

COVID-19 in Myanmar: Impact on Commercial Contracts and Employment

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The coronavirus outbreak is having a significant impact on the global economy and markets. As the coronavirus sweeps around the world, emerging and frontier countries like Myanmar face more challenges.

Since March 2020, the Myanmar government has introduced several immigration measures to reduce the transmission, including temporary suspension of issuing all types of visas and compulsory quarantine requirement for all travelers entering Myanmar. The Myanmar government also subsequently imposed a movement restriction requesting all residents to stay at home during the Thingyan festival (Myanmar New Year), in conjunction with the immigration measures.

Social and economic measures have also been put in place to alleviate the financial stress of residents (individuals and entities), which include, *inter alia*, the following:

- i. On 7 April 2020, the Myanmar Ministry of Electricity and Energy announced each Myanmar household is exempted from paying for the first 150 units of electricity this month.
- ii. The Myanmar Investment Commission (MIC) reduced the application fees by 50 percent (originally ranging from 50,000 Kyat to 500,000 Kyat) effective from 20 April 2020, in response to the decline in foreign investment.
- iii. The Ministry of Planning, Finance and Industry issued Notification No. 1/2020 on 18 March 2020 announcing that the government will establish a specific fund with an initial value of 100 billion Kyat (approximately USD 70 million). This fund will be used for financing prioritized businesses, which include the local businesses in cut-make-pack industries, hotel and tourism businesses, and small-and-medium enterprises, as well as to provide tax relief to these businesses, including removal of the 2 percent advance income tax on exports until 30 September 2020, and deadline extension for payment of the quarterly income tax and monthly commercial tax by the prioritized businesses to 30 September 2020.
- iv. The Ministry of Labor, Immigration and Population issued Notification No. 63/2020

on 20 March 2020 whereby it extended the deadline of payment of social security contributions (for both employer and employee) from 15 days after the end of the month to three months after the end of the month.

- v. The Central Bank of Myanmar further reduced the interest rate by 1 percent (*i.e.* 8.5 percent) by its Directive No. 4/2020 dated 24 March 2020, effective from 1 April 2020. Directive No. 4/2020 also reduced the minimum bank deposit rate to 6.5 percent while adjusted the maximum lending rates for collateralized loans and noncollateralized loans to 11.5 percent and 14.5 percent, respectively.

Notwithstanding the aforementioned efforts, foreign and local investors are looking forward to having specific guidelines for their disrupted ongoing projects and business operations. Needless to say, the infrastructure and construction projects and labor-intensive industries in Myanmar will be affected to a great extent by this pandemic. It remains to be seen when and to what extent the Myanmar government will step in to implement effective measures or guidelines to bail out the stressed businesses and employees. Set out below is a brief analysis of key contractual considerations and remedies that may be available to them under the current legal framework.

Force Majeure and Application of Doctrine of Frustration of Contract

As mentioned above, Myanmar has imposed various measures to curb the spread of COVID-19 that has consequently resulted in difficulties for businesses to perform contractual obligations. Times like this have led businesses to pay attention to their obligations and liabilities stipulated in their commercial contracts. One commonly asked question is: Can parties rely on a force majeure clause that allows for nonperformance of contractual obligations without frustrating the contract?

The answer depends on whether the contract contains a force majeure clause and whether the clause covers a pandemic event such as the COVID-19 outbreak.

Force Majeure Clauses

Force majeure clauses are normally inserted into contracts to cover specific events whereby parties may be allowed to alter or discharge the contractual obligations when an extraordinary circumstance prevents either party from fulfilling their contractual obligations.

To ensure that such parties are entitled to rely on the force majeure clause upon occurrence of events such as the COVID-19 outbreak, one can go through the following steps to check whether they are covered under the force majeure clause:

- (a) Whether COVID-19 outbreak is covered as a specified event in the force majeure clause.

There are various ways that a force majeure clause can be drafted. The most common approach is defining the specific types of events that allow either party relief from its contractual obligations during the specified event. The wording of specified events such as “plagues, virus outbreak, epidemic or pandemic” will most probably cover the COVID-19 outbreak.

However, if such wordings are not mentioned in the force majeure clause, the parties can look for a wider definition, such as “events beyond the parties’ reasonable control” or “acts of government” as measures like travel restrictions, quarantine and trade embargo restrictions are determined by the respective government and are beyond the parties’ control.

- (b) Whether parties are required to notify the other party when the force majeure event occurs.

This requirement differs on the way the force majeure clause is drafted. The force majeure clause may require a notice to be given immediately and failure to do so may lead to the party not being able to rely on the force majeure clause to discharge or alter its contractual obligations.

There are instances where the force majeure clause will state “in the event a force majeure event continues beyond [a certain number of] days, the parties are entitled to terminate the contract via written notice.” There may be a requirement for parties to send a written notice to terminate the contract if the force majeure events continue after a certain number of days.

Besides this, there may also be instances where parties are not required to give notice for termination during the force majeure event and the contract automatically comes to a halt. Depending upon the construct of the provision in the contract, the consequences following declaration of force majeure could range from suspension or delay in performance of the contract, to termination of the contract.

In any event, in order to conclusively ascertain the application of the force majeure clause under a contract, and determine the various options and remedies available to the parties to such contract, the underlying provision would have to be specifically analyzed.

Doctrine of Frustration

In the event that a force majeure clause has not been provided for in a contract, it may be possible for parties to rely on the doctrine of frustration to discharge their contractual

obligations during the COVID-19 outbreak. Frustration of contract normally occurs when an unforeseen event outside the control of the parties has caused the contract to be impossible to perform, or to the extent it is unfair to demand the parties to perform their obligations.

Section 56 of Myanmar Contract Act 1872 (MCA) adopted the doctrine of frustration under the common law system whereby it states that "A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."

Section 56 of the MCA provides alternative protection to parties that cannot perform their contractual obligations due to the COVID-19 outbreak. The doctrine of frustration may be applied especially when various countries have imposed travel restrictions, quarantine measures and trade embargos, etc., which have made it difficult or impossible for the parties to fulfill their contractual obligations.

Having said that, we are not aware of any case law involving interpretation of the doctrine of frustration by the courts of Myanmar. We are of the view that the Myanmar courts may not apply the doctrine of frustration without limitations. In particular, the element of "impossibility" may not include commercial impossibility.

Termination of Employment

Myanmar has about 262 Chinese-owned garment factories, more than 20 Myanmar-owned factories, 60 Japanese-owned factories and more than 20 South Korean-owned factories. Starting from March this year, these factories have stopped operations due to shortage of raw materials and purchase orders, as well concerns over spreading the virus within work places.

The immediate consequences that such businesses will have to face may involve laying off workers and insufficient/nonpayment of wages. As published in *Myanmar Times*, as of 11 March, 16 garment factories have shut down due to the lack of raw materials and orders. From publicly available information, we notice that about seven factories in Bago region may need to lay off workers, and another seven are planning to cut their workforces in April.

Is the employer allowed to lay off workers? We set out the following scenarios for reference purposes:

- (a) The worker is sick, under quarantine or diagnosed to be positive infection.

Under the Leaves and Holidays Act 1952, as amended in 2014, and the Leaves and Holidays Rules 2018, employees who have worked at least six months are entitled to not more than 30 days of medical leave a year with full salary, subject to provision of

the medical certificate. In addition, the employees are entitled to 10 days of annual leave after completing 12 months of continuous service, as well as six days of casual leave a year. As such, the right of termination is subject to the aforementioned rights available to the employees as well as the terms of the employment contract that *inter alia* may entail severance payments.

(b) The employer suffers financial stress.

The current standard employment contract template (SECT) as prescribed in 2017 permits termination at the employee's option by giving one month's notice and settling the relevant severance payments (ranging from half to 13 months' salary) based on the employee's duration of employment. In addition, it also provides that the employment contract may be terminated under the following circumstances:

- (i) Closure of the factory, workshop, establishment, company or business;
- (ii) Discontinuation of the business due to an unexpected event; and
- (iii) Death of the employee.

As such, employers may lay off workers with one month's notice or due to closure of business, subject to payment of requisite outstanding amount (including severance). Please note, the investors with the permit or endorsement from the MIC that intend to lay off employees must also comply with the provisions of Myanmar Investment Law 2016 (MIL) and its implementing Investment Rules 2017, as amended in 2018 (MIR). Section 65 (i) of the MIL provides that "the investors shall only close the business after payment of compensation to the employees in accordance with applicable laws for any breach of employment contracts, closure of investment, sale and transfer of investment, discontinuation of investment, or reduction of workforce." Section 197 of the MIR also requires investors to "during the operation period, under the permit of the Commission, submit a business report including the employment of staff and workers quarterly in the prescribed form in accordance with Section 51 of the MIL".

Does the employer have to pay full salary during the lockdown period or temporary closure of business?

- (a) Section 14(g) of the Minimum Wages Law 2013 provides that the employees shall be entitled to remuneration as if they worked full time, even if they work less hours for reasons other than their preference or choice, or as a result of the employees were not assigned (sufficient) work.
- (b) Section 5(d) of the Employment and Skill Development Law 2013 requires the ministry to issue a notification requesting employers to give prescribed compensation in the event that the whole or part of the business is closed for unforeseen or various reasons. However, as far as we are aware, such notification has not yet been issued.

In view of the above, the employees are entitled to payment of salary in full prior to termination of employment.

Is the employer required to allow employees to self-quarantine?

Under Clause 17 (Duties and Responsibilities of the Parties) of the SECT, the employer shall “give special priority to workplace safety in accordance with its business needs” and the employee shall “comply with instructions concerning workplace safety, issued in accordance with the needs of the enterprise.” In addition, the employers are obligated to comply with the directives issued by the Myanmar government pursuant to the Prevention and Control of Communicable Diseases Law 1995. Hence, any requirement towards examination, quarantine or hospitalization will have to be complied with by both employers and employees. The law is also applicable to both foreign expats as well as locals.

Conclusion

Given the above, it is vital for business owners to look into the recent laws, notifications and contractual terms to determine the next feasible steps forward for their business as there may be legal and/or contractual implications for any decision they decide to take during the outbreak of COVID-19. Certain key strategies for making pragmatic assessments regarding the impact of the COVID-19 outbreak on contractual arrangements should be considered, which may *inter alia* involve:

- i. Reviewing the existing material agreements to identify key impacted provisions;
- ii. Proactive mitigation measures; and
- iii. Concurrent legal advice on the assessment and analysis of contractual and statutory rights and obligations.

For More Information

If you have any questions about this *Alert*, please contact Leon Yee, Krishna Ramachandra, Priyank Srivastava, Wang Bei, Ken Tan, any of the attorneys in our Singapore office or the attorney in the firm with whom you are in regular contact.

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