

Durham Center for Chinese Law & Policy and Oxford Chinese Law Discussion Group

Force Majeure and COVID-19: An Assessment of the Contract Law and Civil Code of the People's Republic of China

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Impact of COVID-19 and control & prevention measures taken by the government on a range of contracts

- Delivery of goods (domestically and globally)
- Closure of shops, restaurants & other public spaces
- Quarantine measures and travel restrictions that prevent mobility of people (notably, migrant workers)

...COLD KNOCKOUT... BRILLIANTLY PERCEPTIVE
-Aaron Hill, Village Voice

WINNER



FESTIVAL DE CANNES



- The Guardian



- Time Out New York

"PACKS A SERIOUS PUNCH"

-Damon Wise, Empire

"THRILLING AND ELEGANT... A MUST-SEE DARK COMEDY"

-Erica Abel, The Huffington Post

"MIGHTILY CLEVER... BRACINGLY CINEMATIC"

-Tim Robey, The Telegraph

FORCE MAJEURE

A FILM BY RUBEN ÖSTLAND



Am I excused from performing the contract?

Main provisions in Chinese contract law

CIVIL CODE (2020)

Art 180: Where the non-performance of civil obligations is caused by force majeure, no civil liability shall arise therefrom, except as otherwise provided by law. Force majeure means any objective circumstance that is unforeseeable, unavoidable and insurmountable.

第一百八十条：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。

Art 563 (1): The parties to a contract may terminate the contract if it is rendered impossible to achieve the purpose of the contract due to an event of force majeure.

第五百六十三条：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

Main provisions in Chinese contract law

CIVIL CODE (2020)

Article 590: Where a party is unable to perform a contract due to force majeure, it shall be exempted from liability in part or in whole in light of the impact of force majeure, except otherwise provided by law. If a party is unable to perform the contract due to force majeure, it shall promptly notify the other party to mitigate the potential loss caused to the other party and provide evidence of the force majeure event within a reasonable time. If force majeure occurs after a party's delay of performance, the party shall not be exempted from liability for breach of contract.

第五百九十条：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。

Main provisions in Chinese contract law

CONTRACT LAW (1999)

Art 94(1): The parties to a contract may terminate the contract if the purpose the contract cannot be realised because of force majeure.

第九十四条： 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

Art 117: Where a contract cannot be performed due to force majeure, liability shall be exempted in part or in whole in light of the effects of the force majeure, except as otherwise provided by law. If the force majeure occurs after one party has delayed its performance, the liability of that party shall not be exempt. For the purpose of the Law, force majeure refers to an objective circumstance that is unforeseeable, unavoidable and insurmountable.

第一百一十七条： 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，但法律另有规定的除外。当事人迟延履行后发生不可抗力的，不能免除责任。本法所称不可抗力，是指不能预见、不能避免并不能克服的客观情况。

Main provisions in Chinese contract law

CONTRACT LAW (1999)

Art 118

A party shall, if being unable to perform the contract due to force majeure, inform the other party immediately so as to reduce possible losses to the other party, and shall provide relative evidences within a reasonable period.

第一百一十八条： 当事人一方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。

Outline

- 1. Definition and Scope of Force Majeure**
- 2. Force Majeure and Change of Circumstances**
- 3. Implications for liability for breach and termination of contract**

Definition of force majeure

Article 180, second paragraph of the PRC Civil Code defines force majeure as ‘objective circumstances which are **unforeseeable, unavoidable and insurmountable**’.

Similar definition in Article 117 of the PRC Contract Law

Scope of force majeure

- Objective approach to determining whether certain impediments or circumstances give rise to force majeure
- Such impediment must be external or exogenous to the contract-breaker
- Three commonly recognized causes of force majeure:
 - natural disasters
 - social abnormalities
 - government acts


Government
acts



SARS epidemic 2003: Supreme People's Court's temporary notice recognized that force majeure rules (Arts 117 & 118) of the 1999 Contract Law applied to the epidemic and related administrative measures taken by government authorities

**COVID-19 &
control &
prevention
measures**





COVID-19 &
control &
prevention
measures

*Guiding Opinions (Part I) on Several Issues
Concerning the Proper Trial of Civil Cases
concerning COVID-19*

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

兹证明：依据1月27日浙江省人民政府发布的《浙江省人民政府办公厅关于延迟企业复工和学校开学的通知》，省内各类企业不早于2月9日（星期日）24时前复工，2月10日（星期一）起正常上班。

Force majeure certificates?

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

China Council for the Promotion
of International Trade

The background features several concentric circles of varying radii, some solid and some dashed, creating a ripple effect. A large red callout box is centered on the page, containing the text.

Change of circumstances

A distinct doctrine

*Interpretation II of the
Supreme People's Court of
Several Issues concerning the
Application of the Contract
Law of the PRC (2009) Art 26*



Where there is a **substantial change to the objective circumstances** after the formation of the contract due to reasons which, **except for force majeure and commercial risks**, the parties could not foresee at the moment of entering into the contract, **making it obviously unfair or impossible to realise the purpose of the contract** for any of the parties to perform as originally stipulated, the court shall, upon the claim of either party, **decide to uphold, modify or terminate the contract** based on the **principle of fairness** in combination with the **actual situation** of the case in question.

Civil Code

Art 533

Where there is a **substantial change** to the basic conditions of the contract after its conclusion which, **except for commercial risks**, was **unforeseeable** by the parties at the time of concluding the contract, making it **obviously unfair** for any of the parties to perform as originally stipulated, the party who suffers disadvantage may elect to **renegotiate** with the counterparty; and, in the case of failure to reach a new consensus within a reasonable time period, the party who suffers disadvantage may bring a **claim** before the court or arbitral tribunal for **modifying or terminating the contract**.

The court or arbitral tribunal shall decide to modify or terminate the contract based on the **actual circumstances** of the case, in accordance with the **principle of fairness**.

Case heard by the Supreme People's Court in 2011

- Claimant acquired sand extraction rights at a site belonging to the defendant and paid a lump sum in advance to the defendant.
- While performing the contract, an unexpected drought (once in a 36-year event) led to site's water level falling so low that claimant's dredgers could not enter the site.
- Sand extraction operations had to end much earlier than expected.
- Claimant originally brought a force majeure claim to the court for termination of contract and part restitution of lump sum paid to the defendant.



Case heard by the Supreme People's Court in 2011

- Court's decision instead referred to Article 26 of the SPC's Interpretation II on the 1999 Contract Law and held this was a change of circumstances.
- The objective change of conditions in this case was unforeseeable to both parties when the contract was concluded, and the claimant's losses were not caused by a commercial risk.
- Continuing the performance of the contract would **necessarily lead to the result of the defendant obtaining all the benefits under the contract while the claimant suffering all the investment losses**. Such an scenario would be **obviously unfair** to the claimant.
- Court modified the contract in which the defendant shall return to the claimant a reduced sum proportionate to the time during which the claimant was unable to extract sand from the defendant's site.



Key differences

- Change of circumstances do not require the event in question to be unavoidable and insurmountable.
- Change of circumstances doctrine emphasises the **obvious unfairness** of continued performance of the contract for a party.
- Art 533, Civil Code sets out a procedure for claiming change of circumstances: 1) renegotiate; 2) failing that, apply to the court/arbitral tribunal
- Art 26 of the SPC's Interpretation II on the Contract Law indicated that change of circumstances was an event *except for* force majeure. In Art 533 of the Civil Code, a force majeure event could be in the scope of change of circumstances.
- Art 533, Civil Code: 'making it obviously unfair for any of the parties to perform as originally stipulated' implies that the party affected by the change of circumstances is still be able to perform the contractual obligation. No reference to 'impossibility of performance'.



Implications for liability for breach and
termination of contract

Guiding Opinions (Part I) on Several Issues Concerning the Proper Trial of Civil Cases concerning COVID-19

Para 3: **Unless the parties agree otherwise**, when applying the law in contractual disputes directly affected by the epidemic situation or epidemic prevention and control measures, the people's court should comprehensively consider **the impact of the epidemic situation on different regions, different industries, and different cases** to accurately grasp **the causal relationship and the degree of causality** between the epidemic situation or epidemic prevention and control measures and the party's failure to perform the contract.

Guiding Opinions (Part I) on Several Issues Concerning the Proper Trial of Civil Cases concerning COVID-19

Para 3 (1)

- Force majeure provisions apply where epidemic & related prevention and control measures directly result in party's failure to perform the contract
- Partial or complete exemption of liability based on force majeure depends on degree of impact of the epidemic and related measures on the party's non-performance
- If non-performance or extension of losses was 'imputable' to the parties, then parties bear corresponding liability
- Burden of proof is on the party seeking to rely on force majeure and is obliged to promptly notify other party

Guiding Opinions (Part I) on Several Issues Concerning the Proper Trial of Civil Cases concerning COVID-19

Para 3 (2)

- If epidemic situation or prevention and control measures **only cause difficulties** in performing the contract, the parties may renegotiate.
- If the parties can continue to perform the contract, the people's court shall effectively strengthen its mediation work and actively guide the parties to continue to perform.
- If the parties request the termination of the contract based on the difficulty of performance, the people's court shall not support it.

COVID19 + government controls causing difficulties in performance only → Neither force majeure nor change of circumstances apply.

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Para 3 (2) – Cont.

Where continued performance of the contract is **obviously unfair** to one party, and if that **party requests a change** to the contract performance period, method of performance, price amount, etc., the people's court shall decide whether to support the request in light of the actual circumstances of the case. If, after the contract is modified in accordance with the law and the parties still claim partial or full exemption from liability for non-performance, the people's court will not support such a claim.

COVID19 + government controls make continuing performance for one party *obviously unfair* → Change of circumstances may apply (no mention of the need for initial renegotiation as per Art 533 of Civil Code); parties cannot try to claim exemption from liability after modification of contract.

Guiding Opinions (Part I) on Several Issues Concerning the Proper Trial of Civil Cases concerning COVID-19

Para 3 (2) – Cont.

If the purpose of the contract cannot be realised due to the epidemic situation or epidemic prevention and control measures and the parties request the termination of the contract, the people's court shall support such a request.

COVID19 + government controls frustrate the purpose of the contract → Parties can terminate the contract on the basis of force majeure (as per Art 563(1) of the Civil Code).

Guiding Opinions (Part I) on Several Issues Concerning the Proper Trial of Civil Cases concerning COVID-19

Para 3 (3)

If a party has received government subsidies, tax relief or other types of funding and debt relief due to the epidemic situation or epidemic prevention and control measures, the people's court may take this factor into account for determining the factual situation of whether the contract can continue to be performed.

For specific types of contracts, see Guiding Opinions II, III on the Proper Handling of Civil Cases Involving the Novel Coronavirus Outbreak in Accordance with the Law

Conclusions

- Force majeure rules (from the 1999 Contract Law) remain largely unchanged in the Civil Code
- Notable change in the rules on change of circumstances
- Courts in recent years have generally been cautious in applying both doctrines that may exempt or alter a party's liability or obligations
- COVID-19 and related government control and prevention measures have been recognized as force majeure events, but courts will carefully scrutinize their actual impact on a party's non-performance on a case-by-case basis.