

중국변호사의 영문버전 포스팅 - 코로나19, COVID-19 사태와 국제계약의 계약불이행 관

련 중국법원의 불가항력 Force Majeure 적용 관련 실무적 포인트



링크: [COVID-19 Contractual performance – Force Majeure clauses and other options:](#)

[a global perspective](#) - PRC

1. Does this jurisdiction imply a concept of Force Majeure into commercial contracts, or do the parties need to negotiate the provision?

PRC implies a concept of Force Majeure into commercial contracts. The PRC Contract Law also respects the principle of freedom of contract and it is very common for contracting

parties to agree a contractual definition of Force Majeure.

2. If implied, what is the legal basis for this and what is the scope of the implied provision?

Force Majeure is codified in Article 180 of the General Rules of the Civil Law of the PRC and Article 117 of the PRC Contract Law, which define Force Majeure as "the objective circumstances that are unforeseeable, unavoidable and insurmountable".

3. For a contract without a Force Majeure provision, what options does a party have where its ability to perform its obligations has been affected by COVID-19? Is that different for contracts for services and contracts for the provision of goods?

A party may claim Force Majeure under the aforementioned statutory provisions.

4. How are the courts likely to assess whether COVID-19 qualifies as a Force Majeure event?

Although government statements and local court notices are not binding to all cases, they may be persuasive. The following are some examples of recent statements and local court notices that could be considered:

- A spokesperson for the Legislative Affairs Commission of the National People's Congress Standing Committee is reported to have stated on 10 February 2020 that if parties are unable to perform their contractual obligations due to the government measures relating to COVID-19, they should be allowed to claim Force Majeure relief in accordance with the PRC Contract law.

- The First Civil Division of Higher People's Court of Zhejiang Province is also reported to have issued a notice stating that a Force Majeure could be established if: (i) the failure of performance is directly caused by administrative measures taken by the government to prevent the COVID-19 pandemic; or (ii) it is fundamentally impossible for a party to perform its obligation due to the COVID-19 pandemic.

In case Force Majeure cannot be established, the court may consider applying the principal of fairness and the principle of circumstance change if it is apparently unfair for a party to continue performing its obligations, or the contract purpose cannot be realized due to

COVID-19.

5. What are the potential effects of exercising Force Majeure rights?

The contractual provision will prevail. Further, there are two possible remedies under PRC Contract Law. A party impacted by a Force Majeure event may be **exempted from performance** as result of such Force Majeure event, and either party may **terminate the contract** if the contract's purpose is impossible to perform due to the Force Majeure event.

6. If a party cannot rely on a Force Majeure clause or other legal option, what is the contractual position?

A party may have rights under the statutory Force Majeure provisions as discussed above, if there is no Force Majeure clause in the contract.

In case a party cannot rely on the contractual clause or the statutory provisions (i.e. a Force

Majeure cannot be established), a party may seek to obtain a variation of the contract based on the principle of fairness and the principle of circumstance change (a principle under PRC law which is similar to rebus sic stantibus) where it is considered unfair for such party to continue performing its obligation, or the contract purpose cannot be realized due to the COVID-19 pandemic. However, courts are generally more reluctant to apply such principles as compared to Force Majeure relief.

Where Force Majeure cannot be established and the court decides that the principles of fairness and change of circumstance are applicable, then the failure of (or delay in) performing certain obligations under the contract will constitute a contractual breach, unless the contract provides otherwise.

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