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Coronavirus and *Force Majeure* Declarations

Force majeure declarations could be used to excuse Chinese parties' contractual obligations with pharmaceutical and medical device companies.

Roughly three weeks after the World Health Organization declared the coronavirus to be a “public health emergency of international concern,” the outbreak has begun to disrupt global supply chains severely.¹ The virus, now officially named “Covid-19,” remains first and foremost a public health emergency. Since the first cases were reported in December 2019, it has sickened more than 72,000 people, killed nearly 2,000, and spread to every province and region in China—and from there to 26 other countries.

Chinese authorities have taken a number of steps to contain the coronavirus, and the Chinese economy is feeling the effects. China has completely quarantined a number of cities including Wuhan—the epicenter of the outbreak and the country's industrial and manufacturing heartland. Varying degrees of domestic travel restrictions now affect an estimated 780 million people: they have kept many workers confined to their homes and halted the movement of goods. Many factories have ceased operations as a result. Ports in Hubei province, in which the city of Wuhan is located, have also been shut in a bid to contain the virus.²

As the coronavirus crisis worsens in the coming months, the effects on the global medical supply chain are expected to intensify. China is the world's largest producer of active pharmaceutical ingredients (APIs) and is a critical source of dietary supplements, biotechnology products, and medical devices.³ About 20% of global trials are now conducted in China, and the U.S. clinical trials database lists nearly 500 studies with a site in the city of Wuhan itself.⁴ Experts previously warned that U.S. dependence on China's drug supply could lead to shortages if the Chinese supply is disrupted, and FDA announced on February 14, 2020



that it is actively monitoring supply chain disruptions caused by the crisis.⁵ Industry analysts have noted that a crucial point to watch will be when Chinese factories reopen.⁶

In these circumstances, pharmaceutical and medical device companies should be aware that many Chinese parties are considering *force majeure* declarations as potential relief from their contractual obligations. The purpose of a *force majeure* clause is to temporarily or permanently excuse the parties from performance of their contractual obligations, upon the occurrence of an event beyond their control that has prevented or impeded contract performance.⁷ While *force majeure* is a recognized concept in most legal systems, it usually does not have a precise legal definition. As a result, most contracts include a definition of *force majeure* and a non-exhaustive list of both illustrative *force majeure* events and events that do not constitute *force majeure*.⁸ Much will turn on how the event of *force majeure* is characterized—for example, whether the relevant impediment to performance is characterized as the outbreak of disease itself, as an act of public authorities in an effort to contain the outbreak of disease (e.g., an order mandating the closure of a buyer's facilities), or as a situation in which performance is economically unreasonable in contracts governed by the Convention on the International Sale of Goods. Significant questions may thus arise as to whether the alleged *force majeure* is covered under the contract, as well as whether a sufficient causal link exists between the alleged *force majeure* and the claiming party's non-performance. Assuming that the declaration of *force majeure* is validly given, parties may have different views as to the period of time in which performance should be excused and the time at which the *force majeure* has ceased to exist.

The Chinese body in charge of foreign trade and investment, the China Council for the Promotion of International Trade, has begun issuing *force majeure* certificates to Chinese companies.⁹ As of mid-February, CCPIT has issued 1,615 of these certificates to companies in over 30 sectors, covering a total contract value of about US\$15.1 billion.¹⁰ It remains unclear what legal effect these certificates have, as *force majeure* is a contractual issue (and the CCPIT is not a party to the contracts in question), but it is expected that Chinese parties may seek to rely on them in supporting *force majeure* claims in future disputes, including with pharmaceutical and medical device companies.

Some other sectors are already seeing *force majeure* declarations based on the coronavirus outbreak, and these initial cases are providing valuable insight. For example, in the liquefied natural gas (LNG) market, the China National Offshore Oil Corp. ("CNOOC"), which operates nearly half of China's LNG import terminals, invoked the *force majeure* clauses in multiple long-term contracts with overseas suppliers.¹¹ In the mining sector, Guangxi Nanguo Copper, a copper smelter in Southwest China, also declared *force majeure* on deliveries of copper concentrate.¹² Other Chinese companies in both sectors are still considering whether to invoke *force majeure*, and some have sought to suspend or delay their contractual obligations.¹³

Parties who have contracts with Chinese companies must carefully weigh the legal and business consequences of accepting or rejecting a *force majeure* declaration based on the coronavirus outbreak. Some parties appear to have accepted *force majeure* declarations, while others have rejected them.¹⁴ Others are actively working with Chinese companies to avoid a *force majeure* declaration altogether by affording the Chinese party certain accommodations, such as extra time to perform.¹⁵

King & Spalding is uniquely positioned to guide pharmaceutical and medical device companies through the coronavirus crisis, including potential *force majeure* declarations. Our "one firm" approach allows lawyers from our nationally ranked FDA & Life Sciences and International Arbitration and Litigation groups to work together in advising pharmaceutical and medical device companies facing contractual issues abroad. Our team includes a deep bench of lawyers and other professionals with expertise and experience in the areas of international regulation and commercial disputes that affect the life sciences industry.



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³ U.S.-China Econ. & Security Rev. Commission, 2019 Report to Congress 248-50 (Nov. 2019), <https://www.uscc.gov/sites/default/files/2019-11/2019%20Annual%20Report%20to%20Congress.pdf>.

⁴ Tamara Mathias, Roxanne Liu, and Manojna Maddipatla, Coronavirus outbreak begins to disrupt booming China drug trials, Reuters (Feb. 12, 2020), available at <https://www.reuters.com/article/us-china-health-clinicaltrials-focus/coronavirus-outbreak-begins-to-disrupt-booming-china-drug-trials-idUSKBN2062IS>.

⁵ Food & Drug Admin., FDA's Actions in Response to 2019 Novel Coronavirus at Home and Abroad (Feb. 14, 2020), https://www.fda.gov/newsevents/press-announcements/fdas-actions-response-2019-novel-coronavirus-home-and-abroad?utm_campaign=021420_Statement_FDA%E2%80%99s%20Actions%20in%20Response%20to%202019%20Novel%20Coronavirus%20%28COVID-19%29&utm_medium=email&utm_source=Eloqua.

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⁷ James Bailey & Rachel Lidgate, LNG – a minefield for disputes? in *Liquefied Natural Gas: The Law and Business of LNG*, (Paul Griffin ed., 3d ed. 2017), p. 248.

⁸ Id.

⁹ Cindy Liang, Shermaine Ang, Srijan Kanoi, and Eric Yep, Analysis: LNG market turmoil to worsen as coronavirus impact deepens, S&P Global (Feb. 10, 2020), available at <https://www.spglobal.com/platts/en/market-insights/latest-news/natural-gas/021020-lng-market-turmoil-to-worsen-as-coronavirus-impact-deepens>.

¹⁰ Xinhua, China issues over 1,600 force majeure slips to coronavirus-hit companies, China Daily (Feb. 17, 2020), available at <https://www.chinadaily.com.cn/a/202002/17/WS5e4a38eaa31012821727818d.html>.

¹¹ Jan Wolfe, Explainer: Companies consider force majeure as coronavirus spreads, Reuters (Feb. 10, 2020), available at <https://www.reuters.com/article/us-china-health-legal-explainer-idUSKBN205059>.

¹² Tom Daly, China copper smelter Guangxi Nanguo declares force majeure amid coronavirus: sources, Reuters (Feb. 6, 2020), available at <https://www.reuters.com/article/us-china-health-copper/china-copper-smelter-guangxi-nanguo-declares-force-majeure-amid-coronavirus-sources-idUSKBN2010NL>.

¹³ Stephen Stapczynski, China LNG Force Majeure Rejected as Virus Chaos Sparks Dispute, Bloomberg (Feb. 6, 2020), available at <https://www.bloomberg.com/news/articles/2020-02-07/china-lng-force-majeure-rejected-as-virus-chaos-sparks-dispute>; Yu, Sun, Chinese copper traders declare force majeure over coronavirus, Financial Times (Feb. 7, 2020), available at <https://www.ft.com/content/e3d6b116-4975-11ea-aeb3-955839e06441>.

¹⁴ Stephen Stapczynski, Mark Burton, and Jaqueline Davalos, China Renegs on Commodity Deals, Worsens Global Trade Chaos, Bloomberg (Feb. 6, 2020), available at <https://www.bloomberg.com/news/articles/2020-02-06/chinese-gas-buyer-cnooc-declares-force-majeure-on-lng-contracts>.

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