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NEWSLETTER

COVID-19 AND FORCE MAJEURE
IN LIGHT OF VIETNAMESE
LAW AND PRACTICE

April 2020

COVID-19 CORONAVIRUS

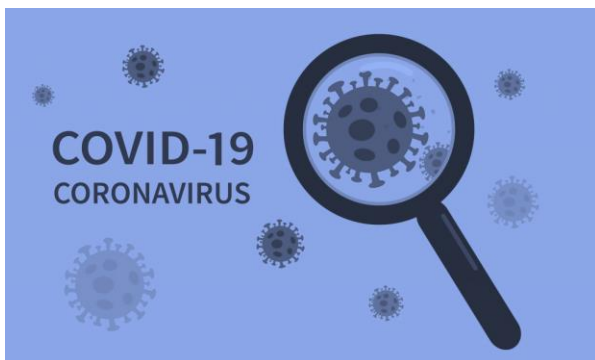


What you should know :

1. Force Majeure Under Vietnamese Law
2. Is Covid-19 qualified as an FME?
3. What Can Businesses Do?

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- Force Majeure Event ("FME") is recognized under Vietnamese law and is commonly used in various commercial contracts including but not limited to large-scale energy projects.
- Upon the occurrence of an FME, an affected party may claim to be immune from its contractual obligations and consider the suspension or termination of its contractual obligations — provided that all elements for creation of an FME are satisfied.
- Covid-19 may give rise to number of claims for an FME under contracts; however, it is still subject to the nature of the transactions and, in practice, the affected party normally is under the obligation to notify, mitigate the effect of an FME, and would normally have high burden of proof to fulfill.
- Businesses should be active to identify key provisions in executed contracts and consider innovative solutions to get through this interim period (i.e. give notice of FMEs, collect evidence of the FME, mitigate damages from an FME, e-signatures for applications for giving consents and approvals, etc.).



Following the outbreak of the new strain of virus, Covid-19, the world has been put on a pause since the start of the diseases initially dedicated and spread in Wuhan, China.

On March 11, 2020, the United Nations World Health Organization ("WHO") assessed and announced that Covid-19 can be characterized as a pandemic. In Vietnam, on April 1, 2020, the Prime Minister Nguyen Xuan Phuc officially announced Covid-19 as a nationwide pandemic under Decision No. 447/QĐ-TTg ("**Decision 447**").

Decision 447 and other recommendations and interim measures such as Directive No. 15/CT-TTg on the Resolute Implementation of the Peak Prevention Phase of the Covid-19 Pandemic ("**Directive 15**"), followed by Directive No. 16/CT-TTg on the Implementation of Immediate Measures for the Prevention of Covid-19 Pandemic

("Directive 16") issued by the Prime Minister (collectively, referred to as "**Government Notices**") have shown the efforts of the Government to control the speedy spread of the virus.

However, such Government Notices also have raised a number of issues relating to how enterprises can fulfil their obligations under various executed contracts due to the effects of quarantine, border closings and restrictions in movements, etc. Needless to say, the global virus is spreading exponentially, causing all nations and businesses significant losses and doubts.

In this Newsletter, we address the specific questions raised in this situation including:

- (i) the concept of Force Majeure Event ("**FME**") under Vietnamese laws;
- (ii) whether Covid-19 is qualified as an FME; and
- (iii) are there any solutions for businesses as a result of Covid-19 and the Government Notices?

Our Newsletter will focus on addressing the above questions from a Vietnamese legal perspective, and we hope this can help enterprises to clear out some of their doubts in this pressing time.

1. Force Majeure Under Vietnamese Law

(i) Definition:

In short, the definition of an FME is covered under the Civil Code 2015 as “an event of force majeure is an event which occurs in an objective manner which is not able to be foreseen and which is not able to be remedied by all possible necessary and admissible measures being taken.” However, definitions are also provided under other laws and regulations governing particular industries and generally speaking; however, fundamentally, they all are in line with the definition under the Civil Code 2015.

(ii) Elements to constitute an FME

An FME is required to have the following characteristics:

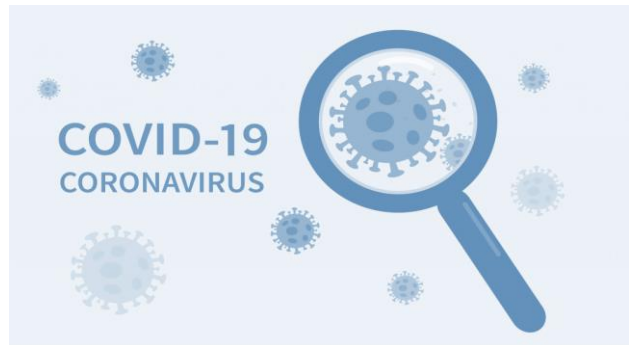
Objectively occurred: Vietnamese law is silent on the requirements or mechanism to determine whether an event happens in an objective manner. However, logically speaking, such event must not occur due to any party’s fault.

Unforeseeable: There is no specific rules or regulations under Vietnamese law on the criteria to determine an unforeseeable event, however it can be argued that an FME is the event which, at the point of signing the contracts, no party has anticipated such event to be happening and thus all the undertakings and obligations set out in the contracts are based on the objective conditions and situations at the point of signing the contract.

Not able to be remedied by all possible necessary and admissible measure being taken: In practice, the Courts could conduct an analysis under the view of a reasonable person in the same situation and whether the party claiming the FME has conducted all the reasonable actions to reduce and mitigate the effects of the FME. Therefore, the party claiming the FME needs to collect evidence proving its efforts to remedy and mitigate the FME’s impacts.

(iii) Consequences of FME

Under the Civil Code 2015, an obligor shall not have any civil liability if it fails to perform an obligation due to an FME.



For commercial transactions, “a defaulting party shall be immune from liability upon occurrence of an event of force majeure.” Upon occurrence of an event of force majeure, the parties may agree to extend the time-limit for performance of contractual obligations or refuses to perform a contract.

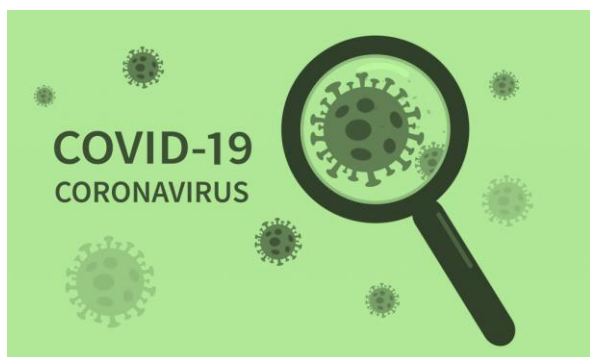
In case the parties do not have any agreement or cannot reach an agreement on such an extension, the term for performing contractual obligations will be extended for a period of time that is equivalent to the period of such FME’s occurrence plus a reasonable period for remedying its consequences. However, the time extended should not exceed the following statutory timeline, except for contracts for purchase and sale of goods or contracts for provision of services with fixed term for goods delivery or service completion:

- 5 months for goods or services for which the agreed time limit for their delivery or service provision does not exceed 12 months from the date of contract execution; and

- 8 months for goods or services for which the agreed time limit for their delivery or service provision exceeds 12 months from the date of contract execution.

Additionally, absence of the parties’ agreement pursuant to which one party can terminate in case the FME lasts for certain period of time, the non-compliant party due to the occurrence of an FME is generally not entitled to unilaterally terminate the contract. Instead, it must continue to perform its contractual obligations after such FME comes to an end.

Meanwhile, the other party will have the right to cancel or terminate the contract if the purpose for which the contract was concluded could no longer be achieved, such as where the non-compliant party fails to complete and hand over the work due to the FME.



2. Is Covid-19 qualified as an FME?

Considering the concept and requirements of FME under Vietnamese law as presented above together with the current situation of the Covid-19 outbreak, it may be eligible to consider Covid-19 and/or any of its related subsequent events such as the international and domestic movement restrictions causing lack of labour, materials which lead to disruption of productions, services as an FME.

Having said that, it is a common practice whether an event can be determined as an FME is interpreted according to the nature of the transactions as well as the contractual provisions agreed between the parties. Therefore, in light of different types of contracts below, there may be different views on the consequences and treatment of an FME.

For loan contracts or contracts for sales of goods or contracts for provision of services, where the obligations of one party are payment obligations, it is arguable that the affected party (e.g., the debtor, the purchaser of goods and services) cannot be excused from performing their payment obligations because Covid-19 by itself does not prevent payment obligations from being performed.

Nonetheless, in other transactions (e.g., lease contracts), Covid-19 can result in negative impact to their business of the lessees right after the pandemic occurs, (e.g., they are not allowed to use or enter the leased properties), which could satisfy the conditions for triggering an FME. Thus, Covid-19 may be considered as an FME in such circumstances.

Interestingly, for large-scale projects such as BOT projects, which are commonly known to contain two types of FMEs including Non-Governmental FME and Government Events under the project documents, pandemics such as Covid-19 would often be included in the category of Non-Governmental FME.

However, it is arguable to claim that the aforementioned Government Notices may give rise to one party's claim of a Government Event since a common element for an event to qualify as a Government Event is "one which prevents the Project Company's (or any of its contractor's, the supplier's or the transporter's) access or interfere with the Project Company's (or any of its contractor's, the supplier's or the transporter's) use and possession of the Site." Recently, a proposal has been sent by the Ministry of Industry and Trade to the Prime Minister to consider extending the the application of fixed feed-in tariffs for wind power projects until December 31, 2023 instead of November 1, 2021.

The reasons for such a proposal include, among others, the effect of Covid-19 on the implementation of approved and, yet to be approved, projects. Such proposal may support the view that the Government is well aware of the effects that such a pandemic is having on enterprises, investors and businesses in Vietnam, including, among others, businesses in the energy sector. Having said that, the position remains that the claiming party of a Government Event would need to fulfil a high burden of proof.



3. What Can Businesses Do?

(i) Notification of FME

In case of an FME, the affected party claiming an FME, apart from having the obligation to provide written notification to the other party, such party must also bear the burden of proof to the other party that an event is the FME which affects the business operation of the affected party, and consequently, the affected Party is entitled to be released from liability. Such evidence is also usually required by the Courts. Again, Vietnamese law does not provide a specific list of evidence required in this situation, however, we are of the view that these can be agreed between the parties under the contract and also, taking into account the current situation of Covid-19, official documents issued by the relevant Government such as the Government Notices would provide relatively strong support for the affected Party.

(ii) Mitigating the effect of FME

In light of Covid-19, businesses are highly recommended to actively identify their positions/standings under various executed contracts including both commercial contracts and labor contracts with their employees. To be prudent, such contracts' key provisions (i.e. penalty, breach, FME clauses, governing law and dispute resolution) should be reviewed, with the help of in-house or external legal counsels.

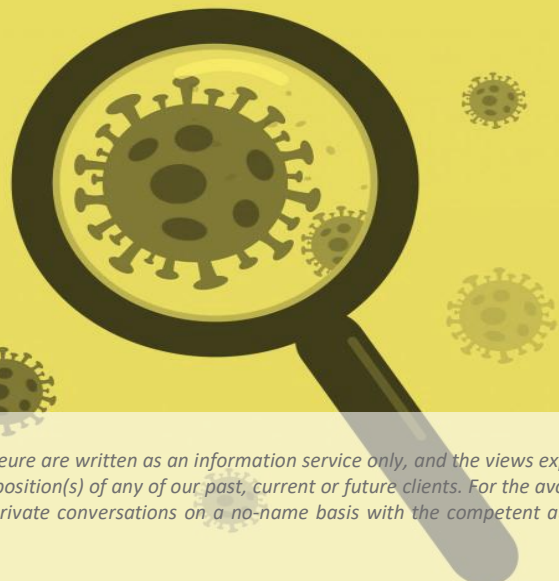
For human resources, an action plan must be put together including working regime for employees, solutions for the same, and management tactics in case of infected employees, sick leave, unpaid holiday pay, working from home situations, etc.

(iii) Others

Given the situation caused and affected by Covid-19 at the moment, many enterprises are looking at innovative solutions to carry on their activities and as said, to minimize the effect of this disruption on their businesses. One of the suggested solutions includes the use of electronic signature for signing documents internally or signing contracts with business partners. The method of creating the e-signature allows the verification of the signatory and the indication of a person's approval on the contents of the data message; and such method is sufficiently reliable and appropriate for the purpose for which the data message was originated and sent.

In Vietnam, the use of e-signature is still causing a lot of controversy concerning its legal validity in its use as evidence in front of the Courts in case of a dispute, or in documents to be submitted to the Governmental authorities. However, businesses may still consider such e-signature to replace the wet signature for this interim period.

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