

Analysis of the Concept of Force Majeure in the Context of the PRC Civil Code

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Abstract: There are eight articles in the PRC Civil Code concerning force majeure. In Article 180, the concept of force majeure is defined: force majeure is unforeseeable, unavoidable and insurmountable objective events. However, in past academic discussions and practice cases, the concept of force majeure was often used in the multi-layer meaning, which is very unfavorable to the unity of the legal order. Therefore, to be able to play a guiding role in the future of the trial, this paper will seriously analyze the concept of force majeure in the context of the PRC Civil Code.

Keywords: Force Majeure; Supervening Event; Exemptions from Liability.

1. Introduction

In the contemporary legal landscape, the concept of force majeure holds a pivotal position, particularly within the ambit of the Civil Code of the People's Republic of China. Despite its significance, the term has often been interpreted and applied in various contexts, leading to inconsistencies and ambiguity. This paper endeavors to delve into the intricacies of force majeure, particularly as enshrined in the Civil Code, seeking to provide a clear and unified understanding of its legal contours.

Article 180 of the Civil Code defines force majeure as "unforeseeable, unavoidable, and insurmountable objective events." However, academic discussions and judicial practices have often veered towards a more nuanced interpretation, obfuscating its legal implications. Given the paramount importance of legal certainty and predictability, it is imperative to clarify and standardize the meaning of force majeure. This paper aims to accomplish this task by conducting a thorough analysis of the concept within the framework of the Civil Code.

By exploring the legal provisions, judicial precedents, and academic opinions, this paper will endeavor to offer a comprehensive and coherent interpretation of force majeure. It hopes to contribute to the harmonious development of legal doctrines and practices, thereby enhancing the efficiency and fairness of the legal system. Furthermore, it is anticipated that this analysis will serve as a valuable guide for judicial practitioners, scholars, and legal practitioners alike, facilitating a more unified and consistent application of the concept of force majeure in legal disputes.

2. A Review of China's Legislation on Force Majeure

In Articles 27 and 34 of the Economic Contract Law of the People's Republic of China, force majeure is stipulated as a ground for exemption from liability for breach of contract, as well as a ground for allowing the modification or termination of contracts. Article 107 of the General Principles of the Civil Law of the People's Republic of China also stipulates that force majeure constitutes a ground for exemption from civil liability, including liability arising from contractual obligations. China's legislation simultaneously treats force

majeure and accidents as parallel exemptions, as stipulated in Article 122, Paragraph 1 of the Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the "Guarantee Law of the People's Republic of China" (now superseded), which reads, "The penalty rule of deposit shall not apply when the principal contract is not performed due to force majeure or accident." This article represents a breakthrough in China's strict liability principle for breach of contract. Article 180 of the General Provisions and Article 590 of the Contract Section of the PRC Civil Code provide corresponding regulations on force majeure. Correspondingly, Article 68 of the Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the General Principles of the Contract Section of the PRC Civil Code only stipulates that force majeure excuses the application of the deposit penalty rule, and no provisions are made for accidents.

3. Analysis of the Concept of Force Majeure

In terms of understanding force majeure, there are three viewpoints in the theoretical community: subjective theory, objective theory, and compromise theory. The mainstream viewpoint adopts the compromise theory, which maintains that "force majeure is unforeseeable, unavoidable and insurmountable objective events." Specifically, "unforeseeable" is a subjective element and adopts the subjective theory, while "unavoidable and insurmountable" are objective elements and adopt the objective theory. All three "unable to" conditions must be met simultaneously for it to be considered force majeure. This middle-of-the-road approach is not perfect in legislative theory. Most foreign legal texts, precedents, and doctrines do not insist on the simultaneous presence of all three "unable to" conditions, as stipulated in Paragraph 1 and Paragraph 3 of the International Chamber of Commerce's "Force Majeure And Hardship Clauses 2020." Requiring all three "unable to" conditions to be met simultaneously can sometimes lead to unfair outcomes. Courts should make flexible adjustments based on individual cases, and in some situations, the presence of two elements can constitute force majeure. There are corresponding cases in China's judicial practice as well.

3.1. The Element of Externality

The definition of force majeure stipulated by the law includes the element of "externality", and the "objective circumstances" mentioned in its definition refer to obstacles that are beyond the debtor's control. In some cases, the court requires that force majeure originate from "outside the debtor's sphere", as exemplified by the Jilin Songyuan Intermediate People's Court in the case of "Gong Bo v. Liang Dejun and Wang Cailian Contract Dispute". The court held that during the performance of a house purchase contract, even though the seller of the house passed away due to illness, the seller's heirs could inherit their rights and obligations, and the contract could still be performed normally. Therefore, the seller's death due to illness did not constitute a force majeure event. Emphasizing the "externality" element of force majeure events is reasonable. For instance, the debtor's illness or unemployment status itself does not constitute force majeure. The true force majeure may be the objective causes that led to the debtor's illness or unemployment. Even in contracts performed by third parties, the debtor cannot simply cite the third party's failure to perform as force majeure. Instead, they must prove that the external causes leading to both the debtor's and the third party's inability to perform are force majeure. As stipulated in Paragraph 2 of the "Force Majeure and Hardship Clauses 2020": "Where a contracting party fails to perform one or more of its contractual obligations because of default by a third party whom it has engaged to perform the whole or part of the contract, the contracting party may invoke Force Majeure only to the extent that the requirements under paragraph 1 of this Clause are established both for the contracting party and the third party."

3.2. Unforeseeable

Regarding the timing of "unforeseeability," Article 24(3) of the Law of the People's Republic of China on Economic Contracts Involving Foreign Interest specifically refers to it as being limited to "the time of contract signing." However, subsequent legal provisions do not explicitly address this stipulation. This has led to differing opinions within the theoretical community. One perspective maintains that the key time node should be the moment of contracting. If the parties had anticipated a certain phenomenon before or during the contracting process but still chose to enter into the contract, the debtor cannot subsequently claim the unforeseeability of that phenomenon even if it arises during the performance of the contract. Alternatively, another view argues that "unforeseeability" should be judged at the time of contract performance. This interpretation is also reflected in practical cases. For instance, in the case of "Sanya Kaili Investment Co., Ltd. v. Zhang Wei Dispute over Confirmation of Contract Effectiveness," the Supreme People's Court recognized that government regulatory policies had already been introduced before the signing of the contract. Although these policies were subsequently refined, they were not considered objective conditions that were unforeseeable at the time of contract signing.

In terms of the criteria for determining "unforeseeability," the theoretical community holds that, on the one hand, the subject of predictability for force majeure should be an average well-intentioned individual. "Unforeseeability" implies that such a person could not have anticipated the event. Furthermore, the assessment of "unforeseeability" must take into account the current level of technological and material

development. On the other hand, the standard of "unforeseeability" should be personalized. If the debtor is a professional in the relevant field, the standard of unforeseeability would naturally be higher. In judicial practice, the court must meticulously consider various factors that influence the judgment of "unforeseeability" to achieve fairness and justice in each case.

3.3. Unavoidable and Insurmountable

Unavoidable refers to a situation where, despite reasonable care and necessary measures taken by the parties involved, it is still not possible to prevent the occurrence of force majeure events. The theoretical community holds a generally consistent understanding of "unavoidable". However, there is controversy surrounding the interpretation of "insurmountable", specifically whether it applies to the occurrence of force majeure events themselves, their natural consequences, or their legal consequences. In reality, a distinction should be made between "unavoidability" (pertaining to the insurmountability of objective situations during their occurrence) and "insurmountability" (pertaining to the difficulty in restoring objective results after their occurrence).

Consistent with this understanding, judicial practices in China also align with this perspective, suggesting that "insurmountability" is directed towards the natural consequences of force majeure events. For instance, in the case of "Beijing Shian Housing Co., Ltd. vs. Lian Lian Commodity House Pre-sale Contract Dispute" heard by the Beijing Third Intermediate People's Court, it was held that "insurmountability" refers to the inability of the parties to overcome the losses caused by an unexpected event. Drawing from foreign legislation, Article 1218(1) of the French Civil Code also supports this viewpoint, stating that "unavoidable" pertains to the occurrence of force majeure events, while "insurmountable" pertains to their natural outcomes.

4. Types of Force Majeure Events

Force majeure events are generally believed to include those caused by natural reasons and those caused by social reasons. The former include floods, droughts, typhoons, volcanic eruptions, mudslides, tsunamis, earthquakes, etc. The latter include war states, terrorist acts, general strikes, military actions, etc.

There are different theoretical understandings of whether state acts constitute force majeure. One view is that the generalized state acts include the acts of enacting laws by the legislature, and the acts of issuing orders by the administrative or judicial organs, while the narrow sense of state acts only refers to the acts of administrative organs. Administrative acts should not be regarded as force majeure, otherwise, it will damage the spirit of the contract and lead to the abuse of the concept of force majeure. However, most views do not divide state acts into narrow and broad categories but believe that state acts can be identified as force majeure events. At the same time, there is still controversy over whether state acts belong to force majeure events caused by social reasons or belong to a separate category. In addition, some scholars believe that technical risks should also be included in force majeure events because they meet the requirements of unforeseeability, unavoidability, and insurmountability.

5. The Relationship between Force Majeure and Accidents

Force majeure originated from Roman law, which is a subordinate concept of event. Events are divided into two types: minor events (*casus minor*) and major events (*casus maior*). Major events are caused by force majeure (*vis maior*). Subsequently, French civil law, which is an important continuation of Roman law and a typical representative of the continental law system, did not distinguish between force majeure and accidents and tended to adopt the theory of unity. After the reform of debt law, Article 1218 of the French Civil Code did not include the description of "accident" in the provisions on the recognition of force majeure, but the general theory of French civil law still believed that force majeure and accident were expressing the same content, and the former was often used to replace the latter as a defense for contract liability and tort liability.

China's legislation has provisions that simultaneously list both force majeure events and accidental events. For example, Article 122(1) of the Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the "Guarantee Law of the People's Republic of China" (now superseded) stipulates this. However, there are two opposing views on whether accidents can be used as a defense for contract liability like force majeure. The affirmative view holds that Article 27 of the Economic Contract Law of the People's Republic of China (now superseded) once stipulated that "if the economic contract cannot be performed due to force majeure or due to external factors that are unpreventable by one party without fault, it is permissible to modify or terminate the economic contract." However, the Contract Law implemented in 1999 did not continue this approach of listing both together but instead uniformly adopted the term "force majeure," which indicates that the legislators intended to include accidents within the scope of force majeure, thereby expanding its connotation and extension. Therefore, for force majeure and accidents, the approach of "same in legislation, differentiated in academic theory" should be adopted, meaning that they are only distinguished in terms of usage. The negative view, however, maintains that the PRC Civil Code implements the principle of strict liability, and it is significant to distinguish between force majeure and accidents. Since the PRC Civil Code only stipulates force majeure as a defense for contract liability, accidents do not constitute a defense for contract liability.

There are differences in judicial opinions in practice regarding whether accidents can be a defense for contract liability. The phrase "inevitable and uncontrollable" in China's current legislation indeed refers to irresistibility. However, it would be biased to assume that unforeseeability necessarily leads to irresistibility. Irresistibility can be divided into two levels: unavailability and insurmountability. Unavailability focuses on the occurrence of force majeure events, which cannot be prevented even with reasonable attention or necessary measures. Insurmountability, on the other hand, concerns the natural consequences of force

majeure events, which cannot be overcome despite maximum efforts. While unforeseeability necessarily leads to unavailability, as both pertain to the occurrence of force majeure events, it does not necessarily result in insurmountability. For instance, the spread of certain epidemics is indeed unpredictable and unavoidable, but it can still be overcome with the development of vaccines or special drugs. In the case of "Lv Yeduo vs. Beijing Performance Co., Ltd. Service Contract Dispute" heard by the Beijing Higher People's Court, it was held that although the occurrence of accidental events is unpredictable, if the unfavorable consequences caused by the event have been overcome, enabling the contract to be performed smoothly, then there is no breach of contract liability.

Therefore, under the current legislative framework, events that are "unforeseeable, unavoidable, and insurmountable" should be defined as force majeure events. However, events that are "unforeseeable and unavoidable" but "can be overcome" should be classified as accidents. When there is a clear distinction between the two, and considering that the PRC Civil Code adopts strict liability for general breaches of contract, it should be recognized that, unless otherwise specifically stipulated, accidents should not be considered as a defense for contract liability like force majeure.

References

- [1] J.Y. Cui: Force Majeure Clause and Its Interpretation, *Global Law Review*, Vol. 1, (2019) No. 1, p. 48.
- [2] K.X. Liu and H.K. Zhang: On Force Majeure, *Legal Studies*, Vol. 1, (2000) No. 6, p. 107.
- [3] L. Ye: On the Force Majeure System, *Northern Law Journal*, Vol.1, (2007) No. 5, p. 36.
- [4] Y.X. Ding: Epidemic force majeure judicial determination and its convergence with the change of circumstance, *People's Justice*, Vol. 1, (2020)No. 10, p. 32.
- [5] K.X. Liu: Commentary on the Civil Code Contract Cancellation System and Suggestions for Improvement, *Tsinghua University Law Journal*, Vol. 14, (2020)No. 3, p. 152.
- [6] B.F. Chen: On the Convergence of Accident and Force Majeure - From Justinian Law to Modern Civil Law, *Tsinghua University Law Journal*, Vol. 4, (2010) No. 4, p. 166.
- [7] L.M. Wang: *Studies on Contract Law* (vol. 2) (People's University of China Press, China, 2015), p. 535.
- [8] S.Y. Han: *General Introduction to Contract Law*(Law Press, China, 2018), p. 483.
- [9] J.Y. Cui: *Contract Law*(Law Press, China, 2015), p. 259.
- [10] J.F. Wang: *Chinese Civil Law -- Civil Law Claims* (Law Press, China, 1991), p. 499.
- [11] G.X. Zhu: *Study on the General Provisions of Contract Law* (People's University of China Press, China, 2018), p. 767.
- [12] M. Katznel, R. Knüttel: *Roman Private Law*(Law Press, China, 2018), p. 388.
- [13] Information on: <http://www.ccoic.cn/cms/content/>.