

CLIENT ALERT

Coronavirus Outbreak: Time to Review Force Majeure Provisions in International Commercial Contracts

Feb. 13, 2020

The recent coronavirus outbreak in Wuhan, China (COVID-19 as described by the World Health Organization) is increasingly putting a strain on businesses. A number of manufacturing facilities and distributors in China have been shut down, and many companies based in the U.S. have also suspended or limited their operations in China.

Companies that may be affected by the outbreak should take proactive steps to mitigate their risks and prepare to address any interruption to their operations. One important step is to review their contracts to determine whether “force majeure” provisions may apply.

If contracts are governed by U.S. law:

What may be considered a “force majeure” under U.S. law will initially depend on the language provided in a specific clause, which usually covers several categories of events including natural disasters, human threats, acts of God, or acts of government. U.S. courts tend to construe force majeure clauses narrowly and will typically include events expressly listed.

Meanwhile, reliance on official announcements from government agencies or non-governmental organizations can be a basis to argue that a force majeure has occurred. Examples of this during the coronavirus outbreak are WHO’s announcement, as well as the routing and screening requirements from the Department of Homeland Security.

The coronavirus outbreak presents an unusual situation in that it includes both a naturally occurring component (the virus) and a government action component (including the quarantines and other response measures put in place). **Therefore, companies should carefully review the force majeure provisions in their contracts to determine whether they apply.**

There are several best practices that companies should follow when they seek to invoke the force majeure provisions of a contract:

- Carefully review the applicable force majeure provisions in their contracts to determine what the provision allows and whether the current situation is covered.
- Obtain information regarding the timing, the number of impacted parts/facilities, and when the force majeure event is expected to conclude.
- Confirm that the notice requirements under the contract have been met. (Time limitations on reporting might also be required).

The parties should work together to evaluate the inventory on hand and whether there is a reserve of parts that can be accessed, determine if there are other manufacturing lines available at different locations, and assess the affected supplier's allocation plan. (Note: A “fair and reasonable” allocation across customers is required under UCC § 2-615(b)).

The party seeking to invoke the force majeure provision must be prepared to prove that there are no alternative means for performing under the contract.

Be aware of the other party's rights if force majeure is invoked, which may include the right to terminate and source from an alternate supplier or to terminate after a certain period of time.

If contracts are governed by PRC law:

On February 10, 2020, the Legislative Affairs Committee of the Standing Committee of National People's Congress has confirmed that the administrative action taken by the People's Republic of China (PRC) government in relation to the coronavirus outbreak should be regarded as a force majeure. According to the spokesman, the administrative actions for prevention and control (including traffic control, shutdown/postponement of production, and lockdown of cities), which make a contracting party unable to perform the contract, are unforeseeable, unavoidable, and insurmountable.

Companies should carefully review their contracts and seek guidance to determine if contract performance has become impracticable or impossible due to force majeure, such that the contractual liability obligations of the party invoking force majeure provisions could be fully or partially suspended. There may be circumstances where the parties may be required to modify the contract or postpone performance.

For companies seeking to invoke the force majeure provision, they must generally be prepared to notify the other party promptly and provide evidence of the force majeure within a reasonable period of time.

On February 5, 2020, the PRC Ministry of Commerce issued a notice encouraging the Chamber of Commerce for Import and Export to provide factual proof for foreign trade enterprises free of charge in the areas of textiles, light crafts, metal, minerals, chemicals, food and native products, medicine and healthcare products, and electrical machinery.

For international trade related contracts, a party can submit an application online to the China Council for the Promotion of International Trade (CCPIT) through <http://www.rzccpit.com>. CCPIT will issue a certificate stating the time, location and extension of the administrative action and overall epidemic situation of coronavirus. As an independent third party, the certificate provided by CCPIT has been recognized by government, customs, chamber of commerce, and corporations in over 200 countries and regions around the world.

As of today's date, several companies have successfully obtained a certificate from CCPIT as proof of force majeure.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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