

CORONAVIRUS



The application and implications of a *Force Majeure* Clause in Hong Kong

The outbreak of the **Coronavirus** epidemic which originated in Wuhan, China, has had a significant impact on the performance of contractual obligations in Hong Kong and throughout Asia. The current disruptions that companies face, including travel bans and flight suspensions to and from various countries (which are impacting, *inter alia*, the supply and distribution of goods), has made it more challenging for parties to fulfill their contractual obligations. This has resulted in many parties taking a closer look at their contracts and whether they contain a *force majeure* clause.

A ***force majeure* clause** is a clause that relieves a party from its obligations to perform the contract in the event of certain extreme circumstances. This type of clause will not be implied by the Court and must be expressly stated in the contract itself in order for a party to rely on it¹.

Many Italian and foreign companies rely on suppliers in mainland China and Hong Kong for the smooth running of their operations. Given the current climate following the spread of the Coronavirus, more people are considering the effectiveness of a *force majeure* clause and whether it can be invoked in such circumstances.

The first issue to consider is whether the contract includes a *force majeure* clause or not. If it does, is the contract governed by Hong Kong law? Unfortunately, Hong Kong law does not define what is classified as extreme circumstances that fall under a *force majeure* clause; it will be determined by examining the wording of the contract term. Whether the Coronavirus will be considered as an extreme circumstance or not will depend on the wording used in drafting the clause. The party wishing to invoke a *force majeure* clause should consider whether the drafted clause expressly provides for epidemics of this sort and if so, whether there are specific requirements supporting the application of the clause (e.g. whether the epidemic must have originated in Hong Kong). If the clause is drafted using a more general language and if it seeks to include the occurrence of any materially impactful and unforeseeable events beyond the party's control, then it may potentially be invoked in the present circumstances of the Coronavirus.

If the clause can be invoked, the next issue to consider is which party has the burden of proving whether the unforeseeable event prevents it from performing its contractual obligations or not. Would it be for the supplier in mainland China and Hong Kong to prove that it is unable to meet its contractual obligations or for the Italian (or foreign) company to prove why the supplier can, in fact, meet its contractual obligations? Under Hong Kong law it is the party claiming relief pursuant to the *force majeure* clause who has the burden of proving that the unforeseeable event described in the *force majeure* clause has occurred and that it prevents, hinders or delays the performance of its contractual obligations.² Such party must further prove that its non-performance was due to circumstances beyond its control and that there were no reasonable steps that it could have taken to avoid, or mitigate, the event. This means that suppliers will have to show why they should be allowed to rely on and invoke the *force majeure* clause rather than simply invoking it because it is provided for in the contract.

¹ Sun Wah Oil & Cereals Ltd. v. Gee Tai Trading Co. Ltd., [1993] HKC 132

² Channel Island Ferries Ltd v Sealink UK Ltd [1988] 1 Lloyd's Rep 323

However, when a contract does not contain a *force majeure* clause, the parties to it may seek to rely on the doctrine of frustration. Under Hong Kong law, the doctrine of frustration applies when, out of no fault of either party, an event occurs after the formation of the contract which fundamentally changes the circumstances to a point where it would be unjust to hold them to the original contract. If the contract is deemed frustrated, it will be discharged and the parties will be released from any and all future obligations.

It is important that businesses verify and examine the *force majeure* clause, if existing, in any contracts they are a party to if they are relying, or will rely, on a supply chain. We expect to see an increase in the number of parties wishing to invoke a *force majeure* clause over the coming months as a result of the Coronavirus. It is important for parties to seek legal advice on the matter. Should you have any queries and / or concerns and wish to discuss the matter in more detail, please do not hesitate to contact our team.

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