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ARTICLE

The 'two faces' of cross-border, transactional legal practice during Covid-19: how and from where have lawyers mobilised China's capital flows under lockdown?

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Abstract

The narrative that banks, government departments and state-owned enterprises are the foremost protagonists in shaping China's outbound capital flows has been a commonplace view. This article seeks to expand the focus to include other under-scrutinised players: lawyers. With reference to exporting industries (such as shipping and natural gas), this article explains how lawyers – in tandem with China's governmental and judicial organs – have shifted from enabling outflows to postponing them, as a result of China's Covid-19 *force majeure* regime. Even with capital on pause, Covid-19 has also kept lawyers busy, prompting them to think about how to maximise their firm's proximity to the clients they have and to new clients that they want to win. Accordingly, this article also provides an overview of the techniques used by predominantly Anglo-American law firms to gain access to new legal markets during Covid-19, with a view to winning more work from Chinese capital-exporters and their foreign counterparties.

Keywords: China; legal services; law firms; Covid-19; force majeure; market entry; internationalisation

Introduction

Conventional views on the capital flows generated by and emanating from the People's Republic of China ('PRC' or 'China') utilise the working assumption that such flows are driven by Chinese state levers and/or their interests. The intention of this article is not to refute that view or its commonly accepted primacy, but is to expand the dialogue to include other under-scrutinised advisers and enablers. Lawyers – and the legal services they supply to their clients – are the focus of this article, which considers how lawyers, during Covid-19 lockdowns, have mobilised China's increasingly locked-up capital.

The article's first part addresses practical questions of *'what'* and *'how'*, specifically: *what* has been the relationship between legal services and China's capital flows and *how* was this changed by Covid-19? This article argues that cross-border, transactional legal services are multidimensional and can be described as having 'faces'. Prior to Covid-19, the 'first face' was that of a transaction-enabler. A panoply of transactions – involving outflows of debt capital, equity capital,

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physical and human capital from Chinese capital-exporters to overseas firms – rested upon the involvement of lawyers. This, however, changed as a result of China's Covid-19 *force majeure* regime and government policies that ordered the cessation of business activity. Thus, the 'first face' shifted to a 'second face': the postponement-broker. Rather than continuing to accelerate and mobilise capital outflows, legal services temporarily blunted those flows and exposed them to precarity. Although lawyers advising Chinese capital-exporters and those advising overseas firms both proposed to postpone the flows, this article – with references to case studies drawn from exporting industries (such as shipping and natural gas) – will show that those lawyers would do so with different geneses, through divergent thought processes and with contrasting levels of willingness.

Having discussed the *'what'* and *'how'*, this article in its second part considers questions of *'where'*. Specifically, to *where* have the transaction-enablers and postponement-brokers (re)located and expanded, so as to win work from Chinese capital-exporters and their overseas counterparties? Additionally, given that all legal industries are – to a degree – closed markets, *where* are the mobilisers of China's capital permitted by regulation to practice? This article proposes that – within the context of China's capital outflows during 2020–2022 – five main market entry strategies were observed. These were included: (i) the 'best friend' strategy, (ii) joint ventures, (ii) Swiss *vereins* as *quasi*-mergers, (iv) greenfield expansions and (v) intellectual property agencies. This article will also go on to argue that the strategies – in ascending order – represented increasing cost but also provided law firms with increasing management control to dictate how to deliver legal services.

'First face': legal services as a transaction enabler

Outflows of debt and equity capital

Legal services and lawyers are key enablers of transactions that mobilise capital outflows from China into the wider world. To take one view of this 'first face' of legal practice, one conservative estimate – from a Belt and Road Initiative (BRI) context – indicates that law firms have advised on 90 BRI transactions since 2015, spanning a breadth of commercial law practices.[1] Illustrative matters include the legal work to bring *debt* finance transactions into fruition. For instance, in January 2020, law firm Milbank advised the Industrial and Commercial Bank of China and the Export-Import Bank of China on their €500 million loan financing to support Guinea's road rehabilitation projects.[2] Such work involved striking a bargain that met the different interests of the lender, borrower and credit insurer – and reflecting that bargain in the loan documentation. In the words of Shepard Liu, who was one of two Milbank partners who led the transaction:

> Structuring the deal to meet the credit requirements of Sinosure [China's state-funded export credit insurer] and financeability requirements of the lenders while balancing the sovereignty and interests of the borrower required a flexible and creative approach to find the right solution.[3]

In practice, that solution involved drafting into the documents a commitment by Guinea's Ministry of Finance to allocate taxes that it was due from mining projects as security to meet the credit and financeability requirements. Specifically, doing so would have plausibly required the lawyers to negotiate and document – among other things – *which* mining projects would pay tax that

[1]Michael Yip, 'City of London Law Firms Advising China's Belt and Road Initiative: A Study of Six Years of Engagement' (China, Law and Development Research Brief No 13/2021, 4 Nov 2021) <https://cld.web.ox.ac.uk/files/yiprbformattedfinal-docxpdf> accessed 23 Oct 2022.

[2]Milbank, 'Milbank Advises Chinese Lenders in Sovereign Loans to Republic of Guinea Valued at €500M' (Milbank, 10 Jan 2020) <https://www.milbank.com/en/news/milbank-advises-chinese-lenders-in-sovereign-loans-to-republic-of-guinea-valued-at-euro500m.html> accessed 23 Oct 2022.

[3]ibid. Square backets added for clarity.

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would be used as security for the loan; *what* percentages of tax revenue would be earmarked as security; *who* would manage the bank accounts into which the revenues would be placed; and *whether* such accounts would be placed in escrow. Given that this contractual mechanism had not been implemented in Guinea before and, typically, is not involved in simpler, 'vanilla' loan transactions, the importance of the role played by Milbank lawyers is self-evident.[4]

Banks, however, are not the only category of capital-exporter and – by the same token – bank loans are not the only example of a debt capital outflow from China. Chinese bondholders can also be viewed as 'capital-exporters' by virtue of the outbound flows they mobilise when they purchase bonds from overseas bond issuers. However, given their comparatively high degree of fungibility *vis-à-vis* bank loans, bonds can change hands quickly, repeatedly and easily. Therefore, in the context of *any* bond issuance it is not always possible for outsiders to the transaction to positively identify the 'capital-exporters'. For instance, in a 2021 renegotiation of bond maturity dates involving law firms Addleshaw Goddard and Linklaters, it was thanks to 'a source with knowledge and a source familiar with the matter' that a news website could report: 'the bonds are *understood* to be *predominantly* held by Chinese banks and financial institutions'.[5]

Mergers and acquisitions mobilise *equity* capital and constitute the second broad category of 'capital outflows' that have emanated from China. This is demonstrated through law firm King & Wood Mallesons' work in acting for China National Complete Plant Import and Export Group Corporation (COMPLANT) on its January 2019 acquisition of Tialoc Group, a Singapore-headquartered waste solutions provider. As part of that acquisition, COMPLANT signed a strategic investment agreement, pledging to build Tialoc Group 'into a Southeast Asian business center and environmental protection professional platform.'[6] According to King & Wood Mallesons, bringing this transaction into fruition required providing legal services which included:

> conducting and coordinating due diligence across five countries (namely Singapore, China, Malaysia, Vietnam and Belgium), preparing and negotiating the transaction documents, and assisting the client and other parties with the successful signing and closing of the transaction.[7]

Non-monetary capital outflows

There is a third, all-encompassing category of 'capital outflow' that ought not to be neglected. Rather than covering transfers of capital in the financial sense (ie, debt and equity), the third category refers to transfers of *non-monetary* capital. These include physical assets (eg, plant machinery) or, to take a broad view *in extremis,* human capital in the form of skilled labourers and expertise. An example of both the former and latter would include the US$74 million sale in 2006 by the China South Locomotive & Rolling Stock Industry (Group) Corporation to the Argentinian Ministry of Federal Planning, Public Investment and Services of '*Passenger Cars, Spare Parts, Tools, Technical Documents, Technical Service and Technical Training*'.[8] Such a

[4]ibid.

[5]Reorg Research, Inc, 'Addleshaw-Advised Ad Hoc Group of Suning Appliance Pushes Back Against Proposed Consent Solicitation; To Release Statement Requesting Co. to Reschedule Bondholders' Meeting, Engage Talks' (Reorg Research, 7 Sep 2021) <https://reorg.com/addleshaw-advised-ad-hoc-group-of-suning-appliance-pushes-back-against-proposed-consent-solicitation-to-release-statement-requesting-co-to-reschedule-bondholders-meeting-engage-talks/> accessed 23 Oct 2022. Italics added for emphasis.

[6]King & Wood Mallesons, 'KWM advises the COMPLANT Group on its strategic investment in the Singapore-based Tialoc Group, facilitating the implementation of the "Belt and Road" Initiative project' (King & Wood Mallesons, 25 Jan 2019) <https://www.kwm.com/cn/en/about-us/media-center/kwm-advises-the-complant-group-on-its-strategic-investment-in-the-singapore-based-tialoc-group.html> accessed 23 Oct 2022.

[7]ibid.

[8]'Contract for the Supply of Passenger Cars, Spare Parts, Tools, Technical Documents, Technical Service and Technical Training: La Secretaria de Transporte del Ministerio de Planificación Federal, Inversión Pública y Servicios Gobierno de la

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transaction demonstrates the broad diversity of what may constitute 'Chinese capital' and is reflective the need of scholars to consider the term holistically when discussing current outflow initiatives such as the BRI or nascent ones like the Global Development Initiative.

Without legal services, capital outflows – be they manifestations of debt, equity or otherwise – would be susceptible to dysfunction on multiple fronts. Two prominent fronts include: (i) codifying mutual contractual intent and (ii) mechanical and conceptual coherence.

Codification of mutual contractual intent

The parties involved in a cross-border transaction may struggle to *fully appreciate* the legal implications of certain contract terms. Additionally, parties may find difficulty in *expressing with clarity* their commercial intent through contractual terms within an agreement. This is particularly so, as barrister Jern-Fei Ng noted, if the transaction under contemplation is unfamiliar or if the parties do not share a common working language.[9] In 2021, he elaborated:

> … the source of the disputes tends to stem from perhaps a misperception about what the parties had agreed or perhaps in the course of performance of the contract, which can be traced back to linguistic (ie, language) differences…
>
> … when in the course of negotiating a contract, what really matters is what you put into the contract. That, as those of us who are familiar with the common law-based system will know, is in fact the principle pursuant to which contracts are interpreted under the common law (so, for example, English law, Hong Kong law and Singapore law).
>
> What is not taken into account is the pre-contractual negotiations. The pre-contractual negotiations – what is said by the parties in the course of negotiating the contracts – are, strictly speaking under a common law governing law, not relevant for the purposes of interpreting the contract's concern. So, what really matters… is the text [and] the language that is used in expressing the contractual terms itself.[10]

In view of Jern-Fei Ng's remarks, the need for a legal specialist to provide assistance with expressing, understanding and eventually codifying mutual contractual intent is evident.

Mechanical and conceptual coherence

In particularly complex finance transactions involving what has been described by Matthew Erie and Sida Liu as a 'constellation'[11] of inter-related contracts and terms, a complete understanding of the inter-relationship between one contractual term and another will require the input of a legal specialist.

By way of a hypothetical example, a typical BRI loan financing may involve not only a *loan agreement* between a lending bank and an overseas borrower, but also a number of other contracts.[12]

Nación Argentina (as the Buyer) and China South Locomotive & Rolling Stock Industry (Group) Copr, Shanghai Golden Source International Economic and Trade Development Co, Ltd and CSR Sifang Locomotive & Rolling Stock Co., LTD (jointly as the Seller)' (AidData, 25 Aug 2006) <https://docs.aiddata.org/ad4/pdfs/how_china_lends/ARG_2007_484_1_of_3.pdf> accessed 23 Oct 2022.

[9]Remarks of Jern-Fei Ng, barrister, to the Uzbek Arbitration Week Belt and Road Initiative panel (7 Sep 2021).

[10]ibid. Square brackets added by the authors.

[11]Matthew S Erie & Sida Liu, 'The Forms and Architects of China's International Legal Order' (2021) 46 Yale Journal of International Law 47 <https://cpb-us-w2.wpmucdn.com/campuspress.yale.edu/dist/8/1581/files/2021/07/Erie-Liu-Forms-Architects-of-Chinas-Intl-Legal-Order-YJIL.pdf> accessed 23 Oct 2022.

[12]The lending back may not always be a Chinese state-owned bank.

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These contracts fall into three broad categories: (i) finance documents, (ii) project documents and (iii) shareholder (or equity) documents.

Aside from the loan agreement, other finance documents may include, firstly, a *guarantee agreement* between the lending bank and what is typically a Chinese state-backed guarantor,[13] to cover the bank from losses arising from borrower default on the loan. Secondly, where multiple loans from multiple lenders are being used to finance the project, a *common terms agreement* between those lenders (and, where appropriate, any guarantors) will identify the contractual terms that are to be consistent across all loans.[14]

A 'constellation' of contracts also makes up the category of project documents. For example, in cases where the provision of finance is conditional upon the procurement of certain goods from certain suppliers, an *export contract* will stipulate what and who these will be. Meanwhile, where land is required for a large infrastructure project, a *licence* or *concession agreement* between the borrower and host country's government gives the borrower the conditional right to develop the land, pursuant to the borrower's fulfilment of environmental and social obligations.[15] Additionally, *construction agreements* will be required so that the project may be built; *operating and maintenance agreements* are necessary so that the project can be staffed and looked after; *fuel supply agreements* will ensure that the project's energy needs are met; and *offtake agreements* will set out the terms on which the output of the project will be sold so that revenue may be generated.[16] Finally, under the category of shareholder documents, a *shareholder agreement* will set out the terms on which the project's investors will seek to work together to develop the project for profit.

Given these documents – and more[17] – would exist in parallel to one another *within the same transaction*, they must be drafted and negotiated to exist and operate in coherence. What this means on a *mechanical level* is that cross-references require the correct clause numbers and, where they are used, defined terms only refer to one meaning and are used consistently. However, the documentation will need to cohere on a *conceptual level*, too. For instance, timed disbursements under the loan agreement will need to be sequenced in chronological synchronisation with the payment dates stipulated in the export contracts, so that loan proceeds can be released in time for the borrower to pay suppliers. A final example of conceptual coherence is the absence of any 'infinite loops' in the documentation. Such loops can arise where the fulfilment of conditions is drafted to be co-dependent on each other, producing a result in which both conditions are never fulfilled.[18]

The result should be a functioning inter-relationship between clauses in the same agreement, as well as between clauses in different agreements. Consequently, the input of lawyers is not only critical but also unique. This is because only lawyers receive specialised training in legal risk assessment, drafting and commercial law that other professional service providers involved in financial transactions (eg, bankers and accountants) do not. Equipped with those skills, lawyers can work to facilitate the satisfactory due diligence for, negotiations and documentation of China's capital outflows.

Capital-exporting transactions during Covid-19: enabled, postponed or abandoned?

The disruptive impact of successive Covid-19 lockdowns, quarantining and social distancing measures on the macroeconomy, production processes and supply chains – both globally and in China – has been well-documented. Although transactional lawyers were typically able to continue their practice from the safety of their own homes, legal services that facilitated capital-exporting

[13]Within the context of China's outbound capital flows, typical examples of such guarantors include the Export-Import Bank of China, which offers 'preferential buyer credit *guarantees*' to induce bank lending that finances a Chinese export.

[14]Neil Cuthbert, 'A Guide to Project Finance' (Dentons, 2013) <https://www.dentons.com/~/media/6a199894417f4877adea73a76caac1a5.ashx> accessed 23 Oct 2022.

[15]ibid.

[16]ibid.

[17]A full discussion of the documents involved in a BRI infrastructure financing falls outside the scope of this paper.

[18]In other words, if 'A' is dependent on 'B' and 'B' is dependent on 'A', how are 'A' and 'B' ever to occur?

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transactions did not escape disruption and evolution. A case study that illustrates this is found in the *pro forma* 'boilerplate'[19] contract terms relating to the civil law concept of *force majeure*. During the imposition of lockdowns throughout 2020, *force majeure* clauses attracted newfound and urgent scrutiny – by not only transaction parties, but also government bodies and the judiciary (both of which would come to issue their own certificates and pronouncements on *force majeure*). Accordingly, the work of lawyers in shepherding capital-exporting transactions through a changing *force majeure* environment necessarily evolved. This is explained below.

Form of Force Majeure Certificates

During Covid-19's onset, China-based, capital-exporting businesses encountered difficulties in performing their contracts with overseas counterparties. In response, the China Council for the Promotion of International Trade (CCPIT)[20] announced in early 2020 that it would offer *Force Majeure* Certificates ('FM Certificates') to those businesses. What were these certificates? Typically, FM Certificates contained an affirmation that companies within a given 'administrative area' (ie, a Chinese province) were prohibited by the People's Government from operating before a certain date. Some FM Certificates went further to positively stipulate a date by which production *would* resume. Meanwhile, other FM Certificates covered significantly different scenarios aside from cessations of production; they included a broader range of impediments (some more severe than others). The range included 'restrictions on entry, flight cancellation, port restrictions, withdrawal of travel agencies, performance of notification obligations, expropriation of medical materials and web certification'.[21]

However, whatever the wording of the FM Certificates – which tended to vary principally because the People's Government notice to which they referred had different titles and scopes[22] – all certificates appeared to comply with the same procedural requirements. Namely, these were that FM Certificates not only bear a unique reference number and QR code, but were also signed, stamped and dated by an authorised CCPIT signatory. An illustrative sample of FM Certificate wording is reproduced below:

> THIS IS TO CERTIFY THAT: According to the "Notice of the General Office of [the] People's Government of Zhejiang Province on the postpone [*sic*] of product recovery of companies and the suspension of school classes" issued by [the] People's Government of Zhejiang Province on January 27, all the companies are forbidden to recover production before 24:00 February 9 (Sunday), and work will start on February 10 (Monday).[23]

Trends in the Issuance of Force Majeure Certificates

The first FM Certificate was issued on 2 February 2020 to an automotive parts manufacturer in Huzhou, Zhejiang Province. According to the CCPIT, the manufacturer was unable to deliver steering gear housings to its overseas clients (in this case, one of Peugeot's Africa-based factories)[24] on

[19]Template contract wordings that can be re-used without significant modifications.

[20]The CCPIT is a 'national foreign trade and investment promotion agency', performing a function that is broadly analogous to a chamber of commerce. See China Council for the Promotion of International Trade, 'About CCPIT' (CCPIT, 24 Mar 2016) <https://en.ccpit.org/infoById/40288117521acbb80153a75e0133021e/5> accessed 23 Oct 2022.

[21]China Council for the Promotion of International Trade, 'CCPIT Provides COVID-19 Force Majeure Certificates and Other Services' (CCPIT, 13 Mar 2020) <https://en.ccpit.org/infoById/40288117668b3d9b0170d2952a7f0799/2> accessed 23 Oct 2022.

[22]Some People's Government notices, for example, only covered the closure of production facilities. Others also cover school closures.

[23]Sarah Yu, 'CCPIT issues the first force majeure cert for coronavirus-hit businesses' (Xinde Marine News, 4 Feb 2020) <https://www.xindemarinenews.com/m/view.php?aid=17793> accessed 23 Oct 2022. Square brackets included for ease of reading.

[24]French car producer.

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time due to the outbreak. In addition to the reputational damage, the potential liability arising from this breach of contract was claimed to have amounted to RMB 32.4 million.[25] Reportedly, the CCPIT processed the application form from the automotive manufacturer and issued the FM Certificate in two days.[26]

Since that first issuance, and as of 20 April 2020, the CCPIT had issued 7,004 FM Certificates with respect to contracts amounting to about RMB 690 billion.[27] However, a few months later, there were indications that issuances had plateaued. A 'return to normalcy'[28] in the manufacturing sector more generally – concomitant with the absence of FM Certificate press release data from April 2020 to September 2022 – suggest that not only the need for FM Certificates had receded but also – in more recent times – there was increasingly less to report regarding issuances. The CCPIT concurred: 'The factors for which enterprises are unable to perform contracts during the pandemic are gradually eliminated, and the demands to apply for the certificates have greatly decreased.'[29]

Issuance of Force Majeure Certificates, by industry

What types of transactions have involved the use of FM Certificates? Three transaction characteristics recur. First, FM Certificates were typically issued in respect of transactions of *non-monetary capital*. In addition to car parts (discussed above), other examples included container ships and liquid natural gas (these are discussed in further detail below). By their intangible nature, transactions of debt and equity capital did not require in-person production processes (indeed, such transactions were conducted virtually) and therefore were relatively immune from the application of Covid-19 health regulations and, in turn, from needing an FM Certificate.

Second, FM Certificates were commonplace in sectors in which in-person (or 'offline') production process were required. According to the CCPIT: 'The certificates issued involve more than 30 industries in China, among which manufacturing, production and distribution of power, heat, gas and water, wholesale and retail, construction, leasing and business services are the five areas with the most certificates issued.'[30]

Third, as is explored further below, FM Certificates appear to have been conceived and issued with predominantly capital *outflows* in mind. Tellingly, 'most' of the applications for the certificates had been submitted by Chinese exporters, rather than importers.[31]

Commercial and legal objects of Force Majeure Certificates

What were FM Certificates to be used for? The objective of issuing FM Certificates was to 'assist [capital-exporting businesses] in prospective disputes with foreign counterparties arising as a result

[25]China Council for the Promotion of International Trade, 'CCPIT Offered the First Force Majeure Certificate of Novel Coronavirus (2019-nCoV)' (CCPIT, 6 Feb 2020) <https://en.ccpit.org/infoById/40288117668b3d9b017019772b5706b0/2> accessed 23 Oct 2022. Comprising not only 'direct losses' of RMB 2.4 million for breach of contract, but also recoverable losses of approximately RMB 30 million arising from two weeks of production line shutdown.

[26]ibid.

[27]China Council for the Promotion of International Trade, 'CCPIT Carried out International Communications on Force Majeure Certificates' (CCPIT, 30 Apr 2020) <https://en.ccpit.org/infoById/40288117668b3d9b0171c8e0ef5408a2/2> accessed 23 October 2022.

[28]Norbert Meyring, Thomas Bailey and Alice Jin, 'Rebooting manufacturing in mainland China' (KPMG, Feb 2020) <https://home.kpmg/cn/en/home/insights/2020/02/rebooting-manufacturing-in-mainland-china.html> accessed 23 Oct 2022.

[29]'CCPIT Carried out International Communications on Force Majeure Certificates' (n 27).

[30]China Council for the Promotion of International Trade, 'National Trade Promotion System Has Issued Over 4000 Force Majeure Certificates' (CCPIT, 13 Mar 2020) <https://en.ccpit.org/infoById/40288117668b3d9b0170d1e7916b0795/2> accessed 23 Oct 2022.

[31]Bate Felix & Jessica Jahanathan, 'UPDATE 4-France's Total rejects force majeure notice from Chinese LNG buyer' (Reuters, 6 Feb 2020) <https://www.reuters.com/article/china-health-total-idCNL8N2A66BX> accessed 23 Oct 2022.

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of the actions being taken by the Chinese government which were, at that time, relatively unique.'[32] In its press releases, the CCPIT indicated that FM Certificates could provide more than mere 'assistance', by adding that FM Certificates were issued to '*exonerate*'[33] and '*shield* [capital-exporting] companies from legal damages arising from the epidemic outbreak'.[34] Did the FM Certificates fulfil these objects? The answer depends on which law was agreed by the parties as the 'governing law' or 'applicable law' of the contract: (i) PRC law, (ii) a foreign common law or (iii) a foreign civil law. Each of these three laws, and how they regulated *force majeure* for a capital-exporting transaction, are discussed below.

The statutory position of Force Majeure Certificates in Chinese law-governed transactions

The *pre-pandemic* starting point for understanding the extent to which FM Certificates would have provided protection to China-based businesses engaged in a capital-exporting transaction *governed by PRC law* is found in the PRC Civil Code. Specifically, as at the time of writing in December 2022, Article 180 states that 'A person who is unable to perform his civil-law obligations due to *force majeure* bears no civil liability, unless otherwise provided by law.'[35] Article 180 then goes on to define *force majeure* as 'objective conditions which are unforeseeable, unavoidable, and insurmountable.'[36]

From the perspective of capital-exporters, the conundrum associated with Article 180's position stemmed from the article's broad construction; in other words, it has a 'general character'. The issue at hand was that Article 180 did not explicitly refer to pandemics or their associated lockdowns as satisfying the un-foreseeability, un-avoidability and insurmountability requirements. As a consequence, it would have been incumbent on capital-exporters and lay readers to make uncertain (albeit educated) guesses that the Covid-19 pandemic *would* indeed be deemed as an 'objective condition' satisfying the three requirements.[37] This would have been more likely than not, especially as the SARS outbreaks in the early 2000s constituted *force majeure* in the eyes of PRC judges.

To address the ambiguity in Article 180, the Supreme People's Court issued the *Guiding Opinions on Several Issues Regarding the Proper Trial of Civil Cases Involving the New Coronavirus Epidemic in Accordance to Law (I)* ('the Opinions (I)'). Of particular significance to the applicability of *force majeure* to Covid-19 business disruption was the Opinion (I)'s explicit declaration that:

> For civil disputes directly affected by the epidemic situation or the epidemic prevention and control measures that meet the statutory requirements of force majeure, Article 180 of the General Rules of Civil Law of the People's Republic of China and Article 117 and Article 118 of the Contract Law of the People's Republic of China and related provisions shall apply.[38]

[32]James Carter et al, 'Force Majeure Certificates in a global context: What are they and what is their effect?' (DLA Piper, 30 Apr 2020) <https://www.dlapiper.com/en/uk/insights/publications/2020/04/force-majeure-certificates-in-a-global-context/> accessed 23 Oct 2022. Square brackets added for explanation.

[33]China Council for the Promotion of International Trade, 'CCPIT Commercial Certification Center Provides Force Majeure Certificates of Novel Coronavirus Pneumonia Service' (CCPIT, 21 Feb 2020) <https://en.ccpit.org/infoById/40288117668b3d9b0170671f67f30716/2> accessed 23 Oct 2022. Italics added for emphasis.

[34]ibid. Square brackets added for clarity and italics added for emphasis.

[35]Civil Code of the People's Republic of China 2020, art 180 <http://www.npc.gov.cn/englishnpc/c23934/202012/f627aa3a4651475db936899d69419d1e/files/47c16489e186437eab3244495cb47d66.pdf> accessed 23 Oct 2022.

[36]ibid.

[37]Tong Zhong Min Er Zhong Zi No 00030 [2015]; Zui Gao Fa Min Zai No 220 [2016].

[38]Mimi Zou, 'Guiding Opinion on the Proper Handling of Civil Cases Involving the Novel Coronavirus Outbreak in Accordance with the Law (1)' (China Law Translate, 20 Apr 2020) <https://www.chinalawtranslate.com/en/guiding-opinion-on-the-proper-handling-of-civil-cases-involving-the-novel-coronavirus-outbreak-in-accordance-with-the-law-1/> accessed 23 Oct 2022. However, it should be noted that the Opinions (I) were issued approximately one month before the PRC Civil Code entered into force. Therefore, the Opinions (I) did not refer to the PRC Civil Code but instead referred to the PRC General Principles of the Civil Law and the PRC Contract Law. This, however, is of little practical significance for the purposes

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Accordingly, the declaration in Opinions (I) confirmed that not only the pandemic itself, but also the associated 'epidemic prevention and control measures' (eg, lockdowns) would constitute *force majeure*. As Zang Tiewei simply put it:[39] 'For the parties who are unable to perform the contract, the epidemic is unforeseeable, unavoidable and insurmountable *force majeure*.'[40] However, although statements such as Zang's were clarificatory and helpful, law firm DLA Piper advised in a client circular:

> this does not mean that this is automatically the case for all contracts and related obligations. It must be checked in detail whether the requirements of objective circumstances which are unforeseeable, unavoidable and insurmountable are really fulfilled for the specific contract and the specific contractual obligations.[41]

In other words, the promulgation of Opinions (I) did not give Chinese capital-exporters a *carte blanche* to freely declare *force majeure* when it may have been commercially or tactically advantageous for them to do so. Rather than operating in an *ipso facto* manner, the Opinions (I) operated in a *prima facie* one. Therefore, for a Chinese capital-exporter to have claimed *force majeure,* it must have taken the further step of *factually demonstrating a causal relationship* between the following three elements: (i) 'the pandemic', (ii) 'the requesting party's effort in prevention and control' and (iii) 'its failure to perform contracts'.[42] Doing so required Chinese firms to address questions such as: 'did the geographic area of the lockdown apply to the site of my production facilities?' and 'did the specified duration of the lockdown correlate to the time period in which the goods would have been produced and delivered?'. Other considerations may include whether it could have been possible to re-allocate or repatriate resources to other projects in areas where the pandemic was less severe, as has been attempted by at least one Chinese state-owned company.[43]

Such a requirement to factually demonstrate a causal relationship between the three elements listed above, as a consequence, may have left open possibilities that some Chinese firms may have successfully applied for and received an FM Certificate but, following a contestation in court and by the determination of judges, would not have been able to factually evidence all three elements.

Assuming, however, that a Chinese capital-exporter was successful in evidencing a causal relationship between all three elements to argue *force majeure*, doing so would have been commercially and tactically significant. This is because it conferred two benefits to the Chinese firm. First, it provided confidence to Chinese firms that their FM Certificate would likely be *prima facie* effective, recognised and persuasive in establishing *force majeure* in the eyes of not only the transaction parties but also the PRC courts (that is, if the capital-exporting transaction was governed by PRC law). Second, *per* the PRC Civil Code, 'The parties may rescind the contract…',[44] which has the legal effect of 'reinstat[ing] the original position of the parties prior to the contract.'[45] Accordingly:

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of this article: the rules concerning *force majeure* remained largely unchanged following the promulgation of the PRC Civil Code. (Interestingly, although a full discussion falls outside the scope of this article, the PRC Civil Code also provided an alternative 'route' that could also have given protection to capital-exporting businesses: the 'change of circumstances' doctrine. Under this doctrine, unavoidability and insurmountability did not need to be demonstrated: Civil Code of the People's Republic of China 2020 (n 35) art 533.)

[39]A spokesperson for the Commission of Legislative Affairs of the National People's Congress (NPC) Standing Committee.

[40]'CCPIT Commercial Certification Center Provides Force Majeure Certificates of Novel Coronavirus Pneumonia Service' (n 33).

[41]Ulrike Glueck, Michael Munzinger & Angela Chan, 'Does the Coronavirus Outbreak constitute Force Majeure?' (CMS China Insight, 2020) <https://www.cms-china.info/insight/2020_China/02_Corporate/Newsletter_Corporate.html> accessed 23 Oct 2022.

[42]'CCPIT Carried out International Communications on Force Majeure Certificates' (n 27).

[43]Remarks given by Shenying Peng, General Counsel and Chief Compliance Officer of PowerChina International Group Limited, to the Uzbek Arbitration Week Belt and Road Initiative panel (7 Sep 2021).

[44]Civil Code of the People's Republic of China 2020 (n 35), art 563(1).

[45]Mo Zhang, *Chinese Contract Law - Theory & Practice* (2nd edn, Brill 2020) 308. Square brackets included to show an omission, made for ease of reading.

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> Where a party is unable to perform the contract due to *force majeure*, he shall be exempted from liability in whole or in part according to the impact of the *force majeure*, unless otherwise provided by law.[46]

The statutory position of Certificates in transactions governed by non-Chinese laws

Given that transaction parties were (and remain), as a general rule, free to nominate any governing law of their choosing, not all transactions involving Chinese capital-exporting firms would have been governed by PRC law. The implication of this was that, where a non-PRC law was chosen, *force majeure*: (a) would have needed to be established differently and (b) would not necessarily have conferred the same rights as would be the case under a PRC law-governed contract. Such an implication was acknowledged at the time by the CCPIT's Director of Commercial Certification Department Zhang Hanrong, who said: 'whether or not the Chinese enterprise accepts the requests and exempt its foreign counterparts' liabilities, both parties are bound by the Applicable Law applied to the contract(s)…'[47]

Accordingly, to take the most divergent example from common law jurisdictions for comparative purposes: both English law and Hong Kong law have 'no freestanding [or, in other words, a legislative or statutory] concept of *force majeure*'[48] that courts in those jurisdictions would recognise *per se* (although FM Certificates may be considered as 'useful evidence'[49]). Consequently, Chinese capital-exporters with common law-governed contracts who intended to claim the benefits of *force majeure* needed to demonstrate that: (i) the contract contained a *force majeure* clause and (ii) the clause 'expressly refers to the issuance of *FM Certificates* as an event which can be relied on, as may be the case in some contracts entered into by parties from the PRC'.[50] Without (i) and (ii), Chinese firms would have been unable to validly claim *force majeure* before a court in a common law jurisdiction. Both (i) and (ii), therefore, served to constrain the availability of *force majeure* to Chinese capital-exporters.

Civil law jurisdictions, however, treated *force majeure* in a manner similar to China during Covid-19. For instance, the Italian Ministry of Economic Development adopted Circular No 0088612, which empowered chambers of commerce to issue FM Certificates to Italian firms.[51] Elsewhere, although France did not issue FM Certificates, the French Ministry of Economy and Finance's Directorate of Legal Affairs issued a note in relation to public-private procurement that indicated the recognition of Covid-19 as a *force majeure* event. This position was then affirmed by the French Court of Appeal.[52] Under both jurisdictions, *force majeure* would also be assessed *in concreto:* that is, 'in concrete terms' by reference to an evidenced, factual matrix.[53]

[46]ibid, art 590.

[47]'CCPIT Carried out International Communications on Force Majeure Certificates' (n 27).

[48]'Force Majeure Certificates in a global context: What are they and what is their effect?' (n 32). Square brackets added for clarity.

[49]ibid.

[50]ibid, emphasis added. Contract laws for England and Hong Kong also include the principle of 'frustration', which can produce similar outcomes to the exercise of force majeure insofar as 'parties are released from their future unperformed obligations'. See Wilson Antoon & Paul Starr, 'Novel Coronavirus Covid-19: Force Majeure and Frustration under PRC, English and Hong Kong Laws – KWM' (King & Wood Mallesons, 28 Sep 2022) <https://www.kwm.com/uk/en/insights/latest-thinking/noval-coronavirus-covid19-force-majeure-and-frustration.html#_ftn14> accessed 23 Oct 2022; *Channel Island Ferries Ltd v Sealink* [1988] 1 Lloyd's Rep 323; *Goldlion Properties Ltd v Regent National Enterprises Ltd* (2009) 12 HKCFAR 512

[51]Guilio Maroncelli & Roberta Padula, 'COVID-19 emergency - Force majeure certificates issued by the Chambers of Commerce in Italy' (DLA Piper, 8 Apr 2020) <https://www.dlapiper.com/en/uk/insights/publications/2020/04/covid-19-emergency---force-majeure-certificates-issued-by-the-chambers-of-commerce-in-italy/> accessed 23 Oct 2022.

[52]Marine Lallemand, 'The coronavirus COVID-19 pandemic in France – force majeure and contractual good faith' (DLA Piper, 10 Apr 2020) <https://www.dlapiper.com/en/uk/insights/publications/2020/04/the-covid19-force-majeure-and-good-faith/> accessed 23 Oct 2022.

[53]ibid.

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Force Majuere Certificates and the 'first face' of legal practice

So far, this article has established how the combination of FM Certificates, PRC Civil Code and Opinions (I) operating in tandem with each other could serve to 'shield' and 'exonerate' Chinese capital-exporters from contractual breach. However, what is the link between the shielding-*cum*-exoneration and the 'first face' of cross-border, transactional legal services? For instance, does the former enable the other?

Ostensibly, the answer is 'no'. The exemption from liability during Covid-19 lockdowns enabled and is likely to have incentivised the recission of contracts and the abandonment of transactions. This fundamentally ran contrary to the *raison d'être* of the 'first face', which is to *enable* transactions. However, given that FM Certificates were not intended to be used as 'trump cards'[54] for a party to exempt themselves from liability either capriciously or at will (and given that this would ultimately be contestable in the courts), there is evidence that *force majeure* declarations did not *ipso facto* lead to the abandonment of transactions. Instead, FM Certificates played an alternative, 'postponing' role. This is discussed below.

'Second face': legal services as a postponement-broker

The Hebei exports case: shifting from abandonment to voluntary postponement

In some transactions, a voluntary 'postponing' effect arose. This is because the rights under *force majeure* promoted two behaviours among parties that served to prolong a 'grace period' and preserved goodwill in respect of capital-exporting transactions that – *through no fault of either party – were already on the precipice of breakdown*. The first behaviour was to renew the contractual 'meeting of minds'.[55] For instance, in conversation on the factors contributing to the *force majeure* declaration, 'Chinese enterprises [were] advised to fully understand the plight of their counterparts first and assess whether or not they have performed the duty of informing and loss reduction according to their contracts.'[56] *Force majeure* 'plights' were also 'understood and recognized'[57] by overseas counterparties, with whom Chinese parties could better attempt to 'conduct friendly negotiations and seek alternative solutions on the basis of mutual understanding.'[58]

Following this, the second behaviour was to salvage whatever rights and obligations were salvageable. In other words, Chinese capital-exporters were called upon to:

> create conditions *to perform the contract as much as possible* from the perspective of maintaining a good cooperative relationship. And enterprises should also negotiate and discuss the alternative plans when it is impossible to perform the contract, to reduce the losses of all parties as much as possible…[59, 60]

[54]'CCPIT Commercial Certification Center Provides Force Majeure Certificates of Novel Coronavirus Pneumonia Service' (n 33).

[55]*Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256.

[56]'CCPIT Carried out International Communications on Force Majeure Certificates' (n 27). Square brackets added to retain a consistent tense.

[57]China Council for the Promotion of International Trade, 'CCPIT Issues the Force Majeure Certificates of Novel Coronavirus Disease (COVID-19) for Enterprises' (CCPIT, 26 Feb 2020) <https://en.ccpit.org/infoById/40288117668b3d9b017080e1f9b5072f/2> accessed 23 Oct 2022.

[58]'CCPIT Carried out International Communications on Force Majeure Certificates' (n 27).

[59]'CCPIT Issues the Force Majeure Certificates of Novel Coronavirus Disease (COVID-19) for Enterprises' (n 57). Italics added for emphasis.

[60]Having said this, the CCPIT shrewdly advised: 'In addition, in view of the situation that the COVID-19 is spreading worldwide, CCPIT Commercial Legal Services suggests that enterprises should not assign an overly precise performance date when

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As a consequence, the sum effect of both behaviours was an increased likelihood that contracts were voluntarily postponed, rather than abandoned. As the CCPIT's Director of Commercial Certification Department Zhang Hanrong said: 'the enterprise keep[s] their orders and perform [s] contracts as soon as conditions allow.'[61] According to a small number of individualised case studies, this appears to have materialised in practice to some extent. In one anonymised case:

> It is reported that after an enterprise in Hebei Province negotiated with and provided the certificate for its German customer, the latter not only extended the delivery term of more than RMB 700,000 of goods under the previous contract by half a month, but also signed a new purchase order with it. The enterprise said that the certificate had helped it avoid the risk of compensation, stabilized the supply chain and safeguarded its international reputation to the greatest extent.[62]

In another testimonial, the chairman of a business-to-business e-commerce company indicated 'This certificate helps us stabilize the trade, ensures the project implementation, and saves a contract worth 14 million yuan. What's more, it also protects the reputation of our company…'[63] However, was the shift to voluntary postponements limited to two anecdotal cases? According to the CCPIT's own data, this does not appear to have been the case: by April 2020, the CCPIT reported that 'Nearly 60% of the contracts concerned are expected to be maintained by delaying the contract performance'.[64] However, given that commercial contracts can be and are typically kept private between the contracting parties, veracity is an issue and it is likely to be prohibitively difficult for independent investigations to verify the CCPIT's '60%' figure.

Voluntary postponement as a tactical and behavioural phenomenon

The FM Certificate's postponement effect was, in essence, a *tactical and behavioural* phenomenon. The phenomenon was not a legal or doctrinal one *per se*. This is significant because postponements could have been proposed, agreed and implemented entirely independently of the developments occurring in the *force majeure* regimes in each country's statute books. In other words, the agency of parties to postpone a contract by mutual consent transcended that of national law. What this also meant is that, although lawyers would have, in practice, been consulted, postponements did not necessitate the commission of legal services *per se*.

Legal services: evolving from transaction-enabler to postponement-broker

There is little transaction-level, open-source data on the extent to which lawyers – whether in private practice or acting as in-house counsel – have brokered postponements. This dearth of information is unsurprising: the process to apply for an FM Certificate was designed to be accessible to lay persons, who were at liberty to negotiate their own postponements without legal input. Additionally, the postponement of transactions was unlikely to be newsworthy and, therefore, to justify a press release by a firm. Furthermore, capital-exporters were likely unwilling to advertise postponements:

negotiating with clients about delaying contract performance and may add relevant conditions to it.' See China Council for the Promotion of International Trade, 'CCPIT Guides Enterprises to Leverage Force Majeure Certificates, which Help to Maintain Nearly 60% Contracts' (10 Apr 2020) <https://en.ccpit.org/infoById/40288117668b3d9b017163990e5a082a/2> accessed 23 Oct 2022.

[61]'CCPIT Carried out International Communications on Force Majeure Certificates' (n 27). Square brackets added for ease of reading.

[62]'CCPIT Guides Enterprises to Leverage Force Majeure Certificates, which Help to Maintain Nearly 60% Contracts' (n 60).

[63]China Council for the Promotion of International Trade, 'Successful case: Force Majeure Certificate of COVID-19 Proves Helpful for ERUI International Electronic Commerce Co., Ltd.' (CCPIT, 9 March 2020) <https://en.ccpit.org/infoById/40288117668b3d9b0170bd2ec4bd0770/2> accessed 23 Oct 2022.

[64]'CCPIT Guides Enterprises to Leverage Force Majeure Certificates, which Help to Maintain Nearly 60% Contracts' (n 60).

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delays in contract performance – whilst understandable and commonplace during Covid-19 – would have remained an unwelcome occurrence, rather than a celebratory milestone. However, on an anecdotal basis, it has been possible to infer that legal services have played three roles to help secure postponements for Chinese capital-exporters.

First, both Chinese and foreign counsel advised the capital-exporters, whether in respect of: (i) the specific provisions in their contracts that cover *force majeure;* (ii) the implied provisions of *force majeure* arising from statute or general law; or (iii) both (i) and (ii) in parallel.[65] One month since the first FM Certificate was issued, the CCPIT announced it had 'utilized the network of international legal cooperation, and united with law firms and legal institutions in more than 50 countries *to provide professional legal services for the virus-hit enterprises* who have encountered difficulties in performing international trade and investment contracts…'[66] On a public-facing level, this manifested in the publication of 'legal guidance' resources for public use, which included: *Procedures and Precautions for Claiming Force Majeure to Foreign Customers* and *How to Deal with the Difficulties in Performing Foreign Contracts During the Outbreak of COVID-19?*.[67] Here, what is most notable about the CCPIT's announcement is that legal service providers were convened by the CCPIT in what appears to be an effort to maximise the geographic coverage of their legal advice to Chinese capital-exporters.

Second, both Chinese and foreign counsel advised the CCPIT *itself*: 'CCPIT Commercial Legal Services strengthened cooperation with law firms and legal institutions in more than 50 countries and *studied the legal systems of the United States, the United Kingdom, Germany, France, Italy, Spain, Singapore, Malaysia, Thailand, Australia and other countries…*'.[68] Such advice, presumably, centred on the interplay between China's regime on *force majeure* and overseas regimes. Additionally, transnational regimes on *force majeure* – particularly the United Nations Convention for Contracts on International Sale of Goods – also appear to have been a subject of research.

Third, despite the clear emphasis placed by the CCPIT on incentivising voluntary postponements, not all transaction parties have agreed to them. Accordingly, counsel had also acted on disputes: 'CCPIT will work closely with the team of foreign cooperative lawyers to safeguard the rights and interests of enterprises through legal channels.'[69]

The cases of Seaspan and Total: reluctance to accept FM Certificates

So far, much discussion has centred on how governmental and judicial drivers emanating from China have mobilised lawyers to support the adoption of FM Certificates and to play a 'postponement-brokering' role. However, it would be remiss to conclude that this 'mobilisation' permeated throughout all transactional legal services during Covid-19. It would be remiss because other significant, non-governmental and non-judicial drivers were at play. Indeed, what also shaped the advice and services provided by lawyers were their clients' commercial interests and, accordingly, the clients' instructions to counsel. Those interests would have varied from business to business. Given this, the commercial objectives and interests of a given party and their counterparty did not *uniformly* embody the optimistic 'mutual understanding' or *uniformly* embrace the use of FM Certificates, as espoused by the CCPIT. This is illustrated by the cases of Seaspan and Total.

[65]Remarks of Jern-Fei Ng, barrister, to the Uzbek Arbitration Week Belt and Road Initiative panel (7 Sep 2021).

[66]This, however, is not to say that all legal services on force majeure received by Chinese capital-exporters were provided via the CCPIT. Undoubtedly, many capital-exporters will have instructed their own counsel without any involvement from the CCPIT. China Council for the Promotion of International Trade, 'CCPIT Unites with Law Firms and Legal Institutions in More than 50 Countries to Provide Legal Services for the Virus-Hit Enterprises' (CCPIT, 23 Mar 2020) <https://en.ccpit.org/infoById/40288117668b3d9b01710524ffbd07c0/2> accessed 23 Oct 2022. Emphasis added. The law firms were unnamed.

[67]ibid.

[68]ibid. Italics added for emphasis.

[69]ibid.

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The Seaspan shipping case

An outright refusal of an FM Certificate (which, in turn, diminished the likelihood of a postponement) was illustrated in the case of Seaspan, a global ship owner and lessor. During August 2022, an undisclosed Chinese shipyard presented FM Certificates to Seaspan in connection to the construction and supply of four 7,700 TEU[70] dual-fuel liquefied natural gas container ships.[71] Seaspan rejected the certificates.[72] Seaspan explained: 'Due to certain [closing] conditions in the contracts not being fulfilled by the counterparty, the contracts have become null and void'[73] and the transaction as a whole was subsequently abandoned.[74] Why was a postponement not agreed to allow time for the shipyard to fulfil the closing conditions? One reason, conjectured by this article, is that an evaluation of what was actually in Seaspan's commercial interest precluded a postponement. Those interests may have included the following: (i) Seaspan considered the container ships as a critical part of business operations – and required their delivery by a certain date and (ii) Seaspan was ready to fulfil its payment obligations on time to successfully buy the ships. By induction, this article conjectures that Seaspan's interests in (i) and (ii) would have led lawyers to insist upon the fulfilment of the contract's terms as-was, rather than propose a modification to accommodate a *force majeure* postponement.

The Total natural gas case

The misalignment between the interests of Chinese firms and their overseas counterparties *vis-à-vis* FM Certificates were evident in Chinese *inbound* transactions, too. This was illustrated in a case involving Total, a French petrochemical company. Total had contracted to sell liquefied natural gas (LNG) to a Chinese buyer, who presented an FM Certificate. Total, insisting that the shipment be accepted and payment be made, refused to accept the certificate. Why? Two plausible explanations emerge. First, this article suggests that Total's insistence have been driven by a need to sustain its revenue flows as much as possible during the business contractions caused by Covid-19. Second, a desire to prohibit alleged gamesmanship also appears to have motivated Total to reject the FM Certificate. Philippe Sauquet, then-President of Gas, Renewables and Power at Total, said:

> There is a strong temptation from some long-term customers to try to play with the *force majeure* concept […] To say I cannot take my cargo under the long-term contract, but I would like to buy [LNG at] spot [prices, which were half the price of LNG sold under long-term contracts] is contradictory.[75]

Of the Total case, S&P Global Platt's then-Head of Gas and Power Analytics, Ira Joseph, also commented: 'This rift has the potential to become quite ugly because of the contractual precedent it

[70]Twenty-foot equivalent units, a unit of measurement for a ship's cargo-carrying capacity.

[71]Jasmina Ovcina Mandra, 'Seaspan terminates deal for four LNG-powered newbuilds' (Offshore Energy, 16 Sep 2022) <https://www.offshore-energy.biz/seaspan-terminates-deal-for-four-lng-powered-newbuilds/> accessed 23 Oct 2022.

[72]Insurance Marine News, 'Seaspan rejects force majeure from Chinese yard' (Insurance Marine News, 15 Aug 2022) <https://insurancemarinenews.com/insurance-marine-news/seaspan-rejects-force-majeure-from-chinese-yard/> accessed 23 Oct 2022.

[73]Atlas, 'Seaspan Announces Update Regarding Order For Four 7,700 TEU Dual-Fuel LNG Containership Newbuilds' (Atlas, 15 Sep 2022) <https://ir.atlascorporation.com/2022-09-15-Seaspan-Announces-Update-Regarding-Order-For-Four-7,700-TEU-Dual-Fuel-LNG-Containership-Newbuilds> accessed 23 Oct 2022. Square brackets added for precision.

[74]LNG Prime, 'Seaspan says contracts for LNG-powered containership quartet "null and void"' (LNG Prime, 16 Sep 2022) <https://lngprime.com/asia/seaspan-says-contracts-for-lng-powered-containership-quartet-null-and-void/61635/> accessed 23 Oct 2022.

[75]Bate Felix & Jessica Jahanathan, 'France's Total rejects force majeure notice from Chinese LNG buyer' (Reuters, 6 Feb 2020) <https://www.reuters.com/article/us-china-health-total/frances-total-rejects-force-majeure-notice-from-chinese-lng-buyer-idUSKBN2001XQ> accessed 23 Oct 2022. Square brackets added for brevity and clarity.

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threatens to set.'[76] This article conjectures that such sentiments, expressed at the client level, would have concomitantly flowed through to and framed legal services eventually sought by the client.

Legal advice to foreign counterparties would have accordingly trifurcated into assisting them with: (a) accepting *force majeure;* (b) disputing *force majeure* (either via litigation or arbitration); or (c) negotiating a compromise.[77] Of the three options, Dan Harris, a China-focused partner at law firm Harris Bricken, posited: 'Suing is probably not going to be the way to go… The best way to go is to meet with the company in China and try to convince them, with money or otherwise, to put you first on their list [once business has resumed]'.[78] Although Harris' recommendation is *prima facie* similar to events that transpired in the Hebei exports case, the *tonality* of the postponements is in contrast. Harris' remarks betray a reluctance to accede to adaptations in contractual performance; whereas the Hebei exports case is a portrayal of adaptation being embraced. Here, the implication is that the party seeking to claim *force majeure* gained more from doing so than its counterparty. Finally, the thought process behind and *genesis* of the postponements were also different. Whereas foreign firms may have settled for postponement as a more viable alternative to court litigation (and as a means of insisting upon the fulfilment of original terms), Chinese capital-exporters – as in the Hebei exports case – may have opted for postponement as better alternative to wholesale abandoning the contract.

Geographic expansions and regulatory clearance

Introduction

Earlier, when discussing the postponement-brokering role played by lawyers, this article highlighted how that role varied according to whether a given lawyer was serving a Chinese capital-exporter or an overseas firm. In other words, the location of a client (ie, *whether they are located in or out of China*) was pertinent and material to the *tonality, genesis and nature* of the legal service provided.

A similar observation is true of the *location of the lawyers* themselves. For instance, by (re)locating and expanding to China, international law firms have sought to win business from Chinese capital-exporters (or the China subsidiaries of existing clients overseas). Meanwhile, by internationalising out of China, Chinese law firms may stay proximate to Chinese capital-exporters seeking footholds overseas. Chinese law firms may even win work from overseas clients altogether.

Whatever the origins of the law firms and irrespective of where they have expanded to, the motives have remained consistent. They have done so broadly in the expectation that expanding to a high-growth country would enable them to compete for new clients, win more work and increase their profitability.[79]

During Covid-19, what have been the means for winning new clients – be they Chinese capital-exporters or their overseas counterparties? In the order of increasing control, integration and cost, this article discusses five market entry strategies utilised by law firms for the purpose of winning new clients during a pandemic.

'Best friend' strategy

Expansion into a new geographic market by way of the network or 'best friend' strategy has involved instituting a blend of a referral and/or co-working relationship(s) with other firm(s) in the target

[76]ibid.

[77]Sue Reisinger, 'General Counsel Pondering How to Handle China's Force Majeure Claims' (Law.com, 12 Feb 2020) <https://www.law.com/international-edition/2020/02/12/general-counsel-pondering-how-to-handle-chinas-force-majeure-claims-378-134237/> accessed 23 Oct 2022.

[78]Sue Reisinger, 'China Is Making Force Majeure Claims, Leaving General Counsel with Many Questions' (Law.com, 12 Feb 2020) <https://www.law.com/international-edition/2020/02/12/general-counsel-pondering-how-to-handle-chinas-force-majeure-claims-378-134237/?kw=China%20Is%20Making%20Force%20Majeure%20Claims> accessed 23 Oct 2022.

[79]Rachel E Stern & Su Li, 'The Outpost Office: How International Law Firms Approach the China Market' (2016) 41 Law & Social Inquiry 184, 184–185.

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market.[80] For instance, 'Firm A' would agree to refer cross-border work to 'Firm B', that operated in China – and in which Firm A has no presence. This referral and/or co-working relationship may be (i) exclusive or non-exclusive; and (ii) bilateral or multilateral. Although neither the network nor best friend strategy can be described as a 'prevailing market entry strategy of choice' for global law firms (whose 'global coverage' ethos has led them to prioritise high levels of control over and integration with their China operations), the best friend strategy has produced two unmistakable advantages. First, it promotes mutual assistance and benefit, insofar as referrals are both given and received. Second, it has been the lowest-cost strategy, as the cross-border work would have been outsourced to the best friend and the referring firm would have avoided spending (eg, on an overseas office and staff). Particularly given the latter reason, this strategy would have been most appealing to firms who were either constrained by resource limits (that were exacerbated by the Covid-19 onset) or not yet ready to commit to more integrated expansions (plausibly due to less promising growth expectations that, again, were muted by the pandemic). Mischon de Reya was one example, having entered the Chinese market for the first time through its association with Karas in Hong Kong in September 2021 – nearly two years following the start of the pandemic.[81]

Meanwhile, hybridised variations of the best friend strategy were also used in China. For instance, less than a year after the Covid-19 outbreak, Ince Gordon Dadds and Winston & Strawn expanded their existing China operations by entering into strategic cooperation deals with, respectively, W&H Law Firm and YuandaWinston.[82] However, both foreign firms already had pre-existing presences in Shanghai and Hong Kong. So, rather than using the best friend strategy as a 'first-time' method of enlarging its Chinese client pool for its common law services, Ince Gordon Dadds and Winston & Strawn did so for the purpose of bringing themselves one step closer to and outsourcing the capability to advise clients on PRC law issues and represent them in PRC courts – given that it was and remains forbidden by PRC law to do so 'in-house'.[83] In any event, acquiring that capability did not replace the law firms' common law offerings (which remain globally trusted as a 'worldwide commodity' and is still frequently used in transactions and dispute resolution).[84] Instead, the new-found PRC capability complemented the existing offering.

Joint ventures

The Chinese government instituted a handful of free trade agreement frameworks that promoted the free flow of legal services into its borders. Two notable examples stand out. The first is the Closer Economic Partnership Arrangement, which in 2003 enabled Hong Kong-based law firms to open a Mainland-based office in association with a local law firm.[85] Then, in 2014, the Chinese government began piloting a second framework: the Shanghai Free Trade Zone (SFTZ), which paved the way for a new market entry strategy for Anglo-American law firms: the SFTZ

[80]Tony Williams, 'Why law firms need best friends' (2019) 3 Modern Legal Practice 5, 6.

[81]Madeline Anderson & Victoria Basham, 'Mishcon de Reya bolsters Asia presence through tie-up with Hong Kong firm' (The Global Legal Post, 28 Sep 2021) <https://www.globallegalpost.com/news/mishcon-de-reya-bolsters-asia-presence-through-tie-up-with-hong-kong-firm-1575685993> accessed 13 Nov 2021.

[82]'McDermott quits Asia as Winston & Strawn takes over its China alliance' (The Global Legal Post, 24 Jun 2020) <https://www.globallegalpost.com/big-stories/mcdermott-quits-asia-as-winston--strawn-takes-over-its-china-alliance-38758846/> accessed 13 Nov 2021.

[83]Eric J Jiang, 'True Market Access to China's Legal Services: Possibilities Under China's New Regulatory Scheme' (Transnational Legal Practice Committee of ABA Section of International Law Quarterly Newsletter, Jun 2016) 1 <http://www.camstrategy.com/wp-content/uploads/2018/11/Eric-Jiang-Shanghai-PFTZ.pdf> accessed 24 Nov 2022.

[84]John Flood, 'Institutional bridging: How large law firms engage in globalization' (2013) 36 Boston College International and Comparative Law Review 1087, 1093.

[85]Lynn Lin, 'The Amendments to the Agreement on Trade in Services of the Mainland and Hong Kong Closer Economic Partnership Arrangement' (Lexology, 22 Jan 2020) <https://www.lexology.com/library/detail.aspx?g=ac0b5bc7-0a0d-45cb-91b8-4dd07bc82c76> accessed 13 Nov 2021.

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joint operation (or 'joint venture').[86] Under this strategy, such firms would (i) set up a joint operation office in the SFTZ,[87] and (ii) enter into a contractual arrangement with a local Chinese firm to both pool resources (eg, real estate space, office systems and personnel)[88] and behave as a *de facto* single legal services provider – whilst remaining as legally and financially separate entities.[89] Since the SFTZ's inception, this strategy has been adopted by half a dozen Anglo-American firms, with examples including the Allen & Overy and Lang Yue joint operation, which secured regulatory approval shortly after the first Covid-19 outbreak in January 2020.[90]

What were the benefits? One benefit was the potential for a more integrated approach to expansion than what would have been possible under a best friend- or network-oriented entry. In turn, this could have been interpreted as a stronger 'vote of confidence' in a given legal market's longer-term growth prospects beyond Covid-19. Such an approach, however, would have been costlier, given that joint operations share real estate space and office systems.

A second benefit was that more control levers over the Chinese entity were available to the foreign firm, as both joint operation partners collaborated over management decisions and personnel were pooled. However, given that Allen & Overy already possessed Beijing and Shanghai offices (and claims its presence in China is already over 30 years old), there is once again a 'hybridised variation' to consider.[91] Rather than making a first-time entry into the Chinese market to provide common law services, Allen & Overy's joint operation strategy appears to have been deployed towards a new and more consequential benefit. That is, more so than under a best friend or network strategy, an SFTZ joint operation enabled Allen & Overy to bring itself *even closer* towards (1) removing itself from the parameters of the PRC law prohibition and (2) acquiring PRC law capability without the costs of a merger with a Chinese firm. This 'PRC law capability' was and is the real prize in the eyes of firms – especially for whom running Beijing and Shanghai offices that offer common law services is the basic norm.[92]

Swiss vereins as quasi-mergers

Entry into Chinese markets may be achieved by merging with a local firm. Typically, the end result is that both entities are no longer separate and become one in legal, financial and shareholding terms. However, this conventional logic has not been true of law firms expanding into China. Instead, the trend had been for firms to merge 'in name only' using a loose associational structure known as the Swiss *verein* – with King & Wood Mallesons and Dentons as prime examples.[93] Under

[86]Dezan Shira & Associates, 'Shanghai FTZ to Expand Liberalization of the Legal Services Industry in China' (China Briefing, 26 Mar 2014) <https://www.china-briefing.com/news/shanghai-ftz-expand-liberalization-legal-services-industry-china/> accessed 13 Nov 2021; Daqing Yao & John Whalley, 'The China (Shanghai) Pilot Free Trade Zone: Background, Developments and Preliminary Assessment of Initial Impacts' (National Bureau of Economic Research Working Paper Series No 20924, Feb 2015) 2, 5 <https://www.nber.org/system/files/working_papers/w20924/w20924.pdf> accessed 24 Nov 2022

[87]Dezan Shira & Associates (n 86).

[88]Yadong Luo, 'Transactional Characteristics, Institutional Environment and Joint Venture Contracts' (2005) 36 Journal of International Business Studies 209, 210.

[89]ibid.

[90]Allen & Overy, 'Allen & Overy Expands China Capabilities Through Joint Operation with Shanghai Lang Yue Law Firm' (7 Jan 2020) <https://www.allenovery.com/en-gb/global/news-and-insights/news/allen-overy-expands-china-capabilities-through-joint-operation-with-shanghai-lang-yue-law-firm> accessed 13 Nov 2021.

[91]Allen & Overy, 'China (Beijing, Shanghai and Hong Kong)' <https://www.allenovery.com/en-gb/global/global_coverage/asia_pacific/china> accessed 12 Nov 2021.

[92]It is important to note that offering common law services to the local Chinese market served (and still serves) a small niche.

[93]Sida Liu, 'The Rise of Big Law in China: Chinese Law Firms in the Age of Globalization' (The Practice, Center on the Legal Profession at Harvard Law School) <https://thepractice.law.harvard.edu/article/rise-big-law-china/> accessed 13 Nov 2021 (webpage was being updated and thus unavailable when last accessed on 25 Jan 2023).

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Dentons' Swiss *verein* structure, its constituents (eg, Dentons' Hong Kong and Chinese entities) shared and adopted the same *verein*-wide brand identity, strategy and office systems.[94] However, the various country-level and/or regional-level entities lying beneath the overarching *verein* 'roof' remained ringfenced from each other – including their assets, liabilities, profits and even team cultures.[95] This ringfencing may primarily have arisen due to flexibility and self-interest: equity partners in one entity of the proposed *verein* may have been loath to dilute and share their profits with counterparts in the other entity. Alternatively, as in the case of China – where Chinese law firms have been subject to PRC regulations prohibiting 'true' mergers with foreign law firms – ringfencing via a Swiss *verein* has been a practical method of remaining in compliance with the PRC prohibition on foreign firm mergers.[96] As an example, King & Wood Mallesons had initially referred to itself as a 'strategic alliance', rather than as a *de jure* merger.[97]

Although the ringfencing would have reduced the level of control over and integration with the Chinese *verein* target that would ordinarily be expected from traditional mergers, it is precisely because of such ringfencing that Swiss *vereins* have been a comparatively nimbler and cheaper method of market entry (and, *per* analysis above, of also acquiring PRC law capability). After all, the genuinely contentious questions in relation to profit-sharing and compensation were kept off the table, whilst a coordinated brand and strategy gave the look and feel of a singular, consolidated global firm. Regardless, comparisons between Swiss *vereins* and true mergers aside, this strategy has provided greater management control and integration with the Chinese entity than prior strategies discussed so far. Hand-in-hand with this, however, were increased budgetary and resource needs.

Despite the advantages, foreign law firms may in future be disincentivised to contemplate the *quasi*-merger strategy following China's promulgation of its Anti-Foreign Sanctions Law (AFSL) on 10 June 2021. Together, Articles 11 and 14 of the ASFL place a duty on 'organisations and individuals' to implement and cooperate with retaliatory sanctions imposed by China on foreign entities – which is a duty that *prima facie* applies to both domestic and foreign law firms operating in China.[98] The implication of this legislation for would-be and current *quasi*-mergers is that the AFSL's implementation raises questions on whether Chinese and foreign law firms could permissively co-exist particularly if: (i) the foreign law firm possessed a client-attorney relationship with an entity subject to retaliatory sanctions under AFSL or (ii) the merged firm took instructions from a client subject to AFSL sanctions. Whilst the specific implications for law firms presently remain unclear, it is possible that China may – as the US does – 'carve-out' seeking legal advice from the range of prohibitions to be imposed on a sanctioned entity.[99]

Greenfield expansion strategy

Firms entering the China market

Greenfield expansions have provided the greatest possible integration with, and management control over, a firm's China operations. Put simply, doing so has involved opening a representative office.[100] For example, White & Case did so initially in Shanghai (2000) and then in Beijing

[94]Dentons, 'Legal Notices' <https://www.dentons.com/en/legal-notices> accessed 29 Nov 2021.

[95]Douglas R Richmond & Matthew Corbin, 'Professional Responsibility and Liability Aspects of Vereins, the Swiss Army Knife of Global Law Firm Combinations' (2014) 88 St John's Law Review 917.

[96]See Liu (n 93).

[97]ibid.

[98]Clifford Chance, 'China introduces Anti-Foreign Sanctions Law' (Jul 2021) <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2021/07/China-Introduces-Anti-Foreign-Sanctions-Law-July2021.pdf> accessed 29 Nov 2021.

[99]Law.com, 'China's Retaliatory Sanctions a Risk for Global Law Firms' (26 Jul 2021) <https://www.law.com/international-edition/2021/07/26/chinas-retaliatory-sanctions-a-risk-for-global-law-firms/> accessed 29 Nov 2021.

[100]Daniel Sokol, 'Globalization of Law Firms: A Survey of the Literature and a Research Agenda for Further Study' (2007) 14 Indiana Journal of Global Legal Studies 1, 5, 12.

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(2004) and this course of action is now commonplace among multinational law firms. However, aside from the associated costs (which, of the four options, are the greatest and do raise questions over the sustainable profitability of overseas offices), there is one glaring shortcoming with respect to greenfield expansions. By 'going it alone' to open a representative office and pursuing this strategy in isolation of the 'best friend', joint venture or Swiss *verein* strategies will – under the *status quo* – provide zero prospect of acquiring a PRC law capability. In the authors' view, such capability must be considered as the most important competitive edge to be acquired by China-interested foreign law firms.

Interestingly, a handful of firms took the decision to close their representative offices during Covid-19. These include: Stephenson Harwood (in Beijing); Vinson & Elkins (in Beijing); Orrick, Herrington & Sutcliffe (in Hong Kong); and McDermott Will & Emery (in Hong Kong). Although each cited their own reasons for doing so, the exits shared two commonalities. First, they usually followed an internally-conducted business review which concluded that the firm's exit was in response to (and a reflection of) changing client needs – which themselves may have been impacted and reinforced by both the pandemic itself and developments during Covid-19. Second, each of the firms expressed their ongoing commitment to the Asian region as a whole and were not merely China-focused (eg, through their Singapore offices).

Firms 'internationalising' out of China

For Chinese law firms, it was as early as 1993 that law firm Jun He opened a small office in New York four years after it was founded in Beijing in 1989. Also, in 1994, with the approval of China's Ministry of Justice, Duan & Duan founded its first overseas branch in Seattle, Washington. However, it was only in the mid-2000s that the first major wave of international expansions of Chinese law firms occurred.[101] Chinese law firms' initial targets were global cities like New York, Paris, Tokyo, and Hong Kong: by 2008, Jun He and Grandall had set up offices in Hong Kong; Jun He, King & Wood and DeHeng in New York; DeHeng in Paris, and King & Wood and Zhong Lun in Tokyo.[102] In general, the overseas offices had more of a symbolic function and were aimed at showing clients as well as other firms that Chinese corporate law firms had international coverage. Many of these offices were small outposts with only one or two partners and few associates. In some cases, these offices also shared spaces with local law firms to save office expenses.

Shortly after the first wave of expansions, however, the 2008 Financial Crisis brought about a decrease in the flow of foreign investments into China and precipitated a reversal in the direction of net capital flows. Over the following decade, the outbound investments of Chinese state-owned enterprises and private companies rose steeply, until the Chinese government started to rein in the capital outflows in 2017.[103] Whatever the changing ebbs and flows of Chinese capital outflows (as in 2020–2022), Chinese law firms continued their expansion. In following the routes of Chinese outbound investments, they expanded from major global cities like Berlin, Singapore, Los Angeles, and London, to other cities such as Mexico City, Warsaw, Detroit, Bangkok, Istanbul, Sao Paolo, and Seattle.

Intellectual property agencies

China's growth as a technology hub and the rise of intellectual property (IP) disputes underscored the expected profitability of providing IP legal services to Chinese clients – which has been undeterred by Covid-19. Although such services may be supplied through the traditional route of common law-

[101]Sida Liu & Hongqi Wu, 'The Ecology of Organizational Growth: Chinese Law Firms in the Age of Globalization' (2016) 122 American Journal of Sociology 798, 808.

[102]ibid 809.

[103]Emily Feng, 'China Tightens Rules on State Groups' Foreign Investments' (Financial Times, 3 Aug 2017) <https://www.ft.com/content/3251987c-7806-1le7-90c0-90a9d1bc9691> accessed 13 Nov 2021.

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qualified practice-based teams, law firms recognised the importance of localising their services to China and providing IP services (comprising repeated, commodifiable tasks) as efficiently as possible. Firms such as K&L Gates and Taylor Wessing therefore opened standalone 'IP agencies' in addition to the usual representative offices during Covid-19.[104] Such agencies have specialised in the discrete tasks that comprise the trademark process, such as oppositions, revocations and renewals.

Conclusion

On geographic expansions and regulatory clearance

To conclude, this article has investigated the entry, exit, reduction and expansion of the foreign law firms in China that play an important enabling role for capital outflows. The conclusions are four-fold. First, a majority of global law firms article retained their *status quo* foothold in the Chinese legal market, be that in the form of a best friend relationship, joint venture arrangement, *quasi*-merger, greenfield office or IP agency. This is suggestive of a broad consensus across foreign law firms that, irrespective of the Covid-19 pandemic's dampening effect on commerce, trade and investments, China remains a vital and lucrative locale in which to station lawyers and win business. Second, for firms that chose to exit, competitiveness and profitability reasons (that were likely exacerbated or caused by the pandemic) were the main factors which rendered a continued presence unviable. Third, as the five market entry strategies discussed all exist on a spectrum of cost and involvement, some were likely failing to deliver value for money especially due to the Covid-19 pandemic. Fourth, looking ahead, there is fertile ground for further scholarship on this matter in a China-specific context, especially as increasing numbers of firms pursue newer market entry methods such as the SFTZ or the IP agency.

On the first and second 'faces' cross-border, transactional of legal practice

As for the legal services provided by law firms, they are multidimensional; they are described by this article as comprising a number of 'faces'. Prior to Covid-19, and in the context of cross-border deal-making, the 'first face' of legal practice was (and remains) that of a 'transaction-enabler'. Under that 'first face', the role played by lawyers was (and is) to smooth and shepherd the transaction process from conception, through to negotiation and documentation, before closing with agreement. To those ends, legal services codified the contractual intents of parties and, when doing so, also ensured the mechanical and conceptual coherence of those contracts. However, the onset of the pandemic brought about slowdowns – in business and the macroeconomy – and lockdowns of personal movement. These disruptions surfaced new client needs and called for a shift in legal practice towards a 'second face': that of a 'postponement-broker'.

Under this 'second face' – and driven by the Covid-19 *force majeure* regime put forward by the PRC's governmental and judicial organs – lawyers facilitated and brokered the postponement of transactions. To those ends, lawyers played three roles: they advised Chinese capital-exporters, advised government organs (notably, the CCPIT) and – where agreement appeared out of reach – advised parties to disputes. Despite the important role played by lawyers, postponement was not an act with strictly legal and doctrinal origins *per se*; rather, postponement was also a tactical and behavioural phenomenon, especially given the CCPIT's emphasis on 'understanding plights' and salvaging transactions already on the precipice of breakdown.

[104]Ben Edwards, 'K&L Gates launches China-focused IP agency to bolster global trademark coverage' (24 Feb 2021) <https://www.globallegalpost.com/news/kampl-gates-launches-china45focused-ip-agency-to-bolster-global-trademark-coverage-30371270> accessed 24 Nov 2022; Ben Edwards, 'Taylor Wessing launches independent China-focused IP and trademark business' (The Global Legal Post, 22 Jun 2021) <https://www.globallegalpost.com/news/taylor-wessing-launches-independent-china-focused-ip-and-trademark-business-67198526> accessed 13 Nov 2021.

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On the other side of the transaction to Chinese capital-exporters were overseas firms. What did lawyers advise them; were *force majeure* and postponements perceived and handled in a similar way? Here, lawyers also played a postponement-brokering role. However, three notable differences were observed. First, governmental and judicial players were not prominent in driving postponements. Second, in the Seaspan and Total case studies, overseas firms were more reluctant to accept *force majeure* – whether, as this article suggests, because of business pressures to conclude the transaction or suspicions of commercial gamesmanship. Third, the thought process behind and genesis of postponements were different. Overseas firms may have reluctantly accepted *force majeure* and postponements as a means of avoiding costly and risk-laden litigation; on the other hand, Chinese capital-exporters (as encouraged by the CCPIT) embraced postponements more willingly. This, perhaps, reflects truths known long before the pandemic about transactions that go wrong: the party seeking to claim *force majeure* gains more from doing so that its counterparty. Lawyers on both sides, therefore, will advise their respective clients on how to 'make the best of a bad situation'.

On the future of China's capital outflows in the 2020s

More generally, what else do the postponements say about China's capital outflows? To conclude, three broader observations can be made. First, capital outflows were at their most blunted since China's opening-up reforms. For a time during 2020–22, capital could not and did not reach their intended recipients. This anomaly must serve to nuance hitherto commonplace descriptions of China as a 'powerhouse'[105] '*buying* the world'[106] or as – by virtue of its role as 'factory to the world'[107] and 'manufacturing superpower'[108] – *selling* to it. Whether those capital flows ultimately become net-inflows under China's 'dual circulation' strategy remains an open question that must be revisited.

Second, on the transactional level, capital outflows remain subject to precarity – even as capital 'importers' (ie, much of the rest of the world) began relaxing their restrictions from the latter half of 2021 onwards. Such precarity would persist especially in transactions in which *force majeure* was declared and no explicit resumption date was agreed.

Third, on the policy plane, China's maintenance of its dynamic zero-Covid strategy (during the Shanghai lockdowns and through to the 20th Party Congress in October 2022) had initially demonstrated a continuing willingness to control the pandemic – even at the significant cost of stymying its capital outflows. However, such a willingness appears to have reversed since China relaxed its zero-Covid strategy in December 2022. Whether China returns to vigorously projecting its capital outflows to the rest of the world at pre-Covid levels – with a view to spurring an economic recovery across the world as it once did following the 2008 Financial Crisis – remains to be seen. Finally, the question of whether lawyers have fully reverted back to their 'first face' for the remainder of the 2020s ought to be followed closely with a gimlet eye. Legal practice deserves as much scrutiny as the activities of other players – banks, governments and state-owned enterprises been – that are much more commonly associated with enabling China to resume its tremendous capital outflows.

[105]See Tilak Abeysinghe & Ding Lu, 'China as an economic powerhouse: Implications on its neighbors' (2003) 14 Chinese Economic Review 164.

[106]See Peter Nolan, *Is China Buying the World?* (1st edn, Polity Press 2013).

[107]The Economist, 'China is the world's factory, more than ever' (23 Jun 2020) <https://www.economist.com/finance-and-economics/2020/06/23/china-is-the-worlds-factory-more-than-ever>, accessed 23 Oct 2022.

[108]Feng Qingyin, 'How has China become the world's manufacturing superpower?' (Global Times, 5 Aug 2021) <https://www.globaltimes.cn/page/202108/1230721.shtml> accessed 23 Oct 2022.

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