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### The Coronavirus Epidemic: Does it Count as *Force Majeure*?

The novel coronavirus outbreak in China has rattled international trade and caused severe disruptions to the global supply chains. On 30 January 2020, the World Health Organization declared that the epidemic constituted a public health emergency of international concern. During this critical period, companies may face various difficulties in fulfilling their existing contractual obligations, due to disruptions caused by the suspension of business operations and trade restrictions across the world.

*Force majeure* clauses, which are often (and mistakenly) overlooked as “standard boilerplate” in commercial contracts, are likely to be brought into sharp focus over the coming weeks and months. Recently, we have been engaged in several important discussions with clients on the pressing question of whether the coronavirus epidemic falls within the operation of a *force majeure* clause so as to delay or absolve their liabilities.

This e-Alert discusses *force majeure* clauses in contracts governed by Malaysian law.

The scope of *force majeure* provisions in common law jurisdictions, including Malaysia, is dependent on the exact words of the clause, unlike civil law jurisdictions where *force majeure* is usually afforded a specific legal meaning by the civil code. Accordingly, whether delays or disruptions from the coronavirus epidemic are specifically covered as a *force majeure* event turns on the interpretation of the relevant wording in the contract. Terms such as “epidemic”, “outbreak of diseases” and “quarantine” spelt out in contracts would likely constitute a *force majeure* event. The same may be said for “Acts of God”, “Acts of Government” or by general wording such as “other circumstance beyond the parties’ control”.

However, even if the novel coronavirus constitutes a *force majeure* event, other considerations must be taken into account:

- (a) **Foreseeability** — Events which could have been *reasonably* provided against, avoided or overcome will be excluded. In light of the recent outbreaks of various strains of flu, such as the 2003 SARS outbreak, it may be argued that the coronavirus epidemic was not an unforeseeable event. However, the scale of cities being locked down, with the consequent severe disruption to global supply chains, restriction in the free

movement of personnel and shortage of labour, is unprecedented. Courts may therefore accept that the current coronavirus outbreak differs from earlier epidemics and does not constitute a foreseeable contingency, where no reasonable steps could have been taken to avoid its occurrence. As reported in the *New York Times* on 4 February 2020, the coronavirus is “isolating a major urban transit hub larger than New York City”.

- (b) **Causal link and impact** — The event must have prevented or hindered parties from performing the contract. In addition, it must be the only effective cause of default by a party seeking to rely on the *force majeure* provision. If there are other competing causes hindering the performance of the contract, the defaulting party may not be able to rely on the *force majeure* provision.
- (c) **Mitigation** — Defaulting parties are usually under a duty to show it has taken reasonable steps to prevent, or at least mitigate, the effects of the coronavirus epidemic.
- (d) **Notice requirements** — Parties seeking relief for *force majeure* should endeavour to comply with the prescribed notice requirements or process under the provisions of the contract. Failure to do so may result in the affected party not being able to rely on the *force majeure* provision.
- (e) **Consequences** — The consequences of invoking the *force majeure* clause depend on what is provided in the contract. At the very least, the clause should hold all parties safe from liability for non-performance. Common types of relief would include:
  - (i) termination of contract;
  - (ii) suspension of contractual obligations;
  - (iii) exclusion of liability for late or non-performance;
  - (iv) extension of time for performance; and
  - (v) renegotiation of contractual terms.

As disruptions continue and the epidemic’s impact remains uncertain, companies would be well advised to review applicable *force majeure* provisions under their contracts so as to ascertain whether the repercussions of the outbreak may constitute a *force majeure* event together with any notice requirements in the clause.

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