

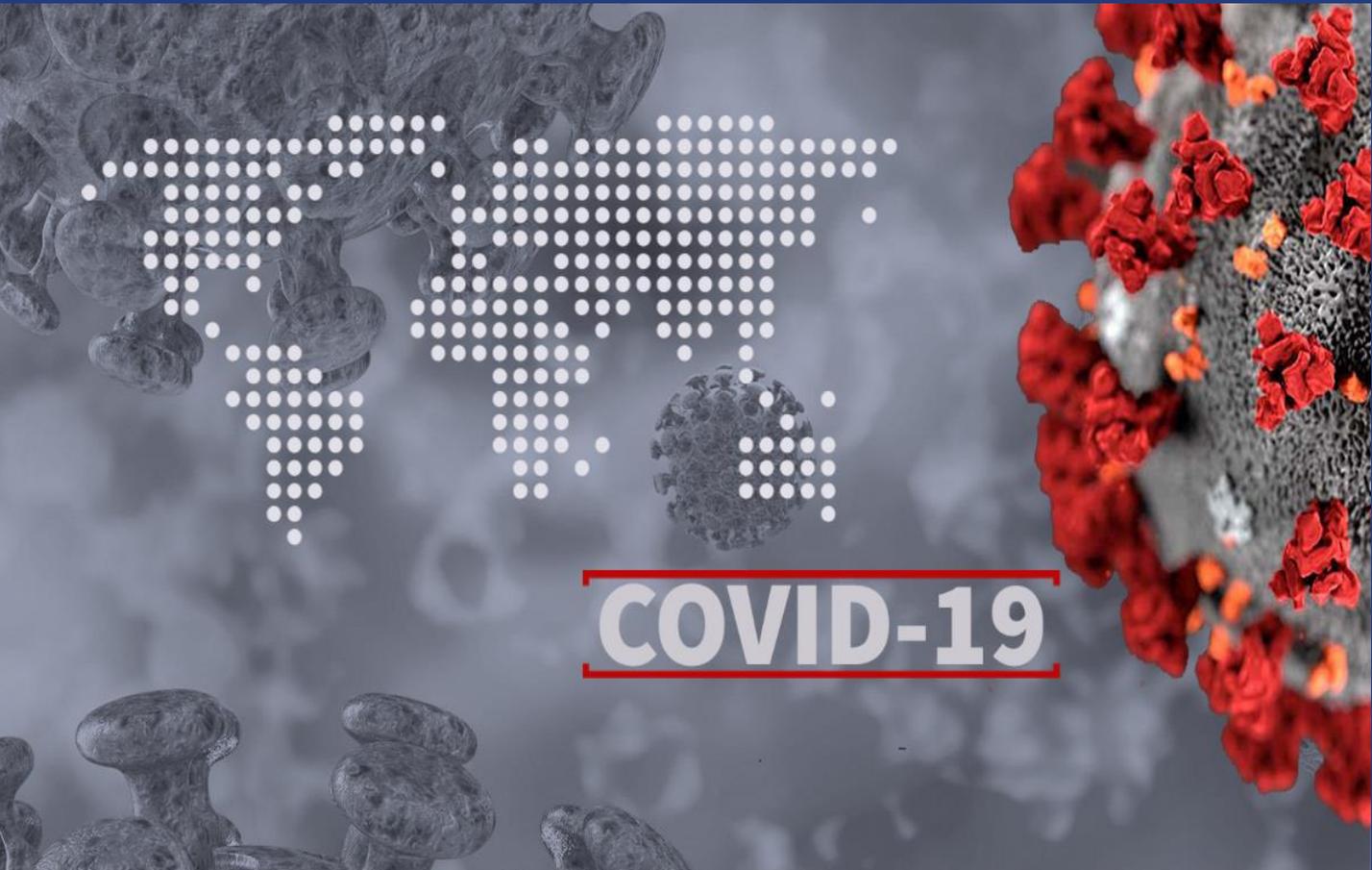
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NEWSLETTER

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

April 2020



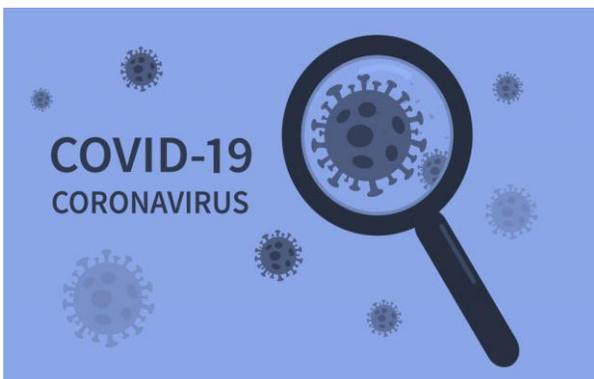
COVID-19

What you should know :

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

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- *Force Majeure Event ("FME") is recognized under Vietnamese laws and is commonly used in various commercial contracts, including pharmaceutical industry.*
- *Covid-19 may give rise to a number of claims for FME in contracts; however, it is still subject to the nature of the transactions and unless all elements for creation of an FME are satisfied, an affected party may claim to be immune from its contractual obligations, and as a result, it may consider to suspend or terminate its contractual obligations.*
- *In practice, the affected party normally is under the obligation to notify, mitigate the effect of FME and would normally have high level of burden of proof to fulfil.*
- *Multinational pharmaceutical companies ("Pharma MNCs") should be active to identify key provisions in executed contracts and consider innovative solutions to get through this interim period, which may include: reporting certain obstacles to the competent authorities; giving notice on FME to business partners; and applying e-signatures for this interim period.*



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 detected 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 as well as other recommendations and interim measures issued by the Prime Minister, such as Directive No. 15/CT-TTg on the resolute implementation of the peak prevention phase of

the Covid-19 pandemic, followed by Directive No. 16/CT-TTg on the implementation of immediate measures for the prevention of Covid-19 pandemic (collectively, referred to as "**Government Notices**") have shown the efforts of Vietnam's government to control the speedy spread of the virus. Accordingly, Vietnam's Government continues to implement various measures to prevent and control the spread of the Covid-19 pandemic, including, among others, quarantine, border closing and social distancing.

However, such Government Notices and strong measures have raised a number of issues on how Pharma MNCs can fulfil their contractual obligations, especially in drug import and tender as approx. 80% of Vietnam's drug consumption market is originated from the most Covid-19 affected countries in the world (e.g., the USA, Italy, France, Japan, etc.).

Needless to say, the global virus is spreading exponentially causing all nations and businesses significant losses and doubts.

Thus, we are writing this Newsletter to address the following questions from a Vietnamese legal perspective:

- (i) the concept of FME;
- (ii) whether Covid-19 is qualified as an FME; and
- (iii) any actions that Pharma MNCs should do to handle the impact of Covid-19.

We hope our Newsletter can help the Pharma MNCs 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 2015 Civil Code (National Assembly, November 24, 2015) as “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.” There has no reference to FME in the pharmaceutical law, and therefore, FME and handling of FME should be in line with those provisions in the 2015 Civil Code and other laws and regulations (e.g., commercial law).

(ii) Elements to constitute an FME

An FME is required to comprise the following characteristics:

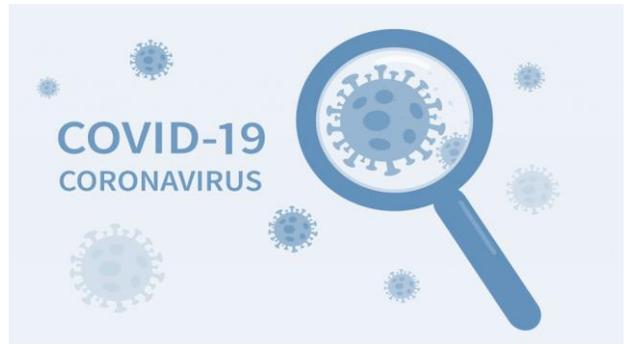
Objectively occurred: Vietnamese law is silent on the requirements or mechanism to determine whether an event happens in an objective manner. However, logically speaking, such event must not occur due to any party’s fault.

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.

Unable to be remedied by all possible necessary and admissible measure being taken: This should be calculated from as a matter of practice rather than contemplating in law. Indeed, 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. Thus, 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 2015 Civil Code, 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.

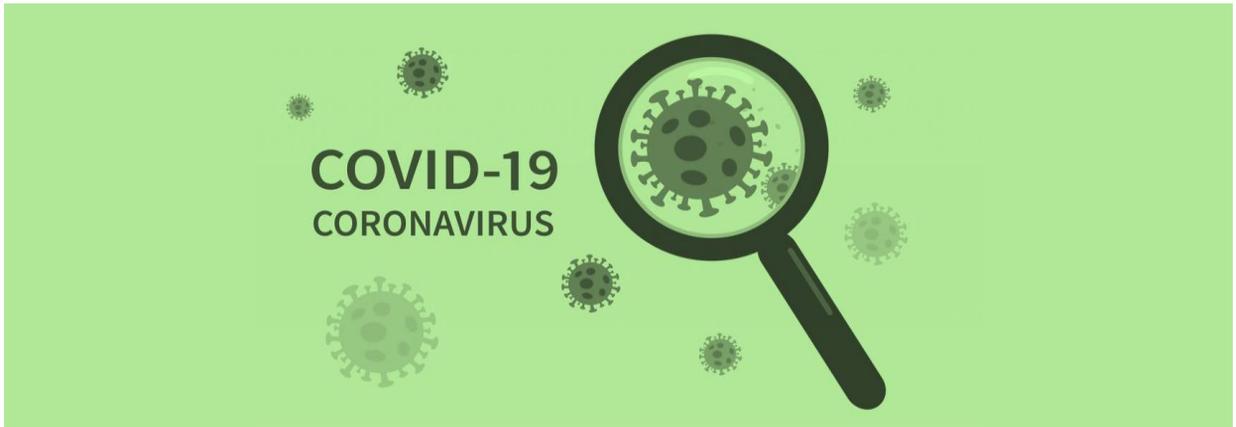
In case the parties do not have any agreement or cannot reach an agreement on such an extension, the term for performing contractual obligations will be extended for a period of time that is equivalent to the period of such FME’s occurrence plus a reasonable period for remedying its consequences. However, 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 movement restrictions internationally and domestically causing lack of labour, materials which lead to disruption of production or services' provision 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, subject to different types of contracts, there may be different views on the consequences and treatment of FME.

For instance, with respect to loan contracts, contracts for sales of goods, contracts for provision of services, drug tender agreements or drug distribution agreements, where the obligations of one party shall be payment obligation, it is arguable that the affected party (e.g., the debtor, the purchaser of goods or services, the hospitals, or distributors) 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, such as, office lease contracts, toll-manufacturing or drug import transactions, Covid-19 can result in negative impact to their business of the lessees or the toll-manufacturers right after the pandemic occurs (e.g., they are not allowed to use or enter the leased properties, or not allowed to import raw materials or drugs due to border closing), which could satisfy the conditions for triggering an FME. Thus, Covid-19 may be considered as an FME in such circumstances.

3. What Can Pharma MNCs Do?

(i) Reporting to Drug Administration of Vietnam (“DAV”)

Governments all around the world, including Vietnam, continue to implement various measures to prevent and control the spread of the Covid-19 pandemic (e.g., quarantine, border closing and social distancing) which cause to reduce drug supply sources and emerge certain obstacles in drug import into Vietnam. Being awareness of factual impacts of Covid-19 with respect to pharmaceutical industry, by notice No. 3121/QLD-KD dated April 1, 2020, the DAV requested Pharma MNCs facing problems in the course of importing and transporting drugs from foreign suppliers to Vietnam shall report their obstacles and recommend feasible solutions in order to ensure a standstill and efficient drug supply during Covid-19 period.

(ii) Notification of FME

In case where an FME occurs, the affected party claiming an FME, apart from having the obligation to provide written notification the other party, must also bear the burden of proof to the other party that the FME affects the affected party's business operation, and consequently, the affected party is entitled to be released from liability. In dispute, evidence is always required by the courts. As noted, Vietnamese law does not provide a specific list of evidence, however, in our opinion, evidence can be any agreement between the parties under the contract and Pharma MNCs should take into account any official documents issued by the relevant Government such as the Government Notices, which would provide relatively strong support in the current situation of Covid-19.

(iii) Amending contractual terms and/or labour management strategy

All businesses, including pharmaceutical businesses, are highly recommended to actively identify their positions/standings under various executed contracts including both commercial contracts and labour 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 a 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.

(iv) Applying e-signature for an interim period

Given the situation caused and affected by Covid-19 at the moment, many enterprises, including the Pharma MNCs, 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 including the use of electronic signature for approving internal documents or signing contracts with business partners. The method of creating 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 upon a dispute, or as 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.

COVID-19 CORONAVIRUS



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