Force Majeure, China & the CISG: Is China's New Contract Law a Step in the Right Direction?

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I. INTRODUCTION

With the death of Mao Zedong in 1976, the Cultural Revolution in China came to an end. With it, the long-standing policy of a closed centralized market that was mostly off limits to foreign investors, was also terminated.[1] When Deng Xiaoping came to power in 1978,[2] his party of reformers led a movement within the Communist Party (Party) to create a more decentralized, market-orientated, incentive-based economy that was open to international trade.[3] In doing so, he came to recognize the positive contributions that law could render to the social stability of China.[4] Mr. Xiaoping quickly began to push for a rapid restoration and augmentation of the legal system to prevent the return of arbitrary personal rule and the instability accompanying such rule.[5] As a part of this new policy, the reformers sought to increase the People's Republic of China's (PRC) involvement in international trade and to encourage foreign investment within China.[6] In order to do so, the Party had to build a new legal system favoring market-oriented contract law and foreign investment.[7]

During the ten years after Deng Xiaoping came to power, the Chinese legal system enacted hundreds of statutes[8] and increased the number of legal practitioners,[9] which in turn caused the number of contracts to

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1. China has a long isolationist history that has strictly forbidden any international trade or any type of interaction with foreigners. Although there have been many breaks from this policy during the past 2,000 years, a closed policy to foreigners has been the norm. *See* Lester Ross, *Force Majeure and Related Doctrines of Excuse in Contract Law of the People's Republic of China*, 5 J. CHINESE L. 58 (1991), *reprinted in* INTERNATIONAL BUSINESS AGREEMENTS IN THE PEOPLE'S REPUBLIC OF CHINA 135 (Ralph Folsom & W. Davis Folsom ed., 1996).

2. Deng Xiaoping was the Chinese Premier from 1978 to 1993.

3. *See* Ross, *supra* note 1, at 59. This policy, often referred to as the two-system government, mixes a centralized government with an open market economy. This was a drastic break from the socialist norm of having a central government and a centrally planned economy, as seen in the former communist government of the Soviet Union. *See id.*

4. *See id.* at 66.

5. *See id.*

6. *See id.* at 59.

7. *See, e.g.*, ALBERT H.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 37 (1992). China re-established the Supreme People's Procturate in 1978 and the Ministry of Justice in 1979. *Id.*

8. *See, e.g.*, ZHONGGUO RENMIN GONGHEHUO FALU HUIBIAN (Legal Compendia of the People's Republic of China) (1979-1984, then annual) (Chinese statutes and regulations are not codified in a series similar to that of the United States and other Western nations. Many Chinese regulations overlap one another and many sources must be consulted in order to asses the current law. Some of the best sources for current enactments of statutes and regulations are the numerous national newspapers published by the central, provincial, and municipal governments.).

9. *See, e.g.*, 1990 ZHONGGUO TONGJI NIANJIAN 812 (1990) (Statistical Yearbook of China). At the end of 1989, there were 43,715 lawyers in China. In 1989, 109,609

explode.[10] China was well on its way to an open market economy.

On March 21, 1985, the Tenth Session of the Standing Committee of the Sixth National People's Congress promulgated the Law of the People's Republic of China on Economic Contracts Involving Foreign Interest (FECL), which became effective on July 1, 1985.[11] This was the first substantive set of regulations that allowed private Chinese citizens to contract openly with foreign investors and individuals. Prior to the promulgation of the FECL, any party wishing to conduct contractual negotiations with a Chinese party had to do so under the 1981 Economic Contract Law of the People's Republic of China (ECL).[12] The laws were primarily designed to cover contracts between domestic parties.

Prior to the promulgation of the FECL, Deng Xiaoping and his reformers decided their next goal was to place the PRC into the world stage as a legitimate player in the international business realm.[13] However, the shift from an isolationist nation to a major player in the global economy takes time. For example, In 1980, China became a signatory to the United Nations Conference on Contracts for the International Sale of Goods[14] (CISG), but it took China six years to ratify

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clients retained lawyers on annual retainers, and lawyers handled hundreds of thousands of matters for these and other clients, including 14,594 matters affecting foreign interests. *See id.*

10. *See* Ross, *supra* note 1, at 66. By the year 1990, the number of written economic contracts far exceeded 700 million per year and continued to grow, forcing the Chinese government to push for further standardization of contractual language. *See* GUOWUYUAN BANGONGTING ZHUANFA GUOJIA GONGSHANG XINGZHENG GUANLI JU GUANYU ZAI QUANGUO AHUBA TUIZING JINGJI HETONG SHIFAN WENBEN ZHIDU QINGSHI DE TONGZHI (Administrative Office of the State Council Notice Disseminating the Request of the State Administration of Industry and Commerce to Publicize Model Economic Contract Documents) (May 26, 1990).

11. The Law of the People's Republic of China on Economic Contracts Involving Foreign Interest (commonly referred to as the Foreign Economic Contract Law of the People's Republic of China), *adopted* Mar. 21, 1985 at the 10th Sess. of the Standing Committee of the 6th National People's Congress, *effective* July 1, 1985, *translated in* 1 CHINA LAW FOR FOREIGN BUSINESS ch. III [hereinafter FECL].

12. Economic Contract Law for the People's Republic of China, *adopted* Dec. 13, 1981 by the 4th Sess. of the 5th National People's Congress, *effective* July 1, 1982 (amended 1993), *translated in* 1 CHINA LAWS FOR FOREIGN BUSINESS ch. IV, *reprinted in* 1 CHINA LAWS FOR FOREIGN BUSINESS (Stephen Fitzgerald ed., 1993) [hereinafter ECL].

13. *See* Ross, *supra* note 1, at 59.

14. UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, U.N. Doc. A/Conf.97/19 (1980), *reprinted in* 19 I.L.M. 668 and 52 Fed. Regs. 6264, *available at* http://www.uncitral.org/english/texts/sales/CISG.htm [hereinafter CISG]. The convention was held in Vienna, Austria from March 10 to April 11, 1980. *Id.*

the CISG.[15] Nonetheless, by ratifying the CISG in 1986, China became only the ninth country to do so.[16] However, as one can imagine, the mere act of becoming a signatory state to international agreements does not coordinate one's laws and regulations with international norms. This maxim proved to be true during the tragic events of the summer of 1989 in Tian'anmen Square.

Shortly after the events of 1989, the leading officials that had supported the genuine rule of law over the rule of man were quickly removed from power and more authoritarian leadership took over.[17] It was during this shaky period that thousands of foreign corporations and entities pulled out of China. Many lawsuits for breach of contract followed these events as Western companies rushed to remove employees and agents from the Chinese mainland. It was probably the greatest introduction that China could wish for, of the important role that *force majeure* plays in the international marketplace.[18]

This paper is designed to provide the reader with a general understanding of the *force majeure* clauses of both the old and new Chinese contract laws and their relation to the CISG. Section II will delve deeper into the Chinese concepts of *force majeure* and historical and moderns beliefs concerning excuse of performance. Section III will analyze the various provisions that apply to a *force majeure* event within the FECL, namely Articles 24 and 25, as well as the damage provisions relating to a *force majeure* event. Section IV will analyze Article 79 of the CISG; provisions pertaining to a breach by a third party, recovery of damages, and passage of risk will also be examined. Section V will study the application of the CISG within China, as well, as the

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15. *See Id.*

16. China signed the CISG on September 30, 1981 and ratified it on December 11, 1986, along with Italy and the United States, *available at* http://www.cisg.law.pace.edu/cisg/cisgintro.html. Countries signing prior to China, in chronological order were: Lesotho (June 1981), France (August 1982), the Syrian Arab Republic (October 1982), Egypt (December 1982), Hungary (June 1983), Argentina (July 1983), Yugoslavia (March 1985), and Zambia (June 1986). *See id.*

17. *See* Ross, *supra* note 1, at 135. The events of Tian'anmen Square threatened China's beginning as a nation with an open market economy and scared investors worldwide from engaging in contracts with Chinese parties. *Id.* It took some time for foreign investors to return to China, although life within China quickly returned to normal. *Id.*

18. *See* FECL, *supra* note 11, art. 24. Article 24 of the FECL defines *force majeure* as "am event that cannot be anticipated at the time of the signing of the contract by the parties concerned, and event of which the occurrence and aftermath are neither avoidable nor surmountable." *Id.*; *see also* Stephanie J. Mitchell & David D. Stein, *United States-Chinese Commercial Contract,* 20 INT'L LAW. 897, 910 n.35 (1986). Force Majeure or vis major is defined as a loss that results from a natural cause without the intervention of man, and could not have been prevented by the exercise of prudence, diligence, and care. *See* BLACK'S LAW DICTIONARY 1086 (6th ed. 1991).

application of the FECL. Section VI will prepare an analysis of the New Contract Law (NCL) of the People's Republic of China, and attempt to determine whether or not the new provisions are an enhancement of the old FECL. In particular, Articles 94, 96, 117, 118, and the applicable recovery of damage provisions will be reviewed. Section VII will focus on how the Chinese courts will theoretically apply the CISG, in comparison to the new provisions of the NCL, in an international setting.

II. THE CONCEPT OF *FORCE MAJEURE* IN CHINESE LAW

Prior to 1989, very little, if any, attention was given by the Chinese to the notion of *force majeure* among contracts with foreign parties.[19] This lack of attention is attributable to several factors. First, the role of law was never given great weight in Chinese society; the various Chinese rulers dismissed law as being inevitably imperfect and even as a harmful effort by mortal beings to govern society.[20] Second, private commercial practices did not achieve a comparable level of development in China.[21] Thus, *force majeure*, like other commercial law doctrines, did not develop because China lacked the incentive to expand international trade relations.[22]

The concept of *force majeure*, as it has developed in China, follows the French choice of words, which connotes a superior or irresistible force.[23] The Chinese use the phrase *"bú k• kàng l•,"* which literally means "not possible, resist force" or more suitably, "irresistible force."[24] Such provisions have been incorporated in all of China's three main contract laws.[25] However, in addition to the specific governing contract

19. *See* FECL, *supra* note 11.
20. *See* Ross, *supra* note 1 at 58.
21. *See id.* During the Qing Dynasty (1644-1911), various Chinese emperors rejected commercial intercourse with the West, believing that China's tightly controlled economy had nothing to gain from international trade. It was this belief and policy that contributed to the British and French invasion of China and the Opium Wars which forced the Chinese emperor to open several port cities of China to international trade. *See* MILTON W. MEYER, CHINA: A CONCISE HISTORY 394 (1994).
22. *See* Ross, *supra* note 1, at 58.
23. *See id.*
24. *See id.*
25. The three main contract laws of China are the Economic Contract Law of the People's Republic of China (ECL), *supra* note 12, the Law of the People's Republic of China on Economic Contracts Involving Foreign Interest (FECL), *supra* note 11, and the Technology Contract Law of the People's Republic of China (TCL). *See* Daniel Rubenstein, *Legal and Institutional Uncertainties in the Domestic Contract Law of the People's Republic of China*, 42 MCGILL L.J. 495, 497 n.3.

law, one must also look towards the basic concepts of contract law as outlined by the General Principles of the Civil Law of the People's Republic of China (General Principles).[26] The General Principles promulgate the basic principles in all civil law, including contract law, while the Economic Contract Law, the Foreign Economic Contract Law, and the Technology Contract Law set forth the substantive standards for contracts in those respective fields.[27]

The applicable articles of the General Principles outline the excuses for nonperformance that derive out of a *force majeure* event. The General Principles state: "Citizens and legal persons that breach a contract or that do not perform other responsibilities shall bear civil liability thereof. . .[u]nless otherwise stipulated by the law, no civil liability shall be borne for the inability to perform a contract or for harm caused to others due to force majeure...."[28] *Force majeure* is then further defined by Article 153 of the General Principles as relating to any event that is unforeseeable, unavoidable, and insurmountable.[29] Article 153 thereby creates a three-prong subjective test for a *force majeure* defense[30] (*i.e.*., unforeseeable, unavoidable, and insurmountable).[31]

This is a rather difficult test to apply, since the General Principles do not enumerate the various conditions that could define what is unavoidable, unforeseeable, and insurmountable.[32] However, in Chinese contract practice, these three prongs generally refer to natural events of unavoidable force that could not have arisen from any human intervention (i.e. flood, fire, storm, earthquake, and other natural disasters).[33] On the other hand, the reach of *force majeure* has expanded in most countries, with the exception of China, as the result of consensual bargaining and through the evolution of judicial doctrine and

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26. The General Principles of the Civil Law of the People's Republic of China, *adopted by* the 4th Sess. of the 6th National People's Congress on April 12, 1986, *effective* Jan. 1 1987, *reprinted in* 4 CHINA L. REPORTER 91 (1987) [hereinafter General Principles].

27. *See* Ping Jiang, Drafting the Uniform Contract Law in China, Lecture Delivered at the Center for Chinese Legal Studies, Columbia Law School, *in* 10 COLUM. J. ASIAN L. 245 (1996). The General Principles provide the necessary backbone for the Chinese legal system. General Principles, *supra* note 26. They act as a general filler for times when questions arise under the specific laws governing a certain area. *Id.* Although the General Principles provide general guidance as to how laws operate, it is always necessary to review the specific regulations in a certain area. *Id.*

28. General Principles, *supra* note 26, arts. 106-07.

29. *Id.*

30. *See* Ross, *supra* note 1, at 70.

31. *See id.* These three prongs are viewed as being "bù néng" or "not able" or "inability" conditions that require the non-performing party to have an inability to fulfill their contractual obligations due to outside forces. *See id.*

32. *See id.*

33. *See* HENRY ZHENG, CHINA'S CIVIL AND COMMERCIAL LAW 68 (1988).

statutory language.[34] *Force majeure* now refers to natural events as well as such calamities as war, civil strife, and government unrest, which stem from human causes.[35] Some courts have even gone as far as allowing a state-owned enterprise to declare *force majeure*, even when their breach was caused by a change in policy by the very government which controls them.[36] Therefore, to understand the make up of China's *force majeure* clauses, this article reviews the regulations and laws that provide for such an excuse.

III. LAW OF THE PEOPLE'S REPUBLIC OF CHINA ON ECONOMIC CONTRACTS INVOLVING FOREIGN INTEREST (FECL)

The Law of the People's Republic of China on Economic Contracts Involving Foreign Interest or commonly referred to as the Foreign Economic Contract Law of China (FECL), enacted on March 21, 1985, separates contracts that involve foreign parties from the Economic Contract Law of China (ECL).[37] The excuse provisions that provide for a *force majeure* defense can be found in Articles 24 and 25 of the FECL.[38] However, the provisions, like most Chinese regulations, are rather general and ambiguous.

A. *Force Majeure Provisions*

1. *Article 24 of the Foreign Economic Contract Law (FECL)*

The main *force majeure* provision of the FECL is Article 24, which provides:

> A party should be exempted from his obligations in whole or in part in case he fails to perform all or part of his obligations as a result of a force majeure event.

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34. *See* Ross, *supra* note 1, at 61.
35. *See id.*
36. *See id.* Such events are becoming increasingly less relevant in China as more and more of the State-owned enterprises are becoming privately owned. However, the Chinese government still maintains ownership and control over many areas of industry such as transportation, oil and other mineral rights, communications and real property. *See id.*
37. ECL, *supra* note 12. The Economic Contract Law (ECL) of the PRC will not be discussed in this paper at any length. For more discussion on the ECL, *see, e.g.*, Ross, *supra* note 1; ZHENG, *supra* note 33.
38. *See* FECL, *supra* note 11, arts. 24-25.

> In case a party cannot perform his obligations within the time limit set in the contract due to a force majeure event, he should be relieved from the liability for delayed performance during the period of continued influence of the effects of the event. An event of force majeure means the event that the parties could not foresee at the time of conclusion of the contract and its occurrence and consequences cannot be avoided and cannot be overcome.
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> The scope of force majeure events may be specified in the contract.[39]

When dealing with the FECL, the application of a *force majeure* defense can be difficult, due to vagueness and ambiguity. This is compounded further by the fact that China does not compile a written record or series of court opinions that could be consulted for guidance.[40] One problem is that Article 24 allows parties to stipulate to the scope of events that would qualify as a *force majeure* event, yet at the same time, the article defines a *force majeure* event as one that is "unforeseeable" and therefore, incapable of stipulation at the time the contract is executed.[41] Chinese courts have been known to hold that when parties were able to stipulate to a specific event in a contractual *force majeure* clause and that event actually occurs, the event *was* foreseeable, and therefore, does not qualify as a *force majeure* event under Article 24.[42]

Another problematic area is that Chinese and foreign parties often disagree on whether certain specified events, such as governmental interference and labor disputes, should be considered *force majeure*.[43] For example, an official from the Ministry of Foreign Economic Relations and Trade of the PRC (MOFERT) stated that labor strikes "can hardly be explained as unavoidable by either party concerned, thus it is inappropriate to list [labor] strikes as *force majeure* in general terms in a contract."[44] The Chinese often argue that a labor dispute that cannot be prevented by a foreign party or is beyond their control should not be considered as a *force majeure* event since the party signing the contract

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39. *See id.*

40. *See, e.g.*, Zhao Yan, *A Comparative Study of the Uniform Commercial Code and the Foreign Economic Contract Law of the People's Republic of China*, 6 INT'L TAX BUS 26, 28-29 (1988).

41. *See* Ross, *supra* note 1, at 80.

42. *See* CORPORATE COUNSEL'S GUIDE TO DOING BUSINESS IN CHINA 251 (Kenneth Cutshaw & Jianyi Zhang eds., 1995).

43. ZHENG, *supra* note 33, at 68; *see also* Zhongguo Shewai Jingi Hetong Fa Zhong De "Bukekangli" Shijian Ying Ruhe Lijie, *How to Understand Events of "Force Majeure" in China's Foreign Economic Contract Law, in* ECON. REPORTER 42 (Aug. 26, 1985); Mitchell & Stein, *supra* note 18, at 910.

44. *MOFERT Official Answers to Questions on Foreign Economic Contract Law,* CHINA ECON. NEWS, July 29, 1985, at 1-2 ("MOFERT" stands for the Ministry of Foreign Economics and Trade and is located in Beijing, China. For a discussion on MOFERT's role within the China, *see* Zhang Yuqing & James S. McLean, *China's Foreign Economic Contract Law: Its Significance and Analysis*, 8 J. INTL. L. BUS. 120, 124-126.).

generally has a decisive role in resolving labor disputes.[45] Furthermore, the Chinese generally only consider governmental interference as *force majeure* if the action was unforeseeable and the interference did not already exist at the time the contract was formed.[46]

Although this theory of governmental interference is not terribly different from Western beliefs of governmental interference, the Chinese government can quickly and suddenly change their stance on issues, laws, and regulations without notice. A Western businessman might expect such a sudden change in position to be unforeseeable or unavoidable.[47] However, a Chinese businessman would expect a sudden change in laws and regulations by the Chinese government whenever a legal doctrine or business practice begins to violate the public and economic interest or social norms of China as set forth in Article 4 of the FECL[48] and Article 7 of the General Principles.[49] For this reason, a fixture in any Chinese law library or business department is a copy of every major national and municipal newspaper published in the PRC. Since the Chinese government issues new regulations, almost daily, one

45. *See* ZHENG, *supra* note 33, at 68; *see also* Zhongguo Shewai Jingi Hetong Fa Zhong De "Bukekangli" Shijian Ying Ruhe Lijie, *supra* note 43, at 42.

46. CISG, *supra* note 14.

47. *See* CISG, *supra* note 14. Article 79(1) of the CISG states that a non-performing party is not liable for failure to perform when: (a) the failure to perform was "due to an impediment beyond his control;" (b) at the time of the contract, the party "could not reasonably be expected to have taken the impediment into account;" and (c) subsequent to the contract, the party could not reasonably be expected to "have avoided or overcome [the obstacle] or its consequences." *Id.* art. 79(1); *see also* U.C.C. § 2-615 official cmt. n.1 (1998) (The CISG and the U.C.C. embody the western theory of excuse and force majeure. One not familiar with Chinese law and the way it can and does suddenly change, would likely consider such sudden changes to be unforeseeable.).

48. FECL, *supra* note 11, art. 4. Article 4 of the FECL states: "Contracts must be made in accordance with the law of the People's Republic of China and without prejudice to the public interests of the People's Republic of China." Articles, such as Article 4 of the FECL, can be found in almost every single set of codes and regulations published by the PRC. *See* ZHONGGUO RENMIN GONGHEHUO FALU HUIBIAN, *supra* note 8; *see also* Zhang Yuping & James S. McLean, China's Economic Contract Law, Its Significance and Analysis, 8 NW. J. INT'L L. & BUS. 120, 129 (1987). Reservation allows China to void any contract, law, or regulation that they have deemed to violate the unwritten public interests of the PRC. *See generally* Chung-hua jen min kung ho kuo she wai fa kuei hui pien, *Laws and Regulations of The People's Republic of China Governing Foreign-Related Matters 1991-1997*, (Tran. Bureau of Legislative Affairs of the State Council of the People's Republic of China, China Legal System Publishing House) (1997).

49. General Principles, *supra* note 26, art. 7. Article 7 of the General Principles states: "Civil acts should respect social morality and must not harm the public interest, undermine the State economic plan nor disrupt the economic order of society." *Id.*

must constantly refer to the latest newspapers in order to stay abreast of the newest changes. Due to this standard of practice by the government, the Chinese have not accepted governmental interference as a *force majeure* event unless the interference was completely unforeseeable, unavoidable, and insurmountable.[50]

Another troubling matter with the FECL is the time limit, imposed upon a non-performing party to perform once they having claimed a *force majeure* event. Article 24 permits a part to avoid being penalized for late delivery if *force majeure* makes it impossible to render performance within the specified time period.[51] Furthermore, if performance is completely impossible, then the party is released from their obligation of performance.[52] However, if the other party still depends on performance, the party claiming *force majeure* maintains the obligation to perform under the contract.[53]

This time limit of performance, under Article 24 of the FECL, creates a barrier for the party claiming a *force majeure* event. For example, assume that party S sells 200 tons of logs to party B. Since there are no passage of risk provisions in the FECL, party S will generally have liability over the logs until they arrive at party B's place of business.[54] However, while en route through the South China Sea, the carriage vessel sinks, resulting in a complete loss of cargo. Party S claims that they are unable to deliver the goods, due to the loss of cargo. Notification is immediately sent to B explaining why the cargo was lost. Party B was completely reliant on S's performance, since these logs can only be ordered through S. Therefore, B demands performance. S informs B that a new shipment will be sent as soon as S receives payment from his insurance company, in order to cover the costs of cutting and shipping the new logs. B agrees to an extension of the delivery date. However, a couple of weeks later, S informs B that a new order of logs cannot be shipped, since a new law was passed in his home country, which forbids loggers from cutting any trees that are the nesting place for the White-Spotted Heron (which just happens to nest in those particular trees). S immediately claims *force majeure*, due to S's inability to perform.

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50. *See id.*, art. 153.
51. FECL, *supra* note 11, art. 24
52. *See id.*
53. *See* ZHENG, *supra* note 33, at 68-69; *see also* General Principles, *supra* note 26, art. 111.
54. This is the case when the contract is silent on the passage of risk terms. *See,* Ross, *supra* note 1, at 144-45. However, Article 13 of the FECL allows parties to stipulate passage of risk clauses in the contract. *See* FECL, *supra* note 11, art. 13.

This example poses an intriguing problem for a Western party. China does not have risk of loss provisions in its contract law. However, under general Chinese practice, the seller maintains the risk of loss until the goods are delivered at the buyer's place of business. Therefore, the seller should have carriage insurance on his goods. For the purpose of this paper, imagine if seller knew of this practice and built the cost of the insurance into the contract price of the goods. Therefore, under the FECL, the issues at hand are whether the new government regulation would be declared a *force majeure* event and whether the seller is required to continue performance even with the *force majeure* impediment.

Would the new government regulation be declared a *force majeure* event? A Chinese court may reason that once the cargo was lost at sea and that loss met the three-prong analysis of the General Principles, a *force majeure* impediment occurred.[55] Since the regulation was unforeseeable (there was no forewarning of the regulation in the media or through normal channels of business at the time of contracting), unavoidable (S could not have shipped substitute logs per the contract), or could not be overcome (again by the inability to ship substitute logs), the government regulation would likely be found to be a *force majeure* impediment.

Upon reading Article 24,[56] one could argue that S must continue with the contract as soon as reasonably possible (by ordering the logs from another foreign country that does not have such a restriction on the harvest of that particular tree). This argument is based on the fact that B relied on S's performance to his detriment and should not be forced to cover his losses. Article 111 of the General Principles supports this argument by granting the performing party the right to demand performance when the other party has failed to perform.[57] Article 111 provides in pertinent part, "[i]f one party fails to fulfill its contractual

55. *See* General Principles, *supra* note 26, art. 153. It is unlikely that a Western party would argue a force majeure impediment for the loss of cargo, since most Western nations do not accept a maritime or transit disaster as a qualifying impediment for a force majeure defense, hence the reason for risk of loss provisions in most Western contract laws. *See* U.C.C. § 2-509 (Risk of Loss in Absence of Breach); CISG, *supra* note 14, art. 79; *see also* Wanki Lee, *Exemptions of Contract Liability under the 1980 United Nations Convention*, 8 DICK. J. IN'L L. 375, 386 (1990).

56. FECL, *supra* note 11, art. 24. Article 24 provides in pertinent part, "[a] party...should be relieved of the liability for late performance for the period during which the consequence of the force majeure is being felt." *Id.*

57. General Principles, *supra* note 26, art. 111.

obligations or if the performance of such obligations fails to comply with the agreed conditions, the other party shall have the right to demand performance or take remedial measures and shall also have the right to claim damages."[58]

To further compound this problem, the FECL leaves some ambiguity, as to whether the party not invoking *force majeure* has the obligation to accept delayed performance or if he has complete discretion to reject the performance. Article 29(3) states: "A party is *entitled* to inform the other party to cancel the contract . . .when the contract cannot be performed due to the occurrence of force majeure."[59] A strict reading of Article 29(3) seems to give the impeded party a *legal right* to simply inform the injured party that they may not be able to perform under the contract, but only if the impediment completely prevents the party from performing all of his obligations.[60]

There are no specific provisions within the FECL that grant an injured party the ability to unilaterally rescind the contract if the other party is unable to perform.[61] The only provision of the FECL that allows a party to terminate a contract is Article 31, which states: "A contract is terminated if any of the following situations occur: 1) when the contract has been performed in accordance with the conditions stipulated in it; 2) when the arbitration tribunal or the court decides to terminate the contract; 3) when termination is agreed upon by both parties through consultations.[62]

Article 31 would likely involve a situation were injured party refuses to terminate the obligation to perform under the contract by relying on the impeded party to perform.[63] However, parties are free to negotiate clauses stating a required window of performance. Then, if a party is unable to perform within that specified window, then the other party may rescind or terminate the contract. For example, one could look at Chinese model contracts, which generally allow parties to cancel the contract if the event lasts more than eight (8) weeks.[64]

2. *Article 25 of the Foreign Economic Contract Law (FECL)*

Article 25 of the FECL continues in the same vein of ambiguity as

58. *Id.*
59. FECL, *supra* note 11, art. 29(3).
60. *See* General Principles, *supra* note 26, art. 153.
61. *See* FECL, *supra* note 11, art. 29(3).
62. *Id.* art. 31.
63. *Id.* art. 31.
64. *See* China National Cereals, Oil & Foodstuffs Import and Export Corp. Shanghai Cereals & Oil Branch. *Confirmation of Order, in* CHINA TRADE AGREEMENT, at 214-16 (C. W. Chiu ed., 1985).

Article 24. Article 25 requires that a party claiming a *force majeure* defense must promptly notify the other party in order to mitigate losses.[65] How much time does a non-performing party have to give the required notice? One source of interpretation is Article 79(4) of the CISG, which delineates a reasonable time standard for notification.[66] However, the notice required in the FECL could differ dramatically from the reasonable time standard of he CISG, and thus, create sufficiently different outcomes.

Article 25 of the FECL recommends that the party claiming force majeure should provide a "certificate" issued from the "relevant agencies" within a reasonable time period.[67] The events surrounding the Tian'anmen Square incident in 1989, provide an illustration of what may qualify as a "certificate." Immediately after the incident, foreign companies began to withdraw from China, claiming a *force majeure* impediment because of the sudden and violent crackdown on student protesters.[68] In order to comply with Article 25 of the FECL, many companies went to their respective embassies or business councils to get certification that there was a *force majeure* event in progress. Embassy certification might meet the certification requirement of Article 25 due to a foreign government's evacuation advisory of its nationals.[69]

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65. FECL, *supra* note 11, art. 25. This provision is also repeated in Article 29(3), referring to notification upon cancellation of a contract. *Id.* art. 29(3).

66. The term "reasonable time," as used in Article 79 of the CISG, has been a thoroughly argued point, ruled upon by numerous courts and is a widely held (and generally understood) term within the Western world. *See* Lee, *supra* note 55, at 391-92; *see also* Amy H. Kastely, *Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention*, NW. J. INT'L L. & BUS. 574, 596 (1988).

67. *Id.*

68. Ross, *supra* note 1, at 68-69. Further adding to the withdrawal, many Western governments ordered or recommended that citizens of their respective nations immediately leave Mainland China. *See id.*

69. *See* Ross, *supra* note 1, at 82. Such a government-ordered evacuation was in effect for many citizens of some Western nations. However, Chinese courts have not yet heard or ruled as to whether or not the courts will recognize such certification as being acceptable. Keep in mind that there is no indication whether or not a Chinese tribunal hearing a force majeure case would accept certification by a non-Chinese agency regarding an event that took place in China. Many of these cases have been ruled on by the appropriate Chinese courts, but the courts' refusal to publish orders and rulings has make it very difficult to ascertain how the Chinese courts would rule on this matter.

B. Recovery of Damages

Article 34 permits a party to maintain a claim for damages.[70] Since Article 24 exempts liability from a non-performing party for a *force majeure* impediment, a question arises as to what is left to be recovered as damages. To answer this question, the General Principles provide in Article 134 that liability would involve returning the (lost or held) property, restoring one to original condition or state, and compensating for damages.[71] These damages can include any amount of deposit paid as a guaranty, insurance proceeds for lost goods, and any other reasonable amounts incurred in anticipation of performance.[72] For example, if a buyer has prepaid according to the contract and the seller is unable to deliver due to a *force majeure* event, the buyer is able to maintain an action against the seller for the amount that he had prepaid as a guaranty deposit. Including such a provision, as Article 134, protects a party from any loss that he may incur from performing his duties as contracted merely because the other party is unable to complete his performance due to an impediment.[73]

When a foreign party intends to enter into a contract with a Chinese party, it would greatly behoove him to thoroughly research and study not only the relevant contract law,[74] but also the actual practice and application of these laws in the Chinese courts. As one can see from the above analysis, Chinese contract provisions regarding a *force majeure*

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70. FECL, supra note 11, art. 34. Article 34 of the FECL states: "Modification, cancellation or termination of a contract does not deprive a party of the right to claim for damages." A common law jurisdiction would refer to this right as the "right for restitution." *See* BLACK'S LAW DICTIONARY, *supra* note 18, at 910; *see also* CISG, *supra* note 14, art. 74; Tim Logan, *The People's Republic of China and the United Nations Convention on Contracts for the International Sales of Goods: Formation Questions*, 5 CHINA L. REP. 53, 59 (1988).

71. General Principles, *supra* note 26, art. 134(iv)-(vii).

72. *See id.* art. 134 (v), (vii), (ix).

73. To allow a seller to keep a payment made in advance when he is unable to deliver the goods due to a force majeure, event would result in unjust enrichment of the seller. Likewise, when a buyer has received the contracted goods, yet is unable to make payment due to a qualifying impediment, the buyer should not be able to maintain title and possession of the goods at the seller's expense. *Compare* CISG, supra note 14, art. 81(2) (restitution) *with* FECL, *supra* note 11, *and* New Contract Law of the People's Republic of China (China Legal System Publishing House) (1999) (The FECL and the NCL do not have similar provisions, that provide for restitution, as the CISG does.) [hereinafter NCL].

74. Some of the relevant contract law provisions in China are found in the Foreign Economic Contract Law (FECL), Economic Contract Law (ECL), Law on Technology of Contracts (LTC), Chinese-Foreign Contractual Joint Venture Law, Chinese-Foreign Equity Joint Venture Law and the Foreign Capital Enterprises Law, *reprinted in* Chung-hua jen min kung ho kuo she wai fa kuei hui pien, *supra* note 48, at 484 (1991). However, keep in mind that the ECL, LTC, and the FECL have been repealed and now fall under the guise of the NCL. NCL, *supra* note 73, art. 428.

event are rather ambiguous at best.

Keep in mind that when a foreign party enters into a contract with a Chinese party, the CISG, as well as the FECL can also apply to the contract. However, the CISG will modify or replace Chinese law only when the contract is between parties of which *both* have their place of business in a signatory State to the CISG.[75] Whereas, the FECL will be the ruling body of law if only one party is considered to have their place of business in a Contracting State to the CISG.[76] But when the rules of private international law require the application of Chinese law, the CISG will not be considered, since China declared itself not be bound by Article 1(1)(b) of the CISG.[77] Thus, it is more likely that Chinese law will be applied without the CISG in Sino-foreign transactions.[78] Nonetheless, a majority of the largest trading partners in the world are signatories to the CISG.[79] Therefore, it is very important to understand the *force majeure* provisions of the CISG.

IV. THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG)

The CISG was adopted on April 11, 1980 after five long weeks of intensive deliberations in Vienna, Austria which cumulated after tens years of work by the United Nations Commission on International Trade

75. CISG, supra note 14, art. 1; *see also* Jianming Shen, *The Remedy of Requiring Performance Under the CISG and the Relevance of Domestic Rules*, 13 ARIZ. J. INT'L & COMP. L. 253, 259 (1996).

76. *See* Shen, *supra* note 75, at 259.

77. *See* CISG, *supra* note 14, art. 1(1)(b). Article 1(1)(b) of the CISG states: "This Convention applies to contracts of sale of goods between parties whose places of business are in different States. . .when the rules of private international law lead to the application of the law of a Contracting State." *Id.* Upon ratification of the CISG, China declared that "[t]he People's Republic of China does not consider itself to be bound by subparagraph (b) of paragraph (1) of Article 1 [of the CISG]." *See* 1987 ZHONGGUO FALU NIANJIAN 540 (Chinese Annual of Law) (1987); 5 CHIN LAW AND PRACTICE 25, 49 (May 1987); JOHN HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES: THE STUDIES, DELIBERATIONS AND DECISIONS THAT LED TO THE 1980 UNITED NATIONS CONVENTION WITH INTRODUCTIONS AND EXPLANATIONS 766-78 (1989) [hereinafter DOCUMENTARY HISTORY]; *see also* Shen, *supra* note 75, at 260, 260 n.17. The United States has also made a similar declaration as to Article 1(1)(b). *Id.*

78. *See* Shen, *supra* note 75, at 258.

79. As of April 4, 2001 the United Nations Treaty Section reports that 58 states have adopted the CISG. *See* U.N. Treaty Collection Web Cite, *available at* http://untreaty.un.org/English/treaty.asp. Contracting States to the CISG, cover the vast majority of the major trading partners of the world. *See id.*

Law (UNCITRAL).[80] The purpose of the CISG was to promote international trade and to fulfill a quest for uniformity of international contract law.[81] The CISG is far more expansive in its scope than the FECL.[82] Specifically, the CISG, in comparison to the FECL, contains no provisions requiring certification of *force majeure* events, adheres to a broader doctrine of excuse,[83] and contains substantial provisions on the passage of risk.[84]

A. Force Majeure Provisions

1. Article 79 of the CISG

Although some of the language of Article 79 of the CISG is similar to Article 24 of the FECL, the application of the CISG is much broader. One of the drafters of the CISG, John Honnold, states that the principle elements of Article 79 in paragraph (1) are that the non-performing party is not "*liable for failure to perform*" when: (a) the failure was "*due to an impediment beyond his control*;"[85] (b) at the time of the contract, the party "*could not reasonably be expected to have taken the impediment into account*;"[86] and (c) subsequent to the contract, the party could not reasonably be expected to "*have avoided or overcome [the obstacle] or its consequences*."[87]

Article 79 of the CISG lays out a similar test to the tree-prong test used under the General Principles, when applying the FECL, to a force majeure event. Both the CISG and the FECL require the non-performing party to show that the event was unforeseeable, unavoidable, and insurmountable.[88] Both also require that a non-performing party provide notice to the other party, within a reasonable time, once the impediment and its effects on performance become known or should have become known.[89] However, as mentioned earlier, the CISG does not require the non-performing party to obtain certification of the event from any relevant agency.[90] The CISG only requires a showing of proof

80. *See* CISG, *supra* note 14; *see* also Jacob S. Ziegal & Claude Samson, *Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods*, at 1 (1981), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/articles/english2.html.

81. *See id.*

82. *See* Shen, *supra* note 75, at 257-58.

83. *See* Ross, *supra* note 1, at 88.

84. *Compare* CISG, *supra* note 14 art. 79, *with* FECL, *supra* note 11, arts. 24-25.

85. *See* HONNOLD, *supra* note 77, at 531.

86. *See id.*

87. *Id.*

88. *See* CISG, *supra* note 11, art. 79; General Principles, *supra* note 26, art. 153.

89. *See id.* art. 79(4).

90. *See* FECL, *supra* note 11, art. 25. The FECL does require certification.

that an impediment occurred, which prevented performance.[91]

Article 79(3) of the CISG does not state a bright-line standard for how long an impediment must exist before a party is excused from performance. Article 79(3) states: "[t]he exemption provided by this article has effect for the period during which the impediment exists."[92] Under general Chinese practice, Article 24 of the FECL requires the non-performing party to resume his performance if the impediment lasts less than ten weeks.[93] Article 79(3) does not seem to make such a distinction as to when non-performance is excused under the contract.[94] Once a *force majeure* impediment has taken place, the non-performing party is only excused from his "liability" for failure to perform (i.e. damages).[95] The contract continues to exist unless and until it is avoided.[96] Therefore, Article 79 leaves one to wonder exactly when, and under what conditions, the non-performing party is released from performing the contract.[97]

Unlike the general practice in China, which allows for cancellation of contracts for events lasting over ten weeks,[98] it appears that the drafters of the CISG did not want to put a bright-line time limit on the ability of the performing party to avoid the contract. Under the CISG, the performing party can avoid the contract when the non-performing party's inability or delay in their performance rises to the level of a fundamental breach.[99] For example, if the buyer cannot pay the seller due to a new exchange restriction, or if the seller cannot deliver due to a sudden change in export controls, the non-performing party in each case

91. *See* CISG, *supra* note 14, art. 79(3).
92. *See id.*
93. *See* FECL, *supra* note 11, art. 24.
94. *See* CISG, *supra* note 14, art. 79(3).
95. *Id.* at art. 79(1); *see also* Jennifer M. Bund, *Force Majeure Clauses: Drafting Advice for the CISG Practitioner*, 17 J.L. & Com. 381, 387 (1998).
96. Ziegel, *supra* note 80, at note 3, (commenting on Article 79(1)).
97. CISG, *supra* note 14, art. 79(5). Article 79(5) of the CISG does not take any rights from the performing party other than the right to claim damages ("Nothing in this article prevents either party from exercising any right *other than to claim damages* under this Convention." (emphasis added)). For example, if there were a delay in delivery caused by a two-month-long government-ordered blockade, the buyer would still have the option to avoid the contract if the delay constituted a "fundamental breach." *Id.* art 25. ("A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract...").
98. *Id.*
99. CISG, *supra* note 14, art. 83.

would not be liable for damages.[100] However, the party who has performed without receiving the agreed return is entitled to redress.[101] This redress is provided by the "right of avoidance,"[102] which carries with it the right to "restitution" for whatever the party "has supplied or paid under the contract."[103]

2. *Breach by a Third Party*

It is quite common for a contract to include acts of performance by a third party. What happens when a *force majeure* event impedes a third party from performing? Article 79(2) of the CISG provides a two-prong test to determine whether or not the contracting parties will be held liable for the failure to perform by the third party.[104] First, the contracting party claiming inability to perform due to an impediment of a third party must prove that he would be exempt from any liability under a *force majeure* defense.[105] In other words, if the contracting party would be unable to perform, due to a direct impediment, he has passed the first prong.[106] Second, the contracting party must prove that the third party would be exempt under a *force majeure* defense.[107] Take, for example, a seller who is unable to perform his obligation of delivery if his third party supplier is unable to provide the supplies he needs to complete the buyer's request. Under the two-prongs of Article 79(2), the seller would not be able to claim *force majeure*, unless the impediment stopping the third party from performing also applies to him. This could apply if there was a governmental restriction on those supplies, war, or a civil strife that affects both the third party and the contracting party.

A breach by a third party is another area were the CISG provides guidance, while the FECL does not. Under the FECL, a party may be

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100. *See id.* art. 79(1).
101. *See id.* art. 81(2).
102. *Id.* art. 79(5). Article 81(2) of the CISG allows a party who has performed the contract, either wholly or in part, to claim restitution from the other party for any damages suffered from the other party's inability to perform due to a *force majeure* event. *Id.* art. 81(2).
103. HONNOLD, *supra* note 77, at 551.
104. CISG, *supra* note 14, art. 79(2).
105. *See id.* art. 79(2)(a).
106. See *id.* art. 79. Article 79 of the CISG requires a party to be unable to perform personally in order to pass the first prong of the test. *Id.* A party who is unable to perform, in part from a third party's inability to perform, cannot claim *force majeure*. *See id.* For example, a seller who is unable to deliver the ordered goods because the necessary parts could not be shipped by a third party will be unable to claim *force majeure*, since the seller could buy the necessary parts from a different third party. *See id.* art. 79(2).
107. *See id.* art. 79(2).

able to claim *force majeure* due to an impediment of a third party, provided that the party claiming *force majeure* is able to pass the FECL's three-prong test.[108] If the third party's impediment can be proven from the contract party's standpoint as passing the three-prong test, then the impediment should be considered a *force majeure* event, thus allowing the contract to be terminated.[109] With the lack of guidance by the FECL, such an event may satisfy the three-prong test even if the impediment would not apply to or completely stops the contract party from performing.

B. Recovery of Damages

The right of avoidance and the corresponding right to restitution provide a means to gauge how long a party must wait before making alternative arrangements, in order to fulfill their contractual desires. Article 81(2) of the CISG allows an injured party to claim damages in the amount, if any, that were prepaid or supplied to the impeded party.[110] Although Article 79(1) provides a liability exemption to an impeded party for their inability to perform, Article 81(2) stipulates that the impeded party is still required to reimburse the injured party for any payments or goods delivered prior to the occurrence of the impediment.[111] A party that has performed, or partially performed, should not be penalized for the non-performance of another party due to a *force majeure* event.

C. Passage of Risk

Unlike the National People's Congress of the PRC, UNCITRAL decided to include passage of risk provisions in the CISG. The passage of risk provisions give a legal basis for parties to decide exactly who carries the risk of loss and when that risk shifts to the other party. The main passage of risk provision, Article 67(1), states:

108. *See* General Principles, *supra* note 26, art. 153. The tree-prong test for establishing *force majeure*, is whether the impediment was unforeseeable, unavoidable, and unable to be overcome. *Id.*
109. *See id.; see also* FECL, *supra* note 11, art. 24.
110. CISG, *supra* note 14, art. 81(2).
111. *Id.*

> If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place.[112]

The CISG sets a standard when the risk of loss shifts from one party to another.[113] However, as noted earlier, Chinese contract law does not contain any risk of loss provisions.[114] There are several reasons for this. First, it has been a long standing Chinese practice (both domestic and international), that the seller maintains the risk until the goods are delivered to the buyer's place of business.[115] A foreign seller must not only cover the risk for the transoceanic carriage, but also for the domestic carriage within China. Second, the national trucking, shipping, and rail line industries of China are controlled by the government. Therefore, various choices of delivery are not available to a seller in China. A foreign or domestic party can overcome this lack of choices in delivery simply by adding the cost of insurance into the contract price.

The theory of passage of risk is consistent with the contractual norm of leaving the parties at status quo when a contract becomes terminated due to a force majeure event. Article 66 of CISG which states: "Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller."[116] The inclusion of the passage of risk provisions in the CISG provides some level of predictability to parties in case a *force majeure* event takes place when goods are in transit.

The CISG appears to be far more expansive than China's FECL when it comes to the *force majeure* provisions.[117] Article 79 of the CISG outlines the general rules and principles of what constitutes a *force majeure* event and what the parties involved should do to mitigate the loss.[118] Article 81(2) of the CISG provides protection for the injured

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112. *Id.* at art. 67(1).

113. This is an important and often overlooked provision in an international contract with a Chinese party. *See* Nung Fu, *Remedies Under Chinese Contract Law,* 2 INT'L LEGAL PERSP. 1, 7 (1990).

114. *See generally* FECL, *supra* note 11; ECL, *supra* note 12.

115. *See Zuigao Rennin Fayuan Guanyu Shiyong Rougan Wenti de Jieda* (The Supreme People's Response to Several Questions Concerning the Application of the Foreign Economic Contracts Law), issued Oct. 19, 1987, 4 S.P.C.T. Bull. 3 (1987).

116. CISG, *supra* note 14, art. 66.

117. *See generally* CISG, *supra* note 14, art. 79; FECL, *supra* note 11, arts. 24-25; *see also* Shen, *supra,* note 75, at 257-58.

118. CISG, *supra* note 14, art. 79.

party and insures that one of the parties will not be unjustly enriched.[119] The passage of risk provisions in Articles 66 and 67 of the CISG lend some predictability as to which party is liable for any loss or damage to the goods while in transit.[120]

However, the CISG is far from providing a completely cohesive and uniform set of regulations for a *force majeure* event. Honnold stated "[i]n spite of strenuous efforts of legislators and scholars . . . [it is very likely] that Article 79 may be the Convention's least successful part of the half century of work towards international uniformity."[121]

V. THE APPLICATION OF THE CISG IN CHINA UNDER THE FECL

A party wishing to familiarize itself with the application of the CISG, in China, faces a daunting task. There are two main reasons for this. First, the PRC has reserved Article 1(1)(b) of the CISG.[122] If such a reservation had *not* been made, Article 1(1)(b) would allow China to use the CISG as their national law in lieu of the FECL for an issue arising under the CISG.[123] However, since the PRC has reserved that article, the CISG will not be applied as the governing law. In lieu of the CISG, the PRC would use the FECL, or since October 1, 1999, the Contract Law of the PRC as the governing law. Second, the Chinese courts do not publish their opinions. The idea of *stare decisis* is not a developed legal doctrine within the PRC, therefore, a court opinion is not of any value in the Chinese legal system.[124] For this reason, a researcher will not be able

119. *Id.* at art. 81(2).
120. *Id.* at arts. 66-67.
121. *See* HONNOLD, *supra* note 77, at 543.
122. CISG, *supra* note 14, art. 79(5). Article 1(1)(b) of the CISG states: "this Convention applies to contracts of sale of goods between parties whose places of business are in different States...when the rules of private international law lead to the application of the law of a Contracting State." *Id.* art 1(1)(b). Upon ratification of the CISG, China declared that "[t]he People's Republic of China does not consider itself to be bound by subparagraph (b) of paragraph (1) of Article 1 [of the CISG]." *See* NIANJIAN, *supra* note 9, at 540. The United States has also made a similar declaration as to Article 1(1)(b). *Id.*
123. *See id.* Article 1(1)(b) of the CISG only comes into play when one of the parties is from a non-signatory state to the CISG and the other party is from a signatory state. *See id.* art 1(1)(b). For further reading on this topic, *see* Ziegal, *supra* note 80; *see also* GRANT R. ACKERMAN, U.N. CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1992).
124. Again, the Chinese legal system does not utilize any type of reporter series of case opinions that is prevalent in the United States common law system. *See* Yan, *supra* note 40, at 28-29.

to find prior case law within the PRC on how Chinese courts have handled issues that arose under the CISG. Therefore, a look at how the FECL might be applied will shed light on how the NCL will be applied in the future.

In order to understand how the CISG and the FECL work, consider the two hypothetical cases below. The first hypothetical deals with two parties that are each from a signatory nation of the CISG. The second hypothetical deals with a party that is not from a signatory nation of the CISG.[125]

A. Hypothetical Case Number One

(1) FACTS: Seller and buyer enter into a contract for the sale of 100,000 pounds of raw iron ore for $900,000 payable in U.S. dollars. Seller is a citizen of and operates out of the United States. Buyer is a citizen of and operates out of China. The contract calls for buyer to place a guaranty deposit in the amount of $300,000 (1/3 of the contract price), in advance via a letter of credit in seller's name, within two weeks after the contract is signed. Shortly before the two-week expiration date, seller receives buyer's letter of credit, immediately cashes it, and begins to process the 100,000 pounds of iron ore for buyer. Two weeks later, seller places the 100,000 pounds of iron ore into ship containers and places them aboard a Panamanian-flagged ship bound for Sydney, Australia for delivery of unrelated cargo and then for Shanghai, PRC. Shortly after arrival in Sydney, Australian authorities seize and impound the cargo of iron ore under a recently passed embargo against China of all natural raw materials (the embargo was quickly passed in retaliation of the arrest of several Australian tourists for smuggling within China). Seller immediately files an injunction against the Australian customs agency claiming that the embargo should not apply to the iron ore since it did not originate in Australia and the ship was only temporarily in Australian waters for delivery of other cargo. The Australian court denies the injunction stating that the raw material is in Australian waters, docked at an Australian dock, and is currently being protected under Australian law. Therefore, any and all cargo aboard the ship (including the current embargo of raw materials to China), falls under Australian law. Two days later, the United States, Canada, Great Britain, France, and Germany all join Australia in the embargo against China. Seller immediately notifies buyer of the Australian embargo and seller's inability to perform.

125. Neither of these hypothetical cases or facts are based on real cases.

ISSUE: Buyer files suit with the China International Economic and Trade Arbitration Commission (CIETAC),[126] under Article 2 of the Arbitration Rules of CIETAC,[127] against seller, for return of his 1/3 deposit. Seller files a countersuit for payment of the remaining $600,000 price of the iron ore.

HOLDING: CIETAC would apply the rules of the CISG since both the United States and China are signatory nations to the Convention. The embargo of the goods would be classified as a *force majeure* event under Article 79(1) of the CISG, since the Australian embargo was unforeseeable, unavoidable, and not able to be overcome by seller.[128] Much like the Chinese FECL, the CISG requires a three-prong test to be satisfied in order for an impediment to be declared a *force majeure* event.[129] (1) Unforeseeable - Under the CISG, seller could not be expected to foresee a sudden, politically inspired embargo of raw materials to China. The fact that Australia and China are having political disputes was not an issue when neither the time the contract between seller and buyer was formed nor the time seller placed his goods onboard the Australian-bound freighter. When seller and buyer concluded the contract and placed the goods with the carrier, there was no indication that Australia would impose a broad embargo against China and include any foreign-originated materials that happened to temporarily stop in Australian territory within the scope of the embargo. (2) Unavoidable - The embargo was unavoidable since it took effect the morning that the ore carrier arrived in Australia and was immediately seized by the Australian authorities. Since that time, several other countries, including the United States (the home country of seller), also imposed the same restrictions on exporting raw materials to China. (3) Insurmountable - Seller attempted to overcome the impediment by filing an injunction against the embargo and lost. Further adding to seller's

126. China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules, *available at* www.cietac-sz.cn/cietac/index-e.htm (*revised and adopted* by the China Council for the Promotion of International Trade/China Chamber of International Commerce on September 5, 2000. Effective as of October 1, 2000.) [hereinafter CIETAC]. CIETAC is the official arbitration board of the PRC and is certified and recognized to provide arbitration for both domestic and international cases. *Id.* art. 2. Article 2 provides that CIETAC has the authority to resolve any dispute arising from economic and trade transactions of a contractual or non-contractual nature. *Id.*

127. *Id.*

128. CISG, *supra* note 14, art. 79(1).

129. *Id.* art 79; *see also* General Principles, *supra* note 26, art. 153.

inability to overcome the impediment, the United States along with the other major producers of raw iron ore joined in the embargo, completely cutting off seller's ability to ship any future shipments of iron ore to China. This is not to mention the fact that most maritime carriers were refusing to load raw materials onboard any of their ships destined for China due to this embargo and the possibility that their ships might be held in port for the duration of the embargo like the Panamanian ship in Australia. Therefore, seller would not be liable to buyer for his inability to perform since he meets the three-prong test of Article 79(1) of the CISG. On buyer's demand for return of his $300,000 Letter of Credit, CIETAC would hold that Article 81(2) requires that seller return the deposit of $300,000 to buyer.[130] Since buyer wholly performed per the requirements of the contract up to the time of the impediment, buyer falls under the guise of Article 81(2) which allows for restitution of any amount that he had paid to S in advance. As to seller's counterclaim for the remaining $600,000 of the payment price, CIETAC would review the passage of risk provisions to determine which party held the risk of the cargo loss at the time of the actual loss. Since there was no passage of risk clause in the contract, CIETAC would apply the rules set forth in Article 67(1) of the CISG.[131] Article 67(1) states that in the absence of a contracted passage of risk clause, the risk of loss passes from seller to buyer once the goods are handed over to the first carrier for transmission or delivery.[132] Therefore, buyer held the risk of loss once seller placed the iron ore into the ship containers and placed them aboard the Panamanian ship. Buyer was expected under the CISG to have placed carriage insurance over the goods in transit.[133] If Australia will not release the ship and goods back to seller, then buyer would still be considered liable for the goods since the goods were "lost" during transit. Thus, buyer is liable to seller for the price of the goods.

In conclusion, CIETAC would hold that the embargo by the various countries, including Australia and the United States, and the subsequent seizure of the goods under the embargo by the Australian authorities,

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130. *Id.* Article 81(2) provides in pertinent part: "A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract." Id. art. 81(2).

131. CISG, *supra* note 14, art. 67(1); *see generally*, CIETAC Arbitration Rules, *supra* note 126.

132. CISG, *supra* note 14, art. 67(1).

133. In lieu of filing suit against buyer for the payment price, seller could demand that the Australian authorities release the goods for shipment back to the United States (who is not affected under the embargo). Therefore, seller would still have the goods and would be able to then sell the iron ore to other parties of countries not affected by the embargo. If the Australian authorities would not release the ore due to a fear that the ship might, once out of Australian waters, head for China, seller would probably file suit for the payment price.

would qualify as a *force majeure* event under the three-prong test of the CISG. Seller must return the $300,000 deposit to buyer under Article 81(2) since buyer performed as per the contract and seller would be unjustly enriched if allowed to keep the guaranty deposit. Furthermore, buyer must pay $900,000 to seller for the loss of the goods under Article 67(1) if the Australian authorities will not release the goods back to seller.

B. Hypothetical Case Number Two

(2) FACTS: The facts are the same as in hypothetical (1) except that seller is from Panama instead of the United States.

HOLDING: CIETAC would apply Chinese law under their reservation of Article 1(1)(b) of the CISG[134] since seller is from a non-signatory nation while buyer is a citizen of China, a signatory nation to the CISG. Upon review of the facts, CIETAC would again hold that the seizure and impounding of the contract goods by the Australian government as being unforeseeable, unavoidable, and unable to be overcome per Article 24 of the FECL[135] and Article 153 of the General Principles of China, and therefore, classify as a *force majeure* event.[136] The reasons that the embargo and seizure of the goods are declared to be unforeseeable, unavoidable, and not able to be overcome are the same as described in hypothetical (1). As to buyer's contention for restitution, CIETAC would more than likely again hold in favor of the buyer. Article 34 of the FECL provides that any contract that is terminated shall not infringe upon a party's ability to collect damages. In this case, it would unjustly enrich seller to hold the deposit of buyer when seller was unable to perform. This is similar to the general theory of damages in contract actions; a party should not be unjustly enriched at the expense of the other party. The countersuit by buyer is a slightly more complex issue. Within the FECL, there are no passage of risk provisions. As the facts stipulate, there was no clause in the contract stating any passage of risk rules. In the absence of any set law, regulations, or contractual clauses, under Articles 38 and 39 of the Arbitration Rules,[137] CIETAC

134. CISG, *supra* note 14, art. 1(1)(b); *see also* General Principles, *supra* note 26, art. 142, which states that "an international treaty shall prevail over Chinese law with the exception of those articles to which the PRC has declared reservation."

135. FECL, *supra* note 11, art. 24.

136. General Principles, *supra* note 26, art. 153.

137. CIETAC, *supra* note 126, arts. 38-39. Articles 38 and 39 combined, give

can gather evidence and call experts and officials to help clarify the law and any issues present before them. In this instance, CIETAC may look towards general Chinese contract practice and call any experts on the practice of international sales contract under Chinese law. If that is the case, CIETAC will likely hold that seller was liable for the loss of the cargo, since Chinese practice is that the seller maintains the risk of loss until the goods reach the buyer's place of business. Since the "loss" of cargo took place while the goods were still in transit, Seller would still be liable for the loss of goods. Therefore, seller's countersuit for the remaining $600,000 of the contracted price will fail. Furthermore, under Article 111 of the General Principles, the court may allow the performing party to continue to demand performance.[138] This would allow buyer to require that seller purchase the iron ore from a third party in a country that is not imposing a raw material embargo on China and then re-ship the goods as per stated in the contract.

In conclusion, CIETAC would hold that the embargo and seizure by Australia would qualify as a *force majeure* impediment since the actions of the governments were unforeseeable, avoidable, or able to be overcome by seller. Buyer will be entitled to the return of his $300,000 deposit under Article 34 and seller (or seller's insurance company if seller is insured) will be liable for the price of the lost goods. Additionally, buyer could continue to demand performance for the contract once the impediment disappears or require that seller find alternative means to ship the goods.

As one can see from the above hypotheticals and the resulting analysis, the application of the FECL versus the CISG can result in greatly opposing rulings. For a party intending to enter into contracts with a Chinese party, especially for parties from non-signatory nations to the CISG, it is best to negotiate a well constructed and thorough *force majeure* provision that outlines a general listing of events that shall be considered *force majeure* events (to protect from the Chinese court's arbitrary holdings of what is a qualifying impediment and what is not), provide grounds for restitution, and establish passage of risk rules. Although including such provisions will not guarantee that the Chinese court will not continue to arbitrarily apply their own line of reasoning, it will help to provide more comfort and predictability for the contracting parties. Article 8 of the FECL states that appendices to a contract will help to govern the contract.[139] A party, therefore, could simply point to

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CIETAC arbitrators the power to conduct their own investigations and call whatever witnesses they deem necessary to aid in their decision. *Id.*

138. General Principles, *supra* note 26, art. 111.

139. FECL, *supra* note 11, art. 8. Article 8 states that "[a]ppendices specified in a contract are integral parts of the contract." *Id.*

Article 8 and inform the court that they must allow the clause or appendices to stand since the clause shows the parties intent and helps to clarify the parties' contract and performance obligations. In addition, a party can stipulate that the contract will be governed by the CISG, regardless of whether both countries are signatory nations to the CISG under Article 5 of the FECL.[140] Negotiating a well-constructed and thorough *force majeure* clause (if possible) is the best way for parties to provide some predictability and uniformity in their contract.

VI. NEW CONTRACT LAW (NCL) OF THE PEOPLE'S REPUBLIC OF CHINA

In 1993, the Judicial Committee of the People's Republic of China began work on drafting a new uniform contract law that would supersede the three current sets of contract laws.[141] As stated by one of the drafters, "[a] contract law that is applicable to all areas [of contracting] will better serve the homogeneous market" under China's new market economy policies.[142] China is currently in the middle of a transition period of moving from a planned economy to an open market economy.[143] Therefore, any contract law must not only cover planned contractual relationships under a market economy, but the current relationships under a planned economy as well. With that in mind, the purpose of the new contract law was to provide uniformity, freedom of contract, creditors' interest, and functionalism.[144]

On March 15, 1999, the Second Session of the Ninth National People's Congress adopted the new Contract Law of the People's Republic of China (NCL), and with its adoption the FECL was repealed.[145]

For a foreign party with intentions of conducting contract negotiations in China, the repeal of the FECL and enactment of the new Contract

140. *Id.* art. 5. Article 5 provides in pertinent part: "The parties to a contract may choose the law to be applied to the settlement of the disputes arising from the contract...." *Id.*

141. *See* Jiang, *supra* note 27, at 245.

142. *Id.* at 246.

143. *See id.* at 257.

144. *See id.* at 246.

145. NCL, *supra* note 73. Article 428 of the NCL states: "This Law shall come into force as of October 1, 1999. The Economic Contract Law of the People's Republic of China (ECL), the Law of the People's Republic of China on Economic Contracts Involving Foreign Interests (FECL) and the Law of the People's Republic of China on Technology Contracts (LTC) shall be invalidated simultaneously." *Id.*

Law may be a mixed blessing. In promulgating the NCL, the National People's Congress have decided to stray away from China's standard practice of enacting generalized and arbitrary codes that are difficult to operate.[146] The NCL is far more comprehensive and uniform.[147] However, the fact that China has enacted nearly ten times the number of provisions in the NCL, than the FECL, does not necessarily mean that the provisions provide more uniformity and predictability. Specifically, the NCL maintain the FECL's broad stance on *force majeure* while dropping some of the stiffening requirements that were found in the FECL.[148]

A. Force Majeure Provisions

1. Articles 94 and 96 of the Contract Law of the People's Republic of China

Articles 94 and 96 of the NCL pertain to rescission of a contract in the event of force majeure. Article 94(1) states: "*The parties to a contract may rescind the contract [if]. . .[t]he purpose of the contract is not able to be realized because of force majeure.*"[149] Thus, Article 94(1) sets up the basis for a party to rescind or revoke a contract for one's inability to perform due to *force majeure*.[150]

Article 96 states: "One party to a contract shall make a notice to the other party if it advances to rescind the contract according to the provisions of. . .[a]rticle 94 of this Law."[151] This provision requires the party seeking to rescind the contract to promptly notify the other party. Combined, Articles 94 and 96 provide a party with the ability to rescind a contract, once a qualified impediment occurs, on the condition that the

146. *See* Jiang, *supra* note 27, at 254.

147. *See id.* at 257. Consider the fact that the ECL of 1981 has only 57 provisions, the FECL has only 43 provisions, and the General Principles has 156 provisions with only 10 of those provisions pertaining to contracts. *See* ECL, *supra* note 12; FECL, *supra* note 11; General Principles, *supra* note 26. On the other hand, the NCL has 428 provisions, probably the largest number among China's current laws. *See* NCL, *supra* note 73.

148. NCL, *supra* note 73. The NCL removed the certification requirement from the appropriate Chinese authorities. *Id.* FECL gave the performing party the ability to require performance from the party claiming a *force majeure* event, even though they are unable to perform under the current circumstances. FECL, *supra* note 11. That is no longer the case under Article 110(1) of the NCL which states that a party who fails to perform a non-monetary requirement of the contract can still be required to perform under the terms of the contract, except for a party who is unable to perform in law or in fact. NCL, *supra* note 73, art. 110(1). Thus, once a party has proven an impediment exists, the performing party can no longer demand further performance. *See Id.*

149. *Id.* art. 94(1).

150. *Id.*

151. *Id.* art. 96.

rescinding party provide notice to the other party.[152]

2. *Articles 117 and 118 of the Contract Law of the People's Republic of China*

Articles 117 and 118 of the NCL are the specific *force majeure* provisions. Article 117 states:

> In case that a contract is not able to be performed because of force majeure, the liabilities shall be exempted in part or wholly in light of the effects of force majeure, except as otherwise stipulated by law. If the force majeure occurs after one party has delayed in performance, the liability may not be exempted.[153]

Thus, a party that is unable to perform due to *force majeure* can be exempted from owing damages to the other party, either in whole or part, depending on the amount of performance that he was able to accomplish, if any, prior to *force majeure*. In addition, Article 117 will not allow a party to be exempted from damage liability if the non-performing party had already breached the contract prior to the occurrence of *force majeure*.

Article 118 of the NCL, requires the non-performing party to give notice of his inability to perform. Article 118 of the NCL states:

> One party to a contract that is not able to perform the contract because of force majeure shall make a notice to the other party promptly so as to reduce the probable losses to the other party and provide evidence within a reasonable amount of time.[154]

The language of Article 118 is similar to Article 94. Both provisions require the non-performing party and/or the rescinding party to give notice in a reasonable time, in order to mitigate damages. In combination Articles 94 and 118, of the NCL, are more specific than Article 25 of the FECL. The FECL's Article 25 only provided that the non-performing party was required to give notice of his inability to perform and the time limit set for such notice was vague and undetermined.[155]

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152. *Id.* arts. 94, 96.
153. *Id.* art. 117.
154. *Id.* art. 118.
155. FECL, supra note 11, art. 25; Article 25 of the FECL only provided that the non-performing party was required to give notice "in time to mitigate the loss which might possibly occur to the other party...." *Id.* art. 25.

Article 118 sets the time limit for notice as a "reasonable time."[156] The delineated standard of Article 118 provides some guidance, as to how much time a rescinding party has to give notice another party in a *force majeure* event.[157] However, for an international party, this reasonable time standard is a question of interpretation, and therefore, could vary in application within China.

Article 118 of the NCL, differs from Article 25 of the FECL, in more than one way. The Article 25 certification requirement from the proper Chinese authority has been eliminated from the language of Article 118.[158] The NCL only requires that "evidence" be provided to the performing party within a reasonable time.[159] However, the inclusion of the term "evidence" may still constitute certification from the proper Chinese authority.[160] Unlike Article 25 of the FECL, which clearly states that certification is required from the "relevant agency," Article 118 only states that "evidence" is required of the intervening event.[161]

3. Breach by a Third Party

The National People's Congress included provisions within the NCL outlining whether or not a breach by a third party would allow a claim of *force majeure* event.[162] Article 121 states: "The party who breaches a contract due to the reason of a third party shall be liable to the other party for breaching the contract."[163] Thus, an impediment stopping a third party from performing will not allow the affected contract party to claim a *force majeure* defense.[164]

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156. NCL, *supra* note 73, art. 118.

157. *Id.*

158. NCL, *supra* note 73, art. 118.

159. *Id.* Although there is no definition as to what constitutes evidence of the intervening event, a reasonable translation of that provision is that any type of proper documentation . . .or other evidence that would prove an impediment occurred will be accepted as evidence of the intervening event. *See id.* Documentation could be certificates from banking authorities, of their inability to issue letters of credit, due to no fault of the buyer; or from governmental authorities stating that a law or regulation has changed causing the seller's inability to deliver; or from a recognized marine authority, stating that the shipment was lost at sea, etc. *See* NCL, *supra* note 73, art. 118.

160. *See id.*

161. *Id.* This is similar to Article 79 of the CISG which requires a non-performing party to "prove that the failure [to perform] was due to an impediment beyond his control." CISG, *supra* note 14, art. 79(1).

162. *See* NCL, *supra* note 73, art. 121.

163. *Id.*

164. *See id.* If a contracted party is not able to claim force majeure since the impediment only applies to the third party and not himself, he would be held liable for breach of contract under both Article 121 and 79(2) of the CISG. On the other hand, under Article 121 of the NCL, if the impediment does apply to the third party as well as the contracted party, the contracted party would be able to claim force majeure since the

The language of Article 121 of the NCL appears to be more restrictive in contrast to Article 79(2) of the CISG. Article 79(2) of the CISG allows a party to claim *force majeure* when a third party is impeded, provided that the impediment applies to both the third party, as well as the contracted party.

B. Recovery of Damages

In comparison with the repealed FECL, the NCL provides more detailed damages provisions.[165] As mentioned previously, parties involved in a contract terminated for *force majeure* reasons may still have damages to contend with.[166] Article 115 of the NCL provides the damage provision that would concern a party involved in an impediment dispute.[167] Article 115 defines the Chinese legal theory of guaranty law.[168] Article 115 gives a party the right to have one's deposit, paid as a guaranty, returned or used to offset payment if performance is completed.[169] Similar to the hypothetical cases supra in Section V, the performing party may be able to request damages in the amount of any deposit he made to the non-performing party.[170] However, if the party paying the deposit performs and the other party does not, the non-performing party shall return *twice* the amount of the deposit to the original payor.[171]

It is plausible that this double damages provision would not be effective under a *force majeure* impediment. Thus, Article 117's provision that a "party impeded from performance due to a *force majeure* event shall not be liable to the performing party for his inability to perform"[172] would trump Article 115's provision for double deposit

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impediment by the third party would not be relevant, due to the fact that the impediment directly hinders the contracted party from performing, regardless of whether or not the third party could perform. *See* CISG, *supra* note 14, art. 79(2) and NCL, *supra* note 73, art. 121.

165. *See* NCL, *supra* note 73, art. 115.

166. *See* CISG, *supra* note 14, arts. 74-77; *see also* NCL, *supra* note 73, art. 115.

167. NCL, *supra* note 73, art. 115. Article 115 provides for restitution damages to any party injured in a contract dispute and allows for the awarding of double damages. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* arts. 74-77.

171. *See id.*; *see also* Chung-hua jen min kung ho kuo she wai fa kuei hui pien, *supra* note 48, at 484.

172. NCL, *supra* note 73, art. 117. Keep in mind that Article 117 would not

damages. To force the non-performing party to pay double damages would defeat the purpose of Article 117 and the legal doctrine of *force majeure.*

VII. ANALYSIS OF THE POTENTIAL EFFECTS OF THE NCL ON THE APPLICATION OF THE CISG

For the past several years, a major goal of the PRC has been to become a member of the World Trade Organization (WTO). The WTO provides increased trading areas and substantial trade benefits for its members.[173] In order to participate in free trade, the National People's Congress felt that it must promulgate contract laws that are consistent with the standards of the international community.[174] It was with this in mind that China enacted the NCL. By comparing the NCL to the older FECL, one can notice the expanded provisions within the NCL outlining in detail the necessary conditions that must exist for a contract to be valid,[175] how to rescind a contract,[176] when a party can file suit,[177] what constitutes damages,[178] and the specifications for declaring a *force majeure* event.[179]

When applying the *force majeure* provisions of either the NCL or the CISG in a Chinese court or before CEITAC, the chances are greater now that the outcome of such cases would turn out similarly regardless of which law guided the court. At this point, let us reexamine the hypotheticals set forth supra in Section V. Remember, the two hypotheticals earlier produced very different results when Chinese law was applied in lieu of the CISG. Will the application of the NCL instead of the FECL produce any different results?

The ISSUE in hypothetical (1) was whether or not a *force majeure* event took place, and if so, could the buyer claim damages for return of his guaranty deposit from the seller. In addition, could seller claim damages or restitution from buyer for the remaining amount of the contract price of $600,000. Both parties were from signatory nations to the CISG. Again, the CISG would be the guiding law since both China

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completely trump Article 115's attempt to place the original payor back at status quo; if the non-performing party had received payment of a deposit as a guaranty for his performance and is then unable to perform, he would still be liable to the payor for the amount of deposit. *See id.*; FECL, *supra* note 11, art. 24.

173. *See generally* World Trade Organization Website, *available at* http://www.wto.org.

174. *See* Jiang, *supra* note 27, at 246.

175. NCL, *supra* note 73, art. 12.

176. *Id.* arts. 94, 97.

177. *Id.* art. 128.

178. *Id.* arts. 107-22.

179. *Id.* arts. 117-18.

and the United States are signatories of the CISG.

HOLDING: Under the NCL, the holding in hypothetical (1) would remain the same, since the CISG would again govern the court's decision. A *force majeure* event did take place, seller would be liable to buyer for the amount of the guaranty deposit paid prior to the impediment, and buyer would be liable to seller for the amount of the contract price, which was $900,000.

The ISSUE in hypothetical (2) was the same as in hypothetical (1), except that the seller was from Panama, not the United States.

HOLDING: Under the NCL, as under the CISG, the Chinese court would use the Chinese law as the governing law since Panama is not a signatory nation of the CISG. However, this time the court would apply the NCL in lieu of the FECL. The seizure of the goods under an embargo would constitute a *force majeure* event under Article 117 of the NCL since the event was unforeseeable, unavoidable, and unable to be overcome. Once again, the reasoning for this finding is the same as in hypothetical (1) as outlined supra in Section V.

As for the restitution issue, buyer would be able to fully recover his guaranty deposit under Article 115 of the NCL, which stipulates that a non-performing party is liable for double the amount of the deposit placed as a guaranty.[180] However, under Article 117, the amount the performing party could claim would be reduced to the actual amount of deposit given to the non-performing party.[181] On seller's claim for the payment of the full price of the goods, the Chinese court would again be forced to look at the general practice of Chinese contracts.[182] Once again, the National People's Congress has neglected to promulgate any type of passage of risk provisions within the NCL and have left that entirely to the parties to place into the contract themselves.[183] Since there was no explicit provision on the passage of risk, the court would again hold that seller would be liable for the loss of his cargo. However, buyer can no longer require performance from seller, since Article 110 of the NCL provides that a party can no longer require performance if the non-performing party is unable to perform either in law or in fact.[184] A qualifying *force majeure* event in this instance would excuse the non-

180. NCL, *supra* note 73, art. 115.
181. *Id.* art. 117.
182. General Principles, *supra* note 26, art. 6.
183. *See generally* NCL, *supra* note 73.
184. *Id.* art. 110.

performing party from that requirement.

VII. CONCLUSION

For decades, the Chinese have attempted to integrate their country more and more into the international market and economy. However, it is not easy for a county that has spent thousands of years, under repressive and often isolationistic regimes, to suddenly throw off its shackles and come forth as a leading global market and economy. It takes time. Industrialized Western nations have been involved in international trade, for the most part, from the time they discovered the ocean and learned how to sail. Many were involved in international trade *before* they knew how to sail or knew what laid on the other side of the oceans. With such a long history of international trade and a legal system built on that history, Western industrial nations have yet to master the fine art of creating a comprehensive and uniform set of laws that parties from around the globe can rely on and understand. China is no different.

Although the NCL is considerably more expansive in its scope and application than the FECL, there is still room for growth. There is no expectation that China should adopt a new contract law that is identical to the CISG. However, the NCL should look to include or incorporate some of the important provisions of CISG, namely, the inclusion of passage of risk laws. Such an inclusion would create more uniformity in international trade with China. Furthermore, it would allow trading partners to enter into contracts with a better understanding of who bears the risk of loss in any one given situation. Parties would no longer need to worry about whether or not Chinese law or the CISG will be applied and whether or not any passage of risk provisions apply.

Within the new global economy, a smart businessman would work to negotiate a series clauses in the contract regarding the passage of risk, scope of *force majeure* events or effects, guaranty deposits, and time limits for notification of inability to perform and recission. Additionally, areas that one might want to include in a *force majeure* clause are whether or not partial performance is available and the procedure necessary to invoke the *force majeure* clause.

Aside from the lack of certain provisions in the NCL, the promulgation of the NCL has placed China in the right direction for the new millennium. The expanded provisions of the NCL provide more clarity, predictability, and uniformity than its predecessor, the FECL. Some may argue that the NCL is simply window-dressing to appease the international community, and there may be some validity to that.

However, with China's impending acceptance into the WTO,[185] China will undoubtedly turn that window-dressing into reality. Maybe then, Foreign parties will begin to see Chinese courts enforcing laws and regulations with more predictability adding to global uniformity.

DONALD L. GRACE

185. China's entrance into the WTO appears to be rapidly advancing. China has gained permanent Most Favored Nation status with the United States, China's entry into the WTO seems to be an inevitable event within the next few years.