

The Historical Comparison and Research Significance of “Difficult Situation” System and “Change of Situation” System —Take COVID-19 as the Research Background

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Abstract

At the beginning of 2020, the global outbreak of COVID-19 led to huge setbacks in the economic and social development of various countries, resulting in the fact that many international and domestic commercial contracts were unable to perform or perform with too high costs.”Difficult situation” and “situation change” are respectively the concept of PICC and Chinese law, this paper is a comparative study of the two, aiming to provide some references for Chinese enterprises when they are considering the term of situation change in commercial contracts, improve their risk-prevention awareness and dispute-resolution ability, as well as partially resolve the current contract performance disputes affected by COVID-19 outbreak , and provide ideas to prevent similar events in the future.

Keywords: COVID-19, contract performance, change of situation, difficult situation

1. Research Background and Research Significance

At the beginning of 2020, the global outbreak of COVID-19 caused huge setbacks in the economic and social development of various countries. Domestic enterprises in all countries faced with the difficulties of stopped production, logistics obstacles, and raw material price fluctuations, resulting in a great impact on international trade, a significant decline in trading volume, and the surge of anti-globalization. The epidemic has also brought great pressure on all walks of life in China, resulting in the failure or high cost of performing trade contracts and project contracts.

“Difficult situation” (“hardship”) is an important system in the Principles of International Commercial Contracts, which can adjust the performance difficulties of the parties concerned due to different changes in the economic environment. International commercial contracts often involve many countries. In the context of the current global COVID-19, the instability of transnational trade increases the uncertainty of the contract basis, and many enterprises have difficulty or high cost in performing the contracts, which leads to the possibility of contract parties to suffer losses. In order to maintain the fairness of the contract and promote the realization of the purpose of the contract, it becomes a feasible path to agree on the difficult conditions in the contract to coordinate the interests between the parties.

There is also a similar concept of “change of situation” in the contract section of Civil Code in China. As to whether there is a substantial difference between the two, jurists at home and abroad have different opinions, and the authors does not try to reach a conclusion. This paper makes a comparative study of the two, aiming to provide some references for Chinese enterprises when they are considering the term of situation change in commercial contracts, improve their risk-prevention awareness and dispute-resolution ability, as well as partially resolve the current contract performance disputes affected by COVID-19 outbreak , and provide ideas to prevent

similar events in the future.

2. Overview of the “Difficult Situation” System in the Principle of International Commercial Contracts

2.1 The Background of the Difficult Situation System of PICC

“Difficult situation” is one of the most important trading principles introduced in the international PICC system, as an exception of “about must keep” trading principle in its provisions, which is the current international trading practice, in order to coordinate the external economic environment and the effective performance difficulties of the investment contract caused by abnormal interest rate changes, promote investment fair value and business integrity, coordinate the complex interests between the interests of the important system. In the Anglo-American law system, this system is called “contract frustration” or “contract failure”, and in the mainland law system, it is called “change of situation”.

2.2 The Definition of “Difficult Situation” in the Principle of International Commercial Contract

In 1994, the Principles of International Commercial Contracts were first published, in which Article 6.2.2 specified the term “difficult situations” (hardship). This is the first time that the concept of “difficult situation” has been incorporated into international legal documents. Previously, it was only the content of the autonomy of the parties, and has not become a system under the unified rules.

2.2.1 Relevant Terms and Interpretation of the Principle of International Commercial Contract

(1) Compliance with the Contract (Clause 6.2.1)

The purpose of Article 6.2.1 is to emphasize the general principle of “contract”, meaning that the parties must perform the contract as possible as they can. This is the fundamental premise for maintaining the stability of the contract and protecting the expected interests of the parties relying on the contract. It is also an important principle as an important model law in the field of international commercial contracts.

(2) Composition requirements (Article 6.2.2)

First, on the objective basis, there are major events that fundamentally change the balanced interests of both parties to the contract, which is the prerequisite for the difficult situation. The “difficult situation” must be an objective event, not an assumption or imagination of the parties; secondly, the event is significant enough to cause a “fundamental change in the contract basis” and thus the unbalanced interests of the parties “.

Second, about time, the occurrence of the event or a party in a clearly adverse status knowing the possible occurrence of the event is after the conclusion of the contract. After the specified period of performance, neither party shall unilaterally claim the application of the difficult situation rules; when the contract is only partially performed, the difficult situation system only applies to the part in which the part not yet performed.

Third, subjectively, the disadvantaged parties cannot accurately and reasonably foresee the occurrence of the contract.

Fourth, in the scope of determination, the event itself is not within the control of the party in the adverse legal status, otherwise it will not be or inevitably lead to the unequal status of the parties to the contract.

Fifth, as a result, the disadvantaged parties do not bear the risk of the event. The rule embodies the principles of fairness and good faith in commercial transactions, which are the substantive conditions for the application of “difficult situations”.

(3) Procedure for applying the “difficult situation” (Clause 6.2.3)

The disadvantaged parties shall be:

A. Request the other party for renegotiation as soon as possible, and the relevant reasons shall be explained according to his legal requirements.”renegotiation” is a pre-procedure of arbitration or litigation, and the parties are not entitled to request the court or the arbitration institution without this procedure; and the renegotiation request itself does not give the disadvantaged party the right to suspend his performance;

B. If either party fails to reach an agreement within the reasonable commitment time limit as soon as possible after resuming the negotiation, or either party refuses to continue the negotiation, either party may make a written request to the other court or the arbitration institution for the modification or termination of the contract;

C. A court or an arbitration agency may make a judgment or award based on fairness.

(4) The effect of the “difficult situation” applies

There are two main effects on applying difficult situations:

A resumed the negotiations, and the two sides negotiated, in terms of the increase or decrease of the subject quantity of the contract, changing the beginning point or term of the contract, changing the subject matter and so on, but the contract itself contains automatic adjustment clauses, which does not require renegotiation; the

negotiation result includes the formation of an alternative agreement, the termination of the contract by adverse parties and the appeal to the court when no agreement is reached.

B cancels or terminates the contract. After judgment or adjudication by the court or arbitration institution, the contract is canceled or terminated, the parties shall be exempted from the liability under the original contract.

2.2.2 Application of Difficult Situations in Judicial Practice

Spanish Supreme Court precedent on 30th June, 2014

The plaintiff and the defendant on May 30th, 2006, signed a four-year advertising space rental contract, but due to the impact of the Spanish 2008 economic crisis, the plaintiff applying difficult situation requires the defendant to reduce the monthly rent. The trial court first ordered the defendant to reduce the rent, then the appeal court reversed the decision, and eventually the supreme court overturned the appeal court's decision and uphold the first-instance judgment.

The case reflects the application of the principle of "difficult situation" from the objective, subjective and time requirements:

(1) Objective requirements: The difficult event increases the performance cost of the party, or reduces the value of the performance obtained, thus fundamentally changing the balance of the contract, and the occurrence of the event cannot be controlled by the parties adversely affected by it:

The Supreme Court judge pointed out that the judgment of objective aspects is based on the basis and fundamental purpose of the contract, that is, the "difficult situation" event causes the party to fail in obtaining the expected value from the performance of the contract, which leads to the destruction of the fundamental balance of interests of the contract and the incomplete equality of status between the parties.

In 2008, the economic crisis greatly changed the economic environment and had a significant impact on the advertising industry. As an advertising company, the plaintiff continuing to perform the original contract will produce huge performance costs, resulting in disadvantages in the performance of the contract, making it unable to realize the expected interests from the contract.

(2) Subjective elements: The adversely affected parties can not reasonably foresee the event at the time of making the contract

Subjectively, the risk caused by the event exceeded the normal risk of the contract. At the time of the contract was signed, there was no sign that the future economic crisis could occur. Therefore, it can be speculated that the plaintiff could not reasonably foresee the occurrence of the event at the time of signing the contract.

(3) Time requirement: The occurrence of the event or disadvantaged party knowing the occurrence is after the conclusion of the contract.

The economic crisis broke out during the performance period after the signing of the contract, causing difficulties for the parties to perform the contract.

3. Overview of the System of "Change of Situation" in the Contract Section of Chinese Civil Code

3.1 The Emergence and Development of the Concept of Situation Change in China

The acceptance of this concept by the field of contract law in China has gone through a period. Through the sorting out of normative documents, we can get the development process of this system in China, which has gone through three stages: the principle acceptance stage, the standardized initial stage and the standardized advanced stage.

3.1.1 Principle Acceptance Stage

In this stage, the concept of "change of situation" has not been legislated, only appearing in some scattered legal documents, and the relationship between the "change of situation" and surrounding systems has not been clarified theoretically. In practice, there are hidden dangers of abuse of this principle in practice.

The clear application of this principle in practical activities is mainly marked by the review and reply document made by the Supreme Court of the People's Republic of China on the case of "Wuhan Gas Company v. Chongqing Gas Table Assembly Line Technology Transfer Contract for Purchase and Sale of Gas Watch Distribution Parts Contract Dispute".

3.1.2 The Standardized Initial Stage

The preliminary specification of the concept of "change of situation" is marked by Article 26 of the Interpretation of Contract Law II published by the Supreme Court on April 24, 2009, which is called the "quasi-legislation" of the change of situation.

The standardization work of this stage mainly focuses on two aspects. On the one hand, the general provisions of

the principle of situation change are stipulated; on the other hand, the application is strictly controlled from the scope of application, standards and procedures, but the system is not determined by formal legislation. In addition, article 26 does not include the change, which confuse the difference between force majeure and the change of situation.

3.1.3 The Standardized Advanced Stage

This stage began with two guidelines from the Supreme Court on COVID-19, and it was not until the Civil Code was issued that the principle “change in situation” was determined as a legal system.

Article 533 of the Civil Code makes up for the loopholes left in Article 26 of the Interpretation of Contract Law II, rationalizes the relationship between the principle of change of situation and the force majeure system, and introduces the “re-negotiation procedure” of the parties, providing a new idea for the normative application of the principle of change of situation.

Table 1. The standardized development process of “Change of Situation” in China

	规范文件	主要内容
原则接受阶段	最高院对“武汉市煤气公司诉重庆检测仪表厂煤气表装配线技术转让合同购销煤气表散件合同纠纷一案”作出的复函（1992.3）	……在合同履行过程中，由于发生了当事人无法预见和防治的情势变更……仍按照合同约定的价格供给煤气表散件，显失公平，对于双方由此而产生的纠纷……根据本案实际情况，酌情予以公平合理地解决
	全国经济审判工作座谈会纪要（1993.5）	第二条6:由于不可归责于当事人双方的原因，作为合同基础的客观情况发生了非当事人所能预见的根本性变化，以致按原合同履行显失公平的，可以根据当事人申请，按情势变更的原则变更或解除
	《最高人民法院关于在防治传染性非典型肺炎期间依法做好人民法院相关审判、执行工作的通知》（2003.6）	第三条（三）：由于“非典”疫情原因，按原合同履行对一方当事人的权益有重大影响的合同纠纷案件，可以根据具体情况，适用公平原则处理。
	规范文件	主要内容
规范化进阶阶段	最高人民法院关于依法妥善审理涉新冠肺炎疫情民事案件若干问题的指导意见（一）（2020.4）	第三条（二）：疫情或者疫情防控措施仅导致合同履行困难的，当事人可以重新协商；能够继续履行的，人民法院应当切实加强调解工作，积极引导当事人继续履行。当事人以合同履行困难为由请求解除合同的，人民法院不予支持。继续履行合同对于一方当事人明显不公平，其请求变更合同履行期限、履行方式、价款数额等的，人民法院应当结合案件实际情况决定是否予以支持。合同依法变更后，当事人仍然主张部分或者全部免除责任的，人民法院不予支持。因疫情或者疫情防控措施导致合同目的不能实现，当事人请求解除合同的，人民法院应予支持。
	最高人民法院关于依法妥善审理涉新冠肺炎疫情民事案件若干问题的指导意见（二）（2020.5）	第一条 关于合同案件的审理：（摘要）对于买卖合同、房屋租赁合同、教育培训合同、金融借款合同等几类典型合同纠纷的变更、解除、违约责任减免等具体适用法律问题，提出了可操作的解决方案。总体要求是鼓励交易、慎用合同解除制度，尽量通过变更合同平衡当事人的利益。
	中华人民共和国民法典（2020.5.28）	第五百三十三条合同成立后，合同的基础条件发生了当事人在订立合同时无法预见的、不属于商业风险的重大变化，继续履行合同对于当事人一方明显不公平的，受不利影响的当事人可以与对方重新协商；在合理期限内协商不成的，当事人可以请求人民法院或者仲裁机构变更或者解除合同。人民法院或者仲裁机构应当结合案件的实际状况，根据公平原则变更或者解除合同。

规范化初阶阶段	最高人民法院关于适用《中华人民共和国合同法》若干问题的解释（二）（2009.4）	第二十六条 合同成立以后客观情况发生了当事人在订立合同时无法预见的、非不可抗力造成的不属于商业风险的重大变化，继续履行合同对于一方当事人明显不公平或者不能实现合同目的，当事人请求人民法院变更或者解除合同的，人民法院应当根据公平原则，并结合案件的实际确定是否变更或者解除。
	最高人民法院关于正确适用《合同法解释（二）》服务党和国家大局的通知（2009.4）	第二条 为了因应经济形势的发展变化，使审判工作达到法律效果与社会效果的统一……解释第二十六条规定……对于上述解释条文，各级人民法院务必正确理解、慎重适用。如果根据案件的特殊情况，确需在个案中适用的，应当由高级人民法院审核。必要时应报请最高人民法院审核。
	最高院印发《关于当前形势下审理民商事合同纠纷案件若干问题的指导意见》的通知（2009.7）	第一条 慎重适用情势变更原则，合理调整双方利益关系：1.……对于部分当事人在诉讼中提出适用情势变更原则变更或者解除合同的请求，人民法院应当依据公平原则和情势变更原则严格审查 2 人民法院在适用情势变更原则时……人民法院应当依法把握情势变更原则的适用条件，严格审查当事人提出的“无法预见”的主张……更要慎重适用情势变更原则

3.2 Relevant Provisions on “Change of Situation” in the Contract Code of the Civil Code

3.2.1 Composition Requirements

First, the time, only applies after the formation of the contract. The party who violates the contractual obligations shall not apply for the change or termination of the contract by invoking the “change of situation”;

Second, the basic conditions of the contract have changed significantly. The so-called “basic conditions” refers to the social realistic conditions and general circumstances on which the parties can trust and facilitate the conclusion of the contract, that is, the objective conditions on which the parties can realize their reasonably expected interests.

Third, major changes are unforeseen by the parties and these are not commercial risks.

Fourth, the continued performance of the contract will be obviously unfair. The change of situation damages the rational basis of the existence of the contract. Continuing the performance will violate the fundamental purpose of the parties to conclude the contract, and constitutes an “obviously unfair” contract to the parties of the contract relied on.

3.2.2 Apply to the “Change of Situation” Procedure

First, the adverse party that is obviously unfair due to the change of the contract shall enjoy the right of renegotiation. The provision here is “a renegotiation right with the other party”, so the negotiation is not a necessary procedure for litigation or arbitration;

Second, if the parties fail to reach an alternative agreement within a reasonable time limit, the parties shall have the right to request the people’s court or the arbitration institution to modify or terminate the contract; the people’s court or the arbitration institution shall modify or terminate the contract in light of the actual situation of the case and on the principle of fairness.

3.2.3 Legal Effect

A change in the situation will produce at least two effects. One is the maintenance of the original legal relationship between the two parties and this only involves the change of some legal contents; when the first legal effect is not sufficient to effectively eliminate the original unfair result, the second effect is generally contract termination, including termination of the original contract, exemption of liability or refusal to perform.

3.3 Analysis of the System of “Change of Situation” in China

3.3.1 Advantage and Rationality

(1) Scope of application

No longer excluding the force majeure from the change of situation, which makes up for the deficiency in the scope of application.

(2) Application of time limitation

Compared with the contract frustration, it has a shorter period, which is conducive to the performance of the contract and can improve the transaction efficiency.

(3) Legal consequences

The specific legal consequences caused by the principle of “change of situation” mainly include the change of the contract relationship and the termination of the contract, and the problem of assuming the responsibility after the termination of the contract can also be treated differently.

3.3.2 Existing Problems

(1) “Fundamental change” and “major change”

The standard of “major change” is relatively vague and broad, and there is no specific judgment standard. In practice, it may cause the parties to abuse the principle to evade their contractual obligations, causing difficulties to judicial practice.

(2) The difference between “business risk” and “change of situation”

Although the concept of “commercial risk” is put forward in the Civil Code, it does not clearly distinguish the difference between the two in application, which leads to the abuse of “change of situation” to avoid normal commercial risks in practice.

(3) Definition of the severity of emergencies

The Civil Code does not specify the extent to which an emergency can defeat contracts.

4. Comparison of PICC “Difficult Situation” and Chinese Law “Situation Change”

4.1 Difference

4.1.1 Different Meanings

(1) The Purpose of the contract: The difficult situation requires that the purpose of the contract must be commercial purposes; but the purpose of the situation change is more extensive, not limited to commercial purposes;

(2) Degree of “hardship”: difficult situation requires the event must be sufficient to cause “fundamental change” on the basis of the contract; the situation change does not require “fundamental change”, as long as the “major change” standard is met, which thus brings great discretion to the parties and easily causes the parties to abuse the principle to avoid business risks.

4.1.2 Different Applicable Procedures

The “difficult situation of PICC” system stipulates the first negotiation obligation of the parties, which is a mandatory negotiation procedure before litigation or arbitration; but Article 533 of the Civil Code only provides the right of renegotiation, and does not clearly specify whether the renegotiation is a legal obligation.

4.1.3 Different Rules of Law Apply

Difficult situation is a unique system in the Principle of International Commercial Contract. If the parties agree on difficult terms, it must apply to the rules and shall apply to the laws of the country. If the parties agree to apply the law of a certain country, and the law of that country provides for the change of circumstances system, the law of that country shall apply.

4.1.4 Different Scope of Application

(1) Difficult situation is the principle of contract performance that equal commercial subjects can apply in international commercial activities; the change of situation applies not only between commercial subjects, but also between countries.

(2) The difficult situation only applies to international business, while the change of situation applies to both international and domestic commercial fields.

4.2 Relationships

4.2.1 The System has the Same Purpose

The establishment of the two system models is both designed to solve the difficulties in contract performance caused by abnormal changes in the social and economic environment in commercial transactions, and both are

important legal systems designed to adjust and balance the interests of the two parties in commercial trade.

4.2.2 Similar Constitutive Elements

The “situation” and “difficult situation” of the situation change are both uncontrollable and unforeseen events by the parties; both occur after the conclusion of the contract; both cause a change on the basis of the contract.

4.2.3 The Same Legal Effect

Both shall result in the change or termination of the contract, and the change shall be the first effect, and the termination shall be the second effect.

4.2.4 The Relationship of Foundation and Development

“Difficult situation” in PICC is a new concept that integrates the relevant concepts and principles of the major legal systems and then develops it. It absorbs the situation change concept of the mainland legal system and further develops its connotation according to the characteristics of international commercial transactions. It is a special form of the “change of situation” system in the international commercial field.

Table 2. Comparison of the “difficult situation” and “change of situation” systems

区别	涵义	表现形式、合同目的、“艰难”的程度
	适用程序	“再协商程序”的必要性
	适用的法律规则	约定适用“艰难情形”的，必须适用《国际商事合同通则》；约定适用某国法律的，且该国法律中存在“情势变更”的相关规定，则应当适用该国法律
	适用范围	“艰难情势”只适用于国际商事中，而情势变更在国际、国内商事领域都适用
联系	设立目的	都是为了解决国际商事交易中因经济环境异常变动而造成的合同履行对一方显失公平的问题，旨在平衡双方利益关系
	构成要件相似	不能控制、不能预见、合同订立之后、合同基础根本改变
	法律效果相同	合同变更或解除
	基础和发展的关系	“艰难情势”是综合了各大法系相关制度、继而发展出的新概念，其吸收了大陆法系的情势变更原则，并根据国际商事交易的特点发展了其内涵，是该制度在国际商事领域的特殊形式

5. Application of the “Change of Situation” of the Civil Code Under the Background of COVID-19

5.1 Three Major Relationships in the Application

The application of the principle of “change of situation” in practice involves three relationships. Clarifying these three relationships is of great significance for domestic enterprises to apply this principle and solve various kinds of performance disputes in the context of the epidemic.

(1) Agreed change terms and legal circumstances

According to the principle of autonomy of private law, the parties can agree on the situation change clause in advance in the contract, only when the parties to the contract do not clearly agree, the court must use the legal situation change rules to supplement the meaning, that is, “agreed by the agreement”, the agreement clause can exclude the effect of the change of legal situation.

Agreed terms are generally divided into expansion clauses and restriction clauses, which are respectively the result of expansion or restriction on the basis of the legal situation change clauses. In addition, there are also mixed-type clauses in practice, that is, there are both restrictions and expansion of the clauses, which can be interpreted separately when applicable.

(2) Change of situation and business risk

At present, there is no unified standard for distinguishing the two, but the following standards can be obtained

from the case analysis: the predictability of the change, judging the balance of profit and loss, the affected scope of the contract, and whether the changes are the inherent risks in the contract.

Based on the comparative analysis of the epidemic, it can be considered that: first, before the outbreak, the parties lack reasonable foresight; second, the profit and loss of the parties are not “balanced”; third, the impact of the epidemic on the contract is large; fourth, the epidemic is not an inherent risk of the contract. **Therefore, epidemic outbreaks generally do not pose a commercial risk.**

(3) Change of situation and force majeure

This paper adopts the theoretical “result” to clarify the difference between the two: that is, when the contract cannot be performed or the purpose is reached, the change constitutes force majeure; when the contract is unfair when continuing perform, the change constitutes a change of situation.

This principle is also reflected in the Supreme People’s Court’s Guidance on Several Issues concerning the Proper Trial of Civil Cases involving COVID-19 (I):... negotiate the performance of the contract;... Actively guide the parties to continue the performance; and further state in the Guidance (II) that the court may “change according to the principles of fairness”.

5.2 Summary of the Applicable Ideas

Here, the applicable ideas of the contract performance dispute in the context of the epidemic situation are summarized:

First, check whether any agreed change clause exists in the contract, analyze whether the agreement violates the public interest to determine whether the legal change rule is applicable; second, the epidemic does not usually constitute a commercial risk. If the contract is concluded before the outbreak, parties shall be assumed unaware of the change; third, combined with the content and the purpose of the contract, force majeure should be applied to contracts that cannot be performed or that fail to achieve the purpose, while changes of circumstances should be applied to contracts that are obviously unfair.

6. Summary and Outlook

The two systems of “situation system” and “situation change” are both related and different. The study of PICC difficult situation system can provide reference ideas for the development of situation change system of China’s legal system.

This paper aims to provide solutions to the risk distribution of contract performance and the difficult commercial activities under COVID-19, so as to reduce the impact of similar events on domestic commercial activities. In the future, when similar events happen again, we can use legal means more calmly to solve similar problems and improve the efficiency of commercial activities.

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