

the brief

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Post-pandemic Trends in Dispute Resolution in China



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Expert Insight

Post-pandemic New Trends in Dispute Resolution in China

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The COVID-19 pandemic has resulted in a rapid economic downturn followed by a potentially slow recovery and continued economic challenges, all of which could lead to exceptional uncertainty in the business world. The commercial pressures borne by contract parties may

cause an increase in disputes and recourse to national courts, as well as other forms of dispute resolution including arbitration and mediation.

Especially in China, with over a billion people living under lockdown conditions, parties, their advisors, and judicial and arbitral institutions now find themselves in an unprecedented situation.

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The post-pandemic period could indeed be difficult for everyone. How can parties invoke force majeure or similar clauses to avoid breach of contract under Chinese law? How do Chinese courts respond to the pandemic's impact on all forms of contracts? How can lawyers adjust to the new ways of litigation/arbitration in the midst of a pandemic? A practical summary of the answers to these questions is set out below.

1. The application of force majeure and the principle of change of circumstances under Chinese law

Under Chinese law, force majeure and the principle of change of circumstances are relevant to events like the COVID-19 pandemic. Article 117 of the *PRC Contract Law* stipulates that, “a party who is unable to perform a contract due to force majeure is exempted from liability in part or in whole in light of the impact of the event of force majeure, except as otherwise provided by law.

Where an event of force majeure occurs after the party's delay in performance, it is not exempted from such liability. For purposes of this Law, force majeure means any objective circumstances which are unforeseeable, unavoidable and insurmountable.” Also, Article 180 of the *General Rules of the PRC Civil Law* provides that no civil liability is borne in cases of failure to perform civil duties due to force majeure, unless otherwise provided by law. Hence force majeure means unforeseeable, unavoidable and insurmountable objective circumstances.

Meanwhile, the principle of change of circumstances is provided in Article 26 of the *Interpretation of the Supreme People's Court on Several Issues Concerning Application of the Contract Law of the PRC (II)* (promulgated in 2009). This article addresses situations in which, after the formation of a contract, a significant change in the objective environment has taken place which could not have been foreseen by the relevant

parties at the time of entering into the contract, which does NOT belong to any commercial risk occasioned by any force majeure cause, and which renders the continual performance of the contract manifestly unfair to the relevant party or renders it impossible to realize the purpose of the contract. In such cases, the People's Court shall confirm whether the contract shall be revised or terminated in accordance with the principle of fairness and actual circumstance, where the party is entitled to apply to a People's Court for modification or termination of the contract.

The two principles of force majeure and change of circumstances have similarities; however, they are applied accordingly given different circumstances. They both refer to unforeseeable events when the contract was formed, and both have a significant impact on the performance of the contract. In general, if the relevant event is insufficient to constitute force

majeure but has impact on the performance of the contract, the parties may try to invoke the change of circumstances clause.

If the parties are bound by a contract governed by Chinese law, and the pandemic has hindered one party's performance of the contract, the very first thing they should do is to inform the other party promptly, in accordance with Article 118 of the *PRC Contract Law*, which states that if a party is unable to perform a contract due to an event of force majeure, it shall promptly notify the other party so as to mitigate the losses that may be caused to the other party, and shall provide evidence of such event of force majeure within a reasonable period.

2. The Chinese courts' response to the cases impacted by the pandemic

The PRC Supreme People's Court issued *Notice of the Supreme People's Court on Promulgation of the Guiding Opinions on Several*

Issues Concerning the Lawful and Proper Trial of Civil Cases Involving the COVID-19 (I), (II) and (III) (“Notice I,” “Notice II” and “Notice III,” collectively referred to as “Notices”) during the last three months, in order to guide the courts in dealing with cases involving the pandemic. It is foreseeable that certain cases, such as contract disputes, loan disputes and even labor disputes, will surge during the post-pandemic period. The judicial authorities sensed the trend and promulgated the three Notices to regulate the trial process, which is rather fair, just and reasonable concerning the amount and complexity of the said disputes.

According to Article 2 of Notice I, the courts shall apply the specific rules of force majeure precisely, and strictly understand the conditions for application. That means the COVID-19 pandemic falls under the scope of force majeure event under the PRC law.

In particular, Article 3.2 of Notice I stipulates that if the pandemic or its prevention measures only lead to difficulties in the performance of the contract, the parties concerned may re-negotiate; if continuing to perform is possible, the courts shall encourage mediation and actively guide the parties to continue performing the contract. Nevertheless where a party requests to terminate the contract due to the difficulty in performance, the courts shall not uphold the request; where continuing to perform is evidently unfair to either party, and the party concerned requests to amend the contract’s performance period, performance method, price amount etc, the courts shall decide whether to support the request, taking into account the actual conditions of the case. If the purpose of a contract cannot be achieved due to the pandemic or its prevention measures, and the party concerned requests to rescind the contract, the courts shall uphold the request.

Notice II, on the other hand, further regulates the trial of disputes over various contracts and financial matters, covering sales of goods and medical supplies, leases, construction, training, investment, insurance and bankruptcy etc. The Notices have addressed issues that have arisen primarily because of the pandemic. Such guiding opinions offer the courts specific standards which could highly enhance the efficiency of the courts themselves, as well as of the parties and their advisors.

3. The new era of courts and arbitral institutions

Courts and arbitral institutions have been making changes to their operations in order to respond to the effects of the pandemic with respect to reducing risks regarding their employees and legal practitioners.

Key words for the changes are “e-filing,” “virtual hearing” and even “AI.” The technology available

has advanced year by year and, with the right technical support in place, can be used very effectively within the legal industry.

The pandemic is also affecting the creation, collection and transmission of evidence in international arbitration. The parties now have to search, review and draft documents by electronic means. Arbitrators who used to require submission of written documentation have gradually given way to those willing and able to handle documents electronically.

China’s mediation system has been developing as well and has efficiently resolved many trade disputes among commercial enterprises during the pandemic. For example, the Mediation Centre of the China Council for the Promotion of International Trade has specially developed an online mediation system to facilitate enterprises. There is no time limit for online consultation

and mediation application. The expert mediation services during the pandemic period are free of charge. Such measures can assist enterprises in resolving disputes faster. During the specific dispute resolution process, much time will be saved through avoiding complicated and arduous legal processes. At the local level, the “Shenzhen Benchmark Chambers International & Benchmark International Mediation Center” promoted “contactless mediation” during the pandemic period through “online mediation” and “online judicial confirmation,” which handled a host of domestic and foreign-related commercial disputes efficiently. At the international level, the International Center for Settlement of Investment Disputes (ICSID) announced that it adopted electronic filing starting from March 16, 2020.

It is fair to conclude that the pandemic has brought significant changes to the methods of

submission/filing and hearings, as evidenced by the increasing number of online dispute resolutions. There might even be other new, advanced technologies which will be introduced into the legal world in the future. Lawyers and practitioners are thus required to constantly keep up with the latest methods for arbitrating and litigating.

Featured Counsel

Counsel registered on Trustiics are among the best English-speaking lawyers and legal translators in China. They have worked at the most reputable legal service firms and legal departments in China and around the world. In each issue of *The Brief*, we will present one legal expert as our “Featured Counsel.”

Dr. Wei Lin, Managing Partner at P.C. Woo & Zhonglun W.D. LLP.
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Dr. Lin completed his Doctor degree in law at Paris II University (Panthéon-Assas) after he obtained both Bachelor and Master degrees in law in China. He also participated Harvard Law School Executive Education in 2014.

Dr. Lin is expert in cross-border M&A, international trade remedies and dispute resolution. He is now serving as the Vice-Chair of Zhonglun W&D Law Firm, Managing Partner of Shanghai Office and P.C Woo & Zhonglun W.D. LLP. Since May 2013 he worked as register foreign lawyer at P.C. Woo & Co. in Hong Kong SAR. Dr. Lin has provided comprehensive legal services in many international arbitration cases in relation with cross-border investment and maritime affairs, and engaged in many transnational M&A projects worth over billions U.S. dollars in Europe, Asia, Africa and Latin Americas, involving real estate, engineering construction, machinery



manufacturing, renewable energy, medicine, food, fashion, educational media, e-commerce, IT industry, etc.

Dr. Lin was selected in the panel of “One Thousand Foreign-related Business Talent Lawyers” by Chinese Ministry of Justice in 2019. He is also the arbitrator at multiple arbitration commissions and centres, including CIETAC, China Maritime Arbitration Commission, HKIAC, SIAC and ICC Arbitration.

Dr. Lin is capable of providing legal services for clients in Chinese, English, French and Fujian dialect proficiently.

Dispute prevention and avoidance

There are endless opportunities for entrepreneurs and SMEs looking to do business in China, but like any new venture, there are risks. While many foreign-owned businesses in China are able to operate without major hiccups, there is always the possibility of a dispute with individuals, companies, or in rare cases, even the government.

Settling a dispute in a foreign country can be tricky; you will likely have a smaller network, newer relationships, and an unfamiliar legal system to navigate, putting you at a disadvantage. The situation can be even more difficult to traverse if you hope to maintain a working relationship with the other party after the dispute is resolved.

While it's possible to resolve disputes amicably (which we'll

cover in the next article of the dispute resolution series), usually the best plan of action is to avoid them altogether. Here are some techniques for dispute prevention and avoidance:



Before you get started

Adjust your mindset

Beyond cultural differences, Chinese businesses operate differently than their Western counterparts – this goes for the way business people speak, think, interact, and the way they treat their clients and partners. It is essential that you pay attention to these differences, as they will not simply disappear in time. Attempts to understand, prepare for, and embrace both cultural and professional differences are often looked upon favorably.

Build relationships

While Western business people often focus on the transaction at hand, Chinese business people aim to forge long-term relationships that require nurturing and maintenance. [Iberchina, a reference website on Chinese issues](#), outlines the do's and don't of building business relationships in China.

Do your due diligence

Make sure to carry out a thorough due diligence review of any potential business partner. It's very important to know your partner when doing business in foreign country, so this process can help you assess the people who will be directly involved in your investment. It will also help you gather relevant general information (financial, legal, market data, etc.) on your potential partner to verify their experience and dependability. While helpful, do not exclusively rely on information provided by your foreign partner — collect information from independent sources, too.

Conduct risk analysis

Like any new business venture, it's imperative that you conduct a proper risk analysis before you dive in. Be realistic about how much risk you are willing to accept and make sure to use reliable sources. Go beyond your regular news

media sources or your immediate partners to evaluate the risk from all angles.

Make certain your project is economically viable

While grants, subsidies, and other windfalls can help supplement a business model, any new project should be economically viable on its own terms. Profitability of a project or the sale of goods and services should be based on sound economic criteria rather than loose projections or expected returns. Do not rely on the promise of subsidies, special considerations, or non market related sources of income to generate a profit.

To avoid future conflicts, it is critical to establish goals with your partner to ensure that the outcomes are actually achievable. You should both have a clear understanding from the beginning and revisit from time to time to make sure

you and your partner are on the same page. This applies to any important issues, specific goals, values, roles, and responsibilities that each party brings to the table.

During contract negotiations

Set clear terms and conditions

One of the most important considerations during contract negotiations is ensuring that the terms and conditions of all contractual documents are clear and unambiguous. The terms and conditions of any contract should fully describe how the contract is to be executed. This means that all contracts should clearly define all major terms and conditions without any room for different interpretations. This applies to:

- Payment clauses
- Dispute resolution

- Responsibilities and obligations of all parties
- Legal title transfer
- Delivery terms
- Performance standards
- Timelines
- And beyond

Establish language guidelines

While Chinese Law permits the use of foreign language in contracts, in the event of a dispute, all evidence must be submitted to the court in the Chinese language. To avoid any issues, it is highly recommended that all contracts are bilingual with English as the prevailing language whenever legally permissible as a matter of Chinese law. If there is no governing language, a Chinese court or arbitration panel will establish Chinese as the prevailing language.

Additionally, if there is no Chinese version of a contract during a dispute, the contract must be translated by a state-appointed translator. With the help of a [translator to draft a Chinese language version of your contract](#), you can avoid mistranslation of the English language contract if a dispute were to arise. In any case, foreign parties should always ensure that the Chinese version of the contract matches the English or other language version.

For added security, it is also advisable to include a clause that in the event of any disagreement as to how the contract is to be interpreted, the English version will prevail. However, there are exceptions in certain situations (e.g. joint venture documents to be submitted to or filed with the Chinese government authorities) where the Chinese law requires the governing language to be Chinese.

Secure your finances

In the event that your partner is insolvent or unable to fulfil their financial obligations to you, it is often ineffective to file legal action against them. Therefore, it is advisable to seek legal counsel for help mitigating any potential risks of credit unworthiness. Additional security measures such as letters of credit, bank guarantees and other financial instruments, are advisable.

Avoid entering into agreements that are not legally permitted

There are many cases of Western companies entering into agreements with Chinese partners with promises from local officials that central government rules will not be enforced in the provinces. While this is sometimes true, problems may arise when these rules are suddenly applied, leaving

the company with little recourse. This is why you must ensure that each investment has a solid legal basis and that contracts are legally binding and enforceable.

Understand the difference between agreement and contract

Different cultures view the purpose of negotiation differently. A good example of this is the contrasting views of what a contract represents. The goal of most Western negotiations is to walk away with a binding, written contract that contains the terms of the agreement. In China, however, the contract is often seen as a framework that guides the relationship between the parties, laying the foundations for the business relationship. This can lead to disagreements as non-Chinese may have difficulty in accepting what appears to be a process of perpetual negotiation.

After you've signed a contract

Visit China if you can

If you are serious about doing business in China, it is extremely valuable for you to actually go and visit. Finding a trustworthy partner in a foreign country can be much more difficult if you are unable to meet face-to-face. This shows that you are serious and committed, and personal meetings will definitely help build trust, a prerequisite for a long-term relationship in China.

Hire reliable local management

If your investment involves setting up an office in China, you should hire a local manager who is trustworthy and willing to cooperate with the parent company. The best candidates for these local hires are usually

people with overseas study or working experience and with solid experience on the ground.

This can help you avoid situations where the local manager refuses to follow the parent company's guidelines or disappears with confidential company information and official stamps. Beyond local management, hiring a legal expert with experience in China can help you navigate the legal system, vet potential local managers, and [gauge legitimacy of potential partners](#).

Communicate

To help avoid going to court over a dispute, build in practical communication mechanisms to identify and solve problems before major disputes arise. In addition, ensure that you have more than one person on your team who can speak Chinese. This can help to eliminate blind spots and provide

a more accurate reading of the situation. Relying on a single communication channel can be detrimental to negotiations, especially if there are personal interests or conflicts of interest involved.

Search for problems before they materialize

Spend time at the beginning of your project to examine what you will do if things go wrong, and try to anticipate possible problem areas. If you can't find any, you are not looking hard enough. Additionally, set milestones in the project for performance and have an exit strategy for each stage of the project, even if you don't plan on using it.

Bottom line

Disputes with business partners or clients can slow down your operation, cause complications, or cost a great deal of money if they are not handled properly. In our next post, we will explore dispute resolution options, but it's always a good idea to take measures to prevent them from arising in the first place.

If you're looking to learn more about dispute resolution in China post Covid-19, [register for a free Trustiics account](#) to start working with some of the top English-speaking lawyers in China. You are also welcomed to view video recordings of our recent webinar on Dispute Resolution available only to our registered users.

Your Free Template

In this issue we are providing a template of draft Term Sheet which is to be adopted when the subject investment is made under an offshore structure.

This Term Sheet is drafted in consideration of Chinese laws. If you intend to use this agreement in a different situation or jurisdiction, certain clauses may need to be revised, added or deleted.



Please note that this document is for your reference only. You should always consult an experienced lawyer in the areas of securities law and contract law, before entering into such agreements. In addition, you are advised to have a professional legal translator review the consistency if you need to sign such agreement in bilingual versions because legal translation is a very special type of translation, requiring years of training and practice. Counsel registered on Trustiics are among the best English-speaking lawyers, legal translators and other professionals you can possibly find in China. They have worked at the most reputable legal service firms and legal departments in China and around the world and are ready to help you throughout the process.



[Click here to download the free Term Sheet template](#)

About us



Trustiics.com is an online platform where international businesses and individuals such as expats can access direct, convenient and affordable legal services provided by well-trained English-speaking legal professionals from China.

We seek to improve, through the use of information technology and the Internet, the efficiency of the legal services market for the benefit of international SMEs doing business in China and elsewhere. We want to break down geographic, linguistic and financial barriers for businesses looking for top-notch legal counsel.

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