

# NEWSLETTER

Manuela António - 安文娜 大律師及公證員 | *Lawyers and Notaries*

2 MARCH 2020

## CONTRACTS

### Covid-19 Outbreak and its Impact in Contracts

The outbreak of the novel coronavirus (COVID-19) now declared a global health emergency by the World Health Organization and on the eve of being eventually being considered a pandemic, has raised concerns globally. When it comes to business, COVID-19 has caused disruptions in virtually all economies and across all industrial sectors, from manufacturing, travel, shipping to technology businesses, amongst many others.

Given the uncertainties currently hanging in the air, different businesses, individuals and even states are grappling with situations of extreme difficulty in contract performance, whatever their nature.

In an attempt to deal with the Covid-19 outbreak, many private entities and even governments, (including the Macau SAR Government, through the application of Law no.2/2004 - Communicable Disease Prevention, Control and Treatment Law), have taken steps that inevitably clash with the good performance of contracts, such as: the closure of certain businesses by imposition of the Government; the prohibition of certain activities; restrictions on travel and transportation etc.

Under Macau law, it is possible to frame solutions for different situations in which non-compliance with contractual obligations precedes events beyond the control of the parties, namely, as is the case, the outbreak of an epidemic. These cases are commonly outlined as force majeure events, but the question arises as to the extent to which force majeure may or may not be invoked to justify non-compliance with contracts.

The contractual law in force in Macau allows that in the event that the provision becomes impossible due to a cause not attributable to either party, the party becomes excused to perform the contract.

*“When it comes to business, COVID-19 has caused disruptions in virtually all economies and across all industrial sectors, from manufacturing, travel, shipping to technology businesses, amongst many others. (...)*

*In an attempt to deal with the Covid-19 outbreak, many private entities and even governments (...) have taken steps that inevitably clash with the good performance of contracts, such as: the closure of certain businesses by imposition of the Government; the prohibition of certain activities; restrictions on travel and transportation etc.”*

However, the impossibility must be absolute, in the sense that if the provision is still possible, even if extremely onerous or difficult, it is not a cause for the party to be exempted from the performance of the obligation. It will be the case, for example, that due to the measures imposed regarding the quarantine of certain persons, someone is prevented from entering Macau or is forced to be quarantined at the only time when the contract was possible to be executed.

Another solution that we believe it is possible to defend, despite the fact that the Macau Courts are very reluctant about the application of this institute, is the modification or termination of contracts due to changing circumstances.

Now, this institute is underpinned by the idea that the security of legal relations leads to the stability of contracts, but it may happen, however, that a profound change in the circumstances in which the parties are bound makes it excessively onerous or difficult for one of them to comply with that to which it is obliged, or causes a marked imbalance between the respective obligations, in the case of long-term or deferred contracts. In these situations, despite the benefits of contractual stability, it is necessary, in the name of justice, that the contract be terminated or modified.

Although it is possible for the contracting parties to beware of adverse situations that may affect contracts, namely by including hardship clauses ("Wirtschaftsklauseln") or force majeure clauses, there is also judicial mechanisms to either terminate or modify the contracts, based on the verification of unexpected circumstances.

In order for the change in circumstances assumed by the contracting parties to lead to the termination of the contract or to the modification of its content, the following requirements must be cumulatively fulfilled:

- a) that the change considered relevant relates to circumstances on which the decision to celebrate the contract was based, that is, to circumstances that, although not determinant for both parties, are presented as evident, according to the typical end of the contract, that is, which are at the base of the deal, with awareness of both contracting parties or reasonable notoriety;
- b) that these fundamental circumstances have undergone an abnormal change, that is, unpredictable or, although predictable, affecting the balance of the contract;
- c) that the stability of the contract involves injury to one of the parties, either because it has become too costly, in an economic perspective, to provide one of the parties, either because the change in circumstances involves, for the injured party, great personal risks or excessive non-patrimonial sacrifices;
- d) that the maintenance of the contract or its terms seriously affects the principles of good faith;
- e) that the situation is not covered by the risks inherent in the contract, that is, that the anomalous change in circumstances is not included in the specific section of the contract, that is, in its normal fluctuations or purpose or in the risks specifically contemplated by the parties in the contractual agreement entered into.

*“Although it is possible for the contracting parties to beware of adverse situations that may affect contracts, namely by including hardship clauses ("Wirtschaftsklauseln") or force majeure clauses, there is also judicial mechanisms to either terminate or modify the contracts, based on the verification of unexpected circumstances.”*

An epidemic seems to fit perfectly with the classic academic hypothesis of force majeure or changing of the circumstances on which contracts were founded.

In fact, it seems clear that the appearance of an epidemic will not be predicted in the risk sphere of most contracts, so it is difficult to argue that the contract, whatever its nature, cannot be revised in the light of the ongoing exceptional circumstances.

In view of the above, it is certain that, in face of the Covid-19 outbreak, all over the world, but especially in Mainland China, Macau and Hong Kong, the consequences will be severe, given the draconian impositions of the respective governments and also due to internationally imposed limitations on the traffic of people, goods, etc. Therefore, it is expected that many contractual situations must have to be reviewed on a case-by-case basis, in order to mitigate the harmful effects that this epidemic may have on the economy and on the stability of the legal trade.

*“ (...) it is certain that, in face of the Covid-19 outbreak, all over the world, but especially in Mainland China, Macau and Hong Kong, the consequences will be severe, given the draconian impositions of the respective governments and also due to internationally imposed limitations on the traffic of people, goods, etc. Therefore, it is expected that many contractual situations must have to be reviewed on a case-by-case basis, in order to mitigate the harmful effects that this epidemic may have on the economy and on the stability of the legal trade.”*

---

## NEWSLETTER

**Manuela António** - 安文娜 大律師及公證員 | *Lawyers and Notaries*

The distribution of this communication is limited and the information herein expressed is for general purposes only, not substituting legal advice on specific issues.

### Contacts

Dr. Carlos D'Assumpção, n.ºs 411-417, Edifício Dynasty Plaza, 15.º andar D-H, Macau, China

T.: +853 28 591 592 / 128  
F.: +853 28 345 678  
info@mantonio.net  
www.mantonio.net