森・濱田松本法律事務所
MORI HAMADA & MATSUMOTO

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The impact of the novel coronavirus on Asian legal practice
～Force majeure clauses and related doctrines in typical situations (Part I)

Introduction

The spread of the novel coronavirus is having an enormous impact on all aspects of business activities in every country, and the number of countries in Asian region where preventive measures such as lockdowns are being implemented is increasing. As a result, a variety of legal issues have already arisen for Japanese companies doing business in the Asian market.

Part I of this article outlines the so-called force majeure clauses and related doctrines (see Section 1 below), and Part II of this article (which will be distributed next week) will provide an overview of what to keep in mind in corporate legal practice by introducing some typical cases where force majeure clauses and related doctrines are discussed.

Although there are various laws and regulations applicable to Japanese companies in the Asian market, this article will focus on Japanese law and Singapore law. Singapore law is chosen for this article because it is often the chosen governing law for Japanese companies which have a headquarter in Asian region.

1. Force majeure clauses and related legal theories under Japanese law and Singapore law

(1) Force majeure clauses

Many contracts in international transactions contain so-called force majeure clauses. By and large, this is a clause that allows a party to be released from default or to terminate the contract in the event of the occurrence of an event which is beyond the control of the parties, such as natural disasters like earthquakes or man-made disasters such as wars.

Although the requirements, procedures and effects of force majeure clauses vary from contract to contract, the starting point is to determine whether a natural disaster or man-made disasters (for the purposes of this article, the spread of the novel coronavirus) or an event resulting from it (lockdown, etc.) constitutes a "force majeure" event under the contract.

In practice, there are many ways to draft a force majeure clause, such as a

broad/catch-all definition (e.g., "Any event outside the control of the parties"), by enumerating individual events (e.g., "War" and "Earthquake"), or a combination of both. In the context of the current situation, the conclusion may be relatively straightforward if "pandemic" or "governmental actions" (if lockdown is an issue) are specifically listed as force majeure events.[1] In other cases where the definition of force majeure is not so clear, the interpretation of the scope of individual events and catch-all requirements gives rise to uncertainty. This point will be discussed with examples in Part II of this article.

It should also be noted that, even if circumstances constituting a force majeure event exist, causation (or link) between the event in question and the actual or potential non-performance of the contract needs to be established.

Thus, it is often unclear whether a force majeure clause can be invoked, and the recent events associated with the novel coronavirus provides clear illustration of the difficulties in applying the force majeure clause. Further, if the effect of a force majeure clause in a contract is only to exempt the breach of certain obligations, then that clause would not be a solution for a party wishing to terminate the contract. In addition, some contracts (especially ones governed by Japanese law) do not even contain a force majeure clause.[2]

When the application of the force majeure clause is uncertain or when there is no force majeure clause, it is necessary to consider whether there are any other general principles applicable to provide the appropriate remedy. Thus, we will first provide an overview of some particularly important doctrines under Japanese law and Singapore law that are closely related to or may supplement the absence of force majeure clauses.

This article will examine the Japanese law position both before and after the newly revised Japanese Civil Code became effective on April 1, 2020 (hereinafter, the pre-amendment Civil Code will be referred to as the "Former Civil Code" and the post-amendment Civil Code will be referred to as the "New Civil Code").

(2) Japanese law

a) Principle of negligence in damages due to default

Under Japanese law, in order to establish a claim for damages based on default, the default must be shown to be "attributable to the obligor" in relation to such default

[1] Even after a state of emergency is declared in Japan, if the government order is just a request and is not a mandatory order, it is still unclear whether such government order falls under the category of governmental action.

[2] In addition, there are a variety of matters that need to be considered depending on the contract, such as (1) timely notification to the other party of the occurrence of a force majeure event, (2) exclusion clauses, and (3) mitigation duties of the party seeking to invoke force majeure.

(Article 415 of the Former Civil Code), or there must not be "reasons that the default cannot be attributed to the obligor in light of the underlying obligation such as contract or common business practices" (Article 415 of the New Civil Code). This is also known as the principle of negligence.

In situation where a force majeure event is alleged to have occurred, it is usually not due to the negligence of the obligor.[3] Therefore, it is important to note that, a claim for damages based on a default under the Civil Code is not permissible if the default of performance is due to force majeure without any negligence on the part of the obligor.[4]

Some Japanese law governed contracts reflect this established principle in their contracts and therefore usually contracts that are governed by Japanese law do not provide for force majeure clauses.

b) Termination by default of an obligation

Under the Former Civil Code, the principle of negligence is applicable to termination of a contract based on default, as was the case with damages. Therefore, no termination is allowed under the Former Civil Code in respect of a default based on force majeure events for contracts entered into on or before March 31, 2020.[5]

On the other hand, the New Civil Code does not require the obligor's negligence as a general requirement for termination of a contract due to default (see Article 541-543 of the New Civil Code). Therefore, for contracts entered into on or after April 1, 2020, even if the default is based on force majeure without proof of negligence on the part of the obligor, the Civil Code allows for termination. For this reason, it has become increasingly important to provide force majeure clauses, including termination effects, in contracts.

c) Assumption of risk

The concept of assumption of risk under Japanese Civil Code is quite similar to the concept of force majeure. When one of the parties to a bilateral contract becomes unable to perform its obligation due to reasons not attributable to the party after the execution of the bilateral contract, that obligation is deemed extinguished. The concept of assumption of risk is the question of how the other party's obligation (the counter obligation) will be treated in such a case.

[3] Obligors cannot raise the defense of force majeure for a monetary obligation (Article 419(3) of the Civil Code).
[4] It is a totally different case if the contract provides a different requirement for damages due to a default.
[5] With respect to the application of the New Civil Code on termination, the time of execution of a contract decides whether the New Civil Code applies to the contract (Article 32 of the Supplementary Provisions of the New Civil Code).

Important changes have been made to the assumption of risk principle in the New Civil Code. A comparison of the assumption of risk principle under the Former Civil Code and the New Civil Code is summarized in the table below.

	General rule	**In cases where the subject matter of the bilateral contract is the creation or transfer of real rights regarding specified things, and if the things have been lost or damaged due to reasons not attributable to the obligor**
Former Civil Code	The counter obligation is extinguished as a matter of course (article 536)	The counter obligation survives (article 534)
New Civil Code	In both cases, the counter obligation is not extinguished as a matter of course, but the person who owes the counter obligation may refuse to perform it (article 536).	

For contracts entered into on or before 31 March 2020, the Former Civil Code applies,[6] so for example, in the case of a contract for the sale and purchase of a building, if the building in question is destroyed or damaged by force majeure prior to delivery, the buyer must still pay the price even if the seller's performance of the building delivery obligation becomes impossible.[7] On the other hand, for contracts entered into on or after April 1, 2020, if the obligation is extinguished due to a force majeure event, the person who owes the counter obligation may refuse to perform it, regardless of the type of contract.

d) Doctrine of change of circumstances, good faith and principle of prohibition of abuse of rights

Under Japanese law, the doctrine of change of circumstances also overlaps with the function and effect of force majeure clause. This doctrine permits modification or termination of the contract when a substantial change of the surrounding circumstances that the parties could not have foreseen at the time of execution of the contract, such as an earthquake or war, have occurred and it is considered to be unfair to force the performance of the original contract. Therefore, for example, when a service cannot be provided as originally planned due to a lockdown ordered by the government amid the novel coronavirus outbreak, it may be possible to request termination of the contract or a change in the time of performance based on the

[6] With respect to the application of the New Civil Code on assumption of risk, the time of execution of a contract decides whether the New Civil Code applies to the contract (Article 30 of the Supplementary Provisions of the New Civil Code).
[7] However, since it is unfair that the buyer assumes the risk of loss or damage of the object when the contract is executed, it is common in practice to stipulate in the contract that the risk is transferred at the time of delivery of the object.

doctrine of change of circumstances.

It should be noted, however, that only extremely limited number of precedents have permitted modification or termination of a contract based on the doctrine of change of circumstances.

In addition, as a more general principle, good faith (Article 1(2) of the Civil Code) and principle of prohibition of abuse of rights (Article 1(3) of the Civil Code) may also be applicable in the absence of force majeure clauses.

When negotiating or exercising rights in relation to delays or defaults due to a force majeure event, it is necessary to keep the above principles in mind.

(3) Singapore law[8]

a) Non-existence of principle of negligence

Under the common law system including Singapore law, the element of negligence is irrelevant in establishing liability for breach of contract. This is a major difference from Japanese law.

Therefore, as compared to Japanese law, there is more room for force majeure clauses to be relied upon to appropriately allocate risks between parties in relation to events which are beyond their control.

Also, although the doctrine of frustration (see b)) has been developed as a remedy for a situation which is not foreseeable at the time of execution of the contract, the scope of its application is quite limited and is largely left to the interpretation of the courts.

b) The Jurisprudence of Frustration

The doctrine of frustration under Singapore law provides that when a contractual obligation has become incapable of being performed because the circumstances have changed so radically due to an unforeseen event that performance required has become entirely different from that which was contracted for, then the parties are discharged from further obligations under the contract.

Although there is no settled test as to when this doctrine should be applied, generally speaking, the doctrine of frustration is applicable if the following are established:

(i) An event has occurred after the contract has been is executed;

(ii) Such event is beyond what was contemplated by the parties when they entered into the contract, and the impact is so fundamental as to be going to the very essence of the contract.

[8] In addition to the matters discussed in the body, please take note of other laws and regulations enacted by the Singapore Parliament to deal with the impact brought by the novel coronavirus, such as the Covid-19 (Temporary Measures) Bill.

(iii) The event is not due to the fault of either party and is not self-induced.

(iv) As a result of the event, performance of the contract has become impossible, illegal, or radically different from what was contemplated at the time the contract was entered into.

It should be noted that, although frustration events and force majeure events may overlap, the two remedies are conceptually different: force majeure deals with foreseeable events, whereas frustration deals with unforeseeable events.

Also, although the doctrine of frustration has been developed largely as a remedy for a situation which is not foreseeable at the time of execution of the contract and is beyond the control of the parties, the scope of its application is quite limited and is largely left to the interpretation of the courts.

* Mori Hamada & Matsumoto (Singapore) LLP is licensed to operate as a foreign law practice in Singapore. Where advice on Singapore law is required, we will refer the matter to and work with licensed Singapore law practices where necessary.

Editorial Team　編集責任者

Kana Manabe　眞鍋 佳奈
Partner　パートナー
Tel: +65-6593-9762（Singapore）
kana.manabe@mhm-global.com

Chong Chia Chi　チョン・チア・チー
MHM Singapore Counsel
MHM シンガポールカウンセル
Tel: +65-6593-9759（Singapore）
chiachi.chong@mhm-global.com

Ryo Kawabata　川端 遼
Associate　アソシエイト
Tel: +65-6593-9758（Singapore）
ryo.kawabata@mhm-global.com

(Contacts)
Public Relations
mhm_info@mhm-global.com
+81-3-6212-8330
www.mhmjapan.com