

# Study on Force Majeure of International Commercial Contracts Under the COVID-19 Epidemic

Jiale Chen<sup>1</sup>, Yinghua Tan<sup>2</sup>

<sup>1</sup>Northern University of Malaysia 50300, Malaysia

<sup>2</sup>Hubei Normal University 435002, China

## Abstract

In December 2019, the novel coronavirus epidemic broke out in China. The sudden outbreak of COVID-19 not only has a great impact on the lives and health of international people, but has even spread to the whole world's economic field. The continuation of the epidemic has brought a lot of uncertainty to the development of international commercial projects involving foreign interests, overseas investment and so on, and many international commercial contracts have also resulted in many disputes. In recent years, whether the outbreak of the novel coronavirus is judged as force majeure is also a difficult point in international commercial contracts, and there are many disputes. Since international contracts are usually multi-country cooperation, there is no uniform standard for the judgment of force majeure in each country. This paper ensures the validity of force majeure in international contracts and improves the force majeure clauses in post-epidemic contracts by comparing the recognition of force majeure clauses in the laws of different countries.

## Keywords

Force majeure; Foreign-related contract; COVID-19 pandemic.

## 1. Raising Questions

The World Health Organization (WHO) has declared the coronavirus outbreak a "public health emergency of international concern" as it spreads across the globe. Although the epidemic has entered a normal state, the situation is still serious, with a serious impact on the domestic and international economy. In particular, it has a great impact on China's import and export trade, which not only limits the scope of export trade, but also increases the cost of cross-border goods transactions, delays the transaction date, and even misses some overseas orders. The epidemic and government actions further increased the uncertainty of foreign-related contracts for business entities in China, leading to a large number of contract disputes related to the epidemic during this period. Force majeure, as a common cause of regulating risks for commercial entities, deserves attention in practice.

By comparing the relevant provisions of different national legislation and international uniform law, this paper tries to clarify the common provisions and their functional significance in different legislative provisions, deepen the understanding of force majeure and relevant rules, and help foreign-related enterprises safeguard their legitimate rights and interests.

### 1.1. At home and abroad, the identification of whether the novel coronavirus epidemic is force majeure

A comparative analysis of the legal provisions in typical countries and the international Uniform law shows that the provisions on force majeure are inconsistent, and there is no concept of force majeure in the common law system. This paper discusses the determination of force majeure in international commercial contracts when different applicable laws are

applied. The following is a comparative analysis to explain the reasons behind such provisions in different countries and the links between other systems, so as to carry out a more profound and comprehensive study of force majeure clauses.

## **1.2. The determination under Chinese law shall apply**

China belongs to the civil law system, take Chinese law as the representative of the civil law system, analyze the definition of force majeure in Chinese law, and whether major public health emergencies can be recognized as force majeure.

In the Civil Code issued and effective on January 1, 2021, the concept of "force majeure" has been clearly defined, namely, "unforeseeable", "unavoidable", and "insurmountable" three constitutive elements. According to the Tort Law of China in Zhang Xinbao's monograph, force majeure can be generally divided into three causes: natural causes, social causes and national causes. The classification of these three types of force majeure has been generally recognized by the domestic academic community. In China's current way of identification, the novel coronavirus outbreak is sudden and unforeseeable, its impact on the world trading order is inevitable, and the loss caused by enterprises and individuals is insurmountable. On February 10, 2020, the spokesperson of the Legislative Affairs Commission of the National People's Congress clearly stated that the novel coronavirus outbreak could constitute force majeure; Subsequently, a series of guidelines issued by the Supreme People's Law clearly stated that the epidemic could be regarded as a force majeure factor in contract disputes. Combined with the contract disputes in recent years due to the novel coronavirus epidemic and a series of measures taken by the government to reduce rent, it can be seen that the novel coronavirus epidemic can be recognized as force majeure under the current legal system in China.

However, in legal practice, the novel coronavirus epidemic can constitute force majeure, and there is also changed circumstances. Whether it is deemed as force majeure or changed circumstances, the specific applicable rules should be differentiated according to the consequentialist theory. Force majeure mainly means that during the performance of a contract, unforeseeable accidents occur, making it impossible to continue to perform and difficult to achieve the purpose. While the change of circumstances focuses on the unfairness between the parties to the contract, even if the purpose can be achieved, it can also trigger the change of circumstances. In the current Civil Code, the application of changed circumstances and force majeure is no longer contradictory, but can be applied simultaneously.

## **1.3. The determination applicable to the common law system**

The concept of force majeure has not been legally defined in the common law system, but it does not exclude that the parties to the contract may agree on the application of force majeure in a foreign-related contract. When there is no provision or additional force majeure clause in the contract, the common law Doctrine of Frustration can be relied upon. The doctrine of frustration can be applied when circumstances arise that make the contract impossible to perform or where the expectations of the parties are completely different. However, in the common law, the standard for the identification of "frustration of contract" is very high, and the court will not easily judge it as "frustration of contract" because of the difficulty or high cost of performance, so as to release a party from the responsibility and obligation to perform the contract. In *The Centre (76) Limited v Victory Serviced Office (HK) Limited* (HCA 1020 of 2020), in the recent judgment of the High Court Judges, the Court held that, Notwithstanding that both a pandemic and social unrest may not foresee the timing of the signing of the lease agreement and result in the operation of the business being more onerous and unprofitable, no event fundamentally or radically changes the nature of the parties' obligations, or is actually or commercially impossible to fulfill the obligation to pay rent and comply with the terms of the lease agreement. Therefore, the frustration of contract cannot be justified.

With neighboring Malaysia as the representative country of the Anglo-American law system, the standard for frustration of contract stipulated in Article 57 (2) of the current 1950 Contract law in Malaysia is analyzed. If the standard is met, the contract can be claimed invalid and there is no obligation to perform the contract later. However, in Malaysia, whether the principle of the blocked contract applies to the COVID-19 epidemic needs to be analyzed on a case-by-case basis, considering the time when the contract is signed and whether the purpose of the contract cannot be realized. Similar to most countries in the common law system, Malaysian courts have been very conservative when it comes to whether to apply the frustration of contract doctrine. Therefore, in the common law system, if the contract contains a force majeure clause, specifically COVID-19 or a global pandemic, force majeure can be applied without consideration of the principle of obstruction of contract. However, if the force majeure clause in the contract is not supplemented, the principle of "frustration of contract" should be introduced. However, in practice, successful cases of "frustration of contract" are very few.

#### **1.4. The determination of force majeure in international law**

The law of our country has made clear the application of the law on civil relations involving foreign interests. When international conventions and domestic law are inconsistent, the provisions of international treaties shall apply, that is, international conventions shall have priority over the applicable law of each country. This shows that it is very important for international conventions to determine whether the novel coronavirus outbreak constitutes force majeure.

In China's judicial practice, it is also very common to take the United Nations Convention on Contracts for the International Sale of Goods (hereinafter referred to as CISG) as the applicable law in foreign-related cases. Although there is no name for force majeure in CISG, a new attempt is made to create a rule similar to "force majeure", namely, Article 79 stipulates several important factors constituting force majeure: (1) the occurrence of obstacles that make it impossible to continue to perform the contract; (2) the occurrence of such obstacles is unforeseeable when the contract is concluded; (3) the obstacle and the accident cannot be overcome or avoided. Under the criteria of this international treaty, the outbreak of COVID-19 was not expected by the world, which satisfies the condition of unforeseeable; The harm it brings is so great that it directly affects the normal life of the world's residents, and the harm is unavoidable. So far, the novel coronavirus epidemic is still undergoing mutation, and the international community has not developed an effective vaccine to overcome it. In the CISG, force majeure can be recognized only if one of the three conditions is met. In a word, the COVID-19 epidemic is force majeure in line with international treaties. However, Article 79 also stipulates that a party to the contract must be notified promptly of the impact of such an obstacle. It is also emphasized that immunity may be granted if the impossibility of overcoming the obstacle is permanent; But only temporary, the defaulting party can only be exempted from the liability for a period of time, after the obstacle is removed, it needs to continue to perform the obligation. Therefore, even if the contract signed before the outbreak of the epidemic can be regarded as meeting the conditions, with the normalization of the epidemic and the resumption of work and production, the contract performance conditions are restored, and the responsibility should continue to be fulfilled.

The General Rules of International Commercial Contracts (hereinafter referred to as PICC) also plays an important role in international commercial contracts. Unlike the CISG, the PICC provides a clear definition of what force majeure means. The PICC's definition of "force majeure" is similar to that of the CISG, and is almost identical. By definition, it means an obstacle that is unforeseeable, uncontrollable, unavoidable or surmountable. The difference, however, is that a PICC is a broader definition of insurmountable obstacles. Similar to our country, PICC uses a dual model and also provides for "hardship". As for the difficult performance of the contract, it

can be applied to both force majeure and difficult circumstances. In general, force majeure on contracts during COVID-19 is recognized under the PICC treaty.

Based on the above analysis, it can be concluded that both CISG and PICC have recognized the composition of force majeure on the COVID-19 outbreak in international commercial contracts.

## **2. The Suggestion of Applying Force Majeure to International Commercial Contracts in China Under the Novel Coronavirus Epidemic**

### **2.1. Take the initiative to make good use of Force Majeure Evidence**

In the early stage of the outbreak, many foreign-related enterprises were hampered in contract performance due to the epidemic, resulting in contract disputes and disputes. In order to help solve contract disputes faced by Chinese enterprises and safeguard the legitimate rights and interests of Chinese enterprises, the China Council for the Promotion of International Trade issued a statement on January 30, 2020, stating that Chinese enterprises are unable to perform international commercial contracts due to the outbreak of the novel coronavirus can issue a Force Majeure Certificate. This means that "Proof of Fact of Force Majeure" can be used as factual proof material to prove the force majeure in the contract. So far, the force majeure factual certificate issued by the China Council for the Promotion of International Trade has been recognized by more than 200 countries and regions around the world, and has authority and credibility overseas. However, it is worth noting that this certificate is not a "gold medal" for enterprise contract exemption, but a proof based on objective facts. After this certificate is issued, the parties can partially or completely exempt themselves from the liability for non-performance, incomplete performance and delayed performance of the contract. Therefore, when the contract performance is blocked in the epidemic situation, the enterprise shall be careful whether the circumstances it encounters constitute force majeure, issue the proof of force majeure promptly and proactively, inform the other party of the contract for negotiation at the first time, reduce its own losses and avoid the risk of breach.

### **2.2. Actively perform the notification obligation**

In the face of the COVID-19 pandemic, the enterprise has difficulties in performing the contract, which cannot be overcome, and needs to extend the contract period or terminate the contract, it should inform the other party in the first time. As stipulated in the Contracts of China's Civil Code, if a party is unable to perform a contract due to force majeure, it shall notify the other party in a timely manner so as to mitigate the possible loss to the other party, and shall provide proof within a reasonable time. In Article 79 of CISG, it is also stipulated that the party who fails to perform its obligations must notify the other party of the obstacles and their impact on its ability to perform its obligations. If such notice is not received by the other party within a reasonable period of time after the non-performing party became or should have become aware of the obstacle, he shall be liable for damages caused by the non-performing party's failure to receive notice. It follows that the affected party must actively perform the notification obligation, otherwise it is not exempt from liability. Comparatively speaking, if the other party claims force majeure and the performance of the contract is blocked, our Chinese company should also pay attention to whether the other party has informed us in time, and keep relevant time content, so as to prepare for the need to negotiate litigation later.

### **2.3. Customize the force majeure clauses**

The description of force majeure clauses in existing international commercial contracts is a too simple template. For different foreign-related contracts, specific customization of force majeure clauses should be made instead of a simple template application. First of all, the scope of the disclaimer clause must be clearly defined in the clause to prevent any part of the enterprise from deliberately avoiding mistakes on the grounds of the epidemic. Although there are cases

where contracts cannot be performed due to the epidemic, force majeure does protect the legitimate rights and interests of enterprises. However, in the post-epidemic era, it is inevitable that some enterprises still claim to avoid liability due to force majeure in order to avoid their responsibilities. For such "loophole" and "free-riding" behavior, it is also very necessary for enterprises to customize personalized terms.

Secondly, in some international commercial contract templates, the force majeure clauses adopted by them do not include "infectious disease" or "epidemic disease", which will also bring controversy on whether the COVID-19 outbreak is judged as force majeure. Therefore, when drafting international commercial contracts, it is necessary to formulate personalized contract clauses based on specific circumstances and make them as specific as possible. For example, "infectious diseases" and "epidemic diseases" should be included in the clauses, and "including but not limited to" and "such as" should be listed. Finally, the notification should be specified in detail. In the force majeure clause, the notification obligation and notification period should also be specified to avoid related disputes in the later stage.

### 3. Conclusion

The COVID-19 pandemic had a great impact on the world, spreading across all industries. Whether it is transportation difficulties leading to skyrocketing logistics costs, or lockdown behavior causing enterprises to suspend production, the original contracts signed by enterprises cannot be performed on time or not at all. Therefore, the identification of force majeure in the contract is very important for enterprises. In the case that the applicable contract law is based on Chinese Law, China generally holds the attitude of recognizing the novel coronavirus outbreak as force majeure, and a series of policies and guidelines have also provided the basis for the application of force majeure to the novel coronavirus outbreak. Taking common law system as a typical example, force majeure is defined, but if the contract contains the factor of force majeure, liability can be exempted. If there is no such clause, it can be analyzed on a case-by-case basis whether it applies to the principle of contract obstruction. However, international laws all emphasize the three elements of "unforeseeable", "insurmountable" and "uncontrollable", and the COVID-19 pandemic basically meets its requirements for force majeure conditions. In the post-epidemic era when the epidemic is becoming more and more normal, our company should also improve the force majeure clause and correctly understand the role of the force majeure clause, to better protect its legal rights and interests.

### References

- [1] Han Xiuli, Rong Ting. Recognition and proof of force majeure in international commercial contracts under the COVID-19 epidemic [J]. International business research, 2022 lancet (05) : 42-52. DOI: 10.13680 / j.carol carroll nki ibr. 2022.05.002.
- [2] Gong B H. Application of force majeure clauses in international commercial contracts to COVID-19 [J]. Journal of Shanghai foreign economic and trade university, 2020, 27 (02) : 5-15 + 25. DOI: 10.16060 / j.carol carroll nki issn2095-8072.2020.02.001.
- [3] Jessica tong. "new crown pneumonia outbreak and the cognizance of international commercial rules in force majeure [D]. Foreign affairs college, 2021. DOI: 10.27373 / , dc nki. GWJXC. 2021.000262.
- [4] Jiang Z F. Judicial Determination of Force Majeure in foreign civil and commercial contracts under international major epidemic situation [J]. Medicine and Law, 2021, 14(02):64-75.

- [5] Qin Jingbo. Study on Application of Force Majeure to Chinese foreign commercial contracts based on Public health emergencies [D]. The northeast agricultural university, 2021. DOI: 10.27010 /, dc nki. Gdbnu. 2021.000628.
- [6] Zheng Tianyi, Meng Guobi. Recognition and countermeasures of force Majeure on international commercial contracts under major public health emergencies [J]. Zhejiang wanli college journal, 2021 (6) : 34-40 + 46. DOI: 10.13777 / j.carol carroll nki issn1671-2250.2021.06.006.
- [7] Dai Lurong. Theory of the new champions league pneumonia outbreak on international trade in the contract of force majeure influence [J] shall apply. Foreign Trade,2020(11):6-10.
- [8] Tang X W, Zhao X. Study on the use of force majeure clauses in international railway contract in post-epidemic era [J]. Modern Urban Rail Transit,2021(05):134-137.