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COVID-19

WHAT YOU SHOULD KNOW

CONTRACTUAL ISSUES

“Force majeure” events and their implications on contracts

With the COVID-19 outbreak, Governments all around the world adopted special and unprecedented measures, in an attempt to minimize its spreading and the well-known severe consequences as much as possible. With WHO declaring that the world is facing a pandemic, the situation is far from being solved. Among those special measures, we witnessed city lockdowns, forced quarantines, closed public spaces, public departments and borders, cancellation of events, flights, closure of airports, etc.

Macau has been no exception in implementing several strict and tight preventive measures to control the epidemic. For the first time in history, Macau has seen the shutdown of its casinos for two weeks and apocalyptic scenarios with previously crowded places became more like ghost towns.

While Macau is recovering, the world is still fighting the virus and some important legal questions start to arise, with many more to come to light soon. Several of them relate to contractual issues due to the impossibility of performing their respective obligations, delays, etc.

One of the most recurrent questions is whether this situation is frameable as a "force majeure" event and what are the contractual consequences if so.

There is no "force majeure" disposition in Macau's legislation. Nonetheless, this is a well-known legal concept, with its genesis in the civil law system (including Macau's law), and recurrently applied by the courts.

"Force majeure" can be defined as an unpredicted occurrence or event that is beyond the control of the contracting parties. Such events may have direct implications on the impossibility to comply with the contractual obligations fully.

While the legislation of People's Republic of China (PRC) provides specific provisions on the concept of force majeure, (e.g. General Provisions of the Civil Law of the PRC and Contract Law of the PRC), complemented by announcements from the National People's Congress Standing Committee stating that COVID-19 outbreak may be considered as force majeure if a case meets the regulations, Macau legislation does not establish specific statutory provisions that define and regulate "force majeure" concept. Notwithstanding, contractual parties may resort to legal remedies set out in the law.

Can COVID-19 lead to impossibility of performance? What are the consequences?

Yes, the COVID-19 can lead to impossibility of performance, depending on the particular circumstances of each case. The consequences of such impossibility may vary according to its nature, as it can be total or partial, temporary, or definitive.

In the total and definitive impossibility situation, the affected party is not able to comply with a contractual obligation and may see an unavoidable barrier to perform. In that scenario, if the impossibility is not attributable to the obligor, the obligation will extinguish and is no longer due.

On the other hand, if the impossibility to perform is partial, the obligation will only extinguish after the party complies with the part that is possible to fulfil.

Sometimes the contract's compliance is not entirely affected by the "force majeure" event. However, it may cause delays in contract performance. In that case, the party may not be liable for the delay.

We should note that the mere occurrence of the "force majeure" event is not enough for the obligee to be released from his obligations. The obligee must always prove that the event occurred outside his control and that, at the time of the execution, the contract could not reasonably foresee the event at stake or its consequences.

Therefore, in order to say that COVID-19 is deemed to be considered as a "force majeure" event, we need to analyse the exact circumstances of each case.

Macau law also establishes the possibility for one of the contractual parties to terminate the contract or to modify its contractual provisions (e.g., price revision or change of the contract object) in the case of an unpredicted and abnormal change of the circumstances, and that if the parties predicted such events they would not enter into that contract or they would consider a different arrangement.

The aggrieved party have the right to terminate or modify the contract if relevant changes of the circumstances occur due to an unpredicted event, and the performance of his contractual obligations is severely affected in a way that its performance may be contrary to the principles of good faith.

The Covid-19 outbreak may be deemed as an unforeseeable event in many contractual circumstances. The entitlement of the aggrieved party to terminate or modify the contract due to a "change of circumstances" must be analysed caustically, for each contract, on a case by case basis. Legal analysis and advice are required.

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