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FROM CORONATION TO CORONAVIRUS: COVID-19, *FORCE MAJEURE* AND PRIVATE INTERNATIONAL LAW

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I. INTRODUCTION

In Anglo-American law, *Krell v. Henry*,[1] otherwise known as the coronation case, is arguably the most important case in the development of the law of *force majeure* and frustration.[2] In 1903, an English court held that a contract for the leasing of a room to watch King Edward VII's coronation procession was discharged when the coronation was cancelled because of the king's illness.[3] Ever since that case, a contract is discharged under English law if the common purpose of the contracting parties is frustrated by a supervening event. Fast-forward a century and the doctrine of *force majeure* which developed from the coronation case is playing a significant role in resolving contractual disputes resulting from, coincidentally, the coronavirus ("COVID-19") pandemic. Compared with most disasters in the world's history, the COVID-19 pandemic is arguably the most international as no countries are immune from it. The international character of COVID-19 therefore makes private international law an essential component of the *force majeure* analysis. This Article aims to facilitate the understanding of the interlocking nature of COVID-19, *force majeure*, and private international law, and seeks to analyze the private international

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1. Krell v. Henry [1903] 2 K.B. 740 (Eng.).

2. Strictly speaking, *force majeure* is not a common law concept but is used to describe clauses that excuse a party from certain specified supervening events. The equivalent doctrine under English law is frustration of contract. *See* Ewan McKendrick, *Force majeure and Frustration – Their Relationship and A Comparative Assessment, in* FORCE MAJEURE AND FRUSTRATION OF CONTRACT 33 (Ewan McKendrick ed., 2d ed. 1995). However, because this Article covers more than just English law and the wide use of *force majeure* commercially, the term *force majeure* will be used generally to cover frustration as appropriate.

3. *See Krell*, 2 K.B. 740.

law issues that are expected to arise in COVID-19 related *force majeure* cases. As both *force majeure* and private international law are national laws, this Article illustrates the relevant issues by comparing both sets of laws between England, the place of origin of modern *force majeure* law and frustration in common law jurisdictions, and China, the jurisdiction that has the most experience in dealing with *force majeure* related to coronavirus.

A. Why is COVID-19 Different From Other Force Majeure *Events?*

Four aspects distinguish COVID-19 from other historical *force majeure* events. The first and most obvious aspect is its huge economic impact. As of October 4, 2020, there were over 34.8 million confirmed cases of COVID-19 infection, with the death toll reaching more than 1 million.[4] According to the latest projection by the International Monetary Fund (the "IMF"), global output in 2020 will contract by 4.9 percent.[5] With no end to the pandemic in sight, it is not possible to estimate the eventual economic loss at this point in time. As the primary function of *force majeure* is to allocate the loss caused by a supervening event between the contracting parties,[6] the bigger the loss from COVID-19, the more important the law on *force majeure* becomes.

The second aspect is the strong public interest present in COVID-19 related *force majeure* cases. Insofar as English law is concerned, *force majeure* is meant to do justice to the contracting parties.[7] As Lord Sumner famously put it, the doctrine is a device "by which the rules as to absolute contracts are reconciled with a

4. *Coronavirus disease (COVID-19) Weekly Epidemiological Update,* WORLD HEALTH ORGANIZATION [WHO], (Oct. 4, 2020, 10:00 CEST), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20201005-weekly-epi-update-8.pdf.

5. IMF, *A Crisis Like No Other, An Uncertain Recovery*, World Economic Outlook Update, (June 2020), https://www.imf.org/en/Publications/WEO/Issues/2020/06/24/WEOUpdateJune2020. Comparatively, the global financial crisis triggered by the implosion of sub-prime mortgages led to only about a 4 percent of contraction in the world's economy between 2008 and 2009. *See* Renae Merle, *A guide to the financial crisis — 10 years later*, WASHINGTON POST (Sept. 11, 2018) ("[i]n all, the Great Recession led to a loss of more than $2 trillion in global economic growth, or a drop of nearly 4 percent, between the pre-recession peak in the second quarter of 2008 and the low hit in the first quarter of 2009, according to Moody's Analytics.").

6. *See* G.H. TREITEL, FRUSTRATION AND FORCE MAJEURE 503 (3d ed. 2014).

7. *See id.* at 643-44.

special exception which justice demands."[8] However, third parties are certainly affected by the resolution of the *force majeure* issue in this pandemic. For example, in *Lakeman v. Pollard*, the issue was whether a defendant could be discharged from working in the vicinity of a prevailing epidemic, and the Supreme Judicial Court of Maine held that if the performance of contract was rendered impossible by the epidemic, the defendant would be discharged.[9] Although the court focused on the impacts that upholding the contract would have on the employee,[10] the decision can also be justified on the basis of public interest "for the reason that the state cannot risk the loss of its citizens even to preserve inviolate the contracts of individuals." [11] In other words, upholding the employment contract and making the defendant go to work would not only put the defendant at risk of contracting the virus, but also expose other employees as well as put the public at risk.

The third aspect relates to the second as such public interests rise to a national level in this pandemic. Because of the significant negative impacts of COVID-19 on all countries in the world, each country has a strong national interest in the law of *force majeure*. This is reflected in various laws passed specifically on *force majeure* by many countries regarding COVID-19,[12] as well as other COVID-19-related laws like the measures on quarantine and lockdowns. [13] Traditionally, as a contractual doctrine, strong involvement of the State is alien to the law of *force majeure*.[14]

8. Hirji Mulji v. Cheong Yue Steamship Co. Ltd. [1926] A.C. 497, 510 (P.C.).

9. Lakeman v. Pollard, 43 Me. 463, 467 (1857).

10. Stating in no uncertain terms, the court made it clear that "[i]f the fulfillment of the plaintiff's contract became impossible by the act of God, the obligation to perform it was discharged . . . The plaintiff was under no obligation to imperil his life by remaining at work in the vicinity of a prevailing epidemic so dangerous in its character that a man of ordinary care and prudence, in the exercise of those qualities, would have been justified in leaving by reason of it, nor does it make any difference that the men who remained there at work after the plaintiff left were healthy, and continued to be so." *Id.*

11. *Contracts – Defenses – Impossibility of Performance*, 17 HARV. L. REV. 197, 200 (1904).

12. *See infra* notes 91-101 and accompanying texts.

13. *See, e.g., Interim Measures for the Prevention and Control of Pneumonia Outbreak of Novel Coronavirus Infection in Wuhan*, NAT'L HEALTH COMM'N OF THE PEOPLE'S REPUBLIC OF CHINA (Jan. 29, 2020), http://www.nhc.gov.cn/xcs/fkdt/202001/7bde2706a5614338b106362ac161ddaa.shtml [https://perma.cc/58RG-XCNZ].

14. *See supra* notes 7 and 8.

However, given the severity of COVID-19, the manner in which disrupted commercial transactions are handled by *force majeure* may affect the survival of a government.[15] There is thus a significant incentive for states to get involved in private transactions through the *force majeure* doctrine to protect their national interests. COVID-19 could thus turn the law on loss allocation between private parties into the law on loss allocation between countries. It is expected that states like China, which has a large share of its economy in the hands of state-owned enterprises, will have an even stronger incentive than other states to shape their *force majeure* laws in their favor.

The final aspect is the international nature of COVID-19. The global reach of COVID-19 is unprecedented and greatly contributed to the scale of the disaster, but the international nature goes beyond that. The severity of the pandemic is closely related to modern international transportation and commerce through which the virus spreads,[16] and in turn COVID-19 also causes huge disruptions to the same international transportation and commerce.[17] Cross-border *force majeure* issues arising from COVID-19 therefore require analysis of private international law.

B. Why Does Force Majeure *From COVID-19 Cause Unique Private International Law Issues?*

Force majeure has never attracted much attention from the perspective of private international law. For example, in a leading textbook written on *force majeure* and frustration by Professor Treitel, only one page discusses private international law, and it mostly just refers readers to specialty works like *Dicey, Morris &*

15. In this sense, COVID-19 imposes threats to the survival of a government much like those imposed by wars. *See* TREITEL, *supra* note 6, at 348 ("The public policy considerations on which the prohibition against trading with the enemy are based are of exceptional strength because observance of this prohibition can affect the very survival of the nation.").

16. *See* Matteo Chinazzi et al., *The effect of travel restrictions on the spread of the 2019 novel coronavirus (COVID-19) outbreak*, 368 SCIENCE 395, 395-400 (2020).

17. Various countries have imposed travel restrictions as a result. For example, Japan has imposed a travel ban on foreigners from more than 100 countries. *See Border enforcement measures to prevent the spread of novel coronavirus (COVID-19)*, MINISTRY OF FOREIGN AFFAIRS OF JAPAN (Aug. 13, 2020), https://www.mofa.go.jp/ca/fna/page4e_001053.html [https://perma.cc/53VQ=GZHD].

Collins on The Conflict of Laws.[18] However, Dicey, Morris and Collins also have very limited discussions on the topic.[19] The lack of discussion is a bit surprising considering that international trade has long been subject to various kinds of *force majeure* events, though not on the scale of COVID-19. As will be discussed below, one explanation is the belief that frustration is just another contractual principle that could be handled by the general choice of law rules on contracts.[20] This may have been correct pre-COVID-19, but this is no longer true.

First, as mentioned above, there is a significant national interest in *force majeure* regarding COVID-19. Similar to the law on *force majeure*, private international law has traditionally been perceived as a means of achieving justice between private parties, not generally for dealing with relationships between countries.[21] The national interests in COVID-19-caused *force majeure* disputes therefore bring new challenges to private international law, particularly in public policy and mandatory rules. In addition, the increased number of disputes due to COVID-19 also provides courts with the opportunity to apply foreign *force majeure* laws, which they had no experience applying. These foreign laws also include new COVID-19-specific laws which could serve to widen the differences between foreign *force majeure* laws and those of the forum, creating "true conflicts" that had not been seen pre-COVID-19.[22]

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18. *See* TREITEL, *supra* note 6, at 390 ("[f]or detailed discussion of the relevant Conflicts rules [on illegality], reference should be made to the specialist works on that subject."). References were made to DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS (Lord Collins of Mapesbury et al. eds., 15th ed. 2012) and CHESHIRE, NORTH & FAWCETT: PRIVATE INTERNATIONAL LAW 42 (J.J. Fawcett & Janeen M. Carruthers eds., 14th ed. 2008).

19. For example, the term "frustration" appears in the latest edition only twelve times. *See* DICEY, MORRIS & COLLINS, *supra* note 18, at ¶¶ 16-022, 32-026, 32-027, 32-050, 32-092, 32-124, 32-151, 32-156, 32-162, 34-016, 36-023 (with the word appearing twice in this paragraph).

20. *See infra* Part III(D); *see also* McKendrick, *supra* note 2 (discussing "frustration").

21. *See* ALEX MILLS, THE CONFLUENCE OF PUBLIC AND PRIVATE INTERNATIONAL LAW: JUSTICE, PLURALISM AND SUBSIDIARITY IN THE INTERNATIONAL CONSTITUTIONAL ORDERING OF PRIVATE LAW 3-10 (2009).

22. *See infra* note 24 regarding false conflict generally.

C. Why Compare Both the Substantive Laws and Private International Laws on Force Majeure*?*

Private international law, particularly choice of law rules, is closely related to the substantive laws.[23] To assess and illustrate the impact of COVID-19 on *force majeure*, this Article will make two comparisons between England and China. The first is a comparison of the two countries' substantive force majeure law. The second is a comparison of the two countries' private international law rules applied to *force majeure* issues. While the emphasis of this Article is on the second comparison, such a comparison is not possible without conducting the first comparison. This is because there will be no meaningful need for a choice of law analysis if the substantive laws are essentially the same and lead to an identical result (in other words, a "false conflict").[24] However, the first comparison will only highlight those key differences with a particular significance on the conflict analysis.

England and China are ideal subjects of comparison. England is representative of the common law jurisdictions and serves as a striking contrast to the civil law system of China.[25] In addition, while England has had a century-long history of *force majeure*, China has more experience dealing with *force majeure* caused by coronaviruses. In 2003, China experienced an epidemic caused by another coronavirus, Severe Acute Respiratory Syndrome ("SARS").[26] At the time, the Supreme People's Court (the "SPC") issued a special judicial interpretation to deal with *force majeure*

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23. *See* CHESHIRE, NORTH & FAWCETT'S PRIVATE INTERNATIONAL LAW 7 (Paul Torremans eds., 15th ed. 2017) (stating that the function of choice of law is to choose the appropriate system of law and not to furnish a direct solution).

24. *See generally* Peter K. Westen, *False Conflicts*, 55 CALIF. L. REV. 74, 76-77 (1967) (in particular, the author identified seven different types of false conflicts. The false conflict referred to in this article is the second type, i.e. "[c]ases in which the laws of two states, though different, yield identical results with respect to the specific issue before the court".).

25. *See* John D. Wladis, *Common Law and Uncommon Events: The Development of the Doctrine of Impossibility of Performance in English Contract Law*, 75 GEO. L.J. 1575, 1575-76 (1987) on the impacts of English law of frustration on US law.

26. *See China's latest SARS outbreak has been contained, but biosafety concerns remain – Update 7*, WORLD HEALTH ORGANIZATION [WHO], (May 18, 2004), https://www.who.int/csr/don/2004_05_18a/en/ [https://perma.cc/8YQS-6NM9].

issues resulting from SARS.[27] Chinese courts also decided a number of cases regarding such disputes.[28] In 2019, China was also the first country to be significantly affected by COVID-19.[29] The SPC promulgated three judicial interpretations between April and June of 2020 which focus on *force majeure* caused by COVID-19 ("Guidances").[30] In terms of the national interests highlighted above, China has arguably more substantial national interests than

27. Zuìgāo fǎyuàn: Guānyú zài fángzhì chuánrǎn xìng fēidiǎn xíng fèiyán qíjiān yīfǎ zuò hǎo rénmín fǎyuàn xiāngguān shěnpàn zhíxíng gōngzuò de tōngzhī (最高法院：关于在防治传染性非典型肺炎期间依法做好人民法院相关审判执行工作的通知) [Notice of the Supreme People's Court on Handling of the Trial and Implementation of the People's Court in pursuant to the law during the prevention and treatment of SARS] (promulgated by the Sup. People's Ct., effective June 11, 2003).

28. *See, e.g.*, Měiguó dōngjiāng lǚyóu jítuán gōngsī (J) yǔ chángjiāng lúnchuán hǎiwài lǚyóu zǒng gōngsī chuánbó zūlìn hétóng jiūfēn shàngsù àn (美国东江旅游集团公司（J）与长江轮船海外旅游总公司船舶租赁合同纠纷上诉案) [Appeal Case for Ship Leasing Contract Disputes between J.PI Travel U.S.A., Inc. and Yangtze River Shipping Overseas Tourism Corporation], (Higher People's Ct. of Hubei Province 2007) (China).

29 . *See Novel Coronavirus (2019-nCoV) Situation report - 1*, WORLD HEALTH ORGANIZATION [WHO] (Jan. 21, 2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200121-sitrep-1-2019-ncov.pdf?sfvrsn=20a99c10_4 [https://perma.cc/AQ5K-RVDN]. The Author takes no position on the cause or country of origin of COVID-19.

30. *See* Zuì gāo rén mín fayuàn yìnfā "guānyú yīfa tuoshàn bànli shè xīnguān fèiyán yìqíng zhí xíng ànjiàn ruò gàn wèntí de zhidao yì jiàn" de tōngzhī (Fa fā [2020] 16 hào) (最高人民法院印发《关于依法妥善办理涉新冠肺炎疫情执行 案件若干问题的指导意见》的通知（法发〔2020〕16 号)) [Notice by the Supreme People's Court on Issuing the Guiding Opinions on Several issues Concerning Properly Handling Enforcement Cases Involving the COVID-19 Outbreak According to Law, No. 16 [2020]] (promulgated by the Sup. People's Ct., effective May 13, 2020) ("Guidance I"); Zuì gāo rén mín fayuàn yìnfā "guānyú yīfa tuoshàn shenli shè xīnguān fèiyán yìqíng minshi ànjiàn ruògān wèntí de zhi dao yìjiàn (èr)" de tōngzhī (Fa fā [2020] 17 hào), (最高人民法院印发《关于依法妥善审理涉新冠肺炎疫情民事案件若干问题的指 导意见(二)》的通知 （法发〔2020〕17 号)) [Circular of the Supreme People's Court on the Promulgation of the Guiding Opinions of the Supreme People's Court on Several Issues Concerning Properly Handling Civil Cases Related to COVID-19 Epidemic in Accordance with the Law (II), No. 17 [2020]] (promulgated by the Sup. People's Ct., effective May 15, 2020) ("Guidance II"); Zuìgāo rénmín fayuàn yìnfā "guānyú yīfa tuoshàn shenli shè xīnguān fèiyán yìqíng minshi ànjiàn ruògān wèntí de zhi dao yìjiàn (sān)" de tōngzhī (Fa fā [2020] 20 hào) (最高人民法院印发《关于依法妥善审理涉 新冠肺炎疫情民事案件若干问题的指导意 见(三)》的通知 (法发〔2020〕20 号)) [Notice by the Supreme People's Court of Issuing the Guiding Opinions on Several Issues of Properly Hearing Civil Cases Involving the COVID-19 Pandemic (III), No. 20 [2020]] (promulgated by the Sup. People's Ct., effective June 8, 2020) ("Guidance III").

other countries in this pandemic since it has a large number of large state-owned enterprises.[31]

With respect to the second comparison regarding private international law rules as applicable to *force majeure* issues, England follows the European Union's private international law regime, which contrasts in significant ways with the Chinese private international law regime.[32] The comparison will therefore equally apply to a case between China and any EU member state. Both countries also have plenty of commercial transactions with each other.[33]

II. COMPARISON OF FORCE MAJEURE *SUBSTANTIVE LAWS*

A. English Law

In England, the doctrine of frustration can be understood as an exception to the doctrine of absolute contracts. Under the latter doctrine, a contracting party is required to perform the agreed-upon bargain even though it has been made impossible by a supervening event that is out of its control.[34] The landmark case that developed the exception of frustration was *Taylor v. Caldwell*.[35] In that case, the plaintiff contracted to host concerts at the defendant's music hall which was destroyed by fire before the dates of the concerts.[36] The English court held that the parties were discharged from their respective obligations due to "the

31. *See* Curtis J. Milhaupt & Wentong Zheng, *Beyond Ownership: State Capitalism and the Chinese Firm*, 103 GEO. L.J. 665, 676-78 (2015).

32. The Chinese regime seems to be influenced significantly by the EU regime, as well. *See generally* Guangjian Tu, *China's New Conflicts Code: General Issues and Selected Topics*, 59 AM. J. COMP. L. 563 (2011) (comparing the Chinese choice of law regime with Rome I Regulation throughout the article).

33. The United Kingdom ("UK") was the third largest trading partner of China in Europe in 2018. *See Total Value of Imports and Exports by Country (Region) of Origin/ Destination*, NAT'L BUREAU OF STAT. OF CHINA, CHINA STAT. YEARBOOK (2019), http://www.stats.gov.cn/tjsj/ndsj/2019/indexeh.htm [https://perma.cc/9P87-DSL8]. China was the UK's sixth largest export market and fourth largest source of imports in 2019. *See* House of Commons Library, Briefing Paper, *Statistics on UK trade with China*, Number 7379 (July 14, 2020), https://commonslibrary.parliament.uk/research-briefings/cbp-7379/[https://perma.cc/UH4X-XK4X] .

34. *See* Paradine v. Jane [1647] Eng. Rep. 82 Aleyn 26.

35. Taylor v. Caldwell [1863] Rev. Rep. 3 B. & S. 826.

36. *Id*. at 826.

impossibility of performance arising from the perishing of the person or thing."[37]

Krell v. Henry was arguably even more important, as it pushed the boundary of the doctrine further than impossibility. Frustration will happen if performance of the contract becomes impossible "by reason of the non-existence of the state of things assumed by both contracting parties as the foundation of the contract . . . [in that case,] there will be no breach of the contract . . . "[38] Impossibility in that case was not necessary. The contract in the case could still be performed, as the plaintiff could rent the room to the defendant for the relevant dates.[39] The issue was simply that the room could no longer be used for the purpose of watching the coronation, a purpose that was not written in the contract, but understood clearly by both parties.[40]

The change in the judicial approach from absolute contracts to frustration is reflected in two English cases dealing with diseases. Prior to *Taylor*, in *Barker v. Hodgson*, [41] despite the impossibility of the defendant loading the cargo onto a ship chartered by the plaintiff due to a health law implemented due to a pestilence that shut down the "public intercourse and communication" in the port, the court held that the defendant was not discharged by the impossibility.[42] The position changed after *Taylor*: in *Condor v. The Barron Knights*, [43] the court held that employee, a talented drummer of a band, was properly discharged from the contract due to an illness he suffered. [44] The court reasoned that his illness was such "that had in a business sense made it impossible for him to continue to perform or for the [employer] have him perform the terms of the contract as a member of their group."[45]

However, it should be noted that the English courts have long accepted, even before *Taylor*, an exception to the doctrine of

37. *Id.* at 839.
38. Krell v. Henry [1903] 2 K.B. 740, 749 (Eng.).
39. *See* TREITEL, *supra* note 6, at 53, 313.
40. *Id.*; *see also* Wladis *supra* note 25, at 1611.
41. Barker v. Hodgson [1814] 105 Eng. Rep. 612, 3 M. & S. 267.
42. *Id.* at 270.
43. Condor v. The Barron Knights [1966] 1 W.L.R. 87 (Eng.).
44. *Id.*
45. *Id.* at 91. For an American example, see Lakeman v. Pollard 43 Me. 463 (1857).

absolute contracts if the supervening event involved illegality.[46] Thus, in *Barker v. Hodgson*, the court explained that the defendant would have been excused if the covenant itself had been prohibited by law.[47] This exception has also been extended to cover supervening illegality under the law of the place of performance.[48] The lower threshold for illegality may be justified as "the court is concerned, not merely with reaching a solution which may do justice between the contracting parties, but also with the public interest in seeing that the law is observed; and this public interest may sometimes outweigh the private interests of the parties."[49]

Even with the breakthrough brought by *Krell v. Henry*, English law has generally adopted a strict approach in discharging contracts based on frustration.[50] Notably, it does not have an equivalent doctrine of impracticability found under US law.[51] In the leading American case on impracticability, *Mineral Park Land Co. v. Howard*,[52] the defendants, who agreed to extract gravel from the plaintiff's land, did not take the gravel below water level as the costs of such extraction would have been ten to twelve times higher.[53] The Supreme Court of California found the contract to be impracticable, saying that "a thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost."[54] Accordingly, a contract may be discharged for impracticability even though it was neither impossible nor was its common purpose frustrated. *Mineral Park* has been widely cited in later authorities in the United States.[55] The UCC which synthesized the common law development has subsequently adopted the use of *impracticability* instead of *impossibility*.[56] This

46. TREITEL, *supra* note 6, at 28-30.
47. *Barker*, 3 M. & S. at 270.
48. Ralli Bros v. Compania Naviera Sota y Aznar [1920] 2 K.B. 287 (Eng.).
49. TREITEL, *supra* note 6, at 346.
50. *See* Wladis, *supra* note 25, at 1620-29.
51. *See* TREITEL, *supra* note 6, at 274-83.
52. Mineral Park Land Co. v. Howard, 156 P. 458 (Cal. 1916).
53. *Id.* at 459.
54. *Id.* at 460.
55. TREITEL, *supra* note 6, at 257.
56. *See* U.C.C. § 2-615 (Am. L. Inst. & Unif. L. Comm'n 1951).

is not an innovation of the UCC as it is observed that US courts do not insist on strict impossibility.[57]

If a frustration case is established under English law, the remedy is the discharge of both parties' obligations from the time of the frustrating event.[58] This "all-or-nothing" remedy could be harsh, so it was mitigated by the Law Reform (Frustrated Contracts) Act 1943, which allows a party to recover a "just sum" of expenses in appropriate cases.[59] In short, two important functions are served by the frustration doctrine: first, it sets out the type of supervening event that could trigger the doctrine; and second, it provides for a set remedy in successful cases for proper loss distribution.

English law also allows the parties to change these default functions by contract. Parties can by agreement make it easier or more difficult to discharge a contract, and can provide for different remedies beyond discharge.[60] They can include a clause to provide for *force majeure* events, which would not constitute impossibility or frustration of common purpose in its absence.[61] This is known as the *force majeure* clause under English law.[62] Conversely, a party may also expressly assume the risk of a *force majeure* event so that its eventual happening will not discharge the obligation and thus the liability of the said party.[63] These *force majeure* clauses are very common.[64] English courts have long accepted that parties will include and rely on a *force majeure* clause.[65] As "[u]ncertainty . . . is inherent in the doctrine of frustration,"[66] it is believed that such

57. E. Allan Farnsworth, Contracts 627 (4th ed. 2004).

58. *See* Taylor v Caldwell (1863) Rev. Rep. 3 B. & S. 826, 840.

59. *See* Law Reform (Frustrated Contracts) Act 1943, s. 1(3); *see also* TREITEL, *supra* note 6, at 602-08.

60. *See* TREITEL, *supra* note 6, at 449.

61. *See id.* at 449, 468.

62. *Id.*; *see also* McKendrick, *supra* note 2, at 34-35.

63. *See* Joseph Constantine SS Line Ltd. V. Imperial Smelting Co. Ltd. [1942] AC 154.

64. *See* William Swadling, *The Judicial Construction of Force Majeure Clauses*, *in* *FORCE MAJEURE AND FRUSTRATION OF CONTRACT* 3, 4-5 (Ewan McKendrick ed., 2nd ed. 1995) ("[i]n many cases the promisor may be especially unwilling to accept the risk of events over which he has no control and a contract may typically provide . . . [for] *force majeure* clauses.").

65. *See* Paradine v. Jane (1647) Eng. Rep. 82 Aleyn 26 (justifying the absolute contracts doctrine "because [the defendant] might have provided against it by his contract").

66. McKendrick, *supra* note 2, at 39.

clauses could reduce the uncertainty of identifying frustrating events.[67] *Force majeure* clauses also afford more flexibility to the rigid remedy under frustration. For example, parties often provide for extension or adjustment as consideration in the *force majeure* clause.[68] Whether these clauses will apply to a given situation will be a matter of interpretation by the courts, which has traditionally been conducted rather narrowly.[69]

B. Chinese Law

The doctrine of *force majeure* has existed since 1986 when the General Principle of Civil Law (the "GPCL") was passed.[70] It adopts the French terminology of *force majeure* and largely reflects the requirements of its French counterparts.[71] To qualify for a *force majeure* event, the event must be unforeseeable, unavoidable and insurmountable.[72] This definition has been adopted by Article 117 of the Chinese Contract Law (the "CCL"), which was promulgated in 1999.[73] Perhaps influenced by English law, it is observed that the CCL further requires the *force majeure* event to have frustrated the common purpose in order to discharge a contract under Article 94(1).[74] The Chinese law, however, is different from the English law in the following aspects:

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67. *Id*.

68. *See* TREITEL, *supra* note 6, at 449*; see also* Michael Furmston, *Drafting of Force Majeure Clause – Some General Guidelines*, *in* FORCE MAJEURE AND FRUSTRATION OF CONTRACT 57, 61 (Ewan McKendrick ed., 2nd ed. 1995).

69. *Id*. at 476.

70. Zhonghua Renmin Gongheguo Minfa Tongze (中华人民共和国民法通则) [The General Principles of the Civil Law of the People's Republic of China] (promulgated by President, Apr. 12, 1986, effective Jan 1, 1987), arts. 106, 107 and 153 [hereinafter *GPCL*]; *see also* Lester Ross, *Force majeure and Related Doctrines of Excuse in Contract Law of the People's Republic of China*, 5 J. CHINESE L. 58, 69-70 (1991).

71. *See* Ross, *supra* note 70, at 68.

72. *See* GPCL, at art. 153. For requirements under French law, *see* Barry Nicholas, *Force Majeure in French Law, in FORCE MAJEURE* AND FRUSTRATION OF CONTRACT 24 (Ewan McKendrick ed., 2d ed. 1995) ("[i]n order to constitute *force majeure* an event . . . must have been (a) irresistible, (b) unforeseeable, and (c) external to the debtor, and must (d) have made performance impossible and not merely more onerous or difficult").

73. Zhonghua Renmin Gongheguo Hetong Fa (中華人民共和國合同法) [Contract Law of the People's Republic of China] (promulgated by The Nat'l People's Cong., Mar. 15, 1999, effective Oct. 10, 2001), art. 117 [hereinafter *CCL*].

74. *Id.* at art. 94(1).

1. Supervening events

Technically, *force majeure* under Chinese law is more difficult to trigger. As mentioned above,[75] unforeseeability is an essential component in the finding of a *force majeure* event. That is not the case under English law: [76] that the event "was or ought to be foreseen . . . does not prevent it from becoming a frustrating event when it occurs; the question . . . is whether the new situation thus created is within or outside the scope of the contract on its true construction." [77] Further, unlike English law, the frustration of common purpose is not by itself sufficient to discharge a contract. It must also be unavoidable and insurmountable, which is a similar standard to impossibility in the sense that both prevent discharge based on performance becoming more onerous.[78]

2. Remedies

The consequence of *force majeure* is also different. Under English law, the general remedy is discharge, and it is "all-or-nothing," meaning that either the whole contract is discharged or none of it is.[79] Under Chinese law, while discharge can similarly be granted under Article 94(1), [80] Article 117 allows the court to exempt the relevant party from liability in whole or in part, thus providing much more flexibility in the award of remedy.[81]

3. Material Change Doctrine

However, the biggest difference between English and Chinese laws lies in the doctrine of "material change" (Qíng shì biàn huà)[82]

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75. *See supra* note 72 and accompanying text.

76. *See* TREITEL, *supra* note 6, at 516-17.

77. Nile Co. for the Export of Agricultural Crops v. H. & J.M. Bennett (Commodities) Ltd. [1963] QB 1 Lloyd's Rep. 555, 582 (Eng.).

78. *See* TREITEL, *supra* note 6, at 284; Nicholas, *supra* note 72, at 24-25.

79. *See* Law Reform (Frustrated Contracts) Act 1943, s. 1(2).

80. *See* CCL, art. 95.

81. *See* CCL, art. 117 ("[a] party who 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 event of force majeure, except otherwise provided by law.") (emphasis added).

82. Adopting the terminology used by the SPC in Huáiběi kuàngyè (jítuán) yǒuxiàn zérèn gōngsī yǔ xīnguāng jítuán yǒuxiàn gong sī gǔquán zhuǎnràng jiūfēn èrshěn mínshì pànjuéshū (淮北矿业（集团）有限责任公司与新光集团有限公 司股权转让纠纷二审民

under Article 26 of Interpretation II of the Supreme People's Court of Several Issues Concerning the Application of the Contract Law of the People's Republic of China ("Interpretation II"):[83]

> "Where any major change which is unforeseeable, is not a business risk and is not caused by a *force majeure* occurs after the formation of a contract, if the continuous performance of the contract is obviously unfair to the other party or cannot realize the purposes of the contract and a party files a request for the modification or rescission of the contract with the people's court, the people's court shall decide whether to modify or rescind the contract under the principle of fairness and in light of the actualities of the case."

This doctrine is by definition not *force majeure*, as it only covers cases falling outside of *force majeure*. However, it could lead to the same remedy, the discharge of the contract.[84] For example, in *Chu Xiang v. Ni Keke Labor Contract Dispute*,[85] a case very similar to *Lakeman v. Pollard* above, the defendant contracted to serve as a translator for the plaintiff in Angola. However, due to the outbreak of the Western African Ebola virus epidemic, the defendant, worrying about her health, decided not to go to Angola.[86] The court recognized that the epidemic had introduced

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事判决书) [Disputes in the equity transfer between Huaibei Mining (Group) Co., Ltd. and Xinguang Group Co., Ltd.], Sup. People's Ct. Gaz. 387 (Sup. People's Ct. 2018) (China).

83. Zuìgāo rénmín fǎyuàn yìnfā "guānyú yīfǎ tuǒshàn shěnlǐ shè xīnguān fèiyán yìqíng mínshì ànjiàn ruògān wèntí de zhǐdǎo yìjiàn (èr)" de tōngzhī (最高人民法院印发《关于依法妥善审理涉新冠肺炎疫情民事案件若干问题的指导意见(二)》的通知) [Interpretation of the Supreme People's Court on Several Issues Concerning Application of the Contract Law of the People's Republic of China (II) [2009]] (promulgated by the Sup. People's Ct. Apr. 24, 2009, effective May 13, 2009). Note, however, that the concept of material change has been used prior to Judicial Interpretation II. *See, e.g.*, Shànghǎi èr zhōng yuàn shūlǐ guānyú 2003 nián-2019 nián gèdì shè yìqíng hétóng jiūfēn 10 dà diǎnxíng ànlì zhī bā: Huìzhōu mǒu gōngsī, lián mǒu yǔ guǎngxī mǒu gōngsī zūlìn hétóng jiūfēn àn (上海二中院梳理关于 2003 年-2019 年各地涉疫情 合同纠纷 10 大典型案例之八：惠州某公司、连某与广西某公司租赁合同纠纷案) [Huizhou Air China Auto. Trading Co., Ltd. and Guangxi Airlines Co., Ltd. leasing contract dispute appeal], (Higher People's Ct. of Guangxi Zhuang Autonomous Region 2007) (dealing with material change arising from SARS).

84. It is unclear whether discharge under material change still needs to have the common purpose frustrated as in the case of discharge under Article 94(1).

85. Chǔ xiáng sù níkēkē láowù hétóng jiūfēn àn (储翔诉倪珂珂劳务合同纠纷案) [Chu Xiang v. Ni Keke Labor Contract Dispute], (People's Ct. of Xuanwu Dist., Nanjing City, Jiangsu Province 2015) (China).

86. *Id.*

material changes to the employment contract, and discharged the parties from the contract accordingly.[87]

In this sense, the material change doctrine is very similar to the American doctrine of impracticability.[88] In fact, the SPC applied the doctrine to a case that was very similar to *Mineral Park*. In *Chengdu Pengwei Industry Co., Ltd. v. People's Government of Yongxiu County of Jiangxi Province and Office of the Leading Group for the Administration of Sand Mining of Poyang Lake of Yongxiu County*,[89] the plaintiff entered into a contract with the defendant for a mining right to sand at Poyang Lake. However, due to an unprecedented low level of water in the lake during the term of the contract, the plaintiff only managed to send its ships to mine sand for a much shorter period of time than expected.[90] The SPC held that the low level of water was unforeseeable and thus applied the material change doctrine.[91] The court did not discuss why it was not a *force majeure* case, but like *Mineral Park* it appears that the mining was still possible despite the low level of water.[92] For example, although the judgment did not suggest any alternatives, it is possible that the plaintiff could use different types of sand carrier or techniques.

Other than discharge of contract, remedies under the material change doctrine include adaptation of contract. Interpretation II allows an alternative remedy of adapting the contract based on the "principle of fairness."[93] This does not exist under the US

87. *Id.*

88. *See Mineral Park Land Co. v. Howard* 156 P. 458 (Cal. 1916)*; supra* notes 48-50 and accompanying text.

89. Chéngdū péng wěi shíyè yǒuxiàn gōngsī yǔ jiāng xīshěng yǒngxiū xiàn rén mínzhèngfǔ, yǒngxiū xiàn póyáng hú cǎi shā guǎnlǐ gōng zuò lǐngdǎo xiǎo zǔ bàngōngshì cǎikuàng quán jiūfēn àn (成都鹏伟实业有限公司与江西省永修县人民政府、永修县鄱阳湖采砂管理工作领导小组办公室采矿权纠纷案) [Chengdu Pengwei Indus. Co., Ltd. V People's Government of Yongxiu County of Jiangxi Province and Office of the Leading Group for the Administration of Sand Mining of Poyang Lake of Yongxiu County], 2010 Sup. People's Ct. Gaz. 4 (Sup. People's Ct. 2009) (China).

90. *Id.*

91. *Id.*

92. *Id.* In the judgment it was only stated that "the too low water level of Poyang Lake made it hard for sand carriers to enter into the mining lots." It has never been stated that the mining was made impossible by the low water level.

93. *See supra* note 82 and accompanying text.

impracticability doctrine.[94] It is further distinguished from the remedy under Article 117 of CCL, which can only reduce liability of the defendant.[95] It does not offer the possibility of upward adaptation in favor of the plaintiff.[96] In other words, the material change doctrine can be used as both the shield and the sword. Adaptation was the remedy awarded by the SPC in *Chengdu Pengwei* when it ordered the defendant to return part of the consideration paid for the mining right to the plaintiff.[97]

This adaptation remedy is not available under English law, but has its equivalent under both French and German laws.[98] This remedy has been emphatically rejected by English law, as there is reluctance to bind parties *ex post* to a bargain on which they did not agree.[99] On the other hand, as mentioned above, adaptation could be achieved under English law by inserting appropriate terms in the *force majeure* clause *ex ante*.[100]

4. *Force Majeure* Clause

Chinese courts apply a stricter interpretation on *force majeure* clauses. On paper, Article 93 of the CCL allows parties to change the default *force majeure* events by making them easier or more difficult to satisfy.[101] However, a series of SPC cases shows that the Chinese courts interpreted such clauses rather narrowly. For example, in *Chengdu Pengwei*, the contract provided specifically that "production impossibility and all other risks for water level and other objective reasons shall be assumed by [the mining company]."[102] Yet, the SPC did not address this clause at all in reaching its decision. Alternatively, it could be interpreted that the

94. *See* FARNSWORTH, *supra* note 57, at 647 (although a similar idea of equitable adjustment that gives a court the power to "grant relief on such terms as justice requires" has been suggested by the Restatement Second of Contracts § 272, it is not generally adopted by the US courts).

95. *See* CCL, art. 117.

96. *Id.*

97. 2010 Sup. People's Ct. Gaz. 4

98. TRIETEL, *supra* note 6, at 578-79.

99. *Id.* at 580-81.

100. *Id*. at 449.

101. *See* CCL, art. 93 ("[t]he parties may prescribe a condition under which one party is entitled to terminate the contract. Upon satisfaction of the condition for termination of the contract, the party with the termination right may terminate the contract.").

102. *See* 2010 Sup. People's Ct. Gaz. 4.

SPC simply found the clause unfair to the plaintiff in the context of the material change principle.

Moreover, drafters of contracts have also tried to expand on the default *force majeure* events, though without much success. In *Beijing Zehua Chemical Engineering Co., Ltd. v. Chongqing Jianfeng Industrial Group Co., Ltd.*,[103] one of the specified *force majeure* events was "government action or Act of State." However, the SPC thought that the said term should be interpreted in light of the default definition of *force majeure* to avoid uncertainty.[104] Accordingly, since the government action in question was foreseeable, there was no *force majeure* event.[105]

Finally, clauses that seek to narrow the scope of the default *force majeure* events have also failed. In *Disputes of House Rental Contract Disputes of Hongshan Village Committee of Hongshan Street Office of Hongshan People's Government of Hubei Shuidiao Getou Food Culture Development Co.*,[106] although the clause in question only listed "flooding, earthquake or war" as *force majeure* events, the SPC held that an event other than the listed ones could still be regarded as a *force majeure* event so long as it fell within the statutory definition.[107] In short, while courts in both England and China want to reduce uncertainty, their approaches are opposite to each other. The negative view of *force majeure* clauses under China's law contrasts greatly with English law's positive view for reducing uncertainty. The SPC probably considers the *force majeure* clauses unnecessary considering the vast power

103. Běijīng zé huá huàxué gōngchéng yǒuxiàn gōngsī, chóngqìng jiàn fēng gōngyè jítuán yǒu xiàn gōngsī jìshù zhuǎnràng hétóng jiūfēn zàishěn mínshì pànjuéshū (北京泽华化学工程有限公司、重庆建峰工业集团有限公司技术转让合同纠纷再审民事判决书) [Beijing Zehua Chem.l Eng'g Co., Ltd. v. Chongqing Jianfeng Indus. Grp. Co., Ltd], Sup. People's Ct. Gaz. 271 (Sup. People's Ct. 2018) (China).

104. *Id.*

105. *Id.*

106. Húběi shuǐ diào gē tóu yǐnshí wénhuà fāzhǎn yǒuxiàn gōngsī, wǔhàn shì hóngshān qū rénmín zhèngfǔ hóngshān jiē bànshì chù hóng shāncūn cūnmín wěiyuánhuì fángwū zū liánbāng hétóng jiūfēn èrshěn mínshì pànjuéshū (湖北水调歌头饮食文化发展有限公 武汉市洪山 区人民政府洪山街办事处洪山村村民委员会房屋租 联邦合同纠纷二审民事判决书) [Disputes of House Rental Contract Disputes of Hongshan Village Committee of Hongshan Street Office of Hongshan People's Government of Hubei Shuidiao Getou Food Culture Development Co], Sup. People's Ct. Gaz. 107 (Sup. People's Ct. 2018) (China).

107. *Id.*

afforded under Article 117 and the material change doctrine that can be used to discharge or adapt the contract. A similar approach is also found in French law in regard to *force majeure* clauses.[108]

5. COVID-19-Specific Law

China has recently made COVID-19 specific laws to cover *force majeure* in the form of the three Guidances.[109] The Guidances mainly provide more detailed applications of the existing laws to *force majeure* cases caused by COVID-19. For example, Article 2 of Guidance I refers to the relevant articles in the GPCL and the CCL as the applicable legislations on *force majeure* arising from COVID-19.[110] Article III(2) of Guidance I and Article I(2) of Guidance II both provide for the court's power of adaptation based on the principle of fairness regarding certain specified situations.[111] Despite the absence of any reference to Article 26 of Interpretation II, it is clear that the aforementioned articles in Guidances I and II are derived from the material change doctrine.[112] However, what stands out from the Guidances in terms of *force majeure* is the lack of any reference given to *force majeure* clauses agreed upon

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108. *See* Nicholas *supra* note 72, at 29.

109. *See* Guidance I, Guidance II and Guidance III.

110. *See* Guidance I, Art. II.

111. *See* Guidance I, Art. III(2)("[i]f continuing performing the contract makes it obviously unfair to one party, and the party requests to change the performance period, performance method or price of the contract, the people's court shall, based on actual conditions of the case, decide whether to support such a request"); Guidance II, Art I(2) ("The negatively affected party's request to adjust the price shall be supported by the peoples courts in accordance with the principle of fairness and the actual situation of each case, where the sales contract can be performed continuously but a significant increase in the costs of labor, raw materials, logistics and other performance or a significant price reduction results from the epidemic or the epidemic prevention and control measures and the continuance of the performance of the contract would be obviously unfair to one party. A party's request to change the performance period shall be supported by the peoples courts based on the principle of fairness and actual situation of each case, where the sellers failure to deliver the goods within the agreed time limit or the buyers failure to pay within the agreed time limit results from the epidemic or epidemic prevention and control measures.").

112. *See* Binbin Sun & Zhuo Xu, *Annotation of Guidance on the Proper Handling of Civil Cases Involving the Novel Coronavirus Outbreak in Accordance with the Law (I)*, ZHONGLUN VISION (Apr. 21, 2020), https://mp.weixin.qq.com/s?__biz=MjM5ODI5MzI0NA==&mid=2651315116&idx=2&sn=7d2cfd68c8d4eff83362a04806e5f261&scene=21#wechat_redirect [https://perma.cc/JT62-BSZD].

between the parties. For example, Article I(1) of Guidance II provides that if a seller cannot deliver goods as agreed due to COVID-19 or related measures and frustrates the buyer's purpose, the buyer is entitled to seek discharge of the contract. [113] However, he can only recover the deposit and may not sue the seller for breach of liability.[114] This rule seems to be in line with Articles 94(1) and 95 of the CCL. However, what if the contract provides for a 90-day suspension for *force majeure* or the recovery of reasonable expenditure in the case of discharge? Will these clauses now be overridden by Article 1(1)? The lack of consideration regarding *force majeure* clauses is in line with the SPC's tendency to restrict or ignore the *force majeure* clauses discussed above. There is no equivalent new legislation under English law.

6. *Force Majeure* Certificate

Finally, the China Council for the Promotion of International Trade (the "CCPIT") has recently issued a large number of *force majeure* certificates to contracting parties to certify disruptions caused by COVID-19.[115] Some countries, such as Russia and Italy, also have these *force majeure* certificate systems. [116] The legal status of the CCPIT certificates is, however, uncertain under

113. *See* Guidance II, Art. I(1)("The buyer's request to terminate the contract and return advance payment or deposit shall be supported by the peoples courts, if the seller fails to complete the order or deliver the goods within the agreed time limit due to the epidemic or the epidemic prevention and control measures, and the purpose of the buyer cannot be realized by continuance of the performance; while the buyer request that the seller shall be liable for breach of contract, such request shall not be supported by the peoples courts.").

114. *Id.*

115. *See* Press Release, China Council for the Promotion of Int'l Trade, CCPIT Provides COVID-19 Force majeure Certificates and Other Services (Feb. 16, 2020), http://www.ccpit.org/Contents/Channel_4324/2020/0216/1240959/content_1240959.htm [https://perma.cc/N6XJ-TKBY] (having issued more than 4,800 such certificates as of March 13, 2020).

116. *See* Ekaterina Pannebaker, *Force Majeure Certificates Issued by the Russian Chamber of Commerce and Industry*, CONFLICTOFLAWS.NET (Apr. 17, 2020), https://conflictoflaws.net/2020/force-majeure-certificates-by-the-russian-chamber-of-commerce-and-industry/ [https://perma.cc/H5R2-729S]; *see also* Guilio Maroncelli & Roberta Padula, *COVID-19 emergency - Force majeure certificates issued by the Chambers of Commerce in Italy*, DLA PIPER (Apr. 8, 2020), https://www.dlapiper.com/en/hongkong/insights/publications/2020/04/covid-19-emergency---force-majeure-certificates-issued-by-the-chambers-of-commerce-in-italy/ [https://perma.cc./68J7-VRS4].

Chinese law. Unlike Russia and Italy, which both have their respective Chamber of Commerce to issue the certificate,[117] the CCPIT is officially composed of civilians, although its Articles of Association was said to have been approved by the State Council.[118] These Articles also authorized CCPIT to issue such *force majeure* certificates.[119] In *Sichuan Borui Vision Outdoor Media Co., Ltd. v. Hangzhou Aoxiang Advertising Co., Ltd*., a case decided in 2016, the contract in question expressly required the party claiming *force majeure* to submit evidence to CCPIT within 15 days of the occurrence of the alleged event.[120] Since no evidence was provided to CCPIT, the court held that the *force majeure* defense failed.[121] While the case does not discuss the standalone status of the CCPIT certificate without the *force majeure* clause, it does show that the CCPIT was handling *force majeure* matters prior to the COVID-19 outbreak, and its *force majeure* certificate could command certain respect from the Chinese courts. This suggests that a CCPIT certificate may have certain evidentiary value under Chinese law.

In summary, Chinese *force majeure* law is substantially different from its English counterpart. It is defined particularly by the restrictive interpretation of the *force majeure* clause and the vast power of the Chinese courts to adapt the contract. The Guidances further widen these differences. As these differences may be outcome determinative, they make private international law analysis even more important to COVID-19-related *force majeure* cases.

III. COMPARISON OF PRIVATE INTERNATIONAL LAW

One of the earliest private international law cases involving *force majeure* is *Jacobs, Marcus & Co. v. The Crédit Lyonnais*.[122] Decided in 1884, the case presented the English Court of Appeal

117. *See, e.g.*, Pannebaker, *supra* note 116.

118. *See* China Council for the Promotion of Int'l Trade, CCPIT Charter (2015).

119. *Id.*, Art 8(1).

120. Sìchuān bó ruì yǎnjiè hùwài zhuàn méi yǒuxiàn gōngsī sù hángzhōu ào xiáng guǎnggào yǒu xiàn gōngsī děng gǔquán zhuǎnràng jiūfēn àn (四川博瑞眼界户外传媒有限公司诉杭州奥翔广告有 限公司等股权转让纠纷案) [Sichuan Borui Vision Outdoor Media Co., Ltd. V. Hangzhou Aoxiang Advert. Co., Ltd.], (Chengdu Intermediate People's Ct., Sichuan Province 2017) (China).

121. *Id.*

122. Jacobs, Marcus & Co. v. The Crédit Lyonnais [1884] QB 12 589 (Eng.).

with two competing laws, namely *force majeure* under the French Civil Code, which would discharge the contract, and the English law of frustration, under which there would be no discharge.[123] The court stated at the outset that the threshold matter was "whether this contract is to be construed according to English law or according to French." [124] Applying the English choice of law contract rule, which assumed the law of the place of execution to be the proper law of contract, the court held that the law of England, where the contract was entered into, was to apply.[125] However, if an English court is to consider the case again under the current choice of law rules of the Rome I Regulation of the European Union,[126] it is possible that the French Civil Code, the law of the country where the seller had its habitual residence, could be regarded the law of the place with the closest connections.[127] In that case, French law would apply and *force majeure* would discharge the contract accordingly. This case thus shows the importance of the private international law rule to an international *force majeure* dispute.

The court also discussed whether the French Civil Code could still be applied even though the contract was governed by English law. While acknowledging that the French Civil Code could be incorporated into the contract, the court was of the opinion that it should be incorporated by an express term.[128] This once again marginalizes the role of the law of the place of performance and makes the choice of law issue regarding frustration a simple process of identifying the proper law of contract.

In Rule 150 of Dicey's *A Digest of the Law of England with reference to the Conflict of Laws* (the first edition of Dicey & Morris which was published in 1896), Dicey states that "[t]he validity of the discharge of a contract . . . depends upon the proper law of the

123. *Id.*

124. *Id*. at 599.

125. *Id*. at 602-03.

126. Council Regulation 593/2008, 2008 O.J. (L 177) 6 (EU) [hereinafter *Rome I Regulation*].

127. *See id.* at Art. 4(1)(a); *see also infra* note 140 and accompanying text.

128. *See* Jacobs, QB 12 at 604.

contract."[129] This certainly matches with the approach of *Jacobs*, though Professor Dicey did not cite the case in Rule 150. *Jacobs* was eventually cited in the relevant rule in the sixth edition of Dicey & Morris (Rule 143) when Professor Otto Kahn-Freund rewrote the chapter on contract.[130] It was cited to support the position that "[t]he proper law ought to determine . . . whether [performance] is excused as a result, e.g., of the frustration of the contract."[131] Citing *Jacobs*, Kahn-Freund further stated that in the comment of Sub-Rule 3 of Rule 136, while the "method and manner" of the performance should be regulated by the law of the place of performance, frustration, as a matter of "substance of obligation," is governed by the proper law of the contract.[132] Although Rule 143 was edited out of the book since the twelfth edition when the editors rewrote the chapter to accommodate the change in the choice of law regime resulting from the Rome Convention, the comment in Rule 136 remains in the latest edition.[133] The simple and authoritative treatment of frustration as a matter covered by the governing law since such an early stage of the development of English conflict of laws partly explains why frustration has not attracted much discussion in the context of private international law by courts and commentators in common law jurisdictions.

The position remains the same under the Rome I Regulation as stated in a recent case, *Canary Wharf (BP4) T1 Ltd. v. European Medicines Agency*.[134] The court held that frustration was governed by the proper law of contract under Article 12 of the Rome I Regulation, whether by virtue of Article 12(1)(b) regarding performance of contract, or Article 12(1)(d) regarding extinguishing contract.[135] It does not matter in the end, as the same law will apply.[136]

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129. ALBERT VENN DICEY, A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS: WITH NOTES OF AMERICAN CASES 575 (1896); *see also* GEOFFREY C. CHESHIRE, PRIVATE INTERNATIONAL LAW 337 (3rd ed. 1935) (suggesting the same position).

130. DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS 651-652 (J.H.C. Morris et al. eds., 6th ed. 1949).

131. *Id.* at 652.

132. *Id.* at 601.

133. *See* DICEY, MORRIS & COLINS, *supra* note 18, at ¶ 32-162.

134. Canary Wharf (BP4) T1 Ltd. V. European Medicines Agency [2019] EWHC (Ch) 335 (Eng.).

135. *Id.* at ¶186.

136. *Id.*

To identify the proper law of contract under Rome I Regulation, Article 3 provides that parties may choose the substantive law.[137] This is most commonly done by an express choice of law clause in international commercial transactions, as in *Canary Wharf* itself where the parties included a choice of law clause in favor of English law.[138] As a result, the English rules of frustration applied to the *force majeure* issue in the case.[139] In the absence of choice, the Rome I Regulation applies the law with the closest connections to the contract.[140] Article 4 identifies such law by using the presumption of characteristic performance subject to rebuttal by the law of a country that is manifestly more closely connected with the contract.[141]

At first glance, the Chinese choice of law regime is very similar. Under Articles 3 and 41 of the Law of Choice of Law for Foreign-related Civil Relationships (the "Choice of law Act"), contracting parties may choose the law applicable to their contract.[142] This law applies to all issues arising from contract, including *force majeure*. For example, in *Appeal Case for Ship Leasing Contract Disputes between J.PI Travel U.S.A., Inc. and Yangtze River Shipping Overseas Tourism Corporation*,[143] the Hubei High Court held that the *force majeure* that resulted from SARS should be governed by Chinese law, which was designated as the applicable law under the express choice of law clause in the contract.[144] Like Article 4 of the Rome I Regulation, in the absence of choice, the law most closely connected with the contract will be applied, and is once again guided by characteristic performance.[145]

137. Rome I Regulation, art. 3.

138. [2019] EWHC (Ch) 335, at ¶ 179.

139. *Id.*

140. Rome I Regulation, art. 4.

141. *Id.*

142. Decree of the People's Republic of China (promulgated by HU Jintao, President of China, Oct. 28, 2010), NO. 36, arts. 3, 41 (China) [hereinafter *Choice of Law Act*].

143. Měiguó dōngjiāng lǚyóu jítuán gōngsī (J) yǔ chángjiāng lúnchuán hǎiwài lǚyóu zǒng gōngsī chuánbó zūlìn hétóng jiūfēn shàngsù àn (美国东江旅游集团公司（J）与长江轮船海外旅游总公司船舶租赁合同纠纷上诉案) [Appeal Case for Ship Leasing Contract Disputes between J.PI Travel U.S.A., Inc. and Yangtze River Shipping Overseas Tourism Corporation], (Higher People's Ct. of Hubei Province 2007) (China).

144. The case predated the Choice of Law Act, but the choice of law principle is substantially the same.

145. Choice of Law Act, Art. 41.

Force majeure is also clearly characterized as a matter for the applicable law of contract under Chinese law, with no article in the Choice of Law Act giving any role to the law of the place of performance.

Due to the similarities between the choice of law rules of the two countries, it appears that the same substantive law will apply regardless of the forum. If this is indeed the case, even if the substantive laws on COVID-19-related *force majeure* are different, choice of law rules will theoretically not be outcome determinative.[146] However, the reality of the interactions of the two regimes are much more complicated. This is because of the differences in mandatory rule, illegality, procedural laws, judicial practice on choice of law, and jurisdiction and enforcement of judgments.

A. Mandatory Rule and Public Policy

The public and national interests discussed above will *prima facie* be reflected in private international law in the form of mandatory rules and public policy. The public interest in COVID-19 demands analysis in this aspect even if it is not generally necessary for a standard *force majeure* case.

Article 4 of the Choice of Law Act provides that Chinese mandatory law will apply regardless of the applicable foreign law.[147] Particularly, law on public health is among one of the five specific categories of laws identified as being mandatory under the SPC interpretation.[148] Although most of the decided cases applying

146. TREVOR C. HARTLEY, INTERNATIONAL COMMERCIAL LITIGATION 4 (3rd ed. 2020).

147. Choice of Law Act, art. 4.

148. *See* Zuìgāo rénmín fǎyuàn guānyú shìyòng "zhōnghuá rénmín gònghéguó shèwài mínshì guānxì fǎlǜ shìyòng fǎ" ruògān wèntí de jiěshì (yī) (最高人民法院关于适用《中华人民共和国涉外民事关系法律适用法》若干问题的解释(一)) [Interpretations of the Supreme People's Court on Several Issues Concerning Application of the Law of the People's Republic of China on Choice of Law for Foreign-Related Civil Relationships (I)] (promulgated by the Judicial Comm. of the Supreme People's Ct., Dec. 10, 2012, effective Jan. 7, 2013), art. 10(2) [hereinafter *Choice of Law Interpretation I*].

Article 4 involved employment[149] or financial legislations,[150] the Guidances clearly fall within the said category. In addition, the preamble of Guidance II prominently highlights the significance of the socioeconomic impacts of COVID-19 by referring to its purpose as furthering "Liu Wen" and "Liu Bao," which are both economic goals of China.[151] It is thus arguable that the Guidances may apply as mandatory law even if the applicable law identified by Article 41 is a foreign law.[152]

Another way to achieve the same result is to utilize the public policy exception under Article 5. This article applies Chinese law if the applicable foreign law is prejudicial to the social and public interests of China.[153] If the application of the English *force majeure* rule is found to be contrary to China's public interest, the Guidances will thus apply instead.[154] There is, however, no room under the Choice of Law Act for the mandatory rule of foreign law to apply if it is not the applicable law. This is because the wording of Article 5 only operates negatively, i.e. negating the effect of foreign law contrary to Chinese mandatory law, but not positively, i.e. negating the effect of Chinese law contrary to foreign mandatory law.[155]

English law also provides for the application of English overriding mandatory law and non-application of foreign law that

149. *See, e.g.*, Yú zhìliáng yǔ wēi mào jīngmì wǔjīn (zhūhǎi) yǒuxiàn gōngsī láodòng zhēngyì shàngsù àn (余志良与威茂精密五金（珠海）有限公司劳动争议上诉案) [Yu Zhiliang v. Weimao Precision Hardware (Zhuhai) Co., Ltd.], (2017).

150. *See, e.g.*, Gāodélóng děng sù nánjīng jīn shà shíyè yǒuxiàn gōngsī gōngsī jièkuǎn hétóng jiūfēn àn (高德龙等诉南京金厦实业有限公司公司借款合同纠纷案) [Gao Delong et al. v. Nanjing Jinsha Industrial Co., Ltd.], (2014).

151. For details of "Liu Wen" (stability on the six fronts) and "Liu Bao" (stability on the six areas), *See* Zhang Jianfeng, *Chinese premier stresses stabilizing foreign trade, investment*, CCTV (June 29, 2020), https://english.cctv.com/2020/06/29/ARTI3drmj1p5gwPe0NwOAAU8200629.shtml [https://perma.cc/RRR7-E34L].

152. In this context, it will fall into the catch-all category under Article 10(6) of Choice of law Interpretation I.

153. Most decided cases on Article 5 relate to gambling debt. *See, e.g.*, Luōjīng yǔ gǔlìmíng, hánxùyīng mínjiān jièdài jiūfēn yīshěn mínshì pànjuéshū (罗京与谷力鸣、韩旭英民间借贷纠纷一审民事判决书) [Luo Jing, Gu Liming v. Han Xuying] (2019).

154. *See* Choice of Law Act, art. 5 ("[i]f the application of foreign laws will damage the social public interests of the People's Republic of China, the laws of the People's Republic of China shall apply.").

155. *Id.*

is contrary to English public policy under Articles 9(2) and 21, respectively.[156] In addition, such application is also possible under Article 3(3), which provides that where all other elements points to a country other than the country whose law has been chosen, the chosen law may not prejudice the application non-derogable law, namely the provisions of the law of that other country which cannot be derogated from by agreement.[157] An act that provides for remedies in frustration cases like the Law Reform (Frustrated Contracts) Act 1943 might thus potentially apply under these Articles even if Chinese law is the applicable law. Another potential application might be the Unfair Contract Terms Act 1977, which may apply as mandatory law to strike out an unfair *force majeure* clause.

Unlike Chinese law, however, it is possible for a foreign overriding mandatory rule to apply positively even if it is not the law the parties chose to the extent that the rule is a non-derogable law under Article 3(3). For example, in *Banco Santander Totta SA v. Companhia de Carris de Ferro de Lisboa SA*,[158] the English Court of Appeal held *in obiter* that Article 437 of the Portuguese Civil Code, which is a *force majeure* provision of Portuguese law, would have been applied under Article 3(3) if all the relevant factors had pointed to Portugal.[159] Although Lord Justice Longmore cautioned that "there is something to be said for the view that a *force majeure* provision of a national law (such as Article 437) is not necessarily a provision which is non-derogable within the terms of Article 3(3),"[160] a *force majeure* law specially passed for the purpose of COVID-19, such as the new SPC judicial interpretations, would seem to present a strong case as non-derogable law when all the factors point to China.

In short, by comparing the choice of law rules between the two countries, it is theoretically possible for each jurisdiction to apply the forum's own mandatory rule even if the other's law is the applicable law. However, in case of the forum law being the

156. Rome I Regulation, arts. 9(2), 21.

157. Rome I Regulation, art. 3(3).

158. Banco Santander Totta SA v. Companhia de Carris de Ferro de Lisboa SA [2017] EWCA (Civ) 1267, 1 WLR 1323 (Eng.).

159. *Id.* at 839.

160. *Id.* at 855.

applicable law, only England will consider applying the Chinese mandatory rule.

Fortunately, each of the relevant substantive laws relating to *force majeure* has a provision that eliminates these complicated applications in both countries. Article 6(1) of Guidance III expressly provides that the governing law on *force majeure* issues shall be identified by the rules under the Choice of Law Act.[161] This clearly indicates that the rules under the Guidances are not mandatory rules. In addition, Article 6(3) of Guidance III also reminds Chinese judges not to assume that the foreign rules on *force majeure* are the same as their Chinese counterparts, thus clearly foreseeing the possibility of applying foreign *force majeure* rules.[162]

The Law Reform (Frustrated Contracts) Act 1943 is even more straightforward. Section 1(1) of the Act expressly provides that it only applies to English contracts.[163] While Morris thought the section was redundant, [164] it does eliminate any potential uncertainty on the Act's application as a mandatory rule. For the Unfair Contract Terms Act 1977, its role as an overriding mandatory rule refers only to its overriding effects on parties' freedom to choose the applicable law in applicable cases, [165] instead of its provision applying directly to international contract. Commentators have generally agreed that *force majeure* clauses are not normally subject to the Act in any event.[166] This is because "a party whose performance is prevented or delayed by supervening events [specified in the *force majeure* clause] is not in breach at all."[167] As such, a *force majeure* clause, by defining the party's duty, is distinguished from an exemption clause which

161. Choice of Law Act, art. 6(3).

162. *Id.*

163. The Law Reform (Frustrated Contracts) Act, 1943, 6 & 7 Geo. 6, Ch. 40 s 1(1) (Eng.).

164. J. H. C. Morris, *The Choice of Law Clause in Statutes*, 62 L. Q. REV. 170, 183 (1946) ("the words limiting the scope of the Frustrated Contracts Act to 'contracts governed by English law' are unnecessary and inadequate.").

165. *See* Unfair Contract Terms Act, 1977, c.50, § 27(2) (Eng.); *see also* discussions in CHESHIRE, NORTH & FAWCETT, *supra* note 23, at 579-81.

166. *See, e.g.*, TREITEL, *supra* note 6, at 469-71.

167. *Id.* at 469-70.

excludes or limits liability.[168] Only the latter is regulated by the Unfair Contract Terms Act 1977.

For public policy to reject foreign law, Article 21 of the Rome I Regulation has also raised the standard higher than its predecessor to "manifestly incompatible,"[169] thus making it more difficult to apply. While the Chinese rules are substantially different from the English rules, there does not seem to be anything particularly objectionable to merit rejection by English public policy.

It is also highly unlikely for an English court to apply a Chinese mandatory rule through Article 3(3). If Guidance III allows the potential application of foreign *force majeure* law, the Guidances are not going to be regarded as non-derogable law either. In any event, it would be highly unlikely for Article 3(3) of Rome I Regulation to have a chance to apply in the first place. This is because the Article would only apply when all factors of the case point to a foreign country, except the express choice by the parties. Such a case will hardly exist when it comes to Chinese contracts since the Choice of Law Act only allow parties to choose a foreign law if the contract is foreign-related.[170]

In short, even if the public interest in COVID-19 requires an analysis of public policy-related rules of private international law, as far as Sino-British *force majeure* laws are concerned, it is highly unlikely that they would be applied for public policy reasons.

B. Illegality

The public interest in preventing the spread of COVID-19 has led countries to make laws on quarantine and lockdowns. In China, for example, the Wuhan government promulgated the Interim Measures for the Prevention and Control of Pneumonia Outbreak of Novel Coronavirus Infection in Wuhan (the "Interim Measures"), which provides the Wuhan government the powers to, *inter alia*, declare quarantine orders and suspend work as appropriate.[171]

168. *Id.* at 470.

169. Rome I Regulation, art. 21.

170. *See* Choice of Law Act, Art. 2 *and* Choice of Law Interpretation I, art. 1.

171. Wǔhàn shì xīnxíng guānzhuàng bìngdú gǎnrǎn de fèiyán yìqíng fáng kòng zhànxíng bànfǎ (武汉市新型冠状病毒感染的肺炎疫情防控暂行办法) [Interim Measures for the Prevention and Control of Pneumonia Outbreak of Novel Coronavirus Infection in

The breach of these laws could potentially be a standalone *force majeure* event to a contract, in addition to the existence of the underlying pandemic. For example, suppose an international supply contract provides for the manufacturing of certain goods in a Wuhan plant of a Chinese supplier during a particular period, the subsequent imposition of the quarantine law could make the operations of the plant in that period illegal.[172] In English private international law, this raises the issue of illegality.[173]

In *Ralli Bros v. Compania Naviera Sota y Aznar*, the English court established the rule that a supervening illegality in the law of the place of performance makes a contract unenforceable even if the law is not the governing law of the contract.[174] There have been heated debates on whether the rule is a part of English domestic contract law or private international law.[175] If it is the former, the rule will only apply if English law is the governing law of the contract (as in the facts of *Ralli Bros*), but will not apply when the governing law is that of a third country.[176] The "prevailing view" is that it is an English domestic contract law doctrine.[177]

However, if the rule ever had any private international law effect, it is now preserved in Article 9(3) of Rome I Regulation. The article provides that effect *may* be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract must be performed or have been performed, where such provisions render the performance unlawful.[178] Thus, the English court has discretion to permit the application of an overriding mandatory Chinese provision, even if it is neither part of English law (the *lex fori*) nor the governing law,

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Wuhan] (promulgated by Wuhan Headquarters for the Prevention and Control of Pneumonia Outbreak of Novel Coronavirus Infection, effective Jan. 29, 2020), arts. 27, 29.

172. *See id.* at art. 43 (providing that the violation of any provision of the Interim Measures would be subject to legal liability, though the article is rather vague as to the exact consequence).

173. For a general discussion on illegality, *see* DICEY, MORRIS & COLLINS, *supra* note 18, at ch. 32.

174. Ralli Bros v Compania Naviera Sota y Aznar [1920] 2 K.B. 287 (Eng.).

175. *See* William Day, *Contracts, Illegality and Comity: Ralli Bros Revisited*, 79 CAMBRIDGE L. J. 64, 67-70 (2020).

176. *See* DICEY, MORRIS & COLLINS, *supra* note 18, at ¶ 32-097.

177. *Id.* at ¶ 32-100. *Cf.* Day, *supra* note 175, at 80-87 (arguing that the rule is neither a choice of law rule nor part of English contract law, but a public policy rule).

178. *See* DICEY, MORRIS & COLLINS, *supra* note 18, at ¶ 32-096.

so long as China is the place of performance. On the other hand, if the governing law is English law, the *Ralli Bros* rule would still apply.[179] The effect in that case is similar to that of Article 9(3) except that the English court will not have the aforementioned discretion, and must thus make the contract unenforceable.[180]

For the purposes of COVID-19 cases, the doctrine of illegality will have three impacts. First, even if Chinese law is not the governing law, its quarantine law could still render the contract unenforceable if it makes the contract illegal. Second, the consequence of the application of illegality is different from frustration under English law. If there is a supervening illegality, the contract is unenforceable, though it is not discharged under frustration.[181] The case of *Ralli Bros* illustrates this distinction. Although the contract's consideration exceeded the maximum price of jute allowed under the supervening Spanish law (the law of the place of performance) the English court simply held that the defendant was not liable to pay more than maximum allowable price.[182] It did not discharge the contract.[183] Finally, unlike the public policy analysis above, the threshold for illegality is lower. All it requires is that the contract is illegal under the law of the place of performance, without requiring the court to conduct a difficult weighing of the public policy at stake.

No similar rule is found under Chinese choice of law rules. Illegality under English law will only be taken into account if English law is the governing law of contract. Article 4 applies solely to the mandatory rules of China and Article 5 applies only negatively to reject foreign law.[184]

C. Procedural Law

Professor Trevor Hartley argues that the harmonization of the choice of law rules will not eliminate the importance of

179. *See id.* at ¶ 32-097.

180. *See id.* ¶ 32-102.

181. *See* Day, *supra* note 175, at 84.

182. Ralli Bros v. Compania Naviera Sota y Aznar [1920] 2 K.B. 287 (Eng.).

183. *See* Day, *supra* note 175, at 84.

184. The effect of Article 5 is similar to Article 21 of Rome I Regulation. For further details on the negative concept of public policy under Article 21, see CHESHIRE, NORTH & FAWCETT, *supra* note 23, at 752-54; *see also* Choice of Law Act, Arts. 4, 5.

jurisdictional analysis (and thus forum shopping) due to the difference in procedural rules.[185] In fact, he thinks that "procedure is often more important than substantive law in determining the outcome of litigation."[186] Under Article 12 of Rome I Regulation, procedural issues are governed by the national law of the member states.[187] For England, this means that most of these procedural matters will be governed by the *lex fori* under the common law.[188] The position is less clear under Chinese law, as there is no specific rule under the Choice of Law Act. [189] One commentator has recommended to have *lex fori* governing procedural matters like most other countries. [190] Thus, both countries will apply their respective procedural laws regardless of the applicable substantive law. The applicable foreign remedy which does not exist under the forum's procedural law is relevant to this discussion, particularly in the context of English procedural law.

Since *force majeure*'s primary function is to allocate losses fairly between the parties,[191] whether a court is able to offer a particular remedy, i.e. the desired loss application, under foreign *force majeure* law is a significant concern to the parties. If the remedy is discharge of contract, there will be no issue, as both England and China can give that remedy under their own procedural law.[192] However, as mentioned above, a key difference between the two countries on substantive law is the adaptation power under the material change doctrine in Chinese law.[193] This could cause a substantial issue if an English court applies that principle, since adaptation is not part of English domestic law. The general rule under English law is that the court may not grant a

185. *See* HARTLEY, *supra* note 146, at 5-6.

186. *Id.* at 6.

187. Rome I Regulation, Art. 12.

188. *See* RICHARD GARNETT, SUBSTANCE AND PROCEDURE IN PRIVATE INTERNATIONAL LAW 38 (1st ed. 2012).

189. *See, e.g.*, Guangjian Tu, Private International Law in China 571 (2016).

190. *Id.* at 44.

191. *See* TREITEL, *supra* note 6.

192. *See* Taylor v. Caldwell (1863) Rev. Rep. 3 B. & S. 826, 840 (Eng.); *see also* Law Reform (Frustrated Contracts) Act 1943, s. 1(2). For the position of Chinese law, see CCL, art. 95.

193. *See supra* notes 84-100 and accompanying text.

remedy unknown to the *lex fori*.[194] As far as the adaptation power is concerned, there are three possibilities:

> (i) To reject both the right and remedy. This is pursuant to *Phrantzes v. Argenti* where the English court refused to compel the plaintiff's father to enter into a dowry contract on the plaintiff's behalf under Greek law as the remedy was not available under English procedural law.[195] In addition, since the remedy is part and parcel of the right, the court decided to dismiss the entire case.[196] By analogy, it has been commented that the vast power of contract variation under the Australian Trade Practices Act 1974 (currently Competition and Consumer Act 2010)[197] would be "perhaps too difficult" to be applied by the English courts.[198]
>
> (ii) To grant both the right and remedy. Conversely, it is possible that the remedy of the adaptation could be made in the right case by analogy to domestic remedies under English law. For example, this could be achieved by *quantum meruit* where work has been performed by a party after the contract is discharged by frustration.[199] If that approach succeeds, the court would of course also recognize the right. However, it is also clear that such a remedy is still substantially different from the adaptation power.
>
> (iii) To grant the right but to apply a domestic remedy. This is the approach taken by the Canadian case, *Khalij Commercial Bank Ltd v. Woods*.[200] The Ontario Court recognized the debt

194. ADRIAN BRIGGS, PRIVATE INTERNATIONAL LAW IN ENGLISH COURTS, 149-50 (1st ed. 2014).

195. Phrantzes v. Argenti [1960] 2 QB 19 (Eng.).

196. *Id.* For a similar rule in the US, see *Conflict of Laws: Application of Foreign Remedies*, *1961*, DUKE L. J. 316-22 (1961).

197. *See Trade Practices Act 1974* (Cth) s 87 (2)(b) (Austl.) (allowing the court to make "an order varying such a contract or arrangement in such manner as is specified in the order and, if the Court thinks fit, declaring the contract or arrangement to have had effect as so varied on and after such date before the date on which the order is made as is so specified").

198. *See* Adrian Briggs, *Conflict of Laws and Commercial Remedies*, *in* COMMERCIAL REMEDIES CURRENT ISSUES AND PROBLEMS 271, 275 (Andrew Burrows & Edwin Peel eds., 2003); *see also* GARNETT, *supra* note 188, at 296.

199. *See* Société Tunisienne d'Armement v. Sidermar SpA [1960] 2 QB 278 (Eng.); *see also* TREITEL, *supra* note 6 at 581-82. For an American example, see *Lakeman v. Pollard* 43 Me. 463, 467 (1857) ("[i]f [the plaintiff] was prevented by sickness or similar inability he may recover for what he did, on a *quantum meruit*.").

200. Khalij Commercial Bank Ltd. v. Woods (1985) 17 O.R. 358 (Can. Ont.).

> governed by Saudi law but applied the forum's enforcement rule in place of the Saudi enforcement law which gave much more discretion to the court than Canadian law did. The court distinguished it from *Phrantzes v Argenti*, by stating that *inter alia* the remedy in that case was not a fixed sum of money and that the enforcement powers in practice were not expected to be much different.[201]

With respect to the adaptation power of the material change doctrine, it appears that possibility (iii) is the most likely. Adaptation power is not the only remedy under the material change doctrine. Discharge is still available.[202] Thus, it is unlikely that the court would see the remedy of adaptation as integral to the contractual right (which is similar to frustration though technically different). This is further supported by *Banco Santander Totta* discussed above.[203] Article 437 of the Portuguese Civil Code is a very similar provision to Article 26 of Interpretation II.[204] Both articles provide for adaptation if there is substantial change in case of material changes.[205] Although the court did not apply Article 437 in the end, the fact that it thought it could be applied[206] suggests that the court saw no difficulty in doing so. Further, the claimant also sought termination or modification of contract.[207] In this light, the situation is much closer to *Khalij Commercial Bank* than *Phrantzes*, and the English court may simply discharge the contract when it applies Article 26 of Interpretation II.

Another procedural law issue is the *force majeure* certificate which concerns proof of foreign law. Part II of this Article

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201. *Id.*

202. *See supra* notes 84-87 and accompanying text.

203. Banco Santander Totta SA v. Companhia de Carris de Ferro de Lisboa SA [2017] 1 WLR 1323 (Eng.).

204 . *See id.* at 1323, 1329 ("Abnormal change in circumstances 1. If the circumstances on which the parties based their decision to enter into a contract have undergone an abnormal change, the injured party is entitled to termination of the contract or to modify it in accordance with principles of equity if fulfilment of that party's obligations under the contract would be a serious breach of the principles of good faith and if the abnormal changes do not form part of the risks covered by the contract. 2. If termination is requested, the counterparty may oppose by stating that it accepts modification of the contract in accordance with the previous paragraph.").

205. *See* Código Civil, art. 437 and Interpretation II, art. 26.

206. *Banco Santander Totta SA v. Companhia de Carris de Ferro de Lisboa SA* [2017] 1 WLR at 1323, 1329 (Eng.).

207. *Id.* at 1331.

mentioned that the *force majeure* clause from the CCPIT may have some evidentiary value if the governing law is Chinese law.[208] Although England does not have such a certificate system, it is possible that the place of performance could be in a country where such certification is available despite the fact that English law is the governing law. In *Xiamen Jida Trade Development Company v. Xiamen Chemical Raw Material Wholesale Co., Ltd.*, [209] the Intermediate People's Court of Xiamen City, Fujian Province accepted the *force majeure* defense, relying on a *force majeure* certificate issued by a Paris trade association which was verified by the CCPIT, notwithstanding that the governing law was apparently Chinese law.[210] This suggests that Chinese courts may be more willing to consider *force majeure* certificates as evidence, regardless of the governing law. It must be noted, however, that this case was decided in 1995 and might not be representative of contemporary judicial practice in China.

It is difficult to see English courts adopting the same liberal position regarding the CCPIT certificate. Under English law, the proof of foreign law is a matter of fact to be established by expert testimony.[211] The English court will not accept the *force majeure* certificate by itself without a foreign law expert presenting and interpreting the certificate.[212] Even if Chinese law is the applicable law, English courts are unlikely to consider a CCPIT certificate as conclusive evidence of Chinese law. This was the position taken by the US Supreme Court, which rejected the claim that a statement of law provided by the PRC Ministry of Commerce should be binding on the interpretation of Chinese law in US courts. [213] If the governing law is English law, given the difference between the substantive laws on *force majeure* described above, the evidentiary value of a certificate provided by a foreign non-governmental organization is doubtful. The CCPIT also did not conduct much

208. See *supra* Part II.

209. Xiàmén shì jí dá màoyì fāzhǎn gōngsī sù xiàmén huàgōng yuánliào pīfā gōngsī fǎnhuán gòuxiāo hétóng dìngjīn àn (厦门市集达贸易发展公司诉厦门化工原料批发公司返还购销合同定金案) [Xiamen Jida Trade Dev. Co. v. Xiamen Chem. Raw Material Wholesale Co., Ltd.], (Interm. People's Ct. of Fujian Province 1995) (China).

210. *Id.*

211. *See* DICEY, MORRIS & COLLINS, *supra* note 18, at 318.

212. *See* BRIGGS, *supra* note 194, at 99.

213. Animal Science Products v. Hebei Welcome, 138 S. Ct. 1865 (2018).

investigation beyond reviewing relevant documents submitted by one contracting party online.[214]

D. Judicial Practice of Choice of Law

Thus far, the focus has been on the analyses of the more technical private international law rules. However, given the national interests in COVID-19 cases, there may be a motivation for courts to apply choice of law rules in such a way that, aside from the technical analysis above, the forum's substantive law is to be applied. This is particularly a possibility for Chinese courts as they have long been following a "homeward trend" in applying Chinese law. [215] To assess this potential manipulation, the Author conducted a survey on choice of law cases of the Chinese courts. The Author did not conduct a similar study on English cases due to the limited amount of relevant decisions.[216] The findings are set out below.

1. Pandemic-Related Force Majeure Cases

Although China has experience dealing with SARS, there were only two reported cases regarding SARS-related *force majeure* that also have an international element: [217] *J.PI Travel U.S.A., Inc. v.*

214. *See* Press Office of the General Conference Office Liu Yue, *The issue force majeure factual proof to help enterprises maintain their legitimate rights and interests*, CHINA COUNCIL FOR THE PROMOTION OF INTERNATIONAL TRADE (Feb. 16, 2020), http://www.ccpit.org/Contents/Channel_4324/2020/0216/1240959/content_1240959 [https://perma.cc/3MFH-YBPS].

215. *See, e.g.*, TANG ET AL., CONFLICT OF LAWS IN THE PEOPLE'S REPUBLIC OF CHINA 227-28 (2016).

216. Search on Westlaw only identifies four cases that deal with *force majeure* and conflict of laws: Jacobs, Marcus & Co. v The Crédit Lyonnais [1884] 12 QBD 589 (Eng.); Libyan Arab Foreign Bank v. Bankers Trust Co [1989] QB 728 (Eng.) (holding that the US presidential order had not discharged the parties from further performance of the contract and therefore the contract had not been frustrated); Canary Wharf (BP4) T1 Ltd. v. European Medicines Agency [2019] EWHC (Ch.) 335 (Eng.); Banco Santander Totta SA v. Companhia de Carris de Ferro de Lisboa *SA* [2017] 1 WLR 1323 (Eng.). All of them have English law as the governing law. However, the sample size is too small to warrant meaningful empirical analysis.

217. The cases are identified in Lawinfochina by the search terms SARS ("fēi diǎn"), foreign-related ("shèwài"), and *force majeure* ("Bùkěkànglì"). There is no such case in England.

Yangtze River Shipping Overseas Tourism Corporation;[218] and *Huizhou Air China Automobile Trading v. Guangxi Airlines*.[219] In both cases, the Chinese courts applied Chinese law. In the former case there was a governing law clause in favor of Chinese law.[220] In the latter case found Chinese law was the law with the closest connections.[221] However, despite the fact that these were the most relevant cases on coronavirus and *force majeure*, the sample size is too small for meaningful analysis. There is one international case that involved another epidemic: the aforementioned *Chu Xiang v. Ni Keke labor contract dispute*.[222] However, despite the fact that the place of performance of the contract was Angola, thereby making the contract a foreign-related contract, the Chinese court simply applied Chinese law with no discussion of choice of law.[223] This shows that Chinese courts do not always conduct choice of law analysis even if there is a foreign element.

2. *Force Majeure*-Related Cases

The next batch of cases surveyed consists of *force majeure*-related cases with a conflict element. The Author only surveyed cases decided after the Choice of Law Act came into effect in 2011

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218. Měiguó dōngjiāng lǚyóu jítuán gōngsī (J) yǔ chángjiāng lúnchuán hǎiwài lǚyóu zǒng gōngsī chuánbó zūlìn hétóng jiūfēn shàngsù àn (美国东江旅游集团公司（J）与长江轮船海外旅游总公司船舶租赁合同纠纷上诉案) [Appeal Case for Ship Leasing Contract Disputes between J.PI Travel U.S.A., Inc. and Yangtze River Shipping Overseas Tourism Corporation], (Higher People's Ct. of Hubei Province 2007) (China).

219. Shànghǎi èr zhōng yuàn shūlǐ guānyú 2003 nián-2019 nián gèdì shè yìqíng hétóng jiūfēn 10 dà diǎnxíng ànlì zhī bā: Huìzhōu mǒu gōngsī, lián mǒu yǔ guǎngxī mǒu gōngsī zūlìn hétóng jiūfēn àn (上海二中院梳理关于 2003 年-2019 年各地涉疫情 合同纠纷 10 大典型案例之八:惠州某公司、连某 与广西某公司租赁合同纠纷案) [Huizhou Air China Auto. Trading v. Guangxi Airlines], at 1-6 (Shanghai Second Interm. People's Ct. 2007).

220. Měiguó dōngjiāng lǚyóu jítuán gōngsī (J) yǔ chángjiāng lúnchuán hǎiwài lǚyóu zǒng gōngsī chuánbó zūlìn hétóng jiūfēn shàngsù àn (美国东江旅游集团公司（J）与长江轮船海外旅游总公司船舶租赁合同纠纷上诉案) [Appeal Case for Ship Leasing Contract Disputes between J.PI Travel U.S.A., Inc. and Yangtze River Shipping Overseas Tourism Corporation], (Higher People's Ct. of Hubei Province 2007) (China).

221. The court highlighted only the China-related factors as Chinese courts often do in applying the closest connection test.

222. Chǔ xiáng sù níkēkē láowù hétóng jiūfēn àn (储翔诉倪珂珂劳务合同纠纷案) [Chu Xiang v. Ni Keke Labor Contract Dispute], (People's Ct. of Xuanwu Dist., Nanjing City, Jiangsu Province 2015) (China).

223. *Id.*

to reflect the judicial practice of the current regime. The survey identified 45 such cases.[224]

Table 1

Governing law (China)	**Governing law (Foreign)**
45	0

Table 2

Choice of law approach			
Choice of law clause	**Express choice at trial**	**Closest connection**	**Total**
2	6	37	45

As shown in Table 1, the Chinese courts did not apply foreign law in any foreign-related *force majeure* case and invariably applied Chinese law. This is the case regardless of the choice of law approach adopted by the court, as displayed in Table 2. In three of the six cases where the parties agreed to apply Chinese law at trial, there was an express choice of law clause designating a foreign law as the governing law. However, the parties decided to use Chinese law at trial instead.[225]

224. The cases are identified in Lawinfochina by using the following search terms: *force majeure* ("Bùkěkànglì"), "Article 41 of the Choice of law Act" ("Shèwài mínshì shìyòng fǎ dì sìshíyī tiáo") and "Article 117 of CCL" (Zhōngguó hétóng fǎ dì yībǎi yīshíqī tiáo").

225. Kāngkǎi pǔ gǔfèn yǒuxiàn gōngsī yǔ duōyuán huánqiú shuǐwù mó kējì (běijīng) yǒuxiàn gōngsī guójì huòwù mǎimài hétóng jiūfēn yīshěn mínshì pànjuéshū (康凯普股份有限公司与多元环球水务膜科技（北京）有限公司国际货物买卖合同纠纷一审民事判决书) [Concap Co. v. Duoyuan Glob. Water Membrane Tech. (Beijing) Co.], (Beijing Daxing Dist. (Cnty.) People's Ct. 2016); Duōyuán huánqiú shuǐwù mó kējì (běijīng) yǒuxiàn gōngsī yǔ kāngkǎi pǔ gǔfèn yǒuxiàn gōngsī guójì huòwù mǎimài hétóng jiūfēn èrshěn mínshì

It must be recognized that none of these cases involved diseases or pandemics, so they cannot be evidence that the Chinese courts prefer to apply Chinese law in pandemic-related conflict cases. They do, however, confirm the homeward trend of the Chinese courts generally in *force majeure* cases. This homeward trend is further corroborated by the following survey on the general choice of law practice in contract cases by Chinese courts.

3. Anglo-American Cases in 2018

Table 3 below identifies 170 contract cases decided by Chinese courts in 2018 that have a foreign factor relating to either England or the United States.[226] They are not, however, *force majeure*-specific.

Table 3

Chinese law	US law	English law	Others	Total
168	2	0	0	170

The data shows that Chinese courts applied Chinese law in all but two cases (1.2%). This greatly supports the "homeward trend" observation. Although it is not the purpose of this Article to analyze the reasons for such trend,[227] the non-application of foreign law can be attributed to the following reasons: first, most sophisticated international transactions involving China will opt for

pànjuéshū (多元环球水务膜科技（北京）有限公司与康凯普股份有限公司国际货物买卖合同纠纷二审民事判决书) [Duoyuan Glob. Water Membrane Tech. (Beijing) Co. v. Concap Co.], (Beijing Second Interm. People's Ct. Mar. 29, 2018); Yúzhuōlóng yǔ zhūhǎi shì jìn hé tiān qìng fángdìchǎn kāifā yǒuxiàn gōngsī shāngpǐnfáng xiāoshòu hétóng jiūfēn yīshěn mínshì pànjuéshū (余卓隆与珠海市晋和天庆房地产开发有限公司商品房销售合同纠纷一审民事判决书) [Yu Zhuolong v. Zhuhai Jinhe Tianqing Real Estate Dev. Co.], (Zhuhai Hengqin New Dist. People's Ct. Nov. 30, 2018) (China).

226. They are identified in lawinfochina by the search terms: contract ("Hétóng"), foreign-related ("shèwài"), the United States ("měiguó"), and England ("yīngguó").

227. The Author is working on a separate article on this very topic titled *An Empirical Review of China's New Choice of law Regime: In Search of Clear Guidelines?*.

arbitration.[228] This leaves only small contract cases to litigation. Due to the relatively insignificant size of these contracts, contracting parties may not include a choice of law clause, leaving these cases to the closest connection test under Article 41 of the Choice of Law Act, which is more prone to manipulation (see below).[229] Even if the parties include a choice of law clause, the size of the claim may not justify the expense of hiring a foreign law expert to testify on foreign law. When no foreign law is pleaded, Chinese law will likely be applied by default.[230] Perhaps more importantly, pleading foreign law in China to the satisfaction of the Chinese courts has proven to be difficult in practice.[231] This could cause the foreign parties to not plead foreign law, despite having an express choice of law clause designating the foreign law.[232] The lack of reliance on choice of law clauses is in stark contrast with the deference by English courts to the governing law clause, whether under common law or the Rome regime.

Second, in the absence of choice by the parties, unlike the detailed balancing exercise on all circumstances of the case by the English courts,[233] Chinese courts tend to refer only to China-related factors in their application of the closest connection test.[234] As a result, the closest connection test under Article 41 always points to Chinese law as having the closest connections with the contract.

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228. MICHAEL J. MOSER, DISPUTE RESOLUTION IN CHINA 2-4 (Michael Moser ed., 2012).

229. *See* Choice of Law Act, art. 41.

230. Choice of Law Interpretation I, art. 17.

231. *See* TANG, *supra* note 215, at 38.

232. *See* Kāngkǎi pǔ gǔfèn yǒuxiàn gōngsī yǔ duōyuán huánqiú shuǐwù mó kējì (běijīng) yǒuxiàn gōngsī guójì huòwù mǎimài hétóng jiūfēn yīshěn mínshì pànjuéshū (康凯普股份有限公司与多元环球水务膜科技（北京）有限公司国际货物买卖合同纠纷一审民事判决书) [Concap Co. v. Duoyuan Glob. Water Membrane Tech. (Beijing) Co.], (Beijing Daxing Dist. (Cnty.) People's Ct. 2016); Duōyuán huánqiú shuǐwù mó kējì (běijīng) yǒuxiàn gōngsī yǔ kāngkǎi pǔ gǔfèn yǒuxiàn gōngsī guójì huòwù mǎimài hétóng jiūfēn èrshěn mínshì pànjuéshū (多元环球水务膜科技（北京）有限公司与康凯普股份有限公司国际货物买卖合同纠纷二审民事判决书) [Duoyuan Glob. Water Membrane Tech. (Beijing) Co. v. Concap Co.], (Beijing Second Interm. People's Ct. Mar. 29, 2018); Yúzhuōlóng yǔ zhūhǎi shì jìn hé tiān qìng fángdìchǎn kāifā yǒuxiàn gōngsī shāngpǐnfáng xiāoshòu hétóng jiūfēn yīshěn mínshì pànjuéshū (余卓隆与珠海市晋和天庆房地产开发有限公司商品房销售合同纠纷一审民事判决书) [Yu Zhuolong v. Zhuhai Jinhe Tianqing Real Estate Dev. Co.], (Zhuhai Hengqin New Dist. People's Ct. Nov. 30, 2018) (China).

233. *See, e.g.*, Jacobs, Marcus & Co. v. The Crédit Lyonnais (1884) 12 QBD 589 (Eng.).

234. *See* King Fung Tsang & Jyh-An Lee, Unfriendly Choice of Law in FRAND, 59 VA. J. INT'L L. 220, 281-83 (2019)(discussing how Chinese courts cherry picked only Chinese related factor in a high profile case relating to FRAND licensing agreement).

In short, because of the long-established practice of Chinese courts applying Chinese law, it is unlikely that *force majeure* cases will be any different. In fact, considering the socioeconomic interests at stake in COVID-19 cases, it is even more likely that the Chinese courts will apply Chinese law to these cases. Thus, although the SPC did not officially make the Guidances mandatory, the homeward trend in choice of law described above certainly makes the Guidances mandatory in Chinese courts without having to invoke the relevant mandatory rule doctrine. However, it is important to note that the survey above is not suggesting that foreign parties are likely to be prejudiced in their chances of success in *force majeure* related cases. The data only suggests that Chinese courts prefer their own law (and probably the notion of justice embedded in Chinese law) over foreign law when adjudicating *force majeure* cases. Assuming that the Chinese *force majeure* rules best reflect the notion of justice of China, it is one way that the national interests of China will be promoted.

4. Jurisdiction and Enforcement of Foreign Judgments

Although choice of law seems to be the most important issue in the *force majeure* context, a brief note on jurisdiction and enforcement of foreign judgments is also warranted. The applicable choice of law rules depend on the country where the forum is located.[235] This in turn is decided by jurisdictional rules. China's jurisdictional rules are generally extremely broad.[236] While it recently adopted a new set of *forum non conveniens* rules, their applications are strictly limited to cases which have close to zero connections with China.[237] Comparing the English *forum non*

235. *See* CHESHIRE, NORTH & FAWCETT, *supra* note 23, at 7.

236. *See* TANG, *supra* note 215, at 59.

237. *See* Zuì Gāo Rén Mínfǎyuàn Guānyú Shì Yòng "Zhōnghuá Rén Míngònghéguó Mínshì Sùsòng Fǎ" de Jiěshì (最高人民法院关于适用《中华人民共和国民事诉讼法》的解释) [Interpretations of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China Fa Shi [2015] No. 5] (promulgated by the Judicial Comm. Sup. People's Ct., Jan. 30, 2015, effective Feb. 4, 2015) Westlaw China, art. 532 [hereinafter *Application of the Civil Procedure Law*]. For *forum non conveniens* to succeed, the case must fulfil the following conditions: (1) *forum non conveniens* must be raised by the defendant; (2) there is no choice of court agreement selecting a Chinese court as the competent court; (3) the case is subject to no exclusive jurisdiction of China; (4) the case involves no interests of the nation, citizens, legal entities or other organizations in China; (5) main facts in dispute in the case has not occurred within China, and the case

conveniens regime, it is much more likely for the English courts to decline jurisdiction in favor of a foreign forum.[238] This higher chance of the assumption of jurisdiction enables Chinese courts to apply Chinese law.

Even if the case is adjudicated in England, and an English court applies English law, it does not mean that Chinese *force majeure* law will necessarily be irrelevant. If the English judgment requires enforcement in China, it is possible that the judgment's incompatibility with Chinese public policy will result in Chinese courts refusing to enforce the judgment.[239] It is theoretically possible that the English judgment could be rejected for violating the public policy embedded in the Chinese *force majeure* law. However, as discussed above,[240] Guidance III suggests that the application of Chinese *force majeure* law is not mandatory. As such, it is difficult to argue that a judgment resulting from an application of law different from Chinese *force majeure* law is a violation of Chinese public policy.

In practice, it is more likely that the enforcement of an English judgment will be rejected for lack of reciprocity.[241] To date, China still does not have a consistent practice of enforcing foreign judgments on the basis of reciprocity.[242] While there has been at least one case of successful recognition of a Chinese judgment in England (*Spliethoff's Bevrachtingskantoor BV v. Bank of China*

shall not be governed by Chinese law; (6) a foreign court has jurisdiction upon the case and would try the case in a more convenient manner.

238. Under the test developed by the House of Lords in Spiliada Maritime Corp. v. Cansulex Ltd., an English court shall normally decline the exercise of jurisdiction if there is another available forum that is clearly or distinctly more appropriate than the English court to adjudicate the case, the court will normally grant a stay. *See* Spiliada Maritime Corp. v. Cansulex Ltd. [1987] A.C. 460, at 478.

239. *See* Zhonghua Renming Minshisusongfa (中华人民共和国民事诉讼法) [Civil Procedure Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong. June 27, 2017, effective July 1, 2017), at art. 281-82.

240. *See* Choice of Law Act, Art. 6(3) and accompanying text.

241. *See* King Fung Tsang, Enforcement of Foreign Commercial Judgments in China, 14 J. PRIV. INT'L L. 262, 281 (2018) (discussing how China did not exercise reciprocity in enforcement of English judgment, even though there was precedent of English court enforcing Chinese judgment).

242. *Id.*

Ltd),[243] Chinese courts have thus far denied the enforcement of English judgments for lack of reciprocity.[244]

Comparatively, enforcement of a Chinese judgment in England is much easier. As *Spliethoff's Bevrachtingskantoor* has shown, English law does not require reciprocity for recognition and enforcement of foreign judgment.[245] The most important requirement is that the deciding Chinese court took jurisdiction on a basis that is acceptable to the English courts.[246] In *Spliethoff's Bevrachtingskantoor*, the jurisdiction requirement was satisfied as the court found the Dutch seller had submitted to the Chinese court's jurisdiction voluntarily.[247]

A similar argument may be made on the public policy exception under the New York Convention regarding foreign arbitral awards.[248] However, China has a much better track record in terms of enforcement of foreign arbitral awards, and it is unlikely that the argument will be successful under the New York Convention generally.[249]

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243. Spliethoff's Bevrachtingskantoor BV v. Bank of China Ltd. [2015] 1 C.L.C. 651 (Eng.).

244. For the recent instances of enforcement of foreign judgments by China, see Béligh Elbalti, *Some Thoughts on the Sino-Japanese Reciprocal Recognition Dilemma in Light of the Recent Developments in the Recognition and Enforcement of Foreign Judgments in China*, CHINA JUST. OBSERVER (Jan. 12, 2020), https://www.chinajusticeobserver.com/a/some-thoughts-on-the-sino-japanese-reciprocal-recognition-dilemma-in-light-of-the%20recent-developments-in-the-recognition-and-enf [https://perma.cc/SZP5-FK7P].

245. *Spliethoff's Bevrachtingskantoor BV v Bank of China Ltd* [2015] 1 C.L.C. 651 (Eng.).

246. *Id.* at 684 ("Dicey, Morris & Collins, *The Conflict of Laws* (15th ed, 2012) (at paragraph 14–055 and following) confirms that a fundamental requirement of recognition of a foreign judgment in England at common law is that the foreign court should have had jurisdiction according to the English rules of the conflict of law.").

247. *Id.* at 684-85.

248. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. 5(2)(b), June 7, 1959, 330 U.N.T.S. 3; *see also* GEORGE A. BERMANN, INTERNATIONAL ARBITRATION AND PRIVATE INTERNATIONAL LAW 573 (2017) ("[The public policy defense] is no different than most countries' standards for the recognition and enforcement of foreign judgments.").

249. *See* Tsang, *supra* note 241, at 290 tb. 9 (showing that Chinese courts have enforced 87 of 118 arbitration awards); *see also* DICEY, MORRIS & COLINS, *supra* note 18, at 580 (advocating the public policy exception to be restricted to only to cases that significantly implicate the state's legitimate interests and concerns).

5. An Illustration

To fully illustrate the impacts of the judicial practices on choice of law, as well as jurisdiction and enforcement of judgment, an example will be helpful. Suppose there is a supply contract between a Chinese supplier in Guangzhou and an English buyer in London. The supply was significantly delayed by the pandemic, leading to a claim of damages by the buyer, and the raising of a *force majeure* defense by the seller. The results of their dispute resolution are shown by the table below:

Table 4

	Choice of law	**Jurisdiction**	**Enforcement**
Litigation in China	Likely to apply Chinese law	*Forum non conveniens* unlikely	Fair chance of enforcement in England
Litigation in England	Depends	*Forum non conveniens* possible	Enforcement in China unlikely

a. Litigation in China

If the litigation is to take place in China, it is highly likely that the Chinese court will apply Chinese law due to its "homeward trend."[250] This is particularly the case where there is no express choice of law clause in the supply agreement. Although there will be a higher chance of the application of English law if there is a choice of law clause designating English law as the governing law, its application by the Chinese courts is uncertain.[251] Chinese courts are also unlikely to decline jurisdiction, as its rule on *forum non*

250. *See* TANG, *supra* note 215.
251. *See id.* at 38 and accompanying text.

conveniens is highly stringent.[252] Here, the fact that the case involves a Chinese seller is sufficient to defeat a *forum non convenience* claim.[253] If the Chinese seller prevails under Chinese *force majeure* law, the resulting Chinese judgment will likely be enforced by the English court, since the initiation of the proceeding by the English buyer in China will be regarded as a submission to the Chinese court's jurisdiction, thereby satisfying the jurisdiction requirement.[254]

b. Litigation in England

Whether the English court will apply English or Chinese law in this case depends on the facts of the case. Clearly, if there is a choice of law clause, an English court will likely follow the law specified in the clause.[255] Whether the English court will decline jurisdiction under the principle of *forum non conveniens* also depends on the facts. However, even if the English court applies English law and does not decline jurisdiction, Chinese courts will likely not enforce the resulting judgment due to the lack of reciprocity. This is particularly significant if the English buyer prevails in the English court and the Chinese buyer has no assets in England. In that case, the only alternative for the English buyer is to sue the Chinese seller again in China, which will then repeat the analysis of scenario (a) above. Thus, the Chinese private international law regime will amplify the effects of Chinese *force majeure* law regardless of the forum.

IV. CONCLUSION

COVID-19-related *force majeure* cases cannot be analyzed without consideration of private international law, given its

252. *See* Application of the Civil Procedure Law, at art. 532 and accompanying text.

253. *See* Application of the Civil Procedure Law, at art. 532(4).

254. Schibsby v. Westenholz [1870] LR 6 QB 155, 161 (Eng.). For further details on the recognition and enforcement of foreign judgments under English law, see DICEY, MORRIS & COLINS, *supra* note 18, at ch. 14. The jurisdiction requirement will be more difficult if it is the Chinese party who initiated the proceeding. In that case, for jurisdiction to be satisfied, the English party must be "present" in China, either through setting up a place of business in China or having entered into a transaction through an agent with such presence. *See* Adams v. Cape Indus. PLC [1989] 7 WLUK 355(Eng.). Alternatively, if there is a jurisdiction clause designating the Chinese court as a forum, it will apparently be sufficient.

255. Vita Food Products Inc. v. Unus Shipping Co. Ltd. [1939] UKPC 7 (Eng.).

international nature. These cases brought unprecedented conflict issues because of the public and national interests present in COVID-19. They trigger those private international law rules regarding public policy and mandatory rules that are not usually part of the analysis of *force majeure* cases. Although this Article focuses on the interactions of these private international law issues between China and England, many of the private international law issues this Article highlights will also be present in *force majeure* cases involving other countries.

In connection with the Sino-British conflict cases, the differences in the substantive laws on *force majeure* make the choice of law analysis outcome determinative. In particular, although Chinese law does not give the COVID-19-specific Guidances the status of a mandatory law, prior judicial practices in China suggest that Chinese courts would most likely apply Chinese law under the judicial practice of the Chinese courts. The difficulty of enforcing English judgments in China discourages litigation in England and further reduces the chances of applying English *force majeure* law. Chinese private international law therefore in effect maximizes the chance that Chinese *force majeure* law applies in COVID-19-related cases, thereby promoting Chinese national interests. These national interests perhaps always exist in the background of private international law, though COVID-19 probably brings them out more prominently. It will be interesting to see if future COVID-19 *force majeure* litigation will manifest these national interests.

Hopefully, the analysis set out in the Article will help parties of international contract anticipate conflict issues and resolve their disputes efficiently. The greater wish of the Author, however, is for this pandemic to end by the time of the publication of this Article and for our world to return to normal.