Aircraft Leasing in the Face of COVID-19 - Does Force Majeure Apply?
English Law vs Chinese Law

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ABSTRACT

The COVID-19 outbreak has had a significant impact on the aviation industry. The performance of aircraft leasing contracts has been a topic of great concern to the industry, particularly in relation to whether a lessee can resort to force majeure to release itself from its obligations in its leasing contract. Since there might be alternative methods to fulfil the delivery of aircraft, and a "hell or high water" clause for the payment obligation, it is difficult for airlines to claim that COVID-19 constitutes force majeure under Chinese Law or frustration of contract under English Law in the absence of a specific force majeure clause in the contract. Possible alternative remedies that can be resorted to by the lessee are the principle of substantial change of circumstances under Chinese Law, and negotiation with the lessors to find consensual resolution.

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Introduction

With the COVID-19 outbreak sweeping the world in 2020, the global aviation industry has been hit in an unprecedented way. A number of countries have imposed travel controls of varying degrees in response to the outbreak, with some even requiring the suspension of flights to and from countries with severe outbreaks. As a result, a large number of airlines have been forced to make significant cuts to the flights they operate. Simple Flying data shows that 34 airlines worldwide have already gone bankrupt, and over 40 airlines have ceased or suspended operations in 2020.[1] Global civil aviation passenger traffic was 65.9% lower in 2020 than in 2019.[2] The majority of aircraft operated by airlines are leased aircraft, and the severe contraction in the air transport market is bound to negatively impact airlines' performance.[3] Against this background, airlines will inevitably default or defer rental payments in the aircraft leasing business.

This article will compare Chinese and English law from the perspective of Chinese airlines, specifically exploring whether the COVID-19 epidemic constitutes force majeure, what impact it might have on the performance of aircraft leasing contracts, and whether airlines as lessees are able to seek remedies under the relevant laws or contracts.

1. Force Majeure Under English Law and Chinese Law

Chinese airlines principally lease aircraft from overseas, and aircraft leasing contracts are generally chosen to be governed by English law in accordance with international practice.[4] However, with the development of the Chinese aviation financial leasing industry in recent years, some aircraft are delivered through Chinese leasing companies and leased to Chinese airlines, and the aircraft leasing contracts signed between Chinese leasing companies and airlines may agree to apply Chinese law.[5] This brings us to the provision and application of force majeure under Chinese law.

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[1] Which Airlines Ceased Operations In 2020? https://simpleflying.com/which-airlines-ceased-operations-in-2020/

[2] 2020 Worst Year in History for Air Travel Demand. https://www.iata.org/en/pressroom/pr/2021-02-03-02/

[3] Aircraft Leasing Accounts for Half of World's Commercial Aircraft Fleet. https://centreforaviation.com/analysis/reports/aircraft-leasing-accounts-for-half-of-worlds-commercial-aircraft-fleet-lessors-shun-widebodies-404111

[4] Bunker, Donald H. *International Aircraft Financing*. Montreal: IATA, 2005: 173-174.

[5] According to the Article VIII of the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, the parties to a lease agreement "may agree on the law which is to govern their contractual rights and obligations, wholly or in part." Unless they further agree to the contrary, such law shall be construed as a reference to the "domestic rules of law of the designated State or, where that State comprise several territorial units, to the domestic law of the designated territorial unit."

1.1 Force Majeure and Frustration of Contract Under English Law

1.1.1 Force Majeure

Although the development of English law was heavily influenced by Roman law, the doctrine of force majeure granted by law to the debtor as an exemption from civil liability was not inherited and developed by English law.[6] For an extended period, English law did not recognise a provision in the law that exempted the debtor from liability by reason of force majeure, nor did it give a clear legal definition of force majeure.[7] The reason is that English law emphasises that contracts should be performed absolutely and strictly and does not allow any cause to exempt the performance of the contract.[8] In the English case of *Paradine v Jane*, the judge held that a man should perform the contractual obligations or expenses incurred by himself in entering into a contract, irrespective of any unavoidable accidents, which he could have excluded in his own contract.[9] This historical tradition of considering the contractual performance to be an absolute liability made the statutory exclusion of force majeure challenging to accept in English law, and parties were unable to invoke the concept of force majeure directly, turning instead to the limitation of liability by agreeing to a number of force majeure circumstances in a specific contract.[10]

As force majeure is not a legal concept in English law, it is difficult to predict how the courts will interpret a simple general force majeure clause. The English courts have held in their jurisprudence that the mere agreement that "usual force majeure clauses shall apply" is invalid.[11] If a party is unable to perform a contract because of a breach by the other party, it cannot claim an exemption under the force majeure clause.[12] Furthermore, it is a well-established principle that changes in economic or market conditions affecting the profitability of a contract or the ease of performance of the parties' obligations are not considered force majeure.[13] It must be legally and factually impossible for the party to perform its contractual obligations, not merely more difficult or costly for it to do so.

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[6] Pringsheim, Fritz. "The Inner Relationship Between English and Roman Law." *Cambridge Law Journal* II, no. 3 (1935): 347.
[7] Thomas, David. "Frustration and Force Majeure: A Hard Line in English Law." *Construction Law International,* no.6 (2011): 21.
[8] Juhász, Ágnes. "Some Issues in Treating the Changes of Circumstances under English Law." *Pro Futuro,* no. 3 (2019): 29.
[9] Kiralfy, Albert. "Absolute Liability in Contract." *Journal of Legal History*, no. 1 (1980): 89.
[10] McKendrick, Ewan. *Force Majeure and Frustration of Contract*. London: CRC Press, 2013:7.
[11] British Electrical and Associated Industries (Cardiff) Ltd v Patley Pressings Ltd [1953] 1 WLR 280. https://uk.practicallaw.thomsonreuters.com/D-016-1491?transitionType=Default&contextData=(sc.Default)
[12] Ministry of Sound (Ireland) Ltd v World Online Ltd [2003] EWHC 2178. https://www.lawteacher.net/cases/ministry-of-sound-v-world-online.php
[13] Tandrin Aviation Holdings Ltd v Aero Toy Store LLC [2010] EWHC 40. https://www.bailii.org/ew/cases/EWHC/Comm/2010/40.html

1.1.2 Frustration of Contract

Although there is no legal provision for force majeure in English law, there is a doctrine of frustration of contract similar to that of force majeure. The "frustration of contract" was an exception to the early principle of "absolute contract". Under the principle of "absolute contract", the performance of the contract is an absolute obligation of the contracting parties, and they are not exempt from liability even if the performance of the contract is prevented by unforeseen circumstances in the course of the performance.[14] As an exemption from absolute contractual liability, frustration of contract is applied very strictly in English law.

The applicability of the doctrine of frustration of contract requires consideration of numerous factors including, but not limited to, the nature of the contract, the terms of the contract, the context in which it was entered into, the perceptions, expectations and presumptions of risk of the parties at the time the contract was entered into and the nature of the events affecting the performance of the contract.[15] Generally speaking, frustration of contract can only be applied when it would be unjust to continue to insist on performance if, after the conclusion of the contract, events beyond the control of the parties to the contract and unexpected by them make the performance of the contract impossible, or if the relevant obligations under the contract become radically different from those reasonably foreseen at the time of the conclusion of the contract.[16]

1.2 Force Majeure in Chinese Law

1.2.1 Force Majeure

"Force majeure" is one of the statutory, contractual exemptions in Chinese law and refers to "any objective circumstance that is unforeseeable, inevitable, and insurmountable."[17] Therefore, even if there is no force majeure clause in the contract, or if the force majeure clause does not include "plague", "epidemic" or other circumstances similar to the current COVID-19 outbreak, the party who cannot perform the contract may still claim partial or total exemption from liability under the law of "force majeure", or may claim rescission of the contract under certain circumstances.[18]

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[14] Ágnes, *supra note* 8.
[15] Edwinton Commercial Corporation & Anor v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel) [2007] EWCA Civ 547.
https://www.bailii.org/ew/cases/EWCA/Civ/2007/547.html
[16] Ágnes, *supra note* 8 at 36.
[17] Article 180 of the Civil Code of of the People's Republic of China.
[18] *Id.*

On 10 February 2020, in response to the COVID-19 pandemic, a spokesman for the Legislative Affairs Commission in the NPC Standing Committee of China said, "In order to protect public health, the government has also taken corresponding epidemic prevention and control measures. For parties who cannot perform their contracts as a result, it is a force majeure that cannot be foreseen, cannot be avoided and cannot be overcome."[19] The statement focuses on the preventive and control measures taken by the government, stating that - in principle - the failure to perform a contract due to the epidemic and the government's actions can be considered a force majeure event.

On the one hand, an epidemic and the resulting preventive and control measures (especially governmental actions) may well be force majeure events in their own right, but on the other hand, whether they constitute force majeure events in the performance of a particular contract is a matter for individual analysis.[20] In judicial practice during the SARS epidemic of 2003, the court would analyse the specific circumstances of a case and examine whether the three elements of legal force majeure - namely "unforeseeable", "unavoidable", and "insurmountable" - were met in order to determine whether the event constituted a legal force majeure event. For example, in the case of *Wang Ting v the Business Department of the Guangdong Branch of the Agricultural Bank of China* (hereinafter referred to as the "Wang Ting case"), the parties entered into a contract after the SARS outbreak. One of the parties subsequently claimed that the SARS outbreak constituted a force majeure event that prevented the contract's performance. The court rejected the claim because "the SARS had already broken out when the loan was granted. The SARS did not qualify as force majeure 'unforeseeable' for the parties to the case."[21] In the case of Y*in Wenmin v Sanya Changyuan Property Development Company Limited*, the court considered the social context of the SARS and held that the comprehensive impact of the epidemic on the enterprise should be taken into account in determining the two elements of "unavoidable" and "insurmountable", and that the enterprise should not be "overly demanding".[22]

The existence of an event of force majeure does not automatically mean that the defence of force majeure is established. There must also be a causal link between the event of force majeure and the failure to perform the contract.[23] In judicial practice,

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[19] Legislative Affairs Commission in the NPC Standing Committee of China: Failure to Perform Contracts Due to Epidemic Prevention and Control is Force Majeure. https://www.chinanews.com/m/gn/2020/02-10/9086203.shtml

[20] Qiang, Han. "Legal Analysis of COVID-19 as Force Majeure." *People's Court Newspaper*, no. 7 (2020): 2.

[21] Wang Ting v the Business Department of the Guangdong Branch of the Agricultural Bank of China [2005]. http://www.110.com/panli/panli_29629.html

[22] Yin Wenmin v Sanya Changyuan Property Development Company Limited [2005]. https://www.110.com/panli/panli_34716.html

[23] Lei, Wang. "Measures for Prevention and Control of COVID-19 Pneumonia Pandemic Provided by Civil and

the court will usually take into account the specific industry, scope of business and transaction process involved in the contract in order to determine whether the force majeure event claimed by one party has caused the contract to be "directly" "necessarily" or "fundamentally" unenforceable.[24] For example, in the aforementioned Wang Ting case, the Guangzhou Intermediate People's Court stated: "Whether it is 'SARS', the bird flu epidemic or municipal construction, what may be affected is only the macro business environment, which does not have any direct and inevitable impact on the performance of the loan contract in this case, and therefore should not be found to be the cause of the three appellants' breach of contract".[25]

1.2.2 Force Majeure Clause

Under Chinese law, in addition to statutory force majeure, the parties may also agree on force majeure clauses in the contract and may refine or expand the scope of force majeure. Where Chinese law is applicable, if the parties agree that force majeure events exceed the scope of "any objective circumstance that is unforeseeable, inevitable, and insurmountable" as defined by law, such an agreement will be deemed to be an agreed exclusion or release clause.[26]

2. Can COVID-19 Invoke Force Majeure or Frustration of Contract in Aircraft Leasing Contracts Under English Law or Chinese Law?

2.1 Aircraft delivery

Aircraft leasing contracts involve the delivery of aircraft. For aircraft leasing contracts signed by Chinese airlines, whether with foreign leasing companies or domestic leasing companies, the delivery of the aircraft is generally completed outside of China.[27] Following the outbreak, a number of countries have imposed travel restrictions which may pose a substantial obstacle to airlines sending personnel outside the country for aircraft monitoring and aircraft acceptance during the duration of the outbreak.

Under an aircraft leasing contract, the lessee shall take delivery of the aircraft on the agreed delivery date and at the agreed location.[28] If the lessee fails to meet the

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Commercial Law." *Journal of Southwest University of Political Science & Law,* no. 3 (2020): 50.

[24] Liming, Wang. *A Study of Contract Law (Vol. 2).* Beijing: Renmin University of China Press, 2015: 535.

[25] Wang Ting case, *supra note* 22.

[26] Hao, Li. and Lei, Liu. "The System of Force Majeure in the Civil Code of the People's Republic of China." *Finance and Economics Law*, no. 5 (2020): 61.

[27] What is the Current Development of Chinese Aircraft Leasing? What are the Rules for the Development of Chinese Aircraft Leasing? https://www.100cjw.com/2922.html

[28] Hanley, Donal. *Aircraft Operating Leasing : A Legal and Practical Analysis in the Context of Public and*

conditions precedent to delivery as agreed in the contract, resulting in a delay in the delivery of the aircraft, or fails to take delivery of the aircraft meeting the conditions agreed in the contract, the lessee shall be in default.[29] If the lessee refuses to take delivery of the leased aircraft, any damage caused to the lessor as a result shall be borne by the lessee.[30]

2.1.1 With Force Majeure Clause

Force majeure clauses in contracts often spell out the definition of force majeure events, the legal consequences of the application of force majeure, the notification obligations of the party affected by force majeure, the obligation to derogate, etc.[31] Therefore, whether the outbreak of COVID-19 is a "force majeure" is a matter of individual circumstances and contractual agreement. If the contract clearly stipulates that a disease or epidemic is a force majeure event and does not violate the mandatory provisions of the enacting law, then the contractual agreement is the implied "law" and should be dealt with according to the contractual agreement.

If the contract does not expressly provide that a disease or epidemic is a force majeure event, it does not mean that there is no remedy under the contract. Consider whether the force majeure clause in the contract includes "governmental action, organised labour activity, shortage of electricity, supplies, infrastructure and transport" and "the existence of an escape clause". It is worth noting that the application of force majeure clauses in contracts is also subject to court interpretation. For example, the High Court's recent decision in *Fibula Air Travel Srl v Just-US Air Srl* makes it clear that, in the absence of specific wording in a force majeure clause referring to outbreaks of disease, the courts are unlikely to accept arguments that the mere existence of COVID-19 is a qualifying event simply because it impedes performance of contractual obligations. The party invoking force majeure must show that the specific restrictions significantly limit the performance of its contractual obligations.[32]

2.1.2 Without Force Majeure Clause

If there is no basis for a defence in the contract, the provisions of the specific law applicable to the contract will have to be examined. As mentioned before, there is no

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Private International Air Law. Alphen aan den Rijn : Kluwer Law International B.V, 2017:44.

[29] Donald H. *supra note* 4 at 84-87.

[30] Donal. *supra note* 29.

[31] Rauh, Theo. "Legal Consequences of Force Majeure under German, Swiss, English and United States Law." *Denver Journal of International Law and Policy*, no. 1 (1996): 151-152.

[32] Fibula Air Travel Srl v Just-US Air Srl [2020] EWHC 3048. https://uk.practicallaw.thomsonreuters.com/Document/I9CFC98F01E7C11EBB4C6B0630008A25C/View/FullText.html?transitionType=Default&contextData=(sc.Default)&comp=pluk

legal provision for force majeure in English law, but only the doctrine of frustration of contract. For aircraft leasing contracts where the governing law is English law, there is considerable uncertainty as to whether the frustration of contract regime under English law can be invoked to claim termination of the contract, notwithstanding that the travel restrictions on personnel in the relevant countries would create a material impediment to the assignment of personnel to supervise the construction and acceptance of the aircraft prior to handover. Does the performance of the contract in such a case become impossible or impractical? For example, can the airlines commission a local agent or professional body to complete the work related to the supervision and delivery of the aircraft, as well as to complete the ferry flight and fly the aircraft back to the country? As the airline's obligation to supervise the construction and delivery of the aircraft is based on a contractual agreement, there may be alternative ways to fulfill that agreement. Therefore, it is difficult to invoke the frustration of contract.[33]

For aircraft leasing contracts governed by Chinese law, as mentioned above, it may be challenging to consider difficulties relating to the delivery of the aircraft as "insurmountable", as there may be other alternative means of performance. This makes it difficult to claim legal remedies based on the relevant provisions of Chinese law on force majeure.

However, COVID-19 may be claimed to constitute force majeure in the performance of aircraft delivery under an aircraft leasing contract if the party obliged to perform is substantially without remedy to continue the contract.

2.2 Payment

Unlike delivery, the lessee's unconditional payment obligations are generally expressly agreed in the aircraft leasing contract, which is called the "hell or high water clause".[34] It means the lessee's obligation to pay rent and any other sums due under the contract shall be absolute, unconditional and non-refundable notwithstanding any contingency whatsoever in the course of the performance of the contract, including the inability to operate or the interruption of the operation of the aircraft for any reason whatsoever by law or otherwise.[35]

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[33] Seabridge Shipping Ltd. v Antco Shipping Ltd (The "Furness Bridge") [1977] 2 Lloyd's Rep 367. https://www.i-law.com/ilaw/doc/view.htm?id=147640

[34] Donal. *supra note at 69.*

[35] Breslauer, Peter. "Finance Lease, Hell or High Water Clause, and Third Party Beneficiary Theory in Article 2A of the Uniform Commercial Code." *Cornell Law Review*, no. 2 (1992): 322.

The airline's ability to pay the aircraft rental and other payments due under the contract in full and on time may be affected to a certain extent by the significant reduction of flights by the airline for a certain period due to the epidemic, which will inevitably have a significant adverse impact on the cash flow of the company. However, based on the express provision of the lessee's absolute, unconditional and non-refundable payment obligation under the aircraft leasing contract mentioned above, it is difficult to apply the principle of frustration of contract under English law to claim remedies for termination of the contract. In the *Salam Air SAOC v Latam Airlines Group SA*, the court ruled that the inability of Salam Air to use the aircraft due to the epidemic, or the relevant Omani control regulations, or the drastic reduction in demand for flights, were potential risks to the commercial operation of the aircraft, and that Salam Air bore such risks under the "hell or high water" terms of the lease contract. Therefore, Salam Air could not be released from its obligation to pay rent.[36]

In the case of aircraft leasing contracts governed by Chinese law, the terms of the contract expressly exclude the impact of various unforeseen events on the lessee's payment obligations. Also, since the lessee's payment obligation is purely monetary and COVID-19 may only affect the macro business environment and does not have any direct and inevitable impact on the performance of the aircraft leasing contract, force majeure is also generally not applicable.[37]

3. Possible Alternative Remedies that Can be Resorted to by the Lessee

3.1 The Principle of Substantial Change of Circumstances Under Chinese Law

According to the Civil Code of the People's Republic of China, "if the basic terms of a contract undergo a substantial change which could not have been foreseen by the parties at the time of entering into the contract and which does not constitute a commercial risk after the conclusion of the contract, making the continuation of the performance of the contract unreasonable for one of the parties, the party adversely affected may renegotiate with the other party; and if the renegotiation fails within a reasonable time, the party may ask the people's court or an arbitration institution to modify or dissolve the contract."[38]

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[36] Salam Air SAOC v Latam Airlines Group SA [2020] EWHC 2414 (Comm). https://www.casemine.com/judgement/uk/5fc48a222c94e0481f26aa94

[37] Wang Ting case, *supra note* 22.

[38] Article 533 of the Civil Code of the People's Republic of China.

This principle is further refined in the "Circular of the Supreme Peoples Court on the Promulgation of the Guiding Opinions of the Supreme Peoples Court on Several Issues Concerning Properly Handling Civil Cases Related to COVID-19 Epidemic in Accordance with the Law (II)". The first step is to actively guide the parties to continue to perform through mediation.[39] The People's Court will not support a request by a party to rescind a contract on the grounds that it is difficult to perform. If the continued performance of the contract is manifestly unfair to one of the parties and it requests a change in the period of performance, the manner of performance, the amount of the price, etc., the People's Court shall decide whether to support it in the light of the actual circumstances of the case.[40] The People's Court shall not support a party's claim for partial or total exemption from liability after the contract has been changed in accordance with the law.[41]

Therefore, given that COVID-19 does not always result in the failure to achieve the purpose of the contract or the failure to perform the contract, but rather may simply result in unfairness in the continued performance of the contract, if the aircraft leasing contract is governed by Chinese Law, the airlines may resort to the principle of substantial change of circumstances.

3.2 Company Voluntary Arrangements

Under the current special circumstance, it is difficult for the lessor to remarket the aircraft. Thus, it is unlikely that lessors will attempt to enforce their contractual rights directly without properly evaluating other options available to them. Since business is business, lessors need to consider the long-term risks and benefits.

One possible remedy for airlines is to negotiate the contractual arrangement with the lessor so that a mutually agreeable contract restructuring can be implemented under challenging times. Negotiations may further include the deferral and rescheduling of debts. Where an event constituting force majeure has severe consequences for the other party, and it is likely and foreseeable that the circumstances arising from the event will extend beyond a certain period, the parties may agree to negotiate adjustments to the contract terms to meet their requirements.

4. Conclusion

[39] Chapter I of the Circular of the Supreme Peoples Court on the Promulgation of the Guiding Opinions of the Supreme Peoples Court on Several Issues Concerning Properly Handling Civil Cases Related to COVID-19 Epidemic in Accordance with the Law (II). http://enipc.court.gov.cn/zh-cn/news/view-389.html
[40] *Id.*
[41] *Id.*

Under Chinese law, it is of limited practical significance to explore in isolation whether the COVID-19 outbreak constitutes force majeure. COVID-19 itself cannot be used as an *ipso facto* legal basis for force majeure performance exemption of the parties to an aircraft lease contract. The parties to an aircraft lease should take into account the causal relationship between their own obstacles in contract performance and COVID-19. Where the parties cannot overcome and/or avoid contract performance obstacles due to the epidemic, then force majeure under Chinese law may be pursued. Where the force majeure clause agreed in the aircraft leasing contract covers a contingency like COVID-19, the parties may directly invoke the force majeure circumstances agreed in the contract to claim the corresponding legal action, without requiring that the agreed outbreak be an unavoidable and insurmountable condition for the parties.

Under English law, the legal provisions of force majeure cannot be directly invoked as a basis for statutory exemption in aircraft leasing contracts, as there is no clear legal definition of force majeure. The parties to an aircraft leasing contract may rely on the force majeure provisions agreed in the contract as a basis for the exclusion of liability. Although the doctrine of frustration of contract similar to that of force majeure in Chinese law exists in English law, the threshold to apply it is relatively high.

In conclusion, it is difficult for airlines to claim that COVID-19 constitutes force majeure under Chinese Law or frustration of contract under English Law in the absence of specific wording that is similar to the definition of COVID-19 in the force majeure clause - especially with regard to the payment obligation. However, if the liquidity of the airline is compromised, it will not be in the interest of the lessor to apply extreme pressure for immediate payment. Therefore, airlines may also resort to negotiating with the lessors to find a consensual solution. Moreover, if the leasing contracts are governed by Chinese law, airlines may seek the help of the courts to adjust their contracts based on the principle of substantial change of circumstances.

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