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Final Thesis

Covid-19: A Case of Force Majeure?

On Force Majeure and its Application in China upon the Burst of Covid-19 Epidemic

Supervisor
Ch. Prof. Renzo Riccardo Cavalieri

Graduand
Maria Dione
Matriculation number 863816

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TABLE OF CONTENTS

前言 .... p. 4
INTRODUCTION .... p. 6

CHAPTER 1
1.1 *A Comparative Overview of Force Majeure* .... p. 9
1.2 *Force Majeure under Italian Law* .... p. 13
1.3 *Force Majeure under the Anglo-American Law System*.. p. 18
1.4 *Force Majeure at the International Level* .... p. 21
1.5 *Force Majeure under Chinese Law* .... p. 27

CHAPTER 2
2.1 *The Case of Sars* .... p. 39
2.2 *Covid-19 Emergency and Force Majeure Application upon the Burst of the Epidemic* .... p. 42
2.3 *Guiding Opinions on the Use of Force Majeure*.. p. 51

CHAPTER 3
3.1 *The CCPIT's Certificate of Force Majeure* .... p. 57

REFERENCES .... p. 61
ONLINE REFERENCES .... p. 66
LIST OF ABBREVIATIONS.. p. 70
ATTACHMENTS .... p. 72

前言

本论文对不可抗力合同条款于新冠肺炎疫情期间在中国如何使用开展探讨，由三章节组成。第一章节的主要目的是介绍不可抗力原则。不可抗力介绍包括不同法系的对比分析，也就是说意大利法系、英美法系与中国法系以及国际公约的不可抗力常识。第二章节注重新冠肺炎疫情突发以及中国政府采取的控制措施，并且研究新冠肺炎疫情对企业无法履约构成不可抗力免责条款的民法案件。第三章节主要聚焦在中国国际贸易促进委员会为了协助受疫情影响的企业提供的不可抗力证明书。

不可抗力原则来源于罗马法法系，目的是给因情势变更而无法遵守有约必守原则、无法履行合同的当事人提供协助。按照罗马法典型，大陆法国家，例如法国与意大利的民法典均有不可抗力制包括在内。与大陆法国家相同，中国民法典也包括不可抗力制度，具体地说，在中华人民共和国民法通则第一百八十条、中华人民共和国合同法第五百六十三、五百六十五和六百九十条。与此相反，英美法系国家典型未接受不可抗力原则。但是，当事人可将国际不可抗力条款写在其合同里。实际上，国际公约，例如《联合国国际货物销售合同公约》、《国际统一私法协会国际商事合同通则》与《欧洲合同法原则》均承认与不可抗力有关的说法，例如《合同受阻》、《不能控制的障碍》、《存在履约障碍》。此外，《国际商会》提供了一项贸易伙伴可以参考或者使用的不可抗力条款。除了国际公约提供的条款之外， 当事人还可以草拟自己的不可抗力条款。自己草拟的条款经常比标准条款有创新性，并且它们更好地适应当事人的具体需要。

新冠疫情爆发之后，大家张口闭口就提出来 “不可抗力”，但是能否在合同里使用不可抗力需要考虑不同因素。实际上，虽然新冠肺炎疫情作为公共卫生问题与政府采取的控制措施均属于不可抗力事件，但是为了证明不可抗力事件直接影响到贸易关系需要考虑的因素很多，尤其是需要证明新冠肺炎疫情作为公共卫生问题或者政府采取的控制措施与合同不履行有直接的因果关系。

为了缩小疫情的感染率中国政府采取了严格的控制措施，此外为了协助企业客服有关疫情的困难中华民国最高法院以及其他贸易组织提供了指导意见，中国国际贸易促进委员会出局了不可抗力证明书。鉴于此在研究于新冠疫情期间如何使用不可抗力这个方面，中国经验至关重要。

本论文研究的材料多种多样。首先，为了获得不可抗力原则的常识本论文研究了法国民法典、意大利民法典、中国民法典以及许多权威性的法律材料，例如法律词典、百科全书与评论。此外，还探索《联合国国际货物销售合同公约》、《国际统一私法协会国际商事合同通则》与《欧洲合同法原则》有关不能履行合同的条款以及《国际商会》提供的不可抗力条款。此次研究分析中华民国最高法院以及其他贸易组织提供的指导意见以及中国国际贸易促进委员会出局的不可抗力证明书。最后，为了更加地了解不可抗力合同条款于新冠肺炎疫情期间在中国如何使用，这本论文研究许多学报，尤其是关于中国不可抗力条款的历史与新冠肺炎疫情作为不可抗力事件的学报。本论文的目的是研究于中国在新冠疫情爆发之后不可抗力如何使用，所以收集的数据于 2020 年第一、二季度有关。

INTRODUCTION

The present thesis focuses on the application of the force majeure principle during the Covid-19 outbreak in China and it develops in three chapters. The first chapter consists of an introduction that aims at providing a comparative analysis of force majeure in different law systems, namely the Italian one, the Anglo-American one and the Chinese one, as well as analyzing how the doctrine is considered internationally. The second chapter provides an introduction of the Covid-19 outbreak and China's national provisions to contain the emergency and then investigates the invocation of Covid-19 epidemic as an event of force majeure in civil law cases. The third chapter consists of a comment on the certificate of force majeure issued by the China Council for the Promotion of International Trade during the Covid-19 emergency to assist companies affected by the epidemic.

Force majeure is a concept which originates from the Roman law system to assist contractual parties not able to abide by the customary rule *pacta sunt servanda* due to a change in circumstances which render the contract's performance impossible to be achieved. Following the Roman law tradition, Civil law countries, such as France and Italy, have accepted in their codes the concept of force majeure. Chinese law also embedded the force majeure doctrine in its civil code, precisely in art. 180 of the General Principles of Chinese Law and art. 563, 565 and 590 of the Chinese contract law. On the contrary, in Common law countries, force majeure is not contemplated in the tradition, nonetheless parties have the possibility to insert international force majeure clause in their agreements. As a matter of fact, international regulations, such as the United Nations Convention on Contracts for the International Sale of Goods, the Unidroit Principles of International Commercial Contracts and the Principles of European Contract Law, all recognize the concept of 'impediment' as well as the concepts of 'impossibility' and 'impracticability', which are related to the concept of force majeure. In addition, the International Chamber of Commerce provides a force majeure clause which may be used or taken as a reference by business parties. In addition to what is provided by international commercial bodies, for international business contracts

parties have the right to draft their own force majeure clauses, which usually stand out for their innovative and original content, adapted to the specific situation of the contractors.

Upon the burst of Covid-19 epidemic, force majeure started being the talk of the town, but its application on business contracts is not as immediate as many of us would think, because even though the pandemic, being a public health issue, along with the governmental measures taken in order to prevent and control the spread of the disease legitimately belongs to the events of force majeure, nevertheless there are many variables which need to be taken into account in order to demonstrate that it directly affects the business relationships. Above all, the presence of a direct cause-effect relation between the pandemic or the measures to prevent and control it and the impossibility to perform the contract is crucial for the proper invocation of force majeure.

The example of China is significant, since the government decided to intervene with strict national provisions of containment aimed at reducing the spread of coronavirus and the Supreme Court, as well as other business bodies, issued some Guiding Opinions in order to help Chinese and foreign enterprises overcome the difficulties related to the pandemic. To reach this goal, the China Council for the Promotion of International Trade also started issuing certificates of force majeure.

The resources considered in the present work are various. First of all, the French civil code, along with the Italian civil code and the Chinese civil code has been consulted in order to gain a basic understanding of the concept of force majeure, as well as many other valid law sources – among others, law dictionaries, encyclopedias and commentaries. Articles dealing with the concept of 'impossibility of performance' belonging to the United Nations Convention on Contracts for the International Sale of Goods, the Unidroit Principles of International Commercial Contracts and the Principles of European Contract Law were also taken into account, along with the force majeure clause issued by the International Chamber of Commerce. The Guiding

Opinions issued by the People's Supreme Court of China and other Chinese commercial bodies have been analyzed, as well as the some of the certificates issued by the China Council for the Promotion of International Trade. Furthermore, many academic publications, especially concerning the history of Chinese force majeure clause and the Covid-19 as event of force majeure, has been consulted so to reach a deeper understanding of the application of above-mentioned clause during the Covid-19 period in China. The thesis aims at analyzing the application of force majeure during the first months following the outbreak of the epidemic in China, so the data collected refer to the first semester of 2020 (*status iuris*).

CHAPTER 1

1.1 *A Comparative Overview of Force Majeure*

The Hammurabi Code contained a formula stating that the leaseholder or the herdsman were not to be deemed responsible for liability for livestocks' death caused by thunderbolt, pestilence or beasts' attack. This might be the first time the concept of force majeure appears in the legal ecosystem[1]. In order to deepen the knowledge on force majeure, it is necessary to take a step back to what is a contract and what are two of the main principles universally recognized as guiding the relationship between contractual parties, namely good faith and *pacta sunt servanda*. Specifically, a contract is the crystallization of the agreement between two or more parties, which can be both physical or juridical persons. It fixes the rights and obligations of the parties concerning their business exchange. Amongst the many principles governing the contractual relationships, good faith and *pacta sunt servanda* are ancient principles of fair government and social order, already cited by Marco Tullio Cicerone in his philosophical work *De Officiis*, where he stated that faith is the basement of the virtue of justice[2] and stressed the importance of maintaining the promises made[3]. Cicerone took Attilio Regolo as an example of the embodiment of the virtuous man who keeps the promise made to his enemy to the death[4]. In particular, the good faith principle is useful when invoking force majeure because it guarantees that parties act taking into account the interests of the counterpart, for instance, giving prompt notification of the force majeure event to the injured party, taking measures for limiting the damages of the injured party or when deciding whether an event was unpredictable. As for the *pacta sunt servanda*, it is an international customary rule, that is, according to the legal encyclopedia Treccani, a non-written source of law characterized by the reiteration of a particular

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[1] GUO Binglin 郭兵林 (2020). 'Bukekangli zhi shiyong biaozhun tanjiu – yi yiqing qijian changjian leixing hetong wi qierudian' 不可抗力之适用标准探究 ——以疫情期间常见类型合同为切入点 (Investigation on the Application Standards of Force Majeure. Taking Common Contractual Types during the Epidemic Period as a Breakthrough Point), Jiaozuo Daxue Xuebao 焦作大学学 报, vol. 3, p. 17.

[2] SILVESTRINI, Emilio (edited by) (1987). *Il fondamento etico-giuridico del principio internazionale "Pacta sunt servanda"*. Rome: Pontificia Università Lateranense, p. 125.

[3] Ibid.

[4] Ibid.

behavior in society and by the common conception that the said behavior is morally, socially and juridically just. The said rule, recognized by art. 1.3 of the Unidroit Principles of International Commercial Contracts[5], hereafter called UPICC, is 'the axiom, postulate and categorical imperative of the science of international law'[6] and was coined by the canonist Hostiensis to express the idea of universal contractual enforcement[7]. The word 'pact' refers to the common will to perform the contract by international subjects[8] and the said principle is connected with the concept of justice since on the one hand it obliges each party to execute its own obligations in any case, this way safeguarding the rights and interests of the counterpart, on the other hand it provides for an exception, namely the *rebus sic stantibus* principle, that parties may invoke in case the contract has become unjust for one of them[9]. The *rebus sic stantibus* clause, recognized by art. 62 of the Vienna Convention on the Law of Treaties[10], abbreviated as VCLT, regards the content of the willingness of the parties, that is a transaction is only binding up to the extent the parties have fixed it to have binding force[11]. When parties conclude a contract, they want to achieve a specific economic result and if a change in circumstances[12] makes the contract impossible to be executed 'a conflict between the socio-economic goal of the contract and its binding force arises'[13].

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[5] The Unidroit (1926) is the International Institute for the unification of Private Law. It is an independent intergovernmental body based in Rome, which aims at harmonizing private law, with particular attention to commercial law, between the States adhering to it. Among the many activities the Unidroit did in order to achieve its goal, it had formulated uniform principles for commercial contracts, known as UPICC.

[6] KUNZ, Josef L. (1945). 'The Meaning and the Range of the Norm Pacta Sunt Servanda'. The American Journal of International Law, 39 (2): p. 180.

[7] HOGG, Martin (2011). Promises and Contract Law - Comparative Perspectives. Cambridge: Cambridge University Press, pp. 82-117.

[8] SILVESTRINI, Emilio (edited by) (1987). *Il fondamento etico-giuridico del principio internazionale "Pacta sunt servanda"*. Rome: Pontificia Università Lateranense, p. 41.

[9] KUNZ, Josef L. (1945). 'The Meaning and the Range of the Norm Pacta Sunt Servanda'. The American Journal of International Law, 39 (2): p. 181.

[10] The Vienna Convention on the Law of Treaties (1980), as the name suggests, is an international agreement providing uniform rules to regulate treaties between the states adhering to it. The VCLT is a source of customary international law.

[11] GIOVENE Achille (1941). *L'impossibilità della prestazione e la "sopravvenienza" (la dottrina della clausola "rebus sic stantibus")*. Padua: Cedam, p. 99.

[12] 情势变更 qíshì biàngēng.

[13] ROSSETTI, Marco (2000). 'La risoluzione per inadempimento'. In Cendon Paolo (edited by), *I contratti in generale XIII - Risoluzione - Inadempimento, Impossibilità sopravvenuta, eccessiva onerosità*. Turin: Utet, p. 24.

Thus the contract is terminated for parties are no longer interested in pursuing the effects of the execution and so for a lack of consent[14]. Traditionally, civil law systems recognize that there are some events independent from parties willingness causing the impossibility to perform a contract and representing a reasonable excuse for not abiding by the principle of *pacta sunt servanda*. In the past, the said events were all collected under the name of *vis major*, an abbreviation of the formula '*vis maior cui resisti non potest*', nowadays commonly known as force majeure. When speaking of the impossibility of performing a contract not due to one party's fault, many experts interchangeably use the terms *casus fortuitus* and force majeure in contrast with the concepts of 'negligence' and 'fraud'[15], even though the above-mentioned terms have slightly different shades of meaning. According to the legal encyclopedia Treccani, F. Laurent defines *casus fortuitus* as the act of men, such as wars, invasions, etc. while force majeure consists of natural forces' effects such as earthquakes, lightning, shipwreck and so on. R. De Ruggiero defines force majeure as an unforeseeable, irresistible and inevitable event including both natural catastrophes and facts of third parties, such as wars and *factum principis*, that is the acts of government causing the inability to perform the contract. B. Dusi considers *casus fortuitus* as an unpredictable or inevitable natural event and force majeure as an irresistible act of men, e.g. *factum principis*. Another interpretation is the one which sees *casus fortuitus* as an event of external origin causing the impossibility of performance, while the term force majeure is mainly used to express the insurmountability of the event[16]. The last interpretation of the two terms is validated by French law, which after going through an analysis of case law, found out that externality of cause is usually considered as the origin of *casus fortuitus*. Nevertheless, French law, which firstly gives to unpredictable and irresistible events making the execution of the contract impossible or unsustainable the name 'force

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[14] ROSSETTI, Marco (2000). 'La risoluzione per inadempimento'. In Cendon Paolo (edited by), *I contratti in generale XIII - Risoluzione - Inadempimento, Impossibilità sopravvenuta, eccessiva onerosità*. Turin: Utet, p. 25.

[15] LUCCHINI, Luigi (supervised by) (1892-1898). *Il Digesto Italiano, vol. XI parte seconda*. Turin: Utet, p. 809.

[16] GIOVANOLI, Silvio (1933). Force Majeure et Cas Fortuit - En matière d'inexécution des obligations, selon le code des obligations suisse (avec une comparaison des droits allemand et français actuels). Genève: GEORG & Cie., S.A. Libraires de l'Université, p. 6.

majeure', considered together the concepts of *casus fortuitus* and force majeure when drafting the related articles in the civil law code. Finally, a different explanation attributes to Roman law's concept of *vis major* the condition of externality of the cause[17]. In addition, this last interpretation gives to force majeure the meaning of a specific category of incidents, whose effects have a major intensity compared to simple events of *casus fortuitus*[18]. In particular, Exner defines *vis major* as an event of external provenience, notorious, thus verifiable, and extraordinary, such as wars, earthquakes, etc. while casus fortuitus also includes ordinary events such as harvest or animals' death[19]. According to Achille Giovene, who takes into account different definitions of force majeure, to be deemed event causing the impossibility of performance there are three conditions that need to be verified, that is an event arises without parties' fault, leads to the impossibility of performance[20] and it is out of the debtor's will and awareness, being provoked by an external cause[21]. So for example, in case the debtor descends into madness and destroys the object of the contract, that shall not be considered as force majeure, since even though it may be proved that there is no fault in the said event, nevertheless it cannot be deemed external cause[22]. Another example is the following: if a company's machine provokes a fire, the fact cannot be considered force majeure as it would be if the fire was provoked by a lightning, since the former is an event connected with the operations of that industry's company[23]. In order to deepen the knowledge of the application of force majeure in comparative law, we are now going to consider its doctrine in several different law systems, namely the Italian law system, the Anglo-American law system and the Chinese law system, as well as the doctrine

[17] GIOVENE Achille (1941). *L'impossibilità della prestazione e la "sopravvenienza" (la dottrina della clausola "rebus sic stantibus")*. Padua: Cedam, p. 161.

[18] GIOVANOLI, Silvio (1933). Force Majeure et Cas Fortuit - En matière d'inexécution des obligations, selon le code des obligations suisse (avec une comparaison des droits allemand et français actuels). Genève: GEORG & Cie., S.A. Libraires de l'Université, p. 7.

[19] EXNER, Adolf (1883). *Der Begriff der höheren Gewalt (vis major) im römischen und heutigen Verkehrsrecht*. Wien: Grünhut's Zeitschrift, pp. 495-566.

[20] GIOVENE Achille (1941). *L'impossibilità della prestazione e la "sopravvenienza" (la dottrina della clausola "rebus sic stantibus")*. Padua: Cedam, p. 80.

[21] Ivi, pp. 160-161.

[22] Ivi, p. 163.

[23] Ivi, p. 173.

understanding at the international level.

1.2 *Force Majeure under Italian Law*

Italian codification has been influenced by the French civil code since 1865. As a matter of fact, France is the country which firstly gave to the unpredictable and irresistible events making the execution of the contract impossible or unsustainable the name force majeure. Art. 1147 of the French code has influenced art. 1225 of the Italian code, which stated that the debtor shall provide a compensation for damages deriving from the non execution of the obligation as well as for the delay in the execution, except for the cases in which the impossibility of performance or the delay was caused by an external cause not ascribable to him, unless he was in bad faith[24]. The concept of diligence of the good family man in the execution of obligations is also recognized both by the French civil code and the Italian civil code of 1856. In order to gain a precise idea of force majeure, a brief analysis of the related articles in the French civil code will be conducted. Specifically, art. 1218 of the French civil code defines force majeure as an unforeseeable event, reasonably impossible to predict or overcome and that relieves the debtor from his obligation. In case such an event arises, the measures taken are either the conclusion of the contract if the impossibility is definitive or the delay in the execution. Art. 1351 and 1351-1, which are related to the impossibility of performance, state that in case of temporary delay the execution of the contract is simply suspended for the time of the delay and parties are not in charge of liability. Art. 1231-1 discharges the debtor from the payment of damages in case of force majeure. Art. 1307-2 and 1307-5 reaffirm the relief from the duty of executing one or all the acts of performance in case of force majeure. Art. 1307-3 and 1307-4 refer to the case of alternative obligations: when partial impossibility of performance occurs and parties have alternative obligations, if the debtor and the creditor did not communicate to the counterpart which acts of performances they want to execute, they have to accept one of the remaining performances. Art. 1308 explains that also optional obligations are extinguished in the event of force majeure. Art. 1351 and 1351-1 state that force majeure prevents the debtor

[24] DE MAURO, Antonio (edited by) (2011). *Dell'impossibilità sopravvenuta per causa non imputabile al debitore - Artt. 1256-1259*, 'Il codice civile. Commentario'. Milan: Giuffrè Editore, p. 44.

from liability of non-execution, unless he accepted the risk or sent notification of performance. In the latter case, if the non-execution of the contract is due to a loss of the object of the exchange, the debtor is relieved from his obligation provided that the loss would have occurred even in case of his performance and recognizing creditor's rights and claims attached to the object. As for the Italian law tradition, according to the Italian Digesto, the definition of force majeure may be deduced by several articles of the civil code, for example art. 1153 which refers to 'impossibility of forbidding the event', art. 1125 about an 'external cause not imputable to the contractor' and art. 1298 on the impossibility for the debtor to perform the obligations due to the fact that the object of the contract is perished, has been lost or is no longer in commerce, as well as articles of the commercial code, such as art. 553 on the blockade of the port of destination and art. 551 and 574 on a superpower impeding the departure of the ship[25]. Force majeure is a relative noun referring to a superior force which cannot be explicated without the presence of another minor force. The Italian Digesto considers the content of art. 1585 and 1605 of the civil code in order to understand what is the minor force usually in contrast with force majeure. The said articles reflect on the case of the conductor using the object of the leasing without making modification to it and without the necessity of repairing it. In case a contingencies render necessary for the conductor to give back the object of the leasing after making modification or repairing it, the will of the conductor is frustrated by the said contingency. Thus, force majeure is the superior event hindering the will of the contractual party[26]. It is 'an event not ascribable to the person, who following the very event is forced to do what it was obliged to omit or to omit what it was obliged to do'[27]. The Italian Digesto refers also to the concept of *casus fortuitus*, speaking of events whose occurrence is uncertain and provokes an impediment in the execution of the contract, without being related to the will of the parties, such as the events included in art. 1621 of the civil code. Nonetheless, the same contingency may be deemed both force majeure and *casus fortuitus*, since it may be both uncertain and

[25] LUCCHINI, Luigi (supervised by) (1892-1898). *Il Digesto Italiano, vol. XI parte seconda*. Turin: Utet, p. 809.
[26] Ivi, p. 810.
[27] Ivi, p. 813.

hindering the will of the parties[28]. In general, the Italian civil code, following the French civil code, mixes up the two terms and refers to them as hendiadys meaning an event arising from a cause not ascribable to the debtor, which is still present in some articles of the civil code, such as art. 1017, regarding the perishing of the good object of usufruct, art. 1492 paragraph 3 on the effects of the warranty in buying and selling and art. 1785 n. 2 on hotelier's liability. Force majeure, or the concept contained in the maxima '*ad impossibilia nemo tenetur*', is recognized in the Italian civil law codification of 1942[29]. Even though there is no fixed definition of force majeure, art. 1218, 1256, 1258, 1463 and 1464 of the civil code define the impossibility of performance as the effect of an impediment, both unpredictable and insurmountable[30], hindering the 'juridical or material possibility of executing the contract by the debtor'[31]. The subject affected by the impediment is relieved from liability thanks to impossibility[32], except when it has stated that it will bear liability or the fortuitous event's risk[33]. In particular, art. 1218 of the Italian civil code focuses on debtor's obligation and states that 'the debtor who does not execute precisely the contract must provide a compensation for the losses, except for the case in which it can prove that the non-execution or the delay in the execution is due to causes not ascribable to him'. Art. 1256 refers to the fact that when the execution of the contract is made impossible due to causes not ascribable to the debtor, he can either advocate for the resolution of the contract, in case the non-execution is definitive or in case the delay in the execution is such to render it not important anymore, or be relieved from the liabilities for the delay, in case the impossibility to fulfill the obligations is just temporary. It clarifies that force majeure is a cause of termination of contracts because the impossibility of execution causes the extinction of at least one of the obligations and

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28 LUCCHINI, Luigi (supervised by) (1892-1898). *Il Digesto Italiano, vol. XI parte seconda*. Turin: Utet, p. 811.

29 DE MAURO, Antonio (edited by) (2011). *Dell'impossibilità sopravvenuta per causa non imputabile al debitore - Artt. 1256-1259*, 'Il codice civile. Commentario'. Milan: Giuffrè Editore, pp. 1-2.

30 BALLETTI, Cinzia (2000). 'La risoluzione per impossibilità sopravvenuta'. In Cendon Paolo (edited by), I contratti in generale XIII. Risoluzione, Inadempimento, Impossibilità sopravvenuta, eccessiva onerosità. Turin: Utet, p. 487.

31 Ivi, pp. 483-484.

32 Ivi, p. 490.

33 Ivi, p. 494.

so the causal justification for the agreement is no longer there[34]. The termination of the contract according to the encyclopedia Treccani is 'the dissolution of a valid and effective contract with retroactive effect, except for already executed performance in contracts with periodic or continuous execution' and usually happens in case of default by one of the parties, impossibility of performance or hardship, after the constitutive sentence of a judge. It regards only those agreements whose performance was possible at the beginning, while in case the performance was not possible from the beginning, the contract is considered void. Examples of contracts void *ab initio* are the promise of traveling around the world in a week or supplying a live pterodactyl[35]. Art. 1258 considers the case of partial impossibility to fulfill the contract. In the said case, the debtor is only obliged to fulfill the obligations that can be fulfilled, while is not deemed responsible for the non-execution of the obligations that cannot be fulfilled due to force majeure. This regulation is applied for example when the goods to be provided have deteriorated or do not exist anymore. Art. 1463 refers to the total impossibility to fulfill the obligations in the case of reciprocal performances: the party released from the obligations not only has no right to ask the counterpart for compensation, but it also has to return to the counterpart the consideration already received. Lastly, art. 1464 refers to partial impossibility of executing the contract by one party, so that the counterpart can either advocate for a correspondent reduction of its obligations or the termination of the contract in case it is not interested in the partial execution of the contract. Considering the content of the articles above, to be deemed impediment the event shall be actual, objective and absolute. It is deemed actual an event that occurs when the obligations should be fulfilled[36]. Objective means that the debtor is not the only subject affected by the impediment and the event influences the performance as well as the

[34] BALLETTI, Cinzia (2000). 'La risoluzione per impossibilità sopravvenuta'. In Cendon Paolo (edited by), I contratti in generale XIII. Risoluzione, Inadempimento, Impossibilità sopravvenuta, eccessiva onerosità. Turin: Utet, p. 483.

[35] MACKINNON, Frank Douglas (1917). *Effect of War on Contract, being an attempted analysis of the doctrine of discharge of contract by impossibility of performance with a résumé of the principal cases decided in the English courts during the present war*. Oxford: Oxford University Press, p. 8.

[36] BALLETTI, Cinzia (2000). 'La risoluzione per impossibilità sopravvenuta'. In Cendon Paolo (edited by), I contratti in generale XIII. Risoluzione, Inadempimento, Impossibilità sopravvenuta, eccessiva onerosità. Turin: Utet, pp. 483-484.

debtor itself or its funds, preventing the debtor from fulfilling its obligations[37]. Considering the case of a painter who has to portrait a subject, it is deemed objective impossibility the death or disease of the painter, while it is deemed subjective impossibility a lack of money or credit to get tools for the painting[38]. Finally, an event is absolute when it cannot be overcome or the means used to overcome it are different from the ones generally used for the performance taken into consideration or the execution of the contract is deemed dangerous for the debtor's life, freedom and personal integrity[39]. The impossibility of performance may be temporary or definitive. In the former case, it lasts up to the moment the creditor stops having interest in the fulfillment of the contract's obligations and just leads to the suspension of the performance until the impediment ceases, while in the latter case, the impossibility remains even after that moment[40]. Moreover, impossibility may be partial or total. Partial impossibility occurs when it affects part of the performance and part of the object of the contract. This quantitative variation could also affect the quality of the performance and lead to a different economic function, thus giving the creditor the right to terminate the contract. Therefore in case of partial impossibility, depending on the interest of the creditor, evaluated through objective criterions, that is considering whether there is correspondence between the executable part and the economic requirement, the performance may be reduced for all the parties or the contract terminated, in line with art. 1464 c.c. As for total impossibility, it occurs when it regards the whole object of the contract and leads to the termination of it[41]. Therefore, partial or temporary impossibility does not lead to the termination of the contract[42]. To advocate for impossibility, the debtor shall show evidence of the impediment or at least, in cases such as when the cause of the impediment is unknown, it shall prove that its conduct

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[37] BALLETTI, Cinzia (2000). 'La risoluzione per impossibilità sopravvenuta'. In Cendon Paolo (edited by), I contratti in generale XIII. Risoluzione, Inadempimento, Impossibilità sopravvenuta, eccessiva onerosità. Turin: Utet, pp. 485.

[38] GIOVENE Achille (1941). *L'impossibilità della prestazione e la "sopravvenienza" (la dottrina della clausola "rebus sic stantibus")*. Padua: Cedam, p. 8.

[39] BALLETTI, Cinzia (2000). 'La risoluzione per impossibilità sopravvenuta'. In Cendon Paolo (edited by), I contratti in generale XIII. Risoluzione, Inadempimento, Impossibilità sopravvenuta, eccessiva onerosità. Turin: Utet, pp. 485-486.

[40] Ivi, pp. 488-489.

[41] Ivi, pp. 489-490.

[42] Ivi, p. 494.

has been diligent[43]. Art. 1176 of the civil code about diligence explains what is the behavior the debtor shall carry out in order to be deemed a good house father. Considering the standard fixed by law, it is possible to evaluate whether the debtor's behavior was appropriate and whether the event of force majeure should be considered related to the debtor's behavior[44]. In addition, depending on the nature of the contract's object, the debtor shall provide proof that the result of the performance is not achievable anymore or that the activity cannot be implemented or the means to implement it are different from the ones fixed in the contract.

1.3 *Force Majeure under the Anglo-American Law System*

In the Common law system there is no univocal concept of contract, which can be referred to as agreement, promise, void, etc. In order for the contract to have binding force it is necessary the consideration, that is 'the exchange of benefit and detriment'[45]. Considering the English law, sudden impossibility belongs to the field of contractual risk[46] and the criteria used to allocate risks and damages is the reasonableness of ordinary man, a concept equated to objective good faith institute[47]. The contract shall be drafted in accordance with the principle of fairness and shall realize the expectations of business man acting in good faith. Thus even though in the contract there is no presence of clauses on contingencies, thanks to implied condition it shall be deemed as they were present if they fit with the standard of reasonableness and normality of a reasonable third party. Otherwise, the contract's object should be deemed frustrated[48]. Ancient English law relied on the principle of sanctity of contract to protect the content of the agreement even in case of manifestation of extraordinary events. The debtor was relieved from all obligations arising from law for impossibility due to external factors, such as wars, natural catastrophes, etc. while obligations deriving from contract were to

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[43] BALLETTI, Cinzia (2000). 'La risoluzione per impossibilità sopravvenuta'. In Cendon Paolo (edited by), I contratti in generale XIII. Risoluzione, Inadempimento, Impossibilità sopravvenuta, eccessiva onerosità. Turin: Utet, pp. 492-493.
[44] DE MAURO, Antonio (edited by) (2011). *Dell'impossibilità sopravvenuta per causa non imputabile al debitore - Artt. 1256-1259*, 'Il codice civile. Commentario'. Milan: Giuffrè Editore, p. 3.
[45] Ivi, pp. 17-18.
[46] Ivi, p. 19.
[47] Ivi, pp. 19-20.
[48] Ivi, p. 20.

be executed in the absence of specific clauses advocating for the exemption[49]. Then, the doctrine of frustration made its appearance conveying the message of 'disappearance of the basis of the contract' for all the events making contract's performance impossible without parties' fault[50]. An example of the application of frustration is the one of Taylor v. Caldwell, regarding a music hall for concerts' exhibitions destroyed by a fire, since the object of the contract was rendered impossible to achieve due to an external cause which cannot be avoided. The application of frustration was, on the contrary, refused in the London Northern Estates Co. v. Schlesinger case, where an Austrian citizen, who was a tenant of an apartment located in an area deemed uninhabitable for security reasons after the outbreak of the World War I, had been required to pay the rent since the residence in the apartment was not the cause of the contract. Moving to the North American Law, force majeure principle goes under the name of impossibility of performance or impracticability when the performance is impossible from an objective point of view, while it is called frustration of purpose when the contract's purposes disappear[51]. An example of demand for exemption from liability being rejected is the case of Lloyd v. Murphy, where Caroline Lloyd and others leased to defendant William Murphy some premises located at Beverly Hills for a five-year term beginning September 15, 1941, for the purpose of selling new automobiles. With the outbreak of the war, the federal government ordered the interruption of the sale of new automobiles. Thus, the defendant vacated the premises giving notice of repudiation of the lease to plaintiffs. The plaintiffs brought an action and the trial court held that war cannot be deemed as an event hindering Murphy's obligations under the lease. Defendant Murphy appealed, contending that the purpose of the contract was frustrated by the restrictions placed on the sale of new automobiles, but court held that the defendant should have accounted for the restrictions when negotiating the lease since it was a well-known news. All thing considered, nowadays Common law systems are likely to accept the termination of contracts due to impossibility of performance when the following events occur: when the object of the contract or something crucial for its execution is destroyed;

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[49] De Mauro Antonio, Dell'impossibilità sopravvenuta per causa non imputabile al debitore - Artt. 1256-1259, Giuffrè Editore, 2011, p. 22.
[50] Ivi, pp. 20-22.
[51] Ivi, p. 26.

when a change in circumstances render the contract impossible to be executed at all or with the manners or within the time prearranged; when after a change in the English law the performance of a contract becomes illegal[52]. The impossibility of contract also involves the case in which the party can perform the contract with an excessive or unreasonable pecuniary loss[53]. Three factors, namely the duration of the inability, the period of execution of the contract and the nature of the contract and its performance decide whether a temporary inability of performance leads to the termination of the contract[54]. Nevertheless, any right accrued and payment made before the termination of the contract will not be undone[55]. As for the Italian law, also in Common law systems a contract whose performance is impossible from the beginning is considered 'void *ab initio* as a mere absurdity'. In addition, a contract cannot be terminated for impossibility of performance if the party has accepted to fulfill some particular obligations unconditionally[56]. Sometimes, the discharge of contract by impossibility of performance belongs to the records of discharge of contract by agreement, since the parties have stated in the contract that it shall be dissolved if certain events occur. In some cases, the matter is understanding what the parties have impliedly agreed, in other cases it is obvious since the party has clearly expressed their will in the contract. For example, if parties agreed that the contract shall terminate in case of perils of the sea and an event such a ship under charter sinking during the delivery occurs, the charter party is not obliged to fulfill the obligation, which is dissolved by implicit agreement, while if parties agreed that the contract shall cease in case of war between Great Britain and a European Power, the agreement has been rendered explicit and there is no need for interpretation[57].

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[52] MACKINNON, Frank Douglas (1917). *Effect of War on Contract, being an attempted analysis of the doctrine of discharge of contract by impossibility of performance with a résumé of the principal cases decided in the English courts during the present war*. Oxford: Oxford University Press, pp. 9-10.
[53] Ivi, p. 23.
[54] Ivi, p. 26.
[55] Ivi, p. 18.
[56] Ivi, p. 9.
[57] Ivi, pp. 14-16.

1.4 *Force Majeure at the International Level*

International contracts are those contracts in which parties do not belong to the same law system and thus, as pointed out by the Hague Principles on Choice of Law in International Commercial Contracts, there is the need to choose between the laws of the distinct States or, in alternative, to appeal to international, supranational or regional rules[58]. Art. 26 of the VCLT recognizes good faith, *pacta sunt servanda* and free consent principles as the guiding principle of international law. Thus, when drafting international contracts, cooperation and reciprocal attention to the interests of the counterpart are always taken into account, even though the principles of good faith and fair dealing are usually just mentioned in long-time contracts such as joint venture and research and development contracts, and some other clauses, such as the clauses of the International Chamber of Commerce, hereafter ICC[59]. Other contracts simply refers to the need of respecting the spirit of the contract[60]. That said, international contracts are usually long-term contracts[61] which, as stated in article 77 of the Convention on Contracts for the International Sales of Goods, abbreviated as CISG[62], and article 7.4.8 of the UPICC, require for the parties to exercise all due diligence in order to remove the obstacle to contracts' execution, minimizing the extent of the damages deriving from the force majeure event[63], otherwise they shall provide a compensation for the damages[64]. With regard to international regulations, the CISG, the UPICC and the Principles of European Contract Law, hereafter PECL[65], all accept the concept of 'impediment'. In

[58] The HCCH is an organization which aims at unifying the rules of private international law among different governments. The HCCH Principles on Choice of Law in International Commercial Contracts were issued in 2015.

[59] The ICC is an institutional body assisting companies from over 100 countries in the promotion of their businesses. It provides services such as the issuing of certificates, incoterms rules, dispute resolution, etc.

[60] FONTAINE, Marcel, DE LY, Filip (edited by), MORRESI, R. M. (translated by) (2008). *La redazione dei contratti internazionali a partire dall'analisi delle clausole*, 'Contratti e commercio internazionale'. Milan: Giuffrè Editore, pp. 236-237.

[61] Ivi, p. 571.

[62] The CISG is an international treaty for regulating sales contracts of movable goods created by the Onu in 1980 and entered into force in 1988.

[63] FONTAINE, Marcel, DE LY, Filip (edited by), MORRESI, R. M. (translated by) (2008). *La redazione dei contratti internazionali a partire dall'analisi delle clausole*, 'Contratti e commercio internazionale'. Milan: Giuffrè Editore, p. 267.

[64] Ivi, pp. 549-50.

[65] The PECL are principles attempting to harmonize the laws of different European countries.

general, we can say that the concept of ‘impediment’[66] as well as the concepts of ‘impossibility’ and ‘impracticability’[67] are connected to the concept of force majeure. An example of impediment or impossibility is the one of a ship sold which sinks after the conclusion of the contract, during the trip toward the buyer, and whose recovery costs are unbearable compared to the costs the buyer bore when it bought it[68]. Article 79 of the CISG tries to provide a solution to impediment, stating that in case of impediment reasonably not attributable to the parties of the contract, they are not liable for the non-execution. The same principle can be applied to a third party in case the failure to perform is on his shoulders. Anyway, in order to be relieved, the non-performing party should respect three conditions: firstly, he shall provide proof of the impediment, both in the case the impediment is only on his shoulder and in the case a third party is involved. In the latter case, the affected party shall also demonstrate that the third party has been affected by the impediment too. It is important to notice that the so-called ‘third party’ is usually a subcontractor, and raw material suppliers are not considered ‘third party’. Thus, for instance, if a mask manufacturer provides the certificate of the stop of production of its supplier of components and advocates for force majeure to be exempted by liability for delay in the delivery caused by the delay in the production, it is unlikely to be approved[69]. Secondly, the non-performing party shall promptly send a notification to the counterpart to give information about the situation. The relief from liabilities and losses is valid for the period of impediment, after the counterpart received the notification. The UPICC refer to the case of impediment in article 7.1.7, where it is established that an event reasonably impossible to foresee, avoid and overcome can discharge the parties from the liabilities and losses deriving from the non-performance of the contract. In case of delay in the execution due to the impediment, the effects of

[66] 合同受阻 hétòng shòuzǔ; 不能控制的障碍 bùnéng kòngzhì de zhàng’ài.

[67] 存在履约障碍 cúnzài lǚxíng zhàng’ài.

[68] DE MAURO, Antonio (edited by) (2011). *Dell’impossibilità sopravvenuta per causa non imputabile al debitore - Artt. 1256-1259*, ‘Il codice civile. Commentario’. Milan: Giuffrè Editore, pp. 28-29.

[69] LIANG Yanmei 梁燕媚 (2020). ‘Xinguanfeiyan yiqing dui chukouqiye wufa lüxing goucheng bukekangli mianze tiaokuan de jianyi’ 新冠肺炎疫情对出口企业无法履约构成 不可抗力免责条款的建议 (Suggestions on Proposing Novel Coronavirus Pneumonia to Constitute Force Majeure Exemption by China’s Export Enterprises), Duiwai Jingmao 对外经贸, 4: 8.

the exemption are valid only for the time of the delay. The affected party shall promptly communicate the impediment to the counterpart in order to be exempted. Anyway, parties could also decide to 'terminate the contract or to withhold performance or request interest on money due'. Finally, the PECL include the case of impediment in article 8:108, where it is given almost the same definition of the UPICC principles regarding the event constituting impediment. The article refers also to the temporary delay in the execution of the contract, establishing that if the period of delay is too long, it has to be considered as non-execution. Lastly, the non-performing party shall give notice immediately after the impediment occurs, in order to avoid being responsible for the losses deriving from the delay or absence of the notification. According to Marcel Fontaine and Filip De Ly, except for international convention, there are some rules which are common to international contracts when speaking of force majeure and the relative clauses are usually characterized by an original and innovative approach if compared to Romanist law systems, such as the French and the Italian ones, thus international force majeure clauses are usually more sophisticated than the traditional ones[70]. International force majeure clauses are usually divided in two parts, the former introducing the hypothesis of force majeure events and the latter specifying the relative regulations. Since the notion of force majeure is different from law system to law system and the events that can be accounted as force majeure are many, there is a huge variety of different formulations of the clause. In general, the definition of force majeure is an event arising by an external cause and characterized by unforeseeability and inevitability, which render impossible the execution of the obligations[71]. Sometimes the clause refers to force majeure as an event which goes beyond the due diligence the parties have to exercise or beyond the control of the parties[72]. Sometimes the definition is modified and one of the characteristics of force majeure is omitted, such as the unforeseeability or the inevitability. In some cases, the definition of force majeure is not given and thus the interpreter shall consider the definition given by the applicable law

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[70] FONTAINE, Marcel, DE LY, Filip (edited by), MORRESI, R. M. (translated by) (2008). *La redazione dei contratti internazionali a partire dall'analisi delle clausole*, 'Contratti e commercio internazionale'. Milan: Giuffrè Editore, p. 518.
[71] Ivi, pp. 519-520.
[72] Ivi, p. 521.

of the contract. Other times, some examples of events of force majeure are provided in place of the definition. Natural catastrophes are always mentioned in the list and epidemics are often present[73]. The practice of providing a list of events is more frequent for Common law systems, which traditionally do not recognize force majeure but do recognize the so-called 'act of God', also known as 'act of Elements' in socialist countries, that is natural calamities[74]. The lists are usually illustrative and not exhaustive, with the exception of some clauses that appear to limit the contingencies to be deemed force majeure[75]. Other events which are typically included in the clauses are acts of war, revolutions, and riots, while labor conflicts, such as strikes, lockouts and labor disputes, are not always inserted. Machinery breakage and other accidents related to machinery are often present, as well as transport and supply issues. Finally, *factum principis* is often deemed events of force majeure[76]. In particular, considering international commerce, an event of force majeure constituted by a *factum principis* hindering the transfer of funds may constitute an exception to the rule *genera non pereunt*, which establishes that the payment of a sum of money cannot be impeded by an event of force majeure[77]. Some clauses even point out contingencies which cannot be deemed force majeure, such as delay in performance by the parties, normal flaws and breakdowns in equipment and some acts of government[78]. In general, the events to be included in the force majeure clause shall be decided considering the type of contract, for example ice risk shall be included in force majeure clauses of contracts stipulated with parties based in cold countries, tools supply contracts shall include bad weather in their force majeure clauses but are not necessary in intellectual performance's contracts[79]. Force majeure clauses usually include the duty for the party affected by impossibility of performance to promptly communicate the situation to the counterpart. The information is usually provided with a written notification, such as an email or fax, which needs to be sent

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[73] FONTAINE, Marcel, DE LY, Filip (edited by), MORRESI, R. M. (translated by) (2008). *La redazione dei contratti internazionali a partire dall'analisi delle clausole*, 'Contratti e commercio internazionale'. Milan: Giuffrè Editore, p. 518.

[74] Ivi, p. 528.

[75] Ivi, p. 533.

[76] Ivi, p. 528-530.

[77] Ivi, p. 557-558.

[78] Ivi, p. 535-37.

[79] Ivi, p. 575.

'immediately', 'as soon as possible' or 'within a reasonable time', usually fixed between 7 and 30 days[80]. Together with the communication of impossibility of performance, the affected party shall also provide the proof of the event which causes the impossibility, which could be government announcements, chamber of commerce's certifications, certificates of derogation measures, etc[81]. In the case of Covid-19, valid proofs to be provided included information on traveling restrictions, quarantine instructions and customs and logistics records[82]. Some clauses also require the affected party to inform the counterpart of the end of the force majeure event[83]. The force majeure clause may also include the impossibility of immediately informing the counterpart of the extraordinary contingency, due to the contingency itself[84]. If the affected party does not send the communications within a reasonable time it runs into sanctions: usually, it loses the right of invoking force majeure, otherwise it is deemed responsible for the damages arising by the delay in communication or it shall be exempted by its obligations only after having sent the notifications[85]. When the force majeure is recognised, the debtor is relieved by liability and the execution is suspended, either by postponing it or by reducing the object of the performance[86]. However, in case of supply contracts, the force majeure clause may allow the counterpart to procure the goods from other suppliers or it can hinder it, especially when an exclusivity clause was inserted in the contract[87]. Force majeure clauses establish that in case of an event hindering the execution of the contract, parties shall either renegotiate the contract or terminate it. In the former case, parties should take into account the possibility of not reaching an agreement, thus they need to discuss whether they want to rely on arbitration or terminate the contract. Moreover, the clause should also specify whether the

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[80] FONTAINE, Marcel, DE LY, Filip (edited by), MORRESI, R. M. (translated by) (2008). *La redazione dei contratti internazionali a partire dall'analisi delle clausole*, 'Contratti e commercio internazionale'. Milan: Giuffrè Editore, pp. 538-40.

[81] Ivi, pp. 540-41.

[82] http://www.mofcom.gov.cn/article/yqfkscbg/swbgz/202003/20200302947231.shtml

[83] FONTAINE, Marcel, DE LY, Filip (edited by), MORRESI, R. M. (translated by) (2008). *La redazione dei contratti internazionali a partire dall'analisi delle clausole*, 'Contratti e commercio internazionale'. Milan: Giuffrè Editore, p. 550.

[84] Ivi, p. 539.

[85] Ivi, pp. 542-43.

[86] Ivi, pp. 544-46.

[87] Ivi, p. 546.

renegotiation shall be made immediately or after a certain period of time. In the latter case, the clause should specify if the right to invoke the termination lies with the affected party, the counterpart or both parties[88]. In case of termination, some force majeure clauses have specific rules for the liquidation of contractual relationships, many others do not[89]. As for the ICC, in 1985 it published the first standard force majeure clause, which was revised in 2003 and again in 2020. The new ICC force majeure clause[90], available both in a long, revised form and in a short as well as harmonized form, aims at meeting the requests of the businessmen asking for a simpler clause to appeal after the burst of Covid-19. As the ICC itself suggests, the former may be inserted in the contract or it can be referred to including the sentence 'The ICC force majeure clause (long form) is incorporated in the present contract'[91]. In addition, since it considers a huge variety of events as fulfilling the requirements of force majeure, it can also be considered as a basis for a 'tailor-made' clause to be edited with additional events and/or with the elimination of the unnecessary ones. The latter may be used too, even though it is not as complete as the long clause and thus it is likely that the parties will face some difficulties in the interpretation of it. The ICC long clause is valid when the following three conditions exist: first, the impediment is beyond parties' reasonable control; second, the event was reasonably unforeseeable when the parties concluded the contract; third, the event produced a series of effects that the affected party cannot reasonably avoid or overcome. Since the ICC long clause includes events such as wars, acts of terrorism, embargo, seizure of works, epidemic, explosions, strikes, etc., the party invoking force majeure just needs to prove that the effects of the event are impossible to avoid or overcome in spite of all the reasonable measures taken in order to limit them. In order to avoid being claimed for non-performance and in order to be relieved from the execution of the contract and from any liabilities, the affected party must promptly give notice to the counterpart on the event causing the non-execution or the delay in the execution of the contract. Only when the notice arrives to the

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[88] FONTAINE, Marcel, DE LY, Filip (edited by), MORRESI, R. M. (translated by) (2008). *La redazione dei contratti internazionali a partire dall'analisi delle clausole*, 'Contratti e commercio internazionale'. Milan: Giuffrè Editore, pp. 551-555.

[89] Ivi, p. 556.

[90] ICC Force Majeure and Hardship Clauses, *ICC*, March 2020.

[91] Ivi, p. 1.

counterpart, if there is no delay, the affected party is effectively relieved. A maximum duration of days should be decided in order to fix the terms that define the non-execution of the contract as incontrovertible so that the parties can opt for the termination of the contract. If the relationship between the parties is unbalanced after the anticipated termination of the contract, that is if one of the parties obtains a benefit before the end of the collaboration, the said party must compensate the counterpart with a sum of money equal to the value of the benefit. Lastly, the force majeure requirements should be met also when a third party's default is invoked. In light of these considerations, the ICC force majeure clause may be deemed as a compromise between the different approaches of civil law, common law and international regulations, because the clause firstly gives a definition of force majeure in line with the civil law practice and then includes a series of specific events that are usually deemed force majeure events[92]. Finally, it attempts to include all the issues considered in international regulations.

1.5 *Force Majeure under Chinese Law*

Confucius considered setting words right, that is calling things by their name and acting in accordance with the essence of their name, as well as keeping good relationships and harmony within society as essential for the maintenance of good government and social order[93]. These concepts are all related to the wider concept of trust, which reflects also in the values of honesty and respect of the agreement already acknowledged in the ancient Chinese legal system. As Martina Timoteo states, the Chinese virtues of 'trust and honesty' assured that the parties kept the promises, while the virtues of 'humanity and compassion' invite the parties to be reasonable in their negotiations[94]. The very word contract[95] means 'carve an agreement' or 'carved agreement', manifesting that the idea of binding force was already there[96]. This term was substituted in 1950 by another

[92] BORTOLOTTI, Fabio (2020). ICC Force Majeure and Hardship Clauses - Introductory note and commentary. ICC: p. 2.

[93] RAINEY Lee Dian (2010). *Confucius and Confucianism: The Essentials*, Wiley-Blackwell, p. 46.

[94] TIMOTEO, Marina (2004). *Il contratto in Cina e Giappone nello specchio dei diritti occidentali*. Padova: Cedam, p. 46.

[95] 契约, qìyuē.

[96] TIMOTEO, Marina (2004). *Il contratto in Cina e Giappone nello specchio dei diritti occidentali*.

word[97] composed by the terms 'union and similarity', in order to convey the new values of the PCR. In general, traditional Chinese law was considered a political and administrative tool used to follow state interests of maintaining social order and to regulate state administration[98]. At the beginning of the twentieth century, during the Qing Dynasty, China started the reform of its law through the study of foreign law, so as to make new codes following the Western models[99]. In particular, the Civil law[100] was preferred, on the one hand because it is composed of fixed norms and regulations, which can be more easily studied and translated, in opposition with the Common law[101] materials, which are composed by a series of precedents. On the other hand, Roman law promoted the authority of the state over the citizen and of the *pater familias* over his dependents, being more consistent with Chinese traditional role of law[102]. As for the civil code, many contemporary western codes were consulted, including the Franco-Italian code on obligations and contracts of 1927[103]. Legal development in China has been taken more seriously after 1979, with Deng Xiaoping 'Two-Hands' policy' stressing the necessity of developing the economy and the legal system[104], so for instance modern contract law is largely a product of the 1980s and 1990s[105]. In addition, when the country started looking abroad, during the 1980s, it decided to adapt to the international principles regarding international trade and included the principle of good faith in its law system. For instance, in 1986 China became a member of the CISG which was 'adopted to govern international contracts for the sale of goods between parties in China

Padova: Cedam, pp. 43-45.

97 合同 hétòng.

98 CHEN, Jianfu (2008). *Chinese Law: Context and Transformation*. Leiden Boston: Martinus Nijhoff Publishers, pp. 20-22.

99 CHEN, Jianfu (2008). *Chinese Law: Context and Transformation*. Leiden Boston: Martinus Nijhoff Publishers, pp. 24-26 and FONTAINE, Marcel, DE LY, Filip (edited by), MORRESI, R. M. (translated by) (2008). *La redazione dei contratti internazionali a partire dall'analisi delle clausole*, 'Contratti e commercio internazionale'. Milan: Giuffrè Editore, p. 552.

100 大陆法 dàlùfǎ.

101 英美法 Yīngměifǎ.

102 CHEN, Jianfu (2008). *Chinese Law: Context and Transformation*. Leiden Boston: Martinus Nijhoff Publishers, p. 28.

103 Ivi, p. 327-329.

104 Ivi, pp. 50-51.

105 Ivi, p. 443.

and those from other signatory nations'[106]. The CISG shall modify or replace Chinese law only if contractual parties 'both have their place of business in a signatory State to the CISG'. In case only one party meets the requirement of having its place of business in a CISG State, the Chinese law shall be applied. Anyway, China declared itself not bound by Article l(1)(b) of the CISG, 'thus, it is more likely that Chinese law will be applied without the CISG in Sino-foreign transactions'[107]. Since 1978, in order to govern contracts, China enacted the GPCL, which include the general rules to be applied to all contracts, and then the Economic Contract Law, hereafter ECL, the Foreign Economic Contract Law, hereafter FECL, governing commercial activities with foreign entities, and the Technology Contract Law, hereafter TCL, which regard the specific standards for different types of contracts[108]. Art. 7 of the GPCL[109] belonging to the updated civil code adopted in May 2020 states that 'when dealing with civil activities, civilians should adhere to the principle of good faith, act honestly and keep the promises'. The principle of good faith as well as the principle of equity and mutual benefit, which refers to the right of both parties to make 'their own profit by entering into contract'[110] were recognised in the ECL, the FECL, the Contract Law of China of 1999, abolished from 1st January 2021, and the new Contract Law, thus gaining a certain consideration in both Chinese civil law and Chinese contract law. The principle of equality and mutual benefit, in particular, is more consistent with Chinese legal tradition and the concepts of 'balanced'[111] and 'reasonable'[112][113]. According to Jiang Rulong[114], the principle of equality and mutual benefit is the basis for a collaboration between two or more parties in China.

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[106] FENG, Chen (2001). 'The new era of Chinese contract law: history, development and a comparative analysis'. Brooklyn Journal of International Law, 27 (1): 156.

[107] GRACE, Donald L. (2001). 'Force Majeure, China & (and) The CISG: Is China's New Contract Law a Step in the Right Direction'. San Diego Int'l L.J, 2, p. 187.

[108] FENG, Chen (2001). "The new era of Chinese contract law: history, development and a comparative analysis". Brooklyn Journal of International Law, 27 (1): 155-6.

[109] 民法通则 mínfǎ tōngzé.

[110] Feng Chen, 'The new era of Chinese contract law: history, development and a comparative analysis', 27 *Brooklyn Journal of International Law* 153, 2001, p. 159-161.

[111] 合情, héqíng.

[112] 合理 hélǐ.

[113] TIMOTEO, Marina (2004). *Il contratto in Cina e Giappone nello specchio dei diritti occidentali*. Padova: Cedam, pp. 48.

[114] JIANG Rulong 汪如龙 (1991). 'Jianxi hetong guanxi zhong de pingdeng yuanze' 简析合同关系中的平等原则 (Analysis of Principle of Equality in Contractual Relationship). Zhili Yu Falü 政治与法律, n. 6.

The said principle is reflected on three elements, that is the parties have the right to manage the good or service representing the object of the contract, the agreement is based on the free will and honesty of the parties and it should be reached through a fair negotiation between them. Art. 2, 4 and 6 of the new civil code, similarly to art. 2, 3 and 5 of the old Chinese contract law, stress the fact that all the subjects involved in civil activities are equal and must follow the principle of equity when fixing their rights and obligations. As for the doctrine of force majeure, according to the Dictionary of Chinese Law and Government, *bukekangju*[115], or the synonymous *bukekangli*[116], is a 'superior or irresistible force, an act of God, an inevitable act or accident or disaster uncaused by human agency, a natural calamity exclusively caused by natural forces'[117]. This definition is in line with the French definition describing 'a superior or irresistible force'. At the beginning, little attention was put on the force majeure doctrine, and China applied it to international contracts for the first time only in 1985. The cause of the late application of this principle derives on the one hand from the fact that the role of law in China was not as prominent as in Western countries, due to the traditional consideration given to it, on the other hand from the fact that 'private commercial practices did not achieve a comparable level of development in China. Thus, force majeure, like other commercial law doctrines, did not develop because China lacked the incentive to expand international trade relations'[118]. In the first articles related to force majeure, it can be observed the Chinese law peculiarity of having general clauses 'wide and vague'[119]. Articles 106, 107 and 153 of the GPCL clarify that parties are exempted from civil liability in case of 'inability to perform a contract or for harm caused to others due to force majeure'[120], which is any unforeseeable, unavoidable and insurmountable

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115 不可抗拒 bùkěkàngjù.

116 不可抗力 bùkěkànglì.

117 BILANCIA, Philip R. (edited by) (1981). *Dictionary of Chinese Law and Government Chinese-English*. Stanford, California: Stanford University Press, p. 506.

118 GRACE, Donald L. (2001). 'Force Majeure, China & (and) The CISG: Is China's New Contract Law a Step in the Right Direction'. San Diego Int'l L.J, 2, p. 177.

119 CAVALIERI, Renzo (2019). *Diritto dell'Asia orientale*. Venezia: Cafoscarina, p. 57.

120 GRACE, Donald L. (2001). 'Force Majeure, China & (and) The CISG: Is China's New Contract Law a Step in the Right Direction'. San Diego Int'l L.J, 2, p. 178.

contingency[121]. Even though the GPCL do not provide a detailed explanation of the events which may be deemed force majeure, the practice usually consider 'natural events of unavoidable force that could not have arisen from any human intervention (i.e. flood, fire, storm, earthquake, and other natural disasters)'[122]. The force majeure concept was included also in the old ECL, TCL and FECL. Article 27 of the ECL regarded irresistible events and events arising from an external cause which cannot be avoided by the party, with the second events probably constituting the Chinese version of *casus fortuitus*[123]. Art. 20 of the second chapter of TCL on conclusion, performance, modification and termination of technology contract states that force majeure, which refers to objective situations caused by natural or social factors which parties cannot prevent[124], exempts parties from liability for breach of contract and art. 24 provides that either parties have the right to communicate to the counterpart the termination of the contract. Finally, force majeure is included in art. 24, 25 and 29 of the FECL[125]. Art. 7, 31 and 32 may be also considered when dealing with impediment. Art. 17 considered the case of a party which cannot execute the contract and provide evidence of that to the counterpart. The non-affected party may either suspend performance and give notification of its decision to the affected party or keep executing the contract in case the affected party is able to provide assurance for it[126]. The FECL's standard to implement protective measures in case of insecurity of performance were stricter than the U.C.C. $ S 2-609 commercial standards[127]. Article 24 gave a definition of force majeure, which has been deemed vague and ambiguous for two reasons. The first reason causing confusion is that it is not clear what should be considered force majeure, considering the difference between Chinese

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[121] GRACE, Donald L. (2001). 'Force Majeure, China & (and) The CISG: Is China's New Contract Law a Step in the Right Direction'. San Diego Int'l L.J, 2, p. 178.
[122] Ibidem.
[123] YE Lin 叶林 (2007). 'Lun bukekangli zhidu' 论不可抗力制度 (On Force Majeure Doctrine). Beifang faxue 北方法学, 5: 39.
[124] WANG Jingbo 王敬波 (2020). 'Lun zhengfu xingwei zuowei xingzheng xieyi susong zhong de bukekangli' 论政府行为作为行政协议诉讼中的不可抗力 (On Government Action as Force Majeure in Administrative Agreement Litigation), Huadong zhengfa daxue xuebao 华东政法大学学报, 4: 109-110.
[125] GRACE, Donald L. (2001). 'Force Majeure, China & (and) The CISG: Is China's New Contract Law a Step in the Right Direction'. San Diego Int'l L.J, 2, p. 176.
[126] FENG, Chen (2001). 'The new era of Chinese contract law: history, development and a comparative analysis'. Brooklyn Journal of International Law, 27 (1): 162-163.
[127] Cornell law school website: https://www.law.cornell.edu/ucc/2/2-609

law and foreign countries' law. For instance, a loss of cargo was not deemed force majeure in Western countries, but it was in China[128], as well as on the invocation of force majeure for strikes[129], which are considered force majeure contingencies in western countries but not in China, except for regional and industrial strikes[130]. Secondly, there were debates on the 'unforeseeability' of the force majeure events, since according to art. 24 parties may fix the range of contingencies to be deemed force majeure but according to Chinese courts, 'when parties were able to stipulate to a specific event in a contractual force majeure clause and that event actually occurs, the event was foreseeable, and therefore, does not qualify as a force majeure event under article 24'. According to art. 24, the impeded party to perform is not penalized for delay in the delivery or for the non-execution of the contract due to force majeure, except when the counterpart still needs the performance of the contract[131]. Article 25 of the FECL states that the party invoking force majeure shall give prompt notification to the counterpart and provide a reliable certification within a reasonable period of time. Donald L. Grace takes the incident of Tiananmen Square in 1989 as an example of invocation of force majeure in China. The above-mentioned event led many foreign enterprises to exit from China, thus causing many lawsuits for breach of contract. The enterprises indicate 'the sudden and violent crackdown on student protesters' as impediment for the performance and their embassies or business councils provide them with the necessary certification. The embassies and business councils were likely to be considered 'relevant agencies' according to article 25 of the FECL since foreign governments were requiring their nationals to evacuate from China. Nevertheless, the author stresses that Chinese tribunals do not explicitly indicate whether they would deem valid a certification issued by a non-Chinese agency for contingencies taking place in China[132]. Article 29 gives a party who cannot perform any of the contract's obligations owing to force majeure the

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[128] GRACE, Donald L. (2001). 'Force Majeure, China & (and) The CISG: Is China's New Contract Law a Step in the Right Direction'. San Diego Int'l L.J, 2: 183.
[129] TIMOTEO, Marina (2004). *Il contratto in Cina e Giappone nello specchio dei diritti occidentali*. Padova: Cedam, p. 296.
[130] GRACE, Donald L. (2001). 'Force Majeure, China & (and) The CISG: Is China's New Contract Law a Step in the Right Direction'. San Diego Int'l L.J, 2: pp. 180-181.
[131] Ivi, p. 182.
[132] Ivi, p. 185.

right to notify the counterpart of the rescission of the contract. Article 31 of the FECL considers the termination of a contract stating that parties may fix a required window of performance and 'if a party is unable to perform within that specified window, then the other party may rescind or terminate the contract'[133]. According to Chinese model contracts, the window of time is usually eight weeks[134]. Article 34 of the FECL allows a party 'to maintain a claim for damages'. Damages may include 'any amount of deposit paid as a guaranty, insurance proceeds for lost goods, and any other reasonable amounts incurred in anticipation of performance'[135]. In 1999 the ECL, FECL and TCL were substituted by a uniform contract law[136]. Among the circumstances allowing the suspension of performance in Chinese contract law were included 'other situations showing inability or possible inability to meet liabilities'[137]. The impossibility to fulfill the contract due to force majeure is the first cause allowing the recession of the contract among the four described in article 94. The canceling party retained all rights of remedy for damages, restitution, etc. which affect the performing party[138]. Article 117 gives the definition of force majeure and clarifies that if a contract cannot be executed due to force majeure, parties are partially or fully discharged from their duties, depending on the extent of the effects of force majeure, unless the law provides other regulations. If the delay in the execution of the contract is prior to the force majeure event, parties shall not be considered discharged from their duties. Article 118 explains that when one of the contractual parties is unable to execute the contract due to force majeure, it shall promptly give notice to the counterpart in order to mitigate the possible losses. Moreover, the affected party shall provide proof of the impossibility to fulfill the contract due to force majeure within a reasonable period of time. Anyway, when referring to the need of providing evidence of the impediment, in contrast with the FECL requests, art.

[133] GRACE, Donald L. (2001). 'Force Majeure, China & (and) The CISG: Is China's New Contract Law a Step in the Right Direction'. San Diego Int'l L.J, 2: pp. 183-184.
[134] Ibidem.
[135] Ivi, p. 186.
[136] FENG, Chen (2001). 'The new era of Chinese contract law: history, development and a comparative analysis'. Brooklyn Journal of International Law, 27 (1): 164.
[137] Ivi, pp. 153-173.
[138] Ivi, p. 178.

118 do not require the evidence to be issued by 'relevant agencies'[139]. All in all, force majeure definition is clearer when considering the combination of articles 94 and 118 of the contract law if compared with article 25 of the FECL[140]. Nowadays, force majeure is recognized by article 180 of the PCR general provisions of civil law:

> '因不可抗力不能履行民事义务的，不承担民事责任。法律另有规定的，依照其规定。不可抗力是不能预见、不能避免且不能克服的客观情况。'
>
> When the impossibility of executing civil obligations derives from force majeure, parties are not in charge of liability. In case the law has other regulations, parties shall abide by the said regulations. Force majeure is an objective contingency which cannot be predicted, avoided or overcome.

The new civil code also include a new contract law, which introduces force majeure in article 563:

> '有下列情形之一的，当事人可以解除合同：（一）因不可抗力致使不能实现合同目的；［...］ 以持续履行的债务为内容的不定期合同，当事人可以随时解除合同，但是应当在合理期限之前通知对方。'
>
> When one of the following circumstances occurs, parties are allowed to terminate the contract: 1. when an event of force majeure leads to the impossibility of executing the contract; [...] Parties are allowed to terminate the contract at any time for contracts of indefinite duration which have the obligation of continuous execution. Nevertheless, the impeded party to perform must give notice to the injured party within a reasonable time.

The said article replaces article 94 of the 1999's contract law, adding the fact that the non-executing party shall give notice to the counterpart. References to force majeure are also available in article 565, which replaces article 96 of the 1999's contract law:

> '当事人一方依法主张解除合同的，应当通知对方。合同自通知到达对方时解除；通知载明债务人在一定期限内不履行债务则合同自动解除，债务人在该期限内未

[139] GRACE, Donald L. (2001). 'Force Majeure, China & (and) The CISG: Is China's New Contract Law a Step in the Right Direction'. San Diego Int'l L.J, 2: pp. 183-184.

[140] Ivi, p. 201.

履行债务的，合同自通知载明的期限届满时解除。对方对解除合同有异议的，任何一方当事人均可以请求人民法院或者仲裁机构确认解除行为的效力。当事人一方未通知对方，直接以提起诉讼或者申请仲裁的方式依法主张解除合同，人民法院或者仲裁机构确认该主张的，合同自起诉状副本或者仲裁申请书副本送达对方时解除。’

When a party advocates for the termination of the contract according to law, it shall notice the counterpart. The contract is considered terminated only after the notice reached the counterpart; in case the notification explains that the debtor won’t fulfill the obligations for a certain period of time, if the debtor does not fulfill the obligation for that period of time, the contract is recessed starting from the moment in which the term specified in the notification expires. If the counterpart moves objections to the rescission of the contract, any of the parties are allowed to refer to the Popular Courts or the Arbitration Centers for the validation of the termination. In case the party does not inform the counterpart, the latter will proceed asking for the rescission of the contract through legal proceedings or arbitration, and if the entity confirms the rescission, it is valid starting from the moment in which the copy of the request has been delivered to the counterpart.

Lastly, article 590 basically replaces articles 117 and 118 of the old contract law:

‘当事人一方因不可抗力不能履行合同的，根据不可抗力的影响，部分或者全部免除责任，但是法律另有规定的除外。因不可抗力不能履行合同的，应当及时通知对方，以减轻可能给对方造成的损失，并应当在合理期限内提供证明。当事人迟延履行后发生不可抗力的，不免除其违约责任。’

A party incapable of executing the contract due to force majeure is fully or partially relieved by liabilities based on the effects of the force majeure itself, unless other provisions are to be applied. In case the execution of the contract is rendered impossible by force majeure, the impeded party to perform shall promptly advise the injured party in order to mitigate the losses that it is likely to bear, as well as to provide certification of the force majeure within a reasonable period of time. If the delay in the execution is prior to the event of force majeure, there is no exemption from the liability of the delay.

All things considered, it can be observed that Chinese legal experts find the same

difficulties which are found internationally, that is on the one hand force majeure is a general and abstract concept, on the other hand when trying to be more specific parties face the problem of including all the possible events in just one clause. Usually events can be included in force majeure clauses when having the following characteristics: they are objective contingencies recognized by society, such as wars, epidemics, regional and industrial strikes which cannot be solved within the enterprise, etc. The action of UFOs cannot be inserted in a force majeure clause, since their existence is not certified by science. They are events provoked by an external cause. There are some situations in which the behavior of the party is caused by an external cause, so judges shall use common sense when analyzing the specific case and deciding whether to deem it force majeure. For example, the delay in the delivering of a manuscript by a book's author who is ill is unlikely to be intentional, so the case can be considered force majeure. Another characteristic of force majeure events is that they are unpredictable events. So for example, an insurance company which has an agreement with an insured against fires cannot invoke force majeure in order to avoid giving the compensation in case of fire. Unpredictability can be objective and subjective. In the former case, judges need to evaluate whether a party carried out all precautionary measures required by due diligence, in the latter case it is necessary to evaluate the specific situation of the party. In general, unpredictability shall be decided according to the good faith standard, that is taking into consideration the ability to predict of ordinary people, not experts in any field[141]. Finally, force majeure must be an irresistible force which cannot be overcome[142]. To be deemed force majeure there must be a cause-effect relationship between the event and the impossibility of performance. For example, in a law case held in 1855 regarding the charter of a ship, courts applied force majeure because the impeded party to perform was not able to start the shipment due to the break out of the Anglo-Russian war, since the war broke out before the terms for the shipment had expired[143]. To be exempted by

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[141] WANG Jingbo 王敬波 (2020). 'Lun zhengfu xingwei zuowei xingzheng xieyi susong zhong de bukekangli' 论政府行为作为行政协议诉讼中的不可抗力 (On Government Action as Force Majeure in Administrative Agreement Litigation), Huadong zhengfa daxue xuebao 华东政法大学学报, 4: 110.

[142] YE Lin 叶林 (2007). 'Lun bukekangli zhidu' 论不可抗力制度 (On Force Majeure Doctrine). Beifang faxue 北方法学, 5: 38-39.

[143] Ivi, p. 41.

the consequences of a force majeure event, the impeded party to perform shall promptly notify the counterpart and provide evidence of the fact, except when the fact itself prevents the party to do so. For example, after the earthquake happened in Wenchuan, the impeded party to perform may have found it difficult to promptly notice the counterpart and provide the evidence of the event due to interferences in the communication system. The counterpart shall act in good faith and adopt the necessary measures to limit damages, since it is aware of the catastrophic event[144]. In general, force majeure application shall always follow principles of good faith, equality and free will and public interest[145]. The said legal exemption from liability may be invoked by both contractual parties, in accordance with the principle of consistency of rights and obligations[146] and the situation of both parties shall be analyzed to make the judgment[147]. For instance, if travel contracts are affected by the epidemic, both the travel agency and the travelers have the right to advocate for termination. The travel agency shall compensate for the expenses travelers have not benefited from yet, but not for the expenses they already benefited from[148]. If the negotiation between parties is not successful, parties must start a proceeding within a certain period of time[149]. Parties shall also be aware that after advocating for force majeure in front of courts, if courts decide that their case of non-execution does not belong to force majeure, they have to bear liability for breach of contract[150]. Thus, a particular matter to be considered is seizing the moment of conclusion of the contract and the moment of elimination of the

[144] ZHANG Gangyin 张钢印. 'Bukekangli hetong tiaokuan de shiyong' 不可抗力合同条款的使用 (The application of the contractual clause of force majeure). 铁路采购与物流. 2008, 3 (12): 43.

[145] LI Wei, LI Jingjing 李伟 李菁菁 (2020). '"Xinguanfeiyan" yiqing li bukekangli zai weiyue zeren zhong de shiyong'新冠肺炎"疫情里不可抗力在违约责任中的适用 (Application of Force Majeure in Liability for Contract Breach in the Context of COVID-19 Pandemic, Yixue yu faxue 医学与法学, 12: 5. The Chinese names of the principles are, in order, 诚实信用原则 chéngshi xìnyòng yuánzé、平等自愿原则 píngděng zìyuàn yuánzé、公共利益原则 gōnggòng lìyì yuánzé.

[146] 权利义务一致性的原则 quánlì yìwù yīzhìxìng yuánzé.

[147] WANG Jingbo 王敬波 (2020). 'Lun zhengfu xingwei zuowei xingzheng xieyi susong zhong de bukekangli' 论政府行为作为行政协议诉讼中的不可抗力 (On Government Action as Force Majeure in Administrative Agreement Litigation), Huadong zhengfa daxue xuebao 华东政法大学学报, 4: 110.

[148] LI Wei, LI Jingjing 李伟 李菁菁 (2020). '"Xinguanfeiyan" yiqing li bukekangli zai weiyue zeren zhong de shiyong'新冠肺炎"疫情里不可抗力在违约责任中的适用 (Application of Force Majeure in Liability for Contract Breach in the Context of COVID-19 Pandemic, Yixue yu faxue 医学与法学, 12: 4-5.

[149] Ivi, p. 5.

[150] Ivi, p. 5.

obstacle, for according to art. 79 of the Convention the impediment shall not be reasonably predictable at the moment of conclusion of the contract[151]. All things considered, Chinese force majeure's doctrine resembles the civil law one. Nevertheless, it has also been influenced by international regulations, specifically when speaking about the concept of 'reasonableness', which derives from the Anglo-American law tradition. The word 'reasonable' refers both to the ratio, that is the area of thoughts, and the common sense used when judging people behavior. The former definition aligns with continental law system while the latter is typical of the common law system. Taking force majeure's definitions as an example, the term 'reasonable' is used by the CISG and UPICC principles when referring respectively to 'an impediment reasonably not attributable to the contractual parties' and 'an event reasonably impossible to foresee, avoid and overcome'. As for Chinese law, the Chinese Imperial legal system already recognized the notion of 'reasonable', which is related to the concept of justice[152]:

> 'A first analysis of the semantic root of the word li can tell us something more about this concept. It is a sound meaning compound and is made by the radical of the jade on the left, that is the ideographic clue to meaning, and, on the right side the character li, a measure, that is the phonetic part. The semantic root of the character li is that of 'texture', 'vain': vain of jade, wood, stone. The concept behind this word, in its most ancient meaning, is that of the 'pattern' in things: jade is a precious stone that can be worked easily if the engraver is able to follow its natural marking. Li as a verb means 'to cut things according to their natural grain or division'. Thus, in a wider sense, judging means to look for the veins, to look and to follow natural patterns in things'[153].

The contract law of China uses this term, even in force majeure clauses, for instance when referring to 'reasonable time'[154].

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[151] LIANG Yanmei 梁燕媚 (2020). 'Xinguanfeiyan yiqing dui chukouqiye wufa lüxing goucheng bukekangli mianze tiaokuan de jianyi' 新冠肺炎疫情对出口企业无法履约构成 不可抗力免责条款的建议 (Suggestions on Proposing Novel Coronavirus Pneumonia to Constitute Force Majeure Exemption by China's Export Enterprises), Duiwai Jingmao 对外经贸, 4: 8.

[152] TIMOTEO, Marina (2010). 'Vague Notions in Chinese Contract Law: The Case of *Heli*', European Review of Private Law, 5: 942.

[153] Ibidem.

[154] TIMOTEO, Marina (2010). 'Vague Notions in Chinese Contract Law: The Case of *Heli*', European Review of Private Law, 5: 940-942.

CHAPTER 2

2.1 The Case of Sars

Until the twentieth century, the Chinese medical system, which is characterized both by Western scientific practices and Chinese traditional medicine, was focused on ‘personal and family problems resulting from individual cases of illness’[155], while ‘epidemics were beyond the scope of conventional knowledge’[156]. In the late nineteenth century, the British colonial authorities implemented the first public vaccinations against plague, a communicable disease with epidemic proportions spreading in Hong Kong. Throughout the twentieth century, China carried out a series of measures in order to modernize its health system, thus controlling infectious diseases and allowing everybody to have access to health services. Following the opening up of China, in 1979, the privatization and marketization of the health-care system made it more difficult for many people to access health-care. The situation changed with the health-care reform made in 2009, which aimed at providing universal coverage of basic health care[157]. Between the years 2002-03, China had been the theater of another epidemic, that is Sars. In November 2002, the first case of a new type of pneumonia was detected and in the mid of february 2003 the WHO was informed of the outbreak of the Sars epidemic[158]. The most affected countries were China, including Hong Kong and Taiwan, Canada and Singapore. The origins of this new type of pneumonia weren’t clear, but it is likely to be found in a mutation of influenza A that infect humans. As a matter of fact, the avian strains of influenza A, a type of influenza which is widespread in nature, has mutations capable of species-hopping[159]. The public health infrastructure was overwhelmed and the Chinese government firstly tried to reduce the international attention on the matter, then took draconian measures in order to face the public health issue so that by the end of May

[155] KLEINMAN, Arthur, WATSON, James L. (edited by) (2006). *Sars in China - prelude to pandemic?* Stanford – California: Stanford University Press, p. 7.
[156] Ibidem.
[157] TAO, Wenjuan et al. (2020). ‘Towards universal health coverage: lessons from 10 years of healthcare reform in China’. BMJ Glob Health, 5 (3): 1-9.
[158] KLEINMAN, Arthur, WATSON, James L. (edited by) (2006). *Sars in China - prelude to pandemic?* Stanford – California: Stanford University Press, p. 17.
[159] Ivi, p. 18.

the epidemic had peaked[160]. The control measures applied in order to control the epidemic included 'closing of schools, widespread screening for fever in airports and at other checkpoints for travelers, the strict isolation of infected cases and the quarantining of those exposed to known cases'[161]. Sars mainly spread over short distances through respiratory droplets, so the use of protective masks and contact precautions decreased the risk of infection[162]. At the end of the epidemic, 8000 cases and 916 were registered[163]. Considering that Sars origins were not clear and that even experts of the health sector cannot predict this event and there were no vaccine or medicine capable of contrasting the infection, in May 12th, 2003 the epidemic was categorized as a sudden event harming public health by the Chinese State Council[164]. From a legal point of view it may be useful to analyze what the Court of Beijing did during the Sars epidemic. Specifically, the Court decided that contractual parties shall consider Sars as a natural catastrophe that cannot be predicted, refrained and faced thus belonging to force majeure events[165]. The Court of Beijing also discussed the cases that most frequently would be held as being related to the invocation of the force majeure by contractual parties or victims of Sars. The first case regarded contracts, such as contracts related to the transfer of property, especially sale contracts, contracts for the transfer of the rights of use of property, such as contracts for lease, contracts that provide labor services, such as labor contracts, contracts for the provision of services, such as transportation, contracts for the construction of large-scale projects, processing contracts, etc. The second case focused on conducts of infringement, such as people being infected during their stay in hospital, when traveling with public transportation or during their shopping, the hospital or the doctors not fulfilling the obligation of giving prompt assistance, taxi-drivers and public transportation drivers refusing to give assistance to

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160 KLEINMAN, Arthur, WATSON, James L. (edited by) (2006). *Sars in China - prelude to pandemic?* Stanford – California: Stanford University Press, pp. 3-5.

161 Ivi, p. 20.

162 Ivi, p. 24.

163 Ivi, p. 21.

164 LI Wei, LI Jingjing 李伟 李菁菁 (2020). '"Xinguanfeiyan" yiqing li bukekangli zai weiyue zeren zhong de shiyong'新冠肺炎"疫情里不可抗力在违约责任中的适用 (Application of Force Majeure in Liability for Contract Breach in the Context of COVID-19 Pandemic, Yixue yu faxue 医学与法学, 12: 2.

165 http://bjgy.chinacourt.gov.cn/article/detail/2003/06/id/820317.shtml

people after having discovered that they have been infected with Sars. In all these violation cases, the victim is likely to ask for compensation for the injustice suffered. The third case regarded all the effects that the epidemic had on the lawsuits occurring during the Sars epidemic, such as the following: the invocation of the suspension of the lawsuit's prescription, since the lawsuit was held during the epidemic and the parties cannot proceed with the sue; the case in which the period for the fulfillment of debts expires during the Sars epidemic and the debtor is not able to promptly fulfill debts; the foreing party cannot prosecute, defend himself and await judgment due to the restriction measures; the parties are unable to produce or obtain evidence within the period specified by the court; the appellant cannot appeal during the statutory appeal period; after the complainant filed a lawsuit or the appellant appealed, they has been infected with Sars during the period of payment for the legal fees and so were unable to pay the fees; the applicant cannot go to the court to apply for enforcement, or the period for the execution of the debt performance fixed by the judgment expires, and the debtor cannot perform the debt due to Sars[166]. Lastly, the Court of Beijing fixed the main six elements to be taken into consideration in order to deem a contract impossible to execute due to force majeure. Firstly, it is necessary to grasp the fixed standard in order for the Court to consider Sars as an event of force majeure, that is the event occurred after the contract has been set up and before its execution and effected the execution of the contract. In light of this, parties cannot invoke force majeure in case of delay in the execution of the contract that happened before the outbreak of Sars as well as invoke force majeure for contracts that were concluded after the epidemic outbreak. Secondly, the consequences entailed after the force majeure event has been recognised are presented. As a matter of fact, the event of force majeure could impact the execution of the contract in different ways, requiring the Courts to take into consideration different solutions and apply the most suitable for each case. Taking lease contracts as example, during Sars the courts considered that the influence of the epidemic on business activities may not be an obstacle to the execution of the contract's object. In addition, considering that the creditor, in accordance with the measures taken for the interruption of the activities, already exempted the debtor from some liabilities, the

[166] http://bjgy.chinacourt.gov.cn/article/detail/2003/06/id/820317.shtml

remaining liabilities shall be on the shoulder of the debtor, in accordance with the principle of equity[167]. The solutions include the delay in the execution of the contract with the relief from the liabilities, the rearrangement of contractual terms, the partial or total relief from liability or the rescission of the contract. In addition, the Courts have to consider whether the liabilities were caused only by the event of force majeure or also by the party itself. If the party has liability, he has to bear it and be relieved only of the liabilities that cannot be undertaken due to Sars. Thirdly, according to the principle of good faith and in order to ease the difficulties of the counterpart, the party invoking force majeure shall promptly give notification to the counterpart on the impossibility to fulfill the obligations and shall provide a certificate of the said impossibility as soon as possible. The force majeure events cover the epidemic itself but also the measures taken by the government to prevent the spread of the epidemic, if the parties can provide evidence of the impossibility of performance. However, they do not cover the cases in which the parties refuse to execute the contract for subjective willingness, such as for fear of being infected, or when other enterprises of the same business sector are executing their contracts. Fourthly, following the principle of good faith, parties are obliged to do whatever they can to prevent or mitigate losses, otherwise they are deemed responsible for the losses they failed to prevent. Fifthly, for labor contracts, the Courts shall defend the legitimate interests of the weakest party, for example, if the employing unit invokes Sars epidemic as a cause to end a labor contract with an employee, the Court shall refuse this request. Lastly, the procedural interests of the parties shall be defended[168].

2.2 *Covid-19 Emergency and Force Majeure Application upon the Burst of Covid-19 Epidemic*

Between December 8th, 2019 and January 2nd, 2020, the symptoms of an unknown severe respiratory disease, such as fever, dyspnoea and features of pneumonia in chest radiographs, were observed in some patients of Wuhan, China. On December 31th,

[167] LI Wei, LI Jingjing 李伟 李菁菁 (2020). "'Xinguanfeiyan" yiqing li bukekangli zai weiyue zeren zhong de shiyong'新冠肺炎"疫情里不可抗力在违约责任中的适用 (Application of Force Majeure in Liability for Contract Breach in the Context of COVID-19 Pandemic, Yixue yu faxue 医学与法学, 12: 2.

[168] http://bjgy.chinacourt.gov.cn/article/detail/2003/06/id/820317.shtml

2019, Chinese authorities informed the WHO of this new type of pneumonia deriving from the Huanan seafood market in Wuhan, which had been closed since January 1st, 2020 for sanitation purposes. The causative agent of this unknown disease was isolated by Chinese authorities on January 7th, 2020 and classified as a new type of coronavirus, that is SARS-CoV-2. For the experts, the novel coronavirus is likely to be transmitted to human by its natural hosts, namely Chinese chrysanthemum bats, and its intermediate hosts, that is wild animals[169], due to a species-hopping[170]. In January, 15th 2020, following the isolation of the causative agent and the sanitary emergence of maximum level declared by the Chinese Center for Disease and Control Prevention, abbreviated in CDC, two different behaviors emerged: on the one hand, the measures for the containment of the epidemic started being implemented, on the other hand the severity of the situation was undervalued by some people and social events, such as the new year banquet of the community of Baibuting[171], were held in spite of the spread of the new disease. The situation changed when, on January 20th, 2020, the expert in epidemiology and pulmonology Doctor Zhong Nanshan confirmed the possibility of human-human contagion and the Central Government adopted several measures in order to control the epidemic[172], in compliance with the national regulation on health matters, namely the first paragraph of art. 21 and 51 of the Chinese Constitution, the former affirming that the health of the population and the development of the health-care and medicine are incentivized by the State and and the latter which stating that collective interests are to be prioritized compared to individual interests[173]. Between

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169 LI Wei, LI Jingjing 李伟 李菁菁 (2020). '"Xinguanfeiyan" yiqing li bukekangli zai weiyue zeren zhong de shiyong'新冠肺炎"疫情里不可抗力在违约责任中的适用 (Application of Force Majeure in Liability for Contract Breach in the Context of COVID-19 Pandemic, Yixue yu faxue 医学与法学, 12: 3.

170 BAGCCHI, Sanjeet (2020). 'Mysterious pneumonia in China'. The Lancet, 20 (2): 173.

171 WU Mengzhen (2020). 'Come è stato affrontato il Covid-19 in Cina: misure adottate e risposte istituzionali'. In Cavalieri Renzo (edited by), Mondo Cinese 167 - Codice cinese. Xi e il governo della legge. Fondazione Italia Cina, pp. 181-196.

172 ZHOU Chuqing 周楚卿 (2020). Xi Jingping Dui Xinxing Guanzhuang Bingdu Ganran de Feiyan Yiqing Zuochu Zhongyao Zhishi; Qiangdiao Yaoba Renmin Qunzhong Shengming Anquan He Shenti Jiankang Fangzai Diyiwei; Jianjue Ezhi Yiqing Manyan Shitou; Li Keqiang Zuochu Pishi 习近平对新型冠状病毒感染的肺炎 疫情作出重要指示 强调要把人民群众生命安全和身体健康放在第一位 坚决 遏制疫情蔓延势头 李克强作出批示 (Xi Jinping announced the directives for the coronavirus epidemic, stressing the need of prioritizing people's safety and health, Li Keqiang wrote instructions for the containment of the wave of contagion). Xinhuanet 新华网.

173 WU Mengzhen (2020). 'Come è stato affrontato il Covid-19 in Cina: misure adottate e risposte

January 22th-23th Wuhan started a lockdown that lasted for more than two months, with the suspension of public transportation[174]. The measures to prevent and control the spread of the novel coronavirus were rapidly implemented throughout Hubei province and in many other cities, up to being carried out across the whole territory of China. These measures, which have been applied in compliance with the Law on the Prevention and Treatment of Infectious Diseases issued the 30th August, 2018, the Law for Emergency Response and the Regulation on Public Health Emergency Management issued 26th February, 2006, include mobility-track measures such as the presence of health checkpoints at public transport hubs, the closure of schools even after the new year holidays and outdoor restrictions which allow just one member of a family to go out periodically in order to buy necessity goods. In addition, other measures taken in order to limit the spread of the virus consisted of tests for contact tracing and mask wearing. In March 10th, 2020, since the transmission of Covid-19 was significantly diminished, the countermeasures adopted by China shifted into measures to prevent the spread of the infection from imported cases, so everyone that entered China needed to be tested and quarantined[175]. As a matter of fact, on March 11th, 2020, the WHO declared Covid-19 as a pandemic. Following this announcement, China closed its borders and only on March 15th, 2021 travelers belonging to 23 countries and respecting the following characteristics were permitted to ask for a visa: residents, workers, people coming for humanitarian reasons and business travelers equipped with the APEC Business Travel Card. Business travelers from countries with which China had an agreement, namely Singapore and South Korea, were also allowed to enter the country. Initially, all travelers needed to prove that they were vaccinated with two doses of the China-made Sinovac vaccine for at least 15 days before entering China. From April 20th, 2020, travelers vaccinated with Pfizer-BioNTech, Moderna and Johnson & Johnson vaccines could also apply for the visa. Travelers also need to show the PCR and the antibody tests taken within 48 hours of travel and with a negative result and then quarantine for 14 or 21 days, depending on the region. At the present moment, life in

istituzionali'. In Cavalieri Renzo (edited by), Mondo Cinese 167 - Codice cinese. Xi e il governo della legge. Fondazione Italia Cina, pp. 181-196.

[174] Ibidem.

[175] BURKI, Talha (2020). China's successful control of COVID-19. The Lancet, 20 (12): 1240-1241.

China is back to normal and lockdowns are implemented in regions where new hotspots of the virus arise[176]. Considering the complex bureaucratic system of China, which makes the attribution of responsibility among higher and lower officers difficult, and considering the novelty of the situation for all the people involved in the containment of the epidemic, China national provisions against the spread of the novel coronavirus were successfully implemented[177] and in line with the story of the national health-care and political system. Experts divide force majeure events in national events of force majeure, social events of force majeure and natural events of force majeure. The case of Covid-19 belongs to national force majeure' events, since the epidemic diffusion all over China and the world has been fast and made necessary for the country's provinces to adopt severe measures in order to control it[178]. As a matter of fact, the epidemic, which broke out during the new year celebrations, has spread rapidly and in May, 31th 2020 6 millions of infected people were registered[179]. Keeping track of the contagion's map has been difficult and the measures taken in order to defeat the virus have affected the socio-economic life of the country[180]. Covid-19 belongs to unpredictable events because both common people and medicine experts cannot predict its outbreak, that was an accidental contingency and did not arise from a subject's fault, and cannot control the spread of the virus, in spite of the several measures that have been taken in order to do so, since the contagiousness was very high[181]. The attribute of inevitable contingency is appropriate since China's efforts to stop the contagions have not been sufficient, despite the measures taken were multiple and in part succeeded in limiting the spread of the

[176] BUCKLEY, Julia, LILIT, Marcus (2022). 'Traveling to China during Covid-19: What you need to know before you go'. *CNN Travel* (accessed on 09/03/2022); Protocol on Prevention and Control of Novel Coronavirus Pneumonia (Edition 6), March 7, 2020, National Health Commission.

[177] WU Mengzhen (2020). 'Come è stato affrontato il Covid-19 in Cina: misure adottate e risposte istituzionali'. In Cavalieri Renzo (edited by), Mondo Cinese 167 - Codice cinese. Xi e il governo della legge. Fondazione Italia Cina, pp. 181-196.

[178] LI Wei, LI Jingjing 李伟 李菁菁 (2020). '"Xinguanfeiyan" yiqing li bukekangli zai weiyue zeren zhong de shiyong'新冠肺炎"疫情里不可抗力在违约责任中的适用 (Application of Force Majeure in Liability for Contract Breach in the Context of COVID-19 Pandemic, Yixue yu faxue 医学与法学, 12: 3.

[179] Ivi, p. 2.

[180] Ivi, p. 1.

[181] Ivi, p. 3.

virus[182]. The pandemic is an event which cannot be overcome, because all the subjects involved in the prevention and control of the virus put all their effort in order to overcome the situation, without fully reaching their goal. In particular, therapeutic drugs capable of curing the disease have not been developed yet[183]. Furthermore, the outbreak of the epidemic is a national event of force majeure belonging to the category of public health issues, being a sudden event causing harm to the public health. As a matter of fact, in January 30th, 2020 the WHO established that Covid-19 was a worldwide public health's matters and took all the relative measures in order to control the spread of the pandemic[184]. To be deemed events hindering the contract's performance, public health issues must be irresistible, provoke a change of circumstances and breach the principle of equity between parties. A public health issue is irresistible when it happens suddenly and was not predictable even by medicine experts. In addition, the contagion cannot be controlled with ordinary treatments. The outbreak of the epidemic may be invoked as an event of force majeure when it compromises the regular activities of production and the normal operations of a business, causing negative effects for at least one of the contractual parties and making its performance unequal or the contract's object unreachable. In addition, the impeded party to perform may also advocate for changes of circumstances. In the former case, it concentrates more on the event causing the impracticability and may ask for rescission, in the latter case, it stresses the fact that the object of the contract is no longer achievable and asks for a re-discussion of contractual terms[185]. According to legal practice, force majeure is the principle usually invoked when dealing with public health issues[186]. Some parties also deemed the governmental actions taken to prevent and control the epidemic as cause of force majeure. Based on judgements documents, few courts analyzed in

[182] LI Wei, LI Jingjing 李伟 李菁菁 (2020). '"Xinguanfeiyan" yiqing li bukekangli zai weiyue zeren zhong de shiyong'新冠肺炎"疫情里不可抗力在违约责任中的适用 (Application of Force Majeure in Liability for Contract Breach in the Context of COVID-19 Pandemic, Yixue yu faxue 医学与法学, 12: 3.
[183] Ivi, p. 3.
[184] Ivi, p. 1.
[185] Ivi, p 2.
[186] Ivi, p. 2.

detail whether governmental actions shall be considered force majeure cause[187]. Some experts deem government's actions as force majeure, since they are external causes insurmountable for parties. Furthermore, the time and place of issuing as well as the specific content of the said actions are usually unpredictable. Other experts do not consider government's actions as force majeure, since there are many different governmental departments and in case their actions were to be considered force majeure then the principle would be invoked too many times. For example, in case of delay in the delivery of commercial housing due to governmental actions, is it possible for the real estate development company to be exempted by liability? Considering the 'unpredictability' factor, the answer is no, for in case of house's prices rising, the buyer should be aware that the government may issue related measures at any time. In case the execution of the contract becomes too burdensome for one party, the change of circumstances may be invoked instead[188]. Nonetheless, in case parties invoke force majeure for governmental actions, they have to fulfill the common requirement of force majeure, such as the cause-effect relationship between governmental actions and the impossibility of performance and the fact that governmental actions shall be issued before the conclusion of the contract. Taking as example a commodity house purchase agreement, with the commercial building being sold for 130000 yuan, parties decided to make the first payment before February 25th, but the buyer was not able to make the payment on time, despite the warning of the property developer, who urged him many times to make the payment on schedule in order to avoid the breach of contract. The buyer asked for a postponement of the payment which was rejected and then he asked the Consumer Council to consider his case. The Consumer Council investigated and collected evidence that the contract was signed on January 1st and the epidemic in Guangdong province started being a public health issue on January 23th, so the agreement was signed before the measures to manage and control the epidemic started being implemented and the buyer, coming from Hubei and facing the consequences of the epidemic in the Hubei province, cannot move to the developer place to provide for

[187] WANG Jingbo 王敬波 (2020). 'Lun zhengfu xingwei zuowei xingzheng xieyi susong zhong de bukekangli' 论政府行为作为行政协议诉讼中的不可抗力 (On Government Action as Force Majeure in Administrative Agreement Litigation), Huadong zhengfa daxue xuebao 华东政法大学学报, 4: 107.
[188] Ivi, p. 106.

the payment due on schedule. Nevertheless, the Consumer Council decided that there is no direct cause-effect relation between the execution of the contract and the epidemic since the buyer could have used electronic payment or other methods of payment to pay the developer from home on time. In light of this, the requirements to appeal to force majeure or change of circumstances to advocate for the discharge from liability were not met, but anyway the property developer agreed to postpone the payment until March 31th[189]. In light of this, it can be observed that the requirement of a cause-effect relationship helps to prevent the epidemic from becoming an excuse to avoid the execution of all the contracts which have to be performed during the epidemic period. Another example is the dispute on the validity of the contract[190] of Sanya Kelly Investment Co., Ltd. vs Zhang Wei, where the plaintiff considered governmental actions as force majeure, but since governmental notice was issued before the conclusion of the contract it was predictable and thus does not belong to force majeure cases[191]. During the epidemic, in order to prevent and control the spread of the virus, the local government did not allow foreign trade bodies to resume activities after the new year celebration. For the said reason, some supply contracts have only been partially executed or they have not been executed at all. The case above belongs to the events that cannot be controlled by parties, because there is a cause-effect relation between the epidemic and the delay in the execution and because the impediment derives from an external cause, that is the governmental measures of control of the epidemic. In addition, parties were not willing to postpone the execution because the market sales season would have been over. Thus, force majeure may be correctly invoked in accordance with Chinese contract law, the GPCL and the VCLT[192]. The measures for

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[189] 'Yiqing bingfei weiyue liyou' 疫情并非违约理由 (The epidemic is not a cause for breach of contract). Zhiliang Yu Renzheng 质量与认证, 5 (2020): 27.

[190] 合同效力纠纷 hétòng xiàolì jiūfēng.

[191] GUO Binglin 郭兵林 (2020). 'Bukekangli zhi shiyong biaozhun tanjiu – yi yiqing qijian changshi leixing hetong wei qierudian' 不可抗力之适用标准探究 ——以疫情期间常见类型合同为切入点 (Investigation on the Application Standards of Force Majeure. Taking Common Contractual Types during the Epidemic Period as a Breakthrough Point), Jiaozuo Daxue Xuebao, 焦作大学学报, 3: 18.

[192] XU Liufang 许留芳 (2020). 'Waimao "bukekangli" de yunyong tanlun xiandai shangmaogongye' 外贸"不可抗力"的运用探讨 (Discussion on the application of foreign trade 'force majeure'), Xiandai shangmao gongye 现代商贸工业, 33: 48-49.

traffic control taken by the local governments after the outbreak of the epidemic are considered an obstacle to many supply contracts' execution. For instance, the announcement of traffic control of the principal urban road of the city of Daqing during the pandemic established that vehicles from the outside were not allowed to enter the city. These measures prevented many contract's executions and constituted force majeure since they could not be overcome. Nonetheless, the commerce of goods such as items for the prevention and control of the epidemic and daily products such as fruit and vegetables was allowed by local governments. For instance, in Anhui province basic necessities were allowed to enter the cities thanks to a 'green channel', making the execution of the contract possible. This way parties involved in the commerce of these products could overcome the difficulties provoked by the restriction measures and could not advocate for force majeure[193]. As for lease contracts, there are local leasing and offsite leasing. Considering local leasing, force majeure shall not be invoked in case of civil lease, since the restriction measures do not hinder the use of the apartment, and in case of commercial lease for common commercial purposes related to the production, storage, selling of items for the prevention and control of the epidemic and basic necessities. However, force majeure may be invoked when the commercial lease does not regard the said products, since the restriction measures affected the use of the property. Considering offsite leasing, force majeure shall be invoked in case of civil lease, since the restriction measures hindered the mobility of workers, and in case of commercial lease for common commercial products, excluded the ones related to the production, storage, selling of items for the prevention and control of the epidemic and basic necessities[194]. Nonetheless, since lease contracts are long-term contracts, the epidemic will affect just a part of the contract's execution and parties are likely to be exempted by liability for the length of time of the epidemic without the contract being terminated. For instance, on February 15th, 2020, Haishu court of Ningbo examined the case between the lessor Mister Sun and the lessee Mister Wang, the parties of a five

[193] GUO Binglin 郭兵林 (2020). 'Bukekangli zhi shiyong biaozhun tanjiu – yi yiqing qijian changshi leixing hetong wei qierudian' 不可抗力之适用标准探究 ——以疫情期间常见类型合同为切入点 (Investigation on the Application Standards of Force Majeure. Taking Common Contractual Types during the Epidemic Period as a Breakthrough Point), Jiaozuo Daxue Xuebao, 焦作大学学报, 3: 18.
[194] Ivi, p. 18.

years lease contract. Mister Wang advocated for termination of the contract for he was not able to use the building during the new year's festival due to the epidemic. Mister Sun sued the lessee because the contract's duration was five years and the epidemic only affected the execution for a certain period of time. The termination of the contract was to be considered breach of contract and the lessee was to pay the settlement of the damage[195]. During the public health emergency, parties may discuss and adopt a 'supplementary agreement' in accordance with art. 510 of the contract volume of the new civil code:

> '合同生效后，当事人就质量、价款或者报酬、履行地点等内容没有约定或者约定不明确的，可以协议补充；不能达成补充协议的，按照合同相关条款或者交易习惯确定。'
>
> After the contract has come into force, if parties have not reached an agreement on matters such as quality, price, compensation, place of execution, etc. or the agreement is not clear, they have the right to adjust the contract with a supplementary part if they can reach an agreement on the issues. Otherwise, they shall act in accordance with the contract's clauses or the commercial practice.

The supplementary agreement can be considered also for rent reduction or price reduction. Thus, parties shall decide whether to continue the contract's performance, modify some contractual terms or opt for termination and draft a supplementary agreement whose value is higher than the original contract[196]. In addition, as stated before, after the outbreak of the novel-coronavirus, many contractual parties advocated for force majeure even though their case did not belong to the ones included in art. 590 of the contract volume of the new civil code, such as when there is no cause-effect relation between the execution of the contract and the epidemic. Finally, there are some

[195] GUO Binglin 郭兵林 (2020). 'Bukekangli zhi shiyong biaozhun tanjiu – yi yiqing qijian changshi leixing hetong wei qierudian' 不可抗力之适用标准探究 ——以疫情期间常见类型合同为切入点 (Investigation on the Application Standards of Force Majeure. Taking Common Contractual Types during the Epidemic Period as a Breakthrough Point), Jiaozuo Daxue Xuebao, 焦作大学学报, 3: 19.

[196] LI Wei, LI Jingjing 李伟 李菁菁 (2020). '"Xinguanfeiyan" yiqing li bukekangli zai weiyue zeren zhong de shiyong'新冠肺炎"疫情里不可抗力在违约责任中的适用 (Application of Force Majeure in Liability for Contract Breach in the Context of COVID-19 Pandemic, Yixue yu faxue 医学与法学, 12: 4.

cases which require a deep analysis in order to establish whether to relief parties from liability, such as when only one part of the performance cannot be achieved due to force majeure; when just a contractual party has been affected by the epidemic and can be relieved by liability; when the delay in the performance was prior to the force majeure event; when the performance is hindered both by the force majeure event and by one party's fault[197].

2.3 Guiding Opinions on the Use of Force Majeure

Considering the large amount of enterprises being damaged by the effects of the pandemic, on February 2nd 2020, the spokesperson of the Legislative Affairs Commission of the Standing Committee of the National People's Congress, Zang Tiewei, stated that contractual parties not able to perform the contract due to the pandemic and the measures taken in order to prevent and control it shall be considered exempt due to force majeure, being the pandemic and event that cannot be predicted, avoided and overcome. Thus, parties may be partially or fully relieved from contractual liability, with the exception of law and administrative regulations having different rules. In addition, in order to face the difficulties arisen after the outbreak of the pandemic, the Supreme People's Court of the People's Republic of China issued the Guiding Opinions on some matters related to how to correctly start civil cases' trials regarding Covid-19 in accordance with law, thus protecting the legitimate interests of people, protecting justice and social equity and integrating the practical experience of trials. The said document establishes that Courts shall display the guarantee role of legal services and act according to their role of regulation of social relations. In order to assist contractual parties which have been affected by the pandemic, Courts shall participate in the management of sources of complaint, favoring the ADR and the search for compromise, mediation and sharing of risks between parties, considering the measures taken to prevent and control the epidemic and their effects on the society and economy of the country. In particular, the second point of the Guiding Opinions explains how to

[197] LI Wei, LI Jingjing 李伟 李菁菁 (2020). '"Xinguanfeiyan" yiqing li bukekangli zai weiyue zeren zhong de shiyong'新冠肺炎"疫情里不可抗力在违约责任中的适用 (Application of Force Majeure in Liability for Contract Breach in the Context of COVID-19 Pandemic, Yixue yu faxue 医学与法学, 12: 4.

properly use the force majeure principle in accordance with law, while point three discusses how to properly start trials for contractual disputes arising from the direct effects of the pandemic and its measures of containment in accordance with law. As for trials of civil cases related to Covid-19, the popular courts shall apply force majeure in accordance with the relative regulations. In case of trials related to the effects of the pandemic or the measures of containment which fit force majeure regulations, the rules described in art. 180 of the GPCL and art. 563, 565. and 590 of the new contract law shall be applied, with the exception of law and administrative regulations having different rules. When parties advocate for the partial or total exemption from liability due to force majeure, they shall provide evidence of the fact that force majeure event directly caused the impossibility of performing civil obligations. In case of trials for contractual disputes arising from the direct effects of the pandemic and its measures of containment, Courts shall consider the effects of pandemic on different areas, different sectors and different cases, verifying the cause-effect relation between the pandemic or the measures to prevent and control it and the impossibility to perform the contract, as well as the extent of the causal force. Trial resolution shall be achieved according to the following rules: first, when the pandemic or the measures to prevent and control it directly caused the impossibility of executing the contract, force majeure's regulations shall be applied in accordance with law and parties shall be partially or totally relieved from liability considering the extent of the effects of the force majeure event. If parties are responsible for the impossibility of execution and the relative losses, they shall bear their own liabilities in accordance with law. In any case, if the party not affected by the force majeure event asks the affected party to promptly receive notification for the impossibility of execution, the latter shall be deemed responsible for the provision of the evidence. Second, when the pandemic or the measures to prevent and control it have only caused difficulties in the execution of the contract, parties may renegotiate the content of the contract. When the performance of the contract is still possible, popular courts shall readapt the contract in order to render it feasible and allow parties to execute it. If parties put forward the difficulties in the execution of the contract as the cause for termination, popular courts cannot agree to their request. Third, if a party advocates for the modification of the schedule, process, costs, etc. fixed in the contract

because the execution of the contract is clearly unjust for it, popular courts shall evaluate the specific case and then decide whether to accept the request. After the contract has been modified, if the party still advocates for the exemption of partial or total liability, popular courts shall not agree with the request. In case a contract's object cannot be achieved anymore due to the pandemic or the measures to prevent and control it and parties advocate for termination, popular courts shall accept their request. Fourth, if parties receive government subsidies, tax reduction or tax exemption or other subsidies and debt relief due to the pandemic or the measures to prevent and control it, popular courts may consider the said measures when deciding whether to sustain or not contrac's execution. All these instructions shall be followed with the exception of law and administrative regulations having different rules. In addition to the Guiding Opinions issued by the SPC, also the Cooperation Department of the MOFCOM, together with the China Council for the Promotion of International Trade, hereafter CCPIT, the Commercial Certification Center, the Enterprise Rights Protection Center, and the China International Contractors Association created guiding opinions on the correct use of force majeure during the pandemic period in order to help foreign projects of outsourcing engineering companies which have been affected by the pandemic and cannot be completed on time[198]. The said guiding opinions underline that there's no common definition of force majeure. In civil law countries there are clear rules on the said institution, thus contractual parties can directly cite the articles of the applicable law chosen. In common law countries there's no regulations on force majeure and if parties have not inserted a force majeure clause in the contract, usually the formulas of 'failure of purpose of the contract', 'contract impediment' and 'impossibility of performance' are applied. The law usually applied by the International Federation of Consulting Engineers, hereafter called FIDIC, is the law of the country in which the project is being implemented, except for the cases in which a force majeure clause has been inserted in the contract. Thus, in order to understand whether Covid-19 may be considered an event of force majeure or special risk, companies should look at the contract and the specific regulations of the applicable law. In addition, enterprises should verify whether the force majeure inserted in the contract includes infectious

[198] http://www.mofcom.gov.cn/article/yqfkscbg/swbgz/202003/20200302947231.shtml

diseases or similar facts. If the list of force majeure events is not complete, enterprises may integrate the contract with the proper definition of force majeure or special risks, thus being able to include Covid-19 in the events of force majeure. When there is no force majeure clause in the contract or the list included in it is not complete, enterprises may not be able to advocate for exemption of liability and compensation and so they should try to rely on rules of contract's applicable law related to force majeure or frustration of purpose. Moreover, when enterprises appeal to force majeure, they need to promptly provide notice to the property owner in accordance with the model, contents and issuing methods requested by the specific contract, thus avoiding the rejection of their request. As for force majeure notice, the notice for the extension of the time of performance or the compensation of added costs due to force majeure belong to different categories of notice. The first shows evidence of the event of force majeure while the latter proves that companies suffered effects on the time of execution and on the costs due to the pandemic. Being the pandemic an ongoing event, China and all the other countries involved in the projects, such as the countries of origin of workers, machinery, material and equipment will continue to be affected by the pandemic and update the measures to prevent and control it. These changes may affect the execution of contacts and so companies should keep track of the development of the situation in order to promptly update their claims. Enterprises shall provide evidence of the following events: effect on the construction period, such as specific activities being affected by the pandemic, effect on project planning, on work and on activities implemented on the key routes, on lack of workers hindered by the restriction measures in their return to work and on lack of equipment and goods, as well as the measures taken by the contractor in order to reduce force majeure events and all the added costs deriving from the impact of the pandemic. Proof materials may include government announcements, WHO notice, traveling restrictions, quarantine instructions, news reports, closure notifications, flight cancellations, correspondence with the owner as well as its requests and instructions, records of storage and consumption of material on site, on-site workers requirements and workers entry and exit records, customs and logistics records, construction records, notifications from the embassy or consulate of the country where the project is located, certificates of derogation measures and so on.

Companies shall register the effective state of performance and the measures taken to limit the damages, as well as promptly send to the owner the records of the period, bearing in mind that the more accurate the situation of the company is, the greater the possibilities for the requests to be accepted. In addition to the procedures mentioned above, in case the contract requires that the event of force majeure should be acknowledged by the competent office located in the place where it took place, enterprises, in accordance with the requests of the contract, shall also prepare the certificate proving that the pandemic is a case of force majeure. They may ask for it from the CCPIT and its authorized branches and subsidiaries. The Guiding Opinions also remind all the enterprises affected by the pandemic that is not always appropriate to refer to the pandemic constituting an event of force majeure in order to advocate for exemption of liability and compensation. As a matter of fact, some companies having scarce knowledge about the application of force majeure advocated for the exemption of liability or a compensation due to force majeure even though their cases did not fit with force majeure regulations, thus their requests have not been accepted. It is suggested to promptly provide the counterpart with the evidence of the difficulties in the execution of the contract so that the counterpart can adopt the right measures in order to reduce its losses and assist the impeded party to perform in the execution of the contract. Along with all the measures described above, it is also necessary to manage subcontractors and suppliers' requests for interests protection and compensation. Enterprises should increase the communication with the said categories and correctly manage the distribution chain and its upstream and downstream activities and contracts in order to reduce the risk of bearing the liability for breach of contract. In case of necessity, enterprises shall get in touch with all the bodies entrusted with the management of the application of force majeure during the Covid-19 pandemic. Except for the useful instructions provided above, the CCPIT also acknowledged that enterprises suffered the effects of the pandemic on several fields, such as goods, logistics, etc. and has been prevented from performing international commercial contracts and contracts in general. The Council decided to issue a certificate of force majeure, in accordance with the Constitution of CCPIT regulations approved by the State Council, in order to assist any enterprise which cannot execute the contract on time or cannot execute the

international commercial contract due to the pandemic. Enterprises shall provide documents such as the certificate issued by the government or the institution where the enterprise is located, the evidence of delay or cancellation related to transportation by sea, by land or by air, the contracts for the purchase and sale of goods for export, freight booking agreements, freight forwarding agreements, customs declarations, etc. and any other evidence available.

CHAPTER 3

3.1 The CCPIT's Certificate of Force Majeure

The CCPIT, which is also referred to as the China Chamber of International Commerce (CCOIC), was founded in 1952 as a national agency for the promotion of foreign trade and investment. It is under the control of the MOFCOM. The activities of the CCPIT include providing foreign trade related certificates such as certificates of origin for export products and force majeure certificate; managing trade fairs, exhibitions and other events, such as promoting the Belt and Road Initiative (BRI) fairs and participating in Bureau International des Expositions (BIE) and World Expo; dealing with intellectual property issues, such as providing patent application and trade mark registration as well as managing litigations[199]. In addition, in 1956 the CCPIT constituted the China International Economic and Trade Arbitration Commission, hereafter CIETAC, as a permanent arbitration institution for economic and trade disputes and investment disputes[200]. The CIETAC is the body in charge of managing most of the disputes that arose after the outbreak of Covid-19, including the disputes in which parties invoked force majeure. On this respect, the CIETAC states[201]:

> 'The loss of fairness and act of God clauses in contracts are two of the most commonly invoked defenses in arbitration cases, but they are also two of the most difficult to substantiate, due to the fact that, in reality, most contracts are established on the basis of free negotiations between the parties. Cautious businessmen always analyze and balance various factors before making decisions and signing contracts. Attempting to avoid executing one's contractual obligations by claiming loss of fairness when changing situations or inaccurate market forecasts create unfavorable conditions for oneself constitutes a violation of the principles of sincerity and fair exchange contained in the Contract Law. Similarly, Article 41 of the Contract Law increases the burden of responsibility on the party that supplies the contract format. If a contract has indeed lost fairness, then the aggrieved party must exercise its right to revoke the contract within the

[199] http://china-italy.com/it/socio/china-council-promotion-international-trade
[200] http://www.cietac.org/index.php?m=Page&a=index&id=35&l=en
[201] http://www.cietac.org/index.php?m=Article&a=show&id=2364&l=en

time period stipulated by the Contract Law. If it exceeds this time limit, the party loses its right to seek revocation.’

As for the issuing of force majeure certificates, paragraph 6 of article 8 of the CCPIT Statute approved by the State Council allows the CCPIT to issue different types of commercial certificates, one of which is the force majeure certificate. The assistance provided in this respect by the CCPIT is of extreme importance. For instance, in 2019 the certificates issued by the local CCPITs helped companies affected by the typhoon Likima to reduce losses for a value of 2,3 billions of yuan[202]. During the Covid-19 pandemic, the CCPIT collected in its website the most common questions that enterprises interested in obtaining the force majeure certificate ask[203]. The CCPIT clarifies that the certificate itself does not directly attest the force majeure event, but it provides certification that events such as delay in the recovery of work or transportation’s control measures occurred. To advocate for the certificate companies , shall fill the application on the online platform created in order to limit the flow of people in the certification room, thus avoiding the spread of the virus among people. Enterprises may also contact the local Council for the Promotion of International Trade via mail, QQ groups, telephone, etc. The procedures to obtain the certificate include registering to the CCPIT website with a personal account, providing company information, selecting the force majeure certificate and filling it with the information required, asking for the emission and selecting the certificate for the Covid-19 epidemic and finally loading the proof materials. The CCPIT issued the first certificate of force majeure on February, 2nd, 2020 to assist Party A, a manufacturer of auto components from Huzhou, Zhejiang which supplies Party B, the African factory of Peugeot, with steering boxes. Due to the pandemic, Party A needs to delay the delivery but is not able to promptly provide a legal certificate of the cause provoking the impediment. The CCPIT certificate exempted Party A from the payment of a compensation valued 2.400.000 RMB for losses caused by the delay and from the 30.000.000 RMB of losses

202 https://www.rzccpit.com/company/infomationdetails.html?id=041bd1e08b0e4bc6bc9da5742cde4b37

203 https://www.rzccpit.com/company/infomationdetails.html?id=041bd1e08b0e4bc6bc9da5742cde4b37

which are likely to be caused by the stop of the production line. In addition, the certificate also exempted Party A from the request of Party B of going into operation on February 3rd, which cannot be accepted due to the restriction measures implemented in China[204]. In the above mentioned case, force majeure was successfully invoked because the epidemic belongs to the category of public health issues being an irresistible contingency, causing a change of circumstances and breaching the principle of equity between parties. The restriction measures taken in order to control the epidemic compromised the regular activities of production and the normal operations of the business, causing negative effects for Party A and making its performance unequal. In particular, the cause-effect relationship between governmental actions and the impossibility of performance was recognized because the measures taken by the local governments after the outbreak of the epidemic are considered an obstacle to many supply contracts' execution. Among the most common situations allowing companies to obtain the certificate of force majeure, there are the restriction measures taken between February and March 2020 preventing foreigners who had to participate in fairs and other similar events to enter China, even though the participation fee had already been paid. In this case companies had to provide the official announcement made by the competent authority and the exhibition contract. Also exhibitors had been prevented from participating in the exhibitions due to the measures for the movements control. In this case, exhibitors had to provide the announcement issued by the government on the implementation of travel control measures and the exhibition contract. Furthermore, in case the exhibitors' flight had been canceled due to the pandemic situation, companies had to provide the notice of flight cancellation issued by the airline company or the governmental agency and the exhibition contract. In case the exhibition was still taking place but the participants were not willing to go, they still had to pay the fee for the exhibition space and the hotel reservation. Exhibition participants may advocate for force majeure when there is an objective obstacle to the contract's execution, such as if the original flight is canceled and there are no airline companies which can provide a

[204] LIANG Yanmei 梁燕媚 (2020). 'Xinguanfeiyan yiqing dui chukouqiye wufa lüxing goucheng bukekangli mianze tiaokuan de jianyi' 新冠肺炎疫情对出口企业无法履约构成 不可抗力免责条款的建议 (Suggestions on Proposing Novel Coronavirus Pneumonia to Constitute Force Majeure Exemption by China's Export Enterprises), Duiwai Jingmao 对外经贸, 4: 7.

substitutive flight or if the government suspended all the flight from and to China, so the affected party is unable to reach both the hotel and the exhibition. On Feb. 12, 2020, the CCPIT issued the certificate n. 201100B0/007402 to assist Sino Soar Hybrid (Beijing) Technology Co., Ltd. The certificate explains that from February 5, 2020 travelers who has visited China in the past 14 days are banned from entering Surinam, in accordance with the Recent Reminder of Relevant National Immigration Control Measures[205], issued on February 10. The cause-effect relation between the epidemic and the delay in the execution and the externality of cause, which is the governmental measures of control of the epidemic, where recognized also for the certificate n. 201100B0/007302 issued on Feb. 11, 2020 for Shell (China) Limited. The certificate states that all enterprises in Ningbo shall not resume work before February 9, with the exception of approved enterprises, in accordance with the '12 Measures' for Epidemic Prevention and Control in Ningbo issued by the Prevention and Control Work Leading Group of the Pneumonia Infected by the Novel Coronavirus in Ningbo[206]. The above-mentioned examples demonstrate the importance of the certificates for Chinese enterprises affected by the epidemic. According to the CCPIT, 4.318 force majeure certificates have been released by 99 commercial bodies in order to assist Chinese exporters of over 30 industries damaged by the epidemic, for a contract total value of $47,2 billions. The main business areas involved are production, wholesale and retail, leasing, construction and production of power generation equipment[207].

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[205] National Immigration Administration website (https://www.nia.gov.cn/)

[206] CCPIT website (https://www.rzccpit.com/titleCertificate.html)

[207] http://english.ccpitbj.org/web/static/articles/catalog_2c94bbf02fd8b281012fd8debea40005/article_ff8080816da92f5b01708ab3ca8f2280/ff8080816da92f5b01708ab3ca8f2280.html

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LIST OF ABBREVIATIONS

BRI - Belt and Road Initiative (一带一路)

BIE - Bureau International des Expositions

CCPIT - China Council for the Promotion of International Trade (中国国际贸易促进委员会)

CCOIC - China Chamber of International Commerce (中国国际商会)

CIETAC - China International and Economic Trade Arbitration Commission (中国国际经济贸易仲裁委员会)

CISG - Convention on Contracts for the International Sales of Goods

ECL - Economic Contract Law (经济合同法)

FECL - Foreign Economic Contract Law (涉外经济合同法)

FIDIC - International Federation of Consulting Engineers

GPCL - General Principles of the Civil Law (民法通则)

ICC - International Chamber of Commerce

MOFCOM - Ministry of Commerce (商务部)

PECL - Principles of European Contract Law

SPC - Supreme People's Court (最高人民法院)

TCL - Technology Contract Law (技术合同法)

UPICC - Unidroit principles of International Commercial Contracts

VCLT - Vienna Convention on the Law of Treaties

WHO - World Health Organization

证 明 书
CERTIFICATE

中 国 国 际 贸 易 促 进 委 员 会 暨 中 国 国 际 商 会
China Council for the Promotion of International Trade is China Chamber of International Commerce

中国国际贸易促进委员会

China Council for the Promotion of International Trade
China Chamber of International Commerce

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CERTIFICATE

201100B0/007402
号码 No.

兹证明：依据2020年2月10日国家移民管理局网（www.nia.gov.cn）发布的《近期有关国家入境管制措施提醒》，自2月5日起，禁止过去14天曾到过中国境内的旅客（包括机组人员和乘客）入境，苏里南常驻居民除外。

THIS IS TO CERTIFY THAT: according to the Recent Reminder of Relevant National Immigration Control Measures issued on the website of the national immigration administration (www.nia.gov.cn) on February 10, 2020 , except for permanent residents of Surinam, passengers (including flight crew and passengers) who have visited China in the past 14 days will be banned from entering Surinam from February 5.

China Council for the Promotion
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