

Impact of the Coronavirus outbreak on International Trade Involving China

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With the novel coronavirus (2019-nCoV, the "**Coronavirus**") spreads globally at alarming speed some countries have responded to the crisis by taking measures such as restricting or denying importation from China and requiring additional risk assessment for vessels travelled to China. For instance, Jordan announced a halt to the Chinese animal and vegetable products and Indonesia will temporarily stop food and beverage imports from China. In the shipping sphere, we have seen massive cancellation of flights to or from China, and many world's top container lines including Maersk, Cosco, MSC and Hapag-Lloyd all reducing or suspending calls to China. All of this comes even when the WHO does not recommend any trade restrictions on Chinese goods based on the current information available.

Against such business disruption, we have already seen reportedly that disputes are arising out of international trade contracts from the impact of the outbreak. The international trade and shipping industries should ready themselves for disruption and difficulties of an even higher degree, including but not limited to potential delays or breaches.

Air Cargo & Shipping

Companies reliant on air cargo shipments traveling to China, particularly in passenger planes, should immediately search for alternatives, whether in freight airplanes or by other means. Already most direct flights from China to the United States have been cut, and many other countries have also suspended flights to China through February 20.

Analysts estimate that there are at least 25,000 fewer flights operated to, from and within China this week compared to before the Chinese New Year, with over 30 airlines halting services completely. Canada, England, Singapore, Korea, France, Russia, Japan, Netherlands, Italy, Israel, Sweden, and Switzerland have all suspended flights. Russia also suspended land crossings, and major carriers such as DHL and UPS have said they are not adding freight flights to take up the lost supply. For companies reliant on shipping goods to and from China via an air carrier, they should immediately work to arrange space in the remaining flights.

Regardless of how such goods are shipped, companies reliant on Chinese factories, whether for finished or input products, would be wise to ship any stockpiled inventory. Other industries with tighter supply chains may need to curtail production or seek suppliers outside of China or the region.

Force Majeure in International Trade Contracts under Common Law¹

Companies may be able to use the novel coronavirus outbreak to trigger force majeure provisions of their contracts. Whether the novel coronavirus constitutes such a force majeure event and whether a party can successfully invoke force majeure would depend on the exact wording of the clause itself and the governing law of the contracts. It has already been reported that disputes are arising out of efforts by Chinese companies trying to invoke force majeure to get out of contracts.

For instance, If the CISG applies, a party can only be exempted for non-performance of contractual obligations if (a) the failure was due to an impediment (which includes epidemic) beyond one's control and (b) that one could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or (c) to have avoided or overcome it or its consequences. Chinese law adopts similar concept as it defines force majeure as unforeseeable, unavoidable and cannot be overcome.

Please note that the China Council for the Promotion of International Trade (CCPIT) has already been offering its "force majeure certificate" to local businesses, in the endeavour to facilitate the exercise of force majeure clauses in international sale contracts. Reportedly, most of the applications for the certificates had been from Chinese exporters, although there were a few inquiries from importers. We have also seen force majeure claims invoked by Chinese importer being pushed back by exporters from other countries.

First, many force majeure clauses may already explicitly cover a health crisis or pandemic. If so, the novel coronavirus will likely be covered if one of the parties is located in a hard-hit region of China or, if the novel coronavirus spreads, to other parts of Asia and beyond. Before triggering this clause, or agreeing that the novel coronavirus does meet the force majeure clause requirement, the parties should carefully review how the novel coronavirus affects the agreement. After the breakout of SARS in 2003, based on a notice issued by the Chinese Supreme People's Court regarding its SARS related judicial decisions, SARS appears to constitute a force majeure event. This indicates the likelihood that the novel coronavirus might also be considered as a force majeure event where Chinese law applies.

Second, other clauses in the force majeure may cover events beyond a party's "reasonable control", but a court may find the wording too general to be enforceable. While jurisdictions vary, courts generally review to determine if the event was unforeseeable, external to the parties of the contract, and unavoidable. The clause must indicate that the parties anticipated the event and made specific provision for it. The fact that the region has previously been buffeted by viral outbreaks such as SARS, means that courts may take the view that businesses should have had occasion to anticipate further outbreaks and make specific provision in their contracts.

Next, the clause should be reviewed for how it operates. If the provision discusses the "prevention" of performance (as opposed to hindrance or delay), then the party seeking to rely on the clause has to show that it has become impossible to perform the obligation, not simply that it has become more difficult or costly. For instance, if the CISG applies, hardship does not necessarily guarantee exemptions. If one fails to perform because its raw materials suppliers fail to supply due to the outbreak, it should still try best endeavour to seek alternative source.

Parties should also recognize that courts generally prefer to honor the terms of a contract under the doctrine *pacta sunt servanda* ("agreements must be kept"). The courts will usually seek to

¹ This note mainly discusses FM from Common Law perspective. For more detailed discussion on relevant Chinese law, please refer to our note: *The Impact of Novel Coronavirus on Construction Sector*.

enforce performance of a contract and will slow to accept that external events, no matter how serious or extreme, should excuse one of the parties from fulfilling their obligations.

Lastly, even for contracts without a force majeure clause, a party may seek to take advantage of the common law doctrine of *frustration*. A contract may be frustrated where a significant change of circumstances makes performance radically different from the obligations undertaken originally. Again, the courts are reluctant to find that frustration exists, and the fact that something has happened to make performance more onerous or expensive is unlikely to persuade the courts to excuse performance.

Quarantine of Vessels/Cargos and Safety of the Ports

In response to the crisis, many countries are taking additional screening or quarantine measures for vessels/cargo from China/Wuhan. For instance, Singapore announced that vessels that have travelled to China in the past 14 days must submit a health declaration form and other documents 24 hours before berthing. Vessels visited China before also need to go through enhanced inspection in Australia, Indonesia, South Korea and some other countries.

In the event that a vessel or cargo is quarantined, Articles IV 2 (h) of the Hague/Hague Visby Rules may apply, which exempts carriers from any loss or damage arising or resulting from quarantine restrictions. As of the moment of writing, it appears that the outbreak has not rendered any port unsafe. Owners therefore may not have sufficient ground to refuse to go to Chinese ports as a Charter orders, solely on the basis of unsafety. However, the situation is evolving quickly and conclusion can change any second. If an Owner refuses to follow a Charterer's order and go to China when the ports are not yet rendered "unsafe", the Charterer may be entitled to terminate the contract and claim damage. That said, if the Owner does follow the order and consequently suffer loss, it may also claim indemnification from the Charterer.

It is advisable to monitor the situation closely and be prepared for other risks caused by the outbreak in addition to the ones related to health and quarantine. For instance, several container lines have announced that due to an ongoing terminal reefer plug shortage in several ports in China including Shanghai due to the outbreak of the coronavirus, they will have to divert cargo to other ports and the Owner will be responsible for additional cost of re-routing the cargo and risk attached to the goods afterwards.

Recommendations for parties involved in international trade contracts

1. Review your contract to identify relevant risks. In particular, review the applicable force majeure provisions to ascertain whether the provision is appropriate. Please note that many contracts require a timely delivery of notice of force majeure before invoking such event. It is therefore important to review any notice requirements in the contract.
2. Collect evidence and assess whether the particular delay or disruption results from the outbreak.
3. Review and consider the impact of outbreak over the supply chain and seek alternative source.
4. In receipt of a force majeure notice, assess its applicability and seek legal advice when necessary as to how to respond.
5. Reach out to counterparties to discuss necessary mitigation steps and allocation of obligations and costs. Consider the appropriateness to reach supplementary contracts or inserting additional provisions to specifically address the current situation.

6. If considering or in the process of entering into a new contract, it is advisable to consider inserting clause specifically addressing the novel coronavirus issue and make it clear what you are seeking to achieve in drafting.
7. Review the dispute resolution clause in your contracts and ready yourself for potential proceedings.

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