

The Implication of the Covid 19 Pandemic on the Commercial Contracts Covering Transportation of Goods, Particularly in the Asia-Pacific Region

By: Tetiana Tymchenko

Covid 19

March 11, 2020 Pandemic

- Performance failure
- Delay
- Spoilage of cargo
- Abandoned cargos



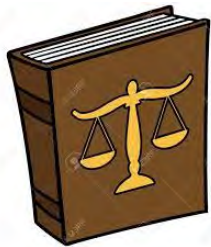
Excuse of Performance Obligations



- Force Majeure “FM”
(Contract/civil law doctrine)
- Frustration (Common law doctrine)
- Hardship
(Contract/national law doctrine)

Choice of Law

Civil



Thailand 

China 

Indonesia 

South Korea



Japan



Common



Malaysia 

Pakistan 

India (except Goa)



Singapore



Australia 

New Zealand



Hong Kong



FM Triggering Events

1) Detailed FM Clause



ICC FM & Hardship Clause (Long & Short Forms)

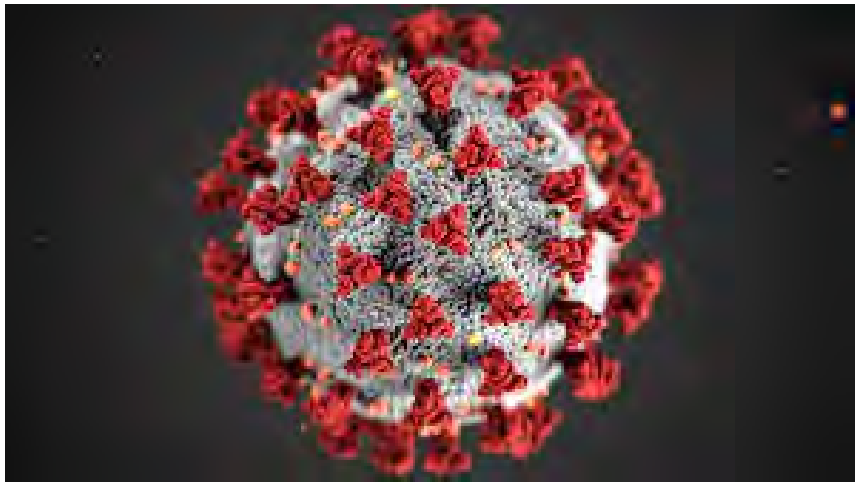
FM Triggering Event

2)“Catch All” FM Clause



Foreseeability of FM Event

“Parties could not have reasonably foreseen the event”



2021 ???

Causation

Step 1: FM Event 

Step 2: Hindrance



- Impeded
- Affected
- Hindered
- Prevented
- Delayed

Duty to Mitigate

1. Alternative Route

2. Change
Destination Port

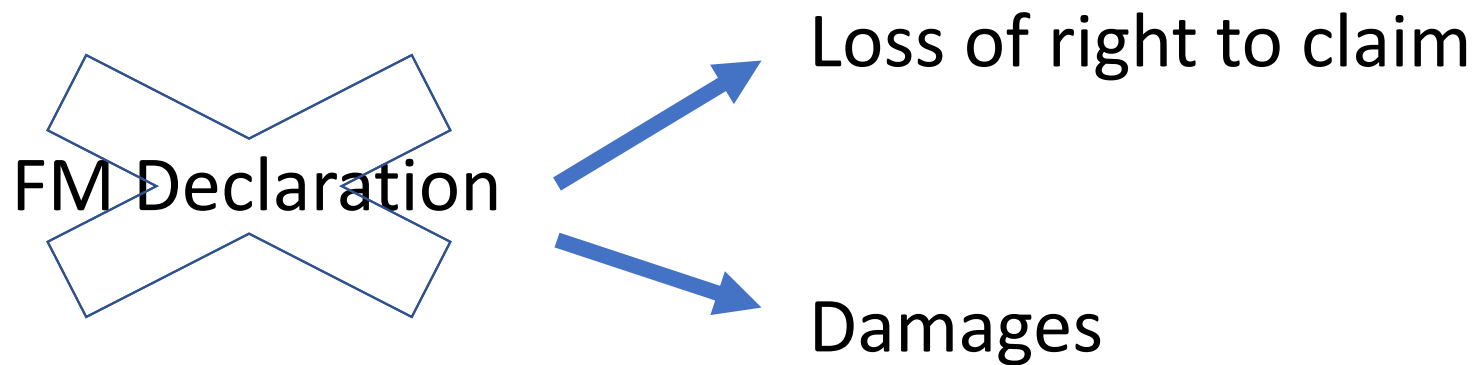
3. Other Methods



FM Declaration \neq FM Certificate

Proper FM Declaration:

- FM Event & Causal Connection
- Form
- Deadline
- Address



FM Effect

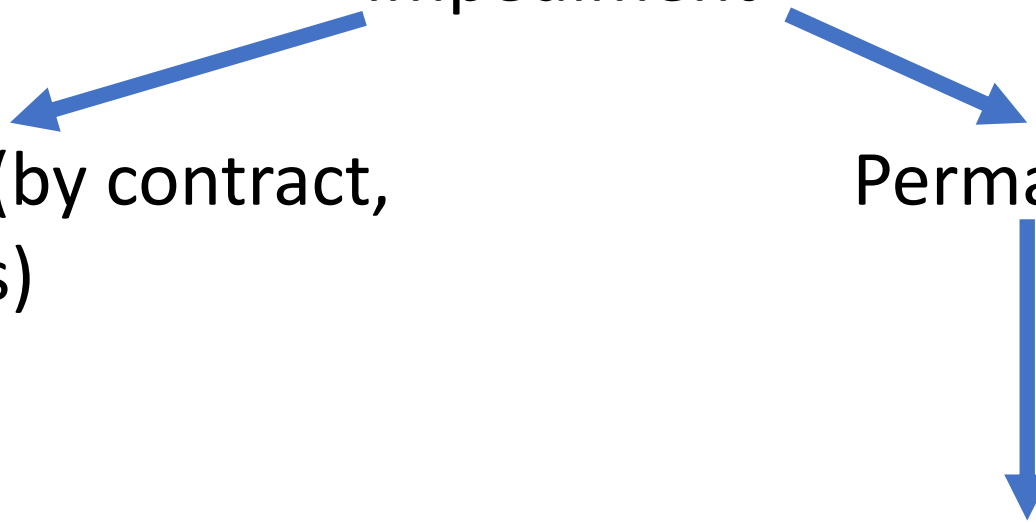
Impediment

Temporary (by contract,
90-180 days)

Permanent

Suspension

Termination



Legal & Tax Consequences

1. Wrongful Declaration
 - Damages
 - Wrongful Termination
2. Impact on other agreements



No Contractual FM

1. National Law
2. Renegotiate
3. “Change of Law” Provision
4. Termination provision
5. Frustration (common law)- supervening event (unexpected, beyond parties control, none of the parties at fault)
6. Hardship – performance became onerous, economic balance was upset.

Conclusions

New Agreement

- Detailed FM
- Foreseeability

Invoke contractual FM

- Tax & Legal consequences
- Proper FM Declaration

No Contractual FM

- Civil Law FM
- Frustration
- Hardship