Force Majeure in Chinese Maritime Law—A Short Note [1]

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Abstract

According to the Chinese Maritime Code and other laws, a party who wants to rely on force majeure to get an exemption from its maritime liabilities under Chinese law must prove that: (1) there has been a force majeure event; (2) the breach of contract is caused by the force majeure event; and (3) the affected party has given timely notice and has fulfilled his duty of mitigation. Depending on what impact the force majeure event has, the affected party may either be exempted from his liabilities or may terminate the contract. This paper, by discussing both the relevant law provisions and representative legal cases, aims to discuss a number of important aspects of force majeure in Chinese maritime law. It clarifies the meaning of force majeure, and also reveals that there are certain confusions and uncertainties that mainly revolve around the parties' duty to give appropriate notification, as well as their mitigation obligations.

Keywords:

Maritime law, force majeure, unforeseeable, unavoidable, insurmountable

I. Introduction

The basic idea of having a "force majeure" clause in a contract is to enable contractual parties to be relieved from performance of their contractual obligations when circumstances that arise are beyond their reasonable control. The term "force majeure" was for the first time introduced into Chinese law in Article 26 of the Interim Regulations on Mining in 1950,[3] and later the term appeared in certain other laws and regulations. It was not until the Implementation of the Law on Economic Contracts Involving Foreign Interests in 1985[4] that the definition of force majeure was to a large extent clarified, where Article 24 paragraph 3 stated that: "An event of force majeure means an event that the parties could not have foreseen at the time of conclusion

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[3] This Regulation came into force on December 22, 1950 and was abolished in 1987. Article 26 provided that: "Prospectors or miners, except for failures due to force majeure, shall perform construction in accordance with the original plan within six months after obtaining the license."

[4] The Law of the People's Republic of China on Economic Contracts Involving Foreign Interest came into force on July 1, 1985, and was repealed on October 1, 1999.

of the contract, with both parties being unable to either avoid or overcome its occurrence and consequences." With the promulgation of the General Principles of the Civil Law in 1986,[5] the legal phrase "force majeure" was clearly defined as meaning "unforeseeable, unavoidable and insurmountable objective conditions".[6] Later on, both the Contract law 1999[7] and the General Provisions of the Civil Law 2017[8] adopt a similar definition. According to the Contract Law, if the breach of the contract is caused by force majeure, the defaulting party is not at fault, so his liability is usually exempted.[9] This exemption can be in part or in whole, depending on the impact of the event of force majeure.[10] The Contract Law also gives the parties a legal right to terminate the contract, though the parties can terminate the contract only if the force majeure renders the purpose of the contract impossible. The occurrence of a force majeure event may have a large or small impact on the performance of the contract. When it only temporarily affects the performance of the contract, so that the purpose of the contract can be achieved by extending the performance, then the legal right of termination cannot thus be exercised.[11] However, force majeure does not apply in certain circumstances; Article 117 of the Contract Law states that it does not apply if the force majeure event occurs after the affected party delays performance.[12]

The Maritime Code in China is the main legislation regulating the relations arising from maritime transport and other associated aspects.[13] In the Maritime Code, although there is no explicit definition, the term "force majeure" appears in three different articles. Firstly, Article 51 includes force majeure as one of the exceptions whereby the carrier shall not be liable for loss of or damage to goods that occurs during the period of the carrier's responsibility if it arises or results from this exception. In addition, Article 90, by applying to both the carrier and the shipper, provides that either the carrier or the shipper may request the cancellation of the

[5] The General Principles of the Civil Law of the People's Republic of China were issued on April 12, 1986, came into effect on January 1, 1987, and were revised in 2009.
[6] The General Principles of Civil Law, Article 153.
[7] The Contract Law was promulgated and came into force in 1999. Article 117, paragraph 1, of the Contract law provides that "For purposes of this Law, force majeure means any objective circumstances which are unforeseeable, unavoidable and insurmountable."
[8] The General Provisions of the Civil Law was promulgated and came into force in 2017. Article 180, paragraph 2 of the General Provisions of the Civil Law provides that "A force majeure means any objective circumstance that is unforeseeable, inevitable, and insurmountable."
[9] See the Interpretation of Article 117 of the Contract Law.
[10] Article 117, para 1, of the Contract Law provides that: "A party who is unable to perform a contract due to force majeure is exempted from liability in part or in whole in light of the impact of the event of force majeure, except as otherwise provided by law. "
[11] See the Interpretation of Article 94 of the Contract Law.
[12] The Contract Law, Article 117.
[13] The Maritime Code was promulgated in 1992.

contract and neither shall be liable to the other if, due to force majeure, the contract cannot be performed prior to the ship's sailing from its port of loading; at the same time, Article 91 provides that if, due to force majeure, the ship cannot discharge its goods at the port of destination as provided for in the contract, the master shall have the right to discharge the goods at a safe place. Under China's legal framework, the Maritime Code is a special law, whereas the General Principles of Civil Law, the Contract Law, and General Provisions of Civil Law are classed as general law. By virtue of Article 83 of the Legislation Law, the stipulations of the Maritime Code shall take precedence in matters of marine business, and the other general laws shall apply where the Maritime Code makes no pertinent stipulations.[14]

Accordingly, by combining the legal provisions in the above-discussed laws, a party who wants to rely on force majeure to get an exemption from its maritime liabilities under Chinese law shall prove that: (1) there is a force majeure event, which is an objective circumstance being unforeseeable, unavoidable and insurmountable; (2) the breach of contract is caused by the force majeure event; and (3) the invoking party has given timely notice; and (4) there is duty of mitigation. In addition, there are different legal remedies when a force majeure event occurs. Hence, this paper aims to present a detailed discussion of force majeure in Chinese maritime law from those particular aspects.

II. Defining "force majeure"

A. In general

As mentioned above, the Chinese Maritime Code does not give an explicit definition of the term "force majeure". In view of this, the definitions in other laws may be used as a good reference. As already said, the Contract Law, the General Principles of Civil Law, and the General Provisions of Civil Law, contain a consistent definition of force majeure, that is to say, being "unforeseeable, unavoidable and insurmountable objective conditions". Apparently, being unforeseeable, unavoidable and insurmountable are primary elements in order to constitute "force majeure". Since Chinese law does not adopt an enumerative approach, it is generally believed that the following situations may be considered as "force majeure": (1) Natural disasters, including earthquakes, floods and other disasters caused by force majeure; (2) war and armed riot; (3) socially abnormal events, such as strikes and riots; and (4)

[14] The Legislation Law of the PRC, Article 83 provides that: "In the case of national law, administrative regulations, local decrees, autonomous decrees and special decrees, and administrative or local rules enacted by the same body, if a special provision differs from a general provision, the special provision shall prevail; if a new provision differs from an old provision, the new provision shall prevail."

government actions, such as interim prohibitions and special administrative measures. There may also be some other special situations. However, in principle, once the event first of all meets the requirement of the objective test, which refers to non-subjective situations independent of the behaviour of the parties[15] and, secondly, is "unforeseeable, unavoidable and insurmountable", it would then be considered as "force majeure".

Nevertheless, even if an incident or event belongs to one of those above-described situations, it could still be debatable as to whether or not it is a "force majeure" event, so the surrounding circumstances will usually have to be evaluated on a case-by-case basis. For instance, the happening of a natural disaster will not necessarily constitute a "force majeure" event, since whether or not an accident falls within the scope of "force majeure" is determined by its fulfilment of all three requirements, i.e., unforeseeable, unavoidable and insurmountable. In *Taicang Branch of China Ping An Property Co. Ltd v. Xiao Hua and Wuhu Tailian Shipping Co. Ltd*,[16] the defendants argued that the strong wind was not foreseeable, for the wind strength had exceeded the level forecast for that time, and that it was also unavoidable and insurmountable, since the defendant had tried his best and taken all reasonable measures. The court, however, decided that, firstly, the wind in this case had been forecasted by the meteorological department in advance, and that the defendants, as water transportation operators, should have been able to predict the adverse impact on the ship brought about by the strong wind, so that the strong wind and bad weather conditions in this case did not constitute unforeseeable conditions. Secondly, to satisfy the requirement of being unavoidable required that the bad consequences of the wind disaster could not be avoided, but it was the ship taking unreasonable measures to shelter from the wind that resulted in the accident, which meant that the accident could have been avoided. The court accordingly concluded that the accident was not due to an unforeseeable, unavoidable and insurmountable condition, and that therefore the defendants could not be exempted from compensation liability on the ground of force majeure.

In addition, since Chinese maritime law does not provide a specific list describing force majeure events, it is sometimes debatable whether or not a particular event is actually a force majeure event. For instance, in *Transfield ER Cape Limited v. Ningbo Jianlong International Economic and Trade Co. Ltd*,[17] the lessor of the charterparty claimed against the charterer for liability for breach of contract for failing to perform the contract on schedule, and the charterer

[15] See the Interpretation of Article 94 of the Contract Law.
[16] (2014) Wuhan Maritime Case No. 0007.
[17] (2006) Yong Maritime Primary Case No. 73.

presented a force majeure defence, stating that he was entrusted by a third party to import and transport iron ore, but that the third party was shut down subject to state policy, which directly led to his inability to perform the charterparty. The court decided that in this case, even if the defendant relied on a third party to perform his contractual obligations, the third party was ordered to suspend work due to illegal acts, which circumstance did not constitute a force majeure event based upon article 117 of the Contract Law, and accordingly the defendant could not be exempted from his liability.

A "force majeure" event is different from changes in circumstances and accidents under Chinese law. Article 24 of the Interpretation II of the Supreme People's Court of Several Issues Concerning the Application of the Contract Law[18] provides that, "Where any major change that is unforeseeable, is not a business risk, and is not caused by a force majeure event occurs after the formation of a contract, if the continued performance of the contract is obviously unfair to the other party or cannot realise the purposes of the contract, and a party files a request for modification or rescission of the contract with the people's court, the people's court shall decide whether to modify or rescind the contract under the principle of fairness and in light of the actualities of the case." Although force majeure can also cause the contract to be rescinded, the main purpose of advocating force majeure is to exempt the parties from their liabilities, whereas applying the rule relating to changes in circumstances and accidents is aimed at the fair sharing of risks, and therefore their legal consequences are different.[19]

Furthermore, it is not uncommon for the standard form of contract in the maritime business to contain a force majeure clause. Therefore, it is the wording of such clauses that will determine whether or not the event qualifies as force majeure for the parties to rely on such. Under Chinese law, unlike in some other common law countries, if a force majeure provision is not included in a contract, it can nevertheless be implied by law. If a contract actually does include a force majeure clause, then a party can either rely on the force majeure clause and/or resort to the protection offered by the general law. It could be beneficial for the party to resort to the general law, particularly when the contractual clause is rather limited or unclear; nevertheless, to be eligible for force majeure protection under Chinese law, the affected party must demonstrate that the relevant situation is unforeseeable, unavoidable and cannot be overcome, and that it is the cause of the affected party's inability to perform its obligation.

[18] This law was promulgated and came into effect in 2009.
[19] See the Interpretation in Article 117 of the Contract Law.

B. The meaning of "unforeseeable", "unavoidable" and "insurmountable"

(1) The meaning of "unforeseeable"

Being "unforeseeable" basically means that the person is subjectively unable to predict the occurrence of an objective situation. Bad weather and sea conditions are usually argued as being "unforeseeable". For instance, *Tianjin Zhonghe Taifu Shipping Co. Ltd v. China Pacific Property Insurance Co. Ltd Dongguan Branch*,[20] involved a dispute over property damage liability under a towage contract. In this case, the towed ship sank and caused fuel pollution in the nearby sea area due to the influence of severe gales in the towing process. As for the costs of cleaning up the oil and anti-pollution, the party of the towed ship claimed for compensation against the owner of the tug ship according to the towage contract. The owner of the tug ship defended the claim based upon force majeure, claiming that according to the provisions of the towage contract, both parties should not be liable for loss caused by force majeure,[21] and that the cause of the sinking of the towed ship was bad weather, which was a force majeure event. However, this defence was not supported by the court; the court held that, subject to Article 153 of the General Principles of the Civil Law, force majeure refers to unforeseeable objective conditions, and that article 29 of the Tort Law provided for exemption of liabilities caused by force majeure. In this case, though, the assessment report by a third party indicated that the bad weather and sea conditions that caused the sinking accident in the case had been known of by the tug ship from the marine weather forecast and thus were not unforeseeable and could not constitute a force majeure event. By contrast, in another case *China Pacific Property Insurance Co. Ltd Ningbo Branch v. Guangdong Ruigao Shipping Logistics Co. Ltd*,[22] more of which will be analysed later in this paper, the ship in the case suffered a typhoon during the voyage. The court held that the requirement of being "unforeseeable" was decided according to the actual environment in which the parties were located rather than a mere weather forecast. Therefore, even though the meteorological and maritime departments had issued a typhoon forecast and the master accordingly knew the route and scope of the typhoon in this case, the extent to which the ship would be affected by the typhoon under a reasonable sailing decision was unpredictable or unforeseeable according to the actual circumstances at that time. This point regarding being "unforeseeable" was supported by the court of appeal, which additionally

[20] (2018) Liaoning Civil Final Case No. 61.
[21] Article 9 of the towage contract concluded by the parties stipulates that: "in case of any force majeure or delay in towage during the towage process, neither party shall hold the other party liable for any claim and each party shall bear its own losses."
[22] (2019) Shanghai Civil Final Case No. 325. This case explains the three aspects of a force majeure event.

stated that the typhoon's specific path, direction, intensity and scope could not be accurately predicted, and therefore whether the ship would be hit by the typhoon, as well as its intensity, could not be foreseen by the captain at that time.

Apart from bad weather and sea conditions, the parties may argue various other situations as being "unforeseeable", thus falling within the definition of "force majeure". For instance, in *Zhejiang Dongda Paper Co. Ltd v. Maersk Line Shipping Co. Ltd*,[23] the carrier claimed against the consignee for the container demurrage fee according to the terms of the bill of lading. The consignee raised a force majeure defence, believing that the cargo of the overdue use of the container was due to custom seizure, which constituted a force majeure, so he should not bear any liability. The court held that, according to the definition of force majeure in Article 117 of the Contract Law, the consignee in the case should have foreseen that the consignment of goods would be detained by the customs of the port of destination if the relevant compulsory standards were not met, and thus have borne the adverse consequences. The act of detention by the customs was to perform legal duties in accordance with the law, which could not fall within the idea of "force majeure" in the Contract Law. Accordingly, the consignee's defence of not assuming compensation liability could not be accepted.

Whether or not the occurrence of an objective situation is foreseeable is a question of fact; at the same time, though, it is subject to the diversity of people's cognitive abilities, as well as to the development level of science and technology. Therefore, to judge a situation or event as being "foreseeable" or not, it is necessary to take the ability of an average person as the standard of judgement. At the same time, an understanding of force majeure should also be based upon the existing technical level, since a human's ability to predict the occurrence of an event largely depends on the current level of science and technology. As analysed in one case, the judge said: "As far as typhoons are concerned, although existing technology can make predictions to a certain degree, the impact of each typhoon cannot be accurately predicted, and whether a party can overcome these impacts under specific conditions also depends on his actual situation".[24] Thus, the occurrence of certain events that were perhaps unforeseeable in the past may be foreseeable nowadays with the development of science and technology.

(2) The meaning of "unavoidable and insurmountable"

[23] (2019) Zhejiang Min Zhong No.1498.
[24] *American Asia Property Insurance Co. Ltd Shipping Insurance Operation Center v. Shanghai Pan Asia Shipping Co. Ltd* (2019) Guangdong Civil Final Case No. 263.

Being "unavoidable" means that the relevant party has done his best, but still cannot avoid the occurrence of the force majeure event; and being "insurmountable" means the inability of a party to overcome the damage caused by an event despite his best efforts after its occurrence. Therefore, being "unavoidable and insurmountable" indicates both the inevitability of an event and its consequences.[25]

In G*uangdong Aokete New Material Technology Co. Ltd v. Guangdong Sinotrans International Freight Forwarding Co. Ltd* and *Venus Shipping Co. Ltd*, [26] the containerised goods suffered from water damage and lost their use value. The defendant argued that the loss of goods was caused by the storm surge resulting from the typhoon, and this constituted a force majeure event; therefore he should not assume liability for compensation. The court held that although the meteorological department had forecast the landing time and wind force of the typhoon, it had failed to show the effects of the wind, rain, waves and tide brought about by the typhoon. The flooding of containers in this case was actually caused by the typhoon and was unavoidable and insurmountable even if the defendants had taken reasonable measures. Therefore, the carrier should not bear liability for compensation for damage to the goods according to article 51(3) of the Maritime Code. In another case, *China Pacific Property Insurance Co. Ltd Ningbo Branch v. Guangdong Ruigao Shipping Logistics Co. Ltd*,[27] as mentioned earlier, the ship suffered from a typhoon during its voyage. In order to ensure the safety of the ship and its cargo, the sacrifices and cost directly incurred by the captain's intentional rescue measures constituted a general average. However, the shipowner claimed against the cargo insurer. The insurer argued that the ship was at fault in the incident and the claim from the shipowner would be denied. Both the court of first instance and the court of appeal upheld the view that the incident in this case was unforeseeable, inevitable and insurmountable. About the accident being "inevitable and insurmountable", the court of appeal supported the view of the court of first instance and stated that the ship in question had taken appropriate typhoon precautionary measures at the time, and its taking shelter in the anchorage was the usual reasonable measure as directed by the maritime department, but that these measures could not prevent the accident due to the nature of the super typhoon. Since the typhoon was a super typhoon, whose strength was far beyond the ship's general wind resistance level, and the shipowner had taken all possible measures to resist the typhoon and avoid losses, yet the ship still lost control and was eventually involved in an accident, it could thus be seen that the accident and damage were

[25] See the Interpretation of Article 180 of the General Provisions of the Civil Law.
[26] (2018) Guangdong 72 Civil Primary Case No. 261.
[27] (2019) Shanghai Civil Final Case No. 325. This case explains the three aspects of a force majeure event.

insurmountable. Therefore, the general average accident in this case was due to the super typhoon that constituted a force majeure, and the shipowner could thus enjoy exemption according to Article 311 of the Contract Law, and the cargo insurer could not refuse to share the expenses on the grounds of the shipowner's fault.

However, it is not always easy for the affected party to prove that the incident is "unavoidable". For instance, in *Li Zhiying* v. *Zhang Yun, Guangxi Guigang Fushun Shipping Co. Ltd*,[28] due to the typhoon that occurred, the ship involved in the case hit the facilities used for seafood cultivation and caused the plaintiff's losses. The owner of the ship defended himself by saying that the incident was partly caused by a strong typhoon, which was a force majeure. The court's analysis, based upon the facts of the case, was that the meteorological observatory had made a typhoon forecast, and that the defendant had had the time and ability to take appropriate measures to defend against the typhoon so as to avoid an accident. However, he did not take such measures, and therefore his defence on the basis of force majeure was denied. In another case, *American Asia Property Insurance Co. Ltd Shipping Insurance Operation Center v. Shanghai Pan Asia Shipping Co. Ltd*,[29] the insurance company that obtained subrogation claimed compensation against the carrier for wet damage to the cargo, and the carrier put forward a defence of force majeure that the wet damage was caused by the typhoon. The court held that, according to Article 117 of the Contract Law, the carrier must prove that the event resulting in the cargo damage was beyond his control and that the consequence remained unavoidable even with his best efforts. However, in this case, the weather forecast had predicted the landing of the typhoon, and the experienced carrier should have foreseen its possible impact. The carrier, who knew that the goods required waterproofing, did not however take any active anti-typhoon measures prior to the typhoon. Therefore, the carrier's defence of force majeure could not be established.

III. Other components for establishing "force majeure"

A. Causation

Article 53, paragraph (3) of the Maritime Code expressly states that the carrier shall not be liable for the loss of or damage to goods occurring during the period of the carrier's responsibility if "arising or resulting from" force majeure. The phrase "arising or resulting from" clearly denotes the necessity to prove a causative link between the "force majeure" event and

[28] (2018) Guangdong 72 Civil Primary Case No. 256.
[29] (2019) Guangdong Civil Final Case No. 263.

"the loss of or damage to the goods". Court practice also shows that it is necessary to establish such causal relationship. As long as the party can prove that it was rendered impossible to achieve the purpose of the contract due to an event of force majeure, the parties to a contract may terminate the contract. For instance, *Jiangsu Baojiang Transport and Trading Co. Ltd v. People's Property Insurance Company of China Tangshan Branch*,[30] involved a dispute over cargo damage under coastal cargo transportation. In this case, the carrier argued that the cargo damage was due to cabin flooding caused by the strong wind, which constituted a force majeure. The courts held that the carrier should have foreseen the strong wind at the loading port. In addition, there was no causal relationship between the gale and the cargo damage. The water ingress into the cabin was caused by the carrier's negligence in performing his management obligations on the ship, so the cargo damage was not due to a force majeure and the carrier should assume the liability.

In some complex and multi-party maritime cases, there are often competing causes for a failure to perform contractual duties. For instance, in some cases it is not unusual for a force majeure event to coincide with other events. In such cases, courts or tribunal will carefully examine the reasons why parties fail to perform. Under Chinese law, since force majeure is listed as one of the exceptions in Article 51 of the Maritime Code, it happens that a party may put "force majeure" together with some other exceptions as combined or alternative grounds on which to be excused from the liabilities. For example, in *Zürich Property Insurance (China) Co. Ltd v Shanghai Jixi International Freight Forwarding Co. Ltd*,[31] the ship encountered a typhoon during the voyage, and certain measures taken by the captain to avoid the typhoon caused cargo damage. The defendant argued that the cargo was damaged due to typhoon "Plum Blossom", and thus the carrier could enjoy exemption of liabilities on the ground of "natural disasters" and "force majeure" in accordance with Article 51, paragraph 1(3) of the Maritime Code and Article 311 of the Contract Law. Although the final decision was the same, that the carrier could be exempted from liability, it is, however, interesting to read that the court of first instance and the court of appeal decided the case based upon different grounds. The court of first instance held that firstly, since the case was a contract dispute about the carriage of goods by sea, Article 51 of the Maritime Code should be applied with priority when determining whether or not the carrier's liability should be exempted; secondly, although the occurrence of a typhoon could be forecast, it was difficult to make an accurate forecast based on the current

[30] (2010) Tianjin Higher Court Civil Final Case No. 35.
[31] (2014) Shanghai Higher Court the Fourth Civil Court Maritime Final Case No. 119.

level of science and technology due to many uncertain factors affecting the typhoon's movement paths. However, the typhoon-induced wind waves would pose a great threat to the safety of ships, but in the face of typhoons only reasonable measures can be expected to be taken. In this case, the ship encountered a high-intensive typhoon resulting in huge waves; this harsh sea condition was sufficient to constitute a sea peril classed as "natural disaster" in maritime law, so the carrier would thus be exempted from liability in accordance with Article 51, paragraph 1 (3) of the Maritime Code. By contrast, the court of appeal did not respond to the issue of whether the typhoon constituted a natural disaster or force majeure on which the carrier could rely for exemption, but held that, although it was difficult to accurately predict the typhoon at present, nevertheless, catastrophic consequences would be expected. Therefore, sufficiently prudent measures should be taken in the face of the typhoon, with a sufficient basis for decision-making provided by the existing weather forecast and historical data. In this case, it was difficult to say that the captain's measures were a sufficiently cautious decision, and it was this that to a large extent caused the ship to be damaged by the typhoon and thereby caused the cargo damage. This constituted the master's fault in navigation or management of the ship, and thus, in accordance with Article 51, paragraph 1 (1) of the Maritime Code, the carrier could be exempted from liabilities due to the captain's negligence in driving his ship.

B. Mitigation and reporting duties

Once it has been determined that there is a force majeure event, the issues will then be focused on the mitigation and reporting duties. If a contract contains a force majeure clause, it often requires that the affected party must notify the counterparty of the force majeure event in a timely manner, stating their claim for an exemption of liability and providing proof of existence of the force majeure event and the impact of the event on the affected party's non-performance; in addition, it would also require the defaulting party to show that it used its reasonable endeavours to prevent, or at least mitigate, the effect of the force majeure; and any clause which includes a phrase referring to events "beyond the control of the relevant party" can only be relied upon if all reasonable steps have been taken by the affected party to mitigate its result.[32] The affected party's obligation to notify and mitigate the effects of the force majeure event is in most cases considered to be one of the essential and indispensable elements for constituting

[32] Channel Island Ferries Ltd v Sealink UK Ltd [1988]1 Lloyd's Rep 323; and "Seadrill Ghana Operations Limited v. Tullow Ghana Limited [2018] EWHC 1640 (Comm), 2018.

a force majeure claim. Failure to send such notice in a timely manner, or to exercise reasonable endeavours, may result in a waiver or have other adverse consequences.

Under Chinese law, such duties as those relating to mitigation and reporting are not explicitly provided in the Maritime Code; however, Article 118 of the Contract Law states that if a party is unable to perform a contract due to an event of force majeure, it shall notify the other party in a timely manner so as to mitigate the losses.[33] Nevertheless, there is uncertainty and confusion with respect to reporting and mitigation duties under Chinese law. First, when should such a notice be given? Should it be given during or after the occurrence of a force majeure event? Secondly, although it is clear that the affected party must give notice to the other party in a timely manner, it does not clearly express the legal consequences if the party fails to do so; thirdly, it is not clear whether it is the party invoking the event of force majeure or the other party that should mitigate the losses; fourthly, it is not crystal clear as to the exact scope of the mitigation responsibility.

IV. Remedies

Force majeure is a phenomenon independent of human behaviour and is beyond the will of the parties involved; it is also an irresistible force greater than human power. An actor's failure to perform certain obligations due to force majeure indicates that there is no causal relationship between the actor's behaviour and failure of his performance, as well as no fault on the part of the actor. It is thus unfair for an actor to assume responsibility for a situation that is beyond his control. Therefore, force majeure is usually stipulated as being a reason to exempt the actor from civil liability, that is, under normal circumstances the civil liability shall not be borne if the civil obligation cannot be performed due to force majeure.

When a force majeure clause exists, it is considered to be an agreement which changes parties' obligations and/or liabilities under a contract when an extraordinary event or circumstance beyond their control prevents one or all of them from fulfilling those obligations. For instance, a clause may be drafted in this way: "A party shall not be liable in the event of nonfulfillment of any obligation arising under this contract by reason of Act of God, disease, strikes, lock-outs, fire and any accident or incident of any nature beyond the control of the relevant party." In addition, depending on the drafting, such clauses may have a variety of consequences, such as excusing the affected party from performing the contract in whole or in part; excusing that

[33] Article 118 of the Contract Law: "Either party that is unable to fulfil the contract due to force majeure shall notify the other party in time in order to reduce losses possibly inflicted on the other party, and shall provide evidence thereof within a reasonable period of time."

party from delay in performance, entitling them to suspend or claim an extension of time for performance; or giving that party a right to terminate. Therefore, if a party wants to rely on such a force majeure clause, he should bring himself squarely within that clause.

Under Chinese law, the legal consequences are put in a very clear way in several legislations. The Chinese Contract Law contains five articles dealing with different circumstances. Article 94 provides a general rule that the parties to a contract may terminate the contract if it is rendered impossible to achieve the purpose of the contract due to an event of force majeure. Article 117, apart from offering a definition of force majeure, is mainly focused on the legal consequences in the event of force majeure: (1) A party who is unable to perform a contract due to force majeure is exempted from liability in part or in whole in light of the impact of the event of force majeure, except as otherwise provided by law; and (2) where an event of force majeure occurs after the party's delay in performance, it is not exempted from such liability. Articles 311 and 314 are related to the carriage of goods: Article 311 provides that the carrier is not liable for damage in the case of damage to or loss of the cargoes in the course of carriage if it proves that such damage to or loss of the cargoes is caused by force majeure; and Article 314 deals with the freight in case the cargoes are lost in the course of carriage due to force majeure.[34] Accordingly, force majeure remedies under the Contract Law are: (1) the affected party is excused from civil liability, including damages, in relation to its non-performance (or delay); and (2) either party may terminate the contract where the essential purpose of the contract cannot be realised as a result of an event of force majeure. Meanwhile, in the General Principles of Civil Law, Article 107 states that "Civil liability shall not be borne for failure to perform a contract or damage to a third party if it is caused by force majeure, except as otherwise provided by law. Therefore, for instance, in *Sinotrans Guangdong Co. Ltd Shunde Branch v. Zhaoqing Shipping Co. Ltd*,[35] the cargo suffered wet damage. The carrier argued that the ship encountered heavy rain with the highest warning level during the voyage, and thereby a large amount of rainwater flooded the cabin. Since the ship was seaworthy and equipped with drainage equipment, the loss was caused by force majeure and the carrier should not be liable to compensate. However, the court held that the heavy rain weather encountered by the carrier could be accurately predicted according to the weather forecast. The container dampness was also not unavoidable and insurmountable, but was due to failure to take more reasonable

[34] The Contract Law, Article 314.
[35] (2015) Guangdong Maritime Primary Case No. 438

measures to avoid the effects of the rain. Therefore, the damage to the cargo was not a result of force majeure, and the carrier should resume his liability for compensation.

V. Conclusions

Clearly, force majeure in maritime law means an objective circumstance that is unforeseeable, unavoidable and insurmountable. However, Chinese law does not adopt an enumerative approach, and it does not include a detailed list of force majeure events. On the other hand, it is clear that Chinese maritime law requires that there must be a causal link between a force majeure event and the affected party's failure to perform, i.e. the affected party must establish that the force majeure event must have caused the non-performance. However, it is not clear under Chinese law whether or not it is necessary to prove that the force majeure event is the only cause immediately and directly resulting in the non-performance. As for the parties' right of notification and mitigation obligations in the event of force majeure, there are certain uncertainties and confusions in Chinese maritime law. Therefore, if parties require better protection, it is perhaps necessary to include a well-designed force majeure clause within their contracts.