On 30 January 2020, the World Health Organization declared COVID-19 to be a public health emergency of international concern. On the same day, the China Council for the Promotion of International Trade (CCPIT) announced that it would issue "force majeure certificates" to affected Chinese companies to help minimize economic losses arising from the outbreak and consequential events.

The effects on the energy industry began to materialize when government restrictive measures (including closure of ports, and quarantine of individuals) caused companies, particularly those with operations in China, substantial difficulty in resuming normal commercial activities. It is foreseeable that the pandemic will continue to hinder performance under energy-related agreements as more countries go into lockdown.

This begs the question of whether, and if so, in what circumstances, parties will be able to invoke force majeure. As discussed in a number of articles available on our COVID-19 Topic Center, a force majeure event may excuse a party from performing its contractual obligations, subject to the specific contract provisions and the treatment of force majeure under the governing law. For parties to long-term energy agreements such as a sale and purchase agreement for liquefied natural gas (LNG SPA), it is essential to understand how force majeure operates under the governing law of the contract, in order to assess whether the delay and/or disruption caused by the coronavirus outbreak would trigger a force majeure clause.

**Force majeure clauses**

There is no uniform force majeure clause in energy agreements such as LNG SPAs: some define force majeure events with broad criteria, often accompanied by an illustrative and non-exhaustive list of scenarios that may constitute force majeure; whilst some define force majeure events narrowly or with a specific and exhaustive list of qualifying events.

A typical force majeure clause usually provides that a force majeure event:
i. occurred beyond the reasonable control of the affected party;
ii. could not have been avoided or mitigated by the affected party taking reasonable steps;
and
iii. has caused or resulted in the affected party being prevented from or delayed in performing any of its obligations under the agreement.

The position under English law

English law is a popular choice of governing law in many LNG SPAs. Common law jurisdictions including England & Wales do not formally recognize or define a general concept of force majeure. It is a creation of contract. Whether the coronavirus outbreak constitutes a force majeure event will depend on the specific wording of the contract and the underlying facts.

When analyzing the impact of the coronavirus outbreak and whether it would trigger a force majeure clause governed by English law, there are a few crucial elements to bear in mind.

Express inclusion of “epidemic” is not necessary

It is not uncommon for “epidemic” to be expressly included in the force majeure clause of an LNG SPA. However, the absence of express reference to an epidemic would not necessarily prevent the coronavirus outbreak from constituting a force majeure event under the agreement. Provided that the conditions set out in a force majeure clause are satisfied, the coronavirus outbreak may well constitute a force majeure event without an express stipulation.

Causation is a key element

It is important to analyze the issue of causation between the coronavirus outbreak and the disruption or delay of performance of contractual obligations. A force majeure clause may require that performance of contractual obligations must be “prevented” by the event in question, or that performance must be “impeded,” “hindered,” or “delayed”:

- For a clause referring to “prevent,” it is generally necessary for the party relying on force majeure to demonstrate that the obstacle to perform is insurmountable, e.g. it is no longer physically possible or legally permissible to perform the contract.
- A clause referring to “impede,” “hinder,” or “delay” can be construed more broadly and does not require the affected party to prove impossibility to perform.

Notably, in either of the above two scenarios, mere economic unprofitability will not qualify as a ground for a force majeure event in the eyes of law.

Explore mitigating options in the time of difficulty

The triggering and impact of a force majeure event is very often tied to the issue of mitigation,
which can be expressly stipulated or implied in a contract. In some agreements, the obligation to mitigate is incorporated into the definition of the force majeure event, i.e. only an event that could not be avoided or mitigated by the affected party taking reasonable steps would qualify as a force majeure event.

Take failure or delay of acceptance of deliveries under an LNG SPA for example. When quarantine is imposed on certain cities or ports due to the outbreak of the coronavirus, the parties should explore the possibility and feasibility of alternative modes to perform, for example, delivery to cities or ports within reasonable proximity that are open and available. If the alternative modes are available but not adequately explored, the affected party may not be able to rely on the force majeure clause as the court will likely consider that the affected party's non-performance is attributable to its own failure to mitigate, as opposed to the alleged force majeure event.

The impacts of a force majeure event on the contractual obligations depend on the particular wording of an agreement

After establishing the occurrence of a force majeure event, the next question is what are the impacts of such event on the performance of contractual obligations? The occurrence of a force majeure event may merely postpone or partially excuse the affected party's contractual obligations. Alternately, it may extinguish all contractual obligations as a whole, depending on the specific wording of the clause and the underlying facts.

- Some energy contracts have terms that can span years and decades (this is the case for LNG SPAs). The coronavirus outbreak has lasted for several months and seems likely to continue for the near future, but the contractual period of an LNG SPA may be significantly longer than the duration of the outbreak. Under such circumstances, what is the impact of the coronavirus outbreak on the performance of the contractual obligations? The practice in the energy industry is considerably divergent:

- Some agreements provide that the parties' contractual obligations during a force majeure event will be extinguished. In other words, the LNG volumes during the period while the force majeure event lasts will be excused and do not have to be delivered or accepted at a later date.

- In contrast, some agreements provide that the parties' contractual obligations while a force majeure event lasts will merely be postponed instead of extinguished. The LNG volumes that would have been delivered will still need to be delivered and accepted at a later date after the force majeure event ceases to exist, in order to restore the overall quantity under the contract.

- Some agreements provide a party (buyer or seller) with discretion to request or accept the volumes that are not taken during a force majeure event. The party obviously will exercise the discretion taking into consideration the contractual price and market circumstances at
Be aware of exceptions set out in a force majeure clause

While a force majeure event usually postpones or extinguishes a party's contractual obligations, the clause could set out exceptions, so that certain obligations continue to exist during a force majeure event (such as the obligation to make payments). The affected party must carefully review the terms of a force majeure clause in order to avoid any inadvertent breach of contract.

It is further worth noting that if a party faces significant difficulty or impossibility to perform, declaring force majeure may not be the only possible relief. For example, long-term LNG SPAs normally provide for price adjustments, delivery quantity flex or other adjusting arrangements under exceptional circumstances. The party should review the contract in its entirety and consider exploring these options if available.

A party could also seek to rely on the doctrine of "frustration." Unlike force majeure, frustration is a concept imbedded and recognized under common law. Frustration requires impossibility to perform caused by an external and unforeseen event that destroys or fundamentally alters a party's obligations. It is very difficult to establish frustration and generally a party is less likely to succeed in proving frustration than force majeure. Unlike force majeure, when frustration does occur, the agreement is terminated automatically by the operation of law upon the occurrence of the frustrating event. All obligations from both sides are extinguished including payment obligations, and the parties may only seek recovery in restitution. Despite the high bar to establish and the harsh effect, frustration remains an option for the affected party in extreme situations, particularly if a contract does not have a force majeure clause.

The position under New York law

New York law adopts a position comparable to English law on the issue of interpreting and applying a force majeure clause. The scope and effect of a force majeure event depends on the specific contractual language. Courts construe force majeure clauses or clauses with similar effect very narrowly within the confines of the contractual language.

In addition to the elements discussed above, which apply under New York law as well, a party should consider the points below if it has a contract governed by New York law.

Pay attention to the definition of force majeure

A party should pay particular attention if a force majeure clause includes a list of exemplary events. New York courts are not in favor of an expansive reading of such a list, even if there is a "catch-all" provision after the specific categories of events. The interpretation would be confined to events of the same or "like" nature as those expressly provided.

If a force majeure clause does not expressly include "epidemic," "pandemic," or references to
diseases and public health issues, a party can rely on acts of authority, governmental actions, and regulations, which are very commonly provided in a list of exemplary force majeure events.

Be diligent in the wake of a force majeure event

Similar to the duty to mitigate under English law, a requirement of due diligence in the wake of a force majeure event is common under New York law. What constitutes due diligence depends on the specific contractual language. A party evoking force majeure is generally required to exercise good faith efforts to identify, give notice of, and be relieved of the restraints which prevent its performance of a contract. This duty continues during the period when the effects of a force majeure event are ongoing, even if the event itself has ended. The absence or lack of due diligence may bar a party from relying on force majeure. A force majeure claim can turn on whether the affected party, exercising due diligence, could have either avoided the causal situation or performed the contract anyway via other arrangements.

Refer to helpful industrial or business practice

New York courts are open to consider business practices when interpreting a force majeure clause in a technical and specialized contract. A party invoking force majeure under an energy contract for example can refer to specific industry practice to support its position, particularly with respect to the definition of force majeure.

If a contract governed by New York law does not provide for force majeure, a party can consider relying on the doctrines of impossibility or commercial impracticability (both similar to frustration under English law). Commercial impracticability applies where contract performance is still possible but so radically different from what the commercial parties have contemplated as to become impracticable. It imposes a high bar on the affected party.

If the performance merely becomes expensive or burdensome (but not economically impossible), then the affected party's obligations would not be altered under this doctrine.

The position under French law

The term force majeure originates from French law. It derives from vis maior under Roman law, meaning superior force. Force majeure is a remedy available under French law to set a limit to strict liability under contracts: an obligation to do the impossible is void. In contrast to common law jurisdictions, force majeure is a statutory relief under French law, independent from contractual terms.

In the 2016 French Civil Code, Article 1218 defines force majeure as "an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of the conclusion of the contract and whose effects could not be avoided by appropriate measures, prevents performance of his obligation by the debtor."
**Force majeure** consists of four key elements: irresistibility, unforeseeability, externality, and impossibility. All elements must be present to establish *force majeure*.

Under a contract governed by French law, if there is no *force majeure* clause, or if a *force majeure* clause contains more demanding criteria than under the French Civil Code, a party needs to establish the four elements above in order to invoke *force majeure*. If a *force majeure* clause provides for less demanding criteria than the four elements, it is the contractual clause that dictates what constitutes *force majeure*.

*Force majeure* is linked with "*impossibility*" to perform under French law. A *force majeure* event may lead to temporary suspension of contractual obligations. Alternatively, if the effect of the *force majeure* event is permanent, it may lead to the automatic termination of a contract by operation of law whereby the contracting parties are discharged from their obligations. In the second scenario, the debtor is not liable for damages. This general principle is subject to the specific provisions under a contract.

Alternatively, Article 1195 of the Civil Code provides that, if an unpredictable change in circumstances renders performance of a contract excessively onerous for a contractual party who had not assumed such risk, it may request to renegotiate with its counterparty (while still performing under the contract). This is very different from the common law position. If the other party refuses to renegotiate or if the renegotiation is not successful, the parties may agree to terminate the contract or refer the dispute to a judge. The judge may, at the request of a party, revise the contract or terminate it. Sophisticated commercial contracts often provide that such risks are assumed by a party so that this provision does not become applicable.

**The position under Chinese law**

Unlike many common law jurisdictions (logically, since China is a civil law jurisdiction), the People's Republic of China Contract Law (the PRC Contract Law) has specific provisions on, and a specific definition of, *force majeure*: namely, objective circumstances that are unforeseeable, unavoidable, and insurmountable; but does not name any specific events. That is for the parties to define.

Sometimes there will be a closed list, but more often the events are given as examples in an "including, without limitation"-type formulation. Sometimes there may be an even more open-ended clause which includes a "sweep-up" of "other events or acts accepted as *force majeure* in international practice." There is no universally accepted standard clause in contracts governed by Chinese law, so it remains a case-by-case analysis. Even if a contract governed by Chinese law does not have a *force majeure* clause, a party may arguably still fall back on the statutory provisions under the PRC Contract Law and claim *force majeure* on the basis of an implied term.
In terms of consequences, the party claiming *force majeure* is usually required to get certification from a government body that an event of *force majeure* has taken place, upon which performance of the obligations is exempted for the duration of the *force majeure* event. Often *force majeure* feeds into a termination event, and the PRC Contract Law expressly supports that outcome where the parties are unable to find an equitable resolution.

While the PRC Contract Law does not expressly specify whether a viral outbreak such as we are currently experiencing constitutes a *force majeure* event, the Supreme People's Court of China previously issued a judicial interpretation in the aftermath of the SARS outbreak in 2003 recognizing such an outbreak and the government's acts aimed at controlling the spread of virus as "*force majeure* events." Although such interpretation was repealed in 2013, there is good reason to believe that the Chinese courts will very likely take the same view in resolving disputes arising from the coronavirus outbreak under Chinese law-governed contracts. A spokesman for the Legal Working Committee of the National People's Congress, China's highest legislative body, has openly said to the press that parties to a contract may seek to invoke the *force majeure* provision if they are unable to perform their obligations under the contract due to the coronavirus outbreak.

China also said that it would offer support to companies seeking to declare *force majeure* on international contracts. It has been reported that the CCPIT has issued certificates to certain Chinese companies seeking to invoke *force majeure* exemptions. However, note that in such certificates the CCPIT was simply certifying the occurrence of certain events, such as the issuance by a local government of an order delaying the resumption of local businesses. CCPIT did not go on to declare that such events actually constituted *force majeure* events. The said certificates were also silent on whether such events had resulted in the parties seeking the certificates being unable to fulfil their contractual obligations, in other words, causation, which evidently needs to be analyzed on a case-by-case basis based on the specific terms of the contract.

In the oil and gas industry, we have seen examples of parties to international trade contracts involving a Chinese counterparty trying to address the issues around the outbreak. It has been reported that some Chinese LNG buyers have considered, or have taken action to, invoke *force majeure* by notifying suppliers that they would not take delivery of cargoes because of the constraints caused by the coronavirus. On the supplier side, an international oil company reportedly rejected a *force majeure* notice from its Chinese LNG buyer, making it the first global energy supplier to push back against a firm trying to back out of a contract amid the coronavirus outbreak. Based on Bloomberg data, some LNG vessels headed to China have been diverted or are idling offshore as the current situation in China constrains the buyers' ability to take deliveries at the port where cargo is due to be offloaded and has cut back demand in the local market.
The issues around invoking *force majeure* under a long-term LNG purchase agreement under Chinese law are complicated and certainly need to be examined individually, based on the specific terms of the relevant contract. It is common to have a clause that states that if the *force majeure* situation persists for a given period of time and the parties cannot find an equitable mutually agreeable solution within a given period, then either party has the right to terminate the contract; so not just whether a *force majeure* event has occurred and gave rise to the inability to perform, but when it occurred is also important. But in general, it may be difficult for Chinese buyers to walk away from such long-term contracts on the grounds of the outbreak alone unless there is a real quarantine or lockdown going on in all of the ports where the cargo is being delivered in China, making it impossible for Chinese buyers to divert to those ports that are not subject to quarantine measures and for them to take deliveries for a sufficiently long period of time. Further, many such contracts contain a “take-or-pay” clause under which a Chinese buyer will be forced to pay if it refuses to take deliveries, in which case it would be difficult to argue that the viral outbreak prevents the Chinese buyer from making payments. It is quite common to carve out a party having insufficient funds to make payment from a *force majeure* clause in Chinese law governed contracts, as this is arguably a subjective not an objective circumstance.

**Key takeaways**

Whether the coronavirus outbreak constitutes a *force majeure* event depends on a wide range of factors, including:

- the governing law of the contract;
- the particular wording of the *force majeure* clause;
- the circumstances of the coronavirus outbreak and associated government restrictions; and
- whether and how the coronavirus outbreak actually disrupts the performance of the contract.

In the midst of a potential *force majeure* event, contracting parties that may be affected should carefully review their contractual terms, in particular, all relevant provisions on *force majeure* and any other alternative reliefs. In the case of an LNG SPA, the parties should also review upstream and downstream agreements and see whether any upstream/downstream *force majeure* circumstances will trigger the *force majeure* clause in their own SPA. Now is a good time to see whether standard clauses in commercial agreements are fit for purpose. We are undertaking many reviews of *force majeure* provisions in client standard form documents in a forward-looking exercise to make sure they are robust enough and “fit for the future.” How these should be drafted depends on whether the party concerned is “pro-performance,” “pro-reliance,” or “neutral.”
Last but not least, a party encountering difficulty in performing the contract should take care to follow the steps of mitigation/due diligence it is obliged to and could reasonably take. This is both in the interest of minimizing its own losses, and preserving its rights to rely on *force majeure* if such event indeed cannot be reasonably avoided or mitigated.

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