



Questions and uncertainty related to the impacts of the COVID-19 global pandemic on construction contracts in Cambodia have been the subject of great interest and concern by real estate developers and construction companies since the beginning of this outbreak. Parties to construction contracts are now carefully analyzing whether this situation can be considered a force majeure event.

On 11 March 2020, the World Health Organization (“WHO”) officially declared the outbreak of the coronavirus disease 2019 (“COVID-19”) to be a global pandemic.

In Cambodia, as across the world, the number of people infected by COVID-19 has been growing rapidly and in response the Royal Government of Cambodia has implemented protective measures and restrictions in order to prevent the spread of the virus. This has involved the closure of all schools, universities, training centers,

museums, cinemas, concert halls, bars and casinos.

The construction industry has not yet been subject to any specific prohibition and construction worksites can, in theory, remain open and operational.

In practice however, the sector, given its nature, is being unavoidably impacted by the COVID-19 crisis. All companies in Cambodia have a duty to ensure the health and safety of its employees and others in the workplace.

Therefore, putting in place measures such as quarantines, self-isolation and social distancing may have a real impact on the ability of contractors to complete construction projects on time and within the agreed budget.

In this respect, prominent figures in the Cambodian construction industry have expressed their concerns regarding the current situation and are interested to know if this crisis can be considered as an event of *force majeure*

which would allow them to claim for delays, avoid late delivery penalties and possibly suspend performance of some or all of their obligations under the contract.

Force majeure is not expressly defined by the Cambodian Civil Code which only refers to some rights that the parties to a contract can claim due to force majeure such as the right of a land lessee to claim a rent reduction in the event of *force majeure*.¹

However, the Law on Construction, which was promulgated by Royal Kram No. NS/RKM/1119/019 on 2 November 2019, defines force majeure as “*an event that happens against one’s will, which is unexpected and which is irresistible*”.

Three cumulative conditions must therefore be fulfilled in order to be able to claim *force majeure*. The parties to a construction contract must provide evidence that the COVID-19 situation is: (i) unexpected; (ii) irresistible; and (iii) beyond its control.

While it appears obvious that COVID-19 is beyond the parties’ control, it may be more challenging to evidence that it is unexpected and irresistible especially if construction worksites have not all been forced to close as a result of a decision passed by the Royal Government of Cambodia.

For example, it would be especially problematic to claim that COVID-19 was unexpected in regard to construction contracts that were executed in February or March 2020 as the parties were already aware of the pandemic at that time.

Additionally, foreign courts in the past have considered that certain pandemics did not

constitute *force majeure* while other courts have handed down contradictory decisions referring to the particular wording of the *force majeure* clause in a given contract.

To our knowledge, we are not aware of any court decisions in Cambodia relating to a similar case. Consequently, whether COVID-19 will be treated as a force majeure event will largely be subject to the discretion of the judges or arbitrators, depending in particular on the signing date of the construction contracts, whether or not a lockdown is implemented resulting in the forced closure of construction worksites and/or the wording of the force majeure clause in the particular contract.

Prior to the entry into force of the Law on Construction, parties were free to define the term *force majeure* in their construction contract and able to limit the events which could constitute force majeure, such as natural disasters, fires, aircraft falling out of the sky, war, revolutions, acts of terrorism, and so on.

In conclusion, in order to consider whether a contractor to a construction contract can claim force majeure, it will be necessary to review (i) the wording of the force majeure clause where the contract includes such a clause, (ii) the time at which the contract was executed, (iii) if the formalities for claiming such an event were fulfilled, (iv) if the construction worksites were closed due to a decision by the Royal Government of Cambodia and (iv) the impact of COVID-19 on the construction project and how it prevents parties from fulfilling their obligations under the respective contract.

¹ Article 606 of the Cambodian Civil Code.



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