

Title: The construction of response  
mechanism to PHEIC in the context of  
CISG

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## **Abstract**

This article will take an analytical look of the response of international sales of goods contract to the Public Health Emergencies of International Concern (PHEIC) in the context of the Convention on the International Sales of Goods (CISG). The article starts off with a brief summary of historical background of PHEIC and the diverse responses in the international law, and the measures appear in various domestic systems, such as China, France and United Kingdom, etc. It goes on to focus on the response to the COVID-19 pandemic, the sixth PHEIC, on transnational commercial behavior under CISG. It will discuss whether COVID-19 can be applicable to the ground of force majeure or hardship to help parties avoid liability, and the inapplicable scenario. It will summarize the current exemption response to the PHEIC under CISG.

Avoiding the contractual liability is called by positive response while conversely keeping the contract is the negative response. In the respect of positive response by a party, the article goes on to examine the value of this response on the another party and even the global supply chain. It will consider the scenario that the parties have been restricted by the government in the PHEIC.

The article goes on to analyze the relationship between the different responses and the expected goal of CISG under PHEIC in terms of clarifying the expected goal of CISG and the impact of different responses. It will give a comment on the application of the principle of the autonomy of parties protected by CISG when the PHEIC appears, so as to seek other available responses and construct the legal response mechanism for the international commercial participant.

## Introduction

COVID-19 outbreak is the sixth PHEIC event declared by the World Health Organization (WHO) on 30th of January 2020. PHEIC means 'an extraordinary event which is determined to constitute a public health risk to other States through the international spread of disease and to potentially require a coordinated international response'.<sup>1</sup> In this condition, all states have a legal duty to respond promptly to the PHEIC event in terms of the International Health Regulations (IHR).<sup>2</sup> In the past one to two years, the supply chain and in related veins have been interrupted by this crisis and even bankruptcy become common as effected by economic trending. For instance, the travel industry experiences the enormous unprecedented destroy due to the sudden declaration of national lockdowns by governments. In order to control the spread of the coronavirus, the government has taken travel restrictions on foreign tourists and domestic people, resulting in huge losses for the aviation, entertainment enterprises and travel agencies, as well as fluctuations in other related industries, such as manufacturing, sales, product processing, construction, etc.

International commercial law focuses on the contracts on international trade where a foreign element included.<sup>3</sup> Under the COVID-19 pandemic crisis, the remedies for the international trade become more complex when the dispute

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<sup>1</sup> World Health Organization: Emergencies: International Health Regulations and Emergency Committees (Q&A), available at < <https://www.who.int/news-room/q-a-detail/emergencies-international-health-regulations-and-emergency-committees>> accessed 6 July 2021.

<sup>2</sup> Annelies Wilder-Smith, MD and Sarah Osman, 'MPH, Public health emergencies of international concern: a historic overview' (2020) 27 JTM J 1.

<sup>3</sup> Saloni Khanderia, 'Transnational Contracts and Their Performance during the COVID-19 Crisis: Reflections from India' (2020) 7 BRICS LJ 52.

occurs.<sup>4</sup> It would appear in that the determination of the rights and liabilities of the parties shall 'depend on [the governed law], which will identified according to the rules of private international law of the adjudicating forum'.<sup>5</sup> In this condition, some contracts would set up clauses on force majeure or hardship in order to solve the cases that execution encounters implement. Because the force majeure and hardship are typically used as the remedy in a changed circumstance, if the party fails to perform the contract. Such a clause could exempt the aggrieved party from damages according to some national laws. It could imagine that exemption would alleviate pressure for the parties in such condition when the different measures taken by states or districts in response to the pandemic have increased the difficulty of cross-border trade, in addition, the difficulties in the operation of companies and the break in the supply chain happen.

However, in this way, the state's response to the COVID-19 pandemic will determine the remedies of the parties of the agreement in the end. Therefore, this article will take an analysis of the global response to the COVID-19 pandemic in law in the first part; and it will be going to explore the response of CISG, the uniform law, in the second part; then it will investigate the reason and consequence of the response to COVID-19 in the third part; and the fourth part will present the opinion to solve the further PHEIC event; and the conclusion will be followed in the end.

## **I. The global response to the COVID-19 pandemic**

It would be found that two primary types of the response to the COVID-19 pandemic, the positive response which gives a positive response to examine

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<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid*; Hubert Konarski, 'Force Majeure and Hardship Clauses in International Contractual Practice' (2003) 2003 Int'l Bus LJ 405.

the COVID-19 pandemic in law, and the negative response which mainly keeps the contract continue without intervention.

#### **a. The positive response**

French courts found that such COVID-19 pandemic could not have been reasonably foreseeable at the time of conclusion of the agreement, and therefore its consequences were beyond the control of the parties and could not have been avoided by appropriate measures.<sup>6</sup> On July 28, 2020, the Pairs Court of Appeals upheld the decision made by the Pairs Commercial Court in the contractual dispute between Électricité de France (EDF) and Total Direct Energie (TDE) on May 20, 2020 and ruling that the COVID-19 crisis constitutes a force majeure event justifying the suspension by TDE of the framework agreement as soon as this event occurred.<sup>7</sup>

China also agrees that the COVID-19 crisis can be regarded as the force majeure event,<sup>8</sup> meanwhile, the Supreme People's Court (SPC) points out that the courts at all levels shall 'place the alternative dispute resolution mechanism at the forefront, insist on the priority of mediation' in response to the COVID-19

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<sup>6</sup> Reed Smith LLP, 'French court qualifies COVID-19 crisis as force majeure event resulting in alternative electricity suppliers' financial losses' (Lexology, 9 June 2020) available at: <<https://www.lexology.com/library/detail.aspx?g=42021341-3589-4161-898d-b9fede111697>> accessed 22 August 2021

<sup>7</sup> Anaëlle Idjeri, 'The Paris Commercial Court rules that COVID-19 is to be considered as a force majeure event' (Soulier Avocats, 29 May 2020) available at: <[https://www.theworldlawgroup.com/writable/documents/news/Soulier\\_Avocats\\_Covid19\\_Business\\_Contracts\\_Force\\_Majeure\\_EDF\\_TOTAL\\_May\\_2020.pdf](https://www.theworldlawgroup.com/writable/documents/news/Soulier_Avocats_Covid19_Business_Contracts_Force_Majeure_EDF_TOTAL_May_2020.pdf)> accessed 22 August 2021

<sup>8</sup> Chinese standing committee: Answers to legal issues related to epidemic prevention and control(2020), available at: <<http://www.npc.gov.cn/npc/c30834/202002/23100ec6c65145eda26ad6dc288ff9c9.shtml>>

epidemic.<sup>9</sup> Apart from that, the China Council for the Promotion of International Trade (CCPIT) issues force majeure certificates in terms of international trade usages and the organizational document of the CCPIT since February 2020. Russia has also taken such action to support the aggrieved party.<sup>10</sup> Indeed, the concept of force majeure in French law and Chinese law is highly similar, which focuses on the event's character of the unforeseeable, unavoidable, and insurmountable in the light of their provisions.<sup>11</sup>

In the international law, the International Chamber of Commerce (ICC), the world business organization, issued an updated force majeure clause in response to the COVID-19 pandemic and recommended using it in international commercial contracts.<sup>12</sup> The ICC's 2020 clause defines a force majeure event as 'the occurrence of an event or circumstance that prevents or impedes a party from performing one or more of its contractual obligations under the contract.'<sup>13</sup> ICC expressly present that the pandemic would be applicable and triggered by the COVID-19 crisis, however, it is in the case which the contract do mention the pandemic specifically or the event that could cover pandemic.<sup>14</sup>

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<sup>9</sup> The Guiding Opinions on Several Issues Concerning Properly Handling Civil Cases Related to COVID-19 Epidemic in Accordance with the Law (The Supreme People's Court, 2020) available at <<http://cicc.court.gov.cn/html/1/219/208/209/1578.html>>

<sup>10</sup> Ekaterina Pannebakker, 'Force Majeure Certificates' (2020) 2 CL LJ

<sup>11</sup> The Civil Code of the People's Republic of China (adopted 28 May 2020, entered into force 1 January 2021), s.180; The Napoleonic Code (entered into force 21 March 1804), s.1150.

<sup>12</sup> ICC Force Majeure Clause (International Chamber of Commerce, March 2020) available at <<https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf>>

<sup>13</sup> *Ibid.*

<sup>14</sup> Christian Twigg-Flesner, 'A Comparative Perspective on Commercial Contracts and the Impact of COVID-19 – Change of Circumstances, Force Majeure, or What?' in Katharina Pistor (ed), *Law in the Time of COVID-19* (CLS 2020)

## **b. Negative response**

In contrast to the actions by France, China and Russia, UK takes a negative response to the COVID-19 in commercial law. In the case of *Mellon v Cine-UK*, the England court uphold that the COVID-19 pandemic is not the reason for hardship as it follows the traditional approach to examine the sort that might be frustrated in the circumstances that have occurred, where it is different from physical damage or destruction, such as fire.<sup>15</sup> While in the case of *Travelport v WEX*, the court refuses to judge the influence of COVID-19, as the consequences of COVID-19 in connection with changes of legal conditions, are difficult for a court, and unworkable for commercial parties 'involving arbitrary value judgements'.<sup>16</sup> It would recognize that the COVID-19 pandemic could not be the special reason for non-performance in the UK. In fact, the England courts give a negative response could be considered that the decisions are on the basis of the strict criterion of the force majeure or hardship. It cannot hard to imagine that the strict criterion would be used in other regional courts in the ground of different understanding of force majeure and hardship.

## **II. CISG has no response in case law**

As mentioned above, states would have their own understanding of the concept of force majeure in the domestic law system. Compared with multiple domestic law's responses, there is no case as regards to CISG that can be found online. But it could presume the cases in context of COVID-19 through its provisions and interpretation. Indeed, CISG, the international convention, as the uniform law, has now gained worldwide acceptance,<sup>17</sup> it clearly affects the regional and international harmonization of substantive law on the contracts of sales of

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<sup>15</sup> [2021] EWHC QB 1013, paras 199

<sup>16</sup> [2020] EWHC Comm 2670, para 307

<sup>17</sup> Ingborg Schwenzer, 'The CISG - Successes and Pitfalls' (2009) 57 Am J Comp L 457

goods.<sup>18</sup> CISG can be considered as the result coming at the harmonization of different commercial law and political projects.<sup>19</sup> The broadly worldwide adoption of CISG could prove the success of it in presenting the uniform law on the international contracts of sales of goods absolutely. In this respect, article 79 of CISG thus has been invoked to prevent a side from recovering damages, at the same time, article 80 thus has been invoked to protect a part from extra damage.<sup>20</sup>

Evaluating the success of CISG is ought to investigate the interpretation of the convention's provisions as well.<sup>21</sup> Interpreting the convention's provisions autonomously means as follows: 1) its own terms is applicable exclusively; 2) the general principle confirmed by the convention should be considered at the same time<sup>22</sup>; and 3) the convention-related decisions in overseas jurisdictions could be referenced.<sup>23</sup> In addition, if the language of the relevant articles of the convention tracks that of the domestic law, the case law interpreting domestic law, as well as related international scholarly writing, is allowed to reference to the case that governed by CISG.<sup>24</sup>

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<sup>18</sup> Marlene Wethmar-Lemmer, 'Regional Harmonisation of International Sales Law via Accession to the CISG and the Importance of Uniform Interpretation of the CISG' (2014) 47 De Jure 298

<sup>19</sup> Saul Levmore, 'Harmonization, Preferences, and the Calculus of Consent in Commercial and Other Law' (2013) 50 Common market law Rev. LJ 243

<sup>20</sup> CLOUT case No. 273 [Oberlandesgericht München, Germany, 9 July 1997]; CLOUT case No. 133 [Oberlandesgericht München, Germany, 8 February 1995]; CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

<sup>21</sup> *Ibid.*

<sup>22</sup> United Nations Convention on Contracts for the International Sale of Goods (adopted 11 April 1980, entered into force 1 January 1988), s.7(1).

<sup>23</sup> UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (2016 Edition)

<sup>24</sup> *Ibid.*



### III. Analysis of response: reason and consequence

Explore the reason why the COVID-19 crisis help the non-performance party exempted, and then found that the main reason is not the pandemic itself, but the severe circumstance caused by the virus. In addition to the threat of the coronavirus itself to human health and even life, the restrictive actions taken by national governments to stem the spread of the pandemic, results in the frustration in complying with the international commercial contracts on time in the background of the COVID-19 pandemic crisis. It includes the restrictions for produce or transport. The traffic corridor away from Wuhan City was asked to close by the China's central government since 30th January 2020 due to the rapid spread of the coronavirus epidemic.<sup>25</sup> The traffic in all parts of China has been temporarily closed according to the degree of dissemination of COVID-19 afterwards.<sup>26</sup> The China's government thus published a series of remedies to relief the effect of restrictions. The lockdown policy also has been announced by other states' governments to reduce the damage caused by pandemic, such as the UK, US and Japan. In this background, factories have been suspended, traffic has been temporarily cut off, and trade has suddenly stalled, which has become a common global problem due to the national governments' restrictions on turning the tide of COVID-19. However, it is still uncertain that the national government's action would be the excuse of failure to perform the contract.

Although many states and ICC indicate that the COVID-19 pandemic could be considered as the force majeure event, it is impossible to completely carve hardship out for determining this crisis's characteristics in the light of the legal

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<sup>25</sup> China's Action Against the COVID-19 Pandemic (Information Office of the State Council of the People's Republic of China, June 2020) available at < [http://www.gov.cn/zhengce/2020-06/07/content\\_5517737.htm](http://www.gov.cn/zhengce/2020-06/07/content_5517737.htm) >

<sup>26</sup> *Ibid.*

consequence. In the ground of multiple domestic legal systems, the legal consequence of force majeure event would not be solely exonerated for the aggrieved party who cannot perform the contract due to the pandemic, but be ordered to execute the contract or compensate for damages. Renegotiation is much milder than these two extreme legal results. As a result, when multiple legal consequences appear, it would constitute as a phenomenon that the purpose for setting the force majeure has been challenged in respect of international commercial contracts, which obtain foreign factors, in domestic system. For instance, there is a discussion on the relationship between force majeure and the principle of change circumstance under COVID-19 pandemic in China. Additionally, if the consequences of force majeure would become similar to hardship, it is unforeseeable for parties to undertake his obligation. Unfortunately, the confusion caused by the non-uniform understanding of force majeure and hardship cannot be eliminated in the domestic law system, as the diversity domestic law culture. Thus it is a expectation that CISG should construct an uniform response mechanism to COVID-19 crisis and further PHEIC event in order to guide the parties in international commerce effectively.

#### **IV. CISG's response to PHEIC through its interpretation approach**

As stated above, if both sides have different understandings of the force majeure and hardship, CISG as a uniform law would be a good choice. This convention avoids mentioning the term 'force majeure' and 'hardship', and article 79 focuses on the failure to perform when the reason is beyond control and unreasonably foreseen<sup>27</sup>, where it would conform to the circumstance of COVID-19 pandemic to some extent. At the same time, the consequence of application of article 79 is exemption for non-performance. If both sides agree on the convention as the governing law, the article 79 would be applied when

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<sup>27</sup> CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996].

the conditions meet the grounds of it. Because the article 79 and 80 could be deemed as the mandatory rule in terms of article 6 of the convention in light of the literature.<sup>28</sup> Therefore, CISG has an outstanding advantage over the domestic law, which has its own standards and rules.

Establishing the mechanism in response to COVID-19 and further PHIEC crisis do not mean that CISG needs to give a direct or detailed response. But it means that establish the response mechanism by means of improving the interpretation approach of the convention's provisions. In accordance with the traditional interpretation approach of the convention's provisions, it gives a good picture of the solution to changed circumstance in article 79 and 80. So it is very expectation for the convention to enhance the work of interpretation and establish the mechanism in response to the COVID-19 and further PHEIC event.

Indeed, the only response that CISG should take is combing the relationship with other soft law in order to form an effective mechanism. It may be impossible to modify the convention's provisions. Because it would change the basis of the consensus or eliminate the expectation for CISG, the predictability and stability. Additionally, it is impossible to give a clear interpretation for the conflict of general principles<sup>29</sup> as well. As it would destroy the diversity of domestic law culture, so that opting out of the convention. The diversity of demotic law mentioned here is primarily reflected by the decisions made by a country's court. Thus, the accessible response for CISG is to interpret the relationship between the CISG and the soft law primarily.

## **Conclusion**

This paper has pointed out two main opinion that the non-uniform concepts of

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<sup>28</sup> *Supra*, no.23.

<sup>29</sup> *Scaform International BV v. Lorraine Tubes S.A.S.*, Case no.07.0289.N (2009)

force majeure and hardship in diverse domestic law would be impediment in solving the conducting problems caused by changed circumstances due to COVID-19 crisis; and the necessary of CISG for different understanding of force majeure and hardship as the convention avoids using these concepts in the text.

In conclusion, the paper empathized that the law has a duty to response to the COVID-19 pandemic and further PHEIC events as soon as possible, as the law is the tool to adjust the relations in society, in particular, when the crisis occurs. Force majeure and hardship are the concepts that provide the solution for the aggrieved side of the contract. This paper found that the applications of force majeure and hardship is not certain in the cases in respect of COVID-19. Although the research method of this paper has a limitation on the number of targets that focuses on China, France, the UK, as wells as CISG and ICC, it could be found that whether it is the domestic law or international law, the law's response to the PHEIC event is not satisfactory.

This paper summarized the social problems in terms of the official instruments and the social media, additionally, it also summarized the courts' decisions related to the force majeure and hardship. This paper analysed the law's response by means of the case law and rules, and then it found that the multiple domestic criterion of force majeure, hardship and other rules about the impediment of performing the contract due to the changed circumstances unforeseeably, has rendered both sides in the position where it is unpredictable to recognize the risk of the international commercial transaction.

This paper agreed on the decisions as regards to the changed circumstances should be on the basis of case-by-case, but at the same time, it expected that the uniform criterion of force majeure and hardship, as well as the relevant rules, can be developed through promoting the discussion and demonstrate of

CISG. This paper conveyed that the response of law to COVID-19 and further PHEIC event is the summary of human experience from lessons, in this sense, the current law cannot give a satisfactory solution, but the law would cross the obstacles and give a convincing method in the further.

This paper considered that it needs a long time to demonstrate whether special preferential treatment is needed in case of global crisis and whether parties should be allowed to be exempted and terminate the contract, as there are many links in cross-border transactions and the issues involves implied the value orientation. The paper insisted on that CISG could be a stable ground of the long-time pursuit that is obtained with interweaving of multiple legal systems' culture.

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