

Insights

SINGAPORE: FORCE MAJEURE AND COVID-19 – FINDING RELIEF UNDER CURRENT CONTRACTS AND PREPARING FOR FUTURE EVENTS

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SUMMARY

Since the onset of the COVID-19 outbreak, parties have searched for contractual clauses (or legal doctrines) which may release, or at the very least, alleviate some of the obligations they are required to perform.

In this vein, there have been various discussions on invoking force majeure clauses. While the COVID-19 (Temporary Measures) Act was passed in Singapore and provides interim relief for some parties, it is still important to understand where parties' rights in respect of a force majeure event may lie.

In this article, we will focus on (a) seeking relief under a force majeure clause in your existing contract and (b) considerations for allocating contractual risk and crafting force majeure clauses in future agreements.

Since the onset of the COVID-19 outbreak, parties have searched for contractual clauses (or legal doctrines) which may release, or at the very least, alleviate some of the obligations they are required to perform.

In this vein, there have been various discussions on invoking force majeure clauses and the doctrine of frustration. As at 7 April 2020, the COVID-19 (Temporary Measures) Act (the "**COVID Act**") was passed and provided welcomed relief for parties that are unable to perform their contractual obligations due to the outbreak. These measures and the contracts which they apply to are addressed in our previous blog posts: [COVID-19 – Singapore introduces temporary measures to give relief from contractual obligations](#) and [Singapore – COVID-19 – Temporary Measures Act and its impact on the construction industry](#).

It is relevant to note that the COVID Act does not preclude parties from taking actions under the Frustrated Contracts Act (Cap. 115) or pursuant to a force majeure clause in a contract. This means that the non-performing party retains the option of seeking relief through either force majeure or

frustration. In any event, the COVID Act is only intended to provide temporary relief and parties will still need to look to their contractual bargain for where their rights land eventually.

In this article, we will focus on (a) seeking relief under a force majeure clause in your existing contract and (b) considerations for allocating contractual risk and crafting force majeure clauses in future agreements.

Force Majeure – Key steps in seeking relief under your current contract

Force majeure is generally taken to mean an unforeseeable event that arises outside of a party's reasonable control, and which prevents a party from fulfilling its obligations under the contract.

In the drafting of a force majeure clause, it is typical to see express provisions for specific events where a party may be excused or discharged from its contractual obligations. There are however contracts which refer to force majeure without defining it – as such it would be left to a matter of interpretation (possibly by the courts) as to whether an event constitutes force majeure.

If you want to seek relief for a force majeure event:

- First identify whether your contract has a force majeure clause. If it does not, parties likely have to look to the doctrine of frustration as force majeure is not strictly speaking a separate legal doctrine in Singapore. This means that it has to be expressly provided for in the contract.
- If there is a force majeure clause, consider first:
 - Whether there are specific events listed that would trigger this clause:
 - If yes:
 - Whether the term “pandemic”, “epidemic”, “disease” or a similar event is provided for in the clause. If such an event is provided, the likelihood of invoking this clause is higher. In this regard the COVID-19 outbreak was declared as a “pandemic” by the World Health Organization on 11 March 2020.
 - If no such event is listed, whether there are other events which the non-performing party can rely on e.g. change in law.
 - If no and only a general definition of force majeure is provided, whether the non-performing party can bring the event within that general definition.
 - Whether there are events excluded in the clause e.g. financial hardship and economic downturn.
 - What is the threshold for invoking relief e.g. whether contractual performance is excused for the force majeure event if it “hinders” or “prevents” performance, or whether a higher

threshold is required such as performance is made “impossible”.

- Assuming that the event can be brought under the scope of the force majeure clause, consider next:
 - Mitigation – what are the steps that the party needs to take to mitigate the effect of COVID-19? The contract may require them to use best or reasonable endeavours to minimize delay and resume performance as soon as practicable. Accordingly it would be important for the non-performing party to keep all records of such steps taken and communication between the parties to document the steps taken here.
 - Procedure – carefully review and follow the procedure on invoking a force majeure clause, in terms of the form and timing of notice.
 - Reliefs – the types of reliefs afforded by reliance on the force majeure clause and whether these are adequate e.g. reliefs may include extension of time / costs compensation, and the contract may also be suspended or terminated. Parties may also need to look to other clauses in the contract for relief.
 - Monitoring and updating – given the uncertainty in the evolution of the COVID-19 virus, it is important for parties to monitor movements in the jurisdictions in which their operations or supply chain might be. This means, for example, monitoring any change in laws / regulations which come into force as a result of the virus (particularly where they intervene in private law contracts such as the COVID Act) and fluctuations in cost of labour and materials.

Entering into future contracts / varying existing contracts

In respect of entering into future agreements, we have suggested some questions to ask and factors to consider when drafting a force majeure clause.

Questions to Ask

We start by considering some basic but fundamental questions to ask in light of the outbreak:

- When is the contract to be entered into?
- When is the contract to be performed?
- Where are the contractual obligations to be performed?
- What are the likely impacts of the COVID-19 outbreak on the parties and their ability to perform the contract?

- Is it possible to obtain insurance in case performance is delayed?
- Have the parties discussed who should bear the risk of delayed/ non-performance of the contract? Has this been priced into the contract?
- Do the parties have contingencies to allow staff allocated to the project to continue work during the outbreak (e.g. from remote working)?

Drafting the Force Majeure Clause

More specifically on force majeure itself - prior to the pandemic, these clauses were often viewed as boilerplate clauses but this has since taken on renewed significance, and parties would do well to consider risk allocation and what this clause should encompass.

When varying existing contracts and looking at future contracts (please note that this is also dependent on the governing law of the contract), we have considered the following for the scope of force majeure:

- Whether a definition of force majeure / list of events should be provided. The benefit to having specific events listed relate to a level of certainty which contractual parties may seek. However, the party receiving the services (in particular) may not agree on including certain types of events e.g. an event related to a virus / pandemic – in view of the current outbreak.
- As such, much would depend on the commercial bargaining power as well as the pricing of the contract. Where the employer is keen on carving out COVID-19 related events or excluding force majeure relief on the basis of a pandemic, this could alter the risk profile and likely to result in the supplier increasing its price significantly to cover the risks. This may not be desirable from a commercial perspective.
- One way might be to reach a middle ground in terms of defining the event. For example, the force majeure event might be limited to a “*pandemic as declared by the [insert relevant health authority]*”.
- In terms of excluded events, it might be pertinent not just to exclude circumstances such as changes in market factors or economic conditions, but also references to a virus or disease and its potential consequences e.g. delay in availability of labour or materials due to such an event.

In relation to COVID-19 specifically, there is a question as to whether this can be considered a force majeure event as it is no longer unforeseeable, and therefore cannot be considered to be reasonably outside of a party’s control. As such, it would likely need to be dealt with as an existing event in the amendment or drafting of a contract.

Apart from the scope of force majeure, it is worth considering what parties are required to do to mitigate the effects of the event, such as:

- Taking all reasonable steps to prevent and avoid the force majeure event;
- Continuing to carry out their duties to the greatest extent possible;
- Taking all reasonable steps to overcome and mitigate the effects of force majeure event, including active management of issues caused by third parties and liaising with them; and
- On becoming aware of the force majeure event, to inform the other party of the event together with the details and a reasonable estimate of the duration of the event.

Depending on what the contracted services are, parties may wish to list out specific actions that an affected party is required to take to mitigate the situation.

This is also an opportune time to consider what are the reliefs to be afforded to a party in the event of force majeure. Commonly, it is a ground for extension of time in the performance of the contract. The contract may also permit the affected party to claim for additional costs and expenses. Where the event continues beyond a certain period of time and affected party is still unable to comply with their obligations, there is usually an option for parties to terminate the contract.

Conclusion

We have focussed this article on the concept of force majeure but there are other avenues for relief (e.g. a material adverse change clause), the doctrine of frustration and in Singapore, the COVID Act. The key thing to bear in mind, COVID-19 or otherwise, is the contractual bargain that parties seek to strike and who is in the best position to bear the risks. A contractual bargain may not always be “fair” or enforceable (with the COVID Act suspending certain legal actions), but we should still ask germane questions when analysing contractual provisions and parties’ interests, particularly when they are severely impacted by events outside of their control.

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