

## Is Covid-19 pandemic considered *force majeure*?

The new wave of Covid-19 pandemic in Thailand has been greatly affecting its economy, commerce, production, import & export activities. Many businesses have been unable to fulfil their obligations under the contracts, despite they wanted to, and they have tried to raise an issue of *force majeure* to suspend or excuse their obligations.

### What is *force majeure*?

“*Force majeure*” is defined in Section 8 of Thailand Civil and Commercial Code (CCC) that “any event the happening or pernicious result of which could not be prevented even though a person against whom it happened or threatened to happen were to take such appropriate care as might be expected from him in his situation and in such condition”. In other words, *force majeure* is an event that could not be expected or prevented even when taking appropriate care.

Referring to Thai Supreme Court Judgment, there are events considered *force majeure* such as natural calamities<sup>1</sup>, conflagration<sup>2</sup>, government’s order/announcement<sup>3</sup>. Alternatively, certain economic crisis may not be deemed *force majeure*<sup>4</sup>.

Due to the fact that there has not yet been any judgment rendered pointing out that pandemic is *force majeure* and Thai Court narrowly interprets the event of “*force majeure*”, it is not advisable to jump to conclusion that Covid-19 pandemic is *force majeure*.

### How can a non-performing party use *force majeure*?

The use of *force majeure* for breach of contract that have occurred during COVID-19 pandemic will be assessed on a case-by-case basis using the definition under Section 8 of CCC as stated above for consideration.

For example, spa businesses in the restricted areas must be temporarily closed according to the government announcement on Covid-19 pandemic control measures. The businesses can use *force majeure* in order to suspend or excuse their obligations under the lease contract of their closed shops during closing of business. However, the businesses may not use *force majeure* to suspend or excuse their obligations under the contract of purchasing products for operation of businesses.

In the event that *force majeure* is not applicable or invokable, a business operator may negotiate with the other party to suspend its obligations under the contract during the pandemic situation.

### Conclusion

The concept of *force majeure* being invoked during the COVID-19 pandemic should be clearer once there is judgment of the Supreme Court in this regard. Until then, the businesses should make it clear by including pandemic in the definition of *force majeure* in the contract.

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<sup>1</sup> The Supreme Court Judgment Nos. 119/2522, 1379/2527, 4646/2558

<sup>2</sup> The Supreme Court Judgment No. 4197/2559

<sup>3</sup> The Supreme Court Judgment No. 5353/2552

<sup>4</sup> The Supreme Court Judgment No. 3506/2546