COVID-19 in Civil or Commercial Disputes: First Responses from Chinese Courts

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Abstract

This comment highlights the major civil or commercial (mostly contract) law provisions in 24 judicial documents newly released by the Supreme People’s Court or High People’s Courts in China in response to the outbreak of COVID-19 and assesses the significance of key changes to the pre-pandemic law. It concludes by noting the increased role of the doctrine of the change of circumstances and the ‘contract purpose’ test, the emphasis placed on consensual solutions (by way of mediation and contract renegotiation), and the flexibility and relatively clearer guidance afforded to lower courts in their adjudication of disputes arising in connection with COVID-19.

Since the disease known as COVID-191 infected China and triggered widespread lockdown measures, the Chinese courts have reacted quickly to promulgate rules to assist in the judicial adjudication of civil or commercial disputes that may arise in connection with what has now become a global pandemic. A recent concept note issued by the British Institute of International and Comparative Law warned about ‘a risk of a deluge of litigation and arbitration placing a strain on the system of international dispute resolution’.2 Likewise, the current pandemic

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1 Lisa Bender, ‘Key Messages and Actions for COVID-19 Prevention and Control in Schools’, United Nations Children’s Fund, World Health Organization and International Federation of Red Cross, March 2020, 2 (‘COVID-19 is a disease caused by a new strain of coronavirus. ‘CO’ stands for corona, ‘VI’ for virus, and ‘D’ for disease. Formerly, this disease was referred to as “2019 novel coronavirus” or “2019-nCoV”’).
2 ‘Breathing Space: A Concept Note on the Effect of the 2020 Pandemic on Commercial Contracts’, a meeting on 7 April 2020 hosted by the British Institute of International and Comparative Law, attended by Lord Phillips of Worth Matravers, Lord Neuberger of Abbotsbury, Sir David Edward, Sir William Blair, Spyros Maniatis, Malik Dahlan, and Keith Ruddock <https://www.biicl.org/>
is likely to pose similar challenges to the Chinese courts. As acknowledged recently by the Sichuan High People’s Court (HPC) No 1 Civil Tribunal, the challenges comprise, potentially, not only a dramatic increase in the number of cases but also heightened complexity in litigation owing to both the economic downturn and the diversity of government measures designed to prevent and contain the pandemic (hereafter referred to as regulatory measures); hence, the need for additional guidance from higher-level courts on these new emerging issues.3

This comment summarizes, synthesizes, and evaluates civil and commercial law rules contained in a number of important judicial documents issued by Chinese courts since February 2020 in response to the pandemic.4 It will not consider many other documents issued by the Chinese courts dealing with criminal or administrative matters pertinent to the pandemic. For judicial documents that cover both, only those provisions embodying rules of a civil or commercial nature, such as contract, tort, and civil procedures, are covered. A great majority of these provisions concern contract disputes, and, consequently, these contract rules will be the focus of this comment. Given their breadth, our attention will be naturally drawn to rules that are novel or that develop or clarify, as opposed to merely repeating, existing positions of the Chinese courts.

A structural change

Compared to the Chinese courts’ handling of similar disputes in a previous epidemic that took place in 2002–3—Severe Acute Respiratory Syndrome (SARS)—the contract law rules applicable to cases involving COVID-19 consist of not only the doctrine of force majeure but also the doctrine of change of circumstances, which was formally established after the SARS cases but before the COVID-19 cases. The overwhelming view of the Chinese courts on SARS was to treat it as a force majeure event,6 subject to Articles 94(1) and 117 of the Contract Law enacted in 1999,7 notwithstanding a vague reference by the documents/10307_legal_considerations_in_mitigating_mass_defaults_wb_final.pdf> accessed 5 June 2020.

3 Sichuan HPC no 1 Civil Tribunal, 关于涉新冠肺炎疫情相关民事案件审理的法官会议纪要 [Judges Meeting Summary Concerning Adjudication of Civil Cases Involving COVID-19 Pandemic], Chuan Gao Fa Min Yi [2020] No 1, issued and effective as of 3 March 2020, pt 1.
4 There are a total of 24 COVID-19 judicial documents—namely, documents issued in response to the outbreak of COVID-19—three by the Supreme People’s Court (SPC) and 21 by High People’s Courts (HPC)—examined in this comment.
5 Severe Acute Respiratory Syndrome. The COVID-19 virus is a new virus linked to the same family of viruses as SARS. See Bender (n 1).
6 Eg, Beijing no 2 Intermediate People’s Court (IPC) Project Team, 正确处理‘非典’疫情构成不可抗力免责事由案件[Dealing Properly with Cases of SARS Constituting a Force Majeure Event], 法律适用 [Judicial Application] (2003), vol. 6, 8 (Beijing no 2 IPC SARS Report); see also SPC, 关于在防治传染性非典型肺炎期间依法做好人民法院相关审判、执行工作的通知 [Notice Concerning People’s Courts’ Conducting Adjudication and Enforcement during the SARS Period], Fa [2003] No 72, issued and effective as of 11 June 2003, art 3(3) (SPC Notice).
7 中华人民共和国合同法 [Contract Law of the People’s Republic of China], adopted at the second meeting of the Ninth National People’s Congress on 15 March 1999, effective as of 1 October 1999 (Contract Law); see also 中华人民共和国民法总则 [General Rules of Civil Law of the
the regulatory measures. Even applying an orthodox approach, which confines the doctrine of change of circumstances. The better view is that it is the doctrine of 'fairness', which refers to the test of 'manifest unfairness' under the doctrine of change of circumstance. The better view is that it is the doctrine of change of circumstances, rather than some broad and vague principle of 'fairness', that directly applies to an event such as the COVID-19 pandemic or the regulatory measures. Even applying an orthodox approach, which confines a change of circumstances to the abnormal rise of market prices or the reduced

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8 SPC Notice (n 6).
9 SPC, 关于适用《中华人民共和国合同法》若干问题的解释（二） [Interpretation II on Several Issues Concerning the Application of the Contract Law of the People’s Republic of China], adopted at the 1462nd meeting of the Judicial Committee of the SPC on 9 February 2009, effective as of 13 May 2009. A similar provision is adopted in the Chinese Civil Code (n 7) art 533.
10 One exception is Neimenggu (Inner Mongolia) HPC, 关于审理涉新冠肺炎疫情民商事案件相关问题的指引 [Guidance on Matters Concerning the Adjudication of Civil and Commercial Cases Involving COVID-19 Pandemic], issued and effective as of 14 February 2020, art 13 (only the doctrine of force majeure applies). In addition, in what is an unfortunate omission, when stating the application of Chinese law as a result of conflict-of-law rules in foreign-related commercial or maritime disputes, the SPC made mention of force majeure rules only. SPC, 关于依法妥善审理涉新冠肺炎疫情民事案件若干问题的指导意见（三） [Guiding Opinion III on Lawfully and Properly Adjudicating Certain Issues Regarding Civil Cases Involving the COVID-19 Pandemic], Fa Fa [2020] No 20, issued and effective as of 8 June 2020, art 6 (SPC Guiding Opinion III).
11 Eg. SPC, 关于依法妥善审理涉新冠肺炎疫情民事案件若干问题的指导意见（一） [Guiding Opinion I on Lawfully and Properly Adjudicating Certain Issues Regarding Civil Cases Involving the COVID-19 Pandemic], Fa Fa [2020] No 12, issued and effective as of 16 April 2020, art 3(2) (SPC Guiding Opinion I); Zhejiang HPC no 2 Civil Tribunal, 关于审理涉新冠肺炎疫情相关商事纠纷的若干问题解答 [Answers to Certain Questions Regarding Commercial Disputes Involving COVID-19], Zhe Gao Fa Min Er [2020] No 1, issued and effective as of 13 February 2020, answer to question 2; Jiangxi HPC, 关于充分发挥审判职能作用为疫情防控提供司法服务和保障的意见 [Opinion on Fully Playing Adjudicative Role and Providing Judicial Service and Safeguard for the Prevention and Control of the Pandemic], issued and effective as of February 2020, art 4; Heilongjiang HPC, 关于充分发挥司法职能支持企业应对疫情服务保障企业健康发展的意见 [Opinion on Fully Playing Judicial Role and Supporting Enterprises’ Healthy Development in Response to the Pandemic], issued and effective as of 7 February 2020, art 10; Xinjiang HPC, 关于应对疫情为企业健康发展提供司法保障的十二条意见 [Twelve Opinions on Providing Judicial Safeguard to the Healthy Development of Enterprises in Response to the Pandemic], issued and effective as of 14 February 2020, art 4.
12 Hubei HPC no 2 Civil Tribunal, 关于审理涉及新型冠状病毒感染人事救助民事案件若干问题的解答 [Answers to Certain Questions Concerning the Adjudication of Commercial Cases Involving the COVID-19 Pandemic], issued and effective as of 12 February 2020, answer to question 6.
efficiency in the logistics or supply chain, the pandemic or the regulatory measures may fall within the scope of such a narrow approach. The doctrine of *force majeure* and the doctrine of change of circumstances are not ‘mutually exclusive’ and may both apply to the same event provided that the relevant legal tests are respectively satisfied.

**Guiding principles**

A number of guiding principles have been created or given special emphasis in relation to COVID-19 cases. These guiding principles are clearly recognized in the two judicial documents issued by the SPC and are echoed, expressly or implicitly, in judicial documents issued by most HPCs. First, there is the principle that alternative modes of dispute resolution shall be resorted to in the first order and, in particular, that mediation shall be adopted as a preferred method in COVID-19 cases. Mediation, particularly judicial mediation (or mediation by the court), has increasingly become an integral part of civil proceedings in China and is regularly, if not invariably, attempted in civil or commercial cases. One judicial document even goes so far as to state that the court should modify or terminate the contract under the doctrine of change of circumstances only where mediation is unsuccessful. The supremacy of mediation as a means of resolving COVID-19 disputes can be gleaned from the fact that almost all civil or commercial disputes involving the pandemic in the first batch of typical (or exemplary) cases published by the SPC were resolved through mediation by the court. This

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13 Sichuan HPC no 1 Civil Tribunal (n 3) pt 2, art 2.
14 Jiangsu HPC no 1 Civil Tribunal, 规范涉新冠肺炎疫情相关民事法律纠纷的指导意见 [Guiding Opinion on the Regulation of Civil Disputes Concerning COVID-19 Pandemic], Su Gao Fa Dian [2020] No 124, issued and effective as of 26 February 2020, art 5.
15 SPC Guiding Opinion I (n 11) art 1; SPC, 关于依法妥善审理涉新冠肺炎疫情民事案件若干问题的指导意见 （二） [Guiding Opinion II on Lawfully and Properly Adjudicating Certain Issues Regarding Civil Cases Involving the COVID-19 Pandemic], Fa Fa [2020] No 17, issued and effective as of 15 May 2020 (SPC Guiding Opinion II).
16 Eg Sichuan HPC no 1 Civil Tribunal (n 3) pt 2; Zhejiang HPC no 2 Civil Tribunal (n 11), answer to question 1; Neimenggu HPC (n 10) art 3; Jilin HPC, 关于审理涉新冠肺炎疫情民事商事案件的工作指引 [Working Guidance on the Adjudication of Civil or Commercial Cases Involving the COVID-19 Pandemic], issued and effective as of March 2020, art 3 (mediation prevails); Xinjiang HPC (n 11) arts 2, 4.
17 For similar provisions about labour contracts, see Tianjin HPC no 1 Civil Tribunal, 关于审理涉新冠肺炎疫情相关民事案件的法官会议纪要 （一） [Summary of Judges’ Meeting Concerning the Adjudication of Civil Cases Involving COVID-19 Pandemic], issued and effective as of 19 March 2020, arts 1–2; Shanghai HPC and Shanghai Human Resources and Social Security Bureau, 关于疫情影响下劳动争议案件处理相关指导意见 [Guiding Opinion on Dealing with Labour Disputes Impacted by the Pandemic], Hu Gao Fa [2020] No 203, issued and effective as of 13 April 2020, art 5.
18 Hubei HPC no 2 Civil Tribunal (n 12), answer to question 6.
19 Namely, all of the nine contract cases in the first batch (which consists of 10 cases in total). See <http://www.court.gov.cn/zixun-xiangqing-223631.html> accessed 5 June 2020 (Chinese version). See also Shaanxi HPC, 服务保障疫情防控和经济社会发展典型案例 [Typical Cases Serving and Safeguarding the Prevention and Containment of the Pandemic and the Development of Economy and Society], issued on 24 April 2020, Cases 3–6. It was also reported as a major achievement of
practice is expected to raise many interesting questions, including, but not limited to, its effectiveness in cases where more contentious issues are brought up.

Second, many provisions in the judicial documents reflect an overarching principle that, in applying the relevant rules, the court should adopt an approach in favour of the performance, as opposed to the determination, of the contract.\(^{20}\) Thus, the SPC, for the first time, makes explicit provision that no termination of contract is allowed for mere difficulty in contract performance.\(^{21}\) Instead, renegotiation and mediation are promoted to facilitate the continuing performance of the contract.\(^{22}\) Further, contract modification is preferred to contract termination, and the latter is avoided in so far as the former is possible.\(^{23}\) Contract renegotiation is an internationally recognized response to hardship caused by a supervening event.\(^{24}\) However, its legal effectiveness will depend on whether, and to what extent, a criterion of ‘good faith’ is built into the process of renegotiation.\(^{25}\) The favouritism towards contract performance also denotes a somewhat stringent approach to a finding of *force majeure* or a change of circumstances, which should generally be made with caution and, hence, not solely by reason of the mere coincidence in time and location between contract performance and the supervening event (such as the spread of COVID-19).\(^{26}\)

Third, it is a distinctive, yet controversial, feature of the judicial practice in China that the courts often order the contracting parties to share losses. This approach seems especially fitting in the context of the current pandemic, and express reference to it can be found in many of the judicial documents.\(^{27}\) Accordingly the courts apportion the losses caused by the supervening event

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\(^{20}\) Eg, SPC Speaker, ‘News Conference Regarding the Guiding Opinion I’ (20 April 2020) <http://www.court.gov.cn/zixun-xiangqing-226251.html> accessed 5 June 2020, answer to question 3 (Chinese version); Guangxi HPC no 1 Civil Tribunal, 关于妥善审理涉新冠肺炎疫情相关民事纠纷的指导意见 [Guiding Opinion on the Proper Adjudication of Civil Disputes Involving the COVID-19 Pandemic], issued and effective as of 3 March 2020, art 8; Jilin HPC (n 16) art 8.

\(^{21}\) SPC Guiding Opinion I (n 11) art 3(2). Further, according to Judges LIN Wenxue and LIU Guixiang in the news conference held by the State Council News Office on 19 May 2020 concerning the SPC Guiding Opinion II (n 15), the general principle is that, at least as far as sales and lease contracts are concerned, termination of contract is available only where the purpose of the contract is rendered unfulfillable. See LIN Wenxue and LIU Guixiang, ‘News Conference Held by the State Council News Office’ (19 May 2020) <http://www.gov.cn/xinwen/2020-05/19/content_5513021.htm> accessed 5 June 2020 (Chinese version).

\(^{22}\) Ibid.

\(^{23}\) SPC Speaker (n 20), answer to question 3; Jilin HPC (n 16) art 7.

\(^{24}\) See eg International Institute for the Unification of Private Law, *UNIDROIT Principles of International Commercial Contracts* (3rd edn, Transnational 2010) art 6.2.3(1).

\(^{25}\) ‘Good faith’ is openly endorsed in Sichuan HPC no 1 Civil Tribunal (n 3) pt 2.

\(^{26}\) Sichuan HPC no 1 Civil Tribunal (n 3) pt 2; see also SPC Speaker (n 20), answer to question 3; Zhejiang HPC no 2 Civil Tribunal (n 11), answer to question 1; Guangxi HPC no 2 Civil Tribunal, 关于审理涉及新冠肺炎疫情民商事案件的指导意见 [Guiding Opinion on the Adjudication of Civil or Commercial Cases Involving COVID-19 Pandemic], issued and effective as of 20 February 2020, pt II.

\(^{27}\) Eg SPC Guiding Opinion I (n 11) art 1.
according to the principle of fairness, by taking into account a wide range of factors including the parties’ respective fault. It is further suggested by some courts that such judicial apportionment of losses is possible only where the parties fail to provide in the contract or renegotiate how the losses are to be allocated.28 While this approach is generally supported in the judicial documents, there is some controversy as to whether such an apportionment of losses should be confined to cases where the contract is terminated pursuant to the doctrine of change of circumstances, with the losses lying where they fall in the case of force majeure.29 More generally, the main challenge confronting this judicial scheme is that the precise criteria by which the losses are apportioned by the courts remain obscure and require further clarification.

Fourth, special protection is afforded to parties most affected by, and vulnerable to, the pandemic, such as employees and consumers (see the discussion on specific contracts below). Many provisions in respect of labour (employment) contracts and consumer contracts implement this protective policy. The presence of these provisions shows that in certain areas the values pursued by contract law (such as favouritism towards contract performance) need to be balanced against countervailing public policies.

In addition, some judicial documents have given priority to party autonomy, but this is far from a universal position, and a divergence of views can be discerned. For example, the SPC has expressed the view that contracting parties may agree upon the circumstances where exemption or modification of contractual liability and/or termination of contract is available in the event of force majeure; such an agreement should be respected by the courts provided that it does not contradict mandatory laws, public order, or good morals.30 In contrast, there is an opposing view that force majeure as a legislative excuse from contractual liability cannot be contracted out, although the parties may agree upon how the losses caused by a force majeure event are to be shared between them.31

28 Sichuan HPC no 1 Civil Tribunal (n 3) pt 2, ch 1, art 4(3); Guangxi HPC no 1 Civil Tribunal (n 20) art 8; Jiangsu HPC. 关于为依法防控疫情和促进经济社会发展提供司法服务保障的指导意见 [Guiding Opinion on Providing Judicial Service and Safeguard for the Lawful Prevention and Containment of the Pandemic and the Development of Economy and Society], issued and effective as of 13 February 2020, art 5.

29 Jiangsu HPC no 1 Civil Tribunal (n 14) art 6; Jilin HPC (n 16) art 7; compare Neimenggu HPC (n 10) art 11 (unavoidable losses caused by force majeure to be shared by non-fault parties).

30 SPC Speaker (n 20), answer to question 3; see also Neimenggu HPC (n 10) art 25 (disputes arising under foreign-related commercial contracts should first of all be handled according to force majeure clauses in the contract (if any)). Regarding building contracts, the courts should modify contract terms in accordance with the standard terms adopted by the parties and, absent those, industry standards and the doctrine of change of circumstances. Sichuan HPC no 1 Civil Tribunal (n 3) pt 4, arts 1, 3. The SPC also stresses the importance of respecting party autonomy when applying international commercial conventions or customs. SPC Guiding Opinion III (n 10) arts 8–9.

31 Sichuan HPC no 1 Civil Tribunal (n 3) pt 2, ch 1, art 4(3).
Key scenarios

In various judicial documents, particularly the SPC’s Guiding Opinion I, the key scenarios in which the relevant contract law rules may apply are helpfully outlined. The unifying theme is, of course, that different legal consequences or remedies follow depending on the impact that the event in question has had on the performance of the particular contract. The following key scenarios are extrapolated from multiple judicial documents.

1. Where the COVID-19 pandemic or the regulatory measures lead to (one or both parties’) inability to perform the contract, the disabled party is wholly or partially exempted from liability for non-performance, according to Article 117 of the Contract Law. In such inability cases, the pandemic or measures are often categorically treated as force majeure events. Obviously, whether this is so hinges on the extent of the inability or the impossibility to perform that results from the supervening event. Thus, it is reiterated that exemption of contractual liability should be proportionate to the extent that the pandemic or measures cause non-performance. Three additional provisions are also noteworthy. First, as a rough guide, the pandemic starts and ends with the provincial Level II Responses to Key Public Health Emergencies at the place of contract performance or the parties’ domicile. Where a contract is concluded after the pandemic starts, the risk of non-performance is presumed to have been foreseen or foreseeable and, hence, does not fall under either the doctrine of force majeure or the doctrine of change of circumstances. Second, while the party alleging force majeure has the onus of proof in relation to not only its constitution but also due performance of the duty

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32 SPC Guiding Opinion I (n 11) art 3.
33 Eg SPC Guiding Opinion I (n 11) art 3(1).
34 National People’s Congress Standing Committee Legal Work Commission, ‘Responsible Officers’ Answers to Legal Questions of Common Interest Concerning the Prevention and Containment of the Pandemic’ (10 February 2020) question 5 <http://www.npc.gov.cn/npc/c30834/202002/23100ec6c65145eda26ad6dc288f9e9.shtml> accessed 5 June 2020 (Chinese version); see also Sichuan HPC no 1 Civil Tribunal (n 3) pt 2, ch 1; Guangxi HPC no 1 Civil Tribunal (n 20) art 7.
35 Sichuan HPC no 1 Civil Tribunal (n 3) pt 2, ch 1, art 4(1); Guangxi HPC no 1 Civil Tribunal (n 20) art 9; Zhejiang HPC no 2 Civil Tribunal (n 11) answer to question 5; Hubei HPC no 2 Civil Tribunal (n 12) answer to question 7.
36 Guangxi HPC no 1 Civil Tribunal (n 20) art 7; Hunan HPC, 关于涉新型冠状病毒感染肺炎疫情案件法律适用若干问题的解答 [Answers to Certain Questions Regarding the Application of Law in Cases Involving COVID-19 Pandemic], adopted at the fourth Judicial Committee of the Hunan HPC on 25 February 2020, effective as of 27 February 2020, answers to questions 4–6; Hubei HPC no 2 Civil Tribunal (n 12) answer to question 3; Guangxi HPC no 2 Civil Tribunal (n 26) pt 3, art 6. The starting date must be between 22 January and 29 January, during which period all the 31 provinces in China initiated Level II responses, and the ending date comes in late April or later, when the Level II responses in the relevant province cease.
37 Sichuan HPC no 1 Civil Tribunal (n 3) pt 2, ch 1, art 1; Guangxi HPC no 1 Civil Tribunal (n 20) art 7; Zhejiang HPC no 2 Civil Tribunal (n 11) answer to question 3.
38 Guangxi HPC no 1 Civil Tribunal (n 20) art 7 (such as by adducing copies of the regulatory measures and/or proof of hospitalization, diagnosis, and quarantine/isolation).
of notification under Article 118 of the Contract Law, it is suggested that
the onus should not be ‘too demanding’. Notice may be served through
electronic means of communication such as text message, webchat, and
emails. Further, the consequence of a failure of notification lies in the
non-recoverability of avoidable, but un-avoided, losses rather than a
defeat of the force majeure claim. Third, where a contracting party
receives subsidies or tax rebates from the government or financial support
or reduction of debt from either the government or third parties by reason
of the pandemic, this fact may be taken into account in determining
whether there is in fact an inability or impossibility to perform, the
extent of exemption of liability, and, presumably how the losses are to
be allocated.

2. Where the COVID-19 pandemic or the regulatory measures render the
purpose of the contract unfulfillable, either party is entitled to terminate
the contract in accordance with Article 94(1) of the Contract Law. This ‘contract purpose’ test is given primacy in the COVID-19 judicial
documents and has emerged as the decisive test for the availability of termination of contract in all pandemic cases. This contrasts starkly with
Chinese courts’ general position in the SARS cases, where the legal test
revolved around the inability or impossibility to perform. Some judicial
documents provide that the termination of a contract may not be effected
where it is still possible to perform the contract. Such a provision is an
unwarranted restriction over the scope of the doctrine of force majeure,
and the better view is that, while inability or impossibility to perform may
very well render the purpose of the contract unfulfillable, the ‘contract purpose’ test may be satisfied in a wider range of cases.

\[\text{References}\]

39 Hubei HPC no 2 Civil Tribunal (n 12) answer to question 4 (are satisfied once notification is made
lawfully, and the texts of the applicable measures are submitted to the court before the conclusion
of the investigation phase); Guangxi HPC no 2 Civil Tribunal (n 26) pt III, art 7.
40 Zhejiang HPC no 2 Civil Tribunal (n 11) answer to question 5.
41 Sichuan HPC no 1 Civil Tribunal (n 3) pt 2, ch 1, art 4(4); see also Guangxi HPC no 1 Civil
Tribunal (n 20) art 9; Zhejiang HPC no 1 Civil Tribunal, 关于规范涉新冠病毒疫情相关民事法律
纠纷的实施意见（试行）[Implementation Opinion (Provisional) on the Regulation of Civil Disputes
Involving the COVID-19 Pandemic], Zhe Gao Fa Min Yi [2020] No 1, issued and effective as of 10
February 2020, pt II, art 4. Cf Guangxi HPC no 2 Civil Tribunal (n 26) pt III, art 11 (did not spell
out liability in damages).
42 SPC Guiding Opinion I (n 11) art 3(3).
43 Jiangsu HPC no 1 Civil Tribunal (n 14) art 2.
44 SPC Guiding Opinion I (n 11), art 3(2); Sichuan HPC no 1 Civil Tribunal (n 3) pt 2, ch 1, art 4
(2); Hubei HPC no 2 Civil Tribunal (n 12) answer to question 5.
45 See note 21 and text accompanying it.
46 Eg, Beijing no 2 IPC SARS Report (n 6).
47 Zhejiang HPC no 1 Civil Tribunal (n 41) pt II, art 1; Jiangsu HPC no 1 Civil Tribunal (n 14) art 1;
Guangxi HPC no 2 Civil Tribunal (n 26) pt 3, arts 1, 5 (overlooked the ‘contract purpose’ test
apart from a mere reference to art 94(1) of the Contract Law under pt 1, art 2).
48 Eg, Zhejiang HPC no 2 Civil Tribunal (n 11) answer to question 2(3). In some specific contracts,
such as contracts for the carriage of goods by sea, right of termination may be limited to cases of
‘inability to perform’. See SPC Guiding Opinion III (n 10) art 12.
3. Where the COVID-19 pandemic or the regulatory measures have the effect that continuing performance of the contract will cause manifest unfairness to one of the parties, that party may request a court or an arbitral tribunal to modify or terminate the contract pursuant to Article 26 of the SPC Contract Interpretation II.\(^{49}\) These provisions largely reiterate what the SPC has previously laid down about the doctrine of change of circumstances in general,\(^{50}\) including, \textit{inter alia}, that the doctrine does not apply to commercial risks, that its invocation should be normally preceded by an attempt to renegotiate the contract, and that a decision to apply the doctrine requires the approval of the relevant HPC and, if necessary, the SPC.\(^{51}\) As shown above, termination of contract is increasingly being controlled by the ‘contract purpose’ test.\(^{52}\) One exception is Valuation Adjustment Mechanism agreements, which may be terminated where the pandemic or measures render continuing performance of the contract manifestly unfair and the parties fail to renegotiate the contract.\(^{53}\)

4. Where the COVID-19 pandemic or the regulatory measures lead to mere difficulty in contract performance, the parties may renegotiate the terms of the contract and people’s courts shall not grant termination of contract but shall encourage the parties, through renegotiation or mediation, to continue to perform the contract where possible.\(^{54}\) As discussed earlier, this reflects a generally stringent approach to the application of both the doctrine of \textit{force majeure} and the doctrine of change of circumstances.

5. Where COVID-19 or the regulatory measures have no impact on contract performance, the parties’ rights and obligations under the contract are unaffected.\(^{55}\) Therefore, declarations to the effect that the pandemic or measures constitute a \textit{force majeure} event without regard to its impact on the performance of the particular contract must be viewed with caution.

\textbf{Specific contracts}

In the SARS report prepared by the Beijing no. 2 Intermediate People's Court, special rules about the test of inability or impossibility to perform the contract

\(^{49}\) Eg. Sichuan HPC no 1 Civil Tribunal (n 3) pt 2, ch 2. Notably, Chinese Civil Code (n 7) art 533 now clearly stipulates that the party may make such a request only where the parties fail to renegotiate the contract within a reasonable period.

\(^{50}\) Eg. SPC, 关于当前形势下审理民商事合同纠纷案件若干问题的指导意见 \textit{[Guiding Opinion on Certain Issues Arising from the Adjudication of Civil or Commercial Contract Disputes under the Current Situation]}], Fa Fa [2009] No 40, issued and effective as of 7 July 2009, pt I.

\(^{51}\) Sichuan HPC no 1 Civil Tribunal (n 3) pt 2, ch 2, arts 1, 3, 4.

\(^{52}\) Cf Chinese Civil Code (n 7), art 533 (‘the people’s court or arbitral tribunal shall modify or terminate the contract in accordance with the principle of fairness and in light of the actual circumstances of the case’).

\(^{53}\) SPC Guiding Opinion II (n 15), art 14.

\(^{54}\) SPC Guiding Opinion I (n 11) art 3(2); Zhejiang HPC no 2 Civil Tribunal (n 11) answer to question 2(2).

\(^{55}\) Zhejiang HPC no 2 Civil Tribunal (n 11) answer to question 2.
were laid down for specific contracts, including sales, lease, hospitality, personal service, and building contracts. The COVID-19 judicial documents likewise make provision for a wider range of specific contracts, and the conceptual core of these provisions extends beyond the inability or impossibility to perform. The ensuing discussion focuses on a number of significant provisions.

**Labour (employment) contracts**

Special protection is afforded to employees affected by the pandemic or measures. Accordingly, an employer is generally disentitled to dismiss an employee on the ground of Articles 26, 39, or 40 of the Labour Contract Law, where the employee is absent from work due to isolation required by a medical institution or the government or where the employee fails to meet the employer’s demand for resumption of work at a date earlier than required by the government. Dismissal is justified in the event of an employee’s gross misconduct in violation of the regulatory measures, such as where an employee is prosecuted and held liable under the criminal law for violating such measures. This can be compared to the greater availability of contract termination at the disposal of the employee, in situations where the pandemic or regulatory measures caused the employer to close down temporarily or cease to pay salary or social security or where the employer forces the employee to resume work earlier than the date required by the government. However, financial compensation payable under the Labour

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56 Beijing no 2 IPC SARS Report (n 6).
57 中华人民共和国劳动合同法 [Labour Contract Law of the People's Republic of China], adopted by the 28th meeting of the 10th Standing Committee of the National People’s Congress on 29 June 2007, amended by the 30th meeting of the 11th Standing Committee of the National People’s Congress on 28 December 2012.
58 SPC Guiding Opinion I (n 11) art 4; Guangxi HPC no 1 Civil Tribunal (n 20) art 2; Sichuan HPC no 1 Civil Tribunal (n 3) pt 3, art 10 (since art 39 is based on the employee’s gross negligence, which is not present where proof of objective circumstances is provided); Tianjin HPC no 1 Civil Tribunal (n 17) art 3; Hunan HPC (n 36) answer to question 10; Neimenggu HPC (n 10) art 28; Guangdong HPC and Guangdong Human Resources and Social Security Department, 关于审理涉新冠肺炎疫情劳动人事争议案件若干问题的解答 [Answers to Certain Questions Concerning the Adjudication of Labour and Employment Dispute Cases Involving COVID-19 Pandemic], Yu Gao Fa [2020] No 38, issued and effective as of 21 April 2020, answer to question 16, contra 17 (disabled from work).
59 Guangxi HPC no 1 Civil Tribunal (n 20) art 6; Jilin HPC (n 16) art 25; Zhejiang HPC no 1 Civil Tribunal (n 41) pt 1, art 7.
60 Guangxi HPC no 1 Civil Tribunal (n 20) art 2; see also Beijing HPC and Beijing Arbitration Commission on Labour and Employment Disputes, 关于审理新型冠状病毒感染肺炎疫情防控期间劳动争议案件法律适用问题的解答[Answers to Questions Concerning the Application of Law in the Adjudication of Labour Dispute Cases During the Prevention and Containment of COVID-19 Pandemic], issued and effective as of 29 April 2020, answer to question 29; Guangdong HPC (n 58) answer to question 11.
61 Guangxi HPC no 1 Civil Tribunal (n 20) art 6. This includes cases where the employee brings the claim and the contract is treated as being terminated by agreement under art 36 of the Labour Contract Law (n 57). Sichuan HPC no 1 Civil Tribunal (n 3) pt 3, art 11; cf Guangdong HPC (n 58) answer to question 12 (no termination for failure to pay social security or less than 30 days
Contract Law may be reduced or rejected if the employer suffers from financial difficulties as a result of the pandemic or regulatory measures. There are also provisions ensuring employees’ pay and leave, as well as enabling labour contracts to be concluded or renewed electronically during the pandemic.

**Sales contracts**

The SPC clarified in its Guiding Opinion II that delay, temporary inability, or onerousness in the performance of a sales contract caused by the pandemic or regulatory measures does not entitle the innocent party to terminate the contract unless it renders the purpose of the contract unfulfillable. This ‘contract purpose’ test applies whether the pandemic or regulatory measures are characterized as a *force majeure* event or a change of circumstances. Thus, where the supervening event results in manifest unfairness in continuing performance without rendering the contract’s purpose unfulfillable, the court, in response to a party’s request, may adjust the contract price or the time for performance according to the particular circumstances of the case and the principle of fairness but may not terminate the contract. Impossibility of performance cases, such as the inability to deliver the subject matter or to take out a secured loan necessary for the payment of the contract price due to the pandemic or regulatory measures, may also satisfy the ‘contract purpose’ test. Whether the purpose of the contract is rendered unfulfillable, a party is generally not liable for non-performance caused by *force majeure* or a change of circumstances.

Special rules apply in two categories of cases. First, under a contract for the sale of pandemic supplies, such as facemasks, protective gears, disinfectants, and so on, the buyer may presumably terminate the contract if the supplier...
unilaterally increases the contract price without legal ground.\textsuperscript{69} Where the supplier resells, in breach of the existing contract, the supplies to a third party for a higher price, the buyer may claim the profits of the resale as damages.\textsuperscript{70} Second, under a consumer sales contract, the consumer may rescind the contract on the ground of ‘exploitation of another’s distress’ under Article 151 of the General Rules of Civil Law, where the business charges evidently unreasonable price for pandemic supplies or necessities.\textsuperscript{71} Where goods purchased online are not shipped by the time appointed in the contract, the consumer may terminate the contract.\textsuperscript{72}

**Lease contracts**

A few useful principles can be extracted from the judicial documents, particularly those issued by the Sichuan HPC no. 1 Civil Tribunal. First, both exemption from liability and termination of contract should be available where a lease contract cannot be performed as a result of the pandemic or regulatory measures.\textsuperscript{73} The lessor’s delivery of the property may be rendered impossible because of, for example, the lessor being a front-line medical staff or worker or the implementation of lockdown or isolation measures.\textsuperscript{74} Termination may also be granted where the lease contract is made specifically for an exhibition, conference, temple fair, and so on and the event is cancelled due to the pandemic or regulatory measures.\textsuperscript{75} Second, with respect to the ‘contract purpose’ test, a general distinction may be drawn between two types of leases: a short-term lease often has specific purposes to be fulfilled within an unalterable time frame and is hence more likely to be terminable consequent on the pandemic, whilst termination of a long-term lease is harder to justify given the temporary nature of the impediment to its performance and the possibility of resumption when the pandemic is over.\textsuperscript{76} Third, a further distinction may be drawn in respect of judicial modification under the doctrine of change of circumstances: where the property in question is leased for business use and the business is significantly impacted by the pandemic or

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\textsuperscript{69} This can be inferred from provisions that the supplier may not do so. Zhejiang HPC no 2 Civil Tribunal (n 11) answer to question 6; Guangxi HPC no 2 Civil Tribunal (n 26) pt 7, art 1. However, the supplier may be exempted from liability if shipment is delayed or prohibited by regulatory measures.

\textsuperscript{70} SPC Guiding Opinion II (n 15) art 3.

\textsuperscript{71} Jiangsu HPC no 1 Civil Tribunal (n 14) art 12; Guangxi HPC no 2 Civil Tribunal (n 26) pt 7, art 2; GRCL (n 7).

\textsuperscript{72} Jiangsu HPC no 1 Civil Tribunal (n 14) art 11.

\textsuperscript{73} Eg, Tianjin HPC no 1 Civil Tribunal (n 17) art 11.

\textsuperscript{74} Sichuan HPC no 1 Civil Tribunal (n 3) pt 5, art 1.

\textsuperscript{75} SPC Guiding Opinion II (n 15) art 5.

\textsuperscript{76} Sichuan HPC no 1 Civil Tribunal (n 3) pt 5, art 2. Similar in part, see Jiangsu HPC no 1 Civil Tribunal (n 14) art 8.
regulatory measures, the courts are more likely to grant such modification.\textsuperscript{77} In comparison, judicial modification of contract is, ‘in principle’, inapplicable where the lease of property is for the lessee’s own accommodation.\textsuperscript{78} In addition, where the lessee is a small or miniature enterprise or individual trader who operates business on the property, the lessee may request a reduction of rent if the lessor is a state-owned enterprise or public-sector institution; with other lessors, such a lessee may have a better chance of requesting judicial modification of the contract.\textsuperscript{79}

\textit{Hospitality contracts}

Hospitality contracts include contracts for the provision of accommodation, travel, food and drink, and related services, which have been very affected by the pandemic and/or the regulatory measures. It has thus been provided that the requisite impact of a \textit{force majeure} event on contract performance in such cases should be relaxed.\textsuperscript{80} Congruent with this position is the provision that consumers may terminate the contract where contract performance is rendered unfair.\textsuperscript{81} There are also provisions to the effect that a contract for the transportation of people or goods may be terminated wherever transportation cannot be made within the time prescribed under the contract.\textsuperscript{82} However, the general principle favoured by the SPC is that termination of contract is justifiable only where the purpose of the contract is rendered unfulfillable. This position finds support in related provisions in the consumer context.\textsuperscript{83} The ‘contract purpose’ test encompasses the inability to perform, and, therefore, a consumer may terminate a contract for the provision of travel or food and drink services during the Spring Festival holiday where such services cannot be provided as agreed.\textsuperscript{84} Support can also be found in the SPC’s provision that a contract for the provision of off-line training is terminable only where an adaption to online training or an extension of the time for performance is not appropriate in the circumstances or does not fulfil the purpose of the contract.\textsuperscript{85} Once the contract is terminated

\begin{itemize}
  \item \textsuperscript{77} Sichuan HPC no 1 Civil Tribunal (n 3) pt 5, art 3. However, the lessor may not terminate the contract or sue for breach of contract where the lessee is unable to pay in full the rent on time. SPC Guiding Opinion II (n 15) art 5.
  \item \textsuperscript{78} Sichuan HPC no 1 Civil Tribunal (n 3) pt 5, art 3. Further, the doctrine should be applied ‘with caution’ to long-term leases for research and development, office, manufacture, or warehousing uses. Similarly, Guangxi HPC no 1 Civil Tribunal (n 20) art 11 (under a lease for the lessee’s accommodation, rental is adjustable only where the lessee cannot actually make use of the property); Hunan HPC (n 36) answer to question 6.
  \item \textsuperscript{79} SPC Guiding Opinion II (n 15) art 6.
  \item \textsuperscript{80} Jiangsu HPC no 1 Civil Tribunal (n 14) art 7.
  \item \textsuperscript{81} Guangxi HPC no 1 Civil Tribunal (n 20) art 10.
  \item \textsuperscript{82} Jilin HPC (n 16) arts 13–14; Jiangsu HPC no 1 Civil Tribunal (n 14) art 9.
  \item \textsuperscript{83} Jiangsu HPC no 1 Civil Tribunal (n 14) art 10; Jilin HPC (n 16) art 15.
  \item \textsuperscript{84} Neimenggu HPC (n 10) art 17.
  \item \textsuperscript{85} SPC Guiding Opinion II (n 15) art 8.
\end{itemize}
or rescinded, pre-payments, deposits, or price paid under the contract are recoverable.

**Loan contracts**

Due to the disparity in bargaining power between the lender and the borrower, the courts treat them differently. A financial institution is generally not allowed to accelerate loans or terminate the contract unilaterally, even where the borrower fails to make repayment in full or punctually. Renegotiation is encouraged and fostered, and the courts prefer solutions by way of contract modification, such as an extension of the repayment time, a renewal of the loan, and the re-arrangement of repayment in instalments. This principle rests largely on a policy affording special protection to medium, small, or miniature enterprises that take out a loan. In contrast, while the borrower is in principle obliged to repay the loan and to pay interest, it may bring the contract to a premature end by repayment and may request reduction of its liability based on specific favourable policies implemented during the pandemic or more generally under the doctrine of change of circumstances.

**Miscellaneous provisions**

The judicial documents contain rules pertinent to other specific contracts. Most of these rules are straightforward and provide ‘no surprise’ in the application of the general rules to the specific context of the COVID-19 cases. For example, a builder may be exempted from liability for a delay in meeting the building schedule caused by the pandemic and he or she may request an increase of contract price or an extension of the deadline where the continuing performance of the original terms becomes manifestly unfair to the builder. Further, a carrier or a

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86 Such as where persons of limited civil capability (e.g., young persons between the ages of eight and 18) pay for Internet games or make user contributions to live streaming without their guardian’s consent. SPC Guiding Opinion II (n 15) art 9.

87 Ibid art 10; see also Sichuan HPC no 1 Civil Tribunal (n 3) pt 6, art 1; Guangxi HPC no 2 Civil Tribunal (n 26) pt 8, art 1; Neimenggu HPC (n 10) arts 19, 21.

88 Jiangsu HPC (n 28) art 4; Guangxi HPC no 2 Civil Tribunal (n 26) pt 8, art 1.

89 SPC Guiding Opinion II (n 15) art 10; see also People’s Bank, Ministry of Finance, China Banking and Insurance Regulatory Commission, China Securities Regulatory Commission and State Administration of Foreign Exchange, 关于进一步强化金融支持防控新型冠状病毒感染肺炎疫情的通知 [Notice Concerning Further Strengthening Financial Support of the Prevention and Containment of COVID-19 Pandemic], Yin Fa [2020] No 29, issued and effective as of 31 January 2020, art 3.

90 Zhejiang HPC no 2 Civil Tribunal (n 11) answer to question 4.

91 Sichuan HPC no 1 Civil Tribunal (n 3) pt 6, art 3.

92 Ibid art 7.

93 Ibid art 10.

94 Ibid art 7.

95 Ibid.
shipping agent may be exempted from liability where the change of route, time, or discharging port is caused by the pandemic or regulatory measures.\textsuperscript{96} There are, however, exceptions. Some provisions clearly change the pre-pandemic law. For example, an insurer may not raise as a defence the fact that COVID-19 is not one of the diseases covered by the policy or that the insured’s COVID-19 disease or other diseases caused by the pandemic are not treated in one of the medical institutions specified in the contract.\textsuperscript{97} The relevant contract clauses are consequently altered by these provisions. In addition, more specific rules are made for the reduction of fees for containers kept for a longer period than expected, or for the sharing of increased costs for the building of a ship delivered late, due to the pandemic or regulatory measures.\textsuperscript{98}

Other civil or commercial rules

The judicial documents also make provision for certain aspects of tort, corporate insolvency, and civil procedure. For tort rules, a medical institution is generally not liable for death or injury of patients infected with COVID-19 unless the institution is at ‘obvious fault’.\textsuperscript{99} However, a person may be held liable for defamation if untrue information about the pandemic harmful to specific persons is disseminated online or otherwise.\textsuperscript{100} No action generally lies against government agencies or medical institutions for unlawful restriction of personal freedom, unlawful harm to personal health, or infringement of privacy by adopting and implementing the regulatory measures or collecting or disclosing necessary personal information.\textsuperscript{101} A person infected by another person with COVID-19 may sue for damages only where the defendant violates the relevant regulatory measures with the knowledge that she or he actually or probably carries, or is suspected to carry, the virus.\textsuperscript{102} A port may be held liable to compensate the owner or operator of a ship where restrictive quarantine measures are applied to the ship without the ‘unequivocal requirement’ of the local authority.\textsuperscript{103}

With respect to civil procedure, there are several notable matters stipulated. First, online mediation and adjudication through videoconferencing are permitted or even encouraged, and evidence, court documents, and other litigation

\textsuperscript{96} SPC Guiding Opinion III (n 10) arts 10, 13, 15.

\textsuperscript{97} SPC Guiding Opinion II (n 15) art 15.

\textsuperscript{98} SPC Guiding Opinion III (n 10) arts 14, 16.

\textsuperscript{99} Jiangsu HPC (n 28) art 8; Jiangsu HPC no 1 Civil Tribunal (n 14) art 16; Zhejiang HPC no 1 Civil Tribunal (n 41) pt III, art 1; Guangxi HPC no 1 Civil Tribunal (n 20) art 16.

\textsuperscript{100} Jiangsu HPC no 1 Civil Tribunal (n 14) art 13; Zhejiang HPC no 1 Civil Tribunal (n 41) pt III, arts 3, 4; Guangxi HPC no 1 Civil Tribunal (n 20) art 15.

\textsuperscript{101} Jiangsu HPC no 1 Civil Tribunal (n 14) art 15; Zhejiang HPC no 1 Civil Tribunal (n 41) pt III, art 5; Hunan HPC (n 36) answer to question 13; Guangxi HPC no 1 Civil Tribunal (n 20) art 14.

\textsuperscript{102} Jiangsu HPC no 1 Civil Tribunal (n 14) art 14; Zhejiang HPC no 1 Civil Tribunal (n 41) pt III, art 2; Guangxi HPC no 1 Civil Tribunal (n 20) art 14.

\textsuperscript{103} SPC Guiding Opinion III (n 10) art 17.
materials can be provided or delivered electronically, such as through fax or email.\textsuperscript{104} Similar provision has been made for foreign-related civil or commercial litigation specifically.\textsuperscript{105} Second, various time limits, including those for appeal, the payment of court fees, the production of evidence, or application for the recognition, enforcement, or revocation of arbitral awards, may be suspended during the last six months before expiry if they have been impacted by the pandemic or regulatory measures.\textsuperscript{106} However, the continuance of the period of a guarantee will not be affected by the pandemic.\textsuperscript{107} Third, more flexible interim measures, such as the seizure of property without divesting the owner or possessor of its use, are adopted against medium, small, or miniature enterprises and individual traders\textsuperscript{108} or of pandemic supplies against medical institutions or suppliers.\textsuperscript{109} Similarly, security rights including floating charges may not be set up over or enforced against properties of manufacturers of pandemic supplies during the pandemic.\textsuperscript{110} The courts may also grant judicial aids (including exemption, reduction, or deferral of fees) to litigants.\textsuperscript{111}

Finally, the meetings of shareholders, directors, or supervisors may be conducted online or via telephone, and the resolution is valid if otherwise in compliance with the company charter.\textsuperscript{112} The courts differentiate between enterprises whose difficulties were caused by the pandemic or regulatory measures and enterprises that have already run into difficulties prior to the pandemic, and they allow only the latter to start insolvency proceedings.\textsuperscript{113} Where insolvency proceedings are affected by the pandemic or regulatory measures, the required time limits may be extended.\textsuperscript{114}

\textsuperscript{104} Eg. Jiangsu HPC no 1 Civil Tribunal (n 14) arts 21–2; Xizang (Tibet) HPC, 关于在新冠肺炎疫情防控期间民商事案件审理过程中有关诉讼程序问题之温馨提示 [Gentle Reminder on Litigation Proceedings in the Adjudication of Civil or Commercial Cases During the Prevention and Containment of COVID-19 Pandemic], issued and effective as of 11 March 2020.

\textsuperscript{105} Hubei HPC, 关于新型冠状病毒感染肺炎疫情防控期间涉外商事海事审判工作的指引 [Guidelines on Foreign-related Commercial and Maritime Adjudication During the Prevention and Containment of COVID-19 Pandemic], issued and effective as of 8 February 2020. Similarly, SPC Guiding Opinion III (n 10) arts 1–3 (time limit for producing foreign-related identity, evidence, or notary documents may be extended).

\textsuperscript{106} SPC Guiding Opinion I (n 11) art 7; SPC Guiding Opinion III (n 10) arts 4–5.

\textsuperscript{107} Zhejiang HPC no 2 Civil Tribunal (n 11) answer to question 12.

\textsuperscript{108} SPC Guiding Opinion I (n 11) art 9.

\textsuperscript{109} Zhejiang HPC no 2 Civil Tribunal (n 11) answer to question 9; Jiangsu HPC no 1 Civil Tribunal (n 14) art 18; Jilin HPC (n 16) art 26.

\textsuperscript{110} SPC Guiding Opinion II (n 15) art 11; see also Zhejiang HPC no 2 Civil Tribunal (n 11) answer to question 11.

\textsuperscript{111} SPC Guiding Opinion I (n 11) art 8; see also Hunan HPC (n 36) answer to question 29.

\textsuperscript{112} Zhejiang HPC no 2 Civil Tribunal (n 11) answer to question 8.

\textsuperscript{113} SPC Guiding Opinion II (n 15) art 18; Guangxi HPC no 2 Civil Tribunal (n 26) pt X, art 2.

\textsuperscript{114} SPC Guiding Opinion II (n 15) arts 20–1.
Concluding remarks

As the British Institute of International and Comparative Law suggests in its second concept note on ‘Breathing Space’, in the context of the law governing commercial contracts, the English common law may evolve in two important aspects by considering legal experience in other jurisdictions—the adoption of negotiated solutions and alternative dispute resolution (ADR)—and have added flexibility to supplement the established doctrine of frustration. In this respect, the positions of Chinese law are in stark contrast to the orthodox positions of English law and are duly referenced in the concept note. The judicial documents discussed in this comment highlight both of these two significant comparative law aspects. The emphasis placed on party renegotiation and mediation as primary solutions to pandemic disputes reflects the Chinese courts’ earlier and wider preference for ADR in constructing a harmonious society. The introduction of the doctrine of change of circumstances into the picture and the shift of attention to the ‘contract purpose’ test provide a measure of flexibility not found in the common law or in the Chinese courts’ previous legal responses to SARS. Whether, and to what extent, the Chinese experience in these two areas may grow into a successful model for comparative law use is an issue awaiting further close observation in the near future.

Of course, the rules enunciated in the judicial documents are still mostly statements of principles or even policies, thus lacking the rich contextual sophistication of concrete legal solutions. Some of these rules can be criticized as overlooking the complicated factual evaluation that is sure to inform, or even sway, the outcome one way or the other. However, they may nonetheless play a role akin to ‘presumptions of law’ in common law countries and thus point to a certain outcome unless strong facts tilting towards the opposite direction are present. This will give lower courts much-needed guidance and certainty in a new and almost unprecedented wave of legal controversies. In that sense, these judicial documents constitute a timely measure that may instil some valuable confidence in businesses and persons affected by the pandemic or the regulatory measures.

115 Sir William Blair and others, ‘Breathing Space: Concept Note 2 on the Effect of the 2020 Pandemic on Commercial Contracts’ (May 2020) <https://www.biicl.org/documents/10320_concept_note_2_final_1.pdf> accessed 1 July 2020.
116 Ibid paras 19, 40, 41, 52.