

## LEGAL DEFINITION OF IRRESISTIBLE FORCE IN THE CIVIL LAW OF RUSSIA AND CHINA

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*The research focus is on concept of force majeure and irresistible force as a reason to release the parties from liability for failure to perform civil obligations. The authors examine theoretical concept and legal definition of “irresistible force” and its characteristics based on legislation, legal literature and judicial practice of the Russian Federation and the People’s Republic of China. Also, the authors analyze the civil law jurisdictions on irresistible force, relatively to its ambiguity and situation with the spread of the new coronavirus infection (COVID-19) and come to the conclusion that courts in each specific case should establish irresistible force circumstances. The work uses a linguistic (philological) method, in particular, the method of distributive analysis of the terms “irresistible force” and “force majeure.” The article shows that in modern Russian law the expression “irresistible force circumstances” has more efficient terminological potential. The authors propose implementation of “irresistible force circumstances” concept in the Russian Civil Code, which would more accurately reflect the essence of this concept.*

*Keywords: irresistible force; force majeure; emergency; inevitability; civil liability; exemption from liability; coronavirus (COVID-19).*

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## Introduction

China and Russia are two countries with important influence in the world which have a special responsibility for maintaining world's peace and promoting common development. The Russian Federation and the People's Republic of China, both being members of the BRICS association, occupy more than 18% of the world's land mass and they account for 20% of the global population. The countries are distinguished today by rapidly growing emerging markets. According to the forecasts of experts, they have the potential to become the dominant economic powers, along with India and Brazil, by 2050. Chinese-Russian relations are characterized by high dynamics of development, well-developed legal systems, well-structured governmental systems and active economic and cultural connections.

Trade turnover between Russia and China in 2019 amounted to a record US\$110.75 billion, which was 3.4% more than in 2018,<sup>1</sup> thus increasing year-over-year as did also the number of international treaties concluded between the two countries.

With the everyday rhythm of the economy and life in a country, citizens and organizations rarely think about the consequences of failure to fulfill their contractual obligations. But in the case of unforeseen circumstances (natural disasters, financial crises, pandemics, etc.) things, of course, change, and so do the economic conditions of entrepreneurial activity. In such times, entrepreneurs become topical issues of civil liability for failure or improper fulfillment of obligations.

Yet, in the face of unforeseen, unavoidable circumstances it is impossible to resolve issues of civil liability without first establishing what an irresistible force is. Irresistible force is an essential tool in the mechanism of civil liability, and it acts as a general rule at its border.

Under civil liability, in general, the term refers to the adverse property consequences for the person who commits a civil offense, expressed in the loss of property by such a person. Consequently, entrepreneurs look for legal grounds upon which to seek exemption from civil liability for failure to fulfill their obligations.

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<sup>1</sup> Товарооборот между Россией и Китаем в 2019 году вырос на 3,4% // РИА Новости. 14 января 2020 г. [Trade Turnover Between Russia and China in 2019 Increased by 3.4%, RIA Novosti, 14 January 2020] (Sep. 3, 2021), available at <https://ria.ru/20200114/1563385964.html>.

Irresistible force may be the basis of exemption from civil liability of persons who do not fulfill or improperly fulfill an obligation. Constant development of business relations and the growth of foreign trade agreements concluded between Russia and China, of course, indicate the need for a proper study of the legal issues related to the circumstances that would exempt the participants from civil legal responsibility. In addition to exemption from liability, irresistible force affects a number of other important circumstances. In particular, it can lead to the impossibility of fulfilling the obligation, and, consequently, to its termination. The irresistible force may cause a significant change in circumstances and become the reason for the termination or change of contract and eventually lead to the termination of obligations or liabilities or their preservation in a modified form. Finally, irresistible force affects the course of the limitation period, serving as the basis for its suspension.

It should be noted that in civil legal science and practice the concepts of “irresistible force” and “force majeure” are given the same meaning, considered to be synonyms.

The notion of “irresistible force” in Russian legislation has not been fully investigated or defined at present. So here, finally, follows a list of the activities and events that fall under irresistible force.

The undeveloped concept of “irresistible force” or “force majeure” is of particular importance in international treaties because a concept in the legislation of different countries can be understood in different ways.

As Pedro Ferreira Malaquias points out, most legal systems do not provide a legal definition of “force majeure.” The reason is not that there is no consensus among legal scholars as to whether the law should give legal definitions or not, but because “force majeure” is an open concept, which can vary depending on the particular area of law or business.<sup>2</sup>

The issue of irresistible force as a circumstance that exempts from liability and entails other legal consequences is also ambiguously resolved in judicial practice. All this requires comprehension and clear guidelines.

The new coronavirus disease pandemic (COVID-19) encourages us to take a fresh look at the regulatory framework relating to “irresistible force.” Currently, the vast majority of entrepreneurs are faced with a whole range of problems that have arisen in connection with the spread of COVID-19. The health regimes and measures taken by the authorities to prevent the spread of the coronavirus have led to downtime in almost all areas of business. In these circumstances, many Russian entrepreneurs have already had their losses with regard to their contractual obligations. The pandemic has also seriously affected the Chinese economy. The spread of the virus in China led the World Health Organization (WHO) to declare the situation a public health emergency. In order to prevent the spread of the coronavirus, China adopted various restrictive measures, which were reflected in the performance of contractual obligations.

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<sup>2</sup> Pedro F. Malaquias, *Revisiting Force Majeure Clauses*, 6 Butterworths J. Int'l Bank. Fin. L. 361 (2012).

The spread of the coronavirus has seriously affected the air transport supply chains of various commodities, and resulted in the closing of industrial enterprises, including enterprises with foreign investments. Because of these business disruptions, many entrepreneurs in China are not able to fulfill their contractual obligations, which could lead to litigation. Given these circumstances, entrepreneurs are looking for ways to avoid responsibility for the execution of their contracts, owing to the outbreak of COVID-19 in China.<sup>3</sup>

The fact that a pandemic is an emergency situation in which citizens find themselves caught up in a life-threatening event, and organizations cannot carry out normal economic activities, it raises questions about the definition of the concept of “irresistible force,” the possibility of classifying certain circumstances as “irresistible force,” as well as the consequences of the use of irresistible force with respect to a contractual obligation are even more relevant. Irresistible force is a concept that is often included in the contracts of corporations around the world and allows them not to take responsibility for breach of contract.

In light of the above, the purpose of this article is to study the concepts of “irresistible force” and “force majeure,” to determine the range of circumstances related to irresistible force under the laws of the BRICS countries, in particular, Russia and China.

For this purpose, this article is organized as follows: section 1 examines the understanding of the term “irresistible force” in the legislation of the Russian Federation on the basis of an analysis of regulatory legal acts of various levels, scientific doctrine, and material relating to Russian judicial practice; section 2 provides an analytical review of the provisions of the Chinese civil law on irresistible force, the views of scholars relating to Chinese judicial practice on the use of irresistible force; and section 3 which contains a linguistic analysis of the concepts of “irresistible force” and “force majeure.”

The concluding section presents the main findings and conclusions. For the purpose of our research the following methods were used: linguistic (philological) method to study the content of normative legal acts, in particular the method of distributive analysis.

## 1. The Notion of “Irresistible Force” in Russian Civil Law

Article 401 of the Civil Code of the Russian Federation provides a definition of “irresistible force”:

A person who has not fulfilled or improperly fulfilled an obligation in the course of entrepreneurial activity is liable if he/she does not prove that proper performance was impossible due to irresistible force, that is, extraordinary

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<sup>3</sup> Bodhisattwa Majumder & Devashish Giri, *Coronavirus & Force Majeure: A Critical Study (Liability of a Party Affected by the Coronavirus Outbreak in a Commercial Transaction)*, 51(1) J. Mar. L. Com. 51 (2020).

and unavoidable given conditions of the circumstances. This rule is valid, unless otherwise provided by law or contract.

In addition, such circumstances do not include the violation of obligations by the debtor's counterparties, the lack of the goods necessary for execution on the market, the lack of the necessary funds for the debtor. Thus, the Civil Code of the Russian Federation defines the concept of "irresistible force" through two fundamental signs of irresistible force, namely: "extreme" and "inevitability." Signs of extreme and inevitability have not received their disclosure in the Civil Code, as well as the concept of "irresistible force."

Irresistible force criteria are also characteristic of the main acts of international unification of contract law. For example, Article 7.1.7 of the UNIDROIT Principles:<sup>4</sup>

The party is exempt from liability for failure, if it proves that the failure was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the conclusion of the contract or to have avoided or overcome its obstacles or its consequences.

A similar definition is found in Article III.-3: 104 of the Model Rules of European Private Law:

A debtor shall not be liable for a default if it is caused by an obstacle beyond the control of the debtor and the debtor could not reasonably be expected to avoid or overcome such obstacle or its consequences ... The debtor is not released from liability for failure to fulfill an obligation arising from an agreement or other legal act, if it could reasonably be expected from him/her that he/she took into account the obstacle at the time the obligation arose.<sup>5</sup>

Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (concluded in Vienna on 11 April 1980) gives the following definition of irresistible force:

A party shall not be liable for failure to fulfill any of its obligations if it proves that it was caused by an obstacle beyond its control and that it could not reasonably be expected to have taken the impediment into account

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<sup>4</sup> Principles of International Commercial Contracts, 1994 – UNIDROIT (Sep. 3, 2021), available at <https://www.jus.uio.no/lm/unidroit.contract.principles.1994/doc.html>.

<sup>5</sup> Рассказова Н.Ю. Модельные правила европейского частного права [Natalia Iu. Rasskazova, *Model Rules of European Private Law*] (2013).

at the conclusion of the contract or to have avoided or overcome it or its consequences.<sup>6</sup>

Thus, these acts associate irresistible force with uncontrollable and unforeseen obstacles, while the term “irresistible force” or “force majeure” is not specifically used.

Russian legislation contains the following definition of irresistible force circumstances (force majeure) in the Regulation on the procedure for witnessing irresistible force circumstances (force majeure) by the Chamber of Commerce and Industry of the Russian Federation:<sup>7</sup>

extraordinary, unforeseen and unavoidable circumstances arising during the implementation of the contract (contractual) obligations that cannot reasonably be expected at the conclusion of the agreement (contract), or be avoided or overcome, and which are beyond the control of the parties to such agreement (contract).

In particular, such circumstances include: natural disasters (earthquake, flood, hurricane), fire, mass diseases (epidemics), strikes, hostilities, acts of terrorism, sabotage, restrictions on traffic, prohibitive measures of states, prohibition of trade operations, including with individual countries, due to the adoption of international sanctions and other circumstances not dependent on the will of the parties to the agreement (contract).

It seems important here to give a definition of the concepts of “emergency” and “inevitability.”

In the Explanatory Dictionary of the Russian Language (by S.I. Ozhegov & N.Iu. Shvedova)<sup>8</sup> the word “emergency” means: “1. Exceptional, superior to all, all; 2. Especially appointed for something, not provided for in the usual course of business.” From this we can conclude that “extraordinary” is “exclusivity” not provided for in the usual course of affairs.

However, it should be noted that the very concept of “emergency” in relation to irresistible force circumstances is ambiguous. Proof of this is the existence of different views on this issue in the legal literature. Specifically, some authors understand

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<sup>6</sup> United Nations Convention on Contracts for the International Sale of Goods, 1980 (CISG) (Sep. 3, 2021), available at <https://www.jus.uio.no/lm/un.contracts.international.sale.of.goods.convention.1980/portrait.pdf>.

<sup>7</sup> Приложение к постановлению Правления ТПП России от 23 декабря 2015 г. № 173-14 // СПС «КонсультантПлюс» [Appendix to the Resolution of the Board of the Chamber of Commerce and Industry of Russia of 23 December 2015 No. 173-14, SPS “ConsultantPlus”] (Sep. 3, 2021), available at [http://www.consultant.ru/document/cons\\_doc\\_LAW\\_192640/](http://www.consultant.ru/document/cons_doc_LAW_192640/).

<sup>8</sup> Ожегов С.И., Шведова Н.Ю. Толковый словарь русского языка [Sergey I. Ozhegov & Natalia Iu. Shvedova, *Explanatory Dictionary of the Russian Language*] 410 (1997).

“emergency” to include only those events that have unusually high strength in their appearance (e.g. natural disasters).<sup>9</sup>

Others note that the emergency is characterized by atypicality, uncharacteristic of either the phenomenon itself or its consequences, for example, the unprecedented flood of the Amur River in the Far East in August 2013. The emergency is manifested in the fact that the previous great flood of the Amur occurred almost 100 years ago. Commonplace, for example, are spring floods, which cannot be recognized as extraordinary by virtue of their regularity and predictability.<sup>10</sup>

In addition, a number of authors point to the unpredictability characteristic of the “emergency” irresistible force, which does not imply a real possibility to foresee this or that phenomenon.<sup>11</sup> In general, most scientists considering the concept of “emergency” understand it as unusual, exceptional, extraordinary circumstances, the probability of occurrence of which is very low in the normal course of life.

To understand the content of the concept of “inevitability,” it is also necessary to refer to the Modern Explanatory Dictionary of the Russian Language (by T.F. Efremova), where the word “inevitability” means “one that is difficult or impossible to avert, eliminate; inevitable.”<sup>12</sup> In the legal literature, “inevitability” is most often understood as the impossibility of preventing the harmful action of irresistible force, taking into account the person’s capabilities. Most scientists start from the fact that the inevitability criterion will relate to irresistible force if the phenomenon is inevitability for every person, taking into account the level of development of science and technology of the whole society.

According to N.P. Korshunova, when assessing the sign of inevitability, a compromise approach should be used, comparing the capabilities of a particular debtor with the capabilities of homogeneous persons and organizations by the nature and conditions of the activity. At the same time, necessarily inevitability circumstance should be considered in the process of generating a breach of contract.<sup>13</sup> There is no doubt of the fact that the sign of inevitability exists if any person engaged in similar

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<sup>9</sup> Кравцов А.К. Понятие непреодолимой силы // Советская юстиция. 1966. № 17. С. 18 [Alexander K. Kravtsov, *The Concept of Force Majeure*, 17 Soviet Justice 18, 18 (1966)].

<sup>10</sup> Кузнецов Р.Н. Понятие и признаки непреодолимой силы: в теории и судебной практике // Право и экономика. 2013. № 9. С. 65 [Roman N. Kuznetsov, *The Concept and Signs of Irresistible Force: In Theory and Judicial Practice*, 9 Law and Economics 63, 65 (2013)].

<sup>11</sup> Каменков В.С., Каменков А.В. Основания освобождения от гражданско-правовой ответственности // Бюллетень нотариальной практики. 2007. № 4. С. 26 [Viktor S. Kamenkov & Alexander V. Kamenkov, *Grounds for Exemption from Civil Liability*, 4 Bulletin of Notarial Practice 20, 26 (2007)].

<sup>12</sup> Ефремова Т.Ф. Современный толковый словарь русского языка [Tatiana F. Efremova, *Modern Explanatory Dictionary of the Russian Language*] 1168 (2006).

<sup>13</sup> Коршунова Н.П. Непреодолимая сила: новый взгляд на старую проблему // Журнал российского права. 2008. № 3. С. 78–93 [Natalia P. Korshunova, *An Irresistible Force: A New Look at an Old Problem*, 3 Journal of Russian Law 78 (2008)].

activities as those of the debtor could not avoid the onset of the circumstances or consequences. After all, only a subject acting in the same sphere of activity as the debtor would be able to assess whether it is possible or impossible to avoid the onset of a circumstance or its consequences which are an irresistible force.

Thus, a circumstance considered to be an irresistible force will inevitably occur, it cannot be prevented. It should be noted that the extraordinary irresistible force must be considered with its second sign – the inevitability in the aggregate, and the extraordinary circumstances can be considered prerequisite for the inevitability of the circumstances, which is confirmed by the fact that the court to clarify the circumstances of the irresistible force before examining the issue of the inevitability of that or another event, first of all, decides the question of its extremeness.<sup>14</sup>

Despite the fact that the Civil Code of the Russian Federation does not state anything about the external nature of the irresistible force circumstances, most scientists agree that such circumstances should be outside the scope of business of the debtor. One should agree with this argument, since there is a concept of “entrepreneurial risk.” If the circumstance is of an internal nature, then it is not insurmountable, such a circumstance will constitute an entrepreneurial risk for the subject.

Risk always poses a danger, a threat associated with the onset of unfavorable material consequences for the subject in a situation where it is impossible to predict the correctness of the choice of decision in the implementation of entrepreneurial activity. Usually the parties include in the contract a clause on irresistible force containing general provisions on the impossibility of fulfilling the obligation in such a case, and on release from liability. In this regard, when considering economic disputes by the courts, disagreements inevitably arise as to whether this obstacle is an irresistible force and whether it can be the basis for exemption from liability.

So, in the resolution 09AP-33653/2013-GK of the Ninth Arbitration Court of Appeal of 30 January 2014 on the claim in respect of Samsung Vina Insurance Co., Ltd.; Samsung Property and Cachety Insurance Co., Ltd. (China); Samsung Fire and Marine Insurance Co., Ltd. to Green Integrated Logistics Rus LLC on recovery of damage, the court ruled that the loss of cargo in a road traffic accident, regardless of the fault of the carrier, does not release the carrier from liability for non-preservation of the cargo, unless the carrier can prove that the cargo was lost as the result of objective criteria, to which circumstances of irresistible force (spontaneous, natural phenomena) can be attributed. A road traffic accident in the activities of a carrier using vehicles is a common circumstance (business risk) that the carrier must foresee, which excludes the qualification of this circumstance in order to release the carrier from liability for non-preservation of the cargo as emergency and inevitability. Thus, the obstacle that provoked the violation must be outside the reasonable control of

<sup>14</sup> Лукьяненко М.Ф., Зимнева С.В. Непреодолимость обстоятельств и гражданско-правовая ответственность // Юрист. 2018. № 9. С. 19–25 [Marina F. Lukyanenko & Svetlana V. Zimneva, *Insurmountable Circumstances and Civil Liability*, 9 Jurist 19 (2018)].

the debtor, must be objectively and not subjectively unavoidable, must not relate to ordinary business risk, and must not be reasonably foreseeable and insured.

In addition, often jurisprudence on irresistible force circumstances does not include natural phenomena which can be predicted or forecast, for example a sharp decrease in the outside temperature in winter time resulting in river ice and heavy snow, which is characteristic in certain areas. These circumstances cannot be considered irresistible force circumstances since they do not have the signs of exclusivity and objective inevitability.

To clarify the signs of irresistible force, the decision of the Plenum of the Supreme Court of the Russian Federation of 24 March 2016 No. 7 “On the Application by the Courts of Certain Provisions of the Civil Code of the Russian Federation on Liability for Violation of Obligations” was called upon, and which subsequently gave the following clarification: “The requirement of emergency implies the exceptional nature of the circumstances, the onset of which is not common in specific conditions.”

Unless otherwise provided by law, the circumstance is recognized as inevitability if any participant in civil turnover carrying out activities similar to the debtor could not have avoided the occurrence of this circumstance or its consequences. As Pedro Ferreira Malaquias notes,<sup>15</sup> the legal systems of the world are characterized by the absence of a definition of the concept of “force majeure” and the presence of a number of common characteristics. In particular, Ferreira Malaquias notes the sign of the uncontrollability of the event, its unpredictability and inevitability, as well as the fact that the event makes the execution of the contract impossible for a certain period of time, or the execution of the contract will be possible only on other conditions that are significantly different from the original ones. But this is where the common understanding of the concept of force majeure between the legal systems of different countries ends, and the same events may have different consequences in respect of referring to them as force majeure for different legal systems.

Judicial interpretation will play an important role in classifying circumstances as irresistible force.

There is no doubt that irresistible force as a circumstance that relieves from liability due to the impossibility of fulfilling an obligation is a matter of fact established by the court. In our opinion, the attribution of one of the possible circumstances to irresistible force directly in the law is conceptually erroneous.<sup>16</sup> In this case, the irresistible force criteria are evaluative concepts, the court in each specific case, taking into account all the circumstances, recognizes or does not recognize the circumstance as irresistible force. According to M.F. Lukyanenko, evaluative concepts do not allow for the possibility of determining their content in an exhaustive way, they are not

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<sup>15</sup> Malaquias 2012.

<sup>16</sup> Allison R. Ebanks, *Force Majeure: How Lessees Can Save Their Leases While the War on Fracking Rages On*, 48 St. Mary's L.J. 857 (2017).

characterized by unambiguity due to constantly changing living conditions.<sup>17</sup> So the signs of “emergency” and “inevitability” of irresistible force circumstances can change over time. For example, in judicial practice, all sorts of natural phenomena are mainly related to circumstances of irresistible force: earthquakes, floods, heavy snowfall, fire, thunderstorms, etc. Provided that they are of an extraordinary nature and could not be prevented by the debtor even when the debtor took all possible preventive measures. And if a person, in connection with the development of the scientific and technical process, can manage the effects of a thunderstorm, then, probably, this circumstance will not meet the criteria of emergency and inevitability.

The world knows such a natural disaster as locust raids. These insects descend on agricultural fields in the form of a swarm, devouring everything. Swarms of these insects are capable of destroying large areas of crops in a short time. By doing so, they cause great damage to agriculture. People cannot control and manage this phenomenon, although in recent years locusts have been fought somewhat successfully with the help of insecticides that are sprayed by airplane. However, in practice, ‘locust attack’ is referred to by courts as an irresistible force only if an emergency regime is declared as a result of a locust infestation in a certain area, on the basis of an act adopted by the local government. Under such conditions, agricultural organizations that have suffered losses due to irresistible force are exempted from liability (Resolution of the Ninth Arbitration Court of Appeal of 30 March 2012 No. 09AP-72/2012 in case No. A40-105673/11-114-922). In cases where the state of emergency is not declared, there is no corresponding act of local government bodies, the courts do not recognize the locust infestation as an irresistible force circumstance (Resolution of the FAS of the Volga District of 28 April 1998 on case No. 50/19). Thus, the impact of irresistible force, occurs from the outside, it does not depend on the will of the people.

It should be noted that the inclusion by the parties in the contract of any circumstance called irresistible force does not always mean that it will be recognized as such when the court resolves a dispute that has arisen. In each case, the court will determine whether the circumstance is emergency and inevitability, whether the debtor could have changed something, and avoided unwelcome consequences. Thus, lightning strikes, and the fires it is likely to cause can be avoided with the help of a lightning rod; arson, with the help of high-quality security. Weather events, such as floods, can be recognized as a common, regularly recurring event, or may require the introduction of an emergency regime. As Pedro Ferreira Malaquias rightly points out, there is no one-size-fits-all solution in determining irresistible force.<sup>18</sup> It

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<sup>17</sup> Лукьяненко М.Ф. Оценочные понятия гражданского права: разумность, добросовестность, существенность [Marina F. Lukyanenko, *Evaluative Concepts of Civil Law: Rationality, Good Faith, Materiality*] 40 (2010).

<sup>18</sup> Malaquias 2012.

is not possible to find a “universal” general basis in the concept of irresistible force events, each irresistible force clause can be a separate case. In the regulatory legal acts of many countries, the definition of irresistible force is not provided, since the decision on whether an event should be considered an irresistible force event or not is a matter of judicial interpretation.

The latest events with the spread of the coronavirus in the Russian Federation show that the courts do not have a common understanding of whether COVID-19 could be considered irresistible force, because despite the fact that such circumstances are not directly called irresistible force by the law, in practice the new coronavirus infection has become a serious obstacle to the implementation of a range of financial and social obligations. The Supreme Court of the Russian Federation in the “Review on Certain Issues of Judicial Practice Related to the Application of Legislation and Measures to Counter the Spread of a New Coronavirus Infection (COVID-19) in the Territory of the Russian Federation No. 1” (approved by the Presidium of the Supreme Court of the Russian Federation on 21 April 2020), formulated the position that the recognition of the spread of a new coronavirus infection as an irresistible force circumstance cannot be universal for all categories of debtors. The existence of irresistible force circumstances must be established considering the circumstances of a particular case.

There is no doubt that the irresistible force circumstances clause should not be a means for a party to avoid liability in connection with a known event or event that could have been prevented by taking adequate precautions. We believe that it is necessary to establish in each specific case all the conditions for exemption from liability for failure to fulfill obligations due to irresistible force. The Supreme Court of the Russian Federation (cl. 7 of the “Review on Certain Issues of Judicial Practice Related to the Application of Legislation and Measures to Counter the Spread of a New Coronavirus Infection (COVID-19) in the Territory of the Russian Federation No. 1”) has indicated what circumstances (conditions) a party to the contract must prove:

- 1) The presence and duration of irresistible force circumstances;
- 2) The presence of a causal relationship between the circumstances of irresistible force that have arisen and the impossibility or delay in the performance of obligations;
- 3) Non-involvement of the party in the creation of irresistible force circumstances; and
- 4) Good faith adoption by the party of reasonably expected measures to prevent (minimize) possible risks.

As for the first condition, on 11 March 2020, the World Health Organization (WHO) announced that the situation in respect of the coronavirus infection could be described as a pandemic. A pandemic is when a disease spreads beyond the borders of one country and takes on a larger scale, which is what we saw happening in the world (and which continues today). In accordance with Article 1 of the Federal Law of 30 March 1999 No. 52-FZ “On the Sanitary and Epidemiological Well-Being

of the Population,” appropriate measures were put into action in Russia to address the threat to the health of the population.

According to the WHO, the outbreak of coronavirus infection COVID-19 was first reported on 31 December 2019 in Wuhan, China. As an irresistible force circumstance, the epidemic has signs of emergency and inevitability. Although an emergency regime was not introduced in the Russian Federation by acts of state authorities and local self-government, unprecedented restrictive measures and bans were adopted in connection with the coronavirus: an isolation regime, quarantine, temporary suspension of the work of enterprises, restrictions on traffic, and others. It can, of course, be assumed that the outbreak of the pandemic may be considered predictable due to the periodic outbreaks of various types of viral infections in recent years. However, the consequences of the outbreak of the coronavirus and the restrictive measures taken by states to prevent its spread turned out to be much more serious than in previous pandemics. According to the WHO, as of 7 July 2020, more than 10.4 million cases of COVID-19 infection and over 535,000 deaths had been registered in the world. This degree of severity makes the pandemic unpredictable, and a defaulting party could not take any reasonable steps to prevent its consequences.

According to Bodhisattwa Majumder and Devashish Giri,<sup>19</sup> since the coronavirus first affected society, and the outbreak was unprecedented, most contracts awarded do not rule out this event as irresistible force. These authors believe that the coronavirus should be viewed as an irresistible force circumstance and note that the rules adopted by states to prevent the spread of coronavirus in terms of blockages, transport restrictions and isolation in various parts of the world are tantamount to a similar situation created in connection with the bans, strikes or other similar irresistible force circumstances that are standard for contracts containing a force majeure clause.

The second condition on the presence of a causal relationship between the irresistible force circumstances that have arisen and the impossibility or delay in the fulfillment of obligations indicates the need to prove the connection between a pandemic, which is a phenomenon (cause) and precedes the impossibility or delay in the fulfillment of obligations (consequence) and gives rise to it.

With regard to the third condition – the non-involvement of the party in the creation of irresistible force circumstances – we consider it necessary for the party to the contract to prove its innocence in violating the terms of the contract. Circumstances of irresistible force cannot be established abstractly, without reference to a specific situation and to a specific debtor.

The fourth condition – the conscientious adoption by the party of reasonably expected measures to prevent (minimize) possible risks – is evaluative and established by the court in each specific case, considering those reasonable actions which justly

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<sup>19</sup> Majumder & Giri 2020.

take into account the interests of both parties that the debtor took. These measures should be aimed either at eliminating adverse consequences for the contracting party or at reducing them. It is the conscientiousness and reasonableness of the behavior of the party to the contract, taking into account the above conditions, that cannot entail negative consequences for the party and should be the basis that exempts him from contractual responsibility. Even if a circumstance is not foreseen, the performance of the contract can be enforced; if it is possible to mitigate the consequences of the event, then the party is obliged to try to mitigate the consequences. Courts should encourage the possibility of at least partial performance of the contract due to irresistible force circumstances.

The current Russian court practice in connection with the coronavirus in recent months shows that the courts, taking into account the impact on entrepreneurs of restrictive measures due to the coronavirus, in some cases recognize that measures to counter the coronavirus are irresistible force which prevents the fulfillment of obligations. In particular, when considering one of the cases, the court took into account that at the current time the applicant does not have proceeds from his/ her main activity, which has been suspended (hampered) due to restrictive measures of the authorities, and therefore the entrepreneur cannot timely repay the debt, and, thus, the court provided him with an installment plan (Definition of the Arbitration Court of the Amur Region of 14 May 2020 in case No. A04-8137/2019, Determination of the Arbitration Court of the Republic of Khakassia of 24 April 2020 in case No. A74-11163/2017). In other cases, referring to the position of the Armed Forces of the Russian Federation that the recognition of coronavirus as irresistible force cannot be universal, refused in specific circumstances to defer payment due to coronavirus as irresistible force, noting that the debtor had not proven that he had exhausted other methods of repayment of creditors' claims (Definition of the Arbitration Court of the Perm Territory of 20 May 2020 in case No. A50-18857/2019). In another case, the court did not extend the deadline for the execution of the plan for restructuring the debts of an individual entrepreneur, arguing that it should have been executed even before the spread of the coronavirus. In addition, the individual entrepreneur did not prove that the spread of coronavirus in the region was recognized as an irresistible force circumstance, in particular, the certificate of force majeure issued by the Chamber of Commerce and Industry of the Russian Federation was not presented (Decision of the Arbitration Court of the Tomsk Region of 20 May 2020 in case No. A67-7799/2018).

In accordance with clause 7 of the "Review on Certain Issues of Judicial Practice Related to the Application of Legislation and Measures to Counter the Spread of a New Coronavirus Infection (COVID-19) in the Territory of the Russian Federation No. 1," the presence of irresistible force circumstances can be confirmed by the relevant documents (conclusions, certificates) issued by authorized bodies or organizations.

According to the Letter of the Chamber of Commerce and Industry of the Russian Federation of 27 March 2020 No. 02v/0241 "On Methodological Recommendations

on the Issuance by the Chambers of Commerce and Industry Conclusions on Irresistible Force Circumstances Under Agreements Concluded Between Russian Business Entities," the Chamber of Commerce issues conclusions on the circumstances irresistible force that occur on the territory of the Russian Federation. Under foreign trade contracts, the Russian Chamber of Commerce and Industry issues certificates of force majeure. This document testifies to circumstances of irresistible force.

It should be noted that notification of the counterparty about the occurrence of irresistible force circumstances is mandatory. If this requirement is not met, the non-notifying party will be obliged to reimburse the other party for the losses caused by this (clause 10 of the Resolution of the Plenum of the Supreme Court of the Russian Federation of 24 March 2016 No. 7). The deadline for notification of irresistible force is usually stipulated in the contract. If the term is not specified, one must notify the counterparty immediately. Timely notification of the event will allow the parties to take appropriate measures to prevent (minimize) possible risks, as well as time to agree on the termination of the obligation due to irresistible force.

Thus, there is no detailed definition of irresistible force in Russian legislation; an exhaustive list of insurmountable circumstances has not been established either. The signs of irresistible force "extreme" and "inevitability" are evaluative concepts that are assessed by the court. Meanwhile, the very concept of "irresistible force" is a normative generalization, that is, through the signs, various phenomena are understood as irresistible force. The main purpose of including a force majeure clause in an agreement is to prevent or mitigate the civil liability of one or another party, whose activities under the agreement were affected by irresistible force or became impossible for reasons beyond its control.

## 2. The Notion of "Irresistible Force" in Chinese Civil Law

Irresistible force and force majeure, 不可抗力 in Chinese, are equal in value.

The main regulatory legal act of the People's Republic of China (PRC) in the field of civil law is the Law "General Provisions of the Civil Code of the PRC," which entered into force on 1 October 2017. According to Article 107 "General Provisions of the Civil Code of the PRC," if due to irresistible force circumstances a person cannot fulfill a contract or thereby damages other persons, the person does not bear civil liability, except in cases provided by law (Chapter VI "Civil Liability").<sup>20</sup>

When considering the definition of "force majeure," it is necessary to refer to the Law of the People's Republic of China "On Contracts" (1999), which lays down a number of important provisions. Thus, if, due to force majeure circumstances, a person cannot fulfill a contract, the person may be released from liability in part or in full in accordance

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<sup>20</sup> 中华人民共和国民法典 [General provisions of the Civil Code of the PRC] (Sep. 3, 2021), available at <https://baike.baidu.com/item/中华人民共和国民法典/5020404?fr=aladdin>.

with the influence of force majeure, with the exception of cases provided for by law. If a force majeure event occurs after a delay in performance, the person cannot be relieved of responsibility. The term “force majeure” refers to an objective situation that cannot be foreseen, cannot be avoided and cannot be overcome (Chapter VII “Liability for Breach of Contract”). Article 118 of the Law of the People’s Republic of China “On Contracts” provides for a rule on mandatory notification by the party to the contract in order to reduce the damage caused to the other party in the event of failure of one of the parties to the contract due to force majeure (Chapter VII “Liability for Breach of Contract”).<sup>21</sup> Also, Article 94 of the Law of the PRC “On Contracts” contains the provision that if due to force majeure the purpose of the contract cannot be achieved, the person can terminate the contract (Chapter VI “Termination of Rights and Obligations”).

Thus, in Chinese law, the concept of force majeure is defined through three fundamental signs of force majeure, namely: 不能 预见 (unforeseen), 不能 避免 (inevitability) and 不能 克服 客观 情况 (irresistible objective circumstance). In the Law of the PRC “On Contracts” (1999), force majeure refers to objective situations that cannot be foreseen, avoided or overcome. At the same time, the Law of the PRC “On Contracts” not only establishes criteria for classifying circumstances as force majeure, but also explains its consequences. Unless otherwise provided by Chinese law, in cases where the contract cannot be executed due to force majeure, the parties may be exempted from liability in whole or in part, depending on the degree of force majeure.<sup>22</sup>

With regard to the elements defining force majeure as a reason for exemption from civil liability, Chinese positive law provides the following:

- An unforeseen situation is understood as an event that modern technologies are unable to predict;
- An inevitable and insurmountable situation means an event that, despite the efforts of the parties and the measures taken to prevent it, leads to adverse consequences.<sup>23</sup>

It should be noted that the civil legislation of China recognizes the system of force majeure and gives certain interpretations regarding the concept of the effectiveness of the application of articles on force majeure, but at the same time, due to the lack of necessary explanations in the text of the Chinese law, it is difficult to give a precise definition of the concept of “force majeure.”

As Cheng Jianwei rightly points out, the force majeure system is aimed at ensuring the protection and balance of interests of all parties affected by force majeure circumstances. Consequently, the regime of force majeure should be mandatory in

<sup>21</sup> 中华人民共和国合同法 [Law of the People’s Republic of China “On Contracts”] (Sep. 3, 2021), available at <https://baike.baidu.com/item/中华人民共和国合同法/61754?fr=aladdin>.

<sup>22</sup> Liang Zhao, *International Recent Developments*, 42 Tul. Mar. L.J. 569 (2018).

<sup>23</sup> Radu Stancu, *The Consequences of the Covid-19 Pandemia on the Performance of Contracts: Short Comparison Between China, French and Romanian Civil Law*, 15(1) EIRP Materials 13 (2020).

order to achieve the goals of legislation and the implementation of the institutional value of law. However, due to the peculiarities of the force majeure itself and the limitations of statutory law, the relevant provisions of Chinese law, according to Cheng Jianwei, are incomplete. The law of the People's Republic of China focuses on the scope of force majeure and the related legal consequences.<sup>24</sup>

According to Liu Kaisiang and Zhang Haixia, force majeure as a legal exemption from liability is a manifestation of the principle of guilt. Force majeure applies to both tort liability and contractual liability. When determining the criteria for force majeure circumstances, both subjective and objective factors must be taken into account. So, according to these scientists, the government's actions should not be classified as force majeure, rather they are a technical risk. The authors draw attention to the fact that force majeure differs from both business risks and changes in circumstances. In each specific case, its action is determined based on the actual impact of force majeure circumstances on legal relations. At the same time, since the force majeure established by law has a mandatory nature of application, the parties to an agreement are not allowed to exclude the use of force majeure in the contract. Strictly speaking, an agreement on force majeure must comply with the general criteria for determining force majeure, an agreement can only be reached within the framework of force majeure, and not expanded, otherwise it is not an agreement on force majeure, but an agreement on something else – a disclaimer.<sup>25</sup>

Professor Wang Limin believes that the contractual law of each country provides for force majeure as a reason for refusing to perform a contract, but the content and scope of force majeure is difficult to specify by law, therefore it is necessary that the parties establish a force majeure clause in the contract, specifically listing all types of force majeure circumstances and their scope.<sup>26</sup>

Chinese scholars have different opinions regarding the application of force majeure clauses in the agreement. According to Cui Jianyuan, if the provisions on force majeure in the agreement are fully consistent with the provisions of the law on force majeure in their content and expansion, then such terms of the agreement have legal force. If the force majeure clauses go beyond the force majeure language defined by law, then such clauses are valid only in terms of the contract and their legal effect is governed by law in relation to the terms of the contract.<sup>27</sup>

Thus, most scholars point out that it is impossible to give an exact definition of the concept of "force majeure" in the text of Chinese law. As Vivian Mao points out,

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<sup>24</sup> 程建伟, 论中国法上的不可抗力条款[J] [Cheng Jianwei, *On the Force Majeure Clause in Chinese Law*], 7 法制与经济(下旬刊) [Legal System and Economics] 87 (2008).

<sup>25</sup> 刘凯湘, 张海峡, 论不可抗力 [Liu Kaixiang & Zhang Haixia, *On Force Majeure*], 6 法学研究 [Legal Research] 107 (2000).

<sup>26</sup> 王利明, 合同法研究 [Wang Liming, *Study of Contract Law*] 470 (2003).

<sup>27</sup> 崔建远, 不可抗力条款及其解释[J] [Cui Jianyuan, *Force Majeure Clause and its Interpretation*], 41(01) 环球法律评论 [Global Law Review] 48 (2019).

“unforeseen, unavoidable and compelling objective conditions are the key characteristics on the basis of which the Chinese courts determine ‘force majeure.’”<sup>28</sup>

According to the judicial practice of China, the following three categories are distinguished according to the degree of force majeure events:

1. Force majeure due to natural causes refers to natural phenomena that reach a certain intensity, such as earthquakes, tsunamis, etc.;

2. Force majeure due to social reasons, that is, unforeseen circumstances that cannot be overcome due to the strengthening of social contradictions, such as war, armed conflicts, etc.;

3. Force majeure due to national situations in which damage is caused by the state through the implementation of administrative and judicial functions.

For example, in Chinese jurisprudence, there are disputes about whether typhoons should be considered force majeure when they become predictable and can be avoided or overcome. PIKC Quanzhou Branch sued Haikou Harbor Container Terminal Co., Ltd. (*PICC v. Haikou Terminal*) asserting that containerized cargo stored in shipyards was damaged following Typhoon Rammasun. The question in the case was whether Typhoon Rammasun was force majeure, as claimed by the defendant, the owner of the container terminal. A controversy arose here over the fact that local media reported the forecast of the time of activity of Typhoon Rammasun and the maximum wind force of the typhoon even before the cargo in the containers was damaged. The applicant argued that the maximum tide due to Typhoon Rammasun could be estimated in accordance with the maximum increase in storm wave water and the high tide. Thus, the defendant could have taken reasonable steps to prevent damage to the containerized cargo, and therefore Typhoon Rammasun should not be force majeure. Thus, the defendant could have taken reasonable measures to prevent damage to the containerized cargo and, therefore, Typhoon Rammasun is not a force majeure circumstance. However, this argument was not accepted by the court during the re-examination of the case. Although the typhoon could be predicted, the court indicated that it could not be predicted accurately, including the exact time, location, continuation, magnitude of impact, etc. Therefore, in the court’s opinion, the goods were actually damaged due to the intrusion of seawater, which was not predictable or predicted, and therefore the court concluded that Typhoon Rammasun was considered to be unforeseen: a typhoon is a typical “Act of God,” force majeure. On the other hand, the defendant exercised due diligence to protect the cargo from the typhoon. Nevertheless, the court held that the defendant was not liable for damage caused to the goods.<sup>29</sup>

If we take the coronavirus (COVID-19) outbreak as an example, then if such specific circumstances as epidemic diseases and pandemics were included in the

<sup>28</sup> Vivian Mao et al., *Coronavirus in China: Applicability of Force Majeure in Contract Disputes*, China Briefing, 4 February 2020 (Sep. 3, 2021), available at <https://www.china-briefing.com/news/coronavirus-in-china-applicability-of-force-majeure-in-contract-disputes/>.

<sup>29</sup> Zhao 2018.

conditions of force majeure under executable contracts, then the situation can be easily identified as force majeure. Even if epidemic diseases or pandemics are not listed in the force majeure clauses of the treaty, then according to Vivian Mao, the arbitration courts are likely to define these events as force majeure, in accordance with the above characteristics of force majeure, and take into account the duration of the epidemic/pandemic detailed provisions in contracts, volume of government orders, etc.<sup>30</sup>

The most similar situation was in the Chinese courts in the 2003 outbreak of Severe Acute Respiratory Syndrome (SARS), or “bird flu” in China, which was declared an epidemic by the World Health Organization. At the same time, in many cases, the courts considered this type of epidemic as force majeure. The Supreme People’s Court of China clarified that in the event of non-fulfillment of a contract as a result of SARS or preventive measures taken by the government, the related contractual disputes must be dealt with in accordance with the provisions of force majeure. However, in some cases, the courts did not support the application of force majeure, since the government’s restrictive actions only partially affected the business activities of the contract-violating parties and did not lead to direct non-performance of contracts.

Given the magnitude of lockdowns, restrictions and isolation in various parts of the world, the current coronavirus outbreak certainly poses a major impediment to the fulfillment of any contract. The COVID-19 pandemic differs from other biological epidemics in its scale and global impact on the economies of many different countries.

The quarantine measures taken by China, where many corporations have been shut down, have been unprecedented. On 29 March 2020, China announced the end of the coronavirus epidemic in the country. Continuously over time, China has made efforts to keep the economy stable. Even with strict quarantine measures that severely limited population movements and placed restrictions on private and public companies, China kept open the supply lines for materials needed to fight the epidemic in Hubei Province and to ensure an acceptable standard of living for the rest of the population. At the state level, a number of measures were taken to provide financial support to small and medium-sized businesses, including the provision of a deferral of lease payments, and the provision of targeted assistance to companies on the verge of bankruptcy. The measures taken made it possible to maintain the industrial base of China in working order. According to reports from relevant departments, starting from the second half of March 2020, almost all large companies in China have resumed operations.

As noted by Vivian Mao, in the event of non-fulfillment of contracts due to the outbreak of the coronavirus, the parties to a contract must take the following measures:

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<sup>30</sup> Mao et al., *supra* note 28.

1) Assess the impact on the performance of the contract and determine whether the provisions are applicable in terms of force majeure and whether contracts should be terminated or modified;

2) Take immediate and effective measures to prevent an increase in losses;

3) Obtain a certificate of force majeure.

The China Council for the Promotion of International Trade (CCPIT) is the competent authority to issue a certificate of force majeure.<sup>31</sup> Thus, the definition of the concept of “force majeure” in Chinese civil law is given through listing the main features of “unforeseen, inevitable and insurmountable objective conditions.” Force majeure does not necessarily exonerate from liability for breach of contract. Disclaimer should be considered in each specific case, taking into account the degree of force majeure and the difficulties in the execution of the contract. If the parties cannot fulfill the contract due to force majeure circumstances, then the contract must be terminated, and the party to the contract must be released from liability for violation of the contract. If the contract is only partially executed due to force majeure, the parties may change the terms of the contract and partially release the party from liability for violation of the contract.

### 3. Functioning of Lexemes “Irresistible Force” and “Force Majeure” in the Russian Language

In modern Russian legal texts, the lexemes “irresistible force” and “force majeure” function as synonyms. Force majeure is a term of French origin that came to Russian from the French Civil Code (the so-called “Napoleon Code”) (1804), *force majeure* (in French), derived from the Roman doctrine of *vis major*. The Napoleon Code operated in the Russian Empire on the territory annexed to it by the decision of the Congress of Vienna and called the Kingdom of Poland, the Governing Senate made decisions based on the Napoleon Code in cassation proceedings.<sup>32</sup> Napoleon’s Codex back in the 19<sup>th</sup> century was called one of the most successful national codifications.

The term “irresistible force” is a literal translation from French *force majeure* (force + basic, main). In modern legal documents regulating international trade agreements, the term “force majeure” and “irresistible force” are often given together, while the French term, previously included in the Russian legal discourse, is given as an explanation of the Russian translation in brackets, as an explanatory part: for example,

#### Article 7.1.7. *Irresistible force (force majeure)*

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<sup>31</sup> Mao et al., *supra* note 28.

<sup>32</sup> Липень С.В. Отечественная цивилистика начала XX века и Кодекс Наполеона // Журнал российского права. 2015. № 1. С. 74–81 [Sergey V. Lipen, *Domestic Civil Law of the Early Twentieth Century and the Napoleon Code*, 1 Journal of Russian law 74 (2015)].

1) A party is released from liability for non-performance if it proves that the non-performance was caused by an obstacle beyond its control and that it could not reasonably be expected to take this obstacle into account when concluding the contract or to avoid or overcome this obstacle or its consequences.

2) If the obstacle is of a temporary nature, the exemption from liability is effective for a period of time that is reasonable, taking into account the impact of the obstacle on the performance of the contract. [Principles of International Commercial Contracts (UNIDROIT Principles, 1994)]

#### Article 15. Activities of the Chamber of Commerce and Industry of the Russian Federation

##### 3. Chamber of Commerce and Industry of the Russian Federation:

m) evidence of *irresistible force circumstances* (*force majeure*) in accordance with the terms of foreign trade transactions and international treaties of the Russian Federation, as well as customs prevailing in the field of entrepreneurial activity, including the customs of the seaport. [RF Law of 7 July 1993 No. 5340-1 "On Chambers of Commerce and Industry in the Russian Federation"]

In the texts of Russian laws, the Russian translation of the term is often used – “irresistible force,” which is entrenched in Russian legal discourse: for example,

#### Article 36. Cancellation of the definition of a supplier (contractor, executor)

2. Upon expiration of the term for canceling the determination of the supplier (contractor, executor) in accordance with part 1 of this Article and before the conclusion of the contract, the customer has the right to cancel the determination of the supplier (contractor, executor) only in the event of *irresistible force circumstances* in accordance with civil law. [Federal Law of 5 April 2013 No. 44-FZ "On the Contract System in the Procurement of Goods, Works, Services to Meet State and Municipal Needs"]

However, as Pedro Ferreira Malaquias points out, the law in the respective jurisdiction will play a decisive role when it comes to the precise meaning, content and consequences of such expressions. The same event can make the performance of a contract impossible in one jurisdiction and possible in another. In addition, the same expression can have different meanings not only in different languages, but also in the same language.<sup>33</sup> Therefore, the provisions of the agreement on irresistible force circumstances must be carefully worked out by the parties.

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<sup>33</sup> Malaquias 2012.

Thus, in the Russian legal literature, there is an opinion that force majeure and irresistible force circumstances are completely different in terms of the form of expression. So, according to R.N. Kuznetsov, circumstances of irresistible force are natural, natural phenomena, while force majeure circumstances are social, artificial. The occurrence of irresistible force circumstances does not depend on the will of a person, but depends on the phenomena of nature, the environment (floods, earthquakes, hurricanes, blizzards), while the occurrence of force majeure circumstances depends on the will of a person, in the form of a decision of a state body or a decision of organizers of strikes, rallies, etc.<sup>34</sup> Note that in Article 401 of the Civil Code of the Russian Federation the legislator gives a general approach to determining precisely the circumstances of irresistible force. At the same time, the definition of an irresistible force circumstance was indicated earlier in the Regulations on the procedure for witnessing irresistible force circumstances (force majeure) by the Chamber of Commerce and Industry of the Russian Federation.

The discrepancy between the meaning of the terms “irresistible force” and “force majeure” in modern Russian was facilitated by the wide occurrence of the word force majeure in the general literary language. Thus, according to the search results on “irresistible force” in Russian National Corpus<sup>35</sup> 42 documents and 44 entries were found. According to the search results on “force majeure” in the corpus, 219 documents, 243 occurrences were found.

To identify the specific features of the terms “force majeure” and “irresistible force” used in modern Russian language, the method of contextual analysis was used. The analysis was focused on comparing the terms “force majeure” and “irresistible force,” as well as the phrases “force majeure circumstances” and “irresistible force circumstances” in typical syntactic models, which makes it possible to identify semantic differences in terms acquiring in literary language.

By the syntactic model of the sentence, we mean a typical grammatical structure, which includes at least a logical subject (carrier of a predicative feature), a predicate and an object.

We have identified five syntactic positions where the word “force majeure” and the phrase “force majeure circumstances” are used: the position of the predicate, the subject of identification, the subject of action, the subject of condition, the position of the object. It should be noted that the word “force majeure” and the phrase “force majeure circumstances” are widely used in literary language in all styles, including colloquial and media.

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<sup>34</sup> Кузнецов Р.Н. Соотношение категорий непреодолимой силы и форс-мажора в российском гражданском праве // Вестник Московского университета МВД России. 2008. № 11. С. 108–109 [Roman N. Kuznetsov, *The Ratio of the Categories of Irresistible Force and Force Majeure in Russian Civil Law*, 11 Bulletin of the Moscow University of the Ministry of Internal Affairs of Russia 107, 108–109 (2008)].

<sup>35</sup> Национальный корпус русского языка [National Corpus of the Russian Language] (Sep. 3, 2021), available at <https://ruscorpora.ru/new/>.

In the predicate position, the word “force majeure” and the phrase “force majeure circumstances” are used in constructions of characterization. At the same time, the terms acquire a descriptive value. For example: “Business in Russia is always force majeure. Inspectors try to slam the company like a fly.”<sup>36</sup>

The contexts of the words “force majeure” and the phrase “force majeure circumstances” in the position of the subject of identification indicate that the boundaries and essence of force majeure and force majeure circumstances are determined by a person: something can be considered/interpreted/regarded as force majeure/force majeure circumstances, be qualified as force majeure/force majeure circumstances, something can be perceived as force majeure/force majeure circumstances, something can be called “force majeure.” For example:

We consider the situation as force majeure, as irresistible force circumstances, and we will notify our Western partners about the situation related to these circumstances that occurred through no fault of Russia.<sup>37</sup>

Force majeure and force majeure circumstances can act as an active force in the position of the subject of action. For example,

Weather force majeure led to failures in the delivery of mail.<sup>38</sup>

In the position of the subject of condition, the terms “force majeure” and the phrase “force majeure circumstances” develop 2 semes: unpredictability and subjectivity. The following contexts indicate this unpredictability: force majeure and force majeure circumstances can happen, occur, arise, be created. For example,

With a frequency of once and a half of year to once of two years, media force majeure happens: for several weeks in a row, one after another, news about catastrophes come, and each of them requires to be on the front newspaper strips.<sup>39</sup>

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<sup>36</sup> Дежурный по российскому бизнесу // Комсомольская правда. 6 июля 2012 г. [Duty on Russian Business, Komsomolskaya Pravda, 6 July 2012] (Sep. 3, 2021), available at <https://www.kp.ru/daily/25911/2866274/>.

<sup>37</sup> Белоруссия: Россия не готова к переговорам по нефтяным пошлинам // Новый День. 9 января 2007 г. [Belarus: Russia Is Not Ready for Negotiations on Oil Duties, New Day, 9 January 2007] (Sep. 3, 2021), available at <https://newdaynews.ru/policy/98631.html>.

<sup>38</sup> Александрова А. Из-за сильных снегопадов возникли сбои в доставке почты на Южный Урал // Новый Регион. 11 января 2011 г. [Alla Alexandrova, Due to Heavy Snowfalls, There Were Failures in the Delivery of Mail to the Southern Urals, New Region, 11 January 2011].

<sup>39</sup> Хестанов Р. Играем в кости // Русский репортер. 22 апреля 2010 г. [Ruslan Khestanov, Playing Dice, Russian Reporter, 22 April 2010] (Sep. 3, 2021), available at [https://expert.ru/russian\\_reporter/2010/15/ot\\_redakcii/](https://expert.ru/russian_reporter/2010/15/ot_redakcii/).

On the other hand, force majeure and force majeure circumstances are determined and identified by a person (i.e. this is a subjective factor): they can be declared, they can be reacted to, blamed on them, pinned a blame on them, they can be referenced/being referenced, they can be provided as a point. In these contexts, the terms “force majeure” and “force majeure circumstances” act in the position of an object that enters the field of action of a person.

Thus, the words “force majeure” and “force majeure circumstances” used in literary Russian language have lost their terminological character. Force majeure is used to define a situation with characterized circumstances unpredictable in everyday life from the point of view of the speaker: “I had force majeure at work.” Hence, it is possible to use the word “force majeure” in the plural: Force majeures (force majeure situations) at active leisure. For example,

Have you had any force majeures during your active holidays? For example, you ride bicycles with a young man and he gets a flat tire, or you ride a motorcycle together, and then the motorcycle stalls, and you both walk 10 km to reach your house. Would you help in such situations (wait with your bikes while he goes to buy a new camera or somehow help drive the motorcycle yourself) or depart, leaving him to deal with the problem himself?<sup>40</sup>

Analysis of the terms “force majeure” and “irresistible force circumstances” shows that their functioning is limited and used mainly in two typical syntactic models, in which these terms act as a predicate and an active subject. For example:

Representatives of Sogaz JSC, involved in the case as a third party, stated that the appearance of a bird on the territory of the airport should be considered as an irresistible force circumstance, therefore, the air hub cannot be responsible for the collision of the aircraft with a rook.<sup>41</sup>

It should be noted that the use of the word “irresistible force” in the position of the subject of action is not terminological in nature and is used mainly in the texts of fiction. The phrase “irresistible force” in literary language means a some kind of subjective condition of a person, his feelings, mood, or, conversely, an external incomprehensible force that makes him do something. For example,

<sup>40</sup> Форс-мажор на активном отдыхе // Woman.ru. 21 июня 2015 г. [Force Majeure on Active Vacation, Woman.ru, 21 June 2015] (Sep. 3, 2021), available at <https://www.woman.ru/relations/men/thread/4572773/>.

<sup>41</sup> Андреева А. Аэропорт Уфы оспорит взыскание \$198 тысяч в пользу «Аэрофлота» в кассации // РБК. 26 августа 2021 г. [Anastasia Andreeva, Ufa Airport Will Challenge the Collection of \$198 Thousand in Favor of Aeroflot in Cassation, RBC, 26 August 2021] (Sep. 3, 2021), available at <https://ufa.rbc.ru/ufo/26/08/2021/6127915a9a7947274064e448>.

I was jealous, I was conscious of my insignificance, I pouted stupidly and stupidly cringed – and yet an irresistible force drew me to her, and every time with an involuntary shiver of happiness I crossed the threshold of her room.<sup>42</sup>

Why it happened this way, he himself did not understand: some irresistible force held him back every time he wanted to touch what was the main interest of his life.<sup>43</sup>

At the same time, contexts show that irresistible force cannot be localized in time and place, i.e. this term is not used in existence sentences. But there may be force majeure circumstances (there were force majeure circumstances, force majeure circumstances took place).

Thus, the analysis of the functioning of the words and phrases “irresistible force,” “force majeure,” “irresistible force circumstances,” “force majeure circumstances” recorded in the National Corpus of the Russian language, allows us to draw the following conclusion: great terminological potential in modern Russian possesses the phrase “irresistible force circumstances.”

Irresistible force should be the same concept for both the Civil Code of the Russian Federation and other regulations. Meanwhile, the acts of civil legislation operate with all the terms: “irresistible force,” “force majeure,” “irresistible force circumstances,” “force majeure circumstances,” “emergency events.” At the same time, the term “force majeure” has left the legal discourse. At present, the term “force majeure” has become entrenched in colloquial speech. And the term “irresistible force” has left the legal discourse and begun to be used in the general literary language. It is obvious that the explanation of a concept in the philological sense cannot replace an explanation of the content of this concept in the legal aspect for the purposes of a specific legal prescription. At the same time, R.N. Kuznetsov asserts that the different legal nature of irresistible force and force majeure circumstances is not confirmed by linguistic analysis. We believe that irresistible force circumstances, as well as force majeure circumstances, are synonyms that characterize unpredictable phenomena of both a natural and a social nature. At the same time, in order to better cover the phenomena falling under the signs of emergency and inevitability, as well as uniformity of legal terminology, we propose to fix the concept of “irresistible force circumstances” in the Civil Code of the Russian Federation. It is precisely “irresistible force circumstances” which is an objective concept that unites the emergency and inevitability of irresistible force.

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<sup>42</sup> Тургенев И.С. Первая любовь [Ivan S. Turgenev, *First Love*] (1860).

<sup>43</sup> Апухтин А.Н. Неоконченная повесть [Alexey N. Apukhtin, *Unfinished Story*] (1888)].

## Conclusion

The doctrine of irresistible force circumstances is a traditional institution of civil law that has its counterparts in legal order. The differences that exist between national legal orders do not allow formulating grounds for exemption from civil liability that are common to all (or most) countries. Therefore, concepts such as “irresistible force” and “force majeure” in different legal systems have a different meaning and content. In particular, the difference in the content of the relevant concepts in national law has led to the fact that modern legal texts of an international character introduce their designations that are not related to foreign borrowings. Thus, a number of international conventions contain the concept of “obstacles out of control” instead of the concept of “force majeure” or “irresistible force” (Art. 79 of the Vienna Convention, Art. 7.1.7 of the 1994 UNIDROIT Principles of International Commercial Contracts).

On the one hand, this approach is quite reasonable, primarily because there are differences in the understanding and interpretation of the notions of “force majeure” and “irresistible force” between national legal orders, and some legal systems do not contain specific provisions on this matter at all. On the other hand, the introduction of a new term in legal texts creates even greater uncertainty in international documents and requires definitions of the term.

An analysis of Russian legislation shows that the concept of “irresistible force” is no longer used in a narrow meaning (traditional for Russian law) – as a basis for exclusion or release from liability. Obviously, this institution has gone beyond the framework of civil law and is actively used to regulate various aspects of public legal relations. At the same time, the range of circumstances that can be recognized as irresistible force circumstances varies from law to law.

The Civil Code of the Russian Federation defines irresistible force as an emergency and inevitability circumstance under the given conditions. Despite such a laconic definition, which is characterized by two qualifying signs – emergency and inevitability – the attitude towards it is ambiguous. On the one hand, in order to attribute a specific circumstance to irresistible force, the presence of these signs in the aggregate is necessary; on the other hand, each of them refers to evaluative concepts, thus their content should be established based on the specific conditions in which the participants in civil turnover interact. In the science of civil law and in judicial practice, the search continues for such an interpretation of the above signs of irresistible force, which would make it possible to exclude judicial errors in law enforcement. The very concept of “irresistible force” is a normative generalization, that is to say, through the signs of “emergency” and “inevitability,” various natural phenomena and social factors are understood as irresistible force. Neither the domestic nor the international legal framework contains a mandatory and complete list of irresistible force circumstances. The legislator refuses to formulate a single

definition of the concept of “irresistible force,” having come to the conclusion that there is no single, ready-made and complete concept of “irresistible force” based on the essence of the relevant legal phenomenon. This concept is relative, which implies that each time the question of exemption from civil liability of a person in connection with the presence of irresistible force is raised, it is necessary to assess the specific circumstances that led to the infliction of harm.

For the legal systems of China and Russia, the common features of irresistible force circumstances are: (a) a sign of the inevitability of irresistible force circumstances or their consequences; (b) the presence of a direct causal link between irresistible force circumstances and non-performance of the contract; (c) the need for notification and documentary confirmation by the party exempted from liability of the fact of irresistible force circumstances; (d) the lack of a complete list of irresistible force circumstances in the legislation of the state. The differences are that for Russian law the second qualifying sign of irresistible force is “emergency”; in Chinese civil law there are signs of “unforeseen” and “inevitable.” Chinese legislation, like Russian, uses the term “force majeure.” Clearly there is no difference between the concepts of “force majeure” and “irresistible force” neither in theory nor in practice, and there is also no consensus regarding the terminology used to refer to the appropriate situation.

An analysis of the functioning of words and phrases “irresistible force,” “force majeure,” “irresistible force circumstances,” “force majeure circumstances” recorded in the National Corpus of the Russian language make it possible to conclude that a more effective terminological potential in modern Russian possesses the phrase “irresistible force circumstances.”

The current acts of civil legislation operate with different terms: “irresistible force,” “force majeure,” “irresistible force circumstances,” “force majeure circumstances,” “events of an extraordinary nature,” however, irresistible force should be a single concept for all civil law. Therefore, for a greater coverage of the phenomena falling under the signs of extreme and inevitability, as well as for the uniformity of legal terminology, we propose consolidating the concept of “irresistible force circumstances” in the Civil Code of the Russian Federation. From a legal point of view, the term “irresistible force circumstances” will more accurately reflect the essence of this concept. The linguistic analysis of the texts shows that it is precisely the “irresistible force circumstances” that are actually those natural phenomena and social factors that depend on the specific situation.

Today, issues related to the application of irresistible force rules have become especially relevant in connection with the COVID-19 pandemic. Unprecedented measures taken by government agencies to combat the virus (closing shopping malls and restaurants, restricting air traffic, and other measures) have already caused numerous disputes related to breach of contractual obligations. We believe that the pandemic corresponds to the signs of emergency and inevitability, and, of course, its occurrence does not in any way depend on the will of the participants in the civil turnover. The position of the Supreme Court of the Russian Federation on this issue

is that it is possible to recognize the spread of a new coronavirus infection as an irresistible force circumstance, but the approach should be individual – the existence of irresistible force circumstances should be established in each specific case.

Obviously, in order to ensure the effectiveness of civil turnover, it is impossible to establish in advance a list of cases that would always be irresistible force. The indicated aspects of irresistible force allow us to treat it as an evaluative concept, which presupposes judicial discretion in relation to each situation related to the establishment of the fact of irresistible force. Therefore, we must agree with legal scholars that the concept of irresistible force is relative. Under different conditions in which a person fulfills an obligation, the same circumstance may appear in some cases as an irresistible force, and in others as a common phenomenon that prevents the performance of the obligation. And the further development of the mankind civilization, the improvement of scientific and technical progress may lead to a change in the idea in respect of the circumstances of irresistible force. What was previously an irresistible force circumstance may cease to be such over time.

## References

Каменков В.С., Каменков А.В. Основания освобождения от гражданско-правовой ответственности // Бюллетень нотариальной практики. 2007. № 4. С. 20–28 [Kamenkov V.S. & Kamenkov A.V. *Grounds for Exemption from Civil Liability*, 4 Bulletin of Notarial Practice 20 (2007)].

Лукьяненко М.Ф., Зимнева С.В. Непреодолимость обстоятельств и гражданско-правовая ответственность // Юрист. 2018. № 9. С. 19–25 [Lukyanenko M.F. & Zimneva S.V. *Insurmountable Circumstances and Civil Liability*, 9 Jurist 19 (2018)]. <http://dx.doi.org/10.18572/1812-3929-2018-9-19-25>

Ebanks A.R. *Force Majeure: How Lessees Can Save Their Leases While the War on Fracking Rages On*, 48 St. Mary's L.J. 857 (2017).

Majumder B. & Giri D. *Coronavirus & Force Majeure: A Critical Study (Liability of a Party Affected by the Coronavirus Outbreak in a Commercial Transaction)*, 51(1) J. Mar. L. Com. 51 (2020).

Malaquias P.F. *Revisiting Force Majeure Clauses*, 6 Butterworths J. Int'l Bank. Fin. L. 361 (2012).

Stancu R. *The Consequences of the Covid-19 Pandemia on the Performance of Contracts: Short Comparison Between China, French and Romanian Civil Law*, 15(1) EIRP Materials 13 (2020).

Zhao L. *International Recent Developments*, 44(3) Tul. Mar. L.J. 611 (2020).

刘凯湘, 张海峡, 论不可抗力 [Kaixiang L. & Haixia Zh. *On Force Majeure*], 6 法学研究 [Legal Research] 107 (2000).

崔建远, 不可抗力条款及其解释[J] [Jianyuan C. *Force Majeure Clause and its Interpretation*], 41(01) 环球法律评论 [Global Law Review] 48 (2019).

王利明, 合同法研究 [Liming W. *Study of Contract Law*] (2003).

程建伟, 论中国法上的不可抗力条款[J] [Jianwei Ch. *On the Force Majeure Clause in Chinese Law*], 7 法制与经济(下旬刊 [Legal System and Economics] 87 (2008).

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