

Coronavirus or Covid-19 ~ A Force Majeure Event?

Introduction

On 30 Jan 2020, World Health Organization ('WHO') has declared the Coronavirus outbreak or COVID-19 in Wuhan, China a Public Health Emergency of International Concern ('PHEIC') following the rampant spreading and rising confirmed cases and death tolls reported in many countries. The term PHEIC is defined in the International Health Regulations (2005) as "*an extraordinary event which is determined to constitute a public health risk to other States through the international spread of disease and to potentially require a coordinated international response*".

The China's isolation started with the Chinese President Xi Jinping order for transportation blockage around central Hubei province on 23 Jan 2020 to stop the outbreak from its originating province capital, Wuhan. This was followed by the suspension of flight service including air shipments to China, a mandatory 14 days quarantine upon arrival for people who have visited China, the lockdown of several major cities and shut down of offices and factories in China, all these have inevitably caused disruptions and delay to domestic and international trades of China. China is one of the major global player, as it is the largest exports destination for 33 nations and the largest source of imports for 65 nations from an analysis based on 186 countries (McKinsey Global Institute's report July 2019).

With such magnitude of freeze in operation, production and logistics, including the quarantine of residents in major cities of China, the delays or failures to fulfil commercial and/ or contractual obligations amongst many organisations, in particular China corporations are increasingly apparent and have impacted the global supply chains extensively. In this exceptional and unfortunate situation, are the contracting parties protected from liabilities of non-performance due to the measures taken by China, Malaysia and other countries in stopping the virus outbreak under the Force Majeure clause in their construction contracts? Is the Coronavirus or Covid-19 outbreak one of the triggering events under Force Majeure claim?

This article discuss and review the applicability and possibility of the said virus outbreak as a Force Majeure event for time and/or cost claims and their entitlement, particularly under FIDIC and the commonly used Malaysian standard forms of contract, as well as serves as a guide to readers in their preliminary risk assessment when dealing with such unforeseen and unfortunate event.

Force Majeure Clauses And Events

Force Majeure is a common clause in construction contracts drafted to protect the parties from liabilities in the event of a party being prevented from performing its contractual obligations by circumstances beyond their control. As there is no imply default protection for Force Majeure events, absence of specific provision in the contract will not excuse a party from liability due to events beyond their control. Hence, it is in the parties' interest to broaden or narrow the scope, criteria and extent of such triggering events in their contract. Since Force Majeure forms part of the risk allocation under a construction contract, close attention to the contractual wording needs to be given as the effects and impacts of such clause, which often vary depending on the forms of contract.

Some contracts expressly define Force Majeure whilst others list events qualifying as Force Majeure by defining inclusively or exclusively, as follows (Ong, 2009, p. 90);

'An inclusive force majeure definition sets out the criteria in which they must be satisfied together with a non-exhaustive list of examples of such event, leaving the parties free to interpret or add on events not included in the list.

An exclusive definition, on the other hand, sets out an exhaustive list of force majeure events. Only those listed events can be construed as force majeure events, which is not open to the parties to interpret or add on any events as force majeure events.'

A sample of 'Inclusive Definition' for Force Majeure clause can be found in the international standard form of contract, FIDIC (1999). As for 'Exclusive Definition', our local standard forms of contract, PAM (2006/2018) and JKR 203A (2007/2010), both definitions are tabulated below:

Inclusive Definition	Exclusive Definition
<p align="center">FIDIC (1999)</p>	<p align="center">PAM (2006/2018)</p>
<p><u>Clause 8.4 Extension of Time for Completion</u> <i>Clause 8.4 (d) 'Unforeseeable shortages in the availability of personnel or Goods caused by epidemic or governmental actions.'</i></p>	<p><u>Clause 23.0 Extension of Time</u> <i>Clause 23.8 'The following are the Relevant Event referred to in Clause 23.0: 23.8(a) Force Majeure'</i></p>
<p><u>Clause 19 Force Majeure</u> <i>Clause 19.1 'In this Clause, "Force Majeure" means an exceptional event or circumstance:</i></p> <ul style="list-style-type: none"> (a) <i>which is beyond a Party's control,</i> (b) <i>which such Party could not reasonably have provided against before entering into the Contract,</i> (c) <i>which, having arisen, such Party could not reasonably have avoided or overcome, and</i> (d) <i>which is not substantially attributable to the other Party.</i> <p><i>Force Majeure may include, <u>but is not limited to</u>, exceptional events or circumstances of the kind listed below, <u>so long as conditions (a) to (d) above are satisfied</u>:</i></p> <ul style="list-style-type: none"> (i) <i>war, hostilities (whether war be declared or not), invasion, act of foreign enemies,</i> (ii) <i>rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war,</i> (iii) <i>riot, commotion, disorder, strike or lockout by persons other than the Contractor's Personnel and other employees of the Contractor and Subcontractors,</i> (iv) <i>munitions of war, explosive materials, ionising radiation or contamination by radio-activity, except as may be attributable to the Contractor's use of such munitions, explosives, radiation or radio-activity, and</i> (v) <i>natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity.'</i> 	<p><i>Article 7 (ad) 'Force Majeure means any circumstances beyond the control of the Contractor caused by terrorist acts, governmental or regulatory action, epidemics and natural disasters.'</i></p> <p align="center">JKR 203A (2007/2010)</p> <p><u>Clause 43.0 Delay and Extension of Time</u> <i>Clause 43.1 (a) 'force majeure as provided under clause 57'</i> <i>Clause 43.1 (i) 'the Contractor's inability for reason beyond his control and which he could not reasonably have foreseen at the date of closing of tender of this Contract to secure such goods, materials and/ or services as are essential to the proper carrying out of the Works.'</i></p> <p><u>Clause 57.0 Effect of Force Majeure (*Clause 58 in JKR 203A (2010))</u> <i>Clause 57.2 'An "Event of Force Majeure" is an event beyond the control of both Parties which are:</i></p> <ul style="list-style-type: none"> (a) <i>war (whether declared or not), hostilities, invasion, act of foreign enemies;</i> (b) <i>insurrection, revolution, rebellion, military or usurped power, civil war, terrorism;</i> (c) <i>natural catastrophe including but not limited to earthquakes, floods, subterranean spontaneous combustion or any operation of the forces of nature against which an experienced contractor could not reasonably have been expected to take precautions;</i> (d) <i>nuclear explosion, radioactive or chemical contamination or radiation (unless caused by the negligence act, omission or default of the Contractor, its agents or personnel);</i> (e) <i>pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds; and</i> (f) <i>riot, commotion or disorder, unless solely restricted to employees of the Contractor or its personnel, servants or agents.'</i>

A Force Majeure clause or provision is usually distinctive as there can be no implied Force Majeure definition. Hence to justify whether Coronavirus outbreak is a Force Majeure event in a construction contract, the claiming party first need to prove that the event is within the criteria and/or list of occurring events.

Applicability Of Coronavirus Outbreak As Force Majeure Event

The inclusive definition of Force Majeure as in FIDIC (1999) enables party to add on events not included in the list, so long as the criteria set out in such clause are satisfied. This includes exceptional events or circumstances:-

- (a) beyond a Party's control;
- (b) Party could not reasonably have provided before entering into the contract;
- (c) Party could not reasonably have avoided or overcome; and
- (d) which is not substantially attributable to the other Party.

By the aforesaid criteria, Coronavirus outbreak is a likely eligible event under Force Majeure in FIDIC (1999) as the criteria (a) to (d) are satisfied.

However, in exclusive definition of Force Majeure under PAM (2006/2018) and JKR 203A (2007/2010), the provisions are comparatively more stringent than FIDIC (1999). In PAM 2006/2018 the fulfilment of criteria 'circumstances beyond the control of the Contractor' is not sufficient as a Force Majeure event. It must be one of the specific events listed. Amongst all, the most akin event relating to Coronavirus outbreak is an 'epidemic', which is defined as '*an outbreak or unusually high occurrence of a disease or illness in a population or area*' (The American Heritage Stedman's Medical Dictionary, 2002) or '*a widespread occurrence of an infectious disease in a community at a particular time*' (Oxford Dictionary).

The World Health Organisation (2020) has recently updated the Coronavirus in the list of "Pandemic, epidemic diseases", which can be found in its website page of Emergencies and subpage under Disease Outbreaks. As of January 2020, there are a total of twenty diseases in the list of pandemic and epidemic, which include Ebola virus disease, plague, SARS, MERS-CoV, etc. Contrarily, there are occasions where the declaration is not so definite or precise, and the term 'epidemic' may not be determinative or certain such as SARS outbreak in 2003. WHO has referred SARS as 'communicable disease outbreak' instead of 'infectious epidemic' which has indeed created an argument as to what is the threshold to constitute an 'epidemic'. However, at the Media Briefing in Geneva on 11 March 2020, WHO Director-General has made an assessment that the Coronavirus (named as COVID-19 on 11 Feb 2020) can be characterised as 'pandemic'. This is the first time the WHO has called such an outbreak pandemic, not since the H1N1 "swine flu" in 2009. In view of the declaration from WHO, the identification of Coronavirus outbreak is apparently equivalent, if not more expansive than the term 'epidemic' defined in PAM 2006/2018. An epidemic becomes a pandemic when it spreads over a wide geographical areas and affects a large proportion of the population, not only at national level but also globally.

The same rule can apply to justify COVID-19 as a Force Majeure event under JKR 203A (2007/2010). Regrettably the list of Force Majeure events does not include any of the expressed terms like 'outbreak', 'disease', 'epidemic' or 'acts of government' which may fit well as a triggering event to the said virus outbreak. It is unlikely for the party to exclude liability from non-performance affected by such outbreak using the Force Majeure provision. However, it is interesting to note that under its clause 77 – Epidemics and Medical Attendance, JKR form provides for any outbreak of illness of an epidemic nature and requires the Contractor to carry out and comply with the regulations, orders and requirements made by the Government, medical or health authorities for the purposes of dealing with and overcoming them. Further, its extension of time clause 43.1(i) '*Contractor's inability to secure such goods, materials and/or services that are essential to the proper carrying out of the Works for reason beyond his control unforeseeable at the date of closing of tender of this Contract*' can be alternatives as opposed to a direct claim under Force Majeure.

In other words, the said virus outbreak is likely to succeed under Force Majeure event (a relevant event under Extension of Time provision) in PAM (2006/2018) but not in JKR 203A (2007/2010), unless pursued under the aforesaid provisions. However, with FIDIC (1999), both Extension of Time and Force Majeure provisions can be relied on but preference would depend on the contractual and commercial considerations and priority by the party relying on them.

It is important to note that, any event relied upon as Force Majeure must be an event which party is unable to perform its obligations under the contract, either temporary or permanently impossible. In the event of temporary non-performance, an extension of time for the performance delay may be considered, whereas in permanent non-performance, the contract may be frustrated and can be voidable (see Contract Act 1950 Section 57(2) and Section 66).

Whilst a Force Majeure event usually entitles a party to be excused from performance liability by entitlement to extension of time, it is not the case in loss and/ or expense, as it is often considered as a neutral event where both contracting parties bear the cost risk. There are exception to this, example in FIDIC (1999) contract, cost claim is allowed for specific Force Majeure events, as expressly stated under its sub-clause 19.4(b).

In justifying a Force Majeure event, China has move a step forward by issuing the Force Majeure certificate to enterprises who have been affected and unable to perform due to the Coronavirus outbreak since 2nd February 2020. This certificate is issued by the credible China Council for the Promotion of International Trade ('CCPIT' also named as the China Chamber of International Commerce since 1988), as follows;

“The Deputy Director-General of CCPIT Commercial Certification Center said that force majeure certificates have been recognized by governments, customs, chambers of commerce and enterprises in more than 200 countries and regions around the world, and it is widely accepted overseas.” (CCPIT, Feb 2020)

The certificate is a factual and documentary proof to enable those enterprises to safeguarding their legitimate contractual rights and interests by minimizing liabilities in contracts which they are unable to fulfil accordingly due to the said virus outbreak.

On 16th March 2020, in an effort to slow down and contained the said Covid-19 virus spread across the whole country, the Malaysian Government has announced the implementation of a partial lockdown or its Movement Control Order issued under [Prevention and Control of Infectious Diseases \(Declaration of Infected Local Areas\) Order 2020](#), effective from 18th March 2020 to 31st March 2020 countrywide, enforceable under the *Prevention and Control of Infectious Diseases Act 1988* and the *Police Act 1967*. In compliance to this Order, all government and private premises are required to be closed down with exception to those involve in essential services. This means all construction activities, except those affecting public safety or cause public hazards, in Malaysia are suspended under this Government or Authority's Order. Hence, the claiming party may be able to rely on PAM 2006/2018 sub-clause 23.8(w)/(x) and 24.3(n)/(o) for its entitlement to both time and loss/ expense claims respectively, which are more direct and accommodating compensating event clauses as compared to the Force Majeure clause, which usually is considered a neutral event for entitlement to extension of time only.

Notice, Causal Link And Duty To Mitigate

Most Force Majeure provisions have prescribed contractual procedures, often a formal notice to be served by the benefitting party becomes aware of a potential Force Majeure event or a statutory order, provided it is not due to the default of the party relying on it. Such party further owes a duty to mitigate or minimize the impact of such event before exclusion from its contractual liability. Procedural compliance is pertinent, as non-compliance can jeopardise a claim under most Force Majeure clauses, such as in the standard forms of contract below.

Description	Relevant Contract Clauses		
	PAM (2006/ 2018)	JKR 203A (2007/2010)	FIDIC (1999)
Force Majeure	23.1(a)	43.1(a)/ 57.0	19.0
Notice of Claim	23.1	43.1/ 57.3	19.2
Duty to Mitigate/ Minimize	23.6	43.1	19.3

If COVID-19 pandemic is found to be a triggering event which satisfied the Force Majeure criteria, the party relying on such contract provision to exclude its contractual liability needs to demonstrate its causation and ensuing effect/s. Its success will depend on the wording of the Force Majeure provision, which must be read in conjunction with other related provisions under the contract as a whole.

Summary/ Conclusion

The measures initiated by China and many other countries including Malaysia in overcoming Coronavirus outbreak or COVID-19 pandemic have apparent adverse impact on the global supply chains and disrupted millions of workforce, not to mention thousands in death toll. Almost every business industries, including the construction industry have been affected by it.

The said virus outbreak, now a pandemic, is unforeseen and an apparent event beyond reasonable control of the contracting parties. In justifying a Force Majeure event would be dependent on its definition in the contract as it is not a default protection clause to the non-performing party. The contract clause or provision and wordings adopted can lead to a different claim entitlement and outcome. Hence, specific wordings is a major consideration in drafting and relying on such provision. Essentially, being prevented or impossible for the party to perform its contractual obligations, accordingly.

In the context of COVID-19, Force Majeure claims that are likely to succeed are those where the contract provisions expressly stating as ‘epidemic’, ‘acts of government’ and/or criteria compliance e.g. event beyond the party’s control. Alternatively, specific provisions such as the PAM clauses on authority’s order, may be relied on for claims under such unfortunate event. In addition, compliance to contractual claim procedures, mitigation efforts and document substantiation to prove a direct causal link between the causal event and its effect/s are pertinent for such claims to succeed. Consultants who are responsible to assess/evaluate such claims must exercise their professionalism and fairness in determining a fair and reasonable outcome for the contracting parties so as to avoid any unnecessary dispute resolution reference.

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