Force Majeure and Related Doctrines of Excuse in Contract Law of the People's Republic of China

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I. INTRODUCTION

Since the death of long-time Communist Party Chairman Mao Zedong in 1976, the leaders of the People's Republic of China ("PRC") have abandoned the economic policies which had isolated the PRC from the global economy for nearly three decades and have expanded the PRC's economic interaction with other countries. The Third Plenum of the Eleventh Congress of the Communist Party in 1978 brought to power reform-minded officials who had a greater appreciation of market practices.[1] Deng Xiaoping, who became the paramount leader at that time, led a movement within the highest reaches of the Communist Party (the "Party") that, while not forsaking centralized planning, reoriented both the Party and the PRC in favor

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1. *See* Byrd, *The Role and Impact of Markets*, in CHINA'S INDUSTRIAL REFORM 237 (G. Tidrick & Chen Jiyuan eds. 1987); *see generally*, Nee, *A Theory of Market Transition: From Redistribution to Markets in State Socialism*, 54 AMER. SOC. REV. 663 (1989). Even many rural cadres, who used to be a major source of resistance to reform, have been persuaded of some benefits of the reforms. Nee & Su, *Institutional Change and Economic Growth in China: The View from the Villages*, 49 J. ASIAN STUDIES 3, 7-8 (1990). For a general theoretical comparison of the role in China of market-exchange methods of policy implementation as compared to bureaucratic administration, including central planning, and mobilizing campaigns, *see* L. ROSS, ENVIRONMENTAL POLICY IN CHINA 8-23 (1988).

of a significantly more decentralized, market-oriented, incentive-based economy much more open to international trade.[2] As part of a larger plan of expanding the PRC's private sector to meet market demands, these reformers sought to increase the PRC's involvement in international trade and to encourage foreign investment in China. Foreign businesses, excited by this new "open door" policy, increased their trade with and investment in the PRC.[3]

The tragic events of the summer of 1989, however, made foreign businesses acutely aware that the "open door" could close. In reaction to widespread popular discontent with corruption, inflation and repression, more conservative officials engineered a crackdown that resulted in hundreds of deaths and the removal from office of then-Party Chairman Zhao Ziyang and other leading reform-minded officials.[4] These events broke the momentum of the economic reforms and created the potential for a drastic policy reversal away from

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2. *See generally* H. HARDING, CHINA'S SECOND REVOLUTION, REFORM AFTER MAO (1987); *The People's Republic of China After 40 Years* (Special Issue), 119 CHINA Q. 419 (1989).

3. The State Statistical Bureau's official foreign trade data show that the value of foreign trade increased from US$14.80 billion in 1977 to US$111.68 billion in 1989 in current-year dollars. 1990 ZHONGGUO TONGJI NIANJIAN (Statistical Yearbook of China) 641 [hereinafter TONGJI NIANJIAN]. As a proportion of national income, the value of foreign trade rose from 10.3 percent of national income in 1977 to 31.7 percent of national income in 1989, notwithstanding a modest proportional decline in the late 1980s. Calculated from *id.* at 34, 641. The most current book on foreign trade and investment in the PRC is DOING BUSINESS IN CHINA (W. Streng & A. Wilcox eds. binder).

4. These events were widely reported in the press and broadcast media. Many book-length accounts have appeared, including BEIJING SPRING, 1989 (M. Oksenberg, L. Sullivan & M. Lambert eds. 1990); CHINA'S SEARCH FOR DEMOCRACY: THE STUDENT AND MASS MOVEMENT OF 1989 (S. Ogden, K. Hartford, L. Sullivan & D. Zweig eds. 1991); THE CHINESE PEOPLE'S MOVEMENT: PERSPECTIVES ON SPRING 1989 (T. Saich ed. 1990); CRIES FOR DEMOCRACY: WRITING AND SPEECHES FROM THE 1989 CHINESE DEMOCRACY MOVEMENT (Han Minzhu ed. 1990); M. FATHERS & A. HIGGINS, THE RAPE OF PEKING (1989); L. FEIGON, CHINA RISING: THE MEANING OF TIANANMEN (1990); G. HICKS, THE BROKEN MIRROR: CHINA AFTER TIANANMEN (1990); INTERNATIONAL LEAGUE FOR HUMAN RIGHTS, MASSACRE IN BEIJING: THE EVENTS OF 3 - 4 JUNE, 1989 AND THEIR AFTERMATH (1989); LIU BINYAN, RUAN MING & XU GANG, TELL THE WORLD: WHAT HAPPENED IN CHINA AND WHY (H. Epstein ed. 1990); MASSACRE IN BEIJING: CHINA'S STRUGGLE FOR DEMOCRACY (D. Morrison ed. 1989) MING PAO NEWS, A CHRONICLE OF THE CHINESE DEMOCRATIC UPRISING (Zi Jin & Qin Zhou trans. 1989); THE PRO-DEMOCRACY PROTESTS IN CHINA: REPORTS FROM THE PROVINCES (J. Unger ed. 1991); H. SALISBURY, TIANANMEN DIARY: THIRTEEN DAYS IN JUNE (1989); S. SIMMIE & B. NIXON, TIANANMEN SQUARE (1989); J. SPENCE, THE SEARCH FOR MODERN CHINA (1990); TIANANMEN: CHINA'S STRUGGLE FOR DEMOCRACY: ITS PRELUDE, DEVELOPMENT, AFTERMATH AND IMPACT (W. Yang & M. Wagner eds. 1990); D. TURNLEY, P. TURNLEY & M. LIU, BEIJING SPRING (1989); YI MU, CRISIS AT TIANANMEN: THE DEMOCRACY MOVEMENT IN CHINA (1989); Pye, *Tiananmen and Chinese Political Culture: The Escalation of Confrontation from Moralizing to Revenge*, 30 ASIAN SURVEY 331 (1990). For a broad review, see Mirsky, *The Empire Strikes Back*, N.Y. Rev. of Books, Feb. 1, 1990, at 21.

foreign trade and market economics in favor of insularity and tighter state control of the economy.

While the long-term effects of the events of June 1989 are unclear, in the short-term they have reduced the expected profitability of many international trade and investment contracts involving China.[5] Foreign lawyers and businessmen, alarmed by this reduction in expected profitability, have become increasingly concerned with the prospect that the foreign party or its Chinese counterpart will be unable to perform its contractual obligations. Meanwhile, although the reforms fostered expansion of the domestic economy in general, trade and commerce have also been disrupted by fluctuations in the money supply, credit availability and other factors. These problems, especially those involving international trade and investment, in turn, have focused attention on force majeure and other related doctrines of excuse. However, little scholarly analysis of these doctrines in Chinese law has appeared to date.[6] Therefore, it is an opportune time to analyze the present scope of the law of force majeure in the PRC in the context of both Chinese statutes and practice.

II. THE CONCEPT OF FORCE MAJEURE IN INTERNATIONAL AND ANGLO-AMERICAN LAW

Force majeure, connoting "superior or irresistible force"[7] that excuses nonperformance or delayed performance but not non-conformance, is a term incorporated directly from the French into international and Anglo-American contract law. In its narrow sense, force majeure, here more properly identified as *vis major*, is limited to natural

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5. *See, e.g.*, Delfs, *Power to the Party*, FAR E. ECON. REV., Dec. 7, 1989, at 23; *Hotel JVs in China: Recovery from June 4 Still Far Off*, BUS. CHINA, Aug. 28, 1989; Keck, *Covering All the Bases*, CHINA BUS. REV., Sept.-Oct. 1989, at 20; Leung, *Foreigners Find China Ventures Difficult to Quit*, Wall St. J., Mar. 12, 1991, at A15, col. 3.

6. The following articles in English discuss force majeure and related doctrines of excuse in the PRC: Chang & Olofsson, *Worst-Case Scenarios*, CHINA BUS. REV., Sept.-Oct. 1989, at 16; Gelatt & Bates, *Force Majeure, Termination, Dispute Resolution: Contract Issues With A New Relevance*, E. ASIAN EXEC. REP., July 15, 1989, at 9. *See also* Leclerq, *Force Majeure in Chinese Commercial Law*, 7 J. ENERGY & NATURAL RESOURCES L. 238 (1989); H. ZHENG, CHINA'S CIVIL AND COMMERCIAL LAW 67-69 (1988); Zhao, *A Comparative Study of the Uniform Commercial Code and the Foreign Economic Contract Law of the People's Republic of China*, 6 INT'L TAX & BUS. L. 26, 39-42 (1988). For discussion of Chinese sources, see *infra*, note 15.

7. BLACK'S LAW DICTIONARY 645 (6th ed. 1990) ("Force majeure . . . In the law of insurance, superior or irresistible force. Such clause is common in construction contracts to protect the parties in the event that a part of the contract cannot be performed due to causes which are outside the control of the parties and could not be avoided by exercise of due care.").

calamities of unavoidable force arising from causes wholly independent of human intervention.[8]

The concept of force majeure would have very limited application in contract law were its scope so narrowly restricted. In fact, however, the reach of force majeure has undergone significant expansion in many countries as the result of consensual bargaining on contractual terms by the parties, and also has developed extra-contractually through the evolution of judicial doctrine and statutory language.

For example, force majeure is now generally understood to encompass events such as war or civil strife, which stem from human causes rather than natural forces.[9] In addition, international practice has expanded the scope of force majeure to include causes not wholly external to the parties. In fact, some courts have gone so far as to allow state-owned enterprises to invoke force majeure defenses even when their breach was occasioned by a change in policy by the government which doubles as their owner. In other words, courts have become more willing to distinguish between the enterprise itself and the government of which it is a part.[10]

In addition to expanding the scope of the doctrine itself, courts have construed force majeure clauses in contracts to encompass analogous events not specifically enumerated. Courts have been able to do this by liberally applying the rule of *ejusdem generis*, which provides that general terms that supplement particular enumerated items

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8. *Id.* at 1572 ("Vis major . . . A greater or superior force; an irresistible force. A loss that results immediately from a natural cause without the intervention of man, and could not have been prevented by the exercise of prudence, diligence, and care. (citation omitted) A natural and inevitable necessity, and one arising wholly beyond the control of human agencies, and which occurs independently of human action or neglect. In the civil law, this term is sometimes used as synonymous with '*vis divina*,' or the act of God.").

9. *See* 6 CORBIN ON CONTRACTS § 1324 (1962).

10. The leading case in this regard was decided in Great Britain. It involved a Polish state-owned enterprise whose inability to fulfill a sugar export contract because of a governmental suspension of export licenses arising from changed domestic market conditions was excused as an unforeseeable external force majeure event. C. Czarnikow, Ltd. v. Centrala Handlu Zagranicznego Rolimpex, [1979] A.C. 351, *cited in* Williams & Inkester, *England*, in COMPARATIVE REPORT ON FORCE MAJEURE IN WESTERN EUROPE 31, 37-38 (M. Kurkela ed. 1982). In another case, an arbitration tribunal actually excused a breach by a government purchaser because a change in the governing entity had fundamentally altered the conditions in effect when the contract was executed. Questech, Inc. v. Ministry of National Defense of the Islamic Republic of Iran, AWD 191-59-1, Iran-United States Claims Tribunal (Sept. 20, 1985), 80 AM. J. INT'L L. 362 (1986). Thus, while a state-owned enterprise faces a higher burden of proof when invoking a force majeure defense with regard to the external nature of the event, the enterprise may succeed, especially when "the enterprise has no particular connection with the authorities." INTERNATIONAL CHAMBER OF COMMERCE, FORCE MAJEURE AND HARDSHIP comment 9, at 14-15 (1985).

are interpreted to refer only to the same kind or class of things as the specifically enumerated items.[11] Through this liberal application, courts have substantial latitude to expand the scope of contractual force majeure clauses on the ground that the parties intended that analogous events qualify as force majeure events.[12] This is entirely appropriate since one of the fundamental tenets of a force majeure clause is the notion of unforeseeability. Since the event or type of event must be unforeseeable, it would be unduly harsh for a court to adopt a per se rule that the parties intended by omission to exclude non-enumerated events from the scope of force majeure.[13] However, the party against which the excuse is asserted should be permitted to present evidence that commercial custom or usage negated the meaning asserted by the party in breach, even though such limitation on the force majeure clause was not expressly included in the contract.[14]

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11. BLACK'S LAW DICTIONARY, *supra* note 7, at 517.

12. E. FARNSWORTH, CONTRACTS 676-77 (1982). *See, e.g.*, Lighthouses Arbitration Case, Award of July 24/27, 1956, 12 U.N.R.I.A.A. 161, *reprinted in* Contre-Reclamation No. 10, at 241, *cited in* G. DELAUME, TRANSNATIONAL CONTRACTS: APPLICABLE LAW AND SETTLEMENT OF DISPUTES (A Study in Conflict Avoidance) § 5.11, at 41 (1991). Greece sought compensation for damages to its lighthouses sustained from bombardment because the operative term defined force majeure events as "*tremblements des terre*, etc." The tribunal determined that "etc." included man-made events such as war as well as natural calamities, although Greece ultimately lost on other grounds. *Id.*

13. This interpretation of open-ended force majeure clauses is also supported by linguistic analysis. As the philosopher H.P. Grice has argued, unless the boundaries of a claim are specifically asserted and other "conversational implicatures" of a claim are specifically denied, the listener (including an opposing party or tribunal) reasonably may conclude that any or all of the implicatures were intended by the person making the assertion. Grice, *Logic and Conversation*, in 3 SYNTAX AND SEMANTICS: SPEECH ACTS 41, 58 (P. Cole & J. Morgan eds. 1975). *See also* INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 10, comment 7, at 13 ("[I]t must be made clear that the enumeration [of events] is in no way meant to be exhaustive."); E. FARNSWORTH, *supra* note 12. Note also the use of the word "*deng*" ("and so forth") in Zhonghua Renmin Gongheguo Zhongwai Hezi Jingying Qiye Fa (The Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures) (adopted July 1, 1979, promulgated July 8, 1979), art. 13 [hereinafter JV Law], 1990 ZHONGHUA RENMIN GONGHEGUO GUOWUYUAN GONGBAO (Gazette of the State Council of the People's Republic of China) 261, 262 (serial) [hereinafter GUOWUYUAN GONGBAO]. *See infra* notes 77, 78 and accompanying text.

14. *But see* Jordan Investments, Ltd. v. All-Union Foreign Trade Corp. (Isr. v. U.S.S.R.), U.S.S.R. Foreign Trade Arbitration Comm'n, 27 I.L.R. 631 (1958); For a criticism of this decision, see Berman, *Force Majeure and the Denial of an Export License Under Soviet Law: A Comment on Jordan Investments, Ltd. v. Souiznefteksport*, 73 HARV. L. REV. 1128 (1960).

III. The Concept of Force Majeure In the PRC

A. Historical Background

Until recently, the place of force majeure in PRC contract law did not attract much concern among foreign parties, Chinese parties, Chinese law-makers and jurists, or legal academics.[15] The lack of attention toward force majeure is attributable to several factors. First, China traditionally did not place great weight on the role of law, dismissing it as an inevitably imperfect and even harmful effort by mortal beings to govern society. Confucianism in particular placed much greater emphasis on the emulation of virtuous rulers rather than on law as the key to a well-ordered society.[16] As a result, force majeure was just one among many legal doctrines found in other cultures, whether civil law or common law in origin, that never

15. *See supra* note 6 and accompanying text. The principal exception is Yang Zhenshan, *Shilun Wo Guo Minfa Queli "Qingshi Biangeng Yuanze" de Biyaoxing* (On the Necessity of Establishing "The Principle of Changed Circumstances" in China's Civil Law), 1990 ZHONGGUO FAXUE No. 5, at 53-60. The topic is also treated in more abbreviated form in Feng Datong, *Shewai Jingji Hetong Fa de Jiben Yuanze he Zhuyao Neirong* (Fundamental Principles and Major Contents of the Foreign Economic Contract Law), 1985 ZHONGGUO FAXUE No. 3, at 49; Huang Xin, *Lun Jingji Hetong Weiyue Zeren de Jiben Yuanze* (On the Basic Principles of Liability for the Breach of Economic Contracts), 1984 ZHONGGUO FAXUE No. 2, at 42-43; Wang Chengbin, *Lianheguo "Xiaoshou Hetong Gongyue" yu Wo Guo "Shewai Jingji Hetong Fa" de Bijiao* (Shang) (Comparisons between the United Nations Convention on Contracts for the International Sale of Goods and China's Foreign Economic Contract Law (pt. 1)), 1989 ZHONGGUO FAXUE No. 3, at 106; Zhang Yuejiao, *Dingli Shewai Jingji Hetong de Jige Wenti* (Some Problems Concerning the Conclusion of Foreign Economic Contracts), 1985 ZHONGGUO FAXUE No. 2, at 57; Zhuang Huichen, *Lun Guoji Shangshi Hetong Zhong de Cuozhe Wenti* (On the Issue of Frustration in International Commercial Contracts), 1985 FAXUE YANJIU No. 4, at 89-96; Zou Yi & Xu Jinlin, *Dui Jingji Hetong Jiage Jiufen Chuli zhi Tantao* (An Inquiry into the Handling of Economic Contract Price Disputes), 1989 FAXUE ZAZHI No. 4, at 24. In addition, the relevant provisions of Chinese statutes, discussed *infra*, reveal a notable lack of precision and inattention to the implications of force majeure doctrine. Moreover, no circulars or other documents on the subject appeared in ZHONGHUA RENMIN GONGHEGUO ZUIGAO RENMIN FAYUAN GONGBAO (Gazette of the Supreme People's Court of the People's Republic of China) [hereinafter ZUIGAO FAYUAN GONGBAO] from its inception in 1985 through 1990. For a discussion of the role of the Supreme Court Gazette in the PRC's legal system, see Liu, *"Legal Precedents" with Chinese Characteristics: Published Cases in the Gazette of the Supreme People's Court*, 5 J. CHINESE L. 145 (1991); on the power of the Supreme People's Court to issue opinions on legal issues outside of decisions on particular cases, see T. HSIA & C. JOHNSON, LAW MAKING IN THE PEOPLE'S REPUBLIC OF CHINA: TERMS, PROCEDURES, HIERARCHY, AND INTERPRETATION 22 (1986) [hereinafter LAW MAKING IN THE PRC]; Liu, *Judicial Review in China: A Comparative Perspective*, 14 REV. SOC. L. 241, 249 (1988).

16. Creel, *Legal Institutions and Procedures During the Chou Dynasty*, in ESSAYS ON CHINA'S LEGAL TRADITION 26, 39 (J. Cohen, R. Edwards & F. Chen eds. 1980).

emerged to any significant extent in China.[17]

Second, private commercial practices, the source of *lex mercatoria* and, indirectly, of a substantial body of statutory law in the West,[18] did not achieve a comparable level of development in China. At the time that the Renaissance had already emerged in the commercial centers of Lombardy and then spread throughout central and Western Europe,[19] China during the Ming Dynasty (1368 — 1644) took a decisive and perverse turn inward. The intellectual product of this reorientation was a Neo-Confucian metaphysical discourse[20] which led China, in the Qing Dynasty (1644 — 1911), to reject commercial intercourse with the West because of the prevailing belief in the imperial government that China's tightly controlled economy had nothing to gain from such trade.[21] Thus, force majeure, like other commercial law doctrines, did not develop in part because China lacked the impetus to expand international trade relations which would have necessitated the development of commercial law doctrines. Even domestic law was impoverished, however, because the state restricted interprovincial trade in order to ensure the satisfaction of its own requirements for grain and other commodities, while preventing the rise of autonomous centers of influence.[22]

Third, when the Communist Party took power in 1949 and established the PRC, it rejected several decades of market-oriented development that had begun in the final years of the Qing Dynasty and had accelerated after the founding of the Republic of China in 1911. Such development had already been dealt a devastating blow by the

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17. On the history of jurisprudence in China, see especially D. BODDE & C. MORRIS, LAW IN IMPERIAL CHINA: EXEMPLIFIED BY 190 CH'ING DYNASTY CASES (1967); T. CHU, LAW AND SOCIETY IN TRADITIONAL CHINA (1961); Creel, *supra* note 16; S. VAN DER SPRENKEL, LEGAL INSTITUTIONS IN MANCHU CHINA (1962); Gernet, *Introduction* to THE SCOPE OF STATE POWER IN CHINA at xxvii, xxxii (S. Schram ed. 1985); Vandermeersch, *An Enquiry into the Chinese Conception of the Law*, in THE SCOPE OF STATE POWER IN CHINA, *supra* at 3, 24.

18. On *lex mercatoria* or "law of the merchant," see Berman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 2 EMORY J. INT'L DISPUTE RESOLUTION 235 (1988).

19. *See* H. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION (1983).

20. On the rise of Neo-Confucianism, see generally T. METZGER, ESCAPE FROM PREDICAMENT: NEO-CONFUCIANISM AND CHINA'S EVOLVING POLITICAL CULTURE (1977).

21. Letter from the Emperor of China to King George the Third (1795) (E. Parker trans.), in 40 NINETEENTH CENTURY 48 (1896), *reprinted in* CHINA: SELECTED READINGS 110 (H. Kublin ed. 1968).

22. On the domestic economy, see generally M. ELVIN, THE PATTERN OF THE CHINESE PAST (1973); D. PERKINS, AGRICULTURAL DEVELOPMENT IN CHINA, 1368-1968 (1969). For a recent critique of scholarship on central-regional marketing structures, see generally D. LITTLE, UNDERSTANDING PEASANT CHINA (1989).

Japanese invasion of 1937, post-war inflation and rampant corruption.[23] The Communist Party certainly promoted rapid economic development, but did so in the Stalinist mode of a state-planned, resource-intensive strategy that repressed the private economy and market transactions. Not only did the PRC's planned economy have little need for commercial law doctrines like force majeure, but none would have been forthcoming because of the Communist Party's hostility toward the rule of law.[24] The codification of laws, particularly criminal law,[25] but also civil law,[26] began to take shape in the 1950s. However, this process was brought to an abrupt end during the Anti-Rightist Campaign (1957 — 1958) that followed the short-lived Hundred Flowers period (1957).[27]

Not until Mao's death and the ascension to power of Deng Xiaoping did commercial practices and commercial legal doctrine, such as force majeure, begin to develop in the PRC. Although Deng and most of his associates appear to have had little faith in law except

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23. *See generally* A. FEUERWERKER, THE CHINESE ECONOMY, CA. 1870-1911 (1969); A. FEUERWERKER, ECONOMIC TRENDS IN THE REPUBLIC OF CHINA, 1912-1949 (1977); S. PEPPER, CIVIL WAR IN CHINA: THE POLITICAL STRUGGLE, 1945-1949 (1978); T. RAWSKI, ECONOMIC GROWTH IN PREWAR CHINA (1989).

24. Upon taking power, the Communist Party promptly abolished the Six Codes that had been the foundation of the legal system under the Republic of China. LIU FA QUAN SHU (The Complete Six Codes) (Tao Baichuan ed. 1986). For the abolition of the Six Codes, see (The Common Program of the Chinese People's Political Consultative Conference) art. 17 (1949), in 1 ZHONGYANG RENMIN ZHENGFU FALING HUIBIAN (Legal Compendia of the Central People's Government) 17, 21 (reprint 1982); S. LENG, JUSTICE IN COMMUNIST CHINA 27-28 (1967).

25. *See* J. COHEN, THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA, 1949-1963, AN INTRODUCTION (1969); S. LENG & H. CHIU, CRIMINAL JUSTICE IN POST-MAO CHINA: ANALYSIS AND DOCUMENTS (1985).

26. For documentation on the civil law drafting process in the 1950s, see COMPENDIUM OF MATERIALS ON THE CIVIL LAW OF THE PEOPLE'S REPUBLIC OF CHINA (1954); REFERENCE MATERIALS ON THE CIVIL LAW OF THE PEOPLE'S REPUBLIC OF CHINA (1956-1957).

27. On the politics of this period, see generally R. MACFARQUHAR, CONTRADICTIONS AMONG THE PEOPLE 1956-1957 (1974). The failure to develop a legal system was one aspect of the Communist Party's monopoly of power that created the conditions for a series of destructive campaigns and power struggles during the final two decades of Mao Zedong's life, most notably the Great Leap Forward (1959-61) and the Cultural Revolution (1966-76, active phase 1966-69), which created tremendous economic disarray as well as tragic political and social repression of the populace. For analysis of cycles and campaigns, see especially Dittmer, *Patterns of Elite Strife and Succession in Chinese Politics*, 123 CHINA Q. 405 (1990); Eckstein, *Economic Fluctuations in Communist China's Domestic Development*, in 1 CHINA IN CRISIS 691 (P. Ho & T. Tsou eds. 1968); Skinner & Winckler, *Compliance Succession in Rural Communist China: A Cyclical Theory*, in COMPLEX ORGANIZATIONS: A SOCIOLOGICAL READER 410 (A. Etzioni 2d ed. 1969); *cf.* V. SHUE, THE REACH OF THE STATE: SKETCHES OF THE CHINESE BODY POLITIC (1988); Nathan, *Policy Oscillations in the People's Republic of China: A Critique*, 68 CHINA Q. 720 (1976). For case studies, see generally R. SUTTMEIER, SCIENCE POLICY AND SOCIETAL CHANGE IN CHINA (1980); L. ROSS, *supra* note 1, at 176-87.

perhaps as a sophisticated instrument of the "people's democratic dictatorship,"[28] Deng for one came to recognize the positive contributions that law could render in behalf of social stability and property rights—both prerequisites for the decentralized economic development that Deng sought to encourage. Thus, shortly after his return to power, Deng urged rapid restoration and augmentation of the legal system to prevent the return of arbitrary personal rule and the instability which such rule would bring.[29] In the decade after Deng Xiaoping took power, dozens of statutes were enacted,[30] the number of legal practitioners increased,[31] the use of contracts mushroomed,[32] and the

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28. The term "people's democratic dictatorship" is a non sequitur employed as a substitute for "dictatorship of the proletariat" because China's tiny proletariat played only a limited role during the revolution. *See* Mao Tse-tung, *On the People's Democratic Dictatorship* (June 30, 1949), in 4 SELECTED WORKS OF MAO TSE-TUNG 411 (1961).

29. Deng stated that "[t]o ensure people's democracy, we must strengthen our legal system. Democracy has to be institutionalized and written into law, so as to make sure that institutions and laws do not change whenever the leadership changes, or whenever the leaders change their views or shift the focus of their attention. The trouble now is that our legal system is incomplete, with many laws yet to be enacted. Very often, what leaders say is taken as the law and anyone who disagrees is called a law-breaker. That kind of law changes whenever a leader's views change. So we must concentrate on enacting criminal and civil codes, procedural laws and other necessary laws concerning factories, people's communes, forests, grasslands and environmental protection, as well as labor laws and a law on investment by foreigners. These laws should be discussed and adopted through democratic procedures. Meanwhile, the procuratorial and judicial organs should be strengthened. All this will ensure that there are laws to go by, that they are observed and strictly enforced, and that violators are brought to book. The relations between one enterprise and another, between enterprises and the state, between enterprises and individuals, and so on should also be defined by law, and many of the contradictions between them should be resolved by law." Deng Xiaoping, *Emancipate the Mind, Seek Truth from Facts, and Unite as One in Looking to the Future* (Dec. 13, 1978), in SELECTED WORKS OF DENG XIAOPING, 1975-1982, at 151, 157-58 (1984).

30. Chinese statutes and regulations have not been assembled in codified series comparable to the United States Code and the Code of Federal Regulations. Many partial and overlapping compendia must be consulted to conduct a full search. The best sources are ZHONGHUA RENMIN GONGHEGUO FALÜ HUIBIAN (Legal Compendia of the People's Republic of China) (1979-1984, then annual) and GUOWUYUAN GONGBAO. Annual summaries are published in ZHONGGUO FALÜ NIANJIAN (Law Yearbook of China) (1987 - present) [hereinafter FALÜ NIANJIAN]. On possible progress toward more prompt and comprehensive publication of Chinese statutes and regulations, see Kristof, *What's the Law in China? It's No Secret (Finally)*, N.Y. Times, Nov. 20, 1988, at A21, col. 1. At a minimum, there now are regulations for the more uniform editing and publication of regulations, although unpublished (*neibu*) regulations will continue to be issued. *See generally* Fagui Huibian Bianji Chuban Guanli Guiding (State Council Management Regulations for the Compilation, Editing and Publication of Regulations) (effective July 27, 1990), 1990 GUOWUYUAN GONGBAO 579. For English-language translations, see CHINA L. & PRACTICE (serial, 1987-present), CHINA LAWS FOR FOREIGN BUSINESS (binder), and COMMERCIAL, BUSINESS AND TRADE LAWS: PEOPLE'S REPUBLIC OF CHINA (O. Nee ed. binder).

31. At the end of 1989, there were 43,715 lawyers in China, of whom 23,606 were employed full-time as lawyers. 1990 TONGJI NIANJIAN, *supra* note 3, at 812. Many current lawyers are not graduates of law schools, but the proportion of graduates is rising following the

number of arbitrations and lawsuits also grew substantially.[33]

The prognosis for future legal development remains far less certain, however, because the events of the summer of 1989 removed from office several of the leading officials most supportive of genuine rule by law rather than rule by man, and enabled the new, more conservative leadership to redefine the rule of law in a more arbitrary, authoritarian and repressive manner.[34] This raises the basic question of the extent to which the PRC's leaders, including those who publicly advocate a greater role for rule of law, are genuinely willing to allow a diminution of their own power and that of the Communist Party. Genuine rule of law could ultimately result in outcomes that clash with their own deeply-held commitment to a monopoly of power by the Communist Party and state control of the economy. It remains to be seen to what extent the Chinese leadership's support for law is purely

establishment of 38 law schools and departments of law in colleges and universities as well as another 82 institutions of learning at the secondary and tertiary levels. 1989 FALÜ NIANJIAN, *supra* note 30, at 1101, 1107. In 1989, 109,609 clients retained lawyers on annual retainers, and lawyers handled hundreds of thousands of matters for these and other clients, including 14,594 matters affecting foreign interests. 1990 TONGJI NIANJIAN, *supra* note 3, at 812.

32. Written contracts played a minimal role in the PRC for many years because economic allocation was governed mostly by the state plan. The role of the plan has greatly diminished since the late 1970s. *See generally* W. BYRD, THE MARKET MECHANISM AND ECONOMIC REFORMS IN CHINESE INDUSTRY (1991). Contracts have assumed a much greater role in the more decentralized system that now governs. By the late 1980s the number of written economic contracts exceeded 700 million per year, creating great pressure for further standardization of contract language. *See* Guowuyuan Bangongting Zhuanfa Guojia Gongshang Xingzheng Guanli Ju Guanyu Zai Quanguo Zhubu Tuixing Jingji Hetong Shifan Wenben Zhidu Qingshi de Tongzhi (Administrative Office of the State Council Notice Disseminating the Request of the State Administration of Industry and Commerce to Publicize Model Economic Contract Documents) (May 26, 1990), 1990 GUOWUYUAN GONGBAO 267, 268.

33. In 1988, the country's arbitration tribunals resolved 47,025 economic contract disputes, an increase of 67 percent from 1987, valued at 2.1 billion RMB (US$1 = 3.71 RMB at the time). 1989 FALÜ NIANJIAN, *supra* note 30, at 31. *See also* Zhong Caichu, *Quanguo Zhongcai Jiguan wei Qiye Paiyou Jienan* (Arbitration Organs Around the Country Are Relieving Anxiety and Settling Difficulties), FAZHI RIBAO, Mar. 14, 1988, at 1. In 1988, the country's courts handled 313,306 criminal cases, 1,455,130 civil cases and 513,615 economic cases, increases of 7.25, 21.6 and 40.4 percent, respectively, from 1987. Statistics calculated from 1989 FALÜ NIANJIAN, *supra* note 30, at 1081-82, and from Zheng Tianxiang (Chief Justice of The Supreme People's Court), Zuigao Renmin Fayuan Gongzuo Baogao (Work Report of The Supreme People's Court), 1988 ZUIGAO FAYUAN GONGBAO No. 2, at 3 (1988), *reprinted in* 1989 FALÜ NIANJIAN, *supra* note 30, at 750.

34. For a notorious example of how the judicial system was bent in the service of the state, i.e., the judiciary's approval of government actions in the Tiananmen Incident and subsequent persecution of dissidents, see generally *Supreme [People's] Court Issues Circular on Speedy Trials, trans. in* Foreign Broadcast Information Service—Daily Report, China, June 21, 1989, at 15 [hereinafter FBIS—China] (expedited trials ordered for serious criminal offenders and counter-revolutionaries); Dicks, *The Chinese Legal System: Reforms in the Balance*, 119 CHINA Q. 540, 573-74 (1989).

instrumental and hence very limited.[35] Furthermore, in the immediate aftermath of the June 1989 events, uncertainty over the PRC's commitment to greater reliance on the rule of law clouded the prospects for trade and investment. Although foreign investment has once again increased,[36] the uncertainty remains.

B. *The Chinese Legal Definition of Force Majeure*

1. Choice of Terminology

The concept of force majeure in the PRC closely follows the French or continental choice of language. As noted at the outset of this paper,[37] force majeure connotes a superior or irresistible force. The Chinese terminology adopts this choice of words. Thus, the Chinese phrase "*bu ke kang li*" literally means, in order of the characters, "not-possible-resist-force" or, more felicitously, "irresistible force."[38] This indicates that Chinese doctrine is narrowly drawn to focus only on external contingencies that affect performance, and will not excuse nonperformance arising from the occurrence of events preventing achievement of the purpose or goal intended by the nonperforming party at the time of the agreement.[39]

Force majeure provisions have been incorporated into all of the PRC's statutes governing contract law. However, the language employed has varied both in degree of specificity and in content. This article will examine the force majeure provisions in each of China's contract laws. Unfortunately, because these statutory provisions are

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35. The subject of the rule of law in China is the subject of an as yet untitled collection of essays under the editorship of Karen Turner, William P. Alford, Mary Buck and James V. Feinerman. *See also* LAW MAKING IN THE PRC, *supra* note 15, at 25-29.

36. McGregor, *Success Stories in China Stay Untold As U.S. Firms Strive for Low Profiles*, Wall St. J., Nov. 7, 1991, at A11, col. 1.

37. BLACK'S LAW DICTIONARY, *supra* note 7 and accompanying text.

38. For dictionary definitions, see P. BILANCIA, DICTIONARY OF CHINESE LAW AND GOVERNMENT: CHINESE-ENGLISH 506 (1981); CHINESE-ENGLISH INTERNATIONAL TRADE DICTIONARY 50 (Xie Tao & Sun Jie eds. 1987); FAXUE CIDIAN (A Dictionary of Jurisprudence) 86 (1988); JINGJI FA CIDIAN (A Dictionary of Economic Law) 40 (1987); XIANDAI SHIYONG MINFA CIDIAN (A Modern Practical Civil Law Dictionary) 24 (Jiang Ping & Wu Changshen eds. 1988).

39. On frustration, see RESTATEMENT (SECOND) OF CONTRACTS § 265 (1981); E. FARNSWORTH, *supra* note 12, at 705; *see also* discussion of impracticability and frustration, *infra* pp. 89-95. *Cf.* Zhao, *supra* note 6, at 41, stating that the Foreign Economic Contract Law of the People's Republic of China (adopted Mar. 21, 1985), *trans. in* J. COHEN, CONTRACT LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 165 (1988) [hereinafter FECL], may embrace the concept of frustration, but failing to cite supporting authority.

very general, they provide little guidance as to their practical operation. A modest amount of clarification can be found in the few Chinese law journal articles discussing force majeure.[40] Perhaps the most helpful information about force majeure in China comes from observing and analyzing actual cases in which force majeure has been invoked. A later section of this paper will discuss a few such cases.[41] Nevertheless, the statutory provisions are the best starting point from which to commence an analysis of force majeure in China.

2. The General Principles of the Civil Law

In the PRC, "basic laws" refer to major codes and organic laws that provide the basis and parameters for more specific laws and regulations, but for the most part do not themselves provide operational definitions for key terms, or the detail required of specific laws and policies for enforcement and adjudication.[42] In the realm of contractual obligations, the applicable basic law is The General Principles of the Civil Law of the People's Republic of China[43] (the "General Principles").

The applicable provisions of the General Principles establish liability for breach of contract, but also excuse nonperformance that is due to force majeure.

> *Article 106* Citizens and legal persons that breach a contract or that do not perform other responsibilities shall bear civil liability thereof. . . .
>
> *Article 107* Unless otherwise stipulated by the law, no civil liability shall be borne for the inability to perform a contract or for harm caused to others due to force majeure. . . .

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40. *See* sources cited *supra* note 6.

41. *See* discussion *infra* pp. 95-102.

42. For a description of the various types of laws and regulations in the PRC, see LAW MAKING IN THE PRC, *supra* note 15.

43. Zhonghua Renmin Gongheguo Minfa Tongze (The General Principles of the Civil Law of the People's Republic of China) (adopted Apr. 12, 1986), in 1986 ZHONGHUA RENMIN GONGHEGUO FALÜ HUIBIAN, *supra* note 30, at 26 [hereinafter General Principles], *trans. in* J. COHEN, *supra* note 39, at 29, 43. *See also* Zuigao Renmin Fayuan Yinfa "Guanyu Guanche Zhixing 'Zhonghua Renmin Gongheguo Minfa Tongze' Ruogan Wenti de Yijian (Shixing)" de Tongzhi (Supreme People's Court Circular on Opinions (Draft) on Some Problems Affecting the Actual Implementation of The General Principles of the Civil Law of the People's Republic of China), 1988 ZUIGAO FAYUAN GONGBAO No. 2, at 16 [hereinafter Supreme Court Circular].

. . . .

Article 153 The term "force majeure" as referred to in this law means objective circumstances that are unforeseeable, unavoidable and insurmountable.[44]

The General Principles thus create an objective rather than a subjective test for the presentation of a force majeure defense. The test is three-pronged: unforeseeability, unavoidability and insurmountability, all of which are described as "*bu neng*", i.e., "inability" conditions.[45] In the absence of any authoritative guidance by the Supreme People's Court on interpretation of these provisions of the statute, the General Principles do not specify the burden of proof borne by a party invoking a force majeure defense or address the dimensions of unforeseeability, including whether government acts or other man-made events, as well as the consequences of natural forces, qualify as force majeure events.[46] Similarly, the General Principles do not address the scope of conditions defining unavoidability, such as whether government acts would be sufficiently external so as to be defined as unavoidable. Moreover, the General Principles do not specify the standard by which the term "insurmountability" is defined. While insurmountability implies impossibility, the General Principles do not indicate whether the term's scope is limited to physical impossibility or whether it also embraces economic impracticability. While these problems might be of small concern if the issue was satisfactorily addressed by more specific statutes, China's contract laws in fact provide only limited additional guidance on the conditions defining force majeure.

44. General Principles, *supra* note 43.

45. Other jurisdictions also apply an objective test. *See, e.g.*, United States v. Brooks-Callaway Co., 318 U.S. 120, 123-24 (1943) (only "unforeseeable" events outside the control and without the fault of the party are eligible for force majeure status); Nissho-Iwai Co. v. Occidental Crude Sales, Inc., 729 F.2d 1530, 1540 (5th Cir. 1984) (California law imposes a "reasonable control limitation" on each specified event in which nonperformance is excused subject to two conditions: "good faith in not causing the excusing event and diligence in taking reasonable steps to ensure performance."), *appeal after remand*, 848 F.2d 613 (5th Cir. 1988).

46. *See* Feng Datong, *supra* note 15, at 49; Yang Zhenshan, *supra* note 15 at 58.

3. The Economic Contract Law

a. Substantive Law

Domestic contracts are specifically governed by The Economic Contract Law of the People's Republic of China[47] (the "ECL"). This statute provides only modest additional guidance on the meaning of force majeure in Chinese law, but substantially more information on the procedural requirements for invoking a force majeure defense.

> *Article 27* It shall be permissible to modify or rescind an economic contract if any one of the following situations occurs:
> (1) If both parties agree through consultation, and if such modification or rescission would not damage the interests of the State or affect the implementation of the State plan;
> (2) If the state plan on the basis of which the economic contract was concluded is amended or canceled;
> (3) If one party closes down, stops production or changes its line of production and truly has no means of performing the economic contract;
> (4) If force majeure or some other cause that a party, although not negligent, cannot prevent makes it impossible to perform the economic contract; or
> (5) If the breach of contract by one party makes performance of the economic contract unnecessary.
>
> When one party requests modification or rescission of an economic contract, it shall promptly notify the other party. If one party suffers losses due to modification or rescission of an economic contract, the party that is responsible, except when it may be excused from liability according to the law, shall be liable to pay compensation.
>
> If one party is merged or divided, the party or parties resulting from the change shall assume or severally assume the obligation to perform the contract and shall enjoy its or their due rights under the contract.

47. The Economic Contract Law of the People's Republic of China (adopted Dec. 13, 1981), art. 27(4), *trans. in* J. COHEN, *supra* note 39, at 49 (1988) [hereinafter ECL].

. . . .

Article 32 If, due to the fault of one party, an economic contract cannot be performed or cannot be fully performed, the party at fault shall be liable for breach of contract; if both parties are at fault, in accordance with the actual conditions, each party shall be commensurately liable for the breach of contract that is its responsibility. . . .

Article 33 If, due to the fault of higher-level leading authorities or the specialized department in charge, an economic contract cannot be performed or cannot be fully performed, the higher-level leading authorities or the specialized department in charge shall bear liability for breach of contract. The breaching party shall, in accordance with provisions, first pay the other party breach of contract damages or compensatory damages, and then the higher-level leading authorities or the specialized department in charge that should be liable shall be responsible for dealing with the matter.

Article 34 If a party cannot perform an economic contract due to force majeure, it shall promptly notify the other party of the reason why it cannot perform or why it needs an extension of the time for performance or for part performance of the economic contract.

After it has obtained a certificate from the relevant authorities in charge, it shall be permitted to extend the time for performance or part performance or not to perform, and it may, in accordance with the circumstances, be partly or completely excused from liability for breach of contract.[48]

There are several notable elements in these sections of the ECL regarding excuse for nonperformance. First, Article 27 recognizes the merit of modifying or rescinding a contract if the basic assumptions in place at the time the contract was executed no longer apply. There is, however, no obligation on the parties to modify or rescind the contract. Rather, the right of a party to modify or rescind a contract under Article 27(1) is permitted ("*yunxü*") subject to the agreement of the other party. If the other party does not agree to modify or rescind the

48. *Id.* arts. 27, 32-34.

contract in response to changed conditions, then the courts must enforce an otherwise valid original contract.[49]

However, the issue of whether to enforce the original contract versus modification or rescission is not always solely a matter of choice for the other party. Were this so, there would be no apparent reason for distinguishing between Article 27(1), which alone provides for voluntary modification or rescission, and the later subsections of Article 27 which allow judicial modification or rescission without the consent of the party or parties. In fact, Article 27(2), (3) and (4) permit modification or rescission without the consent of the victimized party. While these subsections apply primarily to external factors, as shown below, they do not altogether exclude internal or subjective causes of breach.

Second and more importantly, a party may gain contract modification or rescission under Article 27(2) if the state plan is amended. Presumably, large and influential state agencies and enterprises are more likely to be able to seek changes in the state plan beneficial to their interests than are weaker entities. Consequently, an influential party may be able to get its contracts modified or rescinded pursuant to Article 27(2). Alternatively, modification or rescission may arise when state policy is changed in response to widespread problems affecting many contracts.

Articles 27(2) and 33 recognize that nonperformance may result not from the fault of either of the parties, but rather from a change in the state plan or a change imposed by the supervising agency. These provisions signify recognition of the strong, often decisive role played by bureaucratic controls or commands in the Chinese economy, a factor which declined in importance after Mao Zedong's death, but which has increased in importance since late 1988, and especially, since the summer of 1989.[50] Article 33, while absolving the party in

49. Yang Zhenshan, *supra* note 15, at 54.

50. Examples of tighter bureaucratic controls are a reduction in the number of enterprises authorized to conduct trade directly with foreign companies, reestablishment of exclusive control by the Ministry of Foreign Economic Relations and Trade over 12 categories of goods imported through its central trading companies (grain, sugar, steel, chemical fertilizer, plastic sheeting for agricultural use, crude and refined oil, timber, polyester fiber, tobacco, cotton, and chemical pesticides), higher import quality standards, and tighter requirements for import licenses. *Recentralizing Trade*, CHINA BUS. REV., Sept.-Oct. 1989, at 4. Some 3 million small private and collective entities were shut down.

Many other restrictions have been imposed on domestic business entities, especially in the form of more stringent business licensing requirements and stricter controls on access to bank credit.

For a brief discussion of Article 33 of the ECL, see Leung, *Legal Concepts Under Chinese* breach of any liability for nonperformance arising from certain acts by government, also serves to protect the interests of the victim of the breach by mandating compensation by the party in breach, with the agency in charge subsequently reimbursing the party in breach. Because Article 27(2) only applies to certain categories of policy changes or administrative interventions, it is not directly comparable to a pure excuse provision like force majeure. It is, nevertheless, of great interest because it signifies legislative recognition of the supervening force of changes in the state plan or government policy. However, the statute does not state and no authority has indicated how specific or direct the change in state plan or policy must be in order to excuse performance by a party to a contract, or the circumstances under which liability rests on the supervising state agency rather than the party in breach.

Note, moreover, that only Article 33 provides for damages to the injured party arising from an involuntary breach or external cause. Breaches arising merely from amendments to the state plan do not create liability for damages. Thus, an injured party is eligible for damages only if the breach is attributable to the actions of a particular department of government that exceeded its executive or supervisory discretion with regard to the enterprise or other entity that is in breach. In such instances, the party in breach appears to bear the burden of proving fault by the government agency, which indicates that the supervisory agency action in question must be *ultra vires*. The party in breach will, of course, be liable for damages under Article 32 if the breach arises from its own fault.

It also should be noted that inefficiency in state enterprises is a chronic problem in the PRC. If Chinese courts were to apply Article 33 in a flexible manner that expanded the grounds for culpability by state authorities or supervising departments, even to the extent of excusing enterprise inefficiency, it is possible that incentives for enterprise management to increase efficiency and reduce losses would diminish.[51] Empirical work is needed to determine both the importance of compensation by supervisory agencies and the degree to which enterprises are able to cloak their inefficiency as compensable losses.

Third, Article 27(3) excuses nonperformance on grounds of impossibility arising from a party's closure, suspension of operations or change in product line. Article 27(3) apparently is intended to

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Law, INT'L FIN. L. REV., Jan. 1986, at 16, 17; Huang Xin, *supra* note 15.

51. Huang, *Web of Interests and Patterns of Behavior of Chinese Local Economic Bureaucracies and Enterprises During Reforms*, 123 CHINA Q. 431, 449-50 (1990).

address changes in production capacity arising from a state-ordered closure, change of product line or withdrawal of business license for reasons such as restructuring of industry, land condemnation or pollution control. It is not intended to excuse a voluntary suspension of production.[52] As noted at the end of Article 27, the obligation to perform is not excused by the merger or division of a party. Rather, the obligation is assumed by the surviving entity. However, the provision does not exclude decisions by government officials responsible for enterprise management, as well as general policy, or decisions shaped by the enterprise through the exercise of informal influence ("*guanxi*") to close down, suspend production or alter the enterprise's product line. Nor does the provision indicate which party bears the burden of proof regarding impossibility. Therefore, Article 27(2) appears to create latitude for subjective impossibility or impracticability as well as for objective or external impossibility.

Fourth, Article 27, the modification and rescission article, indicates that the victim of a modification or rescission shall be entitled to compensation "except when [the party that is responsible] may be excused from liability according to the law." Because Article 27(4) includes a treatment of force majeure, this language suggests that a victim of modification or rescission attributable to force majeure may be entitled to compensation under some circumstances. This is curious because a successful force majeure defense absolves the party in breach of liability for losses attributable to the event, as provided in Article 34.[53] The juxtaposition of compensation language with force majeure in Article 27 appears to be a product of imprecise drafting in which the force majeure subsection, Article 27(4), is lumped together with other subsections under which a party may be entitled to compensation because reform or rescission arises from the fault of the party in breach or from certain acts of the state.[54] The problem could have been avoided by the use of a contrast conjunction such as "*keshi*" or "*danshi*" ("but" or "however") to distinguish the propositions. In any event, the "excused from liability according to the law" provision of Article 27 appears to serve as a safe harbor for parties invoking force majeure even if the precipitating event results in a modification

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52. *Cf.* Suburban Newspapers of Greater St. Louis, Inc. v. Kroger Co., 886 F.2d 1060, 1061 (8th Cir. 1989) (force majeure does not excuse nonperformance of a long-term contract by a party which deliberately reduces operations by closing its stores).

53. *See, e.g.*, Archibald, *France*, in COMPARATIVE REPORT ON FORCE MAJEURE IN WESTERN EUROPE, *supra* note 10, at 56, 57.

54. *Cf.* Leclerq, *supra* note 6, at 238-39, where Article 27(3) of the ECL is analyzed without reference to Article 34.

or rescission of the contract.

Fifth, Articles 27(4) and 34, the force majeure provisions, are notably silent on the definition of force majeure. Indeed, Article 27(4) includes the intriguing conjunct "force majeure or or some other cause that a party, although not negligent, cannot prevent" without providing any guidance whatsoever on which grounds, other than force majeure, would excuse nonperformance due to impossibility. It also should be noted that domestic regulations, issued in conformance with the ECL, contain force majeure provisions. These provisions, however, do not provide any additional substantive detail on the meaning of force majeure.[55]

b. Procedures for Invoking Force Majeure

Although Articles 27(4) and 34, the force majeure provisions, supply no additional substance to Chinese force majeure law, Article 34 sets forth the procedural requirements for invoking force majeure. Specifically, the party in breach is required not only to notify its counterpart to the contract, but also to secure a certificate from the relevant state agency attesting to the occurrence of and presumably also to the extent of a force majeure event.

All commentators to date contend that the certification of force majeure events is performed by the local notariats[56] which are distributed throughout the country at and above the county level.[57] These observers have noted that the role of the notariats presents major procedural questions.[58] The first concern is that if the notariat does not certify a force majeure event, then it would appear that a party may be unable to exercise the force majeure provision, at least not without bringing suit against the notariat for failure to act under the new Administrative Procedure Law of the People's Republic of China

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55. *See, e.g.*, Regulations on Contracts for the Purchase and Sale of Agricultural By-products (1984), art. 16, *trans. in* J. COHEN, *supra* note 39, at 61, 65; Regulations on Contracts for the Purchase and Sale of Industrial and Mineral Products (1984), art. 38, *trans. in* J. COHEN, *supra* note 39, at 69, 81.

56. Chang & Olofsson, *supra* note 6, at 16; Gelatt & Bates, *supra* note 6, at 13.

57. In 1989, China had 2,914 notariats staffed by 9,408 notaries and 2,515 assistant notaries. 1990 TONGJI NIANJIAN, *supra* note 3, at 812. On regulations governing the notariats, see Zhonghua Renmin Gongheguo Gongzang Zanxing Tiaoli (Interim Regulations of the People's Republic of China on Notarization) (promulgated Apr. 13, 1982), in 2 ZHONGGUO DUIWAI JINGJI FAGUI HUIBIAN (Compendia of China's Foreign Economic Legislation) 119 (1986). *See also* Chen, *The Chinese Notariat: An Overlooked Cornerstone of the Legal System of the People's Republic of China*, 35 INT'L & COMP. L. Q. 63 (1986).

58. Chang & Olofsson, *supra* note 6, at 16; Gelatt & Bates, *supra* note 6, at 12-13.

(1989),[59] the effectiveness of which remains to be demonstrated.

The second concern is that to the extent to which a local notariat enjoys substantial discretion which can be exercised to the detriment of the foreign, non-local or weaker party in the certification of force majeure events, a notariat might, for example, be reluctant to certify a force majeure event because the party seeking certification is unpopular with the local authorities for unrelated reasons, such as tax disputes or conflicts over the supply of raw materials. Alternatively, a local notariat may refrain from certifying a widespread event as force majeure lest such certification lead to the political embarrassment of local officials. Conversely, a local notariat may relax its conditions for certifying an event if the party is popular or if the local government perceives advantages in terms of excusing breaches by local enterprises in general. In any event, the requirement for certification appears to vest the notariat with a power for which it has no demonstrated expertise, and simultaneously to limit a party's access to judicial or arbitral relief.

However, contrary to prevailing belief, the notariats actually do not perform any significant role in the certification of force majeure events,[60] a role for which they would indeed be singularly ill-equipped.[61] Rather, another procedure is followed. First, the party in

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59. Zhonghua Renmin Gongheguo Xingzheng Susong Fa (The Administrative Procedure Law of the People's Republic of China) (promulgated Apr. 4, 1989), 1989 GUOWUYUAN GONGBAO 297. This statute is analyzed in Finder, *Like Throwing An Egg Against A Stone? Administrative Litigation in the People's Republic of China*, 3 J. CHINESE L. 1 (1989). *See also* Gu Angran, *Xingzheng Susong Fa de Zhiding dui Wo Guo Shehuizhuyi Minzhu Zhengzhi he Fazhi You Zhongda Yiyi* (The Enactment of the Administrative Procedure Law of the People's Republic of China Has Enormous Significance for the Socialist Democracy and Legal System of China), 1989 ZHONGGUO FAXUE No. 3, at 3; He Shan, *Xingzheng Jiguan Qinquan Peichang Zeren Xingzhi Chuyi* (Preliminary Comments on the Nature of Liability for Compensation for Torts of Administrative Organs), 1989 ZHONGGUO FAXUE No. 3, at 18; Zhang Shangzhuo, *Shilun Wo Guo de Xingzheng Susong Zhidu he Xingzheng Susong Fa* (A Preliminary Discussion on China's Administrative System and Administrative Procedure Law), 1989 ZHONGGUO FAXUE No. 1, at 3; Zhang Shuyi, *"Xingzheng Susong Fa (Caoan)" Ruogan Zhenglun Wenti Zai Sikao* (Reflections on Some Controversial Issues Concerning the "Administrative Procedure Law (Draft)"), 1989 FAXUE No. 3, at 8; Potter, *Administrative Litigation Law May Offer Some Protection Against Abuse of Power*, E. ASIAN EXEC. REP., Nov. 15, 1990, at 9.

60. *See* commentators cited *supra*, note 6. Commentators may have been misled by the term certification which ordinarily is considered a notarial function. *See* The Law of Civil Procedure of the People's Republic of China (promulgated Oct. 1, 1982), art. 59, *trans. in* Joint Pub. Research Serv., China Report: Political, Sociological and Military Affairs, Mar. 22, 1982, No. 282, at 32.

61. Interview with Ji Ganghe, Chairman of the Research Office, Chen Zhong, Deputy Chief of the Basic Level Service Section, Li Baoyu, Chief of the Foreign Section of the Notariat, Jinan (Shandong) Municipal Justice Bureau, and Wang Guangren, Law Advisor to the Jinan Municipal Government and Director of the Jinan Foreign Lawyers' Office, in Jinan

breach must promptly notify the other party to the contract so that the latter may elect to suspend its own performance or participate in the investigation of the event. Failure to notify the other party deprives it of any opportunity to determine the existence and magnitude of a force majeure event, which may negate the right of the first party to invoke a force majeure defense.

Second, certification is performed, if at all, by the relevant agency at the applicable level of government, as indicated by the phrase, "relevant authorities in charge," in Article 34.[62] Thus, alleged traffic accidents and fires will be investigated and, if confirmed, certified by the public security bureau, just as earthquakes are the responsibility of the seismology bureau and agricultural calamities are within the domain of the agriculture bureau. Complex events transcending administrative boundaries will be jointly investigated by the relevant agencies and then may be certified by the local government rather than by the agencies themselves. All parties, including the party not in breach, have the right to observe the investigation. Furthermore, procedures have been substantially tightened regarding the reporting of disasters to the central government.[63]

Third, although formal certification is required by Article 34, a court may not insist on certification, although it may be expressly required by contract. Thus, the existence of an agricultural calamity resulting in widespread crop losses ordinarily will be a matter of common knowledge and may not require certification by the court. Moreover, a party may plead force majeure even without the benefit of certification. However, its burden of proof will be correspondingly higher. Thus, farmers merely pleading "poor harvest" as their excuse for nonpayment of their sharecropping or land use fees specified in production guarantee contracts appear to have little chance for success in the absence of certification because such farmers are unable to

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(Shandong) (Dec. 30, 1989) [hereinafter Interview with Ji Ganghe]; Interview with Sun Situn, Chief Notary, Nie Zhenluan, Deputy Chief Notary, and Yuan Donglin, Section Chief, Zibo (Shandong) Municipal Notariat, in Zibo (Shandong) (Jan. 18, 1990); Interview with Zhao Jirang, Chair of the Zouping County (Shandong) Legal Advisor's Office, in Zouping Co. (Shandong) (Jan. 9, 1990). There is no reason to believe that procedures in Shandong, the venue for the field research reported here, differ from those found elsewhere in the country.

62. ECL, *supra* note 47, art. 34.

63. Guowuyuan Bangongting Guanyu Tebie Zhongda Shigu Baogao Gongzuo Youguan Wenti de Tongzhi (State Council Office Circular on Some Questions Concerning the Work of Reporting Disasters) (adopted June 5, 1990), 1990 GUOWUYUAN GONGBAO 505; Tebie Zhongda Shigu Diaocha Chengxu Zanxing Guiding (Provisional Regulations on Investigation Procedures for Disasters) (adopted Mar. 29, 1989), 1989 GUOWUYUAN GONGBAO 325. There is no mention of notariats in either document.

prove that the shortfall was due to external causes.[64] Conversely, farmers' chances of obtaining an excuse from liability for breach are much better if they can cite a widespread agricultural calamity as the cause for their poor harvest.[65]

4. The Foreign Economic Contract Law

Fortunately, The Foreign Economic Contract Law of the People's Republic of China[66] (the "Foreign Economic Contract Law" or "FECL"), which governs contracts between Chinese parties and foreign parties, provides substantially more guidance on the meaning of force majeure.

> *Article 24* When a party cannot perform all or part of its contractual obligations because of an event of force majeure, it shall be fully or partially relieved from liability.
>
> When a party cannot perform in accordance with the contractually agreed time periods because of an event of force majeure, it shall be relieved of liability for delayed performance during the period of continued influence of the effects of the event.
>
> An event of force majeure means an event that the parties could not foresee at the time of conclusion of the contract and the occurrence and effects of which cannot be avoided and cannot be overcome.
>
> The scope of events of force majeure may be agreed to in the contract.
>
> *Article 25* When one party cannot perform all or part of its contractual obligations because of an event of force majeure, it shall promptly inform the other party in order to diminish the losses that might be caused to the other party, and it must within a reasonable period provide evidence issued by the

64. Interview with Zhao Jirang, *supra* note 61.

65. Zuigao Renmin Fayuan Guanyu Shenli Nongcun Chengbao Hetong Jiufen Anjian Ruogan Wenti de Yijian (Supreme People's Court Opinion on Some Problems in the Trial of Cases Involving Disputes over Rural Production Responsibility Contracts) (Apr. 14., 1986), para. 5, *reprinted in* 1987 FALÜ NIANJIAN, *supra* note 30, at 591.

66. FECL, *supra* note 39. *See also* Zuigao Renmin Fayuan Guanyu Shiyong "Shewai Jingji Hetong Fa" Ruogan Wenti de Jieda (Supreme People's Court Circular on Some Questions Involving Application of "The Foreign Economic Contract Law") 1987 ZUIGAO FAYUAN GONGBAO No. 4, at 3 [hereinafter Circular on Some Questions].

relevant agency. . . .

. . . .

Article 29 In any one of the following circumstances, a party shall have the right to inform the other party of the rescission of the contract:

(1) The other party has breached the contract, to the extent that such breach has seriously affected the economic benefits expected when concluding the contract;
(2) The other party has not performed the contract during the period agreed to in the contract, and has still not performed within a reasonable time period allowed for delayed performance;
(3) An event of force majeure has occurred, with the result that none of the contractual obligations can be performed; or
(4) The conditions agreed on in the contract for rescission of the contract have arisen.[67]

Thus, the FECL defines an event of force majeure in Article 24 as an event that is (1) unforeseeable as of the time when the contract was executed; and (2) the effects of which are (a) unavoidable and (b) insurmountable by the party or parties to the contract. Furthermore, the parties may stipulate the scope of force majeure events in the contract to suit their particular requirements.

Nevertheless, the statute still contains several areas of ambiguity. Most notably, the statute provides that the parties may stipulate the scope of events qualifying as force majeure, yet at the same time defines a force majeure event as unforeseeable and hence incapable of stipulation at the time when the contract was executed. This may enable a party to invoke force majeure even for an event that is not stipulated in the force majeure clause of its contract on the grounds that the actual event is analogous to an event that was stipulated in the contract; that the parties intended to stipulate the event but mistakenly failed to do so; or, more radically, that the parties would have stipulated the event but were incapable of doing so because of its inherent unforeseeability. The other party can, of course, also present extrinsic evidence in this instance to prove that the events were

67. FECL, arts. 24, 25, 29.

foreseeable or that the omission was the product of mutual agreement. The Chinese party to such contracts often has an advantage in this regard because its delegation typically includes assiduous note-takers on the content of the negotiations, unlike the foreign party which is more likely to limit its concern to the items agreed upon in the contract.[68] Thus, the foreign party is less likely to be able to present reliable extrinsic evidence on the scope of items which the parties agreed to include or omit from the contract.

The statute also refers to unavoidability.It does not, however, specify whether an event attributable to a party's government, such as the denial or suspension of an essential license or access to foreign exchange, is an unavoidable event from the perspective of a party. Another issue is what effect state ownership has on a party in such circumstances. Such questions are left unanswered by the statute.

The statute also defines a force majeure event as an event the effect of which a party cannot overcome. The Chinese adverb is *bu neng*, or "unable". The statute does not, however, distinguish between impossibility of performance and its more modern variant in commercial law, impracticability of performance.[69] In the former, performance must be rendered physically impossible through no fault of the party, while in the latter, nonperformance attributable to external causes may be excused on the less rigorous grounds that performance would be financially calamitous even though physically possible.

In addition, in the same manner as its domestic counterpart, the ECL, the FECL requires that a party invoking force majeure provide "evidence issued by the relevant agency" that a force majeure event has occurred. As previously noted, the certifying agency in China is not the local notariat, but rather, the agency with the substantive authority regarding the specific type of event.[70] Nevertheless, there are grounds for concern regarding the impartiality of such agencies. Would the Ministry of Public Security, the Ministry of Justice or the Ministry of Civil Affairs, as the agency or agencies concerned, decline to certify a politically embarrassing incident of civil disorder or domestic insurrection as a force majeure event, even if the parties have included such events within the scope of their force majeure clause, for fear of

68. Randt, *Negotiating Strategy and Tactics*, in U.S.-CHINA TRADE: PROBLEMS AND PROSPECTS 271, 274 (E. Lawson ed. 1988).

69. *See* discussion of impracticability, *infra* pp. 89-95. E. FARNSWORTH, *supra* note 12, at 677. *Cf.* Zhao, *supra* note 6, at 41 (asserting that Article 24 of the FECL seems to embrace impracticability as well as impossibility, but failing to cite supporting authority). For a translation, see P. BILANCIA, *supra* note 38, at 507.

70. *See supra* notes 60, 61 and accompanying text.

acknowledging the existence and scope of domestic dissent? Indeed, the Chinese government has a built-in incentive to refrain from certifying events as force majeure because such certification may excuse foreign investors of their contractual duties to supply staff members and capital to projects within China, activities which not only promote economic development, but also provide substantial revenue directly to the host government through rents, taxes and service charges administered by various agencies, particularly the Ministry of Foreign Economic Relations and Trade and its subordinate, the Foreign Enterprises Service Corporation.

Some foreign parties, particularly during the June 1989 Tiananmen Incident when large numbers of foreign business personnel temporarily evacuated China, have attempted to circumvent this obstacle by having their national embassy or business council, or the embassy or business council of the contractual choice of law state, certify that an event of force majeure has occurred in China.[71] Embassy certification might suffice to excuse performance due to a foreign government's evacuation advisory to its nationals. There is no indication, however, that a Chinese tribunal hearing a force majeure case would accept certification by a non-Chinese agency regarding an event that actually took place in China.

The Supreme People's Court has not provided any public guidance on the construction of the force majeure provisions of the FECL, nor has it apparently issued any opinions or circulars on this matter. There also do not appear to be any extensive commentaries in law reviews on this subject.

One brief commentary states that the language of Article 24 requires that an alleged force majeure event must satisfy the criteria noted above, i.e., (1) unforeseeability, (2) externality, and (3) both unavoidability and insurmountability.[72] Although this commentary does not resolve the ambiguities described earlier, it supplies some minor additional clarification in the form of examples of events qualifying as force majeure. Specifically, the scope of force majeure events is said "unquestionably" not to be limited to natural disasters. Rather, force

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71. Chang & Oloffson, *supra* note 6, at 16.

72. Gongshang Zixun Fuwu Ban Bianzhe (Industrial and Commercial Advisory Service Page Editor), *Zhongguo Shewai Jingji Hetong Fa Zhong de "Bu Ke Kang Li" Shijian Ying Ruhe Lijie* (How to Understand Events of "Force Majeure" in the Foreign Economic Contract Law of China), JINGJI DAOBAO (Economic Reporter), Aug. 26, 1985, at 42 [hereinafter *How to Understand Events of "Force Majeure"*], *cited in* H. ZHENG, *supra* note 6, at 68. *See also* GU WEI, FU QILIN & QI ANG, SHEWAI JINGJI FA (Foreign Economic Law) 127-28 (1989) [hereinafter GU, SHEWAI JINGJI FA].

majeure also includes man-made calamities, such as wars and severe domestic turmoil.[73] Governmental action like the denial of import or export licenses, an amendment of the economic plan in a planned economy, labor strikes, and other products of human action or inaction might also qualify as force majeure events even though, it should be noted, these are not inherently external events. The commentary adds that the decision must be made according to the facts of each case, placing particular emphasis on the dimension of unforeseeability. Thus, a denial of a license by the government according to a decree in existence at the time when the contract was executed is foreseeable and, hence, would not qualify as a force majeure event. Conversely, a denial of a license resulting from a government decree subsequent to the execution of a contract would qualify as a force majeure event.[74] The commentary adds that labor strikes are generally unlikely to qualify as force majeure events because they are likely to be preventable or avoidable.

In sum, the commentary acknowledges that man-made events and acts of government may qualify as force majeure events. In so doing, however, the commentary appears to reflect a bias in favor of contingencies more likely to affect Chinese parties, such as government interference and changes in economic plans, while exhibiting some, but not absolute, hostility to events like labor strikes that, at least until recently, were more likely to hamper economic performance in free market economies than in controlled economies.

5. The Joint Venture Law

The Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures[75] (the "Joint Venture Law"), which applies to

73. GU, SHEWAI JINGJI FA, *supra* note 72. *See also* WANG JINGAN, XUKEZHENG HETONG (Licensing Contracts). For contracts embodying such provisions, see *Boliheng Gangtie Chukou Gongsi (Maifang) CIF he C&F Xiaoshou de Yiban Tiaokuan* (Bethlehem Steel Export Corporation (Seller) General Conditions of Sale C.I.F. and C. & F.), in SHEWAI JINGJI HETONG SHIWU (Practise of Foreign Economic Contracts) 65, 73 (Chinese-English version) (Wei Jiaju Chinese-English ed. 1989); *Weisidinghaosi Dianzi Gongsi Yiban Xiaoshou Tiaojian* (Westinghouse Electric Corporation General Conditions of Sale), in SHEWAI JINGJI HETONG SHIWU, *supra*, at 79, 86.

74. *How to Understand Events of "Force Majeure"*, *supra* note 72.

75. JV Law, *supra* note 13; 1990 Amendments, *trans. in* E. ASIAN EXEC. REP., Apr. 15, 1990, at 24. The 1990 statute is a revision of the 1979 statute published in 1979, *trans. in* J. COHEN, *supra* note 39, at 170. The 1990 version involves housekeeping rather than substantive amendments. The two versions of Article 13 of the JV Law are identical except that the current version is more concise and incorporates the current names of government organs. For analysis

longer term ventures than most sales contracts,[76] also includes a force majeure provision.

> *Article 13* In cases of heavy losses in a joint venture, failure of a party to fulfill the obligations stipulated in the contract and the articles of association, force majeure and so forth, the contract may be terminated through consultation and agreement by the parties to the venture, subject to approval by the organ that approved the application to form the joint venture and to registration with the State Administration of Industry and Commerce. In cases of losses caused by a breach of contract, economic responsibility shall be borne by the party that has breached the contract.[77]

This statute provides no additional guidance regarding the meaning of force majeure, except that the use of the term "*deng*" ("and so forth") establishes an open-ended set of events allowing excuse for nonperformance.[78] Moreover, by treating force majeure in the same

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of the 1979 version, see S. HOOD, K. HERBST & G. LAU, EQUITY JOINT VENTURES IN THE PEOPLE'S REPUBLIC OF CHINA (1986); for analysis of the 1990 amendments, see Robertson & Chen, *New Amendments to China's Equity Joint Venture Law: Changes Unlikely to Stimulate Foreign Investment*, E. ASIAN EXEC. REP., Apr. 15, 1990, at 9, 12.

76. Equity joint ventures may now last for unlimited terms, in contrast to the former maximum length of 50 years. *Interim Provisions on Duration of Chinese-Foreign Joint Ventures*, E. ASIAN EXEC. REP., Nov. 15, 1990, at 26; Bersani, *Some PRC Joint Ventures Granted Unlimited Terms*, E. ASIAN EXEC. REP., Nov. 15, 1990, at 9.

77. JV Law, art. 13.

78. While "*deng*" as used here appears to apply to all enumerated contingencies rather than force majeure alone, its use suggests that there may be other, unenumerated excuses for nonperformance. This usage appears to be an example of the ejusdem generis doctrine. Consider the following provisions from, first, a sample form contract and, second, an actual contract:

> *Article 57* When the performance of this Contract is directly affected or this Contract cannot be performed according to the agreed terms because of earthquake, typhoon, flood, fire, war and other events of force majeure that are unforeseeable and the occurrence and consequences of which cannot be prevented or avoided, the party that encounters the above-mentioned events of force majeure shall immediately inform the other party of the circumstances of the event by telegram and, within 15 days, provide details of the event, together with a valid certificate evidencing the reasons for which this Contract cannot be performed or cannot be performed in part or for which performance needs to be delayed.

> *Article 15:* Force Majeure
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> 15.1 If the conditions of Force Majeure shall prevail for a period in excess of nine (9) months, then either party, or either member of the JVC (Joint Venture Company), may cancel this Agreement, the JVC, and all other related agreements, by notice by registered airmail to the other party without any other formality.

article as breach, the Joint Venture Law, in the same manner as Article 27(4) of the FECL, appears to equate the two types of nonperformance. As noted earlier, this potentially anomalous result could have been avoided by the use of a contrast conjunction, but is resolved elsewhere in the FECL.

Of greater assistance, however, are the more detailed companion Regulations for the Implementation of the Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures[79] (the "Joint Venture Regulations").

> *Article 102* A joint venture shall be dissolved in the following situations:
> (1) Expiration of the term of the joint venture;
> (2) Inability to continue operations due to heavy losses of this venture;
> (3) Inability to continue operations due to the failure of one of the parties of the venture to fulfill its obligations set forth in the joint venture agreement, contract or articles of association;
> (4) Inability to continue operations due to serious losses arising from a natural disaster, war or other event of force majeure;
> (5) Failure of the joint venture to achieve its business objective, coupled with no possibility for future development; or
> (6) The occurrence of any other event stipulated in the joint venture contract or articles of association to be grounds for dissolution. . . .
> Upon the occurrence of the situations described in paragraph 3 of this Article, the party failing to fulfill its obligations set forth in the joint venture agreement, contract or

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The provision listing force majeure events is open-ended in the first contract, i.e., "and other events of force majeure," while the similar provision in the second contract does not define the term force majeure at all. Similar provisions exist in other form contracts. *See* Zhongguo Jixie Shebei Jinchukou Gongsi Xiaoshou Hetong (China National Machinery & Equipment Import & Export Corporation Sales Contract), in SHEWAI JINGJI HETONG SHIWU, *supra* note 73, at 45-47; China National Machinery Import and Export Corporation Purchase Contract, in SHEWAI JINGJI HETONG SHIWU, *supra* note 73, at 56; and Zhongfang Huaxian Maoma Jinchukou Gongsi Xiaoshou Querenshu (Chinatex Non-Cotton Yarns & Fabrics Import & Export Corporation Sales Confirmation), in SHEWAI JINGJI HETONG SHIWU, *supra* note 73, at 33-34, 38.

79. Regulations for the Implementation of the Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures (promulgated Sept. 20, 1983), *trans. in* J. COHEN, *supra* note 39, at 172.

articles of association, as the case may be, shall be liable to the joint venture for the losses caused thereby.[80]

The Regulations are remarkable not just for clarifying the rule that a party invoking force majeure is absolved from liability to the other party except for a dissolution arising from the failure of a party under condition (3). More important is the stipulation that "serious losses" under condition (4) or "heavy losses" under condition (2),[81] as well as absolute impossibility, may warrant dissolution. This provision indicates that a defense predicated on commercial impracticability[82] arising from an external event, as well as physical impossibility arising from such an event, may be successful under some circumstances, at least with regard to equity as opposed to cooperative or non-equity joint ventures.[83]

6. International Convention

International sales contracts involving the PRC are governed by the United Nations Convention on Contracts for the International Sale of Goods (CISG),[84] to which the PRC has been a party since CISG

80. *Id.*, art. 102.

81. The Chinese language term in both instances is "*yanzhong*" which indicates that there is merely a stylistic distinction between "serious" and "heavy" in translation.

82. *See* discussion on impracticability, *infra* pp. 89-95.

83. The Law of the People's Republic of China on Chinese and Foreign Cooperative Joint Venture Enterprises (promulgated Apr. 13, 1988), *trans. in* J. COHEN, *supra* note 39, at 190. For discussion, see Bates & Wang, *The New Cooperative Joint Venture Law*, E. ASIAN EXEC. REP., May 15, 1988, at 7; Cohen, *The Long-Awaited Cooperative Venture Law*, CHINA BUS. REV., July-Aug. 1988, at 14; Horsley, *Cooperative Joint Venture Law*, INT'L FIN. L. REV., June 1988, at 47. *See also* discussion of impracticability, *infra* pp. 89-95.

84. United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. AL CONF. 97/18 (1980) [hereinafter CISG].

came into force on January 1, 1988.[85] CISG, of course, has its own provisions pertaining to force majeure.

> *Article 79*
>
> (1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.
>
> (2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:
> (a) He is exempt under the preceding paragraph; and
> (b) The person whom he has so engaged would be so exempt if the provision of that paragraph were applied to him.
>
> (3) The exemption provided by this article has effect for the period during which the impediment exists.
>
> (4) The party who fails to perform must give notice to the other party of the impediment and its effects on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages

85. Zuigao Renmin Fayuan Zhuanfa Duiwai Jingji Maoyi Bu "Guanyu Zhixing Lianheguo Guoji Huowu Xiaoshou Hetong Gongyue Ying Zhuyi de Jige Wenti" de Tongzhi (Supreme People's Court Circular Transmitting "Some Questions Warranting Attention Involving the Implementation of the United Nations Convention on the International Sale of Goods" to the Ministry of Foreign Economic Relations and Trade), 1988 ZUIGAO FAYUAN GONGBAO 19 [hereinafter Questions on Implementation of UNCISG]. For commentary, see Ren Jisheng & Lin Fangfang, *Lun "Lianheguo Guoji Huowu Xiaoshou Hetong Gongyue" de Peichang Yuanze* (On the Principle of Compensation in the "United Nations Convention on Contracts for the International Sale of Goods"), 1989 FAXUE YANJIU 77; Sun Nanshen, *Duanping "Lianheguo Guoji Huowu Xiaoshou Hetong Gongyue"* (A Brief Analysis of "UNCISG"), 1987 JIANGSU DUIWAI JINGMAO LUNTAN (Jiangsu Foreign Economic and Trade Forum) 9, *reprinted in* 1987 FAXUE 155 (Reprints); Torbert & Zhao, *The U.N. Convention on the International Sale of Goods: How Will It Affect U.S. Trade With China*, CHINA BUS. REV., Sept.-Oct. 1987, at 52; Wang Chengbin, *supra* note 15, at 106, 112 (1989) (asserting that no essential difference exists between "impediment" in the CISG and "force majeure" in Chinese law).

resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this convention.[86]

Because China attached no reservations to its accession to CISG,[87] CISG apparently applies in all aspects even though CISG contains no provision for certification of force majeure events and adheres to a broader doctrine of excuse than apparently exists in Chinese statutory law.

Professor Honnold, one of the drafters of CISG, summarized the principal elements of an Article 79 excuse as externality of the cause, reasonable unforeseeability of the event, and reasonable unavoidability and inability to overcome the event or its consequences.[88] Excuse would be available to either party, in contrast to Section 2-615 of the Uniform Commercial Code[89] which applies only to the seller.[90] CISG, while sometimes presenting problems of application, is intended to reflect and encourage the development of a uniform body of internal law.[91] Of particular note is the fact that the drafters of CISG consciously refrained from adopting the older and more restrictive term "impossibility," the application of which has eroded in favor of more commercially defined definitions requiring "failure to perform . . . due to an impediment beyond his control."[92] While the drafters also did not adopt the term "frustration," which allows excuse on the grounds of economic hardship, the drafters acted, in part, on the assumption

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86. CISG, art. 79.

87. *See* Questions on Implementing UNCISG, *supra* note 85.

88. J. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 427 (1987).

89. "Except so far as a seller may have assumed a greater obligation . . .

(a) Delay in delivery or non-delivery in whole or in part by a seller . . . is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid. . . ."

UNIFORM COMMERCIAL CODE § 2-615 (1990).

90. J. HONNOLD, *supra* note 88, at 430. China, by contrast, tended to favor the buyer by denying the seller a force majeure right in its standard form international purchase contracts, particularly the older versions, because the Chinese party more commonly was the buyer. *See* Note, *An Analysis of Chinese Commercial Policy and Practice*, 27 WAYNE L. REV. 1229, 1244-45 (1981).

91. J. HONNOLD, *supra* note 88, at 433-34.

92. *Id.* at 433.

that such grounds are encompassed by impracticability, i.e., that "an extreme and unforeseeable change in economic circumstances" could itself qualify as an "impediment" under Article 79(1).[93]

IV. The Development of Force Majeure in the PRC

For the practitioner, the manner in which force majeure is actually implemented in the PRC is even more important than academic analyses of statutes because the PRC's statutory laws on force majeure are undeveloped and contain a number of ambiguities that make it difficult for parties to rely on purely statutory law. Additionally, there are important restrictions on the actual exercise of a force majeure clause. For instance, Chinese law appears to restrict the use of force majeure by tacitly excluding the words "frustration," "impracticability" and "impediment" from statutory clauses concerning force majeure. On the other hand, there also appear to be some elements in Chinese law that permit invocation of a force majeure excuse on grounds less restrictive than physical impossibility. Moreover, the parties are free to include whatever terms they wish in the force majeure clause of their contract. Even though the Chinese party to an international transaction ordinarily will seek to impose the force majeure provision contained in its standard form contract (a gambit that foreign parties should oppose),[94] even this provision tends to leave some latitude for defining the scope of force majeure.

Certain examples of the application of excuse doctrines in Anglo-American and International Law can be used to illustrate how the Chinese may develop and refine the application of force majeure in the PRC.

A. *Impracticability and Related Excuse Doctrines*

Force majeure is closely related to other judicial doctrines, especially mistake, frustration of purpose, or impossibility of perfor-

93. *Id.* at 442-43. *See also* INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 10, comment 3 (Force Majeure Exemption Clause), at 11 ("[Impediment] signifies that circumstances making it inconvenient or more onerous for the obligor to perform are not enough, and much less circumstances which merely make the other party's performance less valuable for the first party to receive. On the other hand it would be too strict to require that performance has become absolutely impossible. It should, however, be some kind of obstacle which has prevented performance as normally foreseen.").

94. *See generally* J. COHEN, *supra* note 39, at 19 (asserting that a foreign party should not accept the Chinese party's standard form contracts without modifications and additions).

mance,[95] which serve to excuse nonperformance or delayed performance by a party to a contract arising from causes other than mere changes in market conditions. In other words, even when the specific event that is said to cause nonperformance is not expressly addressed by the language of the contract, in at least some circumstances, courts have not treated such omission as the product of an agreement by the parties to let the risks fall on the nonperforming party.[96] Rather, these courts have held that reform or even avoidance of the contract may be warranted when the contingencies causing nonperformance or delayed performance were not actually foreseen by the parties and were unforeseeable, when both parties were mistaken as to the occurrence or effect of these contingencies, when the contingencies so altered the conditions governing performance by one party that its purpose for entering into the contract was frustrated or when the contingencies made performance physically or merely practically impossible.

A summary of the application of doctrines of excuse in Anglo-American and international law may be helpful in determining how such doctrines may eventually develop in the PRC. Although the frustration of purpose doctrine[97] was at least tacitly rejected both by China and in the CISG, there is some latitude for a defense predicated on mutual mistake[98] or the more modern doctrine of commercial impracticability.[99] The impracticability defense does not require that the parties foresee existing fact; however, such foresight is an obvious precondition for the invocation of a mutual mistake defense.[100] Thus,

95. *See* E. FARNSWORTH, *supra* note 12, at 670-705 (1982); G. GILMORE, THE DEATH OF CONTRACT 80-83 (1974); Sirianni, *The Developing Law of Contractual Impracticability and Impossibility* (pts. 1 & 2), 14 U.C.C. L. J. 30, 146 (1981).

96. For an argument that omissions should be exempt from judicial modification when they are the product of consensual bargaining between the parties, see Berman, *Excuse for Nonperformance in the Light of Contract Practices in International Trade*, 63 COLUM. L. REV. 1413 (1963). *Cf.* E. Farnsworth, *Disputes Over Omission in Contracts*, 68 COLUM. L. REV. 860 (1968).

97. A "frustration of purpose" excuse exists when an event, which both parties assumed would not occur and which was not the fault of the party seeking to be excused, renders that party substantially unable to gain its expected principal benefit upon which the contract was based. E. FARNSWORTH, *supra* note 12, at 690-91.

98. A "mutual mistake" excuse exists when both parties to a contract are under the same erroneous belief, which was a basic assumption on which the contract was made, which had a material effect on both parties' performances and which was not a risk that the party seeking to be excused had contracted to bear. *Id.*, at 653-54.

99. Commercial Impracticability is generally understood to mean impracticability of performance arising from a cause other than the fault of the party seeking excuse yet which goes to a basic assumption on which the contract was predicated. *Id.*, at 678.

100. RESTATEMENT (SECOND) OF CONTRACTS § 266(1) (1981); Atlas Corp. v. United States, 895 F.2d 745, 751-52 (Fed. Cir. 1990).

impracticability has greater application to the effects of future events. Impossibility applies to situations in which performance is rendered physically impossible, e.g., a farmer who contracts to deliver crops from a particular field may invoke an impossibility defense when the crops are destroyed by the weather. Under the impracticability doctrine, however, a party may excuse nonperformance attributable to external causes on the less rigorous grounds that performance would be financially calamitous even though physically possible. While the phrase "*bu neng*" implies that Chinese law has adopted the doctrine of impossibility of performance, "*lüxing de bu keneng xing*", it does not definitively exclude the doctrine of impracticability. Rather, "impracticability", which, like impossibility, is translated as "*bu neng xing*" in ordinary language, does not appear in legal dictionaries.[101] Thus, the term "impracticability" is absent from Chinese legal discourse. However, the absence of commentary on the doctrine of impracticability suggests that Chinese jurisprudence simply may not yet have encountered the need to interpret the term. Thus, it is conceivable that impracticability would constitute an acceptable defense in certain fact situations.

The impracticability doctrine has gained increased acceptance in other countries in recent years, particularly with regard to long-term supply contracts that are comparable in length not only to long-term purchase and sales contracts, but also to joint venture contracts in China. These supply contracts differ from ordinary sales-of-goods contracts in at least two respects. First, their longer term increases the risk of unforeseeable contingencies which may render the contract commercially impracticable or may frustrate the purpose of one party. Second, the goods that are the subject of the contract are more likely to be made-to-order, which would reduce the ability of the parties to absorb production or distribution risks by hedging or other means in order to obtain substitute goods from alternative sources.

In *Aluminum Co. of America v. Essex Group, Inc.*,[102] a wire manufacturer in Indiana signed a long-term contract (1967 — 1983 with an option to renew for five more years) with an aluminum producer. Essex, the wire manufacturer, agreed to provide raw alumina to Aluminum Co. of America ("Alcoa") for smelting into molten aluminum which in turn would be shipped to Essex for processing into

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101. *See* sources cited *supra* note 38. *See also* ENGLISH-FRENCH-CHINESE DICTIONARY OF INTERNATIONAL LAW (Wang Tieya ed. 1983).

102. 499 F. Supp. 53 (W.D. Pa. 1980); *see also* Speidel, *Court-Imposed Price Adjustments Under Long-Term Supply Contracts*, 76 NW. UNIV. L. REV. 369 (1981).

wire. A price escalator clause was built into the contract based in part on labor production costs, which were under Alcoa's control, and in part on non-labor production costs which were external to Alcoa and, by agreement of the parties, pegged to changes in the Wholesale Price Index (WPI). However, aluminum is an energy-intensive industry, and the energy crisis of the early 1970s gravely weakened the linkage between the WPI and Alcoa's production costs. Alcoa soon found itself losing millions of dollars on the contract every year while Essex profitably resold unprocessed aluminum to other buyers. Alcoa sued to reform the contract and the court found for Alcoa, even though performance by Alcoa remained possible. The court reasoned that the parties had intended to equitably apportion the risk but by mutual mistake had chosen an improper price escalation formula which went to a basic assumption of the agreement, thereby warranting judicial reformation of an agreed risk allocation provision.[103]

The court's conclusion rested on a holding that the parties' mistake was fundamentally one of fact, inasmuch as the parties intended to agree upon a fair cost-and-price-adjustment formula based on historical data. Their mistaken assumption thus "was essentially a present actuarial error" rather than an error of judgment or a projection of future events, neither of which are actionable under the doctrine of mutual mistake.[104]

The court then proceeded to reach the same conclusion on the related grounds of impracticability and frustration of purpose. There is no duty to perform if an unforeseeable event going to a basic assumption of the contract renders performance impracticable,[105] and the duty to perform is discharged if an event, the non-occurrence of which goes to a basic assumption of the contract, occurs and substantially frustrates a party's principal purpose,[106] provided that the fact or occurrence in question is not the fault of the party seeking relief. The court held that Alcoa never agreed to assume the full risk of an unforeseeable loss of such magnitude.[107]

Similarly, in *Florida Power & Light Co. v. Westinghouse Elec. Corp.*,[108] the Fourth Circuit invalidated a long-term supply contract. This decision emerged at the tail end of one of the most complex and

103. 499 F. Supp., at 70.
104. *Id.* at 63.
105. RESTATEMENT (SECOND) OF CONTRACTS § 266 (1981).
106. *Id.* at 265.
107. 499 F. Supp., at 76.
108. 826 F.2d 239 (4th Cir. 1987), *cert. denied*, 485 U.S. 1021 (1988).

seminal series of decisions involving an interrelated set of transactions in the history of the United States.[109] In *Florida Power & Light*, an electric utility sued a builder of nuclear power plants for breaching its contractual promise to reprocess spent nuclear fuel rods. Westinghouse, the plant builder, raised a defense based largely on unforeseeability and commercial impracticability, namely, that reprocessing had been agreed to in the belief that reprocessing would become commercially practicable during the term of the contract. In the interim, however, the United States government had abandoned commercial reprocessing, rendering performance impossible. The court found for Westinghouse on grounds of technical impossibility and commercial impracticability attributable to an unforeseeable contingency that negated the conditions essential to performance.

In addition, the Supreme Court in a public utility case upheld a state law limiting the exercise of contractual price escalator clauses in windfall profit situations created by the relaxation of government price controls, rejecting a constitutional challenge predicated on the doctrine of state impairment of contractual obligations. The Court established a three-pronged test that is deferential to state legislatures on such laws: (1) does the state law impose a substantial impairment of a contractual relationship defined in terms of the reasonable expectations of the parties?; (2) even if the state law imposes a substantial impairment on a contractual relationship, is the impairment justified by a significant and legitimate public purpose, including the remedying of a broad and general social or economic problem, such as "the elimination of unforeseen windfall profits"?; and (3) if the impairment serves a legitimate public purpose, is it based upon reasonable conditions and is it appropriate to the public purpose that justifies the impairment? Strict scrutiny is warranted only when the state alters its own contractual obligations and thus is affected by a conflict of interest.[110]

109. *See also* Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir. 1978), *cert. denied*, 439 U.S. 955 (1978) (conflict of interest); *In re* Westinghouse Elec. Corp. Uranium Contract Litig., 405 F. Supp. 316 (E.D. Va. 1975) (finding that a nuclear power plant builder accepted the risk of fluctuations in the price of raw materials, and hence to have assumed liability for damages for breach of contract, notwithstanding the possibility that the price rise may had been attributable in part to the acts of an international cartel). For an overall analysis, see Joskow, *Commercial Impossibility, the Uranium Market and the Westinghouse Case*, 6 J. LEGAL STUDIES 119 (1977).

110. Energy Reserves Group v. Kansas Power & Light Co., 459 U.S. 400 (1983); *see also* Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) (incidental impairments of contractual obligations are immune from constitutional challenge).

As a further sign of evolving international usage of doctrines of excuse, which may influence the parties and Chinese tribunals, the International Chamber of Commerce has prepared an optional hardship rider to its standard force majeure clause that would permit reform of contracts made onerous by unforeseen circumstances.[111]

Naturally, all courts properly remain extremely reluctant to avoid or reform an otherwise valid contractual relationship because variable factors yielded results not in conformance with one party's original expectations. In *Wabash, Inc. v. Avnet, Inc.*,[112] the parties linked the final price of a sale of assets to changes in GNP without including an inflation index.[113] The court held that the aberrant performance of a variable factor at most involved a mutual mistake about future events rather than a mistake about an existing fact at the time of contracting, and hence, was not actionable.

In *Printing Industrial Association v. International Printing and Graphic Communications Union*,[114] the parties opted for a Cost of Living Adjustment clause based on the local rather than the national Consumer Price Index. The industry association balked when the local index suddenly accelerated in a manner not matched by the national index, perhaps because of distortions created by the small size of the local sampling set.[115] Although the court held that a mutual mistake had occurred with regard to a variable factor, it still found for the union on the theory that the parties had agreed to assume the risks of price fluctuations.[116] There also was no finding of frustration of purpose because the amount of money at stake was modest, and also because the contract was of brief duration.[117] By contrast, *Alcoa* involved a very large contract that was to run for at least 16 years, the accuracy of which went to a basic assumption of the contract.

These cases indicate that there is a somewhat greater willingness among courts to consider reform of contracts when the allocation of returns has been substantially altered by unforeseeable, or at least unforseen, events. The party seeking relief nevertheless faces a heavy burden of proof. That burden is more easily satisfied in cases involving contracts of very long duration, and when there is detailed evidence about how the parties intended profits and risks to be apportioned in

111. INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 10, at 18-27.
112. 516 F. Supp. 995 (N.D. Ill. 1981).
113. *Id.* at 999.
114. 628 F. Supp. 1103 (N.D. Ohio 1985).
115. *Id.* at 1106, 1111.
116. *Id.* at 1109.
117. *Id.* at 1111.

future years on the basis of their understanding of existing facts.[118]

Despite the differences between PRC law and law in other jurisdictions, the basic logic of long-term contracts and contracts for unique goods found in *Alcoa* and *Florida Power & Light* ultimately may be persuasive in the PRC. Indeed, there are contemporary examples of long-term contracts being reformed in response to changed circumstances reminiscent of the doctrine of mutual mistake.[119] The principal and very important variation is that PRC courts are more reluctant to act on their own unless there has been a formal change in government policy legitimating the reform of the contracts in question.[120]

B. Development of Doctrines of Excuse in the PRC

1. Fruit Orchard Management Contracts

Fruit orchard management contracts represent an area of Chinese law where doctrines of excuse have been addressed. Like agriculture in general, fruit production was collectivized and the role of markets greatly diminished in the 1950s. Ownership and production management were subsequently decentralized in the 1960s down from the massive people's communes to the much smaller production teams and brigades. Nevertheless, collectivization and state allocation continued to exert decidedly adverse effects on production into the 1970s.

Therefore, the post-Mao regime resolved in 1978 to convert agriculture to a household management system under which the collectives retained land and some other property ownership rights while management rights were assigned to households under production responsibility contracts.[121] The usual term of such contracts for ordinary cropland was one year, during which time price fluctuations were relatively modest. However, annual contracts were less suitable for forests, fruit orchards and other property characterized by long-term production processes requiring several years of cultivation before the initial harvest and further care to extend the productive life of the assets. Hence, upon discovering that annual contracts were unsatis-

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118. *Cf.* the distinction between conscious and unconscious ignorance in *In re* Westinghouse Elec Corp., 517 F.Supp. 440, 458 (E.D. Va. 1981).

119. *See* discussion of Fruit Orchard Contracts, *infra* pp. 95-102.

120. Yang Zhenshan, *supra* note 15, at 56.

121. *See generally*, Kojima, *Agricultural Organization & New Forms, New Contradictions*, 116 CHINA Q. 706 (1988); Kueh, *The Economics of the "Second Land Reform" in China*, 101 CHINA Q. 122 (1985).

factory for such crops, contract terms were extended or new contracts were negotiated with terms of up to 15 years or for the trees' productive life with regard to fruit trees, and up to 50 years or for the length of the normal rotation with regard to commercial forests.[122]

Problems arose several years after the contracts were signed, however, in instances when the decontrolled prices of fruit, timber or other such long-term crops rose at much faster rates than those of grain and cotton, which remained subject to state price ceilings.[123] Successful forest contractors (*chengbao fang*) in such instances were in a position to make large profits after paying modest land use and other fees to the collective, to the discomfiture of the collective property owner (*fabao fang*) and their less fortunate neighbors with staple crop management contracts.[124]

Large numbers of disputes involving such contracts arose in the countryside during the mid-1980s, particularly in Shandong Province, which is one of the country's leading fruit producers. The principal issue concerned the enforceability of contracts subject to substantial price fluctuations. The collective property owners argued that the contracts were unfair and hence unenforceable. Naturally, the contractors responded that the contracts had been validly executed and hence were fully enforceable. The result was serious social conflict in the countryside and negative effects on production.

The issue of whether such contracts could be modified over the objections of the contractor was eventually decided in the affirmative. The Supreme People's Court held that modification or rescission of such contracts was permissible on several grounds, the most important of which involved changes in state tax, price or other policies causing major changes in the returns enjoyed by the parties.[125]

In other words, as noted above in the discussion of Article 27(2) and (3) of the ECL, modification or rescission of contracts may be

122. L. ROSS, *supra* note 1, at 71. Note that this issue only applies to collective orchards and plantations, not to household lots where the trees are owned by households. Interview with Qi Zhaolian, Chief, Zhang Shujun, Deputy Chief, Xing Jiyang, Section Chief, Yang Yongqing, Station Chief, and Xing Zhishui, Station Chief, Zouping County (Shandong) Forestry Bureau, in Zouping Co. (Shandong) (Sept. 3, 1990).

123. On agricultural price reform, see generally, Sicular, *Agricultural Planning and Pricing in the Post-Mao Period*, 117 CHINA Q. 671 (1988).

124. Interview with Zhang Chuanming, Chief, and Sun Xinyi, Deputy Chief, Zouping County (Shandong) Justice Bureau, in Zouping Co. (Shandong) (Jan. 8, 1990) [hereinafter Interview with Zhang Chuanming]. On the debilitating effect of persistent price controls on producer price incentives, see Watson, *Investment Issues in the Chinese Countryside*, 22 AUSTRAL. J. CHINESE AFFAIRS 85, 87-88, 110-11 (1989).

125. Supreme Court Circular, *supra* note 43, para. 4.

ordered in response to changes in state policy or the state plan as well as to excuses specific to the contract in question. In this instance, modification may have produced a more equitable outcome than enforcement of the contracts as written. The entire Chinese countryside lacked familiarity with economic contracts in the early 1980s when the multi-year contracts were negotiated, resulting in the adoption of fixed fees without price escalator clauses.[126] More importantly, there does not appear to have been any particular reason for the parties on either side to have anticipated that state price policy would make fruit production markedly more profitable than staple crop production.

In this respect, the unequal effect of state price and other policies on household income was both unforeseeable and unforeseen. Thus, the Supreme People's Court's holding cannot be viewed merely as crudely legitimating the state's power to alter voluntary contracts. Rather, the Court was announcing a doctrine similar to mutual mistake, the result of which was to convey an unbargained-for benefit to one party at the expense of the other. In this respect, the Court's reasoning is comparable to that of the *Alcoa* court which reformed a contract because of unanticipated price changes, notwithstanding the fact that the parties had expressly agreed on the price terms embodied in the contract.

Following the ruling by the Supreme People's Court, or as the result of a prior voluntary agreement obtained through negotiation, conciliation, mediation or some combination thereof,[127] the parties in many instances revised the original payment terms by increasing the contractor's payments in cash or kind to the collective property owner or the other members of the collective, often by incorporating a profit-sharing escalator clause tailored to changes in state price policy. Other contracts were terminated in favor of new contracts.

An examination of several fruit orchard production responsibility contract disputes from a Shandong county illuminates these issues. For example, a dispute arose in Shijiang Village, Zouping County Town, between eleven households who prospered by managing the village's apricots and poplars under contract, and their neighbors who watched enviously as the price of apricots quadrupled during the 1980's. Some neighbors stole fruit and vandalized trees. A county work team was

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126. Interview with Zhao Jirang, *supra* note 61.

127. *Id.* On dispute resolution in general, see Ross, *The Changing Profile of Dispute Resolution in Rural China: The Case of Zouping County, Shandong*, 26 STAN. J. INT'L L. 15 (1989); Salbaing, *Dispute Settlement in China*, in DOING BUSINESS IN CHINA, *supra* note 3, at § 21.

organized to investigate this dispute and others like it. While upholding the validity of the underlying contract which was deemed to have been lawfully executed and faithfully implemented, the work team also held that the contract was subject to revision because of the rise in fruit prices. The parties then agreed to modify the contract by generally doubling the annual responsibility fee paid by the contractors to the village, and by incorporating a price adjustment factor into the contract. Fines were also imposed on those individuals who stole apricots or who illegally cut down poplars and other trees.[128]

By contrast, courts in the very same county have regularly enforced contracts against contractors in annual staple crop production responsibility contracts who failed to pay their land use fees. The new manager of the county agricultural experiment farm made extensive use of the courts in this regard to bring suit against delinquent contractors. Although these contractors invoked force majeure to excuse their nonperformance, the courts ruled against those contractors who were unable to prove that their poor harvests were due to genuinely external or natural causes rather than their own ineptitude or lack of effort. The first such court holdings in favor of the experimental farm reportedly persuaded other contractors to quickly pay their debts.[129]

Contractors have prevailed in a narrow range of cases, however, particularly when performance was rendered impossible by the death or disability of a principal part of the contractor's labor capacity. Since the contractor is ordinarily a household or small group of farmers, such holdings are an application of the familiar doctrine that nonperformance is excused in personal performance contracts when the party is physically unable to perform.[130]

While the general position of the Chinese courts is clear in this regard, it must be noted that the Chinese populace remains reluctant to engage in litigation, although there is a discernible trend in favor of a greater willingness to rely on judicial remedies.[131] Therefore,

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128. Described in Interview with Zhang Chuanming, *supra* note 124.

129. *See, e.g.*, Zouping County Agricultural Experiment Farm v. Wang Zesheng, Zouping County People's Court, Mediation Document (1989), Zou Fa Jing Zi No. 8; Zouping County Agricultural Experiment Farm v. Zhang Sihua, Zouping County People's Court, Mediation Document (1989), Zou Fa Jing Zi No. 9, two of six cases based on apparently comparable facts resulting in comparable rulings in favor of the plaintiff. All six cases were read and summarized in note form by the author in an Interview with Zhao Jirang, *supra* note 61 (Jan. 8-9, 1990).

130. This principle is embodied in United States common law in the RESTATEMENT (SECOND) OF CONTRACTS § 262 (1981).

131. *See supra* note 33 and accompanying text. Within Shandong Province specifically, the number of suits filed in the Economic Chamber of the judicial system increased very rapidly following its establishment in 1979. The number of cases rose from 3 in 1979 and fewer than

disputes over fruit orchard management continued to fester for several years after the Supreme People's Court's ruling.[132] This forced the Shandong provincial government and local governments to conduct investigations and to issue policy directives ordering contract reform where acute price changes had resulted in unbargained-for advantages.

In response to the large numbers of disputes arising from external changes in state policy affecting production guarantee contracts, Shandong eventually promulgated a set of regulations to "strengthen" (*jiaqiang*) the management of such contracts by providing clearer guidelines to the parties and the courts for the content, validity and modification of such contracts. For our purposes, the crucial item is the inclusion of an additional ground for contract modification, i.e., changes in state tax or price policy as permitted by the Supreme People's Court in 1986.[133] The Shandong regulations provide as follows:

> *Article 16* Modification of a contract is permissible under any of the following circumstances:
> (1) If both parties agree through consultation, and if such [modification] would not damage the social and public interests of the State, the collective, third parties or society;
> (2) If the State plan on the basis of which the production guarantee contract was concluded is amended;
> (3) If State tax or price policies are amended or if market prices fluctuate creating a relatively large change in the allocation of benefits;
> (4) If force majeure makes it impossible to perform the contract on schedule; or
> (5) If the managing party is unable to perform part of the

200 in 1980 to over 5,000 in 1984 and over 80,000 in 1986 before levelling off at just below 60,000 in the late 1980s. The increase in the mid-1980s was due in part to the rise in rural production responsibility contract disputes. Interview with Zhao Lianting, Vice President in Charge of the Economic Chamber, Yang Sheng, Chief Judge of the Administrative Chamber, and other Judges of the Shandong Provincial Higher Court, in Jinan (Shandong) (Jan. 19, 1990) [hereinafter Interview with Zhao Lianting].

132. According to the Shandong Provincial High Court, the courts will accept suits to enforce original contracts in the absence of a government policy directive authorizing modification, or if the facts of the case in question are not embraced within the scope of the government directive. Once the government has authorized modification, however, the courts will no longer enforce the original contract. Interview with Zhao Lianting, *supra* note 131 (referring specifically to contracts involving price changes).

133. *See* Circular on Some Questions, *supra* note 66.

> contract because of a change in population [i.e., labor force] or other factor.[134]

Article 16(1) merely permits voluntary modification and corresponds directly to Article 27(1) of the ECL.[135] Article 16(2) similarly establishes the primacy of the state plan in the areas where it still applies and corresponds directly to Article 27(2) of the ECL.[136] Article 16(4) allows modification when required by unforeseen, unforeseeable and unavoidable events peculiar to the specific contract or contracts, and directly corresponds to Article 27(4) of the ECL.[137]

Article 16(5) allows modification, and Article 17(6)[138] allows rescission, when the managing party is unable to perform as originally agreed because of a reduction in its labor capacity, usually arising from the death or incapacity of the head of household or principal member(s) of the managing group or household. Although this provision is an innovation in positive Chinese law, it merely fills what appears to be a gap in Chinese law with regard to excused nonperformance in personal services contracts arising from the death or incapacity of the party performing personal services.[139] This provision is required because production responsibility contracts are essentially personal services contracts. Therefore, death or incapacity renders performance impossible. This provision also is efficient because the collective, now usually a village with a population of one hundred or more households, is clearly the superior risk bearer.

The major innovation is Article 16(3) which pertains to state tax and price policies. The new directive permits contract modification, but not rescission, when changes in the state's tax and price policies alter the allocation of risks and benefits between the parties after a contract has been executed. In this respect, the new provision acknowledges that tax and price policy have acquired an importance in the reform period comparable to that of the state plan in terms of their effect on

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134. *Shandong Sheng Nongcun Jiti Jingji Chengbao Hetong Guanli Tiaoli* (Shandong Provincial Articles for the Management of Rural Collective Economic Production Guarantee Contracts), Dazhong Ribao, Dec. 30, 1989, at 2, col. 1.

135. ECL, *supra* note 47, art. 27(1).

136. *Id.*, art. 27(2).

137. *Id.*, art. 27(4).

138. *Id.*, art. 17(6). Article 17 states the following: "It shall be permissible to rescind a contract if any one of the following situations occurs: . . .

> (6) the contracting party (*chengbao fang*) loses the ability to contract, making the contract completely impossible to perform; . . ."

139. A classic case excusing nonperformance in a personal services contract is Yerrington v. Greene, 7 R.I. 589 (1863).

contract performance.

The new provision allows plaintiffs to present evidence on the effect of changes in state tax or price policy on contract performance. Mediation committees and the courts will no longer enforce contracts regardless of such changes. Instead, these organs will consider evidence of the existence of such changes, the magnitude of their effect on the allocation of risks and benefits between the parties, and whether the changes were or were not foreseeable and foreseen by the parties when the contract was negotiated.

The new provision is unlikely to have any major impact on short-term management contracts, which are more suited for field crops, but is likely to affect long-term contracts for long production cycle assets like fruit orchards. The principal effect is likely to involve greater pressure on the advantaged party (i.e., the managing party in the fruit orchard cases) to agree to a modification of the contract. If the advantaged party fails to agree to modification at the conciliation or mediation stages, then the dispute may go to court. If the court also fails to mediate a settlement, then the case will go to trial.[140] Trials, as a general matter, are increasingly likely.[141]

The impact of the Articles remains unclear, but local officials have

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140. *See, e.g.*, Han Peiqian v. Sun Zhaoyi, Zou Min Zi (89) Zou Min Zi No. 37 (annual contract guarantee fee increased from 900 RMB to 10,000 RMB); *rev'd on this point*, Huimin Intermediate Court (88) Min Zi No. 151 (contract guarantee fee not in dispute). This case was read and summarized in note form by the author in an Interview with Zhao Jirang, *supra* note 61.

141. Just a few years ago, upwards of 99 percent of all economic cases in Shandong were settled at the mediation or conciliation stage. A higher percentage of cases are going to trial now, even as the number of cases increases, as indicated in the following table:

Disposition of Economic Law Cases in
Shandong Province, 1985-1989

Year	Percentage Settled at Pre-Trial Stage
1985	99.1
1986	98.95
1987	97.65
1988	97.28
1989	95.27

Interview with Zhao Lianting, *supra* note 131.

Members of the Shandong Provincial High Court attributed the diminished, albeit still very high, popularity of mediation to the growing complexity of the cases, making settlement less likely. *Id.* It seems, however, that the greater value of the claims, easier access to the courts and legal counsel, and weakened social inhibitions regarding the assertion of personal interests also are factors. Ross, *supra* note 127.

stated that they expect implementation of the directive to reduce the incidence of such disputes in fruit management. These disputes also should decline as participants in contract negotiations become more sophisticated about prices and markets, although the problem will remain salient so long as the PRC continues to maintain an economy in which many prices are still not allowed to fluctuate in response to market conditions.

4. Triangular Debts

"Triangular debts" or "debt claims" ("*san jiao zhai*"), by contrast, represent an area of Chinese law where doctrines of excuse have not developed. Contracts such as purchase and sales contracts differ in terms of the parties' obligations to meet their delivery and payment deadlines, although in at least some instances, date-of-delivery provisions are strictly enforced.[142] Beginning in 1988 and especially in 1990, however, the national government tightened credit throughout the country in order to reduce inflation and insure that state-owned industry enjoyed priority access to bank credit. The unanticipated result was a nationwide credit crunch in which liquidity dried up and one enterprise after another became unable to meet its payment obligations. The cumulative effect was to impair the ability of third-party enterprises to meet their obligations as well, hence the term triangular debts.

Under the circumstances, party after party faced the risk of imminent default. Because their predicament was not attributable to a force majeure event, a change in the state plan or interference by a state agency, their only legal remedy was to request that the other party agree to voluntary contract reform or rescission under Article 27(1) of the ECL.[143] Because most parties were simultaneously victims as well as breachers and because of a general recognition that the source of the problem was systemic, rather than the fault of the party in breach,[144] parties refrained from prosecution for nonpayment. However, some parties refused requests for voluntary reform or rescission while insisting on performance under the original terms of the contract.[145]

142. Interview with Tian Jiaqing, Director of the Zouping County (Shandong) Forge and Machine Works, in Dongguan Cun (Sept. 2, 1990).

143. ECL, *supra* note 47, art. 27(1); Yang Zhenshan, *supra* note 15, at 54-55.

144. Interview with Tian Jiaqing, *supra* note 142.

145. Yang Zhenshan, *supra* note 15, at 53, 55.

The situation did not ease until the State Council took action in March and again in July 1990. First, the State Council directed the banks to relax credit controls, pumping an additional US$20 billion into the economy.[146] Second, the State Council supervened contract provisions by imposing a uniform 0.3 percent monthly interest charge on accounts rendered delinquent by the credit crunch. This decision protected parties in breach while they made arrangements to return to compliance with their repayment schedules, while limiting interest charges to the low interest rate paid by state enterprises and other entities for subsidized loans.[147] In addition, the State Council established a structure of "triangular debt" leading small groups to take charge of the problem and expedite its resolution.[148] Through June 1990, some 98.4 billion RMB of such nonperforming triangular debts were repaid or conformed to payment schedules by such means.[149] However, the problem may recur as inventories of unsold goods accumulate in state enterprises.[150]

Such policy change is a cumbersome, imprecise and unreliable remedy in an economy faced with the prospect of radical transformations and considerable macroeconomic instability. At least one Chinese commentator has recommended that the ECL be revised to provide courts with the equitable power to reform or rescind contracts under the doctrine of *rebus sic stantibus* or "changed circumstances" in the event of fundamental change in a contract's background or social environment. The doctrine would be invoked so long as the change was external to the parties; arose during the term of the contract rather than in the pre- or post-contractual period; was unforeseeable, unavoidable and insurmountable; and resulted in manifest inequity, such as a major change in the allocation of the costs and benefits of the contractual relationship.[151] This proposal is oriented primarily toward complex, long-term contracts, especially those involving a high quotient of science and technology content.[152] While this proposal

146. Guowuyuan Guanyu Zai Quanguo Fanwei Nei Kaizhan Qingli "San Jiao Zhai" Gongzuo de Tongzhi (State Council Directive on Beginning the Work of Cleaning Up "Triangular Debts" Throughout the Country) (Issued May 26, 1990), 1990 GUOWUYUAN GONGBAO 265; *see also Li Peng on Current Economic Issues* (Aug. 2, 1990), *excerpted in* BEIJING REV., Oct. 29, 1990, at 16.

147. *Id.*

148. *Id.*

149. BBC Summary of World Broadcasts FE/0817 (1990).

150. Kaye, *Fruits of Success*, FAR E. ECON. REV., Sept. 26, 1991, at 62.

151. Yang Zhenshan, *supra* note 15, at 59.

152. *Id.* at 56.

recognizes the need to adopt more flexible doctrines of excuse, its adoption depends upon an expansion in the power of the judiciary to act even in the absence of a state policy directive. Moreover, this proposal does not allow for the capability of parties in the future to allocate the risk of price fluctuations through price adjustment provisions, hedging and other contractual and non-contractual strategies as these become available in the PRC.[153] Great care would have to be taken less the sanctity of contracts be unduly impaired.[154]

Judges themselves are reluctant to try breach of contract cases where the cause of action arises in a general price rise that was unforeseeable in the old stable price environment.[155] In such cases, the parties are urged to voluntarily reform or rescind their contracts in accordance with the facts, reason and the law.[156] Nevertheless, stronger legislative authority, like that encountered in the fruit orchard cases, is needed for the courts to order contracts reformed or rescinded.[157]

Alternatively, the refusal of Chinese courts to accept broader doctrines of excuse will lead foreign and perhaps even domestic suppliers in such contracts to raise their prices in return for assuming what are perceived to be one-sided and intolerable risks. However, this does not exclude reform or rescission in response to other causes. Indeed, the PRC has intervened on several occasions to prevent the embarrassing collapse of joint ventures in the months following the Tiananmen Incident.[158]

V. CONCLUSION

There are many questions about excuse in Chinese contract law that remain unclear.[159] For example, there is little authority interpret-

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153. Zou Yi & Xu Jinlin, *supra* note 15 (noting that open-price provisions in contracts are becoming more common, a trend which the authors criticize as merely postponing the emergence of disputes).

154. *But see* Yang Zhenshan, *supra* note 15, at 56 (evincing criticism of an overly rigid adherence to the sanctity of contracts).

155. Zou Yi & Xu Jinlin, *supra* note 15.

156. Interview with Zhao Lianting, *supra* note 131.

157. Zou Yi & Xu Jinlin, *supra* note 15 (advocating amendment of the ECL to respond to fluctuations in floating or market-based prices, to parallel Article 17(3), which provides for changes in fixed prices).

158. *See, e.g., Bank of China to Help Ailing JVs*, FAR E. ECON. REV., Nov. 30, 1989, at 95.

159. For an analysis of dispute resolution involving rural contracts, see Ross, *supra* note 127, at 15.

ing the distinction between unforeseeability and conscious omission as those concepts concern contingencies that are not mentioned in the language of the contract. The impracticability doctrine has yet to be addressed. The power of the courts to rule under present statutory authority in the absence of a governmental directive is doubtful. Moreover, the Chinese procedural requirement for certification of force majeure events presents potential obstacles to the invocation of a force majeure defense.

On the other hand, there are a number of provisions of Chinese law that either expressly or potentially broaden the grounds for invoking a defense based on force majeure or another doctrine of excuse. Moreover, international law and the law of other foreign jurisdictions is evolving in favor of a broadening of force majeure and related doctrines. Although such developments, with the exception of CISG and other international conventions to which the PRC is a party, lack authority in the PRC, Chinese courts may very well be influenced by such developments, at least to fill gaps in Chinese law. Indeed, the FECL expressly allows ["*keyi*" ("may")] the application of international practice in matters where the PRC has no law:

> Article 5 . . . . On matters for which the law of the People's Republic of China has not yet made provisions, international practice may be applied.[160]

It is incumbent on any party to a Chinese contract to carefully consider its interests when negotiating an excuse or force majeure clause. Risks should be expressly allocated as intended. All categories of events intended for force majeure status, including civil disturbances, that the clause is intended to encompass should be so designated. Conversely, all other events should be made ineligible by express exclusion or cancellation of the implicature. If certification is required, the procedural requirements should be clarified to stipulate the rights of the parties to receive notice and to participate in the investigation by the certifying agency. If certification of events occurring outside of China is impossible or undesirable, then a simpler notice and evidence procedure should be expressly substituted for certification. To mitigate the effects of legislative or regulatory changes on pricing and other issues affecting performance, the parties at a minimum should include a stabilization clause requiring renegotiation

160. FECL, *supra* note 39, art 5.

if supervening legislation or policies affect the economic returns anticipated by either party.[161] The parties also may incorporate impracticability language into the contract. All parties must remember, however, that such contract language generally is subject to symmetrical application, and thus, can be invoked by either party.

161. Lubman, *Law and Practice, the Contract, and Patents* in U.S.-CHINA TRADE: PROBLEMS AND PROSPECTS 93, 101. Articles 40 and 41 of the FECL also offer foreign investors conditional protection against subsequent legislation affecting contracts. As Cohen has noted, however, the comfort provided by these articles is substantially qualified by the use of permissive "*keyi*" ("may") language, rather than directory language which would allow less latitude for superseding contract language. *See* J. COHEN, *supra* note 14, at 21-22.