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**COVID-19, Contracts, and Force Majeure**  
***Is COVID-19 is a Force Majeure event?***

As the disruptions caused by the COVID-19 pandemic and resulting lockdown ripple through the Lao economy, some businesses will find that they, or parties they have contracted with, will be unable to meet various contractual obligations. The shutdown of international flights, for instance, has delayed deliveries of goods and equipment. Thousands of tourists have canceled their online reservations at Lao hotels and guest houses. And the order by the Lao government to close labor-intensive factories will no doubt lead to delays in fulfilling customer orders.

Widespread, disruptive, and unexpected events such as the COVID-19 pandemic can sometimes trigger application of *force majeure* -- a doctrine under contract law that can excuse non-performance, or delays in performance, of an otherwise mandatory contractual obligation.

As businesses address these issues with their suppliers, customers, or booking agents, they should consider whether *force majeure* is applicable to their circumstances. The following are some points to consider and discuss with an appropriately qualified legal professional.

**What law governs the contract?**

This is a fundamental question as some jurisdictions (civil law countries, such as Lao PDR and China) recognize *force majeure* as a general concept where it need not be mentioned in the contract to potentially apply. But if the governing law is one from a common law system--think Malaysia or Hong Kong--the remedy is normally available only if included in the contract.

Applicable law is thus very important. Parties often specifically define the governing law in their agreements; and many jurisdictions will respect this choice. In Laos, however, it remains unclear whether a commercial court would feel bound by a choice-of-law clause that applies anything but Lao law. If the parties are both in Laos, or if the claim would need to be litigated or enforced in Laos, a business should plan on having Lao law apply. The remainder of this article assumes that this will be a Lao law question.

**Is the COVID-19 pandemic a *force majeure* event in Laos?**

The Lao Law on Contracts and Torts allows parties to a contract to defer performance of obligations in the event of a *force majeure*. The law defines it as an “unexpected and uncontrolled event . . . that renders the debtor not able to perform his/her obligations.” The definition offers several illustrative examples - flood, thunderstorm, and earthquake - that could qualify as a *force majeure* event.

Normally whether an event rises to the level of *force majeure* is either decided by a court or negotiated out by the parties. China, however, has not waited for such case-by-case decisions. Instead, a quasi-government trade promotion body has been issuing “*force majeure* certificates” to affected suppliers as a potential shield from the consequences of non-performance of contracts. Singapore is doing something similar through a site at its Ministry of Justice, where parties unable to meet their obligations can request up to a six-month delay in performance.

The government’s order that established the April lockdown in (PM No. 6, 29 March 2020) noted that the measures to combat the pandemic will have an impact on the “operation of business” that is likely to cause “great sacrifice”, but nothing specific on *force majeure*. ECCIL EuroCham Laos is suggesting that the government issue a clarification on this issue. In the meantime, it will be incumbent upon the party seeking application of the doctrine to convince its counterparty, or eventually a court, that the pandemic falls within

the definition. As other jurisdictions, in addition to China and Singapore, formally recognize the pandemic as a *force majeure* event, proving likewise in Laos will become easier to do.

**Are all contractual obligations excused if the pandemic is indeed a *force majeure* event?**

Definitely not. Even if the party seeking excuse from non-performance can point to a legitimate *force majeure* event, it still needs to show that the event made performance impossible to overcome. As noted by Article 33 of the Law on Contract and Torts:

If either contracting party breaches a contract, that party shall be liable to compensate the other contracting party for the damage occurred; except for in the case that such breach has occurred from the *force majeure*.

Sometimes the causal link between the pandemic and the non-performance will be easy to show. For instance, a professional singer cancels a show because of illness from COVID-19 or well-founded fear of exposure. More often, the direct cause will be the government measures to fight the pandemic, i.e., an order to shut down a factory or close transport links between countries. These too are easily traced to the pandemic.

Beyond those examples, it will become increasingly difficult to trace a causal link between the pandemic and a breach. A customer refusing to accept delivery of supplies, for instance, or a debtor failing to repay a loan, will likely have trouble asserting *force majeure* as an excuse, when all he or she can point to is the overall economic downturn caused by the pandemic.

**How can a party practically raise a *force majeure* excuse?**

Article 29 of the Law on Contracts and Torts provides straightforward guidance on this issue. If a party, despite best efforts

cannot perform its contractual obligations in a regular manner, such party shall inform the other party or the causes of the difficulties in appropriate time prior the expiration of the period of performance.

In other words, parties are well advised to raise any *force majeure* claim before rather than after any failure to perform. The notification should be well documented and in line with the notice requirements in the contract.

**Would a “pandemic-*force majeure*” excuse parties from performance entirely?**

In most cases no. Although *force majeure*, properly applied, will excuse a party from legal liability in the event of non-performance, it does not excuse performance later on, if such is possible and the other party is willing to accept performance despite the delay. See Article 29 (after . . . difficulties [blocking performance] have ended, the debtor shall have to perform its contractual obligation.”)

**Summary**

The COVID-19 pandemic has caused disruptions throughout the economy. Parties facing contractual difficulties as a result should consider the extent that *force majeure* applies, even if such clause is not in their contracts. This will require demonstration:

- That the pandemic falls under the concept of *force majeure* as defined by Lao law.
- That the pandemic, or efforts to fight it, caused the non-performance.
- That the party seeking to apply *force majeure* properly notified the other party.

In most cases, this will excuse only delay in performance. The party asserting *force majeure* is still obligated to perform once the pandemic abates and resulting restrictions are lifted.

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About the author and this article: Daniel Fitzpatrick is an international attorney with American and European training. Formerly he led a trade and investment project in Laos. Currently he is assisting the ECCIL on various advocacy matters and working with the Asia-Pacific Economic Cooperation group on insolvency issues in the wake of the COVID-19 pandemic. He notes that this article should not be construed as legal advice. Rather, it is meant to raise legal issues that businesspersons should more fully explore with the assistance of Lao legal counsel.