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The impact of COVID-19 on the construction industry Part 1: Force Majeure Clause

Civil Litigation Practice Series

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“Corporate Rescue”

The Impact of COVID-19 to the Construction Industry

Introduction

The COVID-19 has presented an unprecedented crisis to the world. In particular, the construction industry is faced with delays to projects attributable to (a) shortage of materials; (b) shortage of manpower due to the nationwide circuit breaker measures; and (c) cash flow issues.

We have received enquiries on the operation of force majeure clauses and its application in the current climate. This article seeks to address the law of force majeure and its ambit.

Law of Force Majeure

The Court of Appeal had examined the concept of force majeure in **RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd** [2007] 4 SLR(R) 413 (“RDC”).

In RDC, the Court of Appeal ruled that RDC is unable to invoke the force majeure clauses as it had failed to plead it as a defence. In any event, the Court found that the force majeure clauses would not exempt RDC from liability or the non- or short supply as RDC could not prove that the shortage of raw materials or plant breakdowns were beyond its control.

It could therefore be inferred from the above that a party must show that a supervening event is beyond its control. In this regard, the Court of Appeal further held that “[a] party who relied on a force majeure clause had the burden of showing not only that it had brought itself squarely within the clause, but also that it had taken all reasonable steps to avoid its operation, or mitigate its results”.

Further observations were made by the Court:-

“In construing a force majeure clause, the courts would apply the presumption that the clause was restricted to supervening events which arose without the fault of either

party and for which neither of them had undertaken responsibility...”

In the subsequent case of **Holcim (Singapore) Pte Ltd v Precise Development Pte Ltd and another application** [2011] 2 SLR 106 (“Holcim”), the Court further held that “[e]vents that did not prevent the literal performance of a contract but would render the continued performance of a contract commercially impracticable, would generally constitute a “disruption” or “hindrance” within the meaning of the force majeure clause in question”.

The Court of Appeal further observed in Holcim that:-

“[t]here could not be a blanket principle to the effect that there was a requirement to take all reasonable steps before a force majeure clause could be relied on. Whether the affected party had to have taken all reasonable steps before he could rely on the force majeure clause depended, in the final analysis, on the precise language of the clause concerned. Nevertheless, where the force majeure clause in question related to events that had to be beyond the control of one or more of the parties, then the party or parties concerned ought to take reasonable steps to avoid the event or events stipulated in the clause...”

“Force Majeure”

Application in the current climate

If your company wishes to rely on the concept of force majeure, the primary argument would be that the pandemic is a *“radical external event that supervened and that was not due to the fault of either of the contracting parties”*

The preliminary step would involve a factual inquiry into the precise construction of the clause. Not all force majeure clauses are made equal. Therefore, the construction of the clause would define the ambit of the clause.

Adopting the words of the Court of Appeal in RDC, the party who sought to rely on force majeure clauses would bear the burden of proving that the COVID-19 outbreak (and its related consequences like shortage of materials etc) falls within the ambit of the specific clause and also that it had taken all reasonable steps to mitigate its results. It is, in all likelihood, a high burden to bear.

Our team stands ready to examine and analyze the force majeure clause in your contract and advise you on the prospects of your case.

“radical event that supervened and that was not due to the fault of either parties”





For more information on the article, or if you wish to learn more about the topics discussed, please contact:-

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