

Recent disruptions in global supply chain by COVID-19
Jointly issued by Stephenson Harwood and Wang Jing & Co



Current situation

Since the new coronavirus "COVID-19" first detected in Wuhan City, China in early December 2019, it has been found in more than 35 locations internationally. As of 3 March 2020, there were more than 90,000 confirmed cases globally, almost 80,000 of which are in China. On 30 January 2020, WHO declared the outbreak of COVID-19 a "public health emergency of international concern" (PHEIC). Recently, WHO escalated the risk assessment at global level to "Very High", the same as in China.

As of 27 February 2020, to deal with COVID-19, 41 WHO member states have declared additional health measures.

In order to control the fast spread of the COVID-19, Chinese government swiftly locked down affected cities, extended the Chinese Lunar New Year Holiday and encouraged people to work from home. Large public events were cancelled or postponed, with all schools, offices, factories, shopping malls and restaurants closed. All cross-province bus routes were taken out of service; only limited segments of urban public transport systems remained operational.

The production lines in China have virtually come to a standstill. This has a significant impact on the global supply chains.

In Hong Kong, the HKSAR Government has closed down most of its services and buildings. Most of the private sectors have followed the Government and encouraged their employees to work from home where possible. The disruption caused to Hong Kong business and supply chain management although beginning to stabilise, is similar to the disruption experienced in China.

PRC Law

As individuals and companies are being affected by the outbreak, it is important to understand their rights, obligations and remedies. The most frequent question being asked is whether COVID-19 can be regarded as a force majeure event under PRC law.

So far, no official documents or judicial interpretations have been issued to answer that question directly. However on 10 February 2020, Zang Tiwei, spokesperson of National People's Congress Standing Committee, stated that the virus was an "unforeseeable, unavoidable and insurmountable force majeure".

According to Article 180 of the PRC General Provisions of Civil Law, Article 153 of the PRC General Principles of Civil Law and Article 117 of the PRC Contract Law, force majeure under PRC law is defined as an objective situation that cannot be foreseen, unavoidable or insurmountable. If a failure to fulfil contractual obligations is caused by force majeure, no civil liability can be found.

Under the Supreme People's Court's Interpretation No (II) of the PRC Contract Law, the PRC courts have power to vary a contract if they consider it to be fair to do so.

It should be noted that a force majeure event does not necessarily lead to a termination of contract. Chinese courts usually adopt a very strict approach and parties are expected to prove their failures to perform are caused by a force majeure event.

Under PRC law, a party must notify the other party of the force majeure event promptly and timely so as to mitigate the other party's loss. Starting from 30 January 2020, the China Council for the Promotion of International Trade (CCPIT) has been able to issue force majeure certificates to Chinese companies. Although such certificates are evidence of a force majeure event, how a party's performance of a contract is affected by the event is still a matter to be decided by the PRC courts on the case by case basis.

Hong Kong Law

Unlike PRC law, Hong Kong law has no general definition of force majeure, whether parties can be relieved of their obligations is a question of contractual interpretation in each case. If there is no force majeure clause or if COVID-19 or similar is not covered by a clause in a contract may be terminated under the doctrine of frustration.

Force majeure

The term "force majeure" in a contract is generally intended to include occurrences beyond the reasonable control of a party. It does not, however, have a specific definition under the Hong Kong law, and is given the appropriate meaning in the context of the subject contract. This is also the position under English law.

A party who wants to rely on force majeure must spell out the force majeure events in the contract. Failure to do so means that the event in question will not be regarded as a force majeure event and cannot be used on that basis to terminate a contract.

In the context of the COVID-19 outbreak, a force majeure clause containing words such as "disease" or "epidemic" may be sufficient.

Frustration

In the absence of a force majeure clause, a contract may still be terminated on the ground of frustration. This will happen when an occurrence after the contract renders its performance

physically or commercially impossible; or which transforms the obligation of a party so radically different that it is no longer the agreed obligation.

In Hong Kong, the doctrine of frustration is narrowly and objectively applied by the court. Mere inconvenience, hardship, or even financial loss in or resulting from an occurrence is not sufficient. Whether or not the COVID-19 outbreak will constitute a frustration event sufficient to discharge a party from a contract will depend on the circumstances of each case in question.

When dealing with SARS in the past, the Hong Kong Court refused to release a tenant from a tenancy agreement when the building in which the premises in question was situated was infected and was ordered to be isolated for 10 days. In doing so, the court refused to accept that the tenancy agreement had been frustrated, saying it could appreciate that there was a genuine fear among the residents whether the building was safe but fear is not a legal justification to terminate their tenancy agreements.

What to do now?

It is advisable for parties affected by the COVID-19 outbreak to consult their legal advisers as soon as possible. Subject to their legal advice, they may consider taking the following protective steps:

- 1) Review their contracts, especially clauses relating to governing law, force majeure situation and notice requirements;
- 2) Check their company insurance, if any to see if it covers losses arising out of "disease", "epidemic", "acts of god", etc.
- 3) Assess how their performance of a contract is affected by the COVID-19 and whether or not to terminate or, if the contract is governed by PRC law, vary their contracts.
- 4) Issue a force majeure notice pursuant to the contract or, if the contract is governed by PRC law, in accordance with the PRC law.
- 5) Discuss with the counterparty to mitigate their losses.
- 6) In the case of China, obtain a force majeure certificate from CCPIT mentioned above.

It is important to understand that each case turns on its own facts. To protect their rights and/or minimize their losses, we reiterate that parties should consult their legal advisers to obtain proper advice.

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