"DEMYSTIFYING THE DOCTRINE OF CHANGE OF CIRCUMSTANCES UNDER CHINESE LAW — A COMPARATIVE PERSPECTIVE FROM SINGAPORE AND THE ENGLISH COMMON LAW"

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Abstract: In the wake of the coronavirus (COVID-19) pandemic, global businesses have witnessed unforeseen supply chain issues, losses of business and the inability to complete certain contractual obligations. For foreign businesses involved in cross-border transactions with China, it is paramount to understand the implications and remedies of the doctrine of change of circumstances ("DCC") under Chinese Contract Law. The DCC is a creature of judicial interpretation by the Supreme People's Court in China, the requirements and functions of which bear some similarities to the doctrine of frustration under common law. The main difference between the doctrines is that unlike the doctrine of frustration which brings about an automatic discharge of the contract, the Chinese courts retain a discretion to modify the parties contract in light of the changes in circumstances. This led many opponents to criticize the DCC for blatantly disregarding the principles of certainty of contract and party autonomy. However, a comparative analysis of the cases from China, UK and Singapore to show that there is a practical convergence between the two differing theoretical frameworks. The DCC has not been abused by the Chinese judiciary like an unriddled horse, but rather, tightly controlled by procedural and substantive requirements. In the exceptional situations where the remedy is granted, the remedies under the DCC can prove to be a more commercially sensible solution than termination because it preserves long-standing business relationships.

I. INTRODUCTION

The turn of the millennium has witnessed China's tremendous growth in its economic and political power in the global order, heralding us into a new era where the need to understand Chinese law and the Chinese legal system has never been more pressing. This is especially true for countries like Singapore and the United Kingdom ("**UK**"), in light of the rising number of cross-border transactions with China as well as the sheer volume of arbitration cases involving Chinese parties in the London Court of International Arbitration ("**LCIA**") and the Singapore International Arbitration Centre ("**SIAC**").[1]

Very recently, the outbreak of **COVID-19** virus pandemic brought about a widespread economic impact and global businesses are considering the best way to mitigate unforeseen supply chain issues and other issues including contractual performance and loss of business. In the event of potential contract disputes, parties may wish to first consider the impact of any force majeure, unforeseen changing circumstances, business continuity and disaster recovery provisions in their contracts and whether, under the governing law of said contracts, which may constitute a situation of impossibility or frustration – before taking any legal action. Parties may also wish to contemplate in advance the applicability of the doctrine of change of circumstances ("DCC") under Chinese law in order to mitigate the loss. In order to ameliorate the economic fallout from the effects of COVID-19, whilst keeping key corporate operations to continue, Singapore legislature has introduced the COVID-19 (Temporary Measures) Act 2020 ("CTMA 2020") and its subsidiary legislation.[2] In a similar vein, the Supreme People's Court ("SPC") in China has also issued the Guiding Opinions of the Supreme People's Court on Several Issues Concerning Properly Handling of Civil Cases involving COVID 19 Epidemic (I). ("SPC COVID-19 Guiding Opinion")[3]

This article aims to explain the significance and key features of these legislative or judicial efforts. However, the understanding of Chinese law has been plagued with numerous difficulties. Not only are there language barriers that may hinder the first-hand understanding of Chinese law, there are also many features of the Chinese legal system that appear fundamentally different from the common law that lawyers and businessmen from Singapore and the UK are more familiar with. This paper aims to contribute to a clearer understanding of Chinese law, focusing on an important and unique aspect of contract law in China, a civil law jurisdiction,[4] that is not replicated under Singapore and English common law — the DCC.

Interestingly, the DCC is not contained in any piece of national legislation in China. Rather, it has been provided by the Supreme People's Court in the form of Judicial Interpretation. This statutory structure itself speaks for how controversial the doctrine is. Also,

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[1] According to SIAC's *Annual Reports* in 2017 and 2018, Chinese parties were the second largest foreign user of the SIAC in 2017 (contributing 77 new cases in 2017) and the fourth largest foreign user in 2018 (contributing to 73 new cases in 2018). According to LCIA's *Annual Casework Report* in 2017, Chinese parties were also the fourth largest foreign user of the LCIA from Asia, contributing to 1.3% of the total number of cases in LCA in 2017.

[2] The COVID-19 (Temporary Measures) (Control Order) Regulations 2020 ("Control Order Regulations") and the COVID-19 (Temporary Measures) (Alternative Arrangements for Meetings for Companies, Variable Capital Companies, Business Trusts, Unit Trusts and Debenture Holders) Order 2020 ("Alternative Meeting Arrangements Regulations"), came into force on 7 April 2020 and 13 April 2020.

[3] he Guiding Opinions of the Supreme People's Court on Several Issues Concerning Properly Handling of Civil Cases Involving COVID 19 Epidemic (I), No Fa Fa〔2020〕12 on 16 April, 2020.

[4] Lei Chen, 'The Historical Development of the Civil Law Tradition in China: A Private Law Perspective', *Legal History Review* 78 (2010), 1, 159-181.

one would argue that the Chinese judiciary is more sympathetic than the Legislature towards the applicability of the doctrine. In the 1980s, the legislators have enacted three separate contract law legislations governing three specific types of contracts, namely, Economic Contract Law of 1981, the Foreign Economic Contract Law of 1985, and the Technology Contract Law of 1987. However, the DCC was not included in any of these three legislations. In 1986, the legislators introduced the force majeure rule in the General Principles of Civil Law, but the DCC rule was still absent. In 1999, the legislators consolidated all fragmented contract laws into one unified contract law. Again, the DCC rule was rejected during the parliamentary deliberations on its draft. The legislators insisted that "it is difficult to distinguish the commercial risks from the change of circumstances… The stipulation of such a rule might become an excuse for the contractual parties to escape from the duty of performance… Accordingly, it is not appropriate to adopt the DCC in contract law".[5] The legislators deleted the rule off the final version of the 1999 Contract Law in hope that the new Contract Law legislation will build up the public confidence in party autonomy in commercial transactions.

In contrast, the SPC has been judicially active in applying the DCC rule. As early as in 1992, the SPC tried to introduce the DCC rule by creatively using the term "some other cause" under subsection 4 of section 27 of the Economic Contract Law.[6] In *Wuhan Gas Co. v. Chongqing Detection Instrument Plant*, the DCC rule was also mentioned for the first time.[7] Today, Article 26 of the *Judicial Interpretation II Concerning the Application of the Contract Law of the Supreme People's Court* ("**Interpretation II**")[8] expressly provides that the DCC could exempt parties from the continued performance of the contract. In view of the consistent reluctance of the Chinese legislature to formalize the rule, the SPC emphasizes the strict application of DCC by introducing several procedural safeguards. In summary, the social necessity prompted the SPC to prefer expediency over doctrines. Nonetheless, it appears that the Chinese legislature has changed its attitude by incorporating the DCC rule in the future Chinese Civil Code.[9]

In essence, the DCC is a default rule under Chinese law. In business contracts governed by Chinese Law without a change of circumstances clause, the statutory doctrine of "changes of circumstances" may be applicable and available to the parties. This doctrine applies where there is a "major change which (i) is unforeseeable; (ii) is not an ordinary business risk; (iii) is not caused by a force majeure occurs after the formation of a contract; and (iv) the continuous performance of the contract is obviously unfair to the other party or cannot realize the purposes of the contract".[10] Where the doctrine of "changes of circumstances" applies, the Court has the

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[5] KS Hu, *Interpretation of Contract Law of PRC by the Law Committee of the Standing People's Committee (in Chinese)* (3rd ed., Law Press China 2012).

[6] *Wuhan Gas Co. v. Chongqing Detection Instrument Plant Fa Han* (1992) No 27. The case is reported in SPC Gazette, 1996, p 63.

[7] *Ibid*.

[8] Judicial Interpretation II of Supreme People's Court of Several Issues Concerning the Application of the Contract Law of the People's Republic of China (13 May 2009) (hereby referred to as "Judicial Interpretation II").

[9] Article 323 of the new draft of Chinese Civil Code provides:
"Where, after the conclusion of the contract, the conditions of the basis of the negotiation undergoes significant changes that were unforeseeable by the concerned parties at the time of conclusion of the contract, and such changes are not caused by force majeure and do not constitute commercial risks, and to continue with the performance of the contract will be obviously unfair to one concerned party, the parties suffering from undue influence may renegotiate with the corresponding party; when it cannot be reached within a reasonable time, the people's court shall, upon the request for modifying or terminating the contract by a concerned party, determine whether to modify or terminate the contract on the basis of the principles of fairness and by considering the actual situation prevalent in the case".

[10] Article 26 of Judicial Interpretation II.

discretion to decide whether to modify or rescind the contract. At the first glance, this may render an impression to non-Chinese law experts that Chinese firms are likely to get a more sympathetic hearing in Chinese courts by using the doctrine as an escape route for a party who has simply made a bad bargain. Some even describe the doctrine as "an obscure legal manoeuvre used to get out of contracts."[11]

Under common law, there is no separate DCC.[12] the closest functional equivalent of the DCC is the doctrine of frustration.[13] The doctrine of frustration is relatively young. Tracing back to the seventeenth century, the English position under the landmark case of *Paradine v Jane*[14] is one of "absolute contract liability"—a party is not excused from the performance of the contract notwithstanding "any accident by inevitable necessity".[15] Through a series of seminal cases, such as *Taylor v Caldwell*,[16] the doctrine of frustration was developed to mitigate the harshness of "absolute contract liability", by allowing parties to be discharged from their contracts where there is an unforeseeable supervening event that radically changes the parties' original contractual arrangement. Nonetheless, the doctrine of frustration is narrow in its application because the threshold for invoking the doctrine is high. To be specific, in *Canary Wharf (BP$) T1 Ltd v European Medicines Agency*[17], the European Medicines Agency (EMA), which was headquartered in London, moved to Amsterdam and sought to escape a 25-year lease on the ground that UK ceased to be a member state of European Union. It was held that whilst Brexit was unforeseeable when the lease contract was entered into, the parties have foreseen the possibility that the EMA might vacate its premise early, which is inferred from the contract provisions allowing for assignment or subletting of the whole premises. Hence, the lease had not been frustrated under English law.[18] This conclusive decision promotes commercial certainty by clarifying the post-Brexit legal position, thus fending off any potential claims of frustration resulting from the impact of Brexit, in relation to all types of contract.

Under Chinese law, however, the DCC is a creature of *Interpretation II*. Just like the doctrine of frustration, it was created to ameliorate the potential unfairness and harshness of unforeseeable changes of circumstances surrounding the contract after the conclusion of the contract. Nevertheless, there remain several theoretical differences between the two doctrines in terms of their respective legal tests, the scope of application and the available remedies. The most significant difference has been said to be the Chinese courts' discretion to modify the parties' contract in light of changes in circumstances. This led many opponents to criticize the DCC for blatantly disregarding the principles of certainty of contract and party autonomy.

The central thesis of this article is to challenge the myth behind the DCC and to unveil that it *does not* unduly compromise fundamental contract law principles. The Statistical survey

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[11] The Economist, 'Chinese firms use obscure legal tactics to stem virus' (The Economist, 22 February 2020) losses <https://www.economist.com/business/2020/02/20/chinese-firms-use-obscure-legal-tactics-to-stem-virus-losses>.

[12] J Devenney and G Howells, 'Common Law Perspectives on Performance and Breach' in L DiMatteo and L Chen (eds), *Chinese Contract Law: Civil and Common Law Perspectives* (Cambridge University Press 2017), 323-350.

[13] Both the doctrine of change of circumstance under Chinese law and the doctrine of frustration under Singapore common law targets situations where there are objective changes in circumstances after the conclusion of the contract which affects the performance of the agreed contractual obligations.

[14] *Paradine v Jane* [1647] EWHC KB J5 (QB).

[15] *Ibid* at 27.

[16] *Taylor v Caldwell* [1863] EWHC QB J1 (QB).

[17] Canary Wharf (BP$) T1 Ltd v European Medicines Agency [2019] EWHC 335 (CH)

[18] Day, W. (2019). Isn't Brexit Frustrating? The Cambridge Law Journal, 78(2), 270-273.

of case law in China has shown that the DCC has not been abused by the Chinese judiciary like an unriddled horse. The Chinese courts have employed a more restrictive approach and it is rare to find the doctrine being pleaded successfully. By drawing a comparative analysis with the common law doctrine of frustration, this paper seeks to show that in reality, there is a practical convergence between the two differing theoretical frameworks. This paper also seeks to show that the remedy of modification under Chinese law is tightly controlled by procedural and substantive requirements. In the exceptional situations where the remedy is granted, modification can prove to be a more commercially sensible solution than termination because it preserves long-standing business relationships.

After this introduction, Part II will compare the theoretical frameworks of the two doctrines, discussing the similarities and differences in their respective doctrinal roots, legal tests, and legal consequences. Part III will deep-dive into selected case studies to compare the practical applications of the two doctrines in the UK, Singapore and China and evaluate whether the cases would have been decided differently had it occurred in the other jurisdiction. Part IV will distil and concretize important lessons from the case studies, thereby contributing to a clearer understanding of Chinese contract law in common law jurisdictions.

II. TWO DIFFERING THEORETICAL FRAMEWORKS

A. The Underlying Rationale

Under Chinese law, the underlying basis for the DCC is grounded in the principles of good faith and fairness between contracting parties.[19] These principles are recognized as fundamental contract law principles under Article 6 and Article 5 of the Chinese Contract Law ("***CCL***")[20] respectively. In fact, prior to the formal issuance of *Interpretation II*[21] in 2009, the Chinese courts have already applied the general provisions of good faith and fairness to resolve cases where the change of circumstances has resulted in manifest unfairness against a contracting party.[22]

In contrast, under Singapore and English common law, the justification for the doctrine of frustration focuses on the lack of consent between the parties to perform an obligation that is radically different from what the parties assumed at the formation of the contract. In the oft-cited words of Lord Radcliffe in the House of Lords decision of *Davis Contractors Ltd v Fareham Urban District Council*, "frustration occurs … [where] the circumstances in which performance is called for would render it a thing *radically different* from that which was undertaken by the contract".[23] Similarly, the Singapore Court of Appeal ("**SGCA**") in *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman* also held that "frustration depends… on whether the contract is, on its true construction, wide enough to apply to the new situation: if it is not, then it is at an end".[24] Therefore, unlike the DCC, the rationale behind the doctrine of frustration is

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[19] E McKendrick and Q Liu, 'Good Faith in Contract Performance in the Chinese and Common Laws' in L DiMatteo and L Chen (eds), *Chinese Contract Law: Civil and Common Law Perspectives* (Cambridge University Press 2017), 44-71.

[20] The Contract Law of the People's Republic of China (hereafter "CCL") was promulgated at the Second Session of the Ninth National People's Congress (NPC) in 1999).

[21] Judicial Interpretation II.

[22] The SPC's Letter on the Questions of the Application of Law in the Case of *Wuhan Municipal Coal Gas Corp. v Chongqing Measuring Instrument Factory* (6 March 1992).

[23] *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 (HL) 729.

[24] *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman* [1994] 1 SLR (R) 233 (CA) [25].

not so much to uphold good faith and fairness between contracting parties, but rather to ensure that the parties are not compelled to perform fundamentally different obligations that fall outside the scope of their consent. In view of the inflexible remedy of the doctrine of frustration (ie the automatic discharge of the contract), the common law courts caution against it for two major reasons. First, the courts are concerned about the potential abuses by the parties to use the doctrine as a tool to escape a bad bargain they concluded. The second reason is that it is not uncommon to see the price fluctuations and sudden inflations, nor is it uncommon to see labour disputes breaking out. This is particularly true in long-term contracts, as evidenced in a very recent decision of *Canary Wharf (BP$) T1 Ltd v European Medicines Agency*.[25] In other words, contracting parties are expected to foresee these events and if they would like to guard against the risks, they may choose to include force majeure and hardship clauses in the contract.[26] The doctrine of frustration is therefore "not lightly to be invoked to relieve contracting parties of the normal consequences of imprudent bargains".[27]

Interestingly, Singapore CTMA 2020 is a bold legislative move to offer temporary relief to specified businesses and individuals who are unable to fulfil their contractual obligations arising from COVID-19. First, the CTMA is a piece of retroactive legislation, that applies to limited types of contracts effected before 25 March 2020, in respect of performance expected on or after 1 February 2020. Second, the temporary relief is available in the limited contracts subject to the specified conditions, termed the scheduled Contracts in the CEMA, when the notifying party is not able to perform contractual obligations due to COVID-19.[28] Third, the envisaged relief would freeze taking legal action for breach of certain contracts for the next 6 and possibly up to 12 months. Among other things, it puts in place moratoria provisions prohibiting the taking of court and insolvency proceedings against businesses most vulnerable during this period of lockdown.

It is worth noting that while the CEMA measures appear to be an interventionist approach taken by the government, parties would generally still be liable for the obligations in their contracts. It is important to note that these measures are only intended to be temporary and will only freeze legal rights and obligations in place while the Act is in force. Any accrued debts are still payable and will continue to incur interest. The CEMA does not affect the underlying contractual obligations; it only freezes the rights to enforce those obligations, for a period of time.[29] More significantly, Force majeure clauses and the Singapore Frustrated Contracts Acts will prevail over the CEMA.[30] Therefore, it would be presumptuous to assert

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[25] Supra note 15.

[26] E McKendrick, *Force Majeure and frustration of contract* (Taylor and Francis 2013),155-160.

[27] *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] AC 724 (HL) 752.

[28] The Scheduled Contracts mainly include 1) loan facilities granted by banks or finance companies that are granted to a Singapore-incorporated entity which carries on business in Singapore, where at least 30% of shareholders are Singapore citizens or permanent residents, with an annual turnover (at group level) of no more than S$100 million in the latest financial year; and secured on commercial or industrial immovable property or plant, machinery or fixed assets used for manufacturing, production or other business purposes, located in Singapore; 2) hire-purchase or conditional sales agreements over plant, machinery or fixed assets used for manufacturing, production or other business purposes, located in Singapore; or commercial vehicles (e.g. goods vehicles, taxis, private hire cars); 3) leases and licences for non-residential immovable property located in Singapore, such as commercial premises; 4) construction contracts or contracts of supply for purposes of construction in Singapore; 5) contracts for the provision of goods and services in relation to certain events in Singapore (such as weddings or conferences); and 6) contracts relating to the Singapore tourism industry (such as cruises and hotel accommodation bookings but excluding air ticket contracts as these have refund policies which are generally standardised internationally amongst most air carriers).

[29] There are two exceptions of liquidated damages for construction and supply and non-refundable deposits for event and tourism-related contracts.

[30] S 5 (13) CEMA.

that the CEMA brings about a radical departure from the substantive rules of common law doctrine of frustration.

Similarly, in China, the SPC COVID-19 Guiding Opinion does not provide any substantial changes to the DCC. Rather, it clarifies the judicial position by providing detailed guidelines on how to resolve the disputes arising from non-performance. Meanwhile, the SPC emphasizes that the contractual liability cannot be lightly escaped due to the unprecedented COVID-19 crisis. The non-performing party can only successfully apply DCC when the fundamental purpose of the contract is frustrated, or the performance is rendered entirely impossible. The parties are encouraged to renegotiate and mediate in order to strategize a sensible commercial solution.

While there are some overlaps at policy level, the difference between the underlying rationales of the two doctrines will be a recurring theme throughout this article. As we will elaborate later, the difference in the underlying rationales goes towards explaining the differences in the legal tests and the available remedies under the two doctrines. For instance, it explains why the element of "manifest unfairness against a contracting party" is featured under the Chinese doctrine but largely disregarded under the doctrine of frustration, as well as why the remedy of modification has been welcomed by the Chinese courts but vehemently rejected in common law jurisdictions.

B. The Legal Tests/ Substantive Elements

Moving to discuss the legal tests of the respective doctrines, the DCC is embodied in Article 26 of the SPC *Judicial Interpretation II* which lists out the 4 main elements of the doctrine:[31]

1. First, there must be a material change of objective circumstances surrounding the contract after the parties have concluded the contract.[32]

2. Second, the change of circumstances must be unforeseeable by the parties at the time of concluding the contract. According to Section 1(3) of the *SPC Guiding Opinion*, [33] the question of foreseeability is to be determined from the perspective of a reasonable person standing in the position of the disadvantaged party after considering all the circumstances and facts of the case.

3. Third, the change of circumstances is neither an ordinary commercial risk nor caused by a force majeure event. The *SPC Guiding Opinion* defines "commercial risks" as risks that are inherent to the engagement in business activities, for instance, normal changes in supply and demand and ordinary

[31] The authors are aware that China is pushing for a new Civil Code to be published in 2020, with the 13th National People's Congress publishing the second draft of the future Chinese Civil Code in December 2018. Section 323 of the draft section on Contract Law contains the DCC with some technical changes. This paper will primarily focus on the law that is currently *in force* in China, namely, Article 26 of *Interpretation II*. Nevertheless, most of the analyses in this paper would likely remain pertinent in the context of the new *Chinese Civil Code*, given that the substantive elements are largely similar.

[32] It should be noted that Section 323 of the draft section on Contract Law in the new Chinese Civil Code has replaced the words "material change in objective circumstances" with "material changes to the basis of the negotiation", demonstrating greater resemblance to the test for the doctrine of frustration.

[33] Guiding Opinions of the Supreme People's Court on Several Issues concerning the Trial of Cases of Disputes over Civil and Commercial Contracts under the Current Situation (7 July 2009) ("***SPC Guiding Opinion***").

currency fluctuations.[34] "Force majeure", on the other hand, is defined as "an objective circumstance that is unforeseeable, unavoidable and insurmountable" under Article 117 of the *CCL*, typically referring to acts of god or wars.[35]

4. Fourthly, the change of circumstances must have been manifestly unfair to one party or have caused the purpose of the contract to be unrealizable. "Manifest unfairness" refers to situations where the performance of the contract has become overly onerous for one party. "Unrealizable purpose" refers to situations where the value of performance has substantially diminished such that the purpose of the contract has been nullified.[36]

Turning to the legal test for frustration under Singapore and English common law, the starting point is to construe the terms of the contract to determine whether the contract has made provisions for the supervening event that has occurred.[37] If the contract has already made provisions to govern the supervening event, there will be no room for the doctrine of frustration to discharge the contract. This is because of the paramount nature of the freedom of contract. Theoretically, parties can use *force majeure* clauses to supersede the effects of frustration of frustration at common law, either by excluding the doctrine of frustration or by providing relief for non-frustrating event.[38] However, in practice, the courts will construe *force majeure* clauses strictly. The language of the provision must be clear and unambiguous in providing for the frustrating event before the court will find that the doctrine of frustration is superseded.[39] The party seeking to rely on the *force majeure* clause must also take reasonable steps to avoid the events stipulated in the *force majeure* clause[40] and shall bear the burden of proving that event falls squarely within the ambit of the clause.[41]

Secondly, the court would consider whether the supervening event is foreseeable or reasonably foreseeable by parties at the time of entry into the contract. This requirement is largely similar to that of the DCC, with the important caveat being that unforeseeability is *not a strict requirement* under the doctrine of frustration.[42] Rather, it is merely a factor to be considered by the Singapore courts in determining whether the parties have provided for the supervening event in their contract. The SGCA in *Lim Kim Som v Sheriffa Taibah*[43] affirmed Lord Denning in *Ocean Tramp Tankers Corporation* held that "[i]t has frequently been said

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[34] In considering whether the change of circumstance is an ordinary commercial risk, the court should consider (i) whether the type of risk is one that is generally accepted as being unforeseeable; (ii) whether the degree of the risk far exceeds the reasonable anticipation of a normal person; (iii) whether the risk could have been guarded against and controlled; and (iv) whether the nature of the transaction falls within the usual "high risk, high return" category.

[35] Chinese law draws a distinction between *force majeure* and the doctrine of change of circumstance. Where there is a *force majeure* event that renders it impossible for the parties to achieve the purpose of the contract, Article 94(1) of the *CCL* states that the parties may terminate the contract. Comparatively, the distinction between *force majeure* and change of circumstances is not replicated under the doctrine of frustration which applies the same legal test for all supervening events.

[36] Section 323 of the draft section on Contract Law in the upcoming Chinese Civil Code has removed the element of "unrealizable purpose" while retaining the element of "manifest unfairness".

[37] E McKendrick, *Contract Law: Text, Cases and Materials* (8th edn, Oxford University Press 2018) 701.

[38] GH Treitel, *Frustration and Force Majeure*, (2nd edn, Sweet & Maxwell 2004) 455.

[39] *Metropolitan Water Board v Dick, Kerr & Co Ltd* [1918] AC 119 (HL).

[40] *The Neptune Agate* [1994] 3 SLR(R) 272 (HC).

[41] *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413 (CA) [65]; *Channel Island Ferries Ltd v Sealink UK Ltd* [1988] 1 Lloyd's Rep 323 (CA) [98].

[42] A Phang, *The Law of Contract in Singapore* (Academy Publishing 2012) [19.129].

[43] *Lim Kim Som v Sheriffa Taiba* [1994] 1 SLR (R) 233 (CA) [48].

that the doctrine of frustration only applies when the new situation is 'unforeseen' or 'unexpected' or 'uncontemplated', as if that were an essential feature. *But it is not so. The only thing that is essential is that the parties should have made no provision for it in their contract*" (*emphasis added*).[44]Therefore, theoretically speaking, frustration can still be invoked even if the parties could have foreseen the supervening event, provided that the parties chose not to make any specific provisions in their contract to cater to those events (possibly due to practical reasons such as the time and cost of negotiation).[45]

Thirdly, the court must be satisfied that the supervening event is not caused by the act or election of the party seeking to rely on it (also known as the rule against "***self-induced frustration***").[46] Although the notion of *self-induced frustration* is not expressly stated under Article 26 of *Interpretation II*, it has been suggested that the term "objective circumstances" connotes the meaning that the change must be beyond the control of the disadvantaged party. Furthermore, the principles of good faith will also preclude a party from invoking the DCC to shift his losses resulting from his own fault or negligence to the other party.[47] Therefore, at least in theory, it is possible to map the rules against *self-induced frustration* onto the DCC.

Lastly, the court will apply the core test of whether the intervening event is so significant that it renders a contractual obligation *radically* or *fundamentally* different from what has been agreed upon in the contract.[48] There are three main categories of supervening events that may amount to a "radical change":

1. Firstly, where the supervening event has rendered performance of a contractual promise impossible (hereby referred to as "***supervening impossibility***"). This can include situations where the subject matter of the contract is destroyed by the supervening event,[49] where the subject matter of the contract is no longer available,[50] or where the specified source of supply has failed.

2. Secondly, where the supervening event has rendered the performance of the contract illegal (hereby referred to as "***supervening illegality***"). This includes situations where there is a subsequent change in legislation or government policy that prohibits the performance of the original contractual obligations.[51]

3. Thirdly, where the supervening event results in a frustration of the purpose of the contract (hereby referred to as "***frustration of purpose***"). *Prima facie*, this category seems to mirror the requirement under the DCC concerning the parties'

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[44] *Ocean Tramp Tankers Corporation v V/O Sovfracht, The Eugenia* [1964] 2 QB 226 (CA) 239.
[45] Phang, supra note 34.
[46] *J Lauritzen A.S. v Wijsmuller B.V (The Super Servant Two)* [1990] 1 Lloyd's Rep 1 (CA).
[47] B Ling, *Contract Law in China* (Sweet & Maxwell Asia 2002) 298.
[48] *Alliance Concrete Singapore Pte Ltd v Sato Kogyo (S) Pte Ltd* [2014] SGCA 35 (CA) [33].
[49] In *Taylor v Caldwell* [1863] EWHC QB J1 (QB), the defendant contracted to let the plaintiff use the Surrey Gardens and Music Hall for the purposes of holding a concert. However, a week before the concerts, the Music Hall was completely destroyed by fire (without the default of both parties). The court held the contract was frustrated.
[50] In *Lim Kim Som* v *Sheriffa Taibah bte Abdul Rahman* [1994] 1 SLR(R) 233 (CA), the parties entered into a contract for the sale of landed property. Prior to the completion of the contract, the Singapore government compulsorily acquired the property in question pursuant to Section 5 of the Land Titles Act. The court held the contract was frustrated.
[51] In *Zinc Corp Ltd v Hirsch* [1916] 1 KB 541 (CA), after the parties contracted for the sale of certain goods, war-time legislations were enacted to prohibit import and export of such goods. The court held that the contract was frustrated.

> inability to "realize the purpose of the contract". However, it must be noted that *frustration of purpose* under common law is extremely limited in that it requires a *total failure* of purpose that is *commonly held* by the contracting parties.[52] As noted in a leading textbook, apart from the coronation cases that the doctrine of *frustration of purpose* has developed from,[53] "a retrospective glance at the [case law] *does not show any English case in which the doctrine has been applied* or in which it formed the sole basis of the decision".[54]

To summarize, comparing the legal tests of the two doctrines, it is evident that there are significant overlaps in terms of the general requirements. Both doctrines require unforeseeable events that significantly affect the parties' performance of the contract and both doctrines exclude ordinary price fluctuations and foreseeable commercial risks. However, at the same time, there are also several conceptual differences in terms of the nuances, such as the necessity of the requirement of "unforeseeability", the scope of "frustration of purpose" and the requirement of "manifest unfairness between the parties". The practical significance of these similarities and differences will be further explored in the case studies analyses below.

C. The Legal Consequences and Remedies

The last axis of comparison will be that of the legal consequences of successfully invoking the two doctrines. Under the DCC, Article 26 of *Interpretation II* states that where the court finds that there has been a change of circumstances, the court "shall decide whether to modify or terminate the contract in accordance with the principle of fairness and in light of the circumstances of the case". This essentially confers the court a discretion to re-write certain terms of the parties' contract to ameliorate the unfairness caused by the change of circumstances.

This stands in stark contrast with the legal consequences of frustration. The traditional common law position is that when a contract is frustrated, it will automatically come to an end and all the contracting parties will be discharged from their obligations under the contract with prospective effect. Losses will lie where they fall and each party will bear their respective losses.[55]

Due to the potential harshness and rigidity of the common law rules, both Singapore and the UK enacted legislations to provide statutory mechanisms for apportioning the losses when a contract is frustrated — for UK, it is the English Law Reform (Frustrated Contracts) Act 1943 ("***ELRFCA***")[56] and for Singapore, it is the Frustrated Contracts Act ("***FCA***").[57] Notably, Singapore's *FCA* is derived from its English counterpart and is *in pari materia* with the *ELRFCA*. Under Section 2(2) of the *FCA*,[58] all monies paid pursuant to the contract *before* the time of discharge shall be recoverable and all monies payable cease to be payable. Under

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[52] *Krell v Henry* [1903] 2 KB 740 (CA).

[53] In *Krell v Henry* [1903] 2 KB 740 (CA), Mr Krell let certain rooms in his flat to Mr Henry for the purposes of allowing the latter to watch the coronation procession of King Edward VII. However, King Edward VII fell sick and the coronation procession was cancelled. Although the performance of the contract was not impossible (the rooms were still available to bet let), the court held that the contract was frustrated due to a total frustration of a commonly held purpose.

[54] Treitel, supra note 30 at 7-035.

[55] A Phang, supra note 34 at 19.086.

[56] English Law Reform (Frustrated Contracts) Act 1943 (6&7 George VI, c40).

[57] Frustrated Contracts Act (Cap 115, 1985 Rev Ed).

[58] The statutory equivalent in UK is Section 1(2) of the *ELRFCA*.

Section 2(3),[59] if the party to whom the sums were so paid or payable incurred expenses before the time of discharge, the court may allow him to retain the whole or any part of that expenses. Under Section 2(4),[60] where any party obtained a "valuable benefit" prior to the discharge of the contract, the other party can apply to recover from him such sum that the court considers just, having regard to the circumstances of the case.[61]

Although the Singapore and English courts emphatically reject the notion that the courts have any power at common law to adapt or modify the parties' contract in light of a frustrating event, it is submitted that the remedies under the *FCA* occasionally reach conclusions which in their practical effects resemble the process of "modification". Section 2(2) and Section 2(4) of the *FCA* confers onto the Singapore courts the discretion to allow contracting parties to recover expenses and "valuable benefits" that are not provided for in their contract. This is, in a limited sense, akin to a "modification" of the parties' original agreement. This point will also be accentuated when we move to evaluate the case studies in Part III and IV.

III. PRACTICAL WORKINGS OF THE DOCTRINES IN CASE STUDIES

After outlining the theoretical distinctions and similarities between the two doctrines in Part II, this paper moves to deep-dive into selected case studies to compare the operations of the two doctrines in practice. To date, there have been 44 cases concerning the DCC that have reached the SPC in China, with only seven cases being supported by the *SPC*.[62] At the provincial High courts level, between 2009 when the SPC *Judicial Interpretation II* was introduced and 2019, there are in total 234 cases concerning the DCC rule. This is either invoked by the claimants or used as a defence by the defendants to exempt or mitigate the contractual liabilities. Out of 234 High Court cases, only 17 cases support the use of DCC rule, among which rural land management contracts contracted out to individual household takes out the largest portion. This number should be viewed against the total number of contractual disputes cases litigated at the High Courts between 2009 and 2019, which stands at 261,157.[63]

While the aforementioned statistics provide some insights on how scrupulous the Chinese courts apply the DCC rule, it may not tell the whole story on the actual application in particular cases. Hence, this section will single out and scrutinize the factual matrixes of all seven SPC cases, together with seminal Singapore Court of Appeal ("***SGCA***") cases and leading English cases and evaluate whether the selected case studies would have been decided similarly if it had arisen in the other jurisdiction.

A. Wuhan Municipal Coal Gas Corp. v Chongqing Gas Meter Factory[64]

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[59] *Ibid*.

[60] The statutory equivalent in UK is Section 1(3) of the *ELRFCA*.

[61] For example, A contracts with B to build a tree-house. A paid B a pre-payment of $100,000 pursuant to the contract. Before the completion of the tree-house, there was an unforeseen forest fire that burned down the house and the contract was frustrated. Under Section 2(2) of the *FCA*, A will be able to recover the $100,000 from B. If B has incurred expenses in building the house, the court may allow him to retain certain amounts from the $100,000 under Section 2(3). If A has received some "valuable benefit" from B's performance, B can seek to recover certain portions of that "benefit" that the court deems just under Section 2(4).

[62] This data is derived from the major databases for Chinese judgments, such as *Bashou Anli* and *China Judgements Online*.

[63] *Ibid*.

[64] *Supra note 4.*

In *Wuhan Municipal Coal Gas Corp*, the plaintiff contracted with the defendant to purchase the defendant's J2.5 Gas Meter Technology and 70,000 sets of spare parts for the gas meters at an average price of RMB 57.3 per set. However, after the conclusion of the contract, there were significant price adjustments which increased the prices of the raw materials needed to manufacture the gas meters.[65] The total cost of production for each set of spare parts rose to RMB 79.22. The defendant proposed to modify the contract and supply the spare parts at RMB 75.50 per set while bearing a small loss, but the plaintiff refused and insisted on the original contract price.

The *SPC* held that the significant increase in price in the raw materials was unforeseeable and unpreventable by both parties. Compelling the defendant to supply the spare parts at the original contract price would be manifestly unfair to the defendant because it would cause the defendant to bear the entirety of the loss. After sending the case back to the lower court for re-trial, the parties voluntarily reached a settlement agreement to terminate the contract.[66]

If such a case were to arise in Singapore or the UK, it is *unlikely* that the court will find that the contract is frustrated. The Singapore and English courts have consistently held that price fluctuations are mere impracticalities that will not normally render the nature of the contract *fundamentally different* from what the parties have agreed upon. In *Glahe International Expo AG v ACS Computer* (*"**Glahe International**")[67], the *SGCA* held that the imposition of 200% import tax on computers and the phenomenal rise in inflation rate[68] in the Union of Soviet Socialist Republics ("***USSR***") were insufficient to frustrate a contract to import computers from the United States into the *USSR*.[69] This is notwithstanding the fact the performance of the contract would likely result in the plaintiff suffering a significant loss.[70] The *SGCA* then affirmed *Brauer & Co v James Clark Ltd* in which Lord Denning opined that the contract *may* be frustrated if the rise in price is "astronomical", such as if the costs had increased a *hundredfold*.[71] In the present factual matrix, the cost of producing each set of spare parts rose from RMB 57.3 per set to RMB 79.22. This is less than a two-fold increase in price and the Singapore courts will be very unwilling to find that the rise in price *fundamentally changed the nature of the contract*, even if this entails that the supplier will inevitably sustain losses completing the contract at the original price.[72]

B. Shenyang High-Grade Highway Construction General Co v Sun Jianfa[73]

In *Shenyang High-Grade Highway Construction*, the plaintiff company delegated certain work related to the construction of an expressway to Sun Jianfa. In their contract, the parties agreed

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[65] The price of aluminum ingot was adjusted upwards by the government from around RMB 4600 per ton to nearly RMB 16,000 per ton. The price of aluminum housing also arose from 23.085 per set to 41 dollars per set.
[66] In the settlement agreement, the parties agreed for the plaintiff to return the defendant the sets of spare parts that it has received from the defendant and the defendant to compensate the plaintiff in the form of a one-time payment of RMB 21,000.
[67] *Glahe International Expo AG v ACS Computer Pte Ltd and another appeal* [1999] SGCA 23 (CA).
[68] The inflation in the USSR rose from an annual rate of 5.6% in 1990 to 92.7% in 1991 and to a phenomenal rate of 1353% in 1992.
[69] *Supra note 59 at* [31]-[35].
[70] *Ibid.*
[71] *Brauer & Co v James Clark Ltd* [1952] 2 All ER 497 (CA) 501.
[72] Supra note 59 at [35].
[73] *Shenyang High-Grade Highway Construction General Co v Sun Jianfa* (2017) Supreme Court Civil Appeal 3108 ("***Shenyang High-Grade Highway Construction***").

to a bill of quantities ("***BOQ***") which set out the scope of work and the unit prices for the work to be done. Due to the changes in planning and the large amounts of rainfall during the construction, the defendant had to carry out certain work that was *not provided for* in the contract (hereafter referred to as the "***additional work***"). Meanwhile, the price of diesel oil increased sharply from $550 per ton at the formation of the contract to $1250 per ton towards the completion of the contract. The dispute before the court was in relation to the valuation of the work done by Sun Jianfa.

The *SPC* held that (i) in relation to the work that was provided for in the parties' contract, the valuation should follow the unit prices in the *BOQ* and (ii) in relation to the *additional work* that was not provided for in the contract, the 127% rise in diesel oil prices amounted to a change of circumstances and it would be unfair to value the *additional work* at the 2005 diesel oil prices. The court then took into account both the unit prices stated in the *BOQ* as well as the rise in diesel oil prices before modifying the contract to reflect a fairer valuation of the *additional work* done.

Transposing the same factual matrix in Singapore or the UK, it is submitted that this case would fall outside the ambit of the doctrine of frustration altogether. This is because the construction of the expressway has already been completed and the parties were only disagreeing as to the valuation of the work done. The doctrine of frustration would not provide the parties with a satisfactory remedy since the only legal consequence of frustration is prospective discharge. Furthermore, even if the courts were to apply the legal test, it is *unlikely* that the court will find that the contract is frustrated. As already explained in the analysis for *Wuhan Municipal Coal Gas Corp* above, a 127% rise in diesel oil prices will unlikely be treated as an "astronomical" increase in price that radically changed the nature of the contract.

Nevertheless, even though frustration might not be made out, the same practical outcome may still be achieved under the common law, albeit via a different route. Given that the original contract and the *BOQ* did not provide for the *additional work* that was undertaken by Sun Jianfa, it can be argued that the parties have left a true gap and the court could imply a term to govern the valuation of the *additional work*. In *Sembcorp Marine Ltd v PPL Holdings Pte Ltd*,[74] the *SGCA* held that in order to imply a term, the implication must fulfill both the "business efficacy test" and the "officious bystander test". In the present context, it can be argued that the court should imply a term to the effect that the valuation of *any additional work* done by Sun Jianfa should take into account prevailing market prices. Such an implication is necessary for business efficacy — otherwise, Sun Jianfa might be required to perform work that is *not stipulated* in the original contract at a price that is lower than the cost of performance, which will clearly be against ordinary business sense. Furthermore, had the term been suggested to the parties, it is likely that both parties would have agreed to it. Assuming that the court chooses to imply such a term, the valuation of the *additional work* would take into account the rise in diesel oil prices, reaching a similar practical outcome as the Chinese courts.[75]

C. Xinshan Mineral Engineering Co of Jiutai City v Shanxi Coal Transportation Group[76]

In *Xinshan Mineral*, the plaintiff leased its boring machinery to the defendant for the

[74] *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 (CA) at [101].

[75] The authors are aware of the stringent requirements concerning the implication of terms and the possibility that the Singapore courts may well choose to adopt a different position. Nevertheless, this analysis remains a relevant possibility and it helpfully demonstrates the practical convergence between the two legal systems.

[76] *Xinshan Mineral Engineering Co of Jiutai City v Shanxi Coal Transportation Group* (2015) Supreme Court Civil Appeal 2456 ("***Xinshan Mineral***").

defendant's mining operations at a particular mining site. However, after the conclusion of the contract, the defendant discovered that the mining site had been damaged by previous mining techniques and it was unsafe for the workers to commence mining operations. After further investigations, the experts stated that an open-pit mining technique would be required, which meant that the boring machinery would no longer be needed. The defendant sent timely notice to the plaintiff seeking to terminate the contract for the boring machinery, to which the plaintiff refused and sought to compel full performance of the contract.

The *SPC* held that the contract should be terminated due to the change of circumstances because the discovery that the mining site was unsafe to commence mining operations rendered the purpose of the contract unrealizable. Since the change of circumstances was not due to the fault of either party, it would be manifestly unfair for the defendant to be liable to pay the full rental sum for boring machinery that it did not even use.

If the same factual matrix were to arise in Singapore or the UK, it is submitted that the doctrine of frustration will *not* apply. This is because the obstacle to performance had already existed at the time of contract formation and the prejudiced party is not excused from performance simply because he discovered the obstacle after entering into the contract.[77] This was the case in *M'Donald v Corporation of Worthington* ("***M'Donald***")[78] in which a building contractor claimed to be discharged from a contract to build a sewer for a local authority when he later discovered that performance was "impracticable by reason of water in the soil"[79] or, in other words, the "moist ground".[80] The English court refused to frustrate the contract, reasoning that the soil conditions had already existed at the time of contract formation and the contractor should have investigated the site "to see if he can do the work upon the terms mentioned in the specification".[81] This shows that the doctrine of frustration places a heavy emphasis on the chronological order of *the timing* at which the obstacle to performance *came into existence*. In the present factual matrix, the damage to the mining site and the hazardous working conditions existed before the parties entered into the contract. The Singapore court will likely follow the position in *M'Donald* and hold that a pre-existing obstacle will not frustrate the contract simply because it was discovered after the conclusion of the contract.

Nevertheless, even though frustration might not be made out, the court may arrive at the same outcome by setting the contract aside on the ground of common mistake.[82] It has been said that frustration and common mistake deal with essentially the same problem with the only difference being in the timing of the supervening event.[83] In the present case, it can be argued that both parties were mistaken about a common assumption that the mining site was fit for carrying out mining work *at the time* of contract formation. Furthermore, this mistake was fundamental to the contract because it would have rendered the rental of the boring machinery

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[77] Supra note 30 at 06-026.
[78] *M'Donald v Corporation of Worthington* (1892) 9 TLR 21.
[79] *Ibid* at 21.
[80] *Ibid at* 230.
[81] *Ibid* at 230.
[82] The SGCA in *Olivine Capital Pte Ltd and another v Chia Chin Yan and another matter* [2014] SGCA 19 has held that a contract can be set aside on the ground of "common mistake" where (i) the parties have a common assumption as to the existence of a state of affairs when entering into the contract; (ii) the non-existence of that subject matter is fundamental to the contract; (iii) the contract did not allocate the risk of the mistake; and (iv) the mistake was not due to the fault of either party (at [66]).
[83] If the parties' common assumption is false at contract formation, the law treats this as a mistake; if their common assumption is falsified after contract formation, the law treats this as a case of frustration (M Chen-Wishard, *Contract Law* (6th edn, Oxford University Press 2018) [7.1.1]).

completely purposeless. Since the contract did not allocate the risk of this mistake and since the damages to the mining site were not caused by the fault of either party, the Singapore or English courts may set aside the contract on the ground of common mistake, thereby reaching a similar conclusion as the *SPC*.

D. Chengdu Pengwei Industry v Jiangsu Province Yongxiu County Government[84]

In *Chengdu Pengwei*, the defendant decided to auction sand-mining rights in Poyang Lake to the public in 2006. The plaintiff company purchased the mining rights to the lake (until 31st December 2006) at a price of RMB 82 million. At the time of the contract, it was anticipated by both parties that the mining season would last for about 5 to 6 months. However, due to unforeseen periods of drought, the water level of the Boyang Lake dropped significantly, reaching the lowest level since the 1970s. Due to the low water levels, the appellant was forced to stop mining operations after 100 days and consequently suffered a huge financial loss. The *SPC* held that the unforeseeable drought and the drastically low water levels (that have not occurred in more than 36 years) amounted to a change of circumstances. After considering that under ordinary circumstances, the plaintiff company would have been able to mine for 150 to 160 days, the *SPC* modified the contract and held that the defendant should compensate the plaintiff for the costs of mining rights for the duration of 30 days.

If a similar case were to arise in Singapore or the UK, it is submitted that the courts may similarly find that the contract will be frustrated on the ground of *frustration of purpose*.[85] From the parties' correspondence and the Expert Reports produced by the defendant, it appears that the common contractual purpose between the parties was for the plaintiff to mine at Poyang Lake for the entire duration of the mining season (which would range from 5 to 6 months). In fact, in the defendant's advertisement for the auction of the mining rights, the defendant produced Expert Reports that made precise predictions as to the profitability of the mining operations and even based the calculation of the contract price on the assumption that the buyer would be able to mine for the entire mining season which spans 5 to 6 months. Therefore, it is possible that the court will find that the common purpose between the parties is for the plaintiff to mine at Boyang Lake for the mining season and that the drastically low water level was an entirely unforeseeable supervening event which rendered the fulfillment of this common purpose unachievable.

Assuming that the Singapore and English courts were to find that the contract is frustrated, the statutory provisions under the *FCA* and *ELRFCA* would be triggered respectively. Firstly, under Section 2(2) of the *FCA*,[86] the plaintiff company would be entitled to recover the *entire* contractual sum from the defendant. Secondly, under Section 2(4) of the *FCA*,[87] the court may exercise its discretion to allow the defendant to recover the "valuable benefits" that the plaintiff company has obtained from the contract, namely, the profit from its 100 days of mining. Therefore, the final outcome under the *FCA* would likely be similar to the

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[84] *Chengdu Pengwei Industry v Jiangsu Province Yongxiu County Government (2017)* Supreme Court Civil Final 91 ("**Chengdu Pengwei**").

[85] For clarity, this case would not be treated as one of *supervening impossibility*. This is because the content of the contract is merely a sale of mining rights — the plaintiff company's contractual obligation is to pay for the mining rights and the defendant's contractual obligation is to grant the plaintiff company the mining right. The supervening event does not render their contractual obligation *impossible*. Nevertheless, it will render the *purpose* of the contract unrealizable.

[86] The statutory equivalent of Section 1(2) of the *ELRFCA*.

[87] The statutory equivalent of Section 1(3) of the *ELRFCA*.

Chinese position in that there will be a similar apportionment of the losses between the contracting parties.

E. Shanxi University of Finance and Economics v Yuntian Tech Co Ltd [88]

In *Shanxi University of Finance and Economics*, the parties entered into a rental contract in which the defendant rented a shophouse from the plaintiff for a duration of 10 years, from 18th May 2006 to 17th May 2016. In 2007, due to the city's road-widening project, there were road-blocks around the defendant's shophouse which caused the defendant to be unable to operate the shophouse for 5 months. The *SPC* held that the road-widening project constituted an unforeseeable change in objective circumstances that prevented the defendant from fulfilling its purpose of contract for that duration. Therefore, the court modified the contract and reduced the rent payable in 2007 by RMB 500,000.

Under the common law, it is unlikely that the same outcome will be reached. In this case, the *SPC* essentially "singled out" the year 2007 in which the road-widening project prevented the defendant from realizing the purpose of the contract. Such flexibility offered by the DCC is not replicated under the common law doctrine of frustration. Frustration operates by prospectively discharging the *entire* contract — it cannot operate by discharging the contract *partially* or altering a *part* of a contract.[89] In other words, "the contract is either *wholly discharged* or *remains fully in force*".[90] In this factual matrix, the Singapore court will unlikely find that the contract is *wholly discharged* since the defendant could still operate his shophouse for the other 9 and a half years of the contract. Therefore, the contract would likely remain in force and the defendant would have to bear the losses caused by the unforeseeable road-widening project.

F. Alliance Concrete Singapore Pte Ltd v Sato Kogyo (S) Pte Ltd [91]

Turning to the *SGCA* case of *Alliance Concrete,* the parties entered into a contract for the appellant to supply ready-mixed concrete for the respondent. However, after the conclusion of the contract, the Indonesian government announced a ban on the export of sand on 23 January 2007. The sand ban greatly affected the appellant's production of ready-mixed concrete because Indonesian sand was one of the main ingredients that the appellant used in its production. The *SGCA* found that "both parties contemplated that Indonesian sand would be used in the preparation of ready-mixed concrete by the appellant and that the sand ban was a supervening event which cut off the appellant's direct access to Indonesian sand".[92] The unavailability of a particular source from which the subject matter of the contract is derived was held to have resulted in a radical change in the parties' contractual obligations and the contract was discharged by frustration.[93]

Interestingly, the *SGCA* noted that the appellant was willing to supply sand to the respondent despite the shortage and the respondent was willing to share a portion of the

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[88] *Shanxi University of Finance and Economics v Yuntian Tech Co Ltd* (2018) Supreme Court Civil Final 520 ("**Shanxi University of Finance and Economics**").
[89] Treitel, supra note 30 at 15.010.
[90] *Ibid* at [15.040].
[91] *Alliance Concrete Singapore Pte Ltd v Sato Kogyo (S) Pte Ltd* [2014] SGCA 35 (CA) ("**Alliance Concrete**").
[92] *Ibid* at [81].
[93] *Ibid* at [55].

increase in prices due to the sand ban, but both parties were unable to agree on a final figure through their negotiations.[94] At the end of the judgment, Andrew Phang opined that "given the longstanding relationship between the parties, these proceedings were particularly unfortunate". [95] He urged the parties to "close the door on this unfortunate episode and … resume amicable business relations again".[96] This suggests some degree of reluctance on the part of the learned judge in discharging the contract, knowing fully well that it may compromise the long-term business relationship between the parties.

If this case were to come before the Chinese courts, it is submitted that the DCC will likely be made out. The sand ban imposed by the Indonesian government was an unforeseeable change of objective circumstances that would unlikely be considered as an *ordinary* commercial risk. Although it may not have "rendered the purpose of the contract unrealizable", such a change of circumstances could be said to have compromised the equilibrium of the contract, making it "manifestly unfair" to compel the supplier to incur huge costs importing sand from another country to perform the contract.

However, in terms of remedies, it is submitted that the Chinese courts might take a different approach from the Singapore courts. As indicated above, the parties are long-time business partners who were both willing to complete the contract notwithstanding the change of circumstances but were simply unable to agree on a fair and reasonable contract price. Rather than terminating the contract, the Chinese courts may choose to exercise their discretion to modify the contract to reflect a fair and reasonable price for the parties to continue their performance of the contract. In light of the exceptional circumstances of this case, modifying the contract may prove to be a more commercially sensible solution that better accords with the wishes of the parties and better preserves long-standing business relationships.

G. BP Exploration Co (Libya) Ltd v Hunt (No 2) [97]

Turning to examine the English case of *BP Exploration*, the defendant owned an oil concession in Libya. However, there was no guarantee that oil could be found within the area covered by his concession. The defendant did not have the resources to carry out the exploration to locate such oil and to bring it on stream. Therefore, it entered into a contract with the plaintiff for the plaintiff to carry out the necessary exploration and exploitation activities and to share the oil that might be found in the area. The plaintiff's explorations were successful in locating an exceedingly rich oil field within the area covered by the concession and the field came on stream in 1967, producing substantial quantities of oil. However, in 1971, the Libyan government forfeited the defendant's concession.

Goff J held that the contract was frustrated and granted the plaintiff's application under Section 1(3) of the *ELRFCA*. Section 1(3) provides that where any party obtained a "valuable benefit" prior to the frustration of the contract, the court could allow the other party to recover from him such sum the court considered just, having regard to the circumstances of the case. In *BP Exploration*, the court held that "in a case of prospecting… there is always the benefit of the prospecting itself, ie knowing whether or not the land contains any deposit of the relevant minerals".[98] The "valuable benefit" that the defendant received was "the development of a bare

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[94] *Ibid* at [116] to [119].
[95] *Ibid* at [121].
[96] *Ibid* at [121].
[97] *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 (HL) ("***BP Exploration***").
[98] *Ibid* at 802.

concession of basically unknown potential into a concession containing a giant oilfield in production, in which [the defendant] held a half share".[99] This is so even if the concession was subsequently forfeited and the defendant is unable to fully capitalize on the oilfield. Goff J's decision was subsequently affirmed by the House of Lords on appeal.[100]

In a way, *BP Exploration* bears a close resemblance to the Chinese case of *Chengdu Pengwei*, although in the latter, the supervening event was caused by nature (ie, the drastically low water levels). If the facts of *BP Exploration* were to arise in China, the Chinese courts would likely invoke the DCC. The expropriation of the concession by the Libyan government was an unforeseeable event that was not contemplated by the parties when entering into the contract. It also made the performance of the contract manifestly unfair for the plaintiff because the plaintiff has incurred millions of pounds in exploring and exploiting the oilfield but it would not be able to enjoy the fruits of its labour. Therefore, the Chinese courts may exercise its discretion to modify the contract and require the defendant to compensate the plaintiff such reasonable sum, so as to ensure that the losses and expenses incurred due to the materialization of an unforeseeable political risk are shared fairly between the parties, the practical outcome of which would likely be substantially similar to the English decision.

H. Leiston Gas Co v Leiston-cum-Sizewell Urban District Council [101]

In *Leiston Gas Co*, the plaintiff contracted to provide gaslighting for the defendants, which includes the provision of the hardware and other equipment for the gas lamps and the repair and maintenance of the lamps, associated equipment and lighting system. In return, the defendants were to make a quarterly payment to the plaintiffs for these services. The contract was to commence from August 1911, and was to continue for five years. However, three and a half years later, the military authorities imposed a "black-out-order" in light of the nocturnal bombing raids in the course of World War I. The plaintiff was prohibited from lighting the lamps but continued with the other maintenance services and ultimately sued the defendants for three-quarters of arrears which were due and unpaid.

The English Court of Appeal held that the effect of the legislation did not frustrate the contract and did not excuse the defendants from their obligation to make the contractually stipulated quarterly payments. Lord Reading CJ reasoned that "on the true effect of the contract… the plaintiffs undertook to perform various services for the defendants… part of the performance of the contract had become unlawful, but another part of the contract, which cannot be regarded as a trivial part, was lawful and could be performed".[102] Therefore, even though the lamps were not lighted, "they remained there connected with the main and would be lighted whenever the prohibition by the military authority was relaxed or withdrawn".[103]

The outcome in *Leiston Gas Co* can appear to run contrary to common sense — if the main purpose of the contract was the provision of the gaslighting, why should the defendant be compelled to pay the full contract price when such lighting was not in fact carried out for the whole duration? It is submitted that if the facts of *Leiston Gas Co* were to arise in China, the court would arrive at a different conclusion. The "black-out-order" which arose from wartime considerations would likely amount to a material change in circumstances that was not

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[99] *Ibid* at 816.
[100] *Ibid.*
[101] *Leiston Gas Co v Leiston-cum-Sizewell Urban District Council* [1916] 2 KB 428 (CA) ("***Leiston Gas Co****").*
[102] *Ibid* at 432-433.
[103] *Ibid* at 432-433.

contemplated by the parties. The performance of the contract on its original terms would also be manifestly unfair for the parties because the defendant would be forced to pay for services he did not enjoy whilst the plaintiff would be able to enjoy benefits for services he did not perform. The obvious solution would be to modify the contract price to reflect the actual duration that the plaintiff had actually lighted the lamps for the defendants, as well as the plaintiff's expenses incurred in maintaining the lamps. This bears reminiscence of the earlier case of *Shanxi University of Finance and Economics* in which the government's road-widening project prevented the defendant from realizing the purpose of his rental contract for a total of 5 months out of the total duration of 10 years. The SPC, in that case, modified the contract price and reduced the rent payable for the year affected.

IV. INSIGHTS DISTILLED FROM THE CASE STUDIES

Drawing from the case studies in Part III, this section summarizes the major lessons that can be distilled from the practical workings of the two doctrines in reality. By shedding light on (1) the scope of application of the two doctrines in practice and (2) the practical outcomes that flow from successful applications of the doctrines, this section seeks to challenge the myth that the DCC blatantly disregards the principles of certainty of contract and party autonomy.

A. Insights on the Scope of Application of the Two Doctrines

In relation to the scope of application, the first takeaway is that the scope of the DCC is *indeed wider* than that of the doctrine of frustration. Firstly, while the Singapore and English courts have almost never frustrated a contract on the ground of increased costs alone, [104] the Chinese courts have invoked the DCC in several cases where the material increase in prices made performance overly onerous for one contracting party. This can be seen in *Shenyang High-Grade Highway Construction*[105] and *Wuhan Municipal Coal Gas Corp*[106] in which the *SPC* invoked the DCC to ameliorate the unfairness caused by a two-fold increase in diesel oil prices and a near-two-fold increase in the cost of production of gas meters respectively. Comparatively, in *Glahe International*, the SGCA refused to find frustration even when there has been an unexpected imposition of 200% import tax coupled with a 1353% rise in inflation rate which would have inevitably resulted in the plaintiff suffering huge financial losses.[107] This difference is hardly surprising when one looks back at the different underlying rationales behind the two doctrines. While it may be easier to see how an unforeseeable increase in prices can make it *manifestly unfair* for the affected party to bear the full brunt of the losses, it is much harder to characterise an increase in prices as a *fundamental change* as to the *nature* of the contractual obligations.

A similar theme resurfaces when one compares the cases concerning the frustration of purpose. Although the notion of frustration of purpose can be found in both doctrines, the doctrine of frustration adopts a much *stricter* approach requiring there to be a *complete* frustration of purpose before the contract can be discharged by frustration. This can be seen from the English case of *Leiston Gas Co*[108] in which the English court refused to find frustration where the contracting party could still derive a "non-trivial" benefit from the

[104] Treitel, supra note 30 at 7-035.
[105] Supra note 65.
[106] *Supra note 4.*
[107] Supra note 59 at [35].
[108] Supra note 93.

performance of the contract. On the other hand, Chinese law seems to support the DCC even where there is only a *partial* frustration of purpose. This is shown in *Shanxi University of Finance and Economics*[109] in which the *SPC* invoked the DCC where the change in government policy only affected the contract for the duration of half a year out of a ten-year lease. This is also unsurprising when one looks at the remedial consequences of the two doctrines. Unlike the DCC which allows for the remedy of modification, the only legal consequence of frustration is the discharge of the *entire* contract.[110] It would logically follow that the court would require the *entire* purpose of the contract to be unrealizable before finding frustration.

However, it would be misleading to stop the analysis here. The DCC and the doctrine of frustration cannot be simply compared in vacuum without accounting for the other legal instruments available in the respective legal systems. As clearly shown from the cases of *Xinshan Mineral* and *Shenyang High-Grade Highway Construction*, even if the Singapore courts will not support the use of frustration, the same outcome might still be reached through the use of other legal doctrines such as that of common mistake and implication of terms. Therefore, even if the scope of frustration is indeed narrower than that of change of circumstances, what we see in reality is a *practical convergence* amidst the two differing legal frameworks. The only difference that remains to be addressed is that of the remedy of modification which would be canvassed in the following subsection.

B. Insights on the Remedy of Modification

In relation to the remedy of modification under Chinese law, there are four major conclusions that can be drawn from the case studies. Firstly, it is a misconception that the Chinese courts will simply disregard the parties' intentions by rewriting the contract and compelling the parties to continue performing the contract against the parties' wishes. Quite to the contrary, the *SPC Guiding Opinion* stipulates that where there is a change of circumstances, the Chinese courts should actively "steer the parties toward conducting new negotiations and amending their contract".[111] This can be seen in *Wuhan Municipal Coal Gas Corp*[112] in which after the lower court's efforts at mediating the dispute, the parties voluntarily reached a settlement agreement. Therefore, rather than going *against* the parties' intentions, the Chinese courts' primary approach is to *give effect* to the parties' intentions, encouraging the parties to resolve such unforeseen changes of circumstances amicably and agreeably between themselves.[113]

Secondly, even when the Chinese courts choose to exercise their discretion to modify the contract, the actual modification still takes reference to the parties' intentions and the original contractual terms. This can be seen in *Shenyang High-Grade Highway Construction*[114] and in which the *SPC* considered the parties' original contract price and the effect of the change of circumstances before coming up with a fair and reasonable price. Similarly, in *Chengdu Pengwei*,[115] the court considered how both parties intended for the plaintiff to mine for 150-

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[109] Supra note 87.
[110] Lei Chen, 'Damages and Specific Performance in Chinese Contract Law' in L DiMatteo and L Chen (eds) *Chinese Contract Law*, 375-376.
[111] Section 1(4) of the *SPC Guiding Opinion*.
[112] Supra note 4.
[113] Section 323 of the draft section on Contract Law in the new Chinese Civil Code has included a new requirement that where there is a change of circumstances, parties must renegotiate the contract before going to the courts.
[114] *Supra note 65.*
[115] *Supra note 78*.

160 days before modifying the contract to reflect a fairer contract price. Therefore, it would be erroneous to assume that modification invariably entails a complete disregard for parties' original contractual intentions.

Thirdly, the remedy of "modification" continues to serve as a valuable remedy under Chinese law, offering parties a more commercially sensible solution in exceptional situations. This point is well illustrated by the case of *Alliance Concrete*[116], where the *SGCA* was clearly of the view that the termination of the contract was unfortunate because it may undermine the long-standing business relationships between the parties.[117] Comparatively, the flexibility offered by the option of "modification" could have preserved the parties' contractual relationship, ameliorating the unfairness to the supplier and at the same time saving additional costs for the buyer (in searching for a new supplier).

Lastly and most interestingly, despite the criticisms levelled against the Chinese doctrine for allowing the courts to rewrite the terms of the parties' contract, the practical effect of the statutory mechanisms under the *ELRFCA* and *FCA* resembles the "modification" of the original contract.[118] By conferring onto the courts wide discretionary powers to allow contracting parties to recover "expenses" and "valuable benefits" that are not provided for in the contract, this would be, practically speaking, *akin* to "modifying" the parties' original contract. This is illustrated in the case of *BP Exploration*. In that case, it cannot be seriously contended that the defendant would have agreed to pay the plaintiff for supplying it with information as to whether the concession area contained any oilfield if the defendant knew that the concession would have been forfeited by the Libyan government in due time. Nevertheless, the English court found that this information amounted to a "valuable benefit" conferred upon the defendant and that the plaintiff would be entitled to claim compensation under Section 1(3) of the *ELRFCA*. Furthermore, even in the Chinese case of *Chengdu Pengwei Industry* in which the SPC modified the parties' contracts, it can be seen that the application of the *FCA* or *ELRFCA* would lead to almost *identical* outcomes as the Chinese courts in terms of the quantum of compensations. Therefore, even if the Singapore and English courts are not amending the terms of the contract *per se*, the practical effect in such cases is indeed to "modify" the contract so as to lead to a fairer apportionment of losses between the parties.

V. CONCLUSION

In a nutshell, contrary to the views of many critics, the DCC does not unduly undermine the principles of certainty of contract and party autonomy under Chinese law. Just like the doctrine of frustration in common law, the Chinese DCC has strict substantive requirements and is only applied in exceptional situations, as evidence from the small number of cases that have reached the highest courts in China. Furthermore, the SPC has instructed the lower courts to apply the doctrine with prudence and to submit their decisions to prior examination and approval from their superior courts, and if necessary, from the SPC itself.[119] The additional procedural safeguards further ensure that the Chinese doctrine is kept under proper limits and is only invoked in exceptional cases. The fears over the escaping contractual liability by Chinese suppliers employing this "obscure legal manoveure" in coronavirus outbreak is unwarranted.

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[116] *Alliance Concrete Singapore Pte Ltd v Sato Kogyo (S) Pte Ltd* [2014] SGCA 35 (CA).
[117] *Ibid* at [121].
[118] Treitel, supra note 30 at15-041.
[119] The circular on the correct application of the Interpretation on Several Issues Concerning the Application of the Contract Law (II) in serving the party and the country (27 April 2009).

By providing a thorough comparison between the DCC under Chinese law and the doctrine of frustration in common law, it is hoped that the authors have debunked the myth surrounding the Chinese doctrine and contributed to a clearer understanding of Chinese contract law. Admittedly, there are differences between the two doctrines in terms of their respective underlying rationales, legal tests, and legal consequences. However, judging from the number of cases that would have likely reached similar conclusions in the other jurisdiction, these theoretical differences appear to be more illusory than real. Even for the remedy of "modification" that has most frequently been regarded as the fundamental difference between the two doctrines, we see that the statutory remedy under the *ELRFCA* and *FCA*, in many ways, resembles the process of "modifying" the contract. The practical convergence between the two doctrines serves to eliminate any remaining doubts surrounding the DCC, bearing testament to the doctrine's legitimacy, principled-ness, and coherency. As a final remark, while it is true that the doctrines of change of circumstances and frustration are difficult to invoke and rarely invoked in practice, they should not be treated as sterile doctrines which are devoid of development. The scopes of the doctrines, as seen from our contextual examination of the case law, have been gradually expanded, underlining the importance of a comprehensive and comparative analysis of the two doctrines for a better understanding of their future developments.