Coronavirus, force majeure certificate and private international law

Coronavirus outbreak and force majeure certificate

Due to the outbreak, China has adopted a number of public health measures, including closing schools and workplaces, limiting public gatherings, restricting travel and movement of people, screening , quarantine and isolation. At least 48 cities were locked down by 14 Feb 2020. (here) More than two thirds of China's migrant workers were unable to return to work, (see here) leaving those firms that have restarted operation running below capacity.

Coronavirus and the emergency measures significantly affect economic activates in China. The China Council for the Promotion of International Trade (CCPIT), a quasi-governmental entity, issued 3,325 force majeure certificates covering the combined contract value of $38.5bn to exempt Chinese companies from their contractual obligations.

Issuing force majeure certificates is a common practice of trade councils or commercial chambers in the world. These certificates are proof of the existence of relevant events that may constitute force majeure and impinge the company's capacity to perform the contract. The events recorded in the certificates would include the confirmation of coronavirus outbreak, the nature, extent, date and length of governmental order for lockdown or quarantine, the cancellation of any transportation, etc. These certificate, however, are not legal documents and do not have direct executive or legal effects. They only attest the factual details instead of certifying those events are indeed force majeure in law. They are also called 'force majeure factual certificate' by the CCPIT. The CCPIT states in its webpage that:

The force majeure factual certificate is the proof of objective, factual circumstances, not the 'trump card' to exempt contractual obligations. The CCPIT issues relevant force majeure factual certificates to Chinese enterprises that are unable to perform contracts due to the impact of the new coronavirus epidemic. The certificate can prove objective facts such as delayed resumption of work,

traffic control, and limited dispatch of labour personnel. An enterprise can request for delaying performance or termination of the contract based on this certificate, but whether its obligation can be fully or partially exempt depends on individual cases. The parties should take all the circumstances and the applicable law into consideration to prove the causal link between 'the epidemic and its prevention and control measures' and the 'failure to perform'.

Force Majeure in Different Governing Law

The force certificate is thus mainly used to demonstrate to the other party the existence of certain factual difficulties that hamper performance and seek understanding to privately settle the dispute. If the disputes are brought to the court, the court should consider whether the outbreak and the relevant emergency measure constitute force majeure events pursuant to the governing law, treating the force majeure certificate as evidence of fact. There is no international uniform doctrine of force majeure and different countries adopt different doctrines to allocate contractual risk in unforeseeable change of circumstances. China is a member of the UN Convention on the International Sale of Goods (CISG), which shall apply if the other party has its place of business in another contracting state, or the parties choose CISG by agreement. Article 79 of the CISG provides that a party is exempted from paying damages if the breach is due to an impediment beyond its control, and either the impediment could not have been reasonably foreseen at the time of the conclusion of the contract, or the party could not reasonably avoid or overcome the impediment or its consequences. Although the disease outbreak is unforeseeable, it can only be an impediment if it makes performance impossible. Therefore, if the outbreak only makes production more difficult or expensive, it is not an impediment. There is no consensus as to whether an event that makes performance excessively burdensome can also be counted as an impediment in CISG. In addition, the impediment must uncontrollable. If a Chinese firm could not perform its contractual obligation due to the compulsory lockdown ordered by its local government, this event is out of control. The same applies if a firm manufacturing facial masks cannot deliver on time due to government requisition. On the other hand, when the Chinese State Council announced the extension of the Chinese New Year holiday to 2 Feb 2020, it was not a compulsory ban and if a firm 'chose' not to operate during the extension without additional compulsory order from any authorities, substantive risk of infection in its place of business, or irreparable

labour shortage, the impediment may not be considered as uncontrollable. For the same reason, if a company decided to lock down after a worker tested positive for coronavirus in order to reduce the risk of spreading the disease among its workers, without the high risk and with alternative and less extreme prevention measures available, the impossibility to perform may be considered 'self-inflicted' instead of 'uncontrollable'. Consideration should always be given to the necessity and proportionality of the decision. Furthermore, if the local government imposed compulsory prohibition for work resumption to prevent people gathering, a firm cannot claim uncontrollable impediments if working in distance is feasible and possible for the performance of the contract.

If the other party is not located in a CISG contracting state, whether the coronavirus outbreak can exempt Chinese exporters from their contractual obligations depends on the national law that governs the contracts. Most China's major trade partners are contracting states of CISG, except India, South Africa, Nigeria, and the UK. Chinese law accepts both the force majeure and hardship doctrines. The party that breaches the contract may be discharged of its obligations fully or partially if an unforeseeable, uncontrollable and insurmountable causes the impossibility to perform. (Art 117 of the Chinese Contract Law 1999) The party can also ask for the alternation of contract if un unforeseeable circumstance that is not force majeure makes performance clearly inequitable. (Art 26 of the SPC Contract Law Interpretation (II) 2009) The 'force majeure factual certificate' can also be issued if CCPIT considers a event not force majeure but unforeseeable change of circumstances in Art 26 of the Interpretation (II). For example, in Jiangsu Flying Dragon Food Machinery v Ukraine CF Mercury Ltd, CCPIT issued the certificate even after recognising that the poorly maintained electricity system of the manufacturer that was damaged by the rain was not a force majeure event. In contrast, other national law may adopt a more restrictive standard to exempt parties their obligations in unforeseeable circumstances. In England, for example, the court will not apply force majeure without a force majeure clause in the contract. A more restricted 'frustration' may apply instead.

Jurisdiction and Enforcement

In theory, a Chinese court should apply the same approach as other jurisdictions to apply the governing law and treat the force majeure certificates issued by CCPIT as evidence of fact. in practice, Chinese courts may prefer applying

Chinese law if the CISG does not apply and the parties do not choose the law of another country, grant more weight to the CCPIT certificate than other courts, and be more lenient to apply the force majeure criteria to support Chinese companies' claim in relation to the coronavirus outbreak.

Finally, if the dispute is heard in a non-Chinese court or international arbitral tribunal, the judgment holding the Chinese company liable need to be enforced in China unless the Chinese company has assets abroad. Enforcing foreign judgments in China is generally difficult, though there are signs of relaxation. If judgments can be enforced pursuant to bilateral treaties or reciprocity, they may be rejected based on public policy. The question is whether the coronavirus outbreak and the government controlling measures can be public policy. According to the precedents of the Supreme People's Court, (eg. *Tianrui Hotel Investment Co., Ltd. (Petitioner) v. Hangzhou Yiju Hotel Management Co., Ltd. (Respondent)*, (2010) Min Si Ta Zi 18) breach of mandatory administrative regulations *per se* is not violation of public policy. But public policy undoubtedly includes public health. If Chinese courts consider the Chinese company should not resume production to prevent spread of disease event without compulsory government order, the public policy defence may be supported.