Panic in a Pandemic – Would “force majeure” clause save you from a contractual dispute?

The ongoing COVID-19 pandemic is creating unprecedented uncertainties for businesses and public life due to the prevailing travel bans, restrictions and shutdowns of public services (including the Judiciary) and business sectors, mandatory quarantines and other health measures with a view to containing the virus spread.

As the pandemic remains severe around the globe, the Hong Kong Government has denied entries to all non-Hong Kong residents who arrive at Hong Kong International Airport, including visitors in transit since the end of March until further notice. Non-Hong Kong residents coming from the Mainland, Macao and Taiwan will be denied entry to Hong Kong if they have been to any overseas countries and regions in the past 14 days. Other inbound travellers other than the exempted persons have to be subject to mandatory 14-day quarantines and/or COVID-19 viral test at the test centre at the AsiaWorld-Expo as circumstances require. Such measures aim to detect symptomatic and asymptomatic cases early on for cutting the community transmission chain which have proven certain effect on epidemic control.

Since April, the city has also imposed restrictions on public gatherings and shut down various entertainment venues. A four-person limit on gatherings in public places, whether indoors or outdoors, has been implemented and is expected to be further extended to May. No doubt, performance of commercial contracts regarding supply of goods and services or holding events would undoubtedly be further affected.
While businesses are actively making alternate arrangements to enable business as usual while practising social distancing, business owners are advised to review and evaluate their commercial contracts on the effectiveness in protecting your legal rights, limiting exposure to risks and mitigating losses against unforeseen business interruptions.

This practical guide discusses the application of force majeure clauses in contracts governed by Hong Kong law and provides clients with quick know-hows on the occurrence of force majeure events.

**What is “force majeure” in a nutshell?**

“Force majeure” means “superior force” in French. Generally it refers to events or circumstances beyond a party’s reasonable control.

A force majeure clause provides contractual relief to an innocent party, who is not in default and “cannot” perform its contractual obligations upon the occurrence of materially impactful events beyond control.

The availability and effect of force majeure clauses will primarily depend on what parties have agreed in the contract. When a force majeure clause is validly relied on, the innocent party is entitled to be exempted from contractual obligations without liability.

**Is there a force majeure clause in the contract?**
Under Hong Kong law, force majeure clauses cannot be implied into contracts and must be expressly drafted to be included in contracts. In the absence of a force majeure clause, contractual party cannot avail themselves of the force majeure doctrine (and the doctrine of frustration in common law may have to be looked into instead).

**What do force majeure events cover?**

Force majeure events usually cover “Acts of God” like natural disasters such as a storm, hurricane, earthquake and so on.

Other commonly adopted force majeure events include major political events including war or invasion, government policy change or action, terrorism, riot, government, etc.

Parties are free to agree on and define other specified force majeure events in an exhaustive or non-exhaustive list for the purpose of allocating risks in the commercial contracts. Subject to parties’ commercial bargain and the specific nature of the parties’ businesses, force majeure events may be loosely or comprehensively drafted.

If a force majeure clause is drafted in a more generic and “catch-all” manner, e.g. “any other cause or event beyond a party’s control”, it leaves parties room to argue if a supervening event falls within the scope of force majeure clause, giving rising to ambiguity and litigation risk for resisting the force majeure doctrine. Case law demonstrates that the Court inclines to construe force majeure clauses strictly against the party relying on them.
“Like any other contractual provision, a force majeure clause is to be given a fair reading in its factual matrix. Of course since contracts are made to be performed, clauses invoked to remove or modify obligations of performance ought at least in general to receive a strict construction. Such a construction means that any ambiguity would be resolved against the party seeking to rely on the clause.” — *Goldlion Properties Ltd and Ors v Regent National Enterprises Ltd* (2009) 12 HKCFAR 512

**What if force majeure events do happen?**

Once an event is within the scope of the specified force majeure events, parties should look into the contract to see if there are notification requirements requesting the party intending to seek a relief under the force majeure clause to notify the other party of the actual or anticipated non-performance of the contract in advance. Attention has to be placed on the formality, contents and time limitations of the notice required.

**What is the level of impact of the force majeure event leading to the non-performance of contractual obligations?**

The actual wording of the force majeure clause and the causation between the force majeure event and the non-performance of contractual obligations have also to be identified.
What kind of failure of performance does the force majeure clause cover? Has the non-performance to be in whole or in part? Does the force majeure clause prescribe a force majeure event “preventing”/“obstructing” as opposed to “hindering”/“delaying” the performance?

If a force majeure clause provides that the specified event must “prevent” performance, the party seeking relief will have to demonstrate that the force majeure event legally or physically impedes performance, not just renders it difficult or costly to perform.

On the other hand, a mere increase in the cost of performing the contract would be unlikely to suffice to invoke a force majeure clause, if the clause uses the word “hindering” or “delaying” performance. For example, recent travel restrictions have caused delay in cargo logistics which in effect may not have prevented, but hindered or delayed the delivery of goods as contracted.

Take note that the party seeking to seek relief might be subject to a duty to show that it has used all “reasonable endeavours” to alleviate the effects of the force majeure event and mitigate the loss, e.g. rescheduling or sourcing for other suppliers of resources and logistics.

Effects of a validly triggered force majeure clause

Subject to terms of the contract, a force majeure clause may provide for a range of contractual relief, for example: temporary suspension of a party’s contractual
obligations, exemption from liability of non-performance and delay, extension of target deadlines, the right to terminate or vary the terms of the contract.

Usually, any losses as a result of a force majeure event are to be borne by the parties at their own costs.

**Whether a force majeure clause applies to COVID-19?**

The questions of whether COVID-19 constitutes a force majeure event in the contract and whether a party can be exempted from contractual liability, again depends very much on the contract drafting.

A public health emergency like an epidemic or a pandemic is highly unlikely to be regarded as an “Act of God” that is normally included in standard force majeure clauses. Unless otherwise agreed, the interpretation of a force majeure clause and the effect on its application may have to be resolved by the Court.

Parties should therefore consult legal advice before declaring a force majeure event based on the recent COVID-19 outbreak and resisting performance of contractual obligations. Otherwise, the party might be liable for damages for a breach of contract.

On the way forward, with reference to the previous SARS epidemic in 2003 and now COVID-19, parties should contemplate if they would cover any public health crisis, epidemic or pandemic, or even major infection or government action like embargoes and travel restrictions as force majeure events in their commercial contracts.
Enterprises are recommended to manage the foreseeable impacts and consequences on their businesses and devise a continuity plan with the use of a properly drafted force majeure clause.

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