



**CHINA'S "DYNAMIC ZERO
COVID STRATEGY":
IMPACT ON COMMERCIAL
CONTRACTS AND
POTENTIAL REMEDIES**

The measures related to the “Dynamic Zero Covid Strategy” propagated by the government of the People’s Republic of China is still heavily affecting the performance of many domestic as well as international commercial contracts as it continues to disrupt supply chains, provision of services, manufacture of goods and flow of people.

The governmental measures related to the “Dynamic Zero Covid Strategy” still cause shutdowns of companies, geographic areas, delays and cancellations of road, air, and sea transport and mandatory and recommended quarantine measures as well as other restrictions still often limit or eliminate the ability of parties to perform their contractual obligations in part or in full. As a result, parties may consider invoking either Force Majeure provisions or claim objective changes of circumstances to limit their civil liabilities and losses.

1. Contractual and Statutory Rules to Invoke Force Majeure Claims

Firstly, contractual parties will have to examine if the contract in question contains a Force Majeure clause or not:

- If such a clause is provided for in the contract or any applicable general terms and conditions (and assuming such clause is valid and does not contravene mandatory laws), the parties shall follow these agreed provisions in terms of (a) objective conditions for invoking a Force Majeure claim and (b) the procedures to be followed in regard thereto. Depending on the individual clause, consequences of Force Majeure can range from extension of time for performance, variations to and even termination of the contract. Typically, such clauses indemnify the affected party from liability for non-performance occurred due to the Force Majeure event.
- If a contract does not contain a Force Majeure clause, the parties will have to determine the existence of a Force Majeure event based on the applicable laws. For any contracts between PRC registered entities and for any international contracts which either explicitly provide for PRC law to govern the contract, or otherwise are governed by PRC law, the applicable PRC laws will have to be consulted. PRC laws stipulate that Force Majeure shall refer to objective situations that are unforeseeable, unavoidable and unsurmountable. Events that are commonly acknowledged as Force Majeure events are natural disasters (e.g. earthquakes, floods), an outbreak of a military war and government acts adopted after the contract is concluded.

According to the “Guiding Opinion on Proper Handling of Civil Cases Involving the COVID19 Outbreak According to Law” (“**COVID19 Guiding Opinions**”) issued by the PRC Supreme People’s Court (“**SPC**”) on 16 April 2020, civil cases directly affected by COVID19 outbreak-related situations or measures that meet statutory Force

Majeure conditions are governed by Art. 180 PRC Civil Code (or by Art. 180 PRC General Rules of Civil Law and Art. 117, 118 PRC Contract Law for commercial contract disputes governed by the legislation in place before 1 January 2021 when the PRC Civil Code entered into effect).

2. Does the COVID-19 Outbreak Qualify as Force Majeure Event?

Whether the COVID-19 outbreak qualifies as an event of Force Majeure with regard to a particular civil legal obligation of a party would – from a general PRC legal perspective – depend on whether such outbreak represents an objective situation that – at the time of conclusion of the contract - was unforeseeable, unavoidable and unsurmountable and which has caused the affected party to become unable to perform its contractual obligation in part or in full.

Thus, one must assess the particular contractual conditions as well as the particular actual circumstances of the affected party. This means also that there is no universally applicable “yes” or “no” reply to the question whether or not the governmental measures related to the “Dynamic Zero Covid Strategy” do or do not qualify as an event of Force Majeure.

That said, some general considerations that may apply in this context are the following: The scale and duration of measures related to the “Dynamic Zero Covid Strategy” measures occurring in China could at least in some cases be a reason to argue that they are situations that have not been a foreseeable contingency against which a prudent business operator could have taken reasonable measures. In this context the WHO’s declaration of the COVID19 outbreak as a “global pandemic” is one but not the only indicator for the unforeseeable nature of this event. The substantial quarantine measures, restrictions of movements, extensions of public holidays, entry restrictions/ bans on travelers etc. which are all governmental acts could be relied upon to argue for a Force Majeure event. Also, if a particular Force Majeure clause in a contract decrees that a pandemic or epidemic shall constitute a Force Majeure event, this may also support the claim that the “Dynamic Zero Covid Strategy” measures could be seen as a Force Majeure event.

Further, applying the rationale of a 2003 PRC Supreme People’s Court (“**SPC**”) notice that was issued in connection with the SARS outbreak at the time, it should be reasonable to conclude that at least any government measures which are taken in connection with the prevention of COVID19 outbreaks that directly result in the contract being unable to be performed could qualify as a Force Majeure event.

Still, every case must be carefully and individually assessed in light of the applicable laws, the individual contractual agreements and the actual circumstances faced by the affected parties, and it is important to understand that not simply any exposure to “Dynamic Zero Covid Strategy” related measures will automatically warrant a claim for Force Majeure. Further, the COVID19 Guiding Opinions require the parties claiming Force Majeure event to bear the burden of proof for such claims (i.e., the Force Majeure event must directly cause non-performance of their contractual obligations in whole or in part).

3. Measures to be Taken to Invoke Force Majeure Claims

Any party that decides after a thorough inspection of the law, the contract and the actual circumstances to invoke a Force Majeure claim is generally well advised – subject to the specific valid agreements in the affected contract and applicable legal provisions – to take the following measures:

- to notify the other party/parties to the contract in writing (with send/receipt tracking evidence) about the existence of a Force Majeure event and the expected direct consequences thereof on the contractual relationship; such notices shall comply with all and any formal requirements as a given contract (or any applicable general terms and conditions) may require and clearly communicate any proposals which may alleviate or at least minimise any potential losses and damages arising from “Dynamic Zero Covid Strategy” measures. According to the COVID19 Guiding Opinions, the party claiming to have fulfilled its obligation of timely Force Majeure notification shall bear the burden of proof for such claim.
- to collect and keep all evidence that can be reasonably collected concerning the occurrence of the claimed Force Majeure event and to share them with the other party/parties of the contract without undue delay

Parties trying to collect evidence for claiming Force Majeure may also consider approaching the locally competent organizations issuing Force Majeure certifications. For China, the China Council for the Promotion of International Trade (“CCPIT”) offers to issue Force Majeure certificates to companies potentially dealing with disputes arising from the “Dynamic Zero Covid Strategy” related measures. According to CCPIT, all companies may approach CCPIT in this regard (though in practice it may be easier for PRC-registered entities to provide the documentation required by CCPIT to examine the possibility to obtain such Force Majeure certificates from CCPIT). To apply for such certificates, the applicant must submit legitimate documents such as the contract in question, proof of delays or cancellation of transportation, a description of circumstances and detailed presentation of the claimed Force Majeure event, its

consequences in relation to the affected contract /contractual partner, etc. CCPIT will then verify and assess such documents and in case of approval, issue bilingual English/Chinese Force Majeure certificates.

Such certificates will not only facilitate the invoking of a Force Majeure clause where a particular contract requests the provision of a such certificate by a competent authority but even help in cases where a contract would not request such certificate. While these certificates are not necessarily binding on any competent arbitration tribunal or court in case of a dispute, they could still serve as a solid argument for any party seeking to rely on a Force Majeure claim.

4. Consequences of Successfully Invoking Force Majeure Clauses

According to PRC law (and subject to additional contractual provisions of specific contracts and any other applicable laws governing a particular contract), anyone who cannot fulfill its civil obligations due to Force Majeure events shall be relieved from bearing civil liability in regard to such nonfulfillment. In addition, subject to the contractual and statutory conditions being met, contract termination rights may be triggered as well.

5. Other Legal Remedies besides Force Majeure & Statue of Limitation

The COVID19 Guiding Opinions lay out specific contractual scenarios that do not constitute a Force Majeure event and decree how PRC courts shall handle scenarios.

The COVID19 Guiding Opinions in general can be considered a reflection of a concept found in many international conventions that provides for the unenforceability of a treaty due to fundamentally changed circumstances. It hence represents a legal foundation to allow parties to argue a substantial change of objective circumstances having occurred after the conclusion of a contract and because of which the contract shall either be amended or terminated.

Similarly, the said COVID19 Guiding Opinions confirm the concept of frustration of contract due to objectively changed circumstances and laid out the conditions under which the competent civil courts or arbitration institutions may rule to change or rescind a contract that has been rendered obviously unfair or cannot be performed because of a change in objective circumstances which

- was unforeseeable for the parties at the time of conclusion of the contract,

- was not caused by Force Majeure, and
- cannot be attributed to the commercial risks of either party.

In such a situation, the affected party may, among other things, appeal to the court/ arbitration commission to remedy such a situation with regard to the principle of fairness and actual conditions. Thus, even in cases where parties fail to invoke Force Majeure rules, it may still examine if the contractual and actual conditions allow the claim of a change of objective circumstances to change or rescind a contract in light of the “Dynamic Zero Covid Strategy” measures as follows:

If the “Dynamic Zero Covid Strategy” measures

- cause difficulties in performing a contract, parties may renegotiate the contract. In case a continued contractual performance appears to be feasible, the parties may renegotiate under the mediation of the court/arbitration commission and execute the contract under the guidance of the court/arbitration commission. In such case, neither party has the right to terminate the contract.
- render the performance of contracts obviously unfair for one party, such party may request changes of performance periods or methods, prices, etc., in consideration of the actual circumstances. In case such changes have been actually made, no party may claim exemption from liability (in part or in full) due to non-performance.
- render the purpose of the contract unfeasible, a party may request to rescind the contract.

Again, each case shall be individually reviewed in light of the applicable laws, contractual agreements and the actual circumstances faced by the affected parties to decide whether a claim based on changes of objective circumstances appears substantiated or not. When reviewing the actual circumstances, it shall be reflected whether a party has received government subsidies, tax relieves or other support related to the “Dynamic Zero Covid Strategy” measures.

Further, a party that is subject to “Dynamic Zero Covid Strategy” measures may request the suspension of limitation periods during the last six months of such periods in accordance with Art. 194(1) PRC Civil Code (or Art. GRCL 194(1) PRC General Rules of Civil Law for commercial contract disputes governed by the legislation in place before 1 January 2021 when the PRC Civil Code entered into effect).

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