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Force Majeure and Exemption of Liability in Connection with the COVID-19 Outbreak from the Korean Law Perspective

I. Introduction

The World Health Organization has declared the worldwide outbreak of COVID-19 virus a pandemic, with more than 118,000 cases in 110+ countries and over 4,200 deaths. The virus is spreading rapidly in Korea and elsewhere, resulting in non-performance of contracts across various industries including manufacturing, aviation, travel and entertainment performances.

This newsletter will look at possible legal counter measures and the treatment of force majeure under Korean law in relation to the spread of COVID-19 exemption of liability.

II. Force Majeure and Exemption of Liability

Under Korean law, while 'force majeure' is prescribed as grounds for exemption of liability in very limited areas of the law, such as the exemption of liability for carriers or aircraft operators, there is no force majeure clause in the Korean Civil Code that applies to contracts in general. Therefore, legal basis for exemption of liability on grounds of force majeure is found in the Civil Code provision that excuses the obligor from liability when an obligation becomes impossible to perform without the obligor's intent or negligence.

That said, it is difficult to find a Korean Supreme Court case or other authority that clearly and uniformly presents the meaning and the factors for determining what constitutes "force majeure," that exempts the liability of the non-performing party. Instead, the Korean courts look at the specific circumstances of the case to individually determine whether force majeure exists.

Force majeure was found to exist where: ① a ship collided with an object in 100-meter-deep seawater, since there was no sea mark or other signs to indicate the existence of underwater objects, which made the collision impossible to prevent or otherwise anticipate (Supreme Court Judgment 2004Da8494 rendered on July 8, 2004), ② a river flooded from a record rainfall that occurs in about 600 to 1000 years, exceeding the planned 1-in-100 year rainfall flood level, since there was no predictability or avoidability (Supreme Court Judgment 2001Da48057 rendered on October 23, 2003).

On the other hand, 'force majeure' was denied where: ① IMF and its resulting disruptions in the supply chain caused a contractor's delay in performance (Supreme Court Judgment 2001Da1386 rendered on September 4, 2002), ② Typhoons "Rusa" and "Maemi" caused flood damages, resulting in landowners' liability for the damage since the impact of these typhoons were not as severe as other typhoons in the past (Supreme Court Judgment 2007Da50663 rendered on July 24, 2008), ③ discovery of ancient artifacts in a construction site caused housing companies' delay in performance finding that the delay could have been foreseeable by the housing company (Supreme Court Judgment 2008Da15940, 15957 rendered on July 10, 2008).

As evidenced by the above cases, the Korean Supreme Court does not have a uniform set of rules it uses to determine force majeure but looks at the details of the case to determine whether the event could have been foreseeable or prevented, taking into account the language of the relevant contract. Even if a contract does not specify force majeure, the court find the obligor to be without fault and exempt liability based on force majeure when the relevant event arises outside of a party's control and cannot be prevented or foreseen with reasonable efforts. However, from the contractual liability perspective, a party seeking exemption of liability must establish that a force majeure exists. So far, courts have rarely acknowledged force majeure as basis for emption of liability, reserving it for exceptional situations.

For reasons cited above, whether COVID-19 outbreak qualifies as a force majeure event will depend on the unique circumstances in each case, contract terms and the governing law. In construction, the Ministry of Land, Infrastructure and Transportation issued an interpretation that circumstances arising from responding to the COVID-19 outbreak qualifies as a force majeure event that is stipulated in standard construction contracts. However, such interpretation would not apply to other contracts in general.

Therefore, those seeking to avoid liability for damages caused by the spread of COVID-19 should review whether it is possible to declare force majeure in their specific case and promptly engage in discussions with the counterparty regarding a possible exemption of liability. If the counterparty is expected to declare force majeure, then one should review whether the given situation qualifies as a force majeure event and discuss with the counterparty, but may also consider the option of termination to get out of the contract if possible.

III. Conclusion

As shown above, Korean Courts determine the existence of force majeure on a case-by-case basis and the courts are generally reluctant to exempt liability based on force majeure.

Therefore, businesses should carefully manage their contracts to prevent any delays caused by the COVID-19 incident and, in the event that non-performance is inevitable, prepare legal countermeasures.

If you have any questions regarding the above information or have other inquiries, please contact the following attorneys or your usual contact at Yulchon.

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