
COVID-19 OUTBREAK IN CHINA: IMPACT ON COMMERCIAL CONTRACTS AND POTENTIAL REMEDIES



**BEITEN
BURKHARDT**

The COVID-19 outbreak in the People's Republic of China ("PRC" or "China") will adversely affect the performance of many domestic as well as international commercial contracts. The extension of PRC public holidays, flight delays and cancellations, mandatory and recommended quarantine measures as well as other national and international travel bans and restrictions will in many cases limit or eliminate the ability of parties to perform their contractual obligations in part or in full. As a result, parties may consider to invoke either Force Majeure provisions or claim objective changes of circumstances to limit their civil liabilities and losses.

Contractual and Statutory Rules to Invoke Force Majeure Claims

Firstly, contractual parties will have to examine if the contract in question contains a Force Majeure clause or not:

- If such a clause is provided for in the contract or any applicable general terms and conditions (and assuming such clause is valid and does not contravene mandatory laws), the parties shall follow these agreed provisions in terms of (a) objective conditions for invoking a Force Majeure claim and (b) the procedures to be followed in regard thereto. Depending on the individual clause, consequences of Force Majeure can range from extension of time for performance, variations to and even termination of the contract. Typically, such clauses indemnify the affected party from liability for non-performance occurred because of the Force Majeure event.
- If a contract does not contain a Force Majeure clause, the parties will have to determine the existence of a Force Majeure event based on the applicable laws. For any contracts between PRC registered entities and for any international contracts which either explicitly provide for PRC law to govern the contract, or otherwise are governed by PRC law, the applicable PRC laws will have to be consulted. PRC laws stipulate that Force Majeure shall refer to objective situations that are unforeseeable, unavoidable and unsurmountable. Events that are commonly acknowledged as Force Majeure events are natural disasters (e.g. earthquakes, floods), an outbreak of a military war and government acts adopted after the contract is concluded.

Does the COVID-19 Outbreak Qualify as Force Majeure Event?

Whether the COVID-19 outbreak qualifies as an event of Force Majeure with regard to a particular civil legal obligation of a party would – from a general PRC legal perspective – depend on whether such outbreak represents an objective situation that – at the time of conclusion of the contract – was unforeseeable, unavoidable and unsurmountable and which has caused the affected party to become unable to perform its contractual obligation in part or in full.

Thus, one must assess the particular contractual conditions as well as the particular actual circumstances of the affected party. This means also that there is no universally applicable “yes” or “no” reply to the question whether or not the COVID-19 outbreak does or does not qualify as an event of Force Majeure.

That said, some general considerations that may apply in this context are the following: While not any flu outbreak qualifies as a Force Majeure event, the scale and duration of lockdowns having occurred in the PRC (and in part elsewhere in the world) could be a reason to argue that the COVID-19 outbreak has not been a foreseeable contingency against which a prudent business operator could have taken reasonable measures. In this context the WHO’s declaration of the COVID-19 outbreak as a “global health emergency” (an event which only very rarely has been declared by the WHO) is another indicator for the unforeseeable nature of this event. The substantial quarantine measures, restrictions of movements, extensions of public holidays, etc. which are all governmental acts could be relied upon to argue for a Force Majeure event. Also, if a particular Force Majeure clause in a contract decrees that a pandemic or epidemic shall constitute a Force Majeure event, this may also support the claim that the COVID-19 should be seen as a Force Majeure event.

Further, applying the rationale of a 2003 PRC Supreme People’s Court (“**SPC**”) notice that was issued in connection with the SARS outbreak at the time, it should be reasonable to conclude that at least any government measures which are currently taken in connection with the prevention of the COVID-19 outbreak that directly result in the contract being unable to be performed should qualify as a Force Majeure event.

Still, every case must be carefully and individually assessed in light of the applicable laws, the individual contractual agreements and the actual circumstances faced by the affected parties and it is important to understand that not simply any exposure to COVID-19 related measures will automatically warrant a claim for Force Majeure.

Measures to be Taken to Invoke Force Majeure Claims

Any party that decides after a thorough inspection of the law, the contract and the actual circumstances to invoke a Force Majeure claim is generally well advised – subject to the specific valid agreements in the affected contract and applicable legal provisions – to take the following measures:

- to notify the other party/parties to the contract in writing (with send/receipt tracking evidence) about the existence of a Force Majeure event and the expected consequences thereof; such notices shall comply with all and any formal requirements as a given contract (or any applicable general terms and conditions) may require and clearly communicate any proposals which may alleviate or at least minimise any potential losses and damages arising from the COVID-19 outbreak;
- to collect and keep all evidence that can be reasonably collected concerning the occurrence of the claimed Force Majeure event and to share them with the other party/parties of the contract without undue delay.

Parties trying to collect evidence for claiming Force Majeure may also consider to approach the locally competent organisations issuing Force Majeure certifications. For China, the China Council for the Promotion of International Trade (“CCPIT”) offers to issue Force Majeure certificates to companies potentially dealing with disputes arising from the COVID-19 related epidemic control measures. According to CCPIT, PRC as well as non-PRC companies may approach CCPIT in this regard (though in practice it may be easier for PRC-registered entities to provide the documentation required by CCPIT to examine the possibility to obtain such Force Majeure certificates from CCPIT). To apply for such certificates, the applicant must submit legitimate documents such as the contract in question, proof of delays or cancellation of transportation, a description of circumstances and detailed presentation of the claimed Force Majeure event, its consequences in relation to the affected contract/contractual partner, etc. CCPIT will then verify and assess such documents and in case of approval, issue bilingual English/Chinese Force Majeure certificates.

Such certificates will not only facilitate the invoking of a Force Majeure clause where a particular contract requests the provision of a such certificate by a competent authority but even help in cases where a contract would not request such certificate. While these certificates are not necessarily binding on any competent arbitration tribunal or court in case of a dispute, they could still serve as a solid argument for any party seeking to rely on a Force Majeure claim.

Consequences of Successfully Invoking Force Majeure Clauses

According to PRC law (and subject to additional contractual provisions of specific contracts and any other applicable laws governing a particular contract), anyone who cannot fulfill its civil obligations due to Force Majeure events shall be relieved from bearing civil liability in regard to such nonfulfillment. In addition, subject to the contractual and statutory conditions being met, contract termination rights may be triggered as well.

Other Legal Remedies besides Force Majeure

Besides the limited situations that could qualify as Force Majeure events, parties may still face situations where the COVID-19 outbreak impacts their commercial arrangements.

Where this is the case, PRC legislation allows an amendment or termination of contracts on grounds of objective changes in circumstances.

In the context of the financial crisis of 2008, the SPC issued two guiding documents in 2009, namely a notice in relation to disputes arising from civil and commercial contracts affected by the financial crisis and an interpretation governing the legal concept of objective changes in circumstances.

The said SPC notice was a reflection of a concept found in many international conventions that provides for the unenforceability of a treaty due to fundamentally changed circumstances. It hence represents a legal foundation to allow parties to argue a substantial change of objective circumstances having occurred after the conclusion of a contract and because of which the contract shall either be amended or terminated.

Similarly, the said SPC interpretation confirmed the concept of frustration of contract due to objectively changed circumstances and laid out the conditions under which the competent civil courts or arbitration institutions may rule to change or rescind a contract that has been rendered obviously unfair or cannot be performed because of a change in objective circumstances which:

- was unforeseeable for the parties at the time of conclusion of the contract;
- was not caused by Force Majeure; and
- cannot be attributed to the commercial risks of either party.

In such a situation, the affected party may, among other things, appeal to the court/arbitration commission to remedy such a situation with regard to the principle of fairness and actual conditions. Thus, even in cases where parties fail to invoke Force Majeure rules, it may still examine if the contractual and actual conditions allow the claim of a change of objective circumstances to change or rescind a contract in light of the COVID-19 outbreak.

Again, each case shall be individually reviewed in light of the applicable laws, contractual agreements and the actual circumstances faced by the affected parties to decide whether a claim based on changes of objective circumstances appears substantiated or not.



Susanne Rademacher

German Attorney-at-law | Partner
BEITEN BURKHARDT
Rechtsanwaltsgesellschaft mbH
Beijing



Dr. iur. Jenna Wang-Metzner

Legal Consultant | Partner
BEITEN BURKHARDT
Rechtsanwaltsgesellschaft mbH
Beijing



Simon Henke

German Attorney-at-law | LL.M.
BEITEN BURKHARDT
Rechtsanwaltsgesellschaft mbH
Beijing



Corinna Li

Legal Consultant | LL.B. | LL.M.
BEITEN BURKHARDT
Rechtsanwaltsgesellschaft mbH
Beijing



Kata Liu

Legal Consultant | LL.B. | LL.M.
BEITEN BURKHARDT
Rechtsanwaltsgesellschaft mbH
Beijing



BEIJING | BERLIN | BRUSSELS | DUSSELDORF | FRANKFURT AM MAIN
HAMBURG | MOSCOW | MUNICH | ST. PETERSBURG

WWW.BEITENBURKHARDT.COM

02/2020