



PROPOSAL about FORCE MAJEURE DUE TO COVID19

version b

Executive Summary

This Proposal is focused on supply contracts to government impacted by COVID 19. JFCCT recommends that for government contracts, (i) COVID 19 and its consequence are recognized as a force majeure event. (ii) A cabinet decision is needed which agencies can follow; a default of 180 day extension is a useful minimum. Details at the end.

Force Majeure in context

A force majeure (FM) event is an external event which prevents at least one party to a contract from performing it.

Parties can describe an FM clause as broadly or narrowly as they choose. In common law jurisdictions (eg UK, US, Australia, Canada, Singapore, Malaysia) there is typically no statutory definition; it depends on what the parties agreed to. In civil law jurisdictions (France, PRC, Thailand) there is typically a codified definition which is usually broad. In Thailand the definition is in s.8 of the Civil and Commercial Code (see below). In a civil law jurisdiction if there is no FM clause in a contract, an FM clause is usually imported into the agreement if there is a codified definition (as for example in PRC).

The law (legal system) governing a contract (proper law of the contract) may not be Thai law; it could be some common law system and thus the reach of an FM clause would depend on what it says.

Our focus here

This JFCCT Proposal focuses on supply contracts with local or foreign (whether or not Chinese (PRC) firms) where there is a foreign or local party responsible for supply to the Royal Thai government, to an agency of some kind (eg SOE, statutory body). We do not draw distinctions as to the nature of the government entity in this Proposal.

Is COVID 19 an FM event/consequence of COVID 19

There is some debate about whether the COVID 19 virus and its impact is an FM event.

The relief which a force majeure clause may offer to be relief from specific obligations to the extent that the external event is the effective cause, and subject to any duty to avoid the external event (i) occurring and (ii) having an impact. There is *usually* also a duty to mitigate. The consequences of the impact of the external event would be provided for in a well-drafted FM clause.

It will depend on what the FM clause says in each case. A virus may or may not be an FM event. There is nothing preventing parties agreeing a different set of



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circumstances such that the generality of the s.8 definition in Thai law could not be modified – ie parties to a contract may define it as they choose, a common practice.

Due to the outbreak of COVID19 in China since prior to Chinese new year in January 2020, the Chinese government has asked the private sector to close some factories and for workers to stay at home. At the end of February 2020, some of the factories resumed production but return to a normal state is not yet achieved – staff levels may be low or production may be less than usual, for example. Now the spread of COVID-19 is well beyond China and is having a major impact on supply chains and will continue to cause disruption for sometime.

China is considered as the “Factory of the World”. Many businesses globally are involved both directly and indirectly in supply chains which fully or partially originate from China. Various industries are now facing challenges along their supply chains such as vendor’s low capacity and production, raw material shortages, lead time issues, ocean blank sailings and truck/transport capacity constraints.

According to the United Nation COMTRADE database on international trade, <https://tradingeconomics.com/thailand/imports/china>. In 2018, Thailand imports from China was US\$49.95 billion. The top 5 items are Electrical, electronic equipment at \$15.03 billion; Machinery, nuclear reactors, boilers at \$8.42 billion; Articles of iron or steel at \$2.62 billion; Iron and steel at \$2.55 billion; Plastics at \$ 2.51 billion. It shows that Thailand is a part of supply chain from China to trade, to produce, to re-process, and to value-add the product for both domestic and international market.

The PRC government has acted on force majeure specifically, with the quasi-governmental China Council for the Promotion of International Trade (CCPIT) announcing on 30 January that it would offer “force majeure certificates” (or ‘slips’) to help companies deal with disputes with foreign trading partners arising from government control measures. To date, it has been reported that thousands of certificates have been issued purporting to shield Chinese companies against liabilities for non-performance (source BakerMcKenzie).

In PRC law (civil jurisdiction) FM exists as a doctrine under Article 180 of the General Rules on the Civil Law and Articles 117 and 118 of the PRC Contract Law. The regime applies automatically to commercial contracts governed by PRC law where the contract contains no FM provisions. This is similar (but not identical to) the Thai law.

The consequence of the delay of production in China is a concern for business community especially who has an obligation to deliver goods or service, which requires a physical goods or component originated from China, according to the contract. Consequences may be a delay which misses a deadline where time is of the essence for example, or they may be a delay which causes some minor loss, or there may be a complete failure of supply. If the contracting parties are private companies,



the dispute of force majeure can be resolved through negotiation. But if the contract is under the **Public Procurement and Supplies Administration Act, B.E. 2560 (2017) (PPSA)** which is the contract between government and private sector, the force majeure clause can be enabled by the interpretation/decision of the individual government agencies referring to PPSA section 102:

Section 102.

The waiving or reduction of penalty for a contractual party or the extension of time for performance of a contract or an agreement may be, in the discretion of the competent person, granted in accordance with the number of days of actual occurrence of events in the following cases:

- 1) *an event attributable to a fault or neglect of the State agency;*
- 2) *force majeure;*
- 3) *an event in consequence of any circumstance for which the contractual party is not liable under the law;*
- 4) *any other event as prescribed in the Ministerial Regulation.*

The rules and procedures for application for the waiving or reduction of penalty in favour of a contractual party or the extension of time for the performance of a contract or an agreement shall be in accordance with the Rule prescribed by the Minister.

For s.102(2), FM is in the **Civil and Commerce Code B.E. 2558 (2015) (CCC)**, section 8 :

Section 8.

"Force majeure" denotes 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;

And a prescribed rule pursuant to s.102 would include **Finance Ministry Regulation on Public Procurement and Supplies Administration B.E. 2560**, section 182:

Section 182.

The suspension or reduction of fines for the contract parties or the extension of the time of operation under the contract or agreement under Section 102 in the event of an offense due to a fault or defect of a government agency or force majeure or arising from a circumstance Any party that is not liable under the law or other reasons as specified in the Ministerial Regulations makes the parties unable to deliver the goods or work according to conditions. And specify the duration of the contract, the State agency shall specify in the contract or the agreement specifies that the contracting party must notify the government agency within 15 days after the date that the event has ended or As specified in the Ministerial Regulations, if not informed within the stipulated time, the parties shall not be able to claim for goods or reduce fines or request for an extension of time, except in the event of an offense or Another



shortcoming of the public authorities, which have established expressly or government agencies know very well from the beginning.

This body of legislation gives a guide about the private sector reserving the right to, and later invoking, a force majeure clause. However whether COVID-19 and its specific consequences in the particular circumstances provides FM relief is in effect up to each agency.

In the past, the Thai government gave a blanket measure to contracting parties due to the incident of labor shortage, hike of minimum wage to 300 baht, and natural disaster such as earthquake and flood by extending the delivery of the contract 180 days.

Without such clear guidance from cabinet, agencies are left to determine for themselves all aspects of the consequence, even assuming that COVID 19 is a FM event. This could mean a second category of disputes about the consequences. As 180 days has been used in the past for certain events and given the unlikely short term normalisation of operations, 180 days should be used as a standard baseline for extension of supply.

JFCCT Recommendation

JFCCT sees this COVID-19 outbreak and the consequences as a major event which can be considered equal to natural disaster which result in damage to all business sectors both directly and indirectly, either through delay or complete failure to supply.

It is recommended that to avoid costly disputes:

- (i) the Thai government should determine that the COVID 19 phenomenon is an FM event; and
- (ii) A cabinet decision is needed which recognises 180 days extension as a standard baseline which agencies can follow

These recommendations remove potentially costly repeated examination of the same issue. The recommendations do not detract from the normal examination of other consequences of this base event.

9 March 2020