

Bird & Bird ATMD

Legal Update



Coronavirus (COVID-19) and Force Majeure Clauses

February 2020

As a result of the novel coronavirus (COVID-19) outbreak that originated in Wuhan, China, several cities and regions across China have announced travel restrictions resulting in full or partial lockdowns. This caused severe disruptions to both inbound and outbound shipments, which has impeded countless supply chains and may result in companies being unable to fulfil their contractual obligations.

Given the widespread and global nature of the coronavirus outbreak and further given that the World Health Organisation (WHO) has declared this a global health emergency, one consideration is whether these events and circumstances faced by the affected parties can fall within the operation of a force majeure clause so as to delay or absolve the liabilities of the affected contracting parties. Where the contract does not provide for a force majeure clause, or if the current outbreak may not fall within the scope of the clause, parties can also consider if this event renders the obligations of the contracting party to be commercially impossible to be fulfilled or transforms the obligation to perform into a radically different obligation, such that the doctrine of frustration may apply.

A force majeure clause provides for what happens in the event of specified events or events beyond the control of either party after entering into the contract. These generally apply to radical, external events that are not due to the fault of either party, such as natural disasters, outbreaks of war and strikes. A force majeure clause can provide for different consequences upon a stipulated event apart from discharge of the contract, such as extension of time for performance, or variation to the contract. At the very least, the clause should hold all parties safe from liability for non-performance, following the specified force majeure event.

Where the force majeure clause in the contract does not stipulate the nature of qualifying events, the courts will apply the presumption that force majeure events are restricted to supervening events which arise without the fault of either party and which neither has intended to undertake responsibility. In addition, the party seeking to invoke the force majeure clause in its contracts must show that there are no alternative means for performing its obligations, or that it has taken all reasonable steps to avoid the operation of the clause. Increased costs or hindrances alone will not be sufficient to prevail on a claim of force majeure. However, this is not an absolute duty and the party seeking the benefit of this clause need only take such steps as to account for foreseeable contingencies.

As such, whether the coronavirus outbreak and/or the resulting government restrictions are covered by this clause will depend on the wording of the scope of the clause, the steps taken by the party seeking to invoke the clause, and whether the outbreak constitutes a foreseeable contingency.

The outbreak of epidemics may not be seen as an unforeseeable event given the recent outbreaks of various strains of flu. However, the unprecedented scale of the lockdowns taken together with its swift implementation, have been described as an 'unbelievable undertaking' and 'isolating a major

urban transit hub larger than New York City¹. This can differentiate the current coronavirus outbreak from the earlier epidemics, and it is likely that the courts will accept that this outbreak and the response taken to such outbreak does not constitute a foreseeable contingency such that reasonable steps could have been taken by the party affected by it. The courts should also take into consideration the WHO's declaration of this virus outbreak as a global health emergency, which is only the sixth such declaration since the WHO was given the power to make such declarations in 2005², to show the severity and unforeseeable nature of this event. Further, to help businesses affected by the virus outbreak and the restrictions imposed, the China Council for the Promotion of International Trade announced on 30 January 2020 that it would offer force majeure certificates to help companies deal with disputes with foreign trading partners arising from epidemic control measures³. To apply for the certificate, companies must provide legitimate documents such as proof of delays or cancellation of transportation to the agency. Such certificates facilitate the invoking of the force majeure clause by parties where the contract requires the provision of a certificate issued by a relevant authority as a prerequisite to rely on the clause. However, even where the contract does not require such certificate and even if such certificate were not necessarily binding on the courts in the event of a dispute, the recognition by the Chinese authorities that the current virus outbreak and its implications constitute a force majeure event is likely to go a long way in assisting the party seeking to rely on the force majeure clause.

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Special thanks to Trainee Associate Lim Neng Fang for contribution to the article.

¹ Source: The New York Times, accessed on 4 February 2020
<<https://www.nytimes.com/2020/01/22/world/asia/coronavirus-quarantines-history.html>>

² Source: South China Morning Post, accessed on 4 February 2020
<<https://www.scmp.com/news/china/society/article/3048314/china-coronavirus-world-health-organisation-declares-outbreak>>

³ Source: China Council for the Promotion of International Trade, accessed on 4 February 2020
<http://www.ccpit.org/Contents/Channel_4256/2020/0130/1238885/content_1238885.htm>

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