

Impact on Contracts

Does Covid-19 constitute Force Majeure?

Occurrence of Force Majeure

- Failure to duly perform contractual obligations
- Generally: breach of contract and respective liabilities
- However: liabilities partly or fully exempted in case of Force Majeure (or, alternatively, another unpredictable change of circumstances)

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What constitutes Force Majeure?

- Decisive: check contractual clause
 - How is Force Majeure is defined?
→ Does it expressly cover “epidemics”, “health emergencies”, “governmental actions” or similar occurrences?
 - What are the consequences of Force Majeure under the contract?
 - Are there special requirements (e.g. notices, certificates proving the occurrence of Force Majeure, etc.) and timelines for relying to Force Majeure?
- If no contractual clause – PRC statutory law:
 - Force Majeure are “*objective circumstances which are unforeseeable, unavoidable and unsurmountable*”
 - Notice of PRC Supreme People's Court and court precedents on SARS: SARS and administrative measures to prevent SARS were recognized as Force Majeure
 - However, decisive are the specific details of the situation, of the specific contract and of specific contractual obligations

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Consequences of Force Majeure

- Statutory PRC law provides for the following consequences in case of Force Majeure:
 - Liabilities shall be exempted in part or in whole in light of the effects of the Force Majeure event, except as otherwise provided by law
 - Contract may be terminated if the purpose of the contract is rendered impossible to achieve due to Force Majeure
 - Party which is not able to perform the contract due to Force Majeure shall give notice to the other party in due time so as to reduce the losses that may be caused to the other party and provide evidence within a reasonable time limit

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If the threshold for Force Majeure is not triggered

- Unpredictable change of circumstances:

Request the competent court or arbitration institution to modify or terminate the contract, if

- the concerned party suffers from an unpredictable change of circumstances;
- which could not have been foreseen by the parties at the time of the conclusion of the contract
- which is not caused by Force Majeure
- which does not constitute commercial risks and
- if the continuous performance would be obviously unfair to the concerned party

Since under such exceptional circumstances, likely also the threshold for Force Majeure should be triggered, in our view, the above likely will not play a very decisive role regarding the Covid-19 outbreak

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What should companies do?

- Evaluate the impact of Covid-19 on your business and contractual obligations
- Inform your contract partners as soon as possible and in writing
- Adopt reasonable measures to mitigate losses
- Collect evidence on the occurrence of the Force Majeure event, adopted mitigation measures, incurred own losses, etc.
- Evaluate possible consequences of the Force Majeure event and what is intended, e.g. termination of the contract, change of the contract with regard to deadlines and delivery dates, etc.
- Discuss and negotiate with your contract partner on how to proceed

Get evidence!

- CCPIT issues Force Majeure certificates for international contracts

Impact on Operations

What can companies do to mitigate effects of Covid-19 on their operations?

Preventive Measures

- HR Management
 - E.g., flexible working time; arrange employees to work from home or to take annual leave; suspension of work/business operations, etc.
- Provide for necessary protective supplies, such as masks, disinfection, etc.
- Consult with and apply for support from government
 - E.g., preferential loans, subsidies, exemption/reduction of rent; correction of bad social credit, etc.

Impact on Operations

What are main obligations of companies related to Covid-19?

PRC Law on the Prevention and Treatment of Infectious Diseases

- Obligations:
 - Promptly report to the nearby virus control authority or medical institutes if a Covid-19 patient or a suspected patient is found
 - Adopt effective health protection measures for employees
 - Follow the quarantine measures as required by the government
 - Supervise the health situation of the employees who attend work, such as their body temperatures
 - Cooperate with the competent health administrative authority:
 - Do not reject or interfere
 - If the authority wants to enter the company premises to do an on-site investigation, check and copy any documents or collect samples

Impact on Operations

What are main obligations of companies related to Covid-19?

PRC Emergency Response Law, PRC Law on Prevention and Control of Infectious Diseases and PRC Criminal Law

- Liabilities:
 - If a company fails to take preventive measures according to the requests of the authority, or fails to eliminate in time hidden dangers causing the occurrence of a virus outbreak, there might be the following liabilities:
 - Administrative liabilities: fine of RMB 50,000 to RMB 200,000; suspension of business operations; suspension or revocation of business license.
 - Civil liabilities: Liability for personal injuries or property damages due to breach of law
 - In serious cases, if the company refuses to implement preventive measures leading to a virus outbreak or a dangerous situation, according to the *PRC Criminal Law*, the company or the persons directly in charge or being responsible can be subject to criminal liability.

→ Document and keep evidence on delegation of responsibilities



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