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## COVID-19 and the Operation of Force Majeure in Hong Kong

The outbreak of COVID-19 novel coronavirus has brought about disruptions to both public life and international business of an unprecedented scale. Not surprisingly, there have already been instances of parties relying on the contractual *force majeure* clauses to “excuse” themselves from performing onerous or impossible contracts. Of note is the Commission of Legislative Affairs of the National People’s Congress Standing Committee’s indication on 10 February 2020, confirming that COVID-19 is indeed an “*unforeseeable, unavoidable and insurmountable*” event that could exempt parties from performing contracts, as well as the World Health Organisation’s declaration on 30 January 2020 classifying the COVID-19 outbreak as a public health emergency of international concern. It is thus critical for parties, particularly those dealing with counterparties in the Mainland, to keep themselves informed as to the applicability of and practical issues related to *force majeure* clauses in contracts governed by Hong Kong laws.

### *Force majeure clauses*

In simple terms, a force majeure clause generally provides a relief to excuse a party from performing or alters the terms according to which a party shall perform, a contract in whole or in part upon the occurrence of a materially impactful and unforeseeable event beyond the party’s control.

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

As with all contractual clauses, the full effect and applicability of a *force majeure* clause hinges upon its precise language, and a party seeking to enforce a *force majeure* clause should consider the following:

- Whether the *force majeure* clause expressly contemplates an epidemic or health crisis situation. One should, however, be mindful of whether the clause provides that the said crisis must have occurred in Hong Kong.

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- If not, the clause may have a catch-all provision referring to all events or circumstances not within the foresight or control of the parties. Depending on the language, COVID-19 (and possibly its ripple effects such as travel restrictions, quarantines etc.) may fall within the ambit of the clause.

## ***Whether a force majeure clause applies to the party's performance***

Once it is established that the definition of *force majeure* extends to or covers COVID-19, a party should then consider whether the act of performance sought to be avoided is a failure of performance covered by the clause:

- The language of the clause may provide relief if performance is "*rendered impossible*", or "*prevented*". In this case, relief will only be available if performance is legally or actually impossible. On the other hand, if the choice of word is "*hindered*" or "*delayed*", then the relief will apply when performance is rendered substantially more difficult and burdensome.
- It is the responsibility of the party seeking to invoke a force majeure clause to compile evidence and demonstrate exactly how COVID-19 has affected performance of its obligations.

## ***Actions to take***

If a party considers that it is entitled to invoke a force majeure clause, it should pay attention to the following:

### *Is there a duty of mitigation?*

- A party may not be entitled to simply abandon the contract and claim *force majeure* upon the occurrence of an event. Mitigation may be a precondition to invoking a force majeure clause, in that a party is required to first take reasonable measures to reduce the loss caused and effects of the *force majeure* event.

### *Are there specific notification requirements?*

- A *force majeure* clause may require timely notification within a certain period of time of the occurrence of the event. The clause may also require periodic updates.
- If notification should be made within a number of days, it may be relevant to consider whether these are business days or calendar days, in view of how the Chinese New Year holidays had been extended by different extents in the Mainland, Hong Kong, and Macau.
- If service of notification is to be effected personally or by post, one should be conscious of the travel restrictions in force in the Mainland, and the limited service being offered by the post offices in the Mainland and Hong Kong.

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*Is there a duty to continue performing?*

- Contracts may specify that the parties should continue to perform other obligations under the contract which are not affected by the force majeure. If so, the force majeure clause will not shield the party from a breach of contract claim for the non-performance of such obligations.
- Contracts may also provide for alternative manners of performance. A party should make sure it has exhausted all contemplated ways of performance.

It may still be early days to fully determine the scale of destruction to be wrought by COVID-19, and the knock-on impacts may very well continue to affect businesses long after its conclusion. The importance of good management of contractual and legal obligations in the face of such uncertainty though cannot be overstated, and parties should continue to pay attention to the situation as it evolves.

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