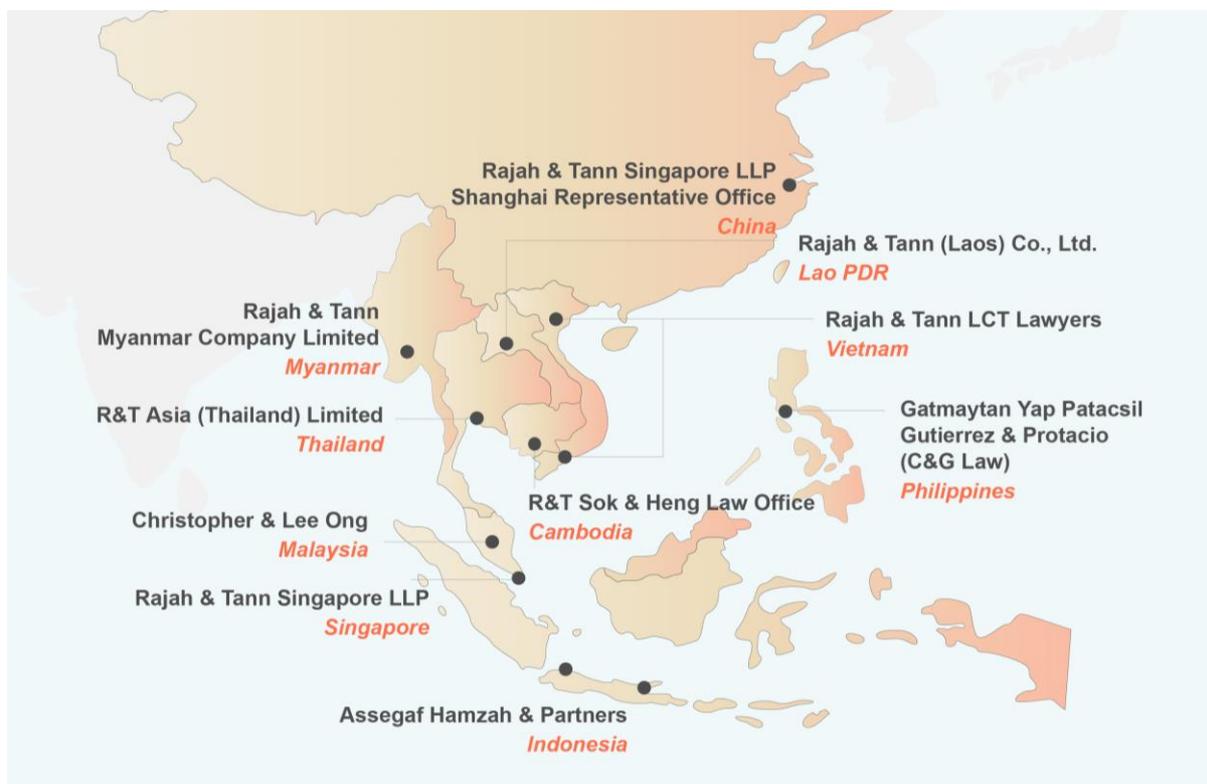
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