CONTRACTUAL TERMS: DOES THE NOVEL CORONAVIRUS (COVID-19) OUTBREAK CONSTITUTE A FORCE MAJEURE EVENT IN SINGAPORE?

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Current condition of the COVID-19 outbreak in Singapore

On 30 January 2020, the World Health Organisation made a declaration that the outbreak of the novel coronavirus (COVID-19) was a public health emergency of international concern. Various countries, including Singapore, swiftly imposed travel restrictions. With effect from 1 February 2020, Singapore imposed travel restrictions prohibiting (i) new visitors of any nationality who travelled to mainland China within the last 14 days and (ii) visitors with Chinese passports, with the exception of Singapore permanent residents and long-term pass holders, from entering Singapore. Returning residents and long-term pass holders with travel history to mainland China in the last 14 days have to be placed on a 14-day leave of absence from the day of their return from China.

On 7 February 2020, the government of Singapore raised the DORSCON alert level from DORSCON Yellow to DORSCON Orange, which indicated that the disease is severe and spreads easily from person to person, but the disease is not spread widely in Singapore and is being contained. On 14 February 2020, the Minister of Health, Gan Kim Yong, expressed that the government of Singapore currently had no plans to escalate the alert response level to DORSCON Red. If DORSCON Red is declared, this would indicate that the disease is severe and is spreading widely, and that people are to avoid crowded areas and practise social distancing.

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What is "*force majeure*"?

"*Force majeure*" refers to contractual terms that contracting parties have agreed upon to deal with situations that might arise, over which the parties have little or no control, that might impede or obstruct the performance of the contract. In Singapore, the courts have held that there is no general rule as to what constitutes a situation of *force majeure*. Whether such a *force majeure* situation arises would all depend on what the parties, in their contract, have provided for.

In the construction of a *force majeure* clause, the courts will apply the presumption that the expression "*force majeure*" is likely to be restricted to supervening events which arise without the fault of either contracting party and for which neither of them has undertaken responsibility.

Where one party seeks to rely on a *force majeure* clause, the burden is on that party to show that it falls within the scope and ambit of that clause. That party must also show that there was truly nothing it could have done to avoid the operation of the *force majeure* event or to mitigate its results. This is because a party must be strictly held to its contractual obligations and should only be released from those obligations where supervening events make it ***impossible***, and not merely *onerous*, to fulfil them.

The remedies of each party in the event of a *force majeure* situation depend on the wording of the *force majeure* clause. For instance, the clause may provide that in circumstances constituting *force majeure*, an extension of time may be granted, or there may be cancellation of the contract at the option of either party.

Does the current COVID-19 outbreak constitute a *force majeure* situation?

It is paramount to note that the applicability of *force majeure* would be strictly dependent on the precise scope and ambit of the particular contractual clause. In other words, whether or not the current COVID-19 outbreak constitutes a *force majeure* situation would depend on the wording of the clause.

If the *force majeure* clause expressly lists an "*epidemic*", "*global health emergency*" or an event that "*poses a risk to the health or safety of participants*" as examples of *force majeure* situations, the current COVID-19 outbreak would very likely fall within such categories.

If the *force majeure* clause in the contract does not list such examples but for instance, defines *force majeure* situations as events "*making it impossible for parties to fulfil their contractual obligations*", the party seeking to invoke the clause must show that the outbreak has made it impossible, and not merely more financially onerous (due to increased costs or expenses) for it to fulfil its obligations under the contract.

Events in Singapore

In light of the COVID-19 outbreak in Singapore, event organisers might be considering whether to cancel their upcoming events in Singapore and whether their contracts with various vendors can be terminated. What is helpful to note is that the Ministry of Health in Singapore ("**MOH**") has issued an advisory on 8

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February 2020 advising event organisers to cancel or defer non-essential large-scale events. For event organisers which choose to proceed, necessary precautionary measures are to be taken. Subsequently, the Ministry of Trade and Industry in Singapore ("**MTI**") also issued an advisory on 15 February 2020 stating that businesses should maintain normalcy, as long as the necessary precautions are taken. Businesses are advised to cancel or defer non-essential large-scale events to reduce the risk of community transmission of COVID-19. According to the MTI, large-scale events refer to events with more than 1,000 attendees, and non-essential large-scale events refer to events like Dinner and Dance and Family Day with more than 1,000 attendees. Smaller-scale events such as training and development courses and internal townhall meetings could continue.

While the government advisories can support the position that non-essential large-scale events should be cancelled, do note that such advisories are not government laws or regulations that strictly prohibit such events. In fact, the advisories contemplate the option for organisers to proceed with non-essential large-scale events, albeit with proper precautionary measures, or at least, deferring them to a subsequent date. More crucially, as at the date of this article, the alert level has not been raised to DORSCON Red where people should practice social distancing and avoid crowded areas.

If, as a result of the outbreak and the travel restrictions imposed by Singapore and other countries, the number of registrants for the event will fall below the minimum number required under the contracts, this can go towards showing that it is impossible for the organiser to fulfil its contractual obligations. What if the contract is silent on the minimum number required for the event? Would the parties construe this to mean the minimum number required for the event to carry on meaningfully or the minimum number by reference to past-year events? We take the view that whether a failure to meet the minimum attendance definitely constitutes a *force majeure* event ultimately depends on the scope of the *force majeure* clause and whether the contract already provides for parties' rights and remedies in the event of such a failure to meet the minimum attendance.

What if the contract does not contain a *force majeure* clause?

Ideally, parties should provide for contracts to contain a *force majeure* clause. Nevertheless, if a contract does not contain a *force majeure* clause, a contracting party can seek to rely on the doctrine of frustration, which discharges both parties from the contract.

Frustration occurs when, without the default of either party, a supervening event has rendered the performance of a party's contractual obligations radically different from that which was contemplated by both parties at the time of the contract. One example would be circumstances which have caused the performance of a contract to be impossible, e.g. if a particular source from which the subject matter of the contract is derived is unavailable. Another example would be the frustration of the purpose of the contract, which would be the cessation of an express condition, which go to the root of the contract, and is essential to its performance. From a business perspective, would the fact that either contracting party may incur huge unexpected costs be a factor in determining frustration of the contract?

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Conclusion

Parties should seek legal advice on whether the current COVID-19 outbreak in Singapore constitutes a *force majeure* event within the scope and ambit of the relevant clause in their contracts, or alternatively, a frustrating event which discharges parties from the performance of their contracts.

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