King & Spalding
Client Alert

DECEMBER 5, 2022

For more information, contact:

Peter Chow
+65 6303 6083
pchow@kslaw.com

Andrea Stauber
+44 20 7551 7574
astauber@kslaw.com

Adam Gregory
+65 6303 6069
agregory@kslaw.com

King & Spalding

Singapore
1 Raffles Quay
#31-01 North Tower
Singapore 048583
Tel: +65 6303 6000

COVID as a Force Majeure Event - An Interesting and Unexpected Development in Singapore

The Appellate Division of the Singapore High Court recently provided the construction industry with interesting, and somewhat unexpected, guidance regarding COVID as a *force majeure* event in the context of construction contracts. As set out below, the Court's observation will pique the interest of contractors that have suffered the impacts of the COVID pandemic and its associated government regulations, as well as the employers who are facing those claims.

FORCE MAJEURE UNDER COMMON LAW

The term *force majeure* (literally translated from French as "*superior force*") originated in the French civil code which excuses contractual performance where performance has been prevented by events outside the parties' control which could not reasonably have been foreseen at the time of contracting, and which could not have been avoided by appropriate measures.

No such general doctrine of *force majeure* exists in the common law world. However, contracting parties may agree express provisions governing what constitutes unexpected circumstances, and, more importantly, what consequences should follow from such an event. Being a creature of contract, the way in which a *force majeure* provision can alter parties' entitlements and/or obligations will depend squarely on its precise terms and, importantly, the *status quo* when the contract was executed.

There are two common forms of a *force majeure* clause: defined or undefined. In a defined *force majeure* clause, the parties will typically agree a general definition of what constitutes a force majeure event and sometimes even include a list of events which, if they occur, will excuse a party (usually the contractor) from performing its obligations during the affected period. In the context of construction contracts, this often means that the contractor would be entitled to claim an extension of time for the period during which the *force majeure* event prevents or hinders

performance. In an undefined *force majeure* clause, as the name suggests, the contract will often refer to the term *force majeure* without any definition or examples of what exactly constitutes a *force majeure* event. In such case, it will be for the parties to attempt to agree whether a certain event should be classified as a *force majeure* event or, if they cannot, it is ultimately a matter for a third-party decision-maker.

In either case, the party seeking to enliven *force majeure* typically must prove that the event or circumstances on which it relies were beyond its reasonable control.

FORCE MAJEURE IN SER KIM KOI V GTMS CONSTRUCTION

In the case of *Ser Kim Koi v GTMS Construction Pte Ltd & ors* [2022] SGHC(A) 34 ("*Ser v GTMS"*), the parties to a construction contract had elected to include an undefined *force majeure* clause. The case had a long and eventful journey through the Singaporean court system, and the relevant facts all occurred well before the COVID pandemic. One of the issues on appeal was whether an extension of time had been properly granted to the contractor (GTMS) in respect of a government requirement to install an overground electrical distribution box, which the contractor argued was a *force majeure* event.

In considering the issue, the Court undertook an extensive review of the case law and literature on *force majeure* from various common law jurisdictions. It concluded that where the parties elected not to define *force majeure* in their contract, a *force majeure* event would generally be "*an event that was radical*" and "*impedes or obstructs the performance of the contract, which was out of the parties' control and occurred without the default of either party*"[1]. Further, it would only cover events *"which were generally not, at the time the contract was entered into, contemplated or expected to or which might reasonably have been foreseen"*.[2]

However, the Court clarified that not *any event* that is beyond the parties' control necessarily constitutes a *force majeure* event – it is critical that the event hinders or prevents performance. For example, it cited well-established law in England and Wales that a mere change in economic or market circumstances, affecting the profitability of a contract or the ease with which the parties' obligations can be performed, is not typically regarded as being a *force majeure* event.[3]

Here, the Court applied the above principles to determine that the governmental requirement to install the distribution box was not a radical or external event beyond the contemplation or control of the parties; it was, therefore, not a *force majeure* event under the contract.

FORCE MAJEURE AND COVID

Interestingly, the Court took the opportunity to look beyond the issues squarely before it. In *obiter*, the Court observed that where the contract contains an undefined *force majeure* clause, the COVID pandemic (and associated impacts preventing a contractor's performance) was a clear example of an event that could constitute a *force measure* event. The Court's guidance is found at paragraph 81 of the Judgment and extracted below (with emphasis added):

> "*What* [force majeure] *covers will therefore be… radical external events and circumstances that prevent the performance of the relevant obligations and which are due to circumstances beyond the parties' control – for example, the COVID-19 pandemic and the "lock down" that followed over much of 2020 and 2021, the shortage of labour and materials due to the COVID-19 pandemic lock-downs, the prohibition of travel between countries and the ensuing disruption of supplies and manufacture of goods and material*."

In making these *obiter* comments, the Court did not cite any previous case law (in Singapore or elsewhere) to justify the example of COVID as a *force majeure* event where the term *force majeure* is undefined. This is perhaps because there are no reported cases in which a superior court has unequivocally stated that COVID (or the associated government measures) would constitute a *force majeure* event where the contract contains an undefined *force majeure* clause. In

fact, there are numerous cases in the England and Wales[4], Hong Kong[5], Singapore and the United States[6] where courts of all levels have been reluctant to excuse a parties' performance of contractual obligations in circumstances where the contract governing those obligations does not contain a clearly drafted *force majeure* clause which includes, for example, the words "epidemic" or, perhaps, "acts of government". The general approach by courts is to construe *force majeure* clauses narrowly and examine a party's attempts to excuse their contractual performance with close scrutiny.

CONCLUSION

While *obiter* comments do not form binding precedent, the guidance from a superior court comprised of experienced and respected judges is likely to be relied on as persuasive authority before the Singaporean courts, and possibly elsewhere in the common law world, to support *force majeure* claims seeking to excuse contractual performance for COVID-related reasons.

That said, parties must remember that ultimately in order to be relieved from contractual performance (and subject to express terms of a defined *force majeure* clause) it is critical to demonstrate that the *force majeure* event has prevented performance (rather than merely making it more expensive or difficult) and that the affected party was unable to avoid or mitigate its impacts. Some contracts may also include strict notice requirements that act as a condition precedent to a party's ability to claim relief for *force majeure* – so parties should pay close attention to their contracts and, if necessary, seek advice early.

[1] *Ser v GTMS at 73.*
[2] *Ser v GTMS at 77.*
[3] *Ser v GTMS at 76 citingThe Concadoro [1916] 2 AC 199, Brauer & Co (Great Britain) Ltd v James Clark (Brush Materials) Ltd [1952] 2 All ER 497.*
[4] *Football Association Premier League Limited v PPLive Sports International Limited [2022] EWHC 38 (Comm).*
[5] *Holdwin Limited v Prince Jewellery and Watch Company Limited [2021] HKCFI 2735. The Court in this judgment relied on a case which examined force majeure clauses during the SARS pandemic in 2009 where it held, relevantly: "…Like any other contractual provision, a force majeure clause is to be given a fair reading in its factual matrix. Of course since contracts are made to be performed, clauses invoked to remove or modify obligations of*

performance ought at least in general to receive a strict construction. Such a construction means that any ambiguity would be resolved against the party seeking to rely on the clause. But that is not to say that such clauses, made within the freedom of contract, are to be viewed with hostility. It is not for the courts to encourage or discourage such clauses…". See, Goldlion Properties Ltd v Regent National Enterprises Ltd (2009) 12 HKCFAR 512.

[6] *In re CEC Entm't, 625 B.R. (Bankr. S.D. Tex. 2020) (as cited in the LexisNexis Practical Guidance Journal, "The Courts Have Spoken: Lessons of the Covid-19 Force Majeure Case, by Timothy Murray)*