

Coronavirus – Key Implications for Your Business

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Introduction. The novel coronavirus outbreak has had immense consequences not only in Mainland China, but, in this hyper-connected era of globalisation, also across Asia and, increasingly, other parts of the world. The number of cases continues to grow, and the death toll has reached the thousands.

Many governments have imposed measures that will plainly have a substantial economic impact. Many of these directives were imposed without warning; often overnight. As a result, supply chains have been disrupted. Deliveries have been suspended. People cannot travel.

For companies, the questions are these: 1) Who should bear that impact? 2) What commercial and legal steps are available to spread that impact?

The answers to these questions lie in:

- The affected contract itself—e.g., any force majeure or similar clauses;
- The legal framework surrounding the contract—e.g., any legal doctrines or legislation;
- The nature of the commercial relationship with the counterparty, including whether it is worth additional reinvestment or whether it is time to extricate.

The Affected Contract. The starting point is always the contract itself.

Many contracts have force majeure clauses. These allow one party to terminate the contract unilaterally upon the occurrence of a force majeure event.

However, great care must be taken before relying on a force majeure clause. Generally speaking:

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- Force majeure clauses are narrowly construed and are often filled with defined terms. Whether they can be relied upon may well turn on words that appear at first glance to be innocuous.
 - They might have embedded in them criteria which are hard to satisfy: for example, that delivery of certain goods has become “impossible” rather than merely “difficult”.
 - They usually have detailed notice provisions if a party seeks to rely upon them. Conversely, they may also have deemed waiver provisions if a party fails to issue a force majeure notice within a certain time.
 - They may also spell out the financial consequences of exercising a force majeure clause.
 - Some force majeure clauses require affected parties to take positive measures to minimise the impact of any force majeure event, with adverse consequences to follow if they fail to do so.

These are all tricky issues. For example, the measures imposed to contain the coronavirus outbreak may have made things difficult, but have they made performance of a contract “impossible”? How much time must pass before a mere delay makes performance “impossible”?

Businesses would therefore benefit from seeking legal advice early on.

Legal Framework Outside the Contract. Businesses should also consider 1) the governing law of the contract (often this is specified expressly in the contract), and 2) the law applicable to key operations (e.g., supply chains, etc.).

First, in relation to governing law, most key bodies of law apply doctrines of frustration, necessity, or a radical or material change of circumstances:

- These are highly technical legal doctrines which apply standards on a spectrum from “impossibility” through to “commercial impracticability”.
- Usually, these doctrines do not apply automatically; instead, a party would need to rely on one or more of these doctrines by giving notice explicitly.
- The likelihood of successfully invoking these doctrines might also depend on the court or tribunal concerned. Sometimes, courts and tribunals are reluctant to interfere in commercial bargains. Others are more likely to recognise that circumstances have changed in a way not foreseen by the parties.

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- Additionally, consequences would be different depending on the legal doctrine relied upon—for example, a party might only be permitted to suspend rather than terminate a contract; moreover, losses might not always lie where they fall.

Second, it might also be relevant to consider the law that applies to key operations under a contract. For example, in Mainland China, the authorities have begun issuing “force majeure certificates”:

- These force majeure certificates provide for full or partial exemptions of liability on the part of affected parties. This is a significant benefit at least under Chinese law, and so businesses should consider applying for them.
- However, businesses operating internationally or with non-PRC law contracts should also bear in mind the risk that such certificates might not be viewed as conclusive evidence by non-PRC courts and tribunals. This is particularly important in circumstances where such certificates can be obtained through an administrative process relatively quickly, and without giving counterparties the opportunity to be heard. It would therefore be prudent for affected businesses to seek both PRC and non-PRC law advice, and to take steps to preserve the legal position under both PRC and non-PRC law, in case it were disputed down the track.

Commercial Relationship Issues. Many businesses will have invested a lot to gain a foothold, or establish themselves, outside their home jurisdictions. In these difficult times, it may be worth bearing in mind medium or longer term strategic and cultural considerations before insisting upon strict legal rights. Engaging in discussions with a counterparty to see if there is a longer term commercial resolution to the immediate problems being faced may ultimately be preferable to resorting to legal remedies (although of course this will not always be possible).

Businesses would therefore be well advised to bear these broader considerations in mind when considering how best to exercise their legal rights, or how best to respond.

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