

Coronavirus (COVID-19) outbreak and emerging contractual claims

Emerging risk of claims against Chinese companies

With China one of the key players in the global supply chain, supplying major manufacturing companies with commodities, components and final products, the recent emerging outbreak of Coronavirus provides for a number of organizational as well as legal challenges.

As a part of preventive and control measures to combat the coronavirus outbreak, the Chinese government has established a number of restrictions in certain areas of China, including lockdowns of cities or their parts, limitation of free movement of people and halting operations in a number of manufacturing plants.



As a result, where manufacturing activities in China have halted, Chinese companies face difficulties in fulfilling deadlines in existing contracts with their foreign customers.

This situation will inevitably lead to damages incurred by both foreign companies as well as Chinese contractors themselves. The Media is already reporting on a number of pending claims against Chinese suppliers made by European car brands and companies relying on rare earths (of which China is the main global supplier).

This issue also concerns Chinese companies in the Polish market, whose presence in the Polish market is steadily increasing. Chinese companies not only sell products to Polish recipients, or supply them to Polish factories, but also participate in large infrastructure projects, including via public tenders.

This means that Chinese companies are already involved in complex contractual relationships with local counterparts and as such are at a risk of claims with regard to contract performance.

Force majeure as a potential protection against claims related to the coronavirus outbreak

In international contract practice, contracts often include the so called force majeure clause. The force majeure is a circumstance excluding the party's liability for non-performance or improper performance of the contract if the defaulting party proves that the failure was due to an impediment beyond his control, that this could not have been foreseen, or its consequences avoided or overcome.

Force majeure clauses in contracts often provide for examples of events giving rise to force majeure such as fires, earthquakes, floods, wars, revolution, strikes, radio-active contamination etc. Some of the contracts explicitly provides for epidemic as an event of force majeure.

The possibility to invoke force majeure has been reflected in a number of domestic legal systems, including through the United Nations Convention on Contracts for the International Sale of Goods (CISG) signed in Vienna on April 11, 1980. China, Poland and most European states are signatory states to the CISG.

The CISG covers sales contracts, including contracts for the supply of goods to be manufactured or produced (supply of labor or services is excluded from the scope of the CISG). When the law applicable to the Contract is Polish law, or a law of a country signatory to the CISG, then the convention applies (unless directly excluded from application to the contract).

Subject to confirmation of the law applicable to a certain contract for the sales of goods as well as a case by case analysis, CISG provides the grounds to use the force majeure clause in international sales contracts involving Polish and Chinese counterparts. Otherwise courts or arbitral tribunals will rely on domestic jurisprudence and doctrine in this regard in handling eventual disputes.

Chinese government backing Chinese suppliers

Since February 2, 2020 the China Council for the Promotion of International Trade (CCPIT) has begun providing Chinese companies with the so-called “force majeure certificate of novel coronavirus pneumonia”.

These certificates confirm that the government has adopted corresponding epidemic prevention and control measures, including stopping production activities in a certain administrative province. The certificates also inform about prohibition on restarting production before certain fixed dates.

According to a China Daily newspaper as of February 17, 2020 the number of certificates issued by CCPIT amounts to over 1,615 for companies spanning over 30 sectors, covering a total contract value of USD 15.7 billion.

Even though the certificates cannot serve as the sole confirmation of the occurrence of a force majeure event, they might be informative in the course of eventual disputes with contractors, as to the enforcement of certain prevention and control measures by the Chinese government, which force Chinese contractors to halt production process, beyond their control.



Possibility to invoke force majeure

A company affected by the negative consequences of the coronavirus, either as a contractor or manufacturer should carefully analyze its contracts, to evaluate whether force majeure could be invoked.

There are at least several important circumstances, which the party invoking force majeure will need to demonstrate in order to seek protection against non-performance or improper performance of the contract.

The analysis starts from establishing the following:

1. Is there any specific reference in the contract to diseases, epidemics, quarantines or governmental action or work halts as constituting an event of force majeure?
2. Is the Party's inability to properly perform the contract or perform it at all affected by the outbreak of the coronavirus?
3. Was it possible for the Party to avoid non-performance or improper performance of the contract through available alternative means?
4. Did the Party invoking the force majeure event notify the other Party of occurrence of the force majeure event?
5. Did the Party take reasonable steps to mitigate the impact related to the emergence of a force majeure event?

However, bearing in mind the still uncertain legal consequences related to coronavirus outbreak and lack of court judgments in this particular regard, each company must carefully consider, whether invoking a force majeure event in each contractual relationship will be the safest and most feasible means of handling the non-performance problem.

Therefore it is crucial for the company affected with the negative consequences of the coronavirus outbreak to thoroughly analyze the contract, and determine the most suitable approach towards negotiation with the counterparty and across any potential litigation/arbitration.

Kochański & Partners is ready to assist a party asserting and receiving force majeure claims in order to secure the best interests of the party.

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