

Client Alert

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Coronavirus outbreak: Force majeure from a PRC law perspective

On 30 January 2020, the World Health Organisation declared the coronavirus outbreak a public health emergency of international concern. We continue to see the ripple effects of the outbreak including business and operational disruptions impacting many of our clients.

Our recent [alert](#) discussing force majeure from a Hong Kong law perspective outlines how business operations may be impacted in performing contractual obligations as a result of business disruptions. The doctrine of force majeure is recognized under PRC law and is defined in the PRC Contract Law. This alert provides you with the PRC perspective when dealing with contracts governed by PRC law.

Force majeure under PRC law

Force majeure exists as a doctrine under Article 180 of the PRC General Rules on the Civil Law (中国《民法总则》) and Article 117 of the PRC Contract Law (中国《合同法》). It is defined as objective event or situation which is unforeseeable, unavoidable and insurmountable (不能预见、不能避免、不能克服的客观情况(事件)).

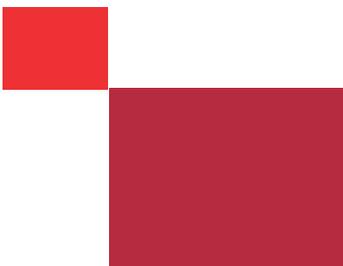
Where contracts have no provision on force majeure, the doctrine applies automatically under PRC Contract Law. Where the contract has a specific provision on force majeure, the contract provision will apply to the extent it does not conflict or derogate from the general principles set out under PRC Contract Law.

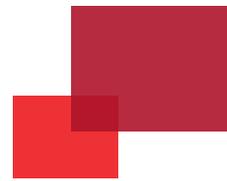
Key principles

1. *Invoking force majeure in PRC contracts*

The doctrine applies where an event of force majeure i) renders the object of the contract impossible to achieve or ii) hinders the ability of a party to perform under the terms of the contract. There are a few elements which need to be fulfilled:

- Causation must be established between the force majeure event and non-performance of the contract, i.e. the force majeure event must be the cause of the non-performance.
- The invoking party must notify the counterparty promptly or in a timely manner.
- The invoking party must provide proof of existence of force majeure, proof of impact of force majeure on performance and state their claim for exemption from liability under the contract. For the novel coronavirus outbreak, existence of force majeure may be proved by providing examples of epidemic precautionary measures adopted by





the PRC government. Meanwhile, the China Council for Promotion of International Trade (CCPIT) issued a notice on 30 January 2020 that in relation to international trade contracts, the company can apply to the CCPIT for issuing certificates of force majeure.

2. *Exceptions to the principle of force majeure*

Force majeure does not apply in the following circumstances:

- Where a contract is concluded after the force majeure event.
- Monetary payment obligations.
- Where the performance is already delayed and the force majeure event took place during the period of delayed performance.

3. *Consequences of invoking force majeure*

If force majeure is successfully invoked, the following are the consequences:

- *Exemption from civil liability:* If a party cannot perform its contractual obligations as a result of a force majeure event, it is absolved of civil liability for such failure to perform, including non-performance in whole or in part, or failure to render timely performance.
- *Right to terminate:* Under Article 94 of the PRC Contract Law, a party may request to terminate the contract where the purpose of the contract cannot be realised because of force majeure.
- *Possibility of modification:* The law does not provide that parties may have the right to modify the contract as a consequence of force majeure. However, based on the relevant judicial principles set out in the wake of the 2003 SARS outbreak, PRC courts appear to be willing to grant creditors the right to unilaterally modify the contract.

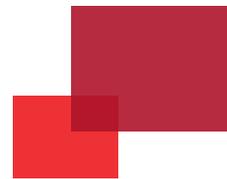
4. *Obligation to mitigate*

As provided by the Contract Law, the non-breaching party that fails to take appropriate preventive measures and thus causes the loss to be aggravated may not claim compensation for the aggravated portion of the loss. This principle should still apply when there is force majeure. Both parties suffering from force majeure shall take appropriate preventive measures to mitigate losses.

Other options – doctrine of change of situation

Under PRC law, an alternative option is to consider a change of situation claim. If the impact of the supervening event is such that the contract cannot be performed, then force majeure should be invoked. If performance is possible but is “obviously unfair”, then a claim should be made under the change of situation regime. When claiming under the change of situation, a party may request to modify the contract or terminate the contract.

The judicial process in bringing a change of situation claim is different from that for invoking force majeure. In a claim for change of situation, a judicial court proceeding must be initiated, otherwise a party's conduct may constitute a breach of contract. Further, when the court applies the doctrine



of change of situation, it must request for the review and approval from the provincial level high court. Sometimes this may escalate and require the approval of the Supreme People's Court. A claim based on force majeure does not need such a precondition. Therefore in practice, it is more difficult to make a change of situation application.

It is useful to note that although the Supreme Court Judicial Interpretation of Contract Law (II) provides that the relationship between change of situation and force majeure is exclusive of each other (i.e. change of situation must be “non-force majeure”), industry commentators suggest that there is room for the simultaneous application of force majeure and the change of situation. In particular, after the 2003 SARS outbreak, the Supreme People's Court distinguished between “the contract that if performed under the original contractual terms then will have a significant impact upon the interests of one party” and the situation of “directly causing the contract unable to be performed”.

Actions to consider

As highlighted in our previous [alert](#), we recommend that parties take practical steps to mitigate the effects of the present situation including considering whether there are alternative ways of performing the contractual obligations (e.g. sourcing another supplier).

Meanwhile, parties should check their existing contracts as to whether these are governed by PRC law and seek assistance and advice in relation to:

- Whether force majeure can be invoked under PRC law.
- Whether a force majeure clause is in place and if so, whether this is consistent with the principles under PRC Contract Law.
- Preparation of the notice of the force majeure event, which must be given promptly or in a timely way.
- Proving the existence of the force majeure event.
- Available options, whether modification or termination of the contract may be suitable and what judicial procedures may apply.

Maintaining operational continuity is key to crisis management. If parties wish to maintain business relations, it may be useful to negotiate a compromise with the counterparty at the earliest opportunity so that the joint effort may lead to a resolution of any issues.

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