The Influences on International Trade by the Proof of Force Majeure and Countermeasures

Zhaohui Chen[1], Lei Wei[2], Yunxiang Zhang[3], Mengxing Guo[4], and Mengxia Wang[5]*

[1]Associate Professor, Dalian Ocean University

[2]Lawyer Specialize in Civil and Commercial Litigation, Jiangsu Zhongling Law Firm

[3]President, Shenzhen Top Talents Development and Promotion Association

[4]Think tank researcher, Shenzhen Top Talents Development and Promotion Association

[5]Adjunct Professor, Gongqing Institute of Science and Technology

**Corresponding Author Email: [5]wangmengxia@pku.org.cn*

***Abstract*—** This study is a targeted practical research on the increase of force majeure in international trade practice after the outbreak of COVID-19. Applicable Logic of force majeure and legal practice of force majeure proof are analyzed, and advices and suggestions is proposed. The aim is to provide intellectual support to solve problems for all kinds of subjects who encounter force majeure events in current international trade.

***Keywords*—** COVID-19, international trade, proof of force majeure, countermeasures.

PREFACE

The outbreak of a new kind of corona virus(COVID-19) pandemic, has caused a powerful negative impact on enterprises to reach strict clauses of international trade contracts, as well as the results of due performances. Just a few months ago, China was the main battlefield of fighting COVID-19 epidemic, and with the people across the country fight the epidemic together, the domestic epidemic situation is now under control. As we celebrate the achievements of Chinese people marveling performance in fighting against corona virus, there still many Chinese companies became the victims of this battle unfortunately. Because of the epidemic, many domestic companies were affected by government restrictive measures and were unable to resume work and production in time. The consequence of this situation is that they were unable to complete orders on time, which should already be done if the epidemic does not exsit. Not only that, the backlog of orders, the loss of personnel, and high costs have made many domestic processing companies unable to make ends meet while mass survival pressures also make them hard to breathe. Because international purchasing orders cannot be completed on time, they also face the risk of being held liability for breaching of contracts. In order to help Chinese enterprises exempt from legal liability for delayed performance or unable to fulfill a contract owing to epidemic situation as well as preventive and control measures took by the government, China Council for the Promotion of International Trade (CCPIT) has issued plenty of force majeure certificates of novel corona-virus (2019-nCoV)–infected pneumonia (NCIP) to exporters affected by the epidemic, by which the enterprises can prove themselves innocent because of the world-wide epidemic has prevented them from fulfilling their contracts normally, with the certificates of CCPIT they can use force majeure rules in order to diminish the loss of the pandemic.

The force majeure certificate issued by the Commercial Certification Center of CCPIT has brought new vitality to domestic enterprises. According to the follow-up visit investigations initiated by Commercial Certification Center of CCPIT into enterprises who has acquired issued certificates, the results shows that after providing the certificates to their clients, most enterprises had gained understanding and acceptance from transaction counterparty of the contract and the counterparty promised that they will not be held civilly liable for delayed delivery in the future. Meanwhile, their orders went on well and they still keep a long -term cooperation between their clients. Also, many enterprises that has entered into import-export contract modified their terms of contracts and made an agreement the reasonable delay is allowed, they won't be charged with liability for breaching the contracts.

In the case discussed above, from the perspective of methods used in resolving disputes, it was settled by transaction parties themselves through multiple reconciliations. This means that contract parties reached an accord to modify or dissolve this predicament after negotiations. In many cases of reconciliations, A force majeure certificate have played a great role. A force majeure certificate is a proof of force majeure events, which is an objective statement of facts. At the same time, it is also a prerequisite for the parties to reach mutual understanding and reconciliation. It is clear that the force majeure certificates issued by CCPIT have already played and will continue to play a positive role in giving forceful support to help Chinese enterprises

achieve understanding from the counterparty of the contract.

Nonetheless, not every such dispute can reach a negotiation without costs. The loss caused by the epidemic is objective, and the contract subject does not want to bear this part of the loss. At this time, who will bear this part of the responsibility becomes an obstacle to the formation of consensus between the contract parties. There are still many companies refused to negotiate, which makes the situation even worse. It was reported that there were many foreign companies reclined to accept the notice of force majeure from Chinese enterprises, such as Royal Dutch Shell Plc and Total SA(a French oil company) refused to accept the notice of force majeure from a Chinese liquefied natural gas purchaser (LNG) and unfortunately LNG company must perform the contract in order to meet with the conditions that specified in the due contract. At the same time, as the epidemic spreads in other countries and regions, foreign companies may also propose to Chinese companies that they need to delay the performance of the contract or terminate the contract due to force majeure. In face of this situation, Chinese companies also need to judge whether they would adopt force majeure certificates from foreign companies based on actual conditions.

Therefore, this paper is based on the global COVID-19 epidemic outbreak at the beginning of 2020 and focused on the reality and feasibility of applying force majeure as disclaimer in international trade affected by the epidemic. The proof of force majeure plays an important role in determining the force majeure facts. In addition, it summarizes how to better apply the proof of force majeure into exemption of proleptic responsibility due to current situation in international trade, so as to better protect the expected interests of the counterparty and reduce the damage caused by force majeure.

1. APPLICABLE LOGIC OF FORCE MAJEURE

In the event of a dispute in a civil and commercial transaction, the parties concerned must submit their own evidence to prove their claims, which called "who claims, who provides evidence" rule. Whether a foreign or domestic company, availing itself of termination of a contract or exemption from liability, should offer reasons that gear to legal logical justification, which means propose needs to meet the legal constitutional requirements. On the one hand, it should provide legal or agreed basis to back up its claims. In other words, The force majeure clauses have been specified in the applicable law or contract. Moreover, the force majeure clause needs to include the objective circumstances which are happening now. On the other hand, the outbreak of public health affairs meets the conditions for rescission of a contract or exemption from liability owing to force majeure that specifically stipulated in international trade contract or stated by law. If the listed circumstances do not constitute a substantial hindrance to the performance of the contract, then such circumstances cannot be regarded as force majeure and apply specific clauses. Meanwhile, a party to the contract claiming itself subjected to force majeure has the burden to prove the direct relationship between the force majeure events and the non-performance of its obligations of this Contract. That is to say, the one who claims force majuere bears out a good cause-and-effect logic.From this, it is concluded that the company can be supported to claim immunity due to force majeure.

1.1 Statutory or Contractual Force Majeure

1.1.1 Statutory Entitlements to Force Majeure

Not all countries in the world have promulgated laws for force majeure as well as single provision. Among the countries representing the Continental Law System, such as France, Germany and China adopts the theory of force majeure. In their laws, force majeure has clear regulations and rigorous elements. Market entities in these countries can avail themselves suffering from force majerue events so as to prevent themslves from taking liabilities. For the losses suffered due to force majeure, the market entities shall bear each other's responsibility according to the principle of fairness. In addition to countries with clear laws and regulations, some countries do not have clear regulations on force majeure. As the typical representative of Anglo-American Law, English law does not explicitly provide the concept of force majeure. In the context of international business, in order to apply force majeure rule to aquire exemption, it is necessary to distinguish where dose the international trade case in dispute was settled and which branch of law the country in applying and whether the country of trial has clear applicable provisions on force majeure. If not, force majeure loses the applicable institutional support, which means even if it is true that the contractual obligations cannot be fulfilled in a timely mainly due to objective circumstances that cannot be attributed to oneself, it is difficult to obtain the support of the court or arbitration tribunal if they want to claim exemption from legal liability. If the company is sued in a country that does not have any legal provisions to recognize force majeure rules, the risk of losing the case is very high.

Therefore, whether to invoke the force majeure exemption clause stipulated by law depends on the

applicable law to solve the contract dispute. The law applicable to an international trade contract may be agreed upon by the parties in the contract or, if not, by the accepting institution of the dispute (determination of the applicable law). Different applicable laws will determine different legal rules and will ultimately make a choice on whether force majeure can be applied. If the civil law system is applied, the possibility of force majeure exemption claimed by market entities is a bit higher, and vice versa.

In order to find out the frequency of Chinese law applied into trial, data from an anonymous survey by one of People's Intermediate Court(PRC) show that, when Court determines proper law for the contract relating to the foreign interests, 58% cases were judged based on the pinciple of autonomy, 36% cases were governed by the law of the country with the closest connection, and 6% were governed by and construed in accordance with Chinese law directly. The previous data shows that it is more common for the parties to choose the law applicable to disputes with autonomy of will, and we also tend to think that choosing the law applicable to disputes in advance is more helpful for the enterprises to solve the problem. If the parties do not choose the applicable legal provisions, according to international practice, the court or the tribunal will choose the place that has the closest relationship with the performance of the contract to determine the applicable law, such as the place of performance of the contract, the place of residence of the defendant, etc. The determination of the applicable law by the court is not conducive to the enterprise's advantage in dispute resolution, and at the same time it will put the enterprise in a passive position, especially in the international dispute resolution, also it will increase a lot of litigation costs.

However, the exertion in a proceeding before a court in solving international commercial dispute makes up a very small portion of the world's total amount. International commercial arbitration (ICA) plays a significant role in resolving these troubles. Most international commercial disputes refer to arbitration. Among the world well-known international arbitration institutes, the majority of the arbitrators have a comprehensive background in Anglo-American law system and a profound understanding of provisions. Compared to other branch of law, they inclined to think and work in the context of Anglo-American law system and make the best choice conformed to their minds. Although the arbitrators are all neutral, the differences in trial thinking and applicable legal systems will also have varying degrees of impact on the rights protection of enterprises. At a time when COVID-19 epidemic has not yet been fully controlled, enterprises pay proper attention to the background of arbitrators and past referees may also beneficial to their rights protection.

When comes to the topic of importing and exporting of goods, the 'United Nations Convention On Contracts for The International Sale of Goods' (CISG) specified in the contract or complying with legal provisions is often applied by tribunals. Nonethless, there are no relevant rules of so called force majeure, which means they hardly use this principle to confront unexpected situations. However, after a deep investigation into the provisions, we find Article 79 of the CISG provides that 'A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond to his control'. The 'impediment beyond to his control' may described and defined as force majeure, for they are similar in many respects, and this kind of obstruction emphasizes uncontrollability, and its connotation includes not only the unpredictability of what is happening now, but also the irretrievability of the current situation. The former seems to place greater emphasis on the absoluteness of the contract cannot be performed.

1.1.2 The Contractually Agreed Terms for Force Majeure

In the current field of international trade and international engineering, the application of English law is very universal. In many companies, their contract templates is highly recommended to applying English law. Force majeure has its origin in the French Civil Code. English law and its judiciary has not set up specific rules in force majeure. However, force majeure clause may be specified in the contract by contracting parties. Although English law does not clearly stipulate the rules of force majeure, they emphasize the principle of autonomy of will. Therefore, even if there is no force majeure clause stated by the law which is applied into the dispute over the contract, but it is stipulated in the contract, contracting parties are capable of claiming force majeure under the force majeure clauses in the contract. The agreed force majeure clause creates another way for contract subjects to safeguard their legal rights. Through the agreed force majeure clauses, the party affected by the epidemic can claim the application of force majeure to exempt or reduce its liability for breaching the contract.

As mentioned above, there are many differences in content between force majeure stipulated by law and force majeure clauses agreed in the contract. As regards statutory entitlements to force majeure, the laws and rules of each country establish a model to sum up and

generalize its meanings and impose very strict restrictions on its application. But the contractually agreed terms of force majeure are embodiment of contracting parties' commercial expectations. They are rich in content and varied from style. For example, statutory entitlements to force majeure usually require force majeure events could not have been foreseen by contracting parties at the time of conclusion of the contract. But the contractually agreed terms of force majeure events could perhaps had been foreseen by contracting parties that might come to happen or not. In other words, they didn't know whether it will certain to happen, such as the price of raw and processed materials, or transportation expense is pushed up. The force majeure clause stipulated in the contract is more operative, because the subjects of the contract can autonomously agree on the specific circumstances under which the force majeure rule can be applied in the future. This method of operation is more flexible and richer than legal regulations. Under the market-oriented economic environment, the prices in market fluctuate according to supply and demand and business is done in a flexible way. Yet for all that, force majeure may be defined to include events such as the prices rising up 10% or 15% based on the contract agreed by both parties.

1.2 The Coronavirus Pandemic is Considered as Force Majeure Event

From the mainstream understanding of the academic circle and the facts based on the trial practice of the People's Courts in China, the elements of force majeure mainly have three parts: (1) it exists independently outside the act of the person, which is neither derived from the act of the party, nor influenced by the will of the party; (2) There is a De facto causal relationship between its occurrence and the consequences of damage; (3) The parties, in accordance with their existing ability and due care and diligence, are unable to control and overcome the objective situation and its consequences. To put it simply, force majeure is a natural phenomenon that cannot be avoided by human forces, uncontrolbility is its main stream. In some countries, force majeure is a legal exemption ground, and it is not exempted by the exception agreement of the parties even if it was agreed in advance. As long as a force majeure event that complies with the law has occurred, the legal consequences of the application of force majeure rules should occur without any exceptions. The party to the contract affected by the fact of force majeure can claim the application of force majeure rules to the other party to avoid liability for not performing the contract and the counterparty must accept this consequnces. In this way, the following conditions shall be met if the minor premise and the impact of the epidemic are in accordance with the legal provisions or the conditions for force majeure exemption that stipulated in the contract:

1.2.1 Disease Outbreak and the Direct Effects of Epidemic

The recent outbreak and adverse effects of epidemic are the judgements from the fact, which proves the objectivity and authenticity of the epidemic, as well as the obstacles to fulfilling obligations caused by the epidemic. To judge wheather the epidemic could be considered as force majeure and its impact over the enterties, there are two specific aspects that we should take into consideration: one is facts about the outbreak of the coronavirus epidemic. To prove the occurrence of an epidemic, it usually includes multiple ways. It is not only necessary to prove the extent of the epidemic, but also to prove the impact of the epidemic,if the epidemic just spread in a very small territory and be controlled fastly, then the epidemic cannot be a excuse used to exempt from the responsibility. The other aspect is restrictive measures being taken by the government to control the epidemic. These measures has many manifestations but mainly reflects in acts of governmental authority, such as the new methods of traffic control, a series of quarantine measures, delayed resumption of work, travel restrictions, trade constraints especially in the areas of storage and port services, and expropriating masks, ventilators and other vital medical supplies. Besides, some enterprise deeds are also included, certainly most of these corporate actions are extensions of government actions, only because the government has issued several control measures, and companies may take corresponding measures on their own. For example, cancellation of international flights, could be either according to the order made by the government, or a strategic business decision on air transports enterprise according to market forces because of the decrease in travellers makes it difficult for routes to maintain profitability. Currently, CCPIT has issued thousands of force majeure certificates to enterprises affected by the novel coronavirus disease (COVID-19). These force majeure certificates are fact proofs acted in the field of commercial transactions. The main points of the certificates were certifying the truth about the description of the above governmental measures.

1.2.2 Direct Effects of Epidemic are Force Majeure Events to be Exempt from Liability

Whether direct effects of the epidemic are force majeure events to be exempt from liability, or the affected party shall be entitled to terminate the contract with notice, is a value judgement. That is to say, this judgment is not

simply confirmed according to the rules of evidence, but must be based on specific criterion, and rely on professional review and analysis and final judgments to draw correct conclusions. Making this value judgement must base on the above facts and examine the provisions of laws and agreement in contracts. The Chinese Contract Law and the United Nations Convention on Contracts for the International Sale of Goods have relatively simple provisions on force majeure. However, in international trade contracts, the provisions on force majeure clauses generally include two aspects: one is the general provisions, and explains what force majeure is; the other is to list the types and specific events that may constitute force majeure. In general, contract would list the acts of the state and social events in areas such as serious losses arising from a natural disaster, war, riots, terrorism, strikes, unrest and governmental control, and some even involve legislations and law amendments that come after definite agreement and the destruction of infrastructure that not arising out of one party's fault. 'Viral pandemic' is often listed as one of the force majeure events in contracts. In short, the consequences caused by the actions listed above cannot be attributed to any party to the contract, that is, the occurrence of the result is not caused by the fault of any party.

Even though viral pandemic has included in the list of force majeure events, it does not mean excusable delays or liability exemption is necessarily applicable in case that rises from the dispute. The force majeure exemption clause agreed in the contract may not be always applicable, and the agreed content must also comply with the law, which means these damaging effects of the viral pandemic should meet the requirements of general provisions as well. In practice, it means such precautions against the spread of viral pandemic would require extensive plant closures and cause severe economic injury to some major industries for instance. The parties could not have foreseen those government requirements at the time of concluded agreement of the contract, both parties being unable to either avoid or overcome its occurrence and consequences. In others words, measures to deal with infectious diseases are 'unforeseeable, unavoidable, and insurmountable'. There are also plenty of international commercial contract does not stipulate definitely those unforeseen circumstances. Therefore, any action or event that meets with the aforementioned three conditions may be considered as force majeure. However, because of the large space for various interpretation, there still exists difficulty to specify in the contract which actions or events can be accounted as force majeure. After all, force majeure is a special situation that prevents the smooth performance of the contract and destroys the value of the order of law. Therefore, the judicial practice of many countries adopts very strict standards for determining force majeure, emphasizing that only when the established contract absolutely has no possibility of performance due to unpredictable situations can force majeure finally permitted to help release the party from due responsibilities.

Contract are completely reached on content, yet a perfect contract model often has to draw a clear dividing line between force majeure and the risk of a business venture. The future market trends and gross profit rate changes often be stipulated and regarded as commercial risk, that should be born by the market entities themselves. So these potential ventures usually have been removed from the force majeure events in contract. Market transactions have inherent risks. Although such risks are usually 'unforeseeable', they are not inevitable and insurmountable. If the market transaction risk is identified as force majeure, the value of the force majeure rule itself will become meaningless and the market order will be destroyed. As a result of the COVID-19 pandemic, this never-before-seen set of circumstances are leading to a fall in domestic market demand and the market price will eventually fall. If the Buyer under international trade contract to claim relief from a force majeure event for all of these reasons, this claim will not be able to garner sufficient or universal support.

1.3 Cause-and-effect Relationship

The last point, and maybe the most critical point, is that the fact of force majeure causes the contract not to be performed as agreed, and there is a causal relationship between the event and the consequences. If there is only a force majeure fact, but the fact does not affect the normal performance of the contract and there is no adverse consequence, then the epidemic cannot be considered as force majeure event. Either party shall not be held liability for failure or delay to performing all or specific part of the contract due to force majeure events, which means the innocent ones shall not be burdened by supervening impossibility of performance. The cause-and-effect relationship between failure to perform the contract and force majeure events must be stressed. In order to meet with this requirement, force majeure events should have a substantial effect on nonperformance of contract with a significant and conprehensive extent or degree. That is to say (a) the contractor fails to perform in accordance with the delivery or performance schedule by reason of force majeure events. It is necessary to give the contractor additional time to complete the preconcerted plan. Or (b) a party is prevented from performing part of its

obligations owing to force majeure, it shall be relieved from conforming with the contract to fulfill its part of obligations. Or (c) all the obligations to the contract cannot be performed owing to force majeure. A party shall have the right to notify the other party that the contract is unable to be conducted, and remedial measures should be implemented as soon as possible for preventing the loss from expanding.

The Supreme People's Court of PRC issued 'The 1st Guiding Opinion on Properly Trying the Civil Cases of Disputes over Problems Related to COVID-19 Pandemic According to the Provisions of Law'. According to Article 3 of the document, when hearing disputed case of the contract arising from direct effects of epidemic and its preventive and control demarche, the judge should acquire an accurate understanding of the cause-and-effect relationship between the epidemic or its preventive and control demarche and how these events react in failing to carry out the contract. This relevant judicial interpretation stressed direct cause-and-effect relationship once again. Epidemic or its preventive and control demarche must be the cause failing to carry out the contract is the direct effect.

Since the outbreak of COVID-19 Pandemic, many nations have issued traffic and harbour control measures. These measures will inevitably exert an extensive negative impact on export shipments of merchandise. Here, the first thing to be done is to analyze and understand how these measures exert effects on the rights and interests in contract parties, pursuant to the trade terms reached in contracts or the agreements upon delivery terms. It is important to take into concern to identify which one is more possibly going to be affected by these measures, the Seller or the Buyer? Buyers and sellers have different responsibilities and obligations, so the scope and extent of the force majeure affected by the epidemic is also different. Some industrial entrepreneurs have said, there was a foreign seller, who claimed to rescind the contract on the base of a series of policies and measures promulgated by the state of the buyer.

The seller claimed that those measures should be considered as force majeure. In fact, those measures only influenced the buyer, and the seller did not suffer any loss from these measures at all. That is, although a force majeure clause in this contract dose really exist, and the anti-epidemic measures are covered by the scope of force majeure specified in the contract, but the seller's obligations hereunder and the time for performance was not affected by those measures. In this case, the anti-epidemic measures have no direct impact on the seller of not performing its obligation under this contract. So the seller cannot rescind the contract simply because of the new measures was announced by the State of the buyer.

2. LEGAL PRACTICE OF FORCE MAJEURE PROOF

The above demonstrates the inherent legal logic of force majeure that COVID-19 epidemic may constitute. However, if the parties want to apply the force majeure rules and then advocate the termination of the contract and exempt themselves from liabilities, the first thing they need to do is to prove the existence of the force majeure fact. The proof of force majeure is the process of proving the authenticity of objective facts related to force majeure.

The main connotation of the proof is to exist objectively, rather than to directly and completely prove the logical relationship that a certain force majeure event caused the company to fail to perform. Therefore, the force majeure certificate will not result in the direct application of the force majeure immunity. As far as this epidemic is concerned, the proof is to explain objective facts such as delayed resumption of work, traffic control, and restricted dispatch of laborers, and so on. In short, the proof is only an objective description of facts, only time, place, people, and results, but no causality. Regarding the proof of force majeure facts, various countries have different practices.

2.1 Practice on Proof of Force Majeure in Mainland of China

In Mainland of China, the China Council for the Promotion of International Trade (CCPIT) is mainly responsible for issuing the 'Force Majeure Factual Proof'. After the outbreak of COVID-19 epidemic, the Ministry of Commerce mentioned in the notice that it required the CCPIT and the Chamber of Commerce to support the issuance of force majeure factual certificates for free to support foreign trade and foreign-funded enterprises to resume work and production.

Affected by this year's epidemic, about 103 commercial certification authorization agencies of the national Trade Promotion System have issued thousands of force majeure factual certificates for companies affected by the epidemic, involving hundreds of billions of dollars.

In addition, after receiving relevant certification documents from the CCPIT, many company obtained clients' understanding and recognition in the process of negotiation with them, so it was able to retain the order and extend the delivery period through a separately

agreed contract to avoid delays in performance or liability for breaching the contract.

2.2 Practices on Proof of Force Majeure in other Countries

In South America, such as Brazil, Mexico, Argentina, Peru, in case of force majeure, the judge will ask the parties to provide a lot of different types of evidence to determine whether it constitutes a condition for determining force majeure. For example, the judge will make a comprehensive judgment based on media reports, contract and bill of lading provisions, rules of WTO and WHO, international and domestic laws and other factors. All these evidences together constitute the force majeure proof and they are also the key basis for the judge to determine the facts of the case. If the court determines that the evidences provided by the parties constitutes force majeure, and actually accepts such evidence, then it is not considered a breach of contract.

In Russia, currently there is no court cases of force majeure. However, as a practical obstacle to contract performance, the Russian Chamber of Commerce has recommended and encouraged contract counterparty to take force majeure into consideration as well as reasonable postponement of contractual obligations until the events of force majeure is over. As for the judicial practice for the application of force majeure proof, such as the force majeure certificate issued by China, if the supplier applies for recognition of this certificate in court, the force majeure certificate shall be notarized. Force majeure notarization refers to the notarization of unforeseeable, unavoidable and insurmountable events and related facts claimed by the notary institution in accordance with legal procedures on the basis of the party's application. It is the recognition and comfirmation of established facts, and to a certain extent, it also plays a role of evidence preservation. In order to reduce and prevent disputes, it fixes the evidence of the facts caused by force majeure to avoid the loss of evidence. In short, it is difficult to be accepted and recognized only by the force majeure certificate issued by China in Russia.

In Germany and France, for the time being, courts recognize and receive force majeure certificates issued by CCPIT, but to maintain a neutral position, they are not bound by the issuance of certificates by foreign agencies at their discretion (that is, to decide separately whether the force majeure can apply in a specific case and how it will effect the process of trial). Therefore, under such circumstance, exporters bear more responsibility of proving the truth, they should ensure that appropriate force majeure documentation is available under all circumstances, such as administrative measures, domestic transport restrictions, work bans, quarantine orders, etc. In addition, the party who fails to perform the obligation must notify the other party of the relevant obstacle and its effect as soon as possible, and if the notice is not received by the other party within a reasonable period of time after the party who fails to perform the obligation has known or ought to have known the obstacle, the party shall be liable for the damage caused by it's own failure to make the notice properly transmitted.

3. ADVICES AND SUGGESTIONS

By analyzing the applicable logic of claiming termination or exemption due to force majeure in international trade, we can see the important role of force majeure proof: it is the link between objective facts and the application of law. After the occurrence of a force majeure event, by using the factual proof, its authenticity and objectivity can be affirmed before entering the value judgment procedure, and finally making a just judgment or ruling conclusion.

3.1 Have More Channels to Obtain Proof of Force Majeure

For the effected contracting party who wishes to be released from her contract, or to be free from a responsibility due to force majeure, proof is not a sufficient condition for its claim, but often a necessary one. Thus, voluntarily applying for and furnishing proof of the impact on the force majeure, is absolutely necessary for the effected contracting party. The result of doing so will not only promote friendly negotiation to the opposite party, but also facilitate furnishing evidence in the pre-trial, discovery phase of litigation or in the course of arbitration.

Chamber of (International) Commerce from various countries is prepared for issuing force majeure certificate for the effected companies. According to Article 8, paragraph 6 of CCPIT Constitution, issuing force majeure certificate is one of the duties of CCPIT. In some countries, the certificate could be issued by the local notary office. Based on lawful prescript and legal practice of some countries, not only the force majeure certificate issued by a professional institution, but also some media reports, could be the identification of the contributing factors to the case. Sometimes, the contract calls for 'enclosing a confirmation by the proper authorities or published information attesting the reality of the facts'. Media reports bear the responsibility of recording facts and reporting truthfully to the world. Therefore, it is reasonable and realistic to use media reports as force majeure proof. As for domestic enterprises, it is necessary to pay attention to media

reports when collecting and fixing the evidences. Especially in the context when the opposite party brought up certificate issued by a professional institution and declared force majeure to terminate the contract, the other party is often hard to raise its verity objections in other ways. Bolstering her plea for media reports is the only road to it.

On the other hand, in theory, China is not a country with case law, and the trial of each case is independent and will not become a precedent. Although China is not a country applying with case law, similar cases can also be used as proof of force majeure. And our country is also actively exploring new ways different from case law countries, the Supreme People's Court has adopted a brand new way by issuing guiding cases to the public so that lower class of people's court could refer to the trial ideas of the decided cases, so as to provide reference for the trials of the same type of cases. In August of 2020, the Supreme People's Court issued the 'Guiding Opinions on Unifying the Application of Laws and Enhancing the Retrieval of Types of Cases (for Trial Implementation)', proposing to unify the judgment criteria through the reference of types of cases, case evaluation and other methods. Courts at all levels throughout the country may refer to existing judgments in accordance with the rules on class cases to ensure uniform application of the law and reflect the due meaning of judicial justice. Therefore, even if there is no litigation or arbitration, the parties to the contract can search the Chinese Judgment Documents online in advance to search through various dimensions such as keywords, court hierarchy, trial year, etc., to see how the settled case explain force majeure and how to identify epidemics as force majeure. So far, the most typical case that can compare with the outbreak of COVID-19 epidemic is the outbreak of SARS in 2003, which has been recognized as force majeure in many legal cases. Therefore, many counterparties in disputes origined in the field of production and trade are exempted from bearing the responsibility for breaching the contract and not fully complete the liability due to the application of force majeure rules. The Higher People's Court of Hubei Province heard an appeal in 2007. The case was called a dispute over a lease contract between the US Dongjiang Tourism Group Corporation and the Yangtze River Shipping Overseas Tourism Corporation. In the course of the litigation, Dongjiang provided proof of the factual impact of force majeure and provided relevant reports on the SARS epidemic caused by online media, thus proving that the SARS epidemic is a vicious epidemic that has a great impact on China. In addition, Chinese translations of 'Fax of Cancellation of Orders' and notarized documents were also provided to prove the impact of the SARS epidemic on the tourism industry. In the judgment, the Hubei Provincial Higher People's Court also adopted a recognized attitude towards these force majeure facts, believing that online news reports and notarized documents can prove the impact on the tourism industry during the SARS epidemic. The COVID-19 pneumonia cases can also refer to the same logic as well. In Chinese foreign-related trade cases, if there are cases heard in the people's court, the party concerned can refer to the previous types of cases, and find out the ideas for determining force majeure from the types of cases, so as to provide reference for further solving disputes.

3.2 Secure a Proof of Force Majeure of Direct Adverse Effects

Force majeure is one of the particular circumstances that prevent one party of performing any of its obligations to this contract. A contract was unable to be performed due to force majeure, that means legal order would be destroying, produced the unstable factor. Therefor, judicial practice in most states in the world has adopted strict standards for acknowledge force majeure. According to Article 3 of 'The 1st Guiding Opinion on Properly Trying the Civil Cases of Disputes over Problems Related to COVID-19 Pandemic According to the Provisions of Law', the contract should be unable to be fulfilled owing to epidemic and its preventive and control demarche directly, the provisions of the force majeure clause shall be applied according to the provisions of law. A party that was unable to perform a contract due to force majeure is exempted from liability in part or in whole in light of the impact of the epidemic and its preventive and control demarche. It follows that the 'Guiding Opinion' emphasized the direct effect of epidemic as well as its preventive and control demarche on nonperformance of contract, that is to say, the indirect impact is not considered to be associated with exemption.

The company availing itself of termination of a contract or exemption should managed to obtain a force majeure certificate that prove the epidemic has happened and its preventive and control demarche have a direct impact on the non-performance of its obligations under this circumstance. There were some companies wondered how to deal with the situation that their upstream enterprises are unable to supply spare parts or accessories to them, since the production has been influenced directly by the epidemic and its preventive and control demarche. While the production of its own also stagnated, the downstream firm could not supply the product to their foreign buyers. In this case, shall the

downstream firm (consulting client) be relieved of all or part from its obligations?

If the proof of force majeure obtained by downstream firm only proves the direct influence of epidemic and its preventive and control demarche on upstream firm, it is a proof of indirect influence, rather than a direct influence to the consulting client. According to the 'Guiding Opinion' of Supreme People's Court of PRC, or starting from international business arbitration practice, the seller (downstream firm) is still not exempt from the contractual liability, even-though the proof of force majeure is true. The cause lies in the fact that, in this situation, the downstream firm could order spare parts or accessories from other suppliers globally. So the contract still has the chance to be carried out. If production costs and expenses went up accordingly, they should be regarded as the risk of a business venture born by the downstream firm no matter the epidemic situation does exist or not. When applying for and furnishing convincing proof of the impact on the force majeure, it is absolutely necessary and very important to the contracting party to focus on the direct effect of epidemic and its preventive and control demarche on nonperformance of its contractual obligations. There is no need to be over state indirect impact. Any proof covering too much information is probably not focused enough, and the loss would outweigh the gain.

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