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The COVID-19 pandemic and *Force majeure* Clauses in Japan

27 March 2020

On 24 March 2020, Prime Minister Abe and the International Olympic Committee agreed to postpone the 2020 Tokyo Olympics for one year until the summer of 2021. This is the first time the games have ever been postponed, and is a historic example of the monumental legal and commercial implications of the Coronavirus pandemic (COVID-19) spreading throughout the world. Innumerable contractual arrangements including commercial contracts, service agreements, facilities and lease agreements, supply agreements, and insurance agreements, to name a few, will need to be revisited to determine the practical and legal ramifications of the COVID-19 pandemic.

This begs the question of whether, and if so, in what circumstances, parties will be able to invoke *force majeure* in Japan. As discussed in a number of articles available on our COVID-19 Topic Center, a *force majeure* event may excuse a party from performing its contractual obligations, subject to the specific contract provisions and the treatment of *force majeure* under the governing law. For parties to commercial arrangements affected by the COVID-19 outbreak, it is essential to understand how *force majeure* operates under the governing law of the contract, in order to assess whether the delay and/or disruption caused by COVID-19 would trigger a *force majeure* clause.

Force majeure clauses in Japan

The Civil Code of Japan does not expressly provide a definition of *force majeure* events. Nonetheless, parties to a Japanese law governed commercial agreement generally enjoy freedom of contract, and may bind themselves to the terms on which the parties agree (with some obvious exceptions of course for illegal activities, etc.), and Japanese courts will generally uphold contractual provisions such as *force majeure* clauses as enforceable. Japanese courts look first to the four corners of contract and often strictly interpret the chosen language. As such, whether the COVID-19 outbreak constitutes a *force majeure* event will depend on the specific wording of the agreement and the underlying facts.

There is no uniform *force majeure* clause: some define *force majeure* events with broad criteria, often accompanied by an illustrative and non-exhaustive list of scenarios that may constitute

force majeure; whilst some define *force majeure* events narrowly or with a specific and exhaustive list of qualifying events.

A typical *force majeure* clause usually provides that a *force majeure* event:

a. occurred beyond the reasonable control of the affected party;

b. could not have been avoided or mitigated by the affected party by taking reasonable steps; and

c. has caused or resulted in the affected party being prevented from or delayed in performing any of its obligations under the agreement.

When analyzing the impact of the COVID-19 outbreak and whether it would trigger a *force majeure* clause governed by Japanese law, there are a few crucial elements to bear in mind.

Express inclusion of "epidemic" is not necessary

It is not uncommon for "epidemic" or "pandemic" to be expressly included in a *force majeure* clause. However, the absence of express reference to an epidemic would not necessarily prevent the COVID-19 outbreak from constituting a *force majeure* event under the agreement, particularly if there is a "catch all" provision included. Provided that the conditions set out in a *force majeure* clause are satisfied, the COVID-19 outbreak may well constitute a *force majeure* event without an express stipulation.

If a *force majeure* clause does not expressly include "epidemic," "pandemic," or references to diseases and public health issues, a party can rely on acts of authority, governmental actions, and regulations, which are very commonly provided in a list of exemplary *force majeure* events.

Causation is a key element

It is important to analyze the issue of causation between the COVID-19 outbreak and the disruption or delay of performance of contractual obligations. A *force majeure* clause may require that performance of contractual obligations must be "prevented" by the event in question, or that performance must be "impeded," "hindered," or "delayed":

For a clause referring to "prevent," it is generally necessary for the party relying on *force majeure* to demonstrate that the obstacle to perform is insurmountable, e.g. it is no longer physically possible or legally permissible to perform the contract.

A clause referring to "impede," "hinder," or "delay" can be construed more broadly and does not require the affected party to prove impossibility to perform.

Notably, in either of the above two scenarios, mere economic unprofitability will not qualify as a ground for a *force majeure* event in the eyes of law.

Explore mitigating options in the time of difficulty

The triggering and impact of a *force majeure* event is very often tied to the issue of mitigation, which can be expressly stipulated or implied in a contract. In some agreements, the obligation to mitigate is incorporated into the definition of the *force majeure* event, i.e. only an event that could not be avoided or mitigated by the affected party taking reasonable steps would qualify as a *force majeure* event.

Take failure or delay of acceptance of deliveries for example. When quarantine is imposed on certain cities or ports abroad due to the COVID-19 pandemic, the parties should explore the possibility and feasibility of alternative modes to perform, for example, delivery to cities or ports within reasonable proximity that are open and available. If the alternative modes are available but not adequately explored, the affected party may not be able to rely on the *force majeure* clause as the court will likely consider that the affected party's non-performance is attributable to its own failure to mitigate, as opposed to the alleged *force majeure* event.

Moreover, reputational risks, particularly in relation to long-term supply agreements, should be carefully considered by both parties to a Japanese law governed commercial agreement. Even where one party appears not to have taken sufficient mitigating steps, it may be advisable for the counterparty to be open to considering restructuring or amending an agreement as opposed to termination.

The impacts of a *force majeure* event on the contractual obligations depend on the particular wording of an agreement

After establishing the occurrence of a *force majeure* event, the next question is what are the impacts of such event on the performance of contractual obligations? The occurrence of a *force majeure* event may merely postpone or partially excuse the affected party's contractual obligations. Alternately, it may extinguish all contractual obligations as a whole, depending on the specific wording of the clause and the underlying facts.

Some agreements have terms that can span many years, as is often the case with long term supplier agreements in Japan. The COVID-19 outbreak has lasted for several months and seems likely to continue for the near future, but the contractual period of a commercial agreement may be significantly longer than the duration of the outbreak. Under such circumstances, what is the impact of the outbreak on the performance of the contractual obligations? The practice in Japan is considerably divergent:

Some agreements provide that the parties' contractual obligations during a *force majeure* event will be extinguished. In contrast, some agreements provide that the parties' contractual obligations while a *force majeure* event lasts will merely be postponed instead of extinguished. Some agreements provide a party with discretion to request or accept the volumes that are not taken during a *force majeure* event. The party obviously will exercise discretion taking into consideration the contractual price and market circumstances at the time of prospective delivery.

Be aware of exceptions set out in a *force majeure* clause

While a *force majeure* event usually postpones or extinguishes a party's contractual obligations, the clause could set out exceptions, so that certain obligations continue to exist during a *force majeure* event (such as the obligation to make payments). The affected party must carefully review the terms of a *force majeure* clause in order to avoid any inadvertent breach of contract.

It is further worth noting that if a party faces significant difficulty or impossibility to perform, declaring *force majeure* may not be the only possible relief. For example, long-term supplier agreements often provide for price adjustments, delivery quantity flex or other adjusting arrangements under exceptional circumstances. The parties should review the contract in its entirety and consider exploring these options if available.

Key takeaways

Whether the COVID-19outbreak constitutes a *force majeure* event depends on a wide range of factors, including:

a. the governing law of the contract;

b. the particular wording of the *force majeure* clause;

c. the circumstances of the COVID-19 outbreak and associated government restrictions; and

d. whether and how the COVID-19 outbreak actually disrupts the performance of the contract.

In the midst of a potential *force majeure* event, contracting parties that may be affected should carefully review their contractual terms, in particular, all relevant provisions on *force majeure* and any other alternative reliefs. If relevant, the parties should also review upstream and downstream agreements if applicable to see whether any upstream/downstream *force majeure* circumstances will trigger the *force majeure* clause in their own agreement.

Now is a good time to see whether standard clauses in commercial agreements are fit for purpose. We are undertaking many reviews of *force majeure* provisions in client standard form documents in a forward-looking exercise to make sure they are robust enough and "fit for the future." How these should be drafted depends on whether the party concerned is "pro-performance," "pro-reliance," or "neutral."

Last but not least, a party encountering difficulty in performing the contract should take care to take all steps towards mitigation that can be reasonably made. This is both in the interest of minimizing its own losses, and preserving its rights to rely on *force majeure* if such event indeed cannot be reasonably avoided or mitigated.

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