# *FORCE MAJEURE*, CHANGE OF CIRCUMSTANCES AND TERMINATION OF CONTRACT

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## ABSTRACT

It is impossible to draw a distinct line between *force majeure* and change of circumstances, because the two overlap. In order to regulate both *force majeure* and change of circumstances, the United Nations Convention on Contracts for the International Sale of Goods (CISG) has adopted a unified model in article 79, whereas Chinese law adopts a dual model by treating them as different things and regulating them in different articles. Where the purpose of a contract becomes impossible to achieve because of a *force majeure* and both the CISG and Chinese Contract Law (the CCL) adopt the same model of termination of the contract, the contract should be terminated by one party with a notice to the other party instead of *ipso facto* avoidance. In a case of a change of circumstances, in order to terminate the contract, both the CISG and the CCL actually follow the path of raising an action by a notice of avoidance or termination to the

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See Notice of Province of Hebei Government on the release of a proposal regarding the prevention of pollution of mines and implementation plans (Ji Zheng Han [2014] No 46) published on 11 April 2014. The implementation of this proposal affected 632 miningrelated enterprises.

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other party. Both approaches have their merits and demerits but the differences between them in practice are not as large as presumed. Where *force majeure* and change of circumstances overlap each other, possible ways for termination of the contract are for a party either to choose their preferred solution or to follow the *lex specialis derogat generali*. The latter way is preferred in this article; and while in an action for termination the judge may balance the interests of both parties in making a final decision, the uniform application of the law, the safety of the transaction and the fairness of the judgment may be ensured in so doing.

**Keywords:** *force majeure*; change of circumstances; termination; *Gestaltungsklagerecht*; CISG; Chinese Contract Law

# INTRODUCTION

For the purposes of improving air quality and mine environments, the government of Hebei Province of China issued an administrative order closing down hundreds of mining-related enterprises. Most of these enterprises, through a bidding process, had entered into agreements for the transfer of mining rights with local governments. Many of these agreements are well within the agreed term but are now faced with an obstacle to performance. The question then becomes how to deal with the obstacle to performance in this particular case. Some local governments have approached the higher-level government for a substantial amount as financial support, arguing that the governments had breached their contracts. The higher-level government leaned towards the position that the administrative order issued by the provincial government constitutes a *force majure* and therefore the local governments could therefore notify the other parties to terminate the contracts without any liability for breach of contract. Whether the above situation can be addressed using the concept of change of circumstances also deserves attention.

Can *force majeure* and change of circumstances be differentiated both legislatively and theoretically? Should a unitary or a dualistic model of regulation of both issues be adopted? As to the legal effect of termination, is it an automatic termination, termination by one party's notice or termination by adjudication? Where in a situation the application of either *force majeure* or change of circumstances is unclear or there appears to be an overlap between the two, how should the concerned party decide on a way of termination? All of these issues need to be considered further.

Using a comparative analysis of the United Nations Convention on Contracts for the International Sale of Goods (referred to as 'CISG' below) and Chinese Contract Law (referred to as 'Contract Law' below) as the focal point, and also comparing their provisions with other legislative models in appropriate situations, this paper analyses and discusses these issues.

# *FORCE MAJEURE* AND CHANGE OF CIRCUMSTANCES: DUAL OR UNIFIED MODEL?

## CISG: A unified model

Does 'impediment' as an exemption under art 79 of the CISG include hardship? As it stands, the mainstream opinion is an affirmative one (Schwenzer 2010; Schlechtriem & Schroeter 2013: 293; Atamer 2011: 1088–1089; Schwenzer 2013: 1087; Magnus 2005: Rn 24). The CISG Advisory Council holds the same position.[1] This legislative model can be referred to as a 'unified model'.

## Chinese law: A dual model

Under the Contract Law of the People's Republic of China, *force majeure* is contained under art 117, 118 and 94(1), whereas change of circumstances is provided for under art 26 of the Second Judicial Interpretation of Contract Law. This legislative model can be referred to as a 'dual model'.

A dual model is not uncommon in comparative law; for example, in the UNIDROIT Principles of International Commercial Contracts (referred to as 'PICC' below), art 6.2.2 and 6.2.3 respectively provide for the definition and effects of hardship, whereas art 7.17 provides for *force majeure.* In addition, the draft of the Common Frame of Reference (referred to as 'DCFR' below) contains art III.1: 1110, which governs 'variation or termination by court on a change of circumstances', and art III.3: 104, which governs 'excuse due to an impediment'.

## A clear differentiation or an overlap?

Under a dual model of *force majeure* and change of circumstances, the intention of the drafters is to clearly differentiate the two systems. However, the two systems share a common characteristic, namely, to govern the situation in which the parties have not assumed an uncontrollable risk, a situation in which whether the two concepts can be clearly differentiated is questionable.

In order to explain this issue, an example may be given. In 2003, the SARS epidemic broke out. As a result, many contracts were unable to be performed. Was SARS a *force majeure* or a change of circumstances? On this, the Supreme People's Court of China did not provide a clear answer.[1] When Chinese courts were dealing

1 See Notice on Supreme People's Court on related works and enforcement during the period of prevention of the spreading of the SARS epidemic Fa (2003) No 72. The notice focuses on providing directions for adjudicating contractual disputes that arose because of SARS. Accordingly, 'the principle of fairness was to beapplied, giving due regards to circumstances, in cases where the interests of one party to the contract would

with disputes concerning leases, different positions surfaced: some deciding that SARS belonged to a change of circumstances;[2] others viewing it as *force majeure*, treating SARS as an impediment to a timely delivery of possession;[3] yet others rejected treating SARS as a change of circumstances and denying it to be a *force majeure*, but at the same time they were firm in modifying the contract, citing the principle of fairness.[4] These give an impression of 'results-oriented legal thinking', namely, when the adjudicator wishes to excuse parts of or all of the liability, SARS would be classified as a *force majeure*; but when the adjudicator wishes to adjust or modify the contract, SARS would then be treated as a change of circumstances.

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be adversely affected if the contract were to be performed under the original terms.'
'In disputes where the impediment to contractual performance was due to works carried out by the government or related departments to prevent the spread of SARS, or where SARS had made the performance of the contract fundamentally impossible, Arts 117 and 118 of the Contract Law of People's Republic of China should be referred to.'
From the above, the former is similar to a change of circumstances, whereas the latter can be interpreted as *force majeure* (including two different situations: one, administrative measures, and two, the SARS epidemic).

2 See, for example, the civil judgment of the People's Court of Danyan of Jiangsu province (2003) Dan Min Chuzi No 2370. The court held that because of SARS, which broke out after the contract was formed, the defendant could no longer operate its restaurant. As such, its ability to perform the contract had been substantially affected, hence it constituted a change of circumstances.

3 See, for example, the civil judgment of the Intermediate People's Court of Sanya of Hainan province (2005) Sanya Min Yi Zhongzi No 79. See also the civil judgment of the Intermediate People's Court of Guangzhou of Guangdong province (2004) Sui Zhongfa Min Er Zhongzi No 1472, where the court stated that 'Even though SARS as a disease is curable, not a *force majeure*, but (sic) before such disease became curable, the effect it had on society was a *force majeure*. Therefore, the effect caused by emergency measures taken against SARS to the venture of the parties should not be taken into account when considering the damages for breach of contract. Because the government took such emergency measures during April and May, the occupancy rate during April and May should be deducted from [the] calculation.'

4 See, for example, the civil judgment of the High People's Court of Guangxi Zhuang Autonomous Region (2007) Gui Min Si Zhongzi No 1. The court held that 'even though SARS was an unexpected event and had to a certain extent affected the business of hotels, but (sic) it was not enough to defeat the purpose of the appellant in leasing the building for operating a hotel business. The decision of the appellant to apply for a suspension of business was a result of a business strategy not a necessary outcome of SARS. As such, SARS had not caused any real effect on [the] performance of the lease contract between the appellant and Guangsheng Company, therefore, it could not be a change of circumstances giving rise to a modification or termination of the contract.'

# *FORCE MAJEURE* AND CONTRACT TERMINATION: AUTOMATIC TERMINATION OR TERMINATION BY NOTICE

## CISG

If an impediment to performance leads to a fundamental breach, the concerned party can 'declare the contract avoided' under arts 49(1)(*a*) and 64(1)(*a*), which in effect is a termination of the contract.[5] Under the rules of the CISG, the right to declare avoidance is not conditional upon fault or attributability (Huber 2011: para 4) as such; even if the impediment is beyond the control of the party, it does not prevent the party from exercising any right other than to claim damages under the CISG (see art 79(5)). Accordingly, an impediment beyond a party's control could still be a valid reason for declaration of avoidance or termination under the CISG (Han 2013: 48). On the ways to avoid, the CISG did not follow its predecessor, the Uniform Law on the International Sale of Goods 1964; in other words, it has not adopted the method of *ipso facto* avoidance (Shiomi, Nakata & Matsuoka 2010: 138), but has instead stipulated, in art 26, that 'a declaration of avoidance of the contract is effective only if made by notice to the other party'. In relation to this kind of notice, the postal rule applies according to art 27. Further, the CISG also allows for termination by a 'mere agreement', as provided for in art 29.

## Chinese law

According to art 94(1) of the Contract Law, where the purpose of the contract cannot be achieved owing to *force majeure*, either party may terminate the contract. This right of termination is, of course, not conditional upon fault or attributability (Han 2001). Notice is required to be given to the other party for the exercise of this right. The contract will then be treated as terminated once the notice reaches the other party, as stated in art 96(1). The Contract Law also allows, under art 93(1), for termination by agreement.

## Further analysis

From a comparative law perspective, the ways to terminate a contract whose purpose cannot be achieved because of *force majeure* vary. One of the ways is, as is the case in Chinese law explained above, by a party's exercise of its right to termination. Another way is to consider the obligation which is impossible to perform because of *force majeure* as having been extinguished as a natural thing. And following the *synallagma* theory of a bilateral contract (or the rules relating to risk assumptions),

5 See the Japanese translation of CISG, which is translated as 'termination'.

any reciprocal obligation to pay is also terminated; it then follows that the contract is also terminated. This perspective is adopted in Japanese law. The PECL and DCFR have also adopted this approach. DCFR art III.3: 104(4) reads '[w]here the excusing impediment is permanent the obligation is extinguished. Any reciprocal obligation is also extinguished …'.

In relation to the rule just mentioned, the drafters (Bar & Clive 2009: 786–787) gave the following explanation:

> 'The main reason for making extinction automatic in this situation, rather than leaving the matter to the rules on termination by notice for non-performance, is that it would be unnecessary and unrealistic to require the creditor to terminate by notice. It could also be pernicious. Notice of termination for non-performance must be given within a reasonable time. If it is not, the creditor loses the right to terminate. However, this would result in an unfortunate situation in the case of a permanent excusing impediment. The obligation could never be performed and could never be terminated. It would continue to exist in a sort of ghostly state. The cleaner solution is to provide for automatic termination both of the obligation in question and any reciprocal obligation.'

Theoretically speaking, the above analysis is, of course, well reasoned. This author (Han 2001) made similar comments 10 years ago, as provided in the following:

> 'What needs to be reflected upon is that, it has already been stipulated in Art 118 of the Contract Law that in contracts interrupted by force majeure, a party must notify the other in a timely manner. In this case, is it still necessary to exercise the right to terminate in accordance to the notice of intention requirement applicable to the general right of termination? If the contract could no longer be performed, allowing a party the right to terminate the contract is, by reverse logic, to also grant the party a right to keep the contract alive (by not exercising the right to terminate). It is, however, practically meaningless. Is it not a better choice to adopt the automatic termination approach to end the contractual relationship?'

On this it can be said that although there may be reasons in support of automatic termination from a theoretical perspective, in reality, experience tells us that the possibility of its happening is very slim, so it seems that it is not necessary to place too much emphasis on it. In the current Chinese law, analysing it from an interpretivist perspective, support can still be found in two respects:

First, practicality. With a procedure to be terminated, both parties could communicate and co-operate to proactively take remedial action, which is advantageous (Cui 2003: 194). Parties are most likely not legal specialists and do not understand their legal positions. With clear termination rights, however, the issues could be clearer, which has practical benefits.[6]

6 Professor Ingeborg Schwenzer delivered a lecture at the School of Law of Tsinghua University on 24 March 2010, where she expressed this reasoning during the discussion of termination relating to *force majeure*.

Secondly, theoretical support. Based on the *synallagma* theory of a bilateral contract, what can be solved is the continuing nature of the obligation to perform (*Leistungspflicht*) and its reciprocal obligation. An ancillary obligation (*Nebenpflicht*), if there is any, is not automatically discharged, though. When dealing with the continuing nature of the obligation to perform and a reciprocal obligation, the *synallagma* theory has not convincingly dealt with the issues of ancillary obligations. On the other hand, this theoretical difficulty can be avoided through allowing a party to exercise its right to termination. This has been pointed out by a German scholar (Teichmann 2004), who asserted that if there is any ancillary duty between the parties in an individual case, it is practically useful if a party has the right to termination.

# CHANGE OF CIRCUMSTANCES AND TERMINATION: TERMINATION BY NOTICE OR TERMINATION BY ADJUDICATION?

## CISG

According to the prevailing explanation in practice as well as in theory, although change of circumstances and hardship have been interpreted under the concept of 'impediment' in art 79 of the CISG, the CISG has not provided rules that specifically deal with change of circumstances or hardship, resulting a lacuna in the CISG. In order to fill this gap, some authors have referred to the 'general principles' of the first part of CISG art 7(2), whereas others have referred to the 'usage' under article 9 of the CISG to incorporate the relevant rules under the PICC. The approach taken in art 6.2.3(4) of the PICC to deal with termination in a situation of hardship is termination by court, not by the party's exercise of its termination right.

## Chinese law

Through an interpretation of art 26 of the Second Judicial Interpretation on Contract Law of the Supreme People's Court, the Chinese law has adopted the termination by adjudication model. However, it must be noted that art 67 of the Tourism Law of the People's Republic of China (referred as Tourism Law below) states that:

> 'Events caused by force majeure or events unavoidable even if the travel agency or its performance assistant has reasonably fulfilled their duties, which then affect the itinerary, shall be settled in the following manners:
>
> (1) If the contract cannot be fulfilled any longer, both the travel agency and the tourists may terminate the contract; in case the contract cannot be fully and completely fulfilled, the travel agency may revise it within a reasonable scope after making an explanation to the tourists; in case the tourists disagree with any revision of the contract, they may terminate the contract.

> (2) If the contract is to be terminated, the organizing travel agency shall deduct the fees which have been paid to the local travel agency or the performance assistant and cannot be refunded and return the rest to the tourists; in case the contract is to be revised, additional fees hence incurred shall be borne by the tourists, and the reduced fees, if any, shall be returned to the tourists.
>
> (3) In the event that the tourists' personal and property safety is endangered, the travel agency shall take appropriate safety measures, and fees hence arising shall be borne jointly by the travel agency and the tourists.
>
> (4) In case tourists are retained, the travel agency shall take proper measures to settle them down. Fees for accommodation hence arising shall be borne by the tourists; additional fees incurred on the way back shall be borne jointly by the travel agency and the tourists.'[7]

With regard to the abovementioned art 67 of the Tourism Law, some hold the opinion that 'events unavoidable even if the travel agency or its performance assistant has reasonably fulfilled their duties' can be read to include a change of circumstances (Liu 2013). If this is the case, this kind of termination should then be termination by notice.

## BGB: another approach in comparative law

Article 313(3) of the BGB ('Interference with the basis of the transaction') states,

> '[i]f adaptation of the contract is not possible or one party cannot reasonably be expected to accept it, the disadvantaged party may revoke the contract. In the case of continuing obligations, the right to terminate takes the place of the right to revoke.'[8]

Accordingly, it grants a right of termination to the party having an adverse effect brought about by an interference with the basis of the transaction.

## Further analysis and discussion

The two termination approaches mentioned above can be categorised as termination through a right to form a legal relation (*Gestaltungsklagerecht*) and termination through a right to sue to form a legal relation (*Gestalungsklagerecht*). These are two different approaches, and each has its own advantages and disadvantages.

Compared to termination through a right to sue, termination through a right to from a legal relation has the advantages of (1) simple enforcement and (2) efficient, saving time, effort and costs when it comes to legal proceedings. The disadvan-

7 Translation provided by the National Tourism Administration of the People's Republic of China (http://en.cnta.gov.cn/html/2013-6/2013-6-4-10-1-12844.html).

8 Translation provided by Juris GMBH, Saarbrucken (http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p1102).

tage is that termination of a contract is concerned not only with a 'qualitative' issue (ie whether the contract is terminated) but also with 'quantitative' issues (ie how a contract is terminated, and the effects of termination). With regard to the effects of termination, the best scenario is based on the mutual consent of the parties, but where such consent is lacking, assistance is still needed from the adjudicator and, therefore, legal proceedings or arbitration cannot be avoided. The question is: Before the question of effect has been determined, can the contract be considered as having already been terminated? And, if it is, what is the value of termination? Is it simply to terminate those obligations that have not yet been performed?

The advantage of termination through a right to sue to form a legal relation is that it provides certainty in the results. Because of the involvement of an adjudicator, it is possible to form new rights and obligations based on the principle of fairness, ensuring fairness and appropriateness. The disadvantage is that it adds costs and reduces efficiency.

As to the rationale behind the design of the right to sue to form a legal relation, it is briefly said that, in some special situations in which important interests of the participants in a legal relationship or the general public are placed under a win–lose situation, the law does not grant the right-holder the power to form a legal relation through the expression of his own will. Consequently, he must exercise his right through litigation, and the relation is formed through a favourable judgment (*Gestaltungsklagerecht*).

What a right-holder has, therefore, is not a right to form a legal relation (*Gestaltungsrecht*), but a right to sue to form a legal relation (*Gestaltungsklagerecht*) (Brox & Walker 2008: 250). A classic example where there is a limitation against forming a legal relation on a sole party's will is divorce. If it is not a mutually agreed divorce, then, when one party wishes to divorce, in order to do so, the Marriage Law of the People's Republic of China requires such person to commence divorce proceedings (art 32(1)).

According to the judicial interpretation, for termination or modification of a contract caused by a change of circumstances, the aggrieved party must apply to court, adopting the approach based on the right to sue. This legislative choice can be said to be consistent with the position of the Contract Law. In situations where there is a clear conflict of interests between the contracting parties, the legal relationship is not formed unilaterally; rather, the rights and obligations between the parties are determined by a court or an arbitration institution – for example, art 114(2) of the Contract Law on adjustments to an agreed-upon payment for breach.

Certainly, speaking of Chinese law only, termination based on a change of circumstances cannot be uniformly treated using the approach of the right to sue. As mentioned previously, art 67 of the Tourism Law is an example of an approach not based on a right to sue but on a right to form a legal relation. As taken from case law, in many cases concerning leases, such as those relating to SARS, the purpose has

not only been entirely frustrated, but seriously negated. In such cases, releasing the obligation to pay the rental (which in effect is a price reduction), notably under civil-law notions, is interpreted as a partial termination. In such cases, how to explain its rationale – that is, whether it is based on a single-sided right to form a legal relation (Han 2011: 679–684) or on the right to sue to form a legal relation – to produce the legal effect of partial release of rental payment is a question worth exploring.

## TERMINATION IN SITUATION WHERE *FORCE MAJEURE* AND CHANGE OF CIRCUMSTANCES OVERLAP: ONE PARTY'S CHOICE OR DOES SPECIAL LAW PREVAIL?

### The issue

It is difficult to differentiate clearly between *force majeure* and a change of circumstances. In situations where the two overlap, is a contract terminated through a party's exercise of their right to termination by notice or through their initiation of legal proceedings? This question is unavoidable under a dual model, where *force majeure* and a change of circumstance co-exist. However, a detailed analysis reveals that such a question is not exclusive to the dual model. Even though the CISG adopts a unified model, on the issue of method of termination there are still two distinct methods: one based on a party's declaration to avoid a contract and another based on adjudication. In situations where *force majeure* and a change of circumstances overlap, therefore, the issue of the choice of termination method, as mentioned above, is still unavoidable.

The issue has not been dealt with directly by the CISG: it exists in the CISG because of the application of the 'general principles' of the first part of the CISG art 7(2) and the matter of 'usage' under CISG art 9 to incorporate the relevant rules under the PICC. As a result, it may be useful to refer to the position of the PICC on this question.

### Approach based on one party's choice

Comment 6 of the PICC art 6.2.2 reads as follows:

> 'In view of the definitions of hardship in this Article and force majeure in Article 7.1.7, under the Principles there may be factual situations which can at the same time be considered as cases of hardship and of force majeure. If this is the case, it is for the party affected by these events to decide which remedy to pursue. If it invokes force majeure, it is [with] a view to its non-performance being excused. If, on the other hand, a party invokes hardship, this is

> the first instance for the purpose of renegotiating the terms of the contract so as to allow the contract to be kept alive although on revised terms.'[9]

It should be noted that the comment has not dealt with the situation where a party relies on hardship to apply for termination in any way. Why this is the case is a question to be asked.

From the wording of the above statement, the purpose of relying on *force majeure* is to excuse from liability; whether this is similar to a terminating the contract is not mentioned. If it is reliance on hardship instead, the purpose must then be to renegotiate. If renegotiation is not achieved, remedial actions naturally rest on the judiciary. When the purpose of the contract cannot be achieved, the contract should then be terminated. Despite the fact that the PICC has expressly provided that it is the aggrieved party who decides on which remedy to adopt, on the method of termination the position is not so clear. If one of the parties insists on termination by notice, but another insists on termination by adjudication, should the effects differ, then which party should prevail is an unresolved issue, and the answer to this conundrum can have practical implications.

## Priority of special law (*lex specialis derogat generali*): Is it a possible approach?

Having considered the legislative purposes between the two models – one allowing the party to terminate through notification to the opposing party and the other allowing the party a right to apply to the court for termination of the contract – we discern that both provide a norm for termination. Clearly, the latter model has an additional constituent requirement (ie to apply to court for termination); therefore, it may be appropriate to treat it as a type of special law while the former is considered a general law. Following the principle of 'special law takes priority', the party cannot terminate a contract on its own but must do so through litigation, leaving it to the judge to decide whether termination is appropriate (Han 2014).

If the position of one of the parties is to claim for termination of contract based on *force majeure* (art 94(1) of the Contract Law stipulates that both of the contracting parties enjoy a right to terminate a contract in the event of *force majeure*), while the position of the other party (for example, the aggrieved party) is based on a change of circumstances, then, considering the specific policy reasons of Chinese law behind selecting the right-to-sue approach for a change of circumstances, the latter party's position should prevail over the former's. The effect of this would be to reject the outcome of effect being given to a party's notification to terminate.

9 Unidroit Principles 2010, Comment 6 of the PICC art 6.2.2.

## Further considerations

The issue identified in relation to the case mentioned at the beginning of this article clearly makes it possible for a change of circumstances to apply as a reason for terminating a contract. Relying solely on *force majeure* as the basis for termination does not adequately deal with the problem. The effect of *force majeure* is different from the general effects of a breach of contract because, based on the excusing effect of art 117(1) of the Contract Law, it rules out the possibility of damages. In comparison, a change of circumstances does involve a question of reasonable compensation. Under Chinese law, when a contract is terminated as a result of a change of circumstances, it does not follow the relevant law under art 97 of the Contract Law, which provides for a ground for damages for breach. Instead, the legal consequences are determined by the fair judgment of a court, including issues of reasonable compensation.

Applying this to the case mentioned at the beginning of this article, the question of what is considered as reasonable compensation from the local government to mining-related enterprises is one of the allocation of reasonable risk allocation to unforeseeable adverse events at the time of contracting. The intervening administrative order was not foreseen by both of the parties – indeed, it was beyond the parties' expectations – and thus constituted an event the risk of which could not previously have been factored in. Accordingly, the risk should not be allocated by following the relevant rules of allocation of either risk of performance or risk of counter-performance. Instead, it should be dealt with by the court according to the principle of fairness, and the risks should be shared equally by both parties.

Undoubtedly, whether the closure of mining-related enterprises should be considered as termination by *force majeure* or a change of circumstances remains debatable. In the case of the former termination, the local government could terminate the contract through notification and an order to cease production. If change of circumstances is applicable, the local government must then apply to the court and leave it to the court to decide on the termination of the contract. This may involve a first trial, a second trial and even a retrial, resulting in significant delays in terminating the contract and ordering the cessation of production. For an immediate cessation of production, other administrative measures would have had to be relied upon.

# CONCLUSION

On the systemisation of *force majeure* and a change of circumstances, the CISG adopts a unified model, whereas the Chinese law adopts a dual model. *Force majeure* and a change of circumstances may overlap with each other.

In the case where *force majeure* leads to impossibility to perform a contract, both the CISG and the Chinese Contract Law have chosen the route of requiring the party to exercise its right to avoidance or termination. This is different from the

DCFR approach, which opts for automatic termination. Both models are reasonable, the resulting choice is one that is based on legal–political considerations. The CISG and the prevailing law in China may further be supported by both practical and theoretical considerations, that is, the method adopted fits better with the practical needs of the parties, avoiding the problem that the *synallagma* theory could deal only with the main obligation of performance and its reciprocal obligation, but would not offer any theoretical support to dealing with ancillary obligations.

As to the avoidance or termination in a case of change of circumstances, both the CISG's approach based on gap-filling by introducing the rules of the PICC and the approach adopted in Chinese law are based on a right-to-sue model. Differing from this is the German BGB, which adopts a right to termination that is effected by a notification to the other party. Each has their own advantages and they are evenly matched in this respect. When terminating a contract through a model based on a notification to the other party, if the parties cannot reach an agreement on the legal effects of the termination, a court or an arbitration institution's involvement is required for an effective resolution of the matter. Therefore, the practical legal effect between the two models can differ, albeit not significantly. In addition, the model based on the right to sue is not uniformly adopted across Chinese law. Whether or not it is necessary to unify the models of termination in the case of a change of circumstances, and how to realise such unification in China, will be an interesting topic for Chinese scholars to consider.

In situations where *force majeure* and a change of circumstances overlap, there exists a conflict between allowing the party to choose and following the special law to terminate the contract by means of an action. The approach of allowing a party to choose is itself not adequate. Following the *lex specialis derogat generali*, the contract should be terminated in a manner other than simply by one party's notification of his will to termination to the other party. In the result, the uniformity and certainty of the law and the fairness of the result may be ensured.

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