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## **Covid-19 Pandemic: Force majeure and legal consequences!**

### **Is the Covid-19 pandemic considering an event of force majeure?**

The World Health Organisation declared the novel coronavirus (Covid-19) outbreak a pandemic on March 11. Following this declaration, the Ministry of Health and other ministries have taken various legal and administrative measures to prevent the rapid spread or import of Covid-19 into the Kingdom.

The government, including the ministries of Health; Education, Youth and Sports; Tourism, and Interior, have instructed public and some private schools, private businesses such as KTV, beer gardens, and other entertainment outlets to close.

Other institutions were instructed to arrange for staff to work from home, etc. The government encourages social distancing among people by urging them to stay home and only go out when it is absolutely necessary.

As a result, businesses which have been instructed to close are effectively closed. Yet, some other businesses which are not directly subject to the closing order from the government would also probably be shuttered soon for various reasons.

These include the insufficient supply of raw materials, lack of market demand for their products and services, the inability to trade due to border closures, prevention of incoming and outgoing flights, the partial or full lockdown of a country, and more.

As of now, more than 50 garment factories have been allowed to suspend operations. Some hotels and restaurants have closed too, while public and private schools are told to provide online education instead of the traditional brick and mortar sessions.

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As a consequence of this, there will be damages suffered by parties to the contract. This event could fall under the legal definition of force majeure and is further explained below.

### **What does Cambodian law say in the event of force majeure?**

Generally, force majeure is defined as an event which occurs not from the will of any party and is insuperable and unpredictable by the affected party.

It could have been caused by the acts of man or nature, acts of government, or other impersonal events.

In any case, an event capable of being claimed as force majeure shall be beyond the reasonable control of the affected party, the ability of such party to continue to perform the contract has been prevented, impeded or hindered, and he has taken all reasonable steps to mitigate or avoid such event or its consequence but it is not possible to overcome such event.

Cambodian law does not provide any detailed definition of force majeure. Normally, such a definition could be stipulated in the contracts.

The event of force majeure could be a political or non-political event, an unexpected change of legal and regulatory environment or natural catastrophe which makes the performance of a contract impossible.

In case of uncertainty, the courts may interpret the meaning of force majeure by taking into account the nature and impact of an event based on Cambodian customs and trade practices.

It should also be noted that Cambodia has adopted the civil law tradition, hence, the application of force majeure as an excuse for breach of contract may not be identical with the application of this concept under English law or other common law jurisdictions.

### **When and how does a force majeure event apply?**

Parties to a valid agreement shall perform their respective obligations according to the terms thereof. However, the obligee may not demand the obligor to perform his obligation if the performance has become impossible without the obligor's fault. In the event of force majeure, the contractual performance could be partially or entirely impossible to fulfil.

A force majeure clause is common in contracts. It essentially frees both parties from liability or obligation when an extraordinary event or circumstance beyond the control of the parties occurs, such as war, strike, riot, crime, pandemic, epidemic, flood, earthquakes, an act of god, etc.

In practice, the contents of the force majeure clause could be brief or quite descriptive. Some contracts include a force majeure clause while others have none. In the latter case, the affected party could rely upon the provisions of law governing his or her contract to claim the event of force majeure.

As a matter of process, if any party believes he is affected by force majeure and wishes to rely upon such clause, he shall promptly notify the other party of that event.

In the notice, he shall provide evidence to establish the causal relationship between the event and the anticipated consequence, and envisaged duration of such event, if possible.

He shall check the contract's clauses carefully because some may require such notice to be made in writing while at other times, verbal communication is legally sufficient.

### **What would be the legal consequence of force majeure claims?**

As a general principle, when a party to a contract claims that there is an event of force majeure, a contract can be suspended during the occurrence of such an event or it can be terminated.

For example, in the case of employment contracts, the labour law allows parties to terminate or suspend employment contracts on the occurrence of an event of force majeure.

If the affected party is able to prove the event of force majeure as explained earlier, the affected party would be exempted from liability for any damages suffered by the other contracting party.

However, the determination of conditions for contractual breach and remedies in case of force majeure may also be stipulated in the contracts.

Contracts may state delayed performance, acceleration or mitigation circumstances, collaborative, protective or other remediable actions to be taken by the contracting parties.

It is not always the case that due to the event of force majeure, all performances of obligations become impossible or stop. For instance, in a loan contract, the borrower may not be released from paying the principal and interest during the occurrence of force majeure.

However, the borrower may not be obligated to pay damages or penalty for the delay in payment. In case of perpetual lease of immovable properties, the lessee may terminate the lease if he cannot generate any profit from the lease for a period of three years due to the occurrence of force majeure.

During the force majeure, the payment of rents could be suspended or a reduction of rents could be demanded if the profit or fruit generated from the use of leased land cannot be achieved.

### **What should contract parties, in particular, the affected party, do in the event of a pandemic?**

It is advisable that contracting parties consider taking the following proactive steps:

Carefully review their contracts, in particular, the definition of force majeure stipulated therein in order to have a good idea on the requirements and measures to be taken in such event;

If it is unclear, seek proper legal advice from lawyers, meaning members of the Bar Association of the Kingdom of Cambodia who are qualified to clarify, respond and advise on your questions;

Keep proper records of documents and evidence of harm and damages caused by the event of force majeure;

Engage and discuss with contracting partners, business partners and related competent authorities in order to express your concerns, to clarify the application of legal and administrative instructions, to take necessary action to protect and mitigate the risks, damages and any unintended consequences caused by the change of laws and administrative orders by competent authorities.

The above views are that of the author, and intended purely as general information only. The Post shall not be held responsible for any unintended damages suffered because of the views expressed in this article.

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## **Managing the nation in state of emergency**

As the world faces the Covid-19 pandemic, there are growing concerns about the potential dangers to the nation and society which necessitates emergency actions.

The government has convened a team of legal experts and the standing committee of the Council of Ministers to draft a Law on the Management of the Nation in a state of emergency (“State of Emergency Law” or “SOE Law”).

The draft law comprising of five chapters and 12 articles was adopted by the National Assembly on April 10. It is expected to be passed by the Senate without major modifications and will subsequently be promulgated by the head of state within the month itself.

This law provides for modalities, process and conditions for declaring a state of emergency, some measures to be taken by the government, the reporting obligations of the government, and sanctions for obstruction and violations of government measures.

While the current Constitution stipulates the notion of a state of emergency, it does not provide a clear definition for it.

Article 22 of the Constitution states that: “When the nation faces danger, the King shall make a declaration to the people putting the nation in a state of emergency after receiving agreement from the Prime Minister and the presidents of the National Assembly and the Senate.”

Article 22 does not define the next steps after the King declares a state of emergency, especially with regards to the roles and responsibilities of the government. The term “state of emergency” itself is not defined in any other existing laws of Cambodia.

However, a state of emergency could be reasonably understood as a situation in which a government is empowered to take the necessary actions or impose policies that it would normally not be permitted to undertake.

The Constitution does not offer any guidance on the distinction between a normal and emergency situation, or to what extent the government’s action is permissible in taking measures which could restrict the rights and freedom of citizens.

Article 31 of the Constitution provides that: “The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the UN Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights...”

The Constitution protects the rights and freedom of Khmer citizens and the only possible way to restrict these rights and freedom is by the legislative act adopted by the National Assembly.

Article 31, paragraph 3, of the Constitution states that: “The exercise of personal rights and freedom by any individual shall not adversely affect the rights and freedom of others. The exercise of such rights and freedom shall be in accordance with the law.”

Thus, without a law allowing the government to impose measures restricting the rights and freedom of persons, the government cannot do so.

Otherwise, the government’s measures could be invalidated by the competent courts for being ultra vires (in violation of) the Constitution and it could also be questioned by the National Assembly.

Under international law, the restriction of rights and freedom of persons is also permissible in case of emergencies, for protection of morality, public order and general welfare.

Article 29 of the Universal Declaration of Human Rights states: “2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”

Article 4, paragraph 1 of the International Covenant on Civil and Political Rights, states: “1. In times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin.”

I disagree with some views expressed by human rights advocates who claim that “[the] proposed emergency powers would obliterate human rights” or that “the egregious State of Emergency Law poses a grave threat to human rights in Cambodia”.

Others claim that “these unprecedented powers are wildly disproportionate and threaten to permanently undercut the human rights of everyone in Cambodia” and “this law should be seen for what it is – a naked power grab which seeks to manipulate the Covid-19 crisis to severely undercut the human rights of everyone in Cambodia”.

I observe that the critics seem to regurgitate their usual political attacks against government measures or policies. In particular, they aim to criticize Prime Minister Hun Sen. It looks like they assume that the baby will be abusive even before he is born.

But the critics should have reviewed the SOE Law from a more objective lens than just their human right utopia.

It is clear from the perspective of local and international law, as mentioned earlier, that restrictions on the rights and freedom are allowed in certain cases.

Also, the SOE Law is not just applicable in the case of the Covid-19 pandemic, but can also be used in any state of emergency as defined under Article 4 of the International Covenant on Civil and Political Rights.

Question is, why would the government abuse the rights and freedom of its citizens in the event of a national emergency?

I believe if the government wants to violate its citizens’ rights and freedom, it can do better without the SOE Law because this law sets out required procedures and conditions for the government to follow.

In the Cambodian practice, if there is no law, the government can impose measures at its behest.

I am aware of cases where the competent courts could revoke or nullify any government decision.

In other words, without the law passed by the National Assembly, it would be the government that has unlimited rights and freedoms in dealing with its citizens.

I also concur with the prime minister that it is better to have the law in place. Even if he does not need to use it now, it can be used when it is needed.

Although it was prepared post haste, the SOE Law was properly drafted by the government’s team.

It contains the necessary conditions and criteria to be considered as a fairly good law and it reflects the needs of the government and National Assembly.

I have reviewed some laws concerning the state of emergency in other democratic countries, and I believe that Cambodia's SOE Law is acceptable.

Nevertheless, I believe that there are some provisions in the SOE Law which could be improved to make it better.

For example, it should have some explicit requirements for the government to prepare proper measures, action plans and strategies to deal with the danger or emergency situation before proposing the King and the presidents of the National Assembly and the Senate discuss and reach an agreement to declare a state of emergency.

Such requirement could be added into either article 3 or 4 of the law as a condition before declaring the state of emergency.

The SOE Law should also require that the government's power to manage the emergency shall meet certain conditions such as urgency, necessity, proportionality, appropriate motivation, temporariness and be non-discriminatory.

Article 5 of the SOE Law enumerates a list of measures for which the government can impose bans or restrictions on rights and freedom of citizens.

But this article does not provide for parameters which allow the government to suspend the rights and freedom of citizens during the emergency.

This could raise a lot of questions, abuses, uncertainty and difficulty in its enforcement.

How can the government justify its choices between applying the measures available to it under existing laws in normal situations, and the measures prescribed under the SOE Law in case of emergency, and to what extent of severity or motivation?

Article 5 allows the government to take "any appropriate and necessary measures in response to the state of emergency".

This, on one hand, gives the government flexibility in taking measures. But on another, it grants the government a blank cheque and unlimited power which cannot be scrutinised by the National Assembly or competent courts because the parameters for determining appropriateness and necessity do not exist. The government would determine this at its discretion.

I conclude that Cambodia needs the SOE Law and it is hoped that the anomalies I have raised here will be looked into and amended at the appropriate time.

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