

新冠肺炎爆发导致不可抗力与情势变更在合同履行上的适用
分析

**Analysis on the Application of Force Majeure and Change of
Circumstances caused by the Outbreak of Coronavirus on
Contractual Performance**

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30th March 2020

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一、介绍

1. Introduction

2019年12月，湖北省武汉市部分医院陆续发现了多例不明原因肺炎病例，后证实为2019新型冠状病毒感染引起的急性呼吸道传染病。2020年1月20日，政府向民众肯定新冠肺炎存在人传人现象。

In December 2019, several cases of pneumonia of unknown etiology were successively found in some hospitals in Wuhan, Hubei Province, and later confirmed as an acute respiratory infectious disease caused by the novel coronavirus pneumonia (“NCP”), or (“2019-nCoV”). On 20th January 2020, the government disclosed to the public that the human-to-human infection of NCP was confirmed.

2020年1月20日，国家卫生健康委员会将“新冠肺炎”纳入《中华人民共和国传染病防治法》¹规定的乙类传染病，并且因“新冠肺炎”表现出极强的传播力，国家卫生健康委员会按照其暴发、流行情况和危害程度决定采取甲类传染病的预防、控制措施。

On 20th January 2020, the National Health Commission concluded that NCP was a Class B infectious disease as provided in the *Law on the Prevention and Control of*

¹ 《中华人民共和国传染病防治法》规定，传染病分为甲类、乙类和丙类。其中，甲类传染病是指：鼠疫、霍乱；乙类传染病是指：传染性非典型肺炎（“非典” SARS）、艾滋病、病毒性肝炎、脊髓灰质炎等；丙类传染病则是指：流行性感冒、流行性腮腺炎、风疹、急性出血性结膜炎、麻风病等。

*Infectious Diseases of the People's Republic of China*¹, and due to the strong power to spread of NCP, the National Health Commission decided to adopt prevention and control measures against Class A infectious diseases for NCP prevention, based on its potential to cause an outbreak.

2020年1月27日，文化和旅游部办公厅发布《文化和旅游部办公厅关于全力做好新型冠状病毒感染的肺炎疫情防控工作暂停旅游企业经营活动的紧急通知》（“《**紧急通知**》”），该《紧急通知》要求各地暂停旅游企业经营活动，全国旅行社及在线旅游企业暂停经营团队旅游及“机票+酒店”旅游产品。

On 27th January 2020, the General Office of the Ministry of Culture and Tourism issued an *Emergency Notice of the General Office of the Ministry of Culture and Tourism on Suspension of Tourism Business Activities in the Proper Prevention and Control of NCP Outbreaks* (“**Emergency Notice**”), which requires all tourism companies’ to temporarily halt operation and all domestic travel agencies and online tourism enterprises shall temporarily stop operations of group travel as well as the “plane tickets plus hotels” tourism products.

2020年1月31日凌晨3:30分，世界卫生组织宣布将“新冠肺炎”疫情列为“国际关注的突发公共卫生事件”（Public Health Emergency of International Concern, “**PHEIC**”）。

At 3:30 a.m. on 31st January 2020, the World Health Organization (WHO) announced “Novel Coronavirus Pneumonia (NCP)” outbreak is a Public Health Emergency (“**PHEIC**”). On 11th March 2020, Tedros Adhanom Ghebreyesus, Director General of WHO announced in a press conference in Geneva that the Covid-19 outbreak has become a global pandemic.

¹ Pursuant to the *Law on Prevention and Treatment of Infectious Diseases of the People's Republic of China*, the infectious diseases governed by this Law are divided into Classes A, B and C. Infectious diseases under Class A are plague and cholera; infectious diseases under Class B are infectious SARS, AIDS, viral hepatitis, poliomyelitis, etc.; infectious diseases under Class C are influenza, epidemic parotitis, rubella, acute hemorrhagic conjunctivitis, leprosy, etc.

2020年3月11日，世界卫生组织总干事谭德塞在日内瓦召开的新闻发布会上宣布，新冠肺炎（Covid-19）疫情已经构成全球性大流行（pandemic）。

二、生产以及流动限制

2. Restriction on work and travel

2020年1月23日，武汉市政府通告，全市城市公交、地铁、轮渡、长途客运暂停运营，无特殊原因，市民不能离开武汉，机场、火车站关闭。各省市、地区分别出台规定，要求民众留在家中，如无必要，不要出门。

On 23rd January 2020, the Wuhan government announced that all buses, metros, ferries and long-distance passenger transportation was suspended. Without special reasons, citizens were not allowed to leave Wuhan. All the airports and train stations were to be closed. Governments in some other cities and regions also issued respective regulations requiring citizens to stay at home, unless otherwise necessary.

2020年1月27日，国务院办公厅将春节假期延长至2月2日。其后，共有24各省市、地区宣布延长复工时间，其中，广东省、上海市、浙江省、重庆市等宣布复工复产时间不得早于2月9日，湖北省复工复产时间更不得早于3月10日。

On 27th January 2020, the General Office of the State Council extended the Spring Festival holiday from 31st January to 2nd February. Later, a total of 24 cities and regions extended the time for resumption of work. In particular, in Guangdong, Shanghai, Zhejiang, Chongqing, etc., the time of work and production shall not be resumed earlier than 9th February, while in Hubei, such time shall not be resumed earlier than 10th March.

虽然国家以及各省市、地区宣布复工复产时间，但为了防控新冠肺炎，各家企业纷纷在此基础上延长复工复产时间。再加上湖北省劳动人口到达其他省份工作需要自我隔离十四天，部分企业在疫情期间转为专注于国内防疫物资的生产、交通运输尚未完全恢复等因素，导致部分已签订的合同无法如期履行，甚至无法履行。

Despite the time of resumption of work and production announced by governments in all cities and regions, in order to prevent and control NCP, companies frequently had to extend their own time of resumption based on their concrete situation. Moreover, since

workers from Hubei Province were subject to 14-days self-isolation as of arrival in other provinces for work, some of companies shifted to production of domestic materials during NCP outbreak. Furthermore, transportation has not fully recovered. These situations and other factors resulted in delay or even failure of performance of some of the signed contracts.

三、中国政府对因新冠肺炎爆发导致企业无法履行合同的意见

3. Chinese Government Opinion on Failure of Performance of Contract by Companies caused by NCP

中国政府机关响应这个主要新冠病毒问题。2020年2月10日，全国人大常委会法工委发言人、研究室主任臧铁伟在回答记者提问时明确指出：当前我国发生了新型冠状病毒感染肺炎疫情这一突发公共卫生事件。为了保护公众健康，政府也采取了相应疫情防控措施。对于因此不能履行合同的当事人来说，是由不能预见、不能避免并不能克服的不可抗力引起。根据合同法的相关规定，因不可抗力不能履行合同的，根据不可抗力的影响，部分或者全部免除责任，但法律另有规定的除外。

The Chinese Government agencies reacted to this major coronavirus problem. On 10th February 2020, Zang Tiewei, spokesman of the Standing Committee of the National People's Congress and director of its Research Office, specified in his response to a reporter's question that the outbreak of NCP in China is a public health emergency. In order to protect public health, the government has also taken corresponding measures to prevent and control the outbreak. For parties who are therefore unable to perform their contracts, if it is the result of an unforeseeable, unavoidable and insurmountable act then, pursuant to the relevant provisions of the *Contract Law*, if a contract cannot performed due to force majeure, depending on the influence of force majeure, they shall be exempt from partial or total liability, unless otherwise provided for by law.

2020年2月26日住房和城乡建设部办公厅下发《住房和城乡建设部办公厅关于加强新冠肺炎疫情防控有序推动企业开复工工作的通知》，其中第（五）项提到加强合同履行变更管理，疫情防控导致工期延误，属于合同约定的不可抗力规定的情形。另外还提到，地方各级住房和城乡建设事务主管部门要引导企业加强合同工

期管理，根据实际情况依法与建设单位协商合理顺延该合同工期。停工期间增加的费用，由发承包双方按照有关规定协商分担。因疫情防控增加的防疫费用，可计入工程造价；因疫情造成的人工、建材价格上涨等成本，发承包双方要加强沟通，按照合同约定的调价方法调整合同价款。地方各级住房和城乡建设事务主管部门要及时做好跟踪测算和指导工作。政府也在鼓励双方预测根据不可抗力责任协商修改建设合同。

On 26th February 2020, General Office of Ministry of Housing and Urban-Rural Department issued the *Notice of Enhancement on Prevention and Control of the NCP Outbreak and Orderly Facilitation on Resumption of Work for Companies*; in order to strengthen the management of changes in performance of contracts, the delay of construction during prevention and control of the outbreak shall be subject to the force majeure provisions agreed to in their contract. In addition, the Notice also states, the competent departments of housing and urban-rural affairs at all levels of local governments shall strengthen their management of construction periods in their contracts, and negotiate with construction companies with respect to a proper delay of this period of construction in contracts based on the actual situation and pursuant to law. The costs and expenses increased during the suspension of construction shall be split between both parties' in accordance with the relevant regulations. The fees for prevention and control of the outbreak may be incorporated in the price of construction; in terms of increase in costs of human labor, price of material, etc. caused by the outbreak on both parties in construction contracts who shall strengthen their communication and adjust the contract price based on the methods of adjustment of price set forth in contracts. The competent departments of housing and urban-rural affairs at all levels of local governments shall promptly and properly track, calculate and provide instructions for this matter. The government is also encouraging parties to negotiate revisions of construction contracts presumably pursuant to force majeure liabilities.

四、“不可抗力”的法律依据

4. Legal Basis of Force Majeure

正如下文讨论，在一些重要法律及司法解释中可以找到不可抗力原则的法律基础。

The legal foundation for the principles of force majeure in Chinese law are found in certain important laws and Supreme Court Interpretations as we shall discuss below.

a) 《民法总则》

The General Provisions of the Civil Law

《民法总则》第一百八十条规定：因不可抗力不能履行民事义务的，不承担民事责任。法律另有规定的，依照其规定。

不可抗力是指不能预见、不能避免且不能克服的客观情况。

The General Provisions of the Civil Law, Article 180 provides that: Where the non-performance of civil obligations is caused by force majeure, no civil liability shall arise therefrom, except as otherwise provided for by any law.

Force majeure means any objective circumstance that is unforeseeable, inevitable, and insurmountable.

《民法总则》第一百九十四条规定：在诉讼时效期间的最后六个月内，因下列障碍，不能行使请求权的，诉讼时效中止：（一）不可抗力；自中止时效的原因消除之日起满六个月，诉讼时效期间届满。

The General Provisions of the Civil Law, Article 194 provides that: The prescriptive period shall be suspended if during the last six months of the period if a claim cannot be filed for any of the following obstacles:

(1) a force majeure;

The prescriptive period shall expire six months after the day when the obstacle causing the suspension is eliminated.

b) 《合同法》

The Contract Law

《合同法》第九十四条规定：有下列情形之一的，当事人可以解除合同：

(一) 因不可抗力致使不能实现合同目的;

The *Contract Law*, Article 94 provides that the parties to a contract may terminate the contract under any of the following circumstances:

(1) it is rendered impossible to fulfil the purposes of the contract due to an event of force majeure;

《合同法》第一百一十七条规定：因不可抗力不能履行合同的，根据不可抗力的影响，部分或者全部免除责任，但法律另有规定的除外。当事人迟延履行后发生不可抗力的，不能免除责任。

本法所称不可抗力，是指不能预见、不能避免并不能克服的客观情况。

The *Contract Law*, Article 117 provides that: A party who is unable to perform a contract due to force majeure is exempt from liability in part or in whole in light of the impact of the event of force majeure, except as otherwise provided by law. Where an event of force majeure occurs after the party's delay in performance, that is not exempt from such liability.

For purposes of this *Law*, force majeure means any objective circumstances which are unforeseeable, unavoidable and insurmountable.

《合同法》第一百一十八条规定：当事人一方因不可抗力不能履行合同的，应当及时通知对方，以减轻可能给对方造成的损失，并应当在合理期限内提供证明。

The *Contract Law*, Article 118 provides that: If a party is unable to perform a contract due to an event of force majeure, it shall timely notify the other party so as to mitigate the losses that may be caused to the other party, and shall provide evidence of such event of force majeure within a reasonable period.

c) 《公司法》

The *Company Law*

《公司法》第九十条规定：发起人应当在创立大会召开十五日前将会议日期通知各认股人或者予以公告。创立大会应有代表股份总数过半数的发起人、认股人出

席，方可举行。创立大会行使下列职权：（七）发生不可抗力或者经营条件发生重大变化直接影响公司设立的，可以作出不设立公司的决议。创立大会对前款所列事项作出决议，必须经出席会议的认股人所持表决权过半数通过。

The *Company Law*, Article 90 provides that: The promoters shall notify all subscribers or make an announcement 15 days prior to convening of the inaugural meeting, which may be held only if attended by the promoters and subscribers representing more than half of the total number of shares.

The following functions and powers shall be exercised at an inaugural meeting:

(7) if force majeure or a major change in business conditions occurs and directly affects the establishment of the company, a resolution of not establishing the company may be passed.

For the inaugural meeting to pass resolutions concerning the matters listed in the preceding paragraph, they must be adopted by more than half of the voting rights held by the subscribers in attendance.

d) 《民事诉讼法》

The Civil Procedure Law

《民事诉讼法》第七十三条规定：经人民法院通知，证人应当出庭作证。有下列情形之一的，经人民法院许可，可以通过书面证言、视听传输技术或者视听资料等方式作证：（三）因自然灾害等不可抗力不能出庭的；

The *Civil Procedure Law*, Article 73 provides that: A witness shall appear in court and give testimony upon summons from the people's court. In any of the following circumstances, upon approval of the people's court, testimonies may be given in the form of written testimonies, audio-visual transmission technology or audio-visual materials:

(3) failing to appear in court because of such force majeure as natural disasters;

e) 《最高人民法院关于适用<中华人民共和国民事诉讼法>的解释》（“《民事诉讼法解释》”）

The Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (the "Interpretation of Civil Procedure Law")

《民事诉讼法解释》第四百六十条规定：民事诉讼法第二百二十三条规定的正当理由，包括：

- （一）因发生意外事件或者不可抗力致使利害关系人无法知道公告事实的；
- （二）利害关系人因被限制人身自由而无法知道公告事实，或者虽然知道公告事实，但无法自己或者委托他人代为申报权利的；
- （三）不属于法定申请公示催告情形的；
- （四）未予公告或者未按法定方式公告的；
- （五）其他导致利害关系人在判决作出前未能向人民法院申报权利的客观事由。

The Interpretation of Civil Procedure Law, Article 460 provides that "Justifiable reasons" as mentioned in Article 223 of the Civil Procedure Law shall include the following reasons:

- (1) an interested party is unable to know the facts of a notice because of the occurrence of an accident or an event of force majeure;
- (2) An interested party is unable to know the fact of an announcement because his or her personal freedom is restricted, or an interested party knows the fact of an announcement but is unable to declare claims personally or through an agent;
- (3) It is not a statutory circumstance under which an application for issuance of an announcement to urge declaration of claims may be filed;
- (4) No announcement is issued or an announcement is not issued in a statutory manner;
- (5) Any other fact causing an interested party's failure to declare claims to the people's court before a judgment is entered.

f) 《最高人民法院关于严格规范民商事案件延长审限和延期开庭问题的规定》
（“《延长审限规定》”）

The Provisions of the Supreme People's Court on Strictly Regulating the Issues on Extending the Time Limit for Trial and Postponing the Hearing for Civil and Commercial Cases (the “Provisions on Statute of Limitations”)

《延长审限规定》第二条规定：民事诉讼法第一百四十六条第四项规定的“其他应当延期的情形”，是指因不可抗力或者意外事件导致庭审无法正常进行的情形。

The Provisions on Statute of Limitations, Article 2 provides that: “Continuance shall be otherwise granted” as mentioned in subparagraph (4) of Article 146 of the Civil Procedure Law means that a court session cannot be normally held for a force majeure or accident.

《延长审限规定》第五条规定：人民法院开庭审理民商事案件后，认为需要延期开庭审理的，应当依法告知当事人下次开庭的时间。两次开庭间隔时间不得超过一个月，但因不可抗力或当事人同意的除外。

The Provisions on Statute of Limitations, Article 5 provides that: A people’s court holding court session to hear a civil or commercial case and deeming a continuance necessary shall notify the parties of the time of the next court session according to the law. The interval between two court sessions shall not exceed one month, except due to force majeure or with the consent of the parties.

g) 最高人民法院关于适用《中华人民共和国民事诉讼法》执行程序若干问题的解释（“《执行程序解释》”）

The Interpretation of the Supreme People's Court of Several Issues concerning the Enforcement Procedures in the Application of the Civil Procedure Law of the People's Republic of China (the “Interpretation on Enforcement Procedures”)

《执行程序解释》第二十七条规定：在执行时效期间的最后六个月内，因不可抗力或者其他障碍不能行使请求权的，申请执行时效中止。从中止时效的原因消除之日起，申请执行时效期间继续计算。

The *Interpretation on Enforcement Procedures*, Article 27 provides that: Where, in the last 6 months of the time limitation for the submission of an application for enforcement, the right of claim cannot be exercised due to any force majeure or other obstacle, the time limitation for the submission of an application for enforcement shall be suspended. It shall continue being counted from the day when the cause of suspension of the time limitation disappears.

五、中国高级法院对因新冠肺炎爆发导致企业无法履行合同的解释

5. Chinese High Courts' Interpretation of Failure of Performance of Contracts by Enterprises as a result of the Outbreak of NCP

2020年2月10日，浙江高级人民法院发布《关于规范涉新冠肺炎疫情相关民事法律纠纷的实施意见（试行）》。其中，第二项第3条表明，确因政府及有关部门为防控新冠肺炎疫情而采取行政措施导致合同不能履行，或者由于疫情的影响致使合同当事人根本不能履行而引起的纠纷，当事人主张减轻或者免除自身的法律责任的，应当依法按照《中华人民共和国合同法》第一百一十七条和第一百一十八条的规定妥善处理。

On 10th February 2020, the Zhejiang High People's Court issued the *Implementation Opinion (Trial) on Regulation on Civil Legal Disputes related to the NCP Outbreak*, Subsection 3 of Section 2 states, if the contract cannot be performed due to administrative measures taken by the government and relevant departments to prevent and control the outbreak of NCP, or if parties to contracts are absolutely unable to perform the contracts due to the impact of the outbreak, for which the parties concerned claim reduction or relief from their legal liabilities, such cases shall be properly handled pursuant to Articles 117 and 118 of the *Contract Law* of the People's Republic of China.

2020年2月17日，上海高院关于涉新冠肺炎疫情案件法律适用问题的系列问答（二）中，对于“新冠肺炎疫情是否属于不可抗力？”问题的回答是：“根据《中华人民共和国民法总则》第一百八十条和《中华人民共和国合同法》第一百一十七条的规定，新冠肺炎疫情被认定为突发公共卫生事件后，为保护人民群众身体健康和生命安全，政府及有关部门采取了相应疫情防控措施。对于因此不能履行合同或不能及时行使权利的，新冠肺炎疫情发生宜认定属于不能预见、不能避免并不能克服的不可抗力。”

On 17th February 2020, with respect to the application of laws in cases involving the NCP outbreak (II): “Is NCP outbreak subject to force majeure?”, Shanghai High People’s Court replied, “Pursuant to Article 180 of the *General Provisions of the Civil Law of the People’s Republic of China* and Article 117 of the *Contract Law of the People’s Republic of China*, after the NCP outbreak was identified as a public health emergency, in order to protect the health and safety of people, governments and the relevant government departments have taken corresponding measures to prevent and control the outbreak. If therefore these result in failure of performance of contracts or exercise of rights in a timely manner, the NCP outbreak shall be held as unforeseeable, inevitable, and insurmountable force majeure.”

2020年2月20日，广西壮族自治区高级人民法院发布《关于审理涉及新冠肺炎疫情民商事案件的指导意见》，要求不可抗力的构成应同时具备以下要件，即合同已成立、尚未履行完毕；发生了不能预见、不能避免且不能克服的客观情况；因客观情况的发生导致合同义务不能履行。认定不可抗力的关键要素在于判断当事人主张的不可抗力免责事由是否成立，不仅考虑疫情发生是否构成不可抗力，还要结合具体个案，考虑是否同时满足“不能预见、不能避免、不能克服”的要件以及债务人是否履行通知义务和举证义务。

On 20th February 2020, Guangxi Zhuang Autonomous Region High People's Court issued the *Guidance on Review of Civil and Commercial Cases involving the NCP Outbreak*, where it requires that cases of force majeure shall be subject to all the following elements at the same time, namely, i) the contract existed but performance is incomplete;

ii) there are objective situations that is unforeseeable, inevitable, and insurmountable; and
iii) the contractual obligations may not be fulfilled due to the occurrence of such objective circumstances. The key element of confirming force majeure is to determine whether the cause of action claim by the parties concerned for relief from force majeure is valid. We shall not only consider whether the outbreak constitutes force majeure, but also consider whether the case satisfies the "unforeseeable, inevitable, insurmountable" elements and whether the obligor has fulfilled its obligations of notice and burden of proof.

其实不难可以推测中国政府以及法院以“不可抗力”的相关条款解决因新冠肺炎导致合同履行不能的问题。早在 2003 年，最高人民法院出台司法解释，规定“因政府及有关部门为防治“非典”疫情而采取行政措施直接导致合同不能履行，或者由于“非典”疫情的影响致使合同当事人根本不能履行而引起的纠纷，按照《中华人民共和国合同法》第一百一十七条和第一百一十八条的规定妥善处理。”²

In fact, it is not difficult to speculate that the related provisions of “force majeure” were provided by the Chinese government and courts to solve the issues of failure of performance of contracts due to the NCP outbreak. In the early 2003, the Supreme People’s Court issued a judicial interpretation, providing that “disputes arising from failure of performance of contracts directly resulting from administrative measures taken by governments and the relevant departments to prevent and control SARS outbreak, or absolute failure of performance by parties to contracts caused by SARS outbreak, shall be properly settled pursuant to Articles 117 and 118 of the *Contract Law of the People’s Republic of China*.”¹

六、“不可抗力”的证明

6. Proof of Force Majeure

² 《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》第三项第(三)条

Section 3.3 of Notice of the Supreme People’s Court on Proper Review, Judgement and Enforcement of People’s Courts Pursuant to Laws during Prevention and Treatment of Contagious SARS Outbreak

根据《合同法》第一百一十八条的规定，当事人一方因不可抗力不能履行合同的，负有通知和证明的义务。

Pursuant to Article 118 of the *Contract Law*, a party shall have the obligation of notice and proof if it is unable to perform the contract due to force majeure.

具体来说，不可抗力事件发生后，企业应当及时书面通知相对方，以减轻损失。同时在合理期限内向对方提供不可抗力发生的证明材料，用来证明不可抗力发生的时间、地点、程度等造成合同不能履行的情况。另外，为减少、预防纠纷，对于不可抗力所发生的事实之证据加以固定，以免证据灭失。

Specifically, as of the occurrence of force majeure, an enterprise shall promptly inform the other party, in writing, to reduce losses, and at the same time, shall provide supporting materials for force majeure within a reasonable period, to prove the failure of performance of contract caused by time, location, and degree of force majeure. In addition, in order to reduce or prevent disputes, the evidence that proves the facts of force majeure shall be preserved and shall avoid being destroyed.

如国际贸易合同受疫情影响而无法履行的，企业在这种情况下可以向中国国际贸易促进委员会（“贸促会”）申请出具不可抗力证明，即新型冠状病毒感染的肺炎疫情不可抗力事实性证明。“不可抗力事实性证明”是指由中国贸促会及其授权的分、支会应申请人之邀，对与不可抗力有关的事实作出证明，企业可以凭借该证明与客户沟通协商，以部分或全部免除无法履行、不完全履行或迟延履行合同的违约责任。

If an international trade contract is affected by an outbreak of disease and cannot be fulfilled, a company may apply to the China Council for the Promotion of International Trade (“CCPIT”) to produce proof of force majeure in this case, a proof of the facts of force majeure as the result of the NCP outbreak. “Proof of facts of force majeure” means that the Trade Promotion Council and its authorized sub-branches and branches, at the invitation of the applicants, shall evidence the facts related to force majeure, by which the company may communicate and negotiate with its customers for partial or complete relief from liability for breach of contract by failure of performance, incomplete performance or delay in performance of the contract.

2020年2月2日，贸促会向浙江湖州某汽配制造企业出具全国首份新型冠状病毒肺炎疫情不可抗力事实性证明书。该浙江湖州某汽配制造企业为法国标致公司非洲工厂转向机壳体供货商，受本次疫情影响，无法按时向境外客户交付产品。如不能及时提供无法履行合同原因的合法证明，企业不仅要承担价值240万人民币的直接合同损失，还可能会因导致其合约方生产线停产两周造成约3000万人民币的损失被追偿。根据国际贸易惯例和《中国国际贸易促进委员会章程》，贸促会为其出具不可抗力证明。

On 2nd February 2020, CCPIT issued the first national certificate of force majeure of the outbreak of NCP to an auto parts manufacturing company in Huzhou, Zhejiang Province. The auto parts manufacturing company in Huzhou, Zhejiang Province is a supplier of steering gear housing for the French Peugeot's factory in Africa. Due to the outbreak, it was unable to deliver products to overseas customers on time. If legal evidence of the reasons causing the failure to perform the contract may be not provided in time, the company would not only have to bear the direct contract losses of 2.4 million yuan, but may also be required to compensate its contracting party losses of about 30 million yuan since it caused a two-week shutdown of the other party's production line. In accordance with the international trade practices and the Constitution of the China Council for the Promotion of International Trade, the Council issued a certificate of force majeure to the company.

截至2020年2月27日，贸促会已累计为企业出具与新冠肺炎疫情相关的不可抗力事实性证明4318件，涉及合同金额约3308亿元人民币。

As of 27th February 2020, the Trade Promotion Council had issued a total of 4,318 certificates of force majeure related to the outbreak of the NCP for companies, involving contract amount of 330.8 billion yuan.

贸促会出具的不可抗力证明仅适用于国际贸易合同，对于国内企业因受疫情影响不能履行合同或者不能如期履行合同，公证机构可以为其办理不可抗力公证，并为企业因不可抗力停产停工的事实及有关损失的事实办理证据保全。

The force majeure certificates issued by the Trade Promotion Council only apply to international trade contracts. For domestic companies that are unable to perform the contracts, or cannot perform the contracts on schedule due to the impact of the outbreak of the NCP, the notary institutions may conduct notarization of the facts of force majeure for the companies and provide preservation of evidence for the fact that the company is suspended from production due to force majeure and the facts of the relevant losses.

国内公证机构可提供的事实事件公证类型包括：（1）不可抗力公证，证明某时某地发生了某一事件，并造成了某种结果。；（2）保全证据公证，根据当事人的申请，公证机构依法对易于灭失或以后不易取得的证据，进行提取、收存、固定、描述的公证活动，例如，对政府等各类官方渠道等发布的信息或者网络上散布的不利于企业形象和发展的言论进行网页证据保全公证、对没有证据、无法证明的事实进行证人证言保全公证、对因疫情影响，企业停工、停产等情况办理现状证据保全公证、对企业通知、协商等邮件往来、微信往来、短息往来办理各类电子数据证据保全、对于企业通知，也可以采取邮寄送达公证的方式，可以证明企业及时地将不可抗力事件及其产生的法律后果第一时间通知了对方，尽最大可能避免了对方的损失，履行了及时通知的义务，也可以有效避免了因对方拒收或拒不承认收到相关通知而导致的风险。

Notaries in China can provide notarization of factual events including: (1) force majeure notarization, proving that an event has occurred somewhere at some time and causing some kind of result; (2) notarization of preservation of evidence. According to the application of a party, notary institutions extract, store, fix, or describe evidence that can be easily lost or difficult to obtain in the future pursuant to the law on evidence. For example, it provides notarization to preserve the website evidence of information issued by the government and other official channels, or comments disseminated on the Internet. As for facts that lack evidence or cannot be proved, it will provide notarization for witness statements. Evidence of current situations due to the impact of the outbreak, such as suspension of work and productions of the companies, can also be notarized. As for a company's notices, negotiations and other mail exchanges, WeChat messages, text exchanges will be subject to all kinds of electronic data evidence preservation. A

company's notice can also be delivered to a notary by mail , to prove that the company has promptly notified the other party of the force majeure event and the legal consequences thereof, and use its best efforts to avoid the losses on the other party. Such action confirmed the obligation of prompt notification, and may also effectively avoid the risks caused by the other party's refusal or denial of receipt of relevant notice.

七、“不可抗力”与“情势变更”

7. Force Majeure and Change of Circumstance

根据《合同法》第九十四条第一项，因不可抗力致使不能实现合同目的，当事人可请求解除合同。另外，根据《合同法司法解释二》第二十六条的规定：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，并结合案件的实际情况确定是否变更或者解除。

Pursuant to Article 94. 1 of the *Contract Law*, if the purposes of a contract may not be fulfilled due to force majeure, the parties may request termination of the contract. In addition, Article 26 of the *Judicial Interpretation of the Contract Law (II)* provides that the as of the existence of contract, in the event that the objective situation has a material change that is unforeseeable, not caused by force majeure and not subject to commercial risk, and continual performance of the contract may be clearly unfair to a party, or may result in failure to achieve the purposes of the contract. When such party requests a people's court to change or terminate the contract, the people's court shall determine whether to change or terminate the contract in accordance with the principle of fairness and in the light of the actual situation of the case.

《合同法》第九十四条将合同解除，双方不再履行合同，而《合同法司法解释二》第二十六条则对合同效力赋予选择权，可以解除，也可以变更后继续履行。但2009年5月13日实施的《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)》第二十六条有一个显著特点，即将不可抗力排除在情势变更之外。

Article 94 of the *Contract Law* provides that as of termination of a contract, the parties cease to perform the contract, while Article 26 of the *Judicial Interpretation of Contract Law (II)* grants the rights to choose between termination of a contract and modifications for continual performance of a contract. However, Article 26 of *the Judicial Interpretation of Contract Law (II)* has a distinctive feature, namely, force majeure is not part of the law of change of circumstances.

在各类合同项下无论是物的给付、行为的给付抑或是金钱的给付，都可能因不可抗力造成严重的履行困难，如债权人此时坚持要求债务人履行合同，则可能给债务人带来严重的不利。但不同的案例中，运用不可抗力解除合同或许可以减少债务人的损失，但不一定是最佳方案。

The payment for objects, actions or money under various types of contracts may face serious difficulties in performance due to force majeure. If creditors insist on the debtors performing the contracts at such time, it may cause serious disadvantage to the debtors. In different cases, however, the application of force majeure for termination a contract may reduce the debtors' losses. Nevertheless, it is not necessarily the best option.

例如，因疫情而停止营业的餐厅经营者仍需负担高额房屋租金给付义务，此时的金钱给付虽非不能履行，但其履行无疑将给债务人造成沉重债务负担，进而还可能引发一系列社会问题，难谓公平。此类案件在 2003 年 SARS 病毒肆虐时既已大量出现，而彼时法院也曾以情势变更为由判令出租人适当降低租金或者延期给付租金，以纾解承租人所面临的经济困境。山东省烟台市中级人民法院对于“李培艳、莱州市永安路街道西关居民委员会追偿权纠纷”作出二审民事判决⁴，该判例认定“非典”疫情系不可预知的灾害，上诉人李培艳承租的宾馆停业，造成经济损失是客观存在的，并有西关居委会两委成员签字确认，该损失超出了市场风险的范围，原审适用情势变更原则适当减免部分租赁费，于法有据。

4 案号：(2018)鲁 06 民终 268 号

4. Case Code: (2018) Shandong 06 Civil Final Judgement No. 268

For example, restaurant operators who had to cease operations due to an outbreak of disease were still bearing their obligation of payment of rent. At this time the obligation of payment is not impossible to perform, but its performance may cause a heavy burden of debt on the debtor, which may also lead to social problems and unfairness. A large number of such kind of cases were found when the SARS virus raged in 2003. At that time the courts also ordered the lessors to reduce or defer the rent on the grounds of a change of circumstances in order to alleviate the economic burden on the lessees. Yantai City Intermediate People's Court of Shandong Province made a civil judgement⁴, in the case of "dispute over right of compensation between Li Peiyan and Xiguan Residents Committee of Yong'an Road Street, Laizhou City", that as the "SARS" epidemic was an unpredictable disaster, the fact that the hotel rented by the Appellant Li Peiyan was closed, resulting in objective economic losses, which was signed and confirmed by two members of the Committee. The losses were beyond the scope of market risk. Therefore, the principle of change of circumstances to appropriately reduce partial lease fees applied in the original hearing was based on fact and evidence.

可见，为平衡利益，维持合同正义，法律授权法官遵循公平原则审慎考量合同履行所处的客观状况和当事人的利害关系，以决定合同命运。

It can be seen that in order to balance the interests and maintain justice in contracts, the law authorized the judge to carefully consider the objective situation of performance of contracts and the interests of the parties so as to determine the fate of the contracts.

2003年“非典”疫情期间，根据最高人民法院及地方各级人民法院对相关合同纠纷的裁判结果，“非典”疫情在部分案件中被认定为“不可抗力”，而在其它部分案件中则被认定为情势变更。该处理结果与2003年6月11日颁布并实施的《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》（“《通知》”）中的观点并无二致。根据该《通知》的规定，因政府及有关部门为防治“非典”疫情而采取行政措施直接导致合同不能履行，或者由于“非典”疫情的影响致使合同当事人根本不能履行而引起的纠纷，按照《中华人民共和国合同法》第117、118条的规定妥善处理。即，最高院明确了，因“非典”疫情导致合同不能履行或致使合同当事人根本不能履行的，即可视之为“不可

抗力”。而该《通知》同时规定，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。即，当“非典”疫情导致按原合同履行对一方当事人的权益有重大影响，可以将“非典”疫情认定为“情势变更”，适用公平原则作出裁判。

During the SARS outbreak in 2003, according to the results of judgement issued by the Supreme People's Court and local people's courts at all levels on the relevant contract disputes, the SARS outbreak was recognized as a "force majeure" event in some cases, while in others it was determined to be a change of circumstances. The results of such determination were the same as the opinion in the *Notice of the Supreme People's Court on the Proper Review and Enforcement of the People's Courts in accordance with Law during Prevention and Control of Infectious SARS Outbreak* (the "**Notice**") which was enacted and enforced on 11th June 2003. In accordance with the Notice, disputes directly arising from failure of performance of contracts caused by administrative measures taken by the government and relevant departments to prevent and control SARS outbreak directly resulted in the non-performance of the contract, or arising from absolute failure of the parties to perform the contract due to the impact of the SARS outbreak, shall be properly handled pursuant to Articles 117 and 118 of the *Contract Law of the People's Republic of China*. That is, the Supreme Court made it clear that if the contract cannot be performed or leads to absolute failure of performance of the parties due to the SARS outbreak, it can be considered as a result of "force majeure". The *Notice* also provides that due to the "SARS" outbreak, contract disputes, in which the performance in accordance with the original contract has a material impact on the rights and interests of a party, may be settled based on the specific circumstances and the principles of fairness. That is, if performance in accordance with the original contract had a material impact on the rights and interests of a party due to the SARS outbreak, the SARS outbreak in this case can be recognized as a "change of circumstances", and the principles of fairness shall be applied to make a decision.

该规定要求法院根据案件的具体情况，根据公平原则，适用情势变更和不可抗力。也就是说，合同因非典疫情不能履行或履行有瑕疵时，法院有可能认定为不可抗力或情势变更引起的避免履行的法律基础。

This provision required the courts to apply changes of circumstances and force majeure based on specific circumstances of a case and in accordance with the principles of fairness. In other words, if a contract cannot be performed or its performance was defective due to the SARS outbreak, the courts may determine the legal basis for excuse from performance either as a result of force majeure or a change of circumstances.

八、“非典”时期不可抗力案件

8. Force Majeure Cases of “SARS” Period

A. “非典”疫情影响主要案件类型

Types of Major Case under Influence of SARS Outbreak

2003 年中国爆发的非典型肺炎疫情对当事人民事权利义务直接产生影响的案件将主要集中在合同案件领域，侵权案件领域，对诉讼时效的中止也会产生影响。

In 2003, cases under the SARS outbreak in China which had a direct impact on civil rights and obligations of parties mainly focused on contract cases and infringement cases; it also had impact on suspension of the statute of limitations.

非典型肺炎疫情导致的债务不能履行合同案件主要如下：

Some contract cases regarding failure of performance of obligations due to the SARS outbreak are discussed below:

(1) 商品买卖合同，例如债务履行期限在非典型肺炎疫情发作期间，因债务人员工患非典型肺炎或法院认为的普通类型疾病住院或被隔离、工厂转产等原因不能如期交付；或债务人本人患非典型肺炎住院、被隔离，无法如期履行合同。例如，当事人双方订立买卖毛巾的合同，卖方毛巾厂供应毛巾，交货日期为4月中旬。由

于非典型肺炎疫情爆发，毛巾厂按照政府的要求转产口罩，致其履行不能，毛巾厂不能履行原合同义务构成不可抗力。

Contracts for sale and purchase of goods, such as contracts where performance failed to be delivered on time due to hospitalization or isolation of the employees of the obligors, and other reasons caused by SARS, or it failed to be performed on time due to hospitalization or isolation of the obligors themselves suffering from SARS or a common type the courts considered. For example, the parties entered into a contract of purchase and sale for towels, where the seller's factory would supply towels to be delivered in mid-April. However, due to the SARS outbreak, the towel factory had to produce masks instead of towels pursuant to the requirements of the government, and thus it could not perform the contract. The failure of performance of original contractual obligations by the towel factory was subject to force majeure.

(2) 在非典型肺炎疫情期间租赁、承包酒店、旅店、商场从事餐饮服务业或其他法院认为的行业类型的合同。例如，承租人、承包人以非典型肺炎疫情发作期间客流量锐减为由要求出租人、发包人减免租金、承包金。例如，承租人承租出租人的房屋作酒店生意，因非典型肺炎疫情发作，客流量锐减，故要求出租人减免非典型肺炎疫情期间的租金。

Contracts of leasing or contracting hotels, inns, or shopping malls engaging in the catering service industry or another type of contract considered by the courts during the SARS outbreak. The lessees and contractors would require the lessors and the party issuing the contracts to reduce or exempt the rent and the fees for the contract on the grounds of significant decrease in customers during the SARS outbreak. For example, a lessee rented a house of a lessor for hotel business. Due to SARS outbreak, it faced sharp decline of customers. Therefore, it required the lessor to reduce the rent during SARS outbreak.

(3) 非典型肺炎疫情期间法院考虑的依附于债务人人身上的合同，如演出合同、出版合同、劳动合同、雇佣合同等。这类合同具有较强的人身依附性和不可代替性，必须由债务人亲自履行，一旦债务人患有非典型肺炎、或者因为被隔离、政府取缔大型演出等类似原因导致合同不能履行。

Contracts attached to the obligors themselves, such as performance contracts, publication contracts, labor contracts, employment contracts, etc. were considered by the courts during the SARS outbreak. Such contracts have strong personal attachment and irreplaceability, and they must be performed by the obligors in person. If the obligors suffer from SARS, or they faced isolation, ban by the government of large-scale performances or similar other reasons, this can result in their failure to perform the contracts.

非典型肺炎疫情期间旅游合同、运输合同、保管合同、中介合同等或其他法院认为的普通类型。例如，旅行社组织“五一”长假游，但因非典型肺炎疫情不得不取消。再如，因非典型肺炎疫情导致受托人迟延领取保管的财物等。

Tourism contracts, transportation contracts, custody contracts, intermediary contracts, etc. or another common type of contract received by the courts during the SARS outbreak. For example, a travel agency organized a tour during “the May Day” long vacation; however, the tour had to be canceled due to the SARS outbreak. Another example is that, a trustee had to delay receipt of property in custody due to the SARS outbreak.

(4) 工程承包合同，因在建项目大量使用民工，为防治非典型肺炎蔓延、传染，政府限制民工流动，或民工被隔离等原因造成工期延误，不能及时竣工。

Project contracts. Since a large number of workers were hired in project construction, in order to prevent and control the spread and infection of SARS, the government restricted the movement of workers; or if the isolation of workers for other reasons resulted in delay of construction, the projects could not be completed on time.

(5) 其他合同债务纠纷。如因为债务人患有非典型肺炎或被隔离，致使其无法交电话费、手机费等形成的消费领域的纠纷。

Other disputes on contractual obligations. For example, since the obligors suffered from SARS or had to be isolated, disputes on consumption such as failure to pay telephone bills or mobile phone charges arose.

B. 具体案例

Case Studies

根据《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》第三条规定：“（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。因政府及有关部门为防治“非典”疫情而采取行政措施直接导致合同不能履行，或者由于“非典”疫情的影响致使合同当事人根本不能履行而引起的纠纷，按照《中华人民共和国合同法》第一百一十七条和第一百一十八条的规定妥善处理”。

Article 3 of the *Notice of the Supreme People's Court on the Proper Review and Enforcement of the People's Courts in accordance with Law during Prevention and Control of Infectious SARS Outbreak* reads, “(3) Due to the “SARS” outbreak, contract disputes, in which the performance in accordance with the original contract has a material impact on the rights and interests of a party, may be settled based on the specific circumstances and the principles of fairness. Disputes directly arising from failure of performance of contracts caused by administrative measures taken by the government and relevant departments to prevent and control SARS outbreak directly result in the non-performance of the contract, or arising from absolute failure of the parties to perform the contract due to the impact of the SARS outbreak, shall be properly handled pursuant to Articles 117 and 118 of the *Contract Law of the People's Republic of China*”.

非典期间，认定因不可抗力事件导致合同不能履行，违约方有权根据不可抗力事件造成影响的程度、范围等免除自己的违约责任，但这并不意味着违约方无需承担所有的违约责任，如案例一。另外，法院有可能根据公平原则要求合同双方公平地承担合同不能履行所带来的损失，如案例二。不能履行合同一方主张因非典疫情该不可抗力时间导致履行合同不能，并主张因不可抗力免责的，法院也可能驳回该主张，因为法院通常受政府政策而非法律的引导。

During SARS outbreak, if it was determined as failure of performance due to force majeure events, the breaching party had the right to release itself from liabilities for breach of contract according to the extent and scope of the impact of the force majeure event. However, this does not mean that the breaching party would not be liable for all the

breaches, as provided in Case 1. In addition, the courts may, based on the principles of fairness, require both parties to bear the losses arising from failure of performance in a fair way, as provided in Case 2. Even though the party that cannot perform the contract may claim that due to SARS outbreak that led to failure to perform their obligation under the contract and thereby assert exemption from liability as a result of force majeure, the courts may reject such a claim since courts are often guided by government policy rather than the law.

案例一 殷文敏与三亚长源物业发展有限公司商品房预售合同纠纷上诉案

Case 1: Yin Wenmin v. Sanya Changyuan Property Development Co., Ltd. in matter of Appeal on Dispute over Presale Commercial Housing Contract

案情摘要:

Case Summary

2002年11月10日,殷文敏与长源公司签订《三亚长源商贸广场精品店购销合同书》,约定购买一房屋。出卖人应在2003年6月30日前,依照国家及地方政府的有关规定,将已经验收合格并符合合同约定的商品房交付买受人,但遇下列特殊原因,除双方同意解除合同或变更合同外,出卖人可据实予以延期:1、遭遇不可抗力,且出卖人在发生之日起15日内告知买受人的,2、政府干预性影响。2004年3月12日长源公司向殷文敏交付房屋,比合同约定的交房日期迟延了256天。

On 10th November 2002, Yin Wenmin and Changyuan Company entered into the Purchase and Sale Contract for a Boutique Shop in Sanya Changyuan Business Plaza, where they agreed on purchase of a house. The seller was to deliver to the buyer a qualified commercial house already inspected and accepted, in compliance with the Contract before 30th June 2003, pursuant to the relevant provisions of the State and the local government. In the event of the following special situations, unless they otherwise agreed to terminate or change the Contract, the seller may be granted an extension: 1) the seller encounters force majeure, and informs the buyer within 15 days as of the date of occurrence; 2) the

government imposes intervening influence. On 12th March 2004, Changyuan Company delivered the house to Yin Wenmin, which was 256 days later than the date set forth in the Contract.

一审三亚市城郊人民法院认为：

At the first hearing, the Sanya City Suburban People's Court held:

殷文敏与长源公司于 2002 年 11 月 10 日签订的《三亚长源商贸广场精品店购销合同书》是双方当事人的真实意思表示，合同合法有效，应受法律保护。长源公司迟于合同约定的时间 256 天才交房，已构成违约，应承担违约责任。殷文敏迟于合同约定的时间交付房款也构成违约，也应承担违约赔偿责任。

That it was the genuine intention of the parties Yin Wenmin and Changyuan Company to enter into the Purchase and Sale Contract for the Boutique Shop in Sanya Changyuan Business Plaza on 10th November 2002; thus, the Contract is legal and valid, and shall be protected by law. Changyuan Company delivered the house 256 days later than the agreed time set forth in the Contract, which is held to be breach of contract. Therefore, Changyuan Company shall bear liability for breach of contract. Yin Wenmin made payment for the house later than the time agreed in the Contract, which also is held to be breach of contract, and shall bear the liabilities for breach of contract.

2003 年 4 月，我国暴发了大规模的 " 非典 " 疫情，国家禁止人员随意流动，海南省虽然未发现一例 " 非典 " 病例，但也采取了禁止录用岛外民工的防范措施，鉴于海南省建筑行业的民工大部分来自省外，" 非典 " 疫情的流行对海南省的建筑行业还是有一定的影响，长源公司以因 " 非典 " 禁止省外技术工人流动作为迟延交房的抗辩理由有事实根据和法律依据，应予采信，但日期的计算应从三亚市建设局 2003 年 5 月 8 日禁止录用岛外民工时开始至合同约定的交房时间即 2003 年 6 月 30 日止，共计 52 天。

In April 2003, due to extensive SARS outbreak in China, the State prohibited the random movement of people. Although no cases of SARS were found in Hainan Province, prohibiting measures were also taken on recruitment of migrant workers outside the Island.

Since most of the migrant workers engaging in construction industry in Hainan Province were from the outside, SARS outbreak certainly had impact on the construction industry in Hainan Province. Changyuan Company's defense was that its delay was due to SARS. The prohibition of movement of skilled workers outside the Province caused delay in the delivery of the house, is supported by factual and legal basis, and shall be sustained. However, the calculation of the date shall begin on 8th May 2003 when Sanya City Construction Bureau prohibited recruitment of migrant workers from outside until the time of delivery of house agreed in the Contract, namely 30th June 2003, a total of 52 days.

长源公司迟延交房 256 天，但殷文敏仅诉求 254 天，多出的 2 天视为殷文敏自动放弃，予以许可。同时因 " 非典 " 和台风的影响导致长源公司迟延交房 60 天可以据实予以免责，长源公司应承担违约赔偿责任的天数为 194 天。

Changyuan Company delayed the delivery of housing for 256 days; however, Yin Wenmin only claimed for 254 days, as the extra 2 days were automatically waived by Yin Wenmin, which is accepted by this Court. At the same time, the Company will be released from liabilities for 60 days of delay of delivery set forth in the Contract due to the impact of SARS and Typhoon. Thus, Changyuan Company shall bear liability for breach of contract for 194 days.

二审三亚市中级人民法院认为：

In the second hearing, Sanya Intermediate People's Court held that:

对于 " 非典 " 疫情的影响，本院认为，该疫情的发生是不可预见、不可避免，并且在当时卫生医疗技术条件下为不可克服的，由此导致政府采取必要的行政措施禁止录用岛外民工。而在政府部门发文禁止录用岛外民工的期日之前，长源公司已与多家建筑企业签订施工合同，但由于 2003 年 4 月 " 非典 " 疫情在全国范围内的大规模暴发，各地均采取措施严格控制大量人员的随意流动，并且客观上本案涉及的标的物施工人员（民工）主要来自岛外，对民工流动的控制客观上导致了各建筑企业进场施工的迟延，应认定 " 非典 " 疫情对 " 天涯一方城 " 项目各项施工的完成构成不可抗力因素。同时三亚市政府职能部门就 " 非典 " 期间禁止录用岛外民工的通知也是属于合同所约定的政府干预性影响，因此长源公司可据此对 " 非典 " 期间

导致工期延误发生的迟延交房主张免责。"天涯一方城"项目各项装修工程的施工需要具有一定专业技术的工人从事。在长源公司已与各装修施工企业签订施工合同后，殷文敏主张这些施工企业完全可在海南本地招募人员，甚至长源公司可以在海南本地另行寻找施工企业完成施工，对于长源公司及各装修施工企业系过分苛求，理由不当，对其主张不予采纳。由于"非典"疫情发生于"天涯一方城"项目建设的装修阶段，政府发文禁止录用岛外民工至双方当事人合同约定的交房日期还有54天，而长源公司与各装修施工企业约定的合同工期最长的为50天，如未发生"非典"疫情，项目装修应在该合理期限内完成，因而计算"非典"疫情造成的交房迟延的免责时间应为疫情发生期间的全部（即2003年5月8日至2003年7月17日，共计71天）并补足被延误的合理施工工期54天，合计为125天。因此，由于"非典"疫情构成阻碍按期交房的不可抗力因素，根据双方合同约定应顺延交房时间至2003年7月17日后的第54天，即2003年9月9日止。

As for the impact of the SARS outbreak, this Court holds that the occurrence of the outbreak is unpredictable, inevitable and at that time, insurmountable under the conditions of health and medical technology, which led the government to take necessary administrative measures to prohibit recruitment of migrant workers from outside the island. Before the date when the government issued a ban on recruitment of migrant workers outside the island, Changyuan had entered into construction contracts with a number of construction companies. However, due to the extensive SARS outbreak in April 2003 in China, all kinds of measures had been taken to strictly control the random movement of large numbers of people at all locations, and, objectively, since the construction personnel (migrant workers) involved in this case were mainly from outside, the control on the flow of migrant workers objectively led to delay of all construction by various construction companies. Therefore, these measures shall be identified as force majeure factors for construction of "Tianya Yifang Cheng" caused by the SARS outbreak. At the same time, the notice issued by functional departments of the Sanya municipal government on prohibition of recruitment of migrant workers outside the island is also subject to the intervening influence of the government as set forth in the Contract. As a result, based on this provision, Changyuan Company can be released from delay of delivery of houses

caused by delay of construction due to the SARS outbreak. The construction of "Tianya Yifang Cheng" requires certain professional and technical workers. After execution of construction contracts between Changyuan Company and various decoration and construction companies, Yin Wenmin claimed that these construction companies could fully recruit people in Hainan, and Changyuan Company could even seek other local construction companies in Hainan for construction, which is harsh on Changyuan Company and the decoration construction companies. Such claim is unreasonable and cannot be accepted. As the SARS outbreak occurred during the decoration stage of construction of "Tianya Yifang Cheng", the date when the government issued a notice on prohibition of recruitment of migrant workers outside the island was 54 days from the date of delivery of the houses agreed to the Contract of the parties, while the construction period of Changyuan Company and the decoration and construction companies agreed to the contract shall last no more than 50 days. If there is no SARS outbreak, the decoration of the project should have been completed within a reasonable period. Thus, the relief period of delays caused by the SARS outbreak shall be the entire period of the outbreak (i.e., from 8th May 2003 to 17th July 2003, a total of 71 days), plus the reasonable construction period of 54 days, which was delayed, resulting in a total of 125 days. Therefore, as the SARS outbreak caused a force majeure factor that obstructed delivery of the house on time, the delivery of the house shall be extended until the 54th day after 17th July 2003, i.e. 9th September 2003, as agreed in the contract of the parties.

案例二 北京科技职业学院诉北京市昌平区精神卫生保健院联营合同案

Case 2: University For Science & Technology Beijing v. Mental Health Care Institution in Changping District, Beijing in matter of Joint Operation Contract

案情摘要

Case Summary

2001年8月30日,保健院为甲方、职业学院为乙方签订联合办学协议书,双方约定:甲、乙双方联合办学,甲方向乙方提供符合办学所需的23亩场地及场地上现有建筑(北楼、后北楼、东平房总计约5000平方米)并负责现有建筑防水维

修及重大自然损坏的修缮；甲方在乙方足额交纳水费、电费、暖气费的情况下，负责供水、供电、供暖；甲方协助乙方报装四部程控电话；协议履行期间甲方不参加乙方的教学及内部管理；协议履行期间，乙方不得将场地、建筑物用于非办学活动及转由他人使用，承担因办学需要对保健院的水、电、暖等设施改造、扩建、增容等全部费用；乙方按时、足额向甲方交纳基础设施费用，第一年定额 45 万元人民币，其后每年 9 月对基础设施费用进行一次修订，每年修订幅度不得超过 10%~15%，连增 5 年，合作期限 15 年；协议延续期间，如遇不可抗力，使甲、乙双方办学不能正常运转，双方均认为有必要终止协议时，本协议自然终止，双方互不承担协议责任。协议期满后，双方按原财产的隶属关系进行清算，根据各自的责任与义务承担各自的债权与债务。协议签订后，保健院向职业学院提供了办学场地、建筑设施，并履行了供水、供电、供暖的义务。职业学院在保健院提供的场地上新建了教室，并针对办学需要对原房屋进行了修缮、改造及装修，并对电力进行了增容。改造装修完成后职业学院招收学员进行教学。

On 30th August 2001, the Health Care Institution, as Party A and Technology University, as Party B, entered into an agreement of cooperation in education. The parties agreed that: Party A and Party B will cooperate in establishment of a school. Party A will provide Party B with 23 acres of space with existing buildings on the site (North Building, Rear North Building and East Bungalow, in total of 5000 m²) and will be responsible for maintenance of waterproof of the existing building and repair in case of major natural damages. While Party B will fully pay for water, electricity and heating, Party A shall be responsible to supply of water, electricity and heating. Party A will assist Party B to install four remote-controlled telephones. During performance of the Agreement, Party A shall not participate in Party B's teaching and internal management. During performance of the Agreement, Party B shall not use the site or building for non-school activities, nor shall it transfer it to others. Party B shall cover all the expenses for renovation, expansion and increase of capacity of water, electricity, heating and other facilities in the Health Care Institution necessary for operation of the school. Party B shall pay Party A infrastructure costs in full amount and on time. The first year Party B shall pay the fixed amount of ¥ 450,000. Subsequently, in September of each year, the infrastructure costs will be

revised once per year, and each annual revision shall not exceed an increase of 10% to 15% per year. Costs will continue to increase for 5 years, and the duration of cooperation will be 15 years. During survival of the Agreement, if the school jointly operated by Party A and Party B did not function normally due to force majeure, which the parties agree that it is necessary to terminate the Agreement, the Agreement will be automatically terminated, and neither of the parties will be held liable for the Agreement. As of expiration of the Agreement, the parties shall, in accordance with the affiliation of the original property, carry out liquidation and bear their respective claims and obligations in accordance with their respective responsibilities and obligations. As of execution of the agreement, the Health Care Institution provided Technology University with the space and construction facilities for education, and fulfilled its obligations of supply of water, electricity and heating. The Technology University had built new classrooms on the space provided by the Health Care Institution, and had repaired, renovated and decorated the original houses as required for the school, as well as increased the capacity of electricity. After renovation and decoration had been completed, the Technology University began to enroll students for classes.

2003年春季,北京地区爆发"非典"疫情。2003年5月7日,昌平区委、区政府决定征用双方联合办学的场地及建筑设施作为专门治疗"非典"的昌平区胜利医院。2003年5月13日,双方签订关于联合办学的补充协议,约定:2003年5月7日,在抗击"非典"斗争中,区委、区政府决定由北京市昌平区中医医院占用双方联合办学的校区(豆各庄1号)作为治疗"非典"医院,双方联合办学被迫暂时终止,现将有关问题达成协议如下:(1)在中医院抗击"非典"占用联合办学校区期间,保健院不再向职业学院收取任何费用;(2)在双方联合办学的期限上,从2003年5月7日开始至昌平中医医院撤出为止,按照中医医院实际占用时间,延长双方联合办学的期限;(3)职业学院自联合办学开始后,包括建设教室、装修房屋等共投入了260万元,经过了甲乙双方共同确认;(4)联合办学以来,乙方共支付甲方75.32万元费用(包括房屋占用费、水暖电费等),尚欠50.1848万元人民币,支付方式双方另行商定。(5)其他未尽事宜双方另行商定。该补充协议将双方联合办学使用房屋遗留问题的处理协议、关于校区改造投入资金情况、校区经费支出

情况作为附件。补充协议签订后，职业学院即将校区及附属设施交给昌平中医医院使用。政府部门及非典医院的经营者为了治疗"非典"的需要对校区进行了改造。2003年6月12日，昌平中医医院撤出，由昌平区医院继续使用原设施经营昌平区胜利医院。在政府部门占用双方联合办学的场地及设施后，职业学院另行租用了其他场地安排学员继续进行学习。

In the spring of 2003, the SARS outbreak occurred in Beijing. On 7th May 2003, Changping District Committee and District Government decided to requisition the space and construction facilities of the school jointly operated by the parties as Shengli Hospital of Changping District specializing in treatment of SARS. On 13th May 2003, the parties signed a supplementary agreement on joint operation in education, where they agreed that: on 7th May 2003, in defense against SARS, the District Committee and the District Government decided that the Chinese Medicine Hospital of Changping District, Beijing would occupy the campus of the school jointly operated by the parties (Dougezhuang No. 1) as hospital for treatment of SARS. The school of the parties was forced to be suspended. The relevant issues were now agreed as follows: (1) the Health Care Institution will no longer charge any fees to the Technology University during the time when the Chinese hospital occupies the school for defense against SARS; (2) as for the duration of joint operation, from 7th May 2003 to withdrawal of the Chinese Medicine Hospital, the duration of joint operation of the parties would be extended in accordance with the actual time of occupation by the Hospital; (3) the parties mutually confirmed that the Technology University had invested a total of 2.6 million yuan for the construction of classrooms, decoration of houses, etc. since the commencement of joint operation; (4) since the joint operation, Party B had paid a total of 753,200 yuan for costs (including housing occupancy, water, heating and electricity charges) and still owed 501,848 yuan. The payment method would be otherwise decided by the parties. (5) Other outstanding matters would be otherwise discussed by the parties. The supplementary agreement was attached with the agreement on the measurement on issues of use of the house in joint operation by the parties, the funds invested for renovation of the campus, and the expenditure of campus funds. As of execution of the supplementary agreement, the Technology University offered the campus and ancillary facilities to Changping Chinese Medicine Hospital for use.

Government departments and SARS Hospitals renovated the campus for treatment of SARS. On 12th June 2003, Changping Chinese Medicine Hospital withdrew, and Changping District Hospital continued to use the original facility for the Shengli Hospital in Changping District. After the government departments occupied the space and facilities jointly operated by the parties, the Technology University had to rent other venues for students to continue their studies.

因不可抗力致使合同不能履行的，原告请求当事人双方均不承担过错责任并可以要求解除合同。合同解除后，职业学院已投入的各项资金 260 万元，保健院作为房屋所有人必然成为事实上及法律上的投资受益人。依据公平原则，保健院应补偿职业学院的部分损失。要求解除双方签订的联合办学协议及其补偿协议，保健院补偿职业学院经济损失 180 万元（全部投入的 70%），诉讼费由保健院承担。

If the Agreement could not be performed due to force majeure, the Plaintiff requested that neither party be held liable for fault and may require for termination of the Agreement. As of termination of the Agreement, since the Technology University had invested ¥2.6 million as funds, the Health Care Institution, as the owner of the buildings, would inevitably become a legal beneficiary of their investment. In accordance with the principle of equity, the Health Care Institution shall compensate the Technology University for partial losses. As for request of the termination of the Agreement signed by the parties and its supplementary agreement, the Health Care Institution shall compensate the Technology University for the economic loss of 1.8 million yuan (70% of all investment) and the court fees.

北京市昌平区人民法院认为：

The People's Court of Changping District, Beijing held that:

职业学院与保健院签订联合办学协议书及其补充协议系双方当事人真实意思表示，所达成的协议不违背法律规定，协议合法有效。2003 年春季"非典"疫情暴发，职业学院及保健院牺牲本单位利益为人民政府作出了贡献。职业学院进行教学具有对场地要求的特殊性 & 教学的连贯性，因对"非典"疫情时间延续及政府征用场地时间的不可预知性，职业学院另行租用其他场地进行教学符合情理以及法律规定。暴

发"非典"及当地政府征用联合办学场地属于双方不可预见、不可避免的不可抗力的情形。鉴于职业学院教学需要及保健院场地现实情况，职业学院请求解除双方之间的联合办学协议于法有据，本院予以支持，保健院反诉要求双方继续履行联合办学协议本院不予支持。职业学院在保健院所属的房屋及场地上投入了 260 万元，双方均无异议并以书面形式进行了确认，考虑到原建设成果的价值及现存情况，该建设成果由保健院享有为宜，保健院应向职业学院进行相应补偿，补偿的范围应以职业学院全部投入的一半为宜，职业学院要求保健院补偿其投入的 70% 本院不予支持。双方已经确认在合作期间职业学院欠保健院 501848 元，职业学院应向保健院支付。在 2005 年 1 月 15 日至 2006 年 1 月 14 日期间，双方并未就原协议如何履行达成一致意见，职业学院亦未使用保健院的场地，保健院要求职业学院支付该期间的基础设施费没有依据，本院不予支持。

The Agreement for joint cooperation in education between the Technology University and the Health Care Institution and its supplementary agreement expressed the genuine intention of the parties. Such Agreement did not breach the law, and thus is legal and valid. In the spring of 2003, during the SARS outbreak, the Technology University and the Health Care Institution sacrificed their own interests to contribute to the people's government. The Technology University had specific requirements for venues and the consistency of teaching. Due to the extension of the "SARS" outbreak and the unpredictable time of government requisition of the space, it is reasonable and legal for the Technology University to rent other sites for teaching. The outbreak of SARS and the requisition of the site of the school by the local government were unforeseeable and unavoidable force majeure situations for both parties. In view of the teaching requirements of the Technology University and the situation of the site of the Health Care Institution, the request by Technology University for termination of the Agreement between the parties has a legal basis, and thus is supported by this Court. The Health Care Institution, in its counterclaim, requested that the parties continue to perform the Agreement, which was not supported by this Court. The fact that the Technology University had invested 2.6 million yuan in the buildings and the site owned by the Health Care Institution was confirmed by both parties in writing, without any objection. Considering the value of the original construction and

the existing situation, the Health Care Institution was the beneficiary of the results generated from the construction, and thus it shall make corresponding compensation to the Technology University, which compensation was suggested to be half of the total investment by the Technology University. The 70% of investment as compensation claimed by the Technology University will not be supported by this Court. Since both parties confirmed that during their cooperation, the Technology University owed ¥ 501,848 to the Health Care Institution, such due payment shall be paid by the Technology University to the Health Care Institution. From 15th January 2005 to 14th January 2006, as the parties failed to reach any agreement on performance of the original agreement, and the Technology University did not use the site of the Health Care Institution, the claim made by the Health Care Institution requiring the Technology University to pay the infrastructure costs during the said period, lacks foundation, will not be supported by this Court.

案例三 孟元诉中佳旅行社旅游合同纠纷案

Case 3: Meng Yuan v. Zhongjia Travel Agency in matter of Travel Contract Dispute

案情摘要:

Case Summary

2004年“五一”期间，被告中佳旅行社组织了“三亚自由人旅行团”，旅行社为该旅行团提供的具体服务为：为游客提供往返机票和入住酒店，游客到达后自由活动。2003年4月21日，原告孟元为参加该旅行团，与中佳旅行社签订了《中佳国际合作旅行社三亚协议》。4月24日，原告以北京市及外地出现“非典”疫情为由，口头提出退团，并要求中佳旅行社退还全款。中佳旅行社表示，可以代为转让机位和酒店，但不同意全部退款，双方未能达成一致意见。4月26日，原告到北京市旅游局反映情况，该局调解未果。4月28日，原告传真通知中佳旅行社退团，中佳旅行社以原告未正式办理退团手续为由，拒绝解除合同。4月30日，原告未参团旅游。

During the “May Day” period in 2004, the Defendant, Zhongjia Travel Agency organized the “Sanya Free Travel Group”, in which the travel agency would provide the travel group with specific services including: providing tourists with round-trip air tickets and accommodation in hotels, and free activities for tourists on arrival. On 21st April 2003, the Plaintiff, Meng Yuan entered into the Sanya Agreement of Zhongjia International Cooperation Travel Agency with Zhongjia Travel Agency for participation in a tour group. On 24th April, the Plaintiff orally was required to resign from the group and asked Zhongjia Travel Agency to refund full payment due to the SARS outbreak in Beijing and other locations. Zhongjia Travel Agency stated that they would change the seats in the airplane and hotels on his behalf; however, they did not agree to refund full payment. The parties failed to reach any agreements. On 26th April, the Plaintiff reported the facts to the Beijing Municipal Tourism Bureau, but mediation by the Bureau failed. On 28th April, the Plaintiff informed Zhongjia Travel Agency, by fax, he declined to participate in the group. Zhongjia Travel Agency refused to terminate the Agreement on the ground that the Plaintiff did not go through formal procedures of resignation. On 30th April, the Plaintiff did not participate in the travel group.

一审北京市宣武区人民法院认为：

In the first hearing, the People’s Court of Xuanwu District, Beijing held:

原告孟元和被告中佳旅行社签订的“三亚自由人旅行团”旅游合同，是双方真实意思的表示，合同的内容不违背法律的禁止性规定，应认定有效，双方都应遵守合同约定的权利和义务。在合同签订后，孟元交付了 6 人的全部旅游费用，中佳旅行社为孟元预订了 6 人机票和酒店客房，并支付了费用。至此，双方已经按照合同的约定履行了各自的义务。在中佳旅行社履行了自己义务后，孟元以出现“非典”疫情为由，要求与中佳旅行社解除合同并全部退款，其免责解除合同请求权的行使，应符合《中华人民共和国合同法》(以下简称合同法)的规定。当时我国虽然出现了“非典”病例，但疫情范围很小，不构成对普通公众的日常生活形成危害，即原告不能以当时“非典”疫情的出现作为免责解除合同的依据。且根据合同法第一百一十七

条的规定，不可抗力因素亦不是当事人不承担解除合同责任的必然条件，故原告以此为由，单方面要求解除合同并由对方承担全部责任的主张，缺乏事实和法律依据。

That the “Sanya Free Travel Group” Agreement signed by the Plaintiff, Meng Yuan and the Defendant, Zhongjia Travel Agency expressed the genuine intention of the parties. The content of the Agreement did not violate the law, and thus it shall be deemed valid. Both parties are bound by the rights and obligations agreed to in the Agreement. As of execution of the Agreement, Meng Yuan had made full payment for traveling fees for 6 people, and the Zhongjia Travel Agency had booked and paid for 6 air tickets and hotel rooms for Meng Yuan. So far, the parties had fulfilled their respective obligations in accordance with the contract. After Zhongjia Travel Agency fulfilled its obligations, Meng Yuan required the termination of contract with Zhongjia Travel Agency due to the SARS outbreak, and he claimed that his exercise of the right to request relief from liabilities for termination of the Agreement complied with the *Contract Law of the People's Republic of China* (hereinafter referred to as the *Contract Law*). At that time, although there were SARS cases in China, the outbreak of the epidemic was very limited, which did not wreak havoc on people’s daily life. This meant that the Plaintiff could not take the SARS outbreak as the basis for relief of liability resulting from termination of the Agreement. Moreover, pursuant to Article 117 of the *Contract Law*, the factors of force majeure may not be held as the necessary condition for the parties to be released from the obligations on termination of the contracts. Therefore, the Plaintiff’s ex parte claim that the Agreement shall be terminated and that the other party shall bear full responsibility, was absent of a factual and legal basis.

二审北京市第一中级人民法院认为：

In the second hearing, the Beijing First People’s Court held that:

本案中，上诉人孟元提出解除合同和要求退款可以理解，但中佳旅行社有权提出异议。双方没达成一致时，仍应继续履行合同规定的权利和义务，违反合同约定的一方，应承担合同违约责任。上诉人在双方未对是否解除合同达成一致意见时，拒绝对方减少损失的建议，坚持要求对方承担解除合同全部损失，并放弃履行合同，

致使损害结果发生，故应承担全部责任。由此，二审法院判决：驳回上诉，维持原判。

In this case, the Appellant, Meng Yuan's request for termination of the Agreement and refund was understandable. However, Zhongjia Travel Agency had the right to make objections. In the absence of agreement between the parties, they shall continue to perform the rights and obligations agreed in the Agreement, and either party shall be held liable in the event of breach of the Agreement. When the parties failed to reach any agreement on whether to terminate the Agreement, the Appellant rejected the other party's proposal to reduce their losses, insisted on having the other party bear all the losses incurred from termination of the Agreement, and waived performance of the Agreement, which resulted in damages. Therefore, he shall bear full responsibilities. As such, the court of second hearing ruled to dismiss the appeal and sustain the original judgement.

九、总结

9. Conclusion

政府对新冠肺炎疫情防控措施作为不可抗力，是否构成合同解除免责事由，与合同履行期限、合同履行内容、不可抗力事件影响程度及因果关系等相关。如今，疫情对旅游、运输、娱乐等行业产生的影响正逐渐显现。因此，我们建议合同双方根据疫情防控措施对合同履行造成的影响，及时沟通协商，按照公平和诚实信用原则变更合同条款或者签订补充协议，尽量通过协商方式，从源头上减少纠纷产生。

As to whether the prevention and control measures of the government because of the NCP outbreak and the actual natural events arising from the covid-19 virus outbreak can be cited as the facts and reasons for avoidance of liability for breach of contract, is related to terms of performance, contents of contract and the extent of the impact of the force majeure event on contractual performance. Nowadays, the impact of the general influence of the NCP outbreak on tourism, transportation, entertainment and other industries is emerging. Therefore, we suggest that the parties to the contracts may promptly communicate based on the impact of the epidemic prevention and control measures on the performance of their contracts, change the terms of the contracts or sign a supplementary agreement in accordance with the principle of fairness and good faith, and try to reduce disputes through negotiations.

假设双方不重新协商合同，对于不可抗力是否可以作为无法履行某些合同义务的答辩这一问题，应取决于适用过程中的特定事实。贸促委提供的不可抗力证明一般应不足以允许违约方用于不可抗力保护，反而要求提供因政府措施、自然灾害等导致不能履行合同的一方的实际事实，足以阻止执行，因为这超出了引用不可抗力的双方根据合同条款履行合同的合理能力范围。例如，如果广州某工厂有多个员工滞留武汉，政府规定不允许员工复工，工厂难以聘请临时员工的话，这些事实可足以判断工厂不能履行合同义务。但如果工厂所有员工住在广州地区，且不存在规定禁止员工复工的，新冠疫情不应允许工厂免于承担合同义务。

Assuming the parties do not renegotiate their contracts, the question as to whether force majeure can be cited as a defense for failure to perform certain contractual obligations should depend on the specific facts of each application. Evidence of force majeure provided

by a CCPIT certificate, ordinarily, should not suffice to allow a party breaching the terms of a contract to invoke the protection of force majeure, but rather the actual facts of the party's inability to perform due to governmental measures, natural disasters, etc. would have to be proved and be sufficient to prevent enforcement since it was beyond a reasonable efforts of the parties citing force majeure to perform the contract according to its terms. For example, if a factory in Guangzhou had many employees in Wuhan, and government regulations did not permit those employees to return to work, and temporary employees were not easy to obtain. These facts may be sufficient to justify the failure of that factory to perform its obligations under the contract during the period when sufficient laborers were unavailable. However, if all the employees of the factory lived in the Guangzhou area and there were no regulations preventing employees from returning to work, the fact that there was a coronavirus outbreak should not permit the factory to avoid its obligations pursuant to the contract based on force majeure.

法官必须合理审理所有因不可抗力导致不能履行合同的事实主张，不得仅依靠贸促委提供的证明。依靠不可抗力免于履行合同的一方应证明合同履行超出其合理控制的事实。

Judges must properly examine all of the facts of an allegation of nonperformance due to force majeure and not rely solely on the certificate from the CCPIT. The party relying upon force majeure to excuse performance should evidence the fact that performance was beyond their reasonable control.