

COVID-19: Asia Guide to Force Majeure



This guide covers 10 jurisdictions: Cambodia, China, India, Indonesia, Malaysia, Philippines, Singapore, South Korea, Thailand and Vietnam.





INTRODUCTION

Since RHTLaw Asia's last article on [force majeure](#) in light of COVID-19 which was published on 14 February 2020, the number of infected has risen over 700% to over 420,000, and the number of deaths has risen over 1,300% to over 18,000. In light of how drastic the situation is, we have, together with some of our partner law firms in the ASEAN Plus Group, prepared the following table summarising various Asian jurisdictions' positions on force majeure. The table is the collective effort of **over 15 lawyers from 9 firms across 10 jurisdictions** and showcases the seamless cooperation within the ASEAN Plus Group.

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1. Does the contract contain a Force Majeure (“FM”) clause? *If not, please jump to (5.)*

Singapore	Malaysia	Cambodia	Indonesia	Philippines	Thailand	Vietnam	China	India	Korea
<p>Contributed by: RHTLaw Asia</p> 	<p>Contributed by: Paul Cheah Associates</p> 	<p>Contributed by: RHTLaw Cambodia</p> 	<p>Contributed by: SSEK</p> 	<p>Contributed by: Villaraza & Anganco</p> 	<p>Contributed by: Bangkok Global Law</p> 	<p>Contributed by: RHTLaw Vietnam</p> 	<p>Contributed by: RHTLaw Asia</p> 	<p>Contributed by: Anant Merathia & Associates</p> 	<p>Contributed by: DR & AJU</p> 
<p>If there is an FM clause, you may seek to invoke it PROVIDED ALWAYS that it provides for the event in question.</p> <p>In the case of COVID-19, the FM clause should provide for “outbreak of disease”, “epidemics”, “pandemics” and the like.</p> <p>If the FM clause does not provide for the foregoing, it may still be invoked if it provides for, amongst others, “governmental acts” and/or “work stoppages”, and an obligation under the contract is negatively affected by a country’s lockdown.</p>	<p>The position under Malaysia law is similar to that in Singapore.</p>	<p>Whilst the Law on Commercial Contract is still in draft, the Cambodia Civil Code is the applicable law governing contractual terms of the parties.</p> <p>The Cambodia Civil Code recognises the concept of FM, however, it does not specify what constitutes FM.</p> <p>In the case of COVID-19, the FM clause should provide for “outbreak of disease”, “epidemics”, “pandemics” and the like.</p> <p>If the FM clause does not provide for the foregoing, the affected party may invoke the provision of impossibility of performance under the Civil Code.</p>	<p>The Indonesian Civil Code, in Articles 1244 and 1245, recognises the concept of FM. However, the Civil Code does not provide any examples of FM or give much granularity to the concept. There is significant room for legal advocacy in this area.</p> <p>If there is an FM clause, the courts will likely enforce it on the twin principles of sanctity and freedom of contract.</p> <p>Given the lack of specificity in the FM concept provided in the Civil Code, parties should consider a more detailed FM clause if the risk is considered significant.</p>	<p>Philippines’ contract law allows parties to agree on provisions that will govern the performance or non-performance of their respective obligations.</p> <p>If there is an FM clause, you may seek to invoke it PROVIDED ALWAYS that it provides for the event in question.</p> <p>If the FM clause does not so provide, the affected party may invoke Article 1174 of the Civil Code which recognises FM as a “fortuitous event”, or an event which cannot be foreseen, or which, though foreseen, was inevitable. Article 1174 provides that except in cases expressly specified by the law, or when it is otherwise declared by stipulation, or when the nature of the obligation requires the assumption of risk, no person shall be responsible for “fortuitous events”, including occurrences that may be considered as FM events.</p>	<p>If there is an FM clause, either party may invoke the FM clause on the basis that the legal obligation cannot be performed.</p> <p>The Thailand Civil and Commercial Code, Book 1, Section 8 defines FM as any event the happening or pernicious result therefrom cannot be prevented even though a person facing such event (or will face such event) takes appropriate care as might be expected from him in his position and in such situation. The Thai Supreme Court has held that, in the context of the avian flu (bird flu) outbreak occurring in the past two decades, if a disease outbreak affects the ability to perform any contractual obligation, such an event shall be regarded as FM. COVID-19 can be considered to be analogous.</p>	<p>The Civil Code of Vietnam, Chapter X, Article 156 defines an FM event 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.</p> <p>If there is an FM clause, even if the clause does not provide for the event in question, you may still seek to invoke it PROVIDED that you prove that the event in question qualifies as an FM event according to Article 156 of the Civil Code.</p>	<p>If there is an FM clause, you may seek to invoke it PROVIDED ALWAYS that it provides for the event in question and it does not derogate substantially from the general principles regarding FM under PRC law.</p> <p>Under Article 180 of the General Rules of the PRC Civil Law and Article 117 of the PRC Contract Law, an FM event is defined as an objective circumstance that is unforeseeable, unavoidable and insurmountable.</p> <p>Further, based on Article 117 of the PRC Contract Law, where a contract cannot be performed due to an FM event, the liabilities of the affected party shall be exempted in part or in whole in light of the effects of such FM event, except as otherwise provided by law.</p>	<p>Section 56 of the Indian Contract Act 1872 provides that any agreement to do an impossible act is void.</p> <p>The Ministry of Finance has also via its memorandum (No. F 18/4/2020-PPD) clarified that the pandemic COVID-19 will come under an extraordinary event or circumstance beyond human control and stated that an FM clause may be invoked for COVID-19 wherever considered appropriate.</p> <p>Considering the broadness of Section 56 and the clarification in the memorandum, unless specified otherwise, an FM clause can be invoked for COVID-19 wherever a direct nexus can be established.</p> <p>However, it will help if the FM clause provides for “outbreak of disease”, “epidemics”, “pandemics” and the like.</p>	<p>Most standard contracts incorporate an FM clause (such as the standard terms for construction contracts issued by the Ministry of Economy and Finance, and the standard terms for foreign travel issued by the Korea Fair Trade Commission).</p> <p>If there is an FM clause, you may seek to invoke it PROVIDED ALWAYS that it provides for the event in question.</p>

2. Is there a duty to mitigate in the case of Force Majeure (“FM”) event occurring?

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<p>There is no blanket requirement.</p> <p>Whether there is such a duty depends on the language of the FM clause.</p> <p>If the FM clause provides that the FM event must be “beyond the control” of the parties, then the concerned party ought to take reasonable steps to avoid the event (the rationale being that to the extent such steps were not taken, it cannot be said that the occurrence was beyond that party’s control).</p>	<p>The position under Malaysia law is similar to that in Singapore.</p>	<p>There is no law imposing a duty to mitigate. However, parties are not prohibited from seeking such a duty.</p> <p>Whether there is such a duty depends on the language of the FM clause.</p> <p>If the FM clause provides that parties should undertake such diligent care or reasonable steps to eliminate the cause of the delay or the inability to perform then the affected party shall use its best effort to carry out such a duty and must show that he had taken all necessary measures.</p>	<p>There is no express requirement under the Civil Code for parties to mitigate losses in the case of FM.</p> <p>However, Article 1338 of the Civil Code provides that parties are to implement their agreements in good faith. One may easily argue that this includes an obligation to mitigate damages in the case of FM.</p>	<p>If the contract does not have an FM clause, and a contracting party resorts to the Civil Code to excuse performance, it must be shown that: (a) the FM event occurred independent of human will; and (b) the obligor must be free from any participation in the aggravation of the injury or loss.</p> <p>As such, there is no specific duty to mitigate the occurrence of an FM event, but there should be no aggravation of the same in order to qualify as FM.</p>	<p>It depends on whether parties include their own FM clause or rely on the definition of FM under the Code. If both parties have agreed on an FM clause that is different from the provisions of the Code, both parties shall be subject to the FM clause as agreed.</p> <p>On the other hand, to rely on the FM provisions as specified in the Code, it must be shown that the event cannot have been prevented, and the exercise of proper care was not possible.</p> <p>The party seeking to rely on an FM clause must show that he had taken preventive measures at an appropriate level considering his career or position.</p>	<p>Yes, as per Article 156 of the Civil Code, to claim FM, it must be shown that the FM event cannot be remedied through all permissible and necessary measures have been taken.</p> <p>In addition, under the Commercial Law of Vietnam, the affected party must: (a) immediately notify the other party in writing of the FM event and the possible consequences thereof; and (b) promptly notify the other party when the FM event terminates. Where the FM clause provides for additional obligations (such as to apply necessary measures to minimise damages), parties have to comply with those obligations as well.</p>	<p>Yes, due to the third limb of the abovementioned statutory definition of an FM event, the PRC’s courts tend to be of the view that the party claiming FM must first take necessary measures to try to mitigate the effects of the FM event in order to prove that such event is insurmountable and therefore qualifies as an FM event.</p> <p>Further, per Article 118 of the PRC Contract Law, a party claiming FM must give notice to the other party in a timely manner so as to reduce the losses that may be suffered and provide evidence within reasonable time.</p> <p>It is worth noting that the obligation to mitigate extends also to the non-breaching party. Article 119 of the PRC Contract Law requires such party to also take proper measures to prevent further losses. Failure to do so may bar claims for compensation for the further losses thereby aggravated.</p>	<p>Generally, the party claiming FM should have taken all measures to reasonably mitigate the event and its effects. This is a subjective standard and will be interpreted on a case-to-case basis.</p> <p>However, it must also be proven that the loss/failure to perform has occurred directly due to the FM event.</p>	<p>It will be different for each contract.</p> <p>Some standard contracts do impose a duty of notice when an FM event occurs, but it is not common to explicitly impose a duty to mitigate.</p> <p>Even if the contract does not contain such terms, parties may have a general duty of care to prevent the occurrence and exacerbation of damages depending on the nature of contract.</p>

3. For a Force Majeure (“FM”) clause to be triggered, is impossibility in performing required or does a degree of difficulty suffice?

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<p>This depends on the language of the FM clause – whether it provides that the FM event must have made performance impossible, illegal or some lesser standard.</p> <p>It has been held that a commercially impracticable situation is sufficient to trigger an FM clause which merely contemplates the “disruption” of supply.</p>	<p>This depends on the language of the FM clause but bear in mind Section 57(2) of the Contracts Act (discussed below).</p>	<p>Article 392 of the Civil Code defines impossibility of performance as where: (a) performance is determined to be physically impossible from a social or economic standpoint; and (b) such impossibility is established prior to the time of performance or such performance is deemed to be impossible at the time.</p> <p>The degree of difficulty might trigger the provision of partial performance provided under Articles 393 and 395 of the Civil Code which might not release the obligor from liabilities.</p>	<p>As provided in Articles 1244 and 1245, an FM event is described as an “uncontrollable circumstance” (“keadaan memaksa”) or happenstance (“kebetulan”). These terms are not defined or clarified in the Civil Code.</p> <p>Many Indonesian legal scholars rely on common law formulations in broadly describing FM as an event which: (a) causes the party relying on FM to be unable to perform an obligation; (b) results from an occurrence for which the claiming party cannot be faulted; and (c) cannot have been foreseen by the claiming party at the time the obligation was formed.</p> <p>However, one should not assume that an Indonesian court will follow this or any other formulation of the concept.</p>	<p>This depends on the language of the FM clause – whether it may be invoked if performance is impossible or just difficult.</p> <p>In the absence of contractual stipulation, impossibility of performance is required. The occurrence must be such as to render performance impossible in a normal manner.</p>	<p>This depends on the language of the FM clause, and a party may have to show that the contractual obligation is completely impossible for performance.</p>	<p>This depends on the language of the FM clause.</p> <p>Pursuant to Article 351 of the Civil Code, where an obligor fails to “perform correctly” an obligation due to an FM event, the FM clause may be triggered. That said, Article 351 allows for parties to agree otherwise. Typically, parties will agree that the “prevention from performance of obligation for a continuous period” is a situation sufficient to invoke FM.</p>	<p>Where a party wishes to be exempt due to FM based on the PRC’s relevant statutory provisions instead of an agreed FM clause, the PRC’s courts tend to be of the view that a degree of difficulty is insufficient. Indeed, the wording used in Article 117 of the PRC Contract Law is “where a contract is not able to be performed”.</p> <p>That said, where there is an agreed FM clause which provides for a lesser standard, the PRC’s courts generally respect the parties’ mutual agreement PROVIDED ALWAYS that it does not derogate substantially from the general principles regarding FM under PRC law.</p>	<p>Case law has held that the word “impossible” has not been used in Section 56 of the Indian Contract Act 1872 to mean physical or literal impossibility. The performance of an act may not be literally impossible but if an untoward event or change of circumstances upsets the very foundation upon which the parties rested their bargain, it can be said that the promisor found it impossible to do the act which he promised to do.</p>	<p>For FM to apply, the FM event should be outside the control of the party, and that it was impossible for the parties to predict or prevent the event by using ordinary means.</p> <p>However, it has been held that a disturbance in supply is not recognised as an FM event. The courts tend to strictly scrutinise the requirements of FM. Therefore, it is unlikely that an FM clause will be triggered if the reason is merely a disturbance in the performance of the contract.</p>

4. If the Force Majeure (“FM”) clause applies, will the contract be terminated or temporarily be suspended?

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This depends on the language of the FM clause. An FM clause may provide for, amongst others, automatic termination, suspension, extension or for the affected party to elect any one of the foregoing.	The position under Malaysia law is similar to that in Singapore.	Article 415 of the Civil Code allows an obligor to terminate a contract without liability if the performance of an obligation has become impossible to perform without any default or breach by the obligor. However, this depends on the mutual agreement between the parties and the type of contract as well. Parties may choose to either suspend or terminate the contract.	Where the parties have themselves provided for remedies in the case of an FM event, one may expect that those remedies will generally prevail. In the absence of contractually specified remedies, Articles 1244 and 1245 of the Civil Code provide that a party which is successful in claiming FM is relieved of the obligation to pay damages. In effect, the party is excused from the performance to which the FM relates. In the context of a sale of goods, Article 1264(3) provides that if goods, due to no fault of the seller, depreciate in value while awaiting the satisfaction of conditions precedent for their delivery, the buyer shall have the option either to cancel the agreement or to require delivery of the goods in their existing condition without any reduction in the agreed price.	Whether or not the contract is suspended or terminated will depend on the stipulations of the contract.	The position under Thai law is similar to that in Singapore.	The position under Vietnam law is similar to that in Singapore.	While a party may request to terminate the contract (per Article 94(1) of the PRC Contract Law) if the purpose of such contract is rendered impossible to achieve due to FM, parties may also choose to temporarily suspend the contract in accordance with an FM clause if it provides for such suspension.	Section 56 read with Section 32 of the Indian Contract Act 1872 specifies that the contract becomes void on impossibility to perform. However, it may be that the language of the FM clause in the contract provides for temporary suspension instead, in which case, there will be a temporary suspension. A party claiming FM may have to notify the counterparty and take reasonable steps to mitigate the effect of the event impacting performance.	This depends on the terms in each contract. Some contracts may state that, if the FM clause applies, the contract may be automatically terminated or the non-breaching party may become entitled to terminate the contract. On the other hand, certain contracts may provide that the duty to perform may be temporarily suspended for a certain period of time, and if the FM event continues after the lapse of such time period then the contract may be terminated or the non-breaching party may become entitled to terminate the contract.

5. What happens if there is no Force Majeure (“FM”) clause or the FM clause is not applicable?

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<p>The doctrine of “frustration” may apply.</p> <p>The doctrine applies where, through no fault of the parties, a supervening event occurs which renders the contractual obligation fundamentally or radically different from what had been agreed.</p> <p>Where the doctrine applies, the contract is discharged, and relief may be sought pursuant to the Frustrated Contracts Act (Cap. 115).</p> <p>This is easier said than done, and it has been affirmed that the doctrine is applied strictly and allowed only in exceptional cases, based on a multi-factorial assessment (taking into account amongst others, knowledge, expectations, terms of the agreement, assumptions and contemplations, in particular as to risk).</p>	<p>Under Section 57(2) of the Contracts Act, a contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor cannot prevent, becomes void when the act becomes impossible or unlawful.</p> <p>Case law suggests that the impossibility to perform the contract extends to situations where performance is radically different from what was contracted.</p>	<p>An affected party may request to invoke impossibility of performance under Article 389, 392 and 415 the Civil Code.</p>	<p>If there is no FM clause, the provisions found in Articles 1244 and 1245 of the Civil Code regarding FM will then apply to the contract.</p>	<p>The affected party may invoke Article 1174 of the Civil Code which recognises FM as a “fortuitous event”, or an event which cannot be foreseen, or which, though foreseen, was inevitable. Article 1174 provides that except in cases expressly specified by the law, or when it is otherwise declared by stipulation, or when the nature of the obligation requires the assumption of risk, no person shall be responsible for “fortuitous events”, including occurrences that may be considered as FM events.</p> <p>Article 1267 of the Civil Code provides that when service has become so difficult as to be manifestly beyond the contemplation of parties, the obligor may also be released from his obligations in whole or in part.</p> <p>Case law has shown that the courts have recognised exceptions to the principle of the obligatory force of contracts, one of which is when the obligation, without fault of the obligor, is no longer legally or physically possible to perform.</p>	<p>If there is no FM clause, provisions of the Code shall be applied. In order for the party to be completely relieved from his obligation to perform, the subject of an obligation must be completely depleted by the FM event (Section 219 of the Code).</p> <p>Where an FM event has occurred but the subject of an obligation remains, the party is responsible for performance of his legal obligations.</p> <p>The party shall not be considered to be in default so long as the performance is not affected in consequence of a circumstance for which he is not responsible (Section 205 of the Code).</p>	<p>If there is no FM clause, performance may be exempted based on Article 351 of the Civil Code. In addition, Article 420 of the Civil Code on “performance of contracts when circumstances change substantially” may apply.</p> <p>The law allows an affected party to renegotiate contract terms when circumstances change substantially. If the parties cannot agree on terms, either party may request the court to: (a) terminate the contract at a specific time; or (b) amend the contract to balance out the lawful rights/interests of the parties.</p> <p>Circumstances are deemed to have changed substantially if: (i) the change is due to objective reasons, occurring after the contract is entered into; (ii) the change is unforeseeable; (iii) if the parties had foreseen such change, they would not have entered into the contract or would have entered into a contract with completely different contents; (iv) continuing performance without changing its contents will cause serious loss and damage to one party; and (v) the affected party has taken all necessary measures to the best of its ability and appropriate with the nature of the contract but is unable to prevent or mitigate the effect.</p>	<p>As mentioned above, the concept of FM is established and codified under PRC law and therefore, a party affected may invoke FM based on the relevant statutory provisions in the absence of an agreed FM clause or where the FM clause is not applicable per se.</p>	<p>An FM clause cannot be implied under Indian law. It must be expressly provided for under the contract and the protection afforded will depend on the language of the same.</p> <p>If there is no FM clause, the affected party can claim relief under the doctrine of frustration under Section 56 of the Indian Contract Act 1872.</p> <p>However, in order to claim that the contract is frustrated, it must be established that the performance of the contractual obligations has become impossible by reason of some event which the affected party cannot prevent and that the impossibility is not self-induced by the affected party or due to his negligence.</p>	<p>Even if there is no FM clause, if the party seeking to rely on FM can prove that he is not responsible for the breach due to an FM event, then liability may be exempted.</p> <p>However, as explained in (3), the Korean courts are extremely hesitant in recognising the exemption of liability due to an FM event.</p>

Other Resources

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RHTLaw Asia LLP had on 14 February 2020 published an article on FM in light of COVID-19. It is available here .	---	---	SSEK had on 26 March 2020 published an article on FM under Indonesian law which is available here .	---	Bangkok Global Law had published an article on COVID-19 in its Legal Insight Vol February 2020. The article is available here .	---	---	The memorandum issued by the Ministry of Finance (No. F 18/4/2020-PPD) referred herein is available here .	---

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