Since the end of January 2020, the rapid outbreak of COVID-19 and the Chinese authorities' highest-degree epidemic control measures have caused havoc in people's daily lives, consumer spending, business and manufacturing operations, supply chains and logistics. This has resulted in a major disruption to China's economy, with ripple effects felt throughout the rest of the world.

Although the disease is spreading in other parts of the world, the health situation appears to be improving in China with fewer new infection cases daily. Enterprises are now authorised to reopen progressively, but all are struggling to get back to business as usual.

In this article, divided into four parts, we discuss the relevant Chinese laws and regulations for companies resuming work after the COVID-19 outbreak and how to deal with the drastic measures implemented by the government, including:

1. Legal liability: how and why follow government preventive measures
2. Employment, how to deal with Chinese and foreign employees during the epidemic
3. Business discontinuity, why force majeure and hardship clauses aren't so simple to claim against business partners or insurers; and
4. Going forward, foreign invested enterprises using national treatment will benefit from the Chinese stimulus package and subsidies.

### 1. Legal liability: how and why follow government preventive measures

Further to the outbreak of COVID-19, the Chinese government has implemented both
urgent and draconian measures at all levels to contain the spread of the disease.

In most Chinese cities, work as usual was expected to resume on 10 February (instead of the intended 30 January, after Chinese New Year (CNY)), but companies across China have all been facing unique challenges to reopen, adjusting their operations to accommodate the daily flow of new administrative restrictions and planning for the coming weeks.

**Strict restrictions**

At the same time a nationwide extension to the Chinese New Year public holiday was decided, on 26 January, the State Council also delegated the power to adopt specific countermeasures against the spread of COVID-19 to provincial and city governments. This is the reason why restrictive measures may vary from one region to the other. For example, companies had to stop their operations until 9 February in most provinces, except enterprises engaging in essential activities (public utilities and transportations, healthcare, supply of food and daily necessities, other activities deemed essential to the national economy and people's livelihood). But in Hubei province, where most COVID-19 infections have been reported, businesses have to remain closed until at least 10 March. This is causing a tremendous impact, not only in China but also at a global level; the automotive sector is particularly hit as Wuhan is a major manufacturing hub.

All over China, the authorities have implemented very strict sanitary measures since the COVID-19 outbreak, some comparable to the military curfew employed during wartime including:

**Limitations of movement**

- lockdowns of over 12 selected cities (eg: Wuhan, Wenzhou);
- self-quarantine for all travellers coming from Hubei province;
- restrictions on access to and exit of residential compounds (directly affecting over 700 million inhabitants);
- a requirement to carry a letter from an employer and/or health record to justify movements; …

**Restrictions to travel**
• travel bans inside China;
• registration of persons' whereabouts over the last 14 days;
• prohibition of non-residents entering some cities; …

Restrictions to assemblies

• banning of public and private gatherings;
• postponing trade fairs, exhibitions and large meetings;
• closing of food & beverage venues; …

Mandatory sanitary measures

• face masks for everyone in all public places;
• health monitoring of individuals;
• registration of visitors;
• reporting of individuals with a fever (a temperature over 37.3° as measured by infrared thermometers); …

Restrictions to business

• immediate closure of all businesses during the extended public CNY holiday, except essential activities;
• lengthy administrative procedures and uncertainty for reopening factories and public venues;
• prevention of truck drivers from entering other provinces or cities; …

These draconian measures are actually in line with the Law on Preventing Infectious Diseases, which was largely revised in 2004 after the SARS outbreak, and further amended in 2013 after the MERS outbreak. Regarding the new Coronavirus, on 20 January the State Council and the Ministry of Health decided to classify it as a Class B infectious disease (such as SARS, AIDS, encephalitis B, rabies, anthrax, pulmonary tuberculosis...), but nonetheless to enforce the most severe protocols normally applicable to Class A infectious diseases, i.e. the plague and cholera. Such controls are enforced not only by local authorities, but also neighbourhood committees and even private entities such as security guards at residential and commercial buildings, who have been empowered in
practice to exercise police control on persons and property whilst reporting daily to the relevant Centre for Disease Control.

In terms of legal liability, refusal to execute control measures during Class A epidemics as instructed by the Health Department or the Centre for Disease Control is considered a very serious offence, which may result for offenders imprisoned for up to three years and in especially serious cases up to seven years (Criminal Law, amended in 2015, article 330). Where a company fails to respect such mandatory measures, its legal representative and other persons directly responsible for the violation may be prosecuted for this crime. Moreover, the company itself may, in addition, receive administrative penalties, including an order to cease business activities immediately, a fine of up to RMB 200,000, have their business licence suspended or permanently revoked (Law on Emergency Response, promulgated in 2007, article 64) and possibly confiscation of the unlawful income (Law on Prevention of Infectious Diseases, article 73). Up until now, in practice, it would appear that offenders in most cases get fined, have to quarantine themselves for 15 days and/or are detained by the police for 15 days on the basis of disrupting public order.

During this epidemic period, companies must monitor such government measures on a daily basis and check controls in each region where they have operations. These relevant local rules are normally published on governmental websites or WeChat official accounts, but vary from one city district to another.

We also expect the governmental controls to be downgraded to Class B epidemic soon and progressively, depending on the regions. Our law firm provides more advice on mitigating the risks of non-compliance and dealing with the authorities in the case of a challenge.

2. Employment: how to deal with Chinese and foreign employees

Restarting work as usual may actually prove to be challenging for companies and their HR departments. Nevertheless, it is important for employers to keep in mind the applicable legal framework in order to mitigate any risks of future disputes with the employees (for example, should the time spent next Saturday or Sunday to catch-up on missed work be paid as overtime or normal salary?...) and disclosure of confidential information (how to share company files with free online tools?...)

A safe and healthy workplace

Under Chinese laws and regulations, employers have a general obligation to provide employees with a safe and healthy workplace. Companies and their managers are legally accountable for occupational disease prevention and control (Law on the prevention and control of occupational diseases, promulgated in 2001), so they need to properly delegate such responsibility with their HR and work safety/EHS departments. Companies with over 100 workers and/or particularly exposed to serious health hazards shall even set up an occupational health management organisation (Regulation on workspace occupational health, promulgated in 2012).

When dealing specifically with a Class A epidemic, the Law on Preventing Infectious Diseases (2009) and the recent administrative notices further to the COVID-19 outbreak provides a full list of obligations to be respected by employers, such as reporting personal information on its staff to the relevant Centre for Disease Control, implementing specific sanitary measures (distribution of face masks and hand sanitisers to employees, frequent cleaning and ventilation of the workplace, recommended distance of 1.5 or 2m between employees, temperature checks of employees), putting travellers from Hubei or lock-downed cities on self-quarantine, disseminating health education to the staff on the basis of official information, etc.

Dealing with employees during and after the outbreak

The Ministry of Human Resources and Social Security (MOHRSS) on 24 January published a notice on how to appropriately handle employment relations during the COVID-19 epidemic, in the hope to promote job stability and minimise mass layoffs in China. Although this notice doesn't translate into a law, it is nonetheless an important guideline for employers wishing to remain compliant when paying overtime for work during the extended holiday, calculating salaries during this long suspension of work, dealing with employees who have been infected or quarantined, adjusting the work schedule or annual leave since 10 February, and considering the termination or non-renewal of employment contracts, etc. In addition to the MOHRSS notice at national level, different provinces and cities have issued their own local measures in reaction to the epidemic outbreak (eg; restricting the legal basis for terminating employees, allowing a payment of minimum salary during the work suspension instead of normal wage, encouraging work on Saturdays or Sundays to catch-up, etc). But the legal validity of these administrative notices published in emergency by local authorities may sometimes be questioned.
Employers are advised to communicate and duly document work arrangements with their employees.

Provided the employer abides by the health recommendations from the government and ensures a safe workplace, an employee normally doesn't have the right to refuse to work for fear of pneumonia caused by the COVID-19 and shall abide by the employer's work arrangements. Otherwise, if the employee can't legally justify their absence (eg; sick leave, quarantined...), then he or she may bear corresponding responsibilities for unjustified leave under PRC employment law, its employment contract and/or the Company’s employee handbook.

Employers are also advised to properly document any work arrangement agreed with their employees during the work suspension; for example, have a written agreement with employees on arranging suspended work with reduced salary during the COVID-19 epidemic and then working with normal pay (instead of overtime) on Saturdays or Sundays afterwards to catch-up.

**Privacy and personal data**

In regards to privacy, employers should be particularly cautious to protect employees' personal and family information collected for the purpose of epidemic control, reduce unnecessary disclosure and take appropriate confidentiality measures. Companies in China need to consider relevant cybersecurity regulations and limit the risks of personal information disclosed to the whole staff, the scope of personal health information transferred to headquarters abroad, transfer of personal or important information without the employees express consent, etc. Depending on the type of information exported and the number of persons concerned, further legal restrictions and penalties may apply.

Meanwhile, as many employers have implemented a work-at-home policy, written communication is strongly recommended on the company’s policy and guidelines to ensure business information remains confidential. Companies need to be cautious that, in practice, their employees may save confidential files on free online platforms and share them through various social media software. Legal, HR and IT departments need to check the terms and conditions of any software which is recommended to be used by their employees under the current circumstances.

**Foreign employees**
At this stage, foreigners may still enter China and exit normally with valid travel documents, except for the lockdown of selected cities such as Wuhan or recently Wenzhou.

Companies which employ foreigners to work in China must continue to respect local employment contracts, handle work permit formalities and visa renewals timely (although most immigration departments have announced they can consider to lighten penalties or even make exemptions for late visa renewals because of COVID-19’s restrictions in China). Foreign employees need to also respect their local employment contract and actively keep contact with their employer in China.

Although not mandatory under Chinese law, many international groups with operations in China have repatriated foreign employees and family members to their home countries, in consideration not only of global group HR policy and foreign government's recommendations, but also with regard to global insurance coverage issues.

The main concern currently is rather on the refusal of entry or quarantine restrictions imposed on travellers from China by many foreign countries, which may hinder working abroad normally.

Employers are advised to negotiate and duly document work arrangements, like working remotely albeit with a time difference. If no mutual arrangement can be found, then employers may consider directly applying annual leave or time off in lieu (according to latest guidelines issued by local bureaus of human resources and social security).

### 3. Business discontinuity: force majeure and hardship in contracts

As companies are struggling to resume work further to the COVID-19 crisis, many suppliers won't be able to deliver on time or possibly at all, or may want to change the goods to be delivered; buyers will seek to escape orders or contracts due to an unprecedented drop in demand; shipping companies will reconsider their service if cargo levels don't meet fuel costs; some supplier or buyers may face insolvency, etc.

In terms of legal remedies, a party may consider to claim force majeure or hardship in order to suspend, modify or terminate commercial a contract which can't materially be performed. The date and cause of peril interrupting the business need to be determined.
A matter of dates

The World Health Organisation (WHO) and the public were informed of an outbreak of pneumonia cases at the end of December 2019 and the Chinese authorities identified the new Coronavirus disease as the causative virus on 7 January, 2020. The Ministry of Health decided on 20 January that control measures for Class A epidemics (like plague or cholera) must be immediately implemented in the whole territory and the State Council decided to extend the Chinese New Year public holiday on 26 January. Then the WHO declared on 30 January that COVID-19 constitutes a Public Health Emergency of International Concern (PHEIC).

Contracts generally contain strict requirements about deadline dates or limited time to fulfil certain obligations. When considering contractual time limits further to the COVID-19 crisis, there may be some room to interpret agreements and the definition of business days, taking into account the extension of the public Chinese New Year holiday by the State Council until 2 February and the local authorities until a late date. But at this stage, the governmental measures restricting businesses are still in place as we draft this article end of February. The greatest issue for most companies is rather the uncertainty on when businesses can fully get back to normal: in a few weeks or in several months?

Force majeure and sufficient proof of COVID-19's impact

Regarding contracts which are governed by Chinese law, the General Principles of Civil Law (promulgated in 1986, article 153), the PRC Contract law (promulgated in 1999, article 117) and the General Rules of the Civil Law (promulgated in 2017, article 180) all give the same general definition of force majeure as an "objective circumstance that is unforeseeable, unavoidable and insurmountable".

It is undeniable that not only the COVID-19 epidemic itself, but also the subsequent governmental measures restricting business are unforeseeable (for a contract concluded before January 2020), unavoidable (violations of governmental measures for Class A epidemics result in criminal offence) and insurmountable (it's beyond the control of the parties). The party suffering from such a force majeure event may normally be exempted from legal liability in part or totally, but only if it notifies the other party timely and proves such event actually prevents it to perform its contractual obligation.

In order to help businesses, the Chinese governmental agency CCPIT proposes to issue
relevant certificates from its online platform www.rzccpit.com.

However, merely providing a certificate on the COVID-19 outbreak to its counterparty may be insufficient for most companies from a legal and contractual point of view. The causal link between the epidemic and interruption of business must also be duly documented.

Close attention must be paid to written contracts, as they often include a specific article on force majeure, provide additional definition to such event (including epidemics) and impose a specific procedure to follow (eg; force majeure events may need to be evidenced by certificate issued by a notary public and within a certain timeframe).

In addition, Chinese law provides that the party suffering from a force majeure event shall always try to mitigate the loss caused to the other party and take appropriate measures to prevent unnecessary losses (Contract Law, articles 118 and 119). Depending on the case, these measures might include paying extra expenses in order to meet the contractual deadlines, such as arranging staff to work overtime, subcontracting to suppliers who have reopened or are based in other countries, etc.

Besides, in practice, contracts for international or important projects may often include a clause on 'Business Continuity and Disaster Recovery Plans', which further details the obligations of parties even during a force majeure event. Companies need to seek legal advice in order to properly claim force majeure against their counterparties.

**Hardship**

When force majeure isn't applicable, a party unable to perform its obligation may consider another legal basis: hardship. There isn't a universal legal definition of 'hardship', but it is generally considered as an unforeseen and major change of circumstance which renders the contract obviously unfair to a party or without purpose anymore. Chinese Law doesn't expressly provide for hardship in contractual relationships, but in judicial practice the People's Courts can recognise it as a rupture of the legal principle of fairness under general civil law (Supreme People’s Court, Interpretation no.11 on several issues concerning the application of the PRC Contract Law, published in 2009, article 26). If the party under hardship fails to negotiate a readjustment of contract with its counterparty, then it may ultimately petition to the relevant People’s Court or commercial Arbitration Commission, in the hope to modify or terminate the contract on a case by case basis.

It is common practice when drafting international contracts to include a hardship clause. In that case, the parties need to follow their contract and the result of a dispute related to
the impact of the COVID-19 may be more predictable.

Insurance

COVID-19 is likely to generate insurance claims across all industries. But, as in force majeure or hardship claims, companies need to check the wording in their contracts or insurance policy, especially in regards to proving how this peril interrupted their business and/or generated unforeseen damage.

4. Going forward: Chinese preferential policies to support the economy

China's first stimulus package following COVID-19

More than just a health crisis, the COVID-19 epidemic has also proven to be an economic crisis with millions of companies facing unforeseeable challenges, which cause discontinuity for all industries in China; particularly tourism, travels, food and beverage, offline retail, entertainment and automotive. Factories are struggling to obtain administrative approvals for reopening, transportation of non-essential goods are still restricted and so it is still far from business as usual.

The Ministry of Commerce has just announced that the market is expected to hit bottom in March, then stabilise and stay in recovery mode in Q2. Provided the COVID-19 epidemic remains contained, resumption of work will probably be progressive depending on regions and industries.

The current situation is unprecedented in modern China (even during SARS) and might threaten the very survival of many small and medium-sized enterprises (SMEs) should the crisis continue for another month or two. Taking into consideration this overwhelming impact, China’s central bank announced already on 2 February that it would inject over USD 170 billion into the economy and encourage banks to grants loans at preferential rates. Since 5 February, the State Council and different ministries have published policies aimed at stabilising the markets, supporting companies. Examples include extension of usual deadlines for paying taxes and social insurance, VAT exemption for key emergency supplies and services, and improving online services provided by administrations and courts, etc.

Meanwhile, many provincial and city governments have also issued preferential policies for
companies, Beijing announced 16 incentives to sustain production for SMEs (5 February), Guangdong initiated 20 measures to help enterprises resume work (6 February), Shanghai introduced 28 measures to steady business (8 February), etc. Companies are advised to consult these policies which are published on these local governments' websites and official WeChat accounts; they generally intensify fiscal support for companies in specific industries, instruct state-owned property owners to waive rent for one or two months, restrict banks from terminating loans early if SMEs fail to repay on time etc. Local governments have also launched online platforms specifically to provide up to date information on new administrative regulations and policies for companies during the COVID-19 epidemic.

**National treatment for foreign invested enterprises and subsidies**

It is worthy to note that according to the new Foreign Investment Law (in force since 1 January, 2020), foreign invested enterprises such as Wholly Foreign Owned Enterprises (WFOE) and Joint-Ventures (JV) are legally entitled to these subsidies just as Chinese owned enterprises are, thanks to the principle of national treatment.

More governmental preferential policies for businesses are expected to be issued shortly at both national and local levels.

*During the current COVID-19 epidemic in China, Gowling WLG’s offices in Guangzhou and Beijing are operating as normal, receiving courier and telephone calls. Our team members are all safe and working remotely until the epidemic is alleviated and governmental restrictions lifted. We encourage the use of online video or tele-conference meetings during this period. All the while, we continue to provide uninterrupted service to clients, partners and contacts.

Our long-time commitment to China puts us in front line of assisting clients both locally amid the epidemic outbreak and their headquarters abroad. With travel restrictions, quarantines and other safety measures, our China desks in China, the UK, France, Dubai and Canada can help bridge communications and ensure seamless operations for our clients doing business in China.

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