

Legal Insight | 法律洞察

27 March 2020
202004/007

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Application of Force Majeure and Change of Circumstances Rules in the Context of COVID-19

Since its outbreak latest by the end of January 2020, prior to the Chinese New Year, the Coronavirus Disease 2019 (hereinafter referred to as “COVID-19”) epidemic has caused major harm to public health, as well as socioeconomic life. The epidemic’s spread severely impacted the performance of many civil and commercial contracts, either directly or from actions taken by government and other social organizations against the epidemic. Debtors who were impeded from fulfilling their obligations are at risk of default. Domestic and international enterprises’ supply chains are also suffering adverse effects. Under such circumstances, a contract party who is unable to satisfy its obligations, or a contract party for whom, in light of the epidemic, the contract appears unfair, may seek assistance from the “force majeure” and “change of circumstances” rules, so as to be exempted from breach of contract liabilities and/or to modify or terminate the contract. In this article, the application of these two legal tools will be analyzed in the context of COVID-19 based on Chinese civil laws in force, applicable judicial interpretations[1] as well as court decisions and rulings, with an aim to provide guidance for epidemic-affected contract parties.

I. Application of the Rules of “Force Majeure”

According to Article 180 of the General Principles of Civil Law and Articles 117, 118 of the Contract Law, in the case of force majeure, contract parties may claim exemption from liability for breach of contract; according to Article 94 of the Contract Law, “force majeure” may also be used as a legal basis for the parties to terminate their contract.

Although “force majeure clauses” are usually

set in contracts, where epidemics and government actions are often listed as typical force majeure events, it does not mean that once an epidemic occurs, or once the government takes emergency measures, that this is automatically a force majeure event. It’s even less grounded to believe that once such situations occur, the party, whose performance of the contract is hindered, can be exempted from liabilities for breach of contract, or has the right to unilaterally terminate or modify the contract. Instead, the following questions must be examined:

A. Is the epidemic itself or the emergency measures taken by the government unforeseeable?

The definition of “force majeure” in Chinese law is “objective circumstances that are unforeseeable, unavoidable, and insurmountable”. Among the preconditions set therein, it requires special attention that the circumstances should be unforeseeable.

Whether an event should be considered “unforeseeable” should be decided by examining whether it is unforeseeable when the contract is signed. If a contract is concluded after large-scale, nation-wide outbreaks of the epidemic, it is generally difficult for a contract party to demonstrate that it was “unable to foresee” the epidemic or the impact that the epidemic may have on the performance of the contract; on the contrary, if there were no infections at the time when the contract was signed, the epidemic may generally be considered as “unforeseeable” at that time. For example, in the decision by Shenyang Intermediate People’s Court with the number (2005) *Shen Min* (2) *Fang Zhong Zi* No. 802, it was stated that “although the SARS epidemic broke out in China in the spring and summer of 2003, the company Xinzhongcheng signed a contract with Zhang Xiaowei on 26 May 2003, where Xinzhongcheng is supposed to have foreseen that the SARS epidemic may affect its normal construction work”[2]. If the contract is concluded at the beginning of the epidemic, objective factors such as the locations of the contract parties, the place where the contract was concluded, as well as the place of performance should be taken into account. The determination of “foreseeability” should be based on the local epidemic situation and the corresponding governmental measures in such places at the time of contract signing. For example, after the verdict by authoritative experts that the epidemic can be spread “person-to-person” was officially announced, or at latest after the national health commission announced the epidemic to be an infectious disease under Class B, which should be controlled as infectious diseases under

Class A, or after the competent authority in Wuhan released its decision of lockdown on 23 January 2020, the parties’ ability to foresee the development of the epidemic situation was much clearer.

B. Is a liability exemption well justified on the grounds of Force Majeure?

Even if it can be ascertained that parties were unable to foresee the epidemic’s outbreak and its consequences when executing a contract, to justify an exemption from breach of contract liabilities, several key points must be paid attention to:

1. Prerequisite: the epidemic or related events lead to absolute impossibility of performance of the contract

Various incidents of different scales occurred throughout the course of this epidemic, creating various difficulties for contract performance. The factors contributing to the performance difficulty include compulsory measures by the government such as delayed work resumption, city lockdown and traffic shutdown, as well as quarantine. It could also be “soft factors”, such as people avoiding leaving home for their own safety. Whether the performance or full performance of a contract is still possible should be determined based on the nature of the contract, external factors and in accordance with general cultural concepts, instead of being solely determined by the debtor’s subjective status. Since the severity of the epidemic and the intensity of government action varies from place to place, and the contract obligations vary from branch to branch, the hindrance imposed on contract performance may also be different.

For example, the Shanxi Higher People’s Court rejected the Company Huaken’s request for liability exemption based on force majeure in its decision with the number (2017) *Jin Min Zhong* No. 93 by pointing out “the traffic was not blocked during the SARS period, hence the trading of goods was not restricted.”

2. Falling under the impact of the epidemic is not due to the debtor's delay

According to Article 117 of the Contract Law, if the force majeure event occurs after a party's delay in performance, the delaying party cannot be exempted from its liabilities.

3. Only exempted within the scope of direct impact by the force majeure event

On one hand, if the performance of the contract, although affected by the epidemic, is not completely impossible (e.g. partial performance of the contract is still possible, or the creditor is willing to accept delayed performance), the scope of exemption of liabilities for breach of contract shall be limited to the part which the debtor is unable to perform or the delayed performance liabilities, rather than a complete release from the debtor's performance obligations.

On the other hand, the impact of the epidemic on social and economic life is extensive, and creates a "domino effect". As an external driving force for the chain reaction, a force majeure event can only justify an exemption from breach of contract liabilities as the "first domino".

Take the supply chain as an example. Company A, an upstream supplier (tier 2 supplier), had been organizing the production of a certain type of general components normally, while the local government postponed the work resumption for epidemic prevention and control, leading to the inability of Company A to deliver the products on time as agreed. In this case, the performance of Company A's supply obligations may be considered as directly impacted by the epidemic, so that Company A is likely to be exempted from its delay liabilities. However, for one of Company A's buyers (Company B, which is meanwhile a tier 1 supplier of an overseas downstream customer; assuming it is located in a slightly affected area and is able to resume its operation normally before the ordered parts are delivered), things can be different. It may fail to duly perform the contract with its downstream customer because it cannot re-

ceive the ordered parts from Company A in time and therefore is not able to accomplish the assembly and production plan on time. Nevertheless, it is still possible for Company B to urgently purchase parts of the same type from other suppliers and fulfill its supply obligations towards the downstream customer Company C after assembly. In this case, since the inability of Company B to perform its contractual obligations towards customer Company C is not a direct result of the epidemic, it is highly disputable whether Company B could be exempted from its breach of contract liabilities by claiming so due to force majeure.

4. Timely notification and provision of proof

When the debtor perceives a slight chance to fulfill the contractual obligations under the impact of the epidemic, it shall promptly notify the creditor and provide relevant proof within a reasonable period. In the case of COVID-19, it is a good example that the local branches of the China Council for the Promotion of International Trade (CCPIT) have issued some certificates for local enterprises to prove the local policies on postponement of work resumption.

Among the retrieved court decisions related to SARS in 2003, although no case has been found where an argument based on force majeure is rejected solely due to the debtor's failure in timely notification, in the above cited court decision (2017) *Jin Min Zhong* No. 93 stated the Shanxi Higher People's Court, "The Company Huaken failed to prove that it has promptly notified the Company Lunda of its inability perform the contract", and took it as one of the reasons to deny the force majeure argument.

C. Is it justified to terminate the contract unilaterally on the basis of force majeure?

For contract parties affected by COVID-19, in addition to considering force majeure as the basis for exemption from their breach of contract liabilities, it is also worth considering

whether the contract can be terminated unilaterally based on the grounds that “the contract purpose cannot be realized due to force majeure” as stipulated in Article 94 of the Contract Law.

As for the way of termination, there would not be any problem if both parties agree to terminate the contract. For the situation where only one party intends to terminate the contract, Chinese law has adopted a relatively convenient model for the contract parties: If the purpose of the contract is prevented from being realized due to force majeure, it can be terminated by either party by sending a notification of termination to the other without a court decision.

However, when we take a close look at the pre-conditions for this right of unilateral termination, it does not arise commonly. The core requirement is that “the purpose of the contract cannot be realized”, e.g. due to a force majeure event. Although the epidemic outbreak definitely affects the performance of various contractual obligations, it does not necessarily make contract performance completely unviable.

For example, in a housing lease contract dispute between Dalian Pengcheng Holiday Damu Co., Ltd. and Dalian Zhengdian Watch Co., Ltd., which arose under the impact of the SARS epidemic in 2003, the lessee Zhengdian was unable to run its wildlife-related catering business because of the epidemic, whereby the company unilaterally terminated the contract. The People’s Procuratorate also supported that the contract had been properly terminated. However, in the retrial decision of the Liaoning Higher People’s Court it was held that “the emergency regulations issued by the Dalian Forestry Bureau and the Administration for Industry and Commerce were only to halt the business related to wild animals, therefore only the catering part of the Zhengdian Company was affected, whilst the accommodation business still in ordinary course ... under the impact of the SARS epidemic and the relevant governmental regulations to suspend businesses concerning wild animals, only part of the business activities of Zhengdian Company were affected,

which did not “immediately” cause the “complete” impossibility to perform the lease contract between Zhengdian Company and Pengcheng Company”.

For another example, in the second instance of the case *Meng Yuan v. Zhongjia Travel Agency*, the disputed contract was a travel contract. The plaintiff Meng Yuan requested withdrawal from the tourists group due to the epidemic and demanded the fees be refunded. The Beijing No. 1 Intermediate People’s Court held that “though there were several cases of SARS in our country at the time, the scope of the epidemic was relatively limited and did not constitute a danger to the daily life of the general public, which means the plaintiff could not use the emergence of the SARS epidemic at that time as a valid basis to terminate the contract.” It also suggests that the Beijing No.1 Intermediate People’s Court did not believe that the SARS epidemic had caused the purpose of the travel contract to be unattainable.

Therefore, if a contract party affected by COVID-19 intends to terminate the contract, it should make an effort to reach an agreement with the other party. When the negotiation fails, a notification of termination may be issued unilaterally. At this time, the receiving party may raise an objection by requesting the court or arbitration court confirm the termination as invalid within the agreed period of objection or, if there is no such agreement, within three months after the receipt. The terminating party may then be faced with an invalidation of the termination and therefore, breach of contract liabilities.

II. Application of the Change of Circumstances Rule

As mentioned above, if a government action or another incident related to COVID-19 is to be regarded as “force majeure”, the premise is that the contract cannot be performed at all. In fact, in many cases, the epidemic situation does not necessarily result in the impossibility of contract

performance, but only causes a “significant impact” instead, which increases the difficulty or cost for one party. Consequently, further performance may cause de facto unfairness. Therefore, Article 26 of the *Interpretation of the Supreme People’s Court on Several Issues Concerning Application of the “Contract Law of the People’s Republic of China”*(2) (This rule is generally called “change of circumstances” in the literature) provides the legal basis for contract parties in this case to change or terminate the contract. However, application of the “change of circumstances” rule is limited by strict conditions, for the reason that the “change of circumstances” rule serve as an ex-post adjustment of the interests between the parties in special cases, which indicates a strong intervention by public power in private autonomy and, hence, should only be applied with caution.

A. Way to exercise rights

In the event parties cannot reach an agreement, any modification or termination of the contract based on the “change of circumstances” rule requires requesting the intercession of the People’s Court.

B. Factors in consideration

In order to deliver a judgement, the People’s Court must comprehensively evaluate multiple constitutive elements and consider various factors. The following aspects are particularly noteworthy:

1. Is the change of objective circumstances a commercial risk that a party should bear?

For most contracts, if there is no explicit agreement, the outbreak of a large-scale epidemic shall be considered as the commercial risk of neither party, which allows room for application of the “change of circumstances” rule as an ex-post risk allocation. However, it does not exclude the existence of special cases where the parties have agreed on the distribution of this specific commercial risk in advance. Further, there may be cases where it is a normal practice sectors or regions that the burden of risk caused by certain type of unforeseen events shall be borne by one party. In

such cases, there is no room for application of the “change of circumstances” rule.

In addition, there may also be an intermediate zone, where case by case observation by the People’s Court is required to determine whether the change of the objective circumstances brought by the epidemic is a commercial risk to be taken by one of the parties based on concrete facts, especially the evidence submitted by both parties.

2. Is further performance significantly unfair to one party? Is the purpose of the contract unattainable?

Whether this precondition is fulfilled, it is largely left to the discretion of the People’s Courts. For a contract party who seeks to terminate the contract, it must attempt to demonstrate that fulfillment of the contract is unviable. As a second line of defense where the termination is not supported, it should strive to prove that further fulfillment of the contract is significantly unfair, and request contract modification.

Looking at some court decisions related to the SARS epidemic in 2003, the People’s Courts showed a conservative attitude towards contract termination under such circumstances, but modifications of the contract are more likely to be supported, such as requiring the lessor lower rent for a certain period. After the outbreak of COVID-19, a number of well-known commercial real estate companies have announced that they would waive or reduce the rents for a certain period of time, which demonstrates a proactive response to the call to “overcome the difficulties together”. From a legal perspective, this action may also be a wise defense against potential disputes over the lease contract and related litigations in the future, with the underlying idea rooted in the “change of circumstances” rule.

III. Recommendations

In essence, it is a matter of risk allocation to determine the rights and obligations of the contract parties after an epidemic or another force majeure event imposes difficulty on the performance of a

contract after its conclusion.

From the perspective of ex post resolutions, a contract party who faces the risk of default due to obstacles of performance (e.g. a supplier) should promptly notify the other party (e.g. its customer), and provide relevant proof (e.g. apply for a certificate of force majeure events from the CCPIT) in a timely manner. The other party (i.e., the customer) should take measures in time to avoid any expansion of the damages or losses, otherwise it will be liable for any increased damages or losses. At the same time, if a contract party intends to modify or terminate the contract, it is advisable to reach an agreement with the other party through negotiation. If it fails, consideration may be given to unilateral termination as well as the litigation or arbitration methods as mentioned in the preceding part of this text. Conversely, for the other party whose performance is not affected by the epidemic (e.g. the customer as mentioned above), it is also necessary to consciously prevent the supplier from expanding the interpretation of or even abusing force majeure rules to request a liability exemption. If necessary, the customer should request the supplier to provide a valid proof of “impossibility of performance due to force majeure” and conduct in-depth investigations in order to ensure its own ability to fulfill the contracts with downstream companies in the supply chain and to protect its own interests.

From the ex-ante arrangement perspective, the COVID-19 outbreak serves as a reminder to enterprises to pay more attention to the force majeure clauses as well as contract modification and termination clauses when entering into future contracts, and to strive for more favorable terms and conditions accordingly. Specifically, when entering into a contract, a party may comprehensively consider by what kind of force majeure events itself or the other may be affected (e.g. typhoon), the probability of the events to occur (e.g. in some seasons, higher possibility of being affected by a typhoon in the coastal areas of southeast China than in the western areas), the negotiating position of each party, negotiation efficiency etc., to determine whether or how to set up the corresponding contract clauses. For example, specific types of force majeure events may be listed into the contract as a basis

for termination, modification or liability exemption (or even the upstream supplier’s inability to supply due to force majeure events may be listed into the contract with a downstream customer as a basis for termination, modification or liability exemption) so as to allocate such risks in advance. It’s also at the contract parties’ discretion how detailed such clauses should be.

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- [1] A contract usually contains force majeure clauses, contract termination clauses and exemption clauses. It is therefore also possible that parties have made special arrangements in their contract for situations similar to COVID-19. However, for the specific situation this time, such clauses in most contracts are generally too abstract, which are often similarly formulated, or even just restatements of legislations. Therefore, when discussing the application of force majeure rules and change of circumstances rules, this article does not examine special arrangements by contract parties.
 - [2] The impacts of SARS outbreak in 2003 and that of COVID-19 on contract performance are highly similar. Therefore, the guiding opinions issued by the Supreme People’s Court and the ruling ideas of local People’s Courts in civil and commercial cases involving SARS are of high reference value for the application of “force majeure” or “change of circumstances” rules in the context of COVID-19.

新冠肺炎疫情影响下不可抗力与情事变更规则的适用

2020 年春节前爆发的新型冠状病毒感染肺炎疫情（以下简称“新冠肺炎疫情”）持续至今，不仅对居民健康造成重大危害，也对社会经济生活产生了多重影响。在此次疫情的发展和应对过程中，众多民商事合同的正常履行因受到突发因素的影响（这种影响可能直接来自于疫情本身，也可能来自于政府或其他社会组织为应对疫情而采取的措施）而变得困难，合同义务履行受阻的债务人也因此面临违约风险，全国乃至全球范围内企业的供应链保障也受到严重影响。此时，不能正常履行义务的合同方或合同继续履行对自己显著不公的合同方可以考虑求助于与“不可抗力”和“情事变更”相关的法律制度，从而得以免除违约责任或寻求变更、解除合同的机会。本文将我国现行民事法律规定和相关司法解释为依据[1]、并结合我国法院的审判实践，分析这两项制度在此次疫情背景下的适用，以期受此次疫情影响的合同当事人提供参考。

一、不可抗力规则的适用

根据《民法总则》第180条和《合同法》第117条、第118条规定，当事人可以不可抗力为依据主张免除违约责任；根据《合同法》第94条，不可抗力也可以作为当事人解除合同的基础。

虽然合同中通常都会设置“不可抗力条款”，而瘟疫、政府行为也常常被作为一种典型的不可抗力事件列举在其中，但这并不意味着一旦发生瘟疫、政府从而紧急实施疫情防治措施即构成不可抗力；更不能理解为，一旦发生该等情形，履行合同受阻碍的一方即可主张免责或有权单方面解除、变更合同。具体而言，需要考察以下几个问题：

（一）疫情以及疫情影响下的政府行为是否“不能预见”？

我国法律对“不可抗力”的定义是“不能预见、不能避免并不能克服的客观情况”，其中需要重点关注的是“不能预见”这一条件。

判断事件是否属于“不能预见”的时间点应当是合同订立之时。如果某合同是疫情在全国大规模爆发后订立，则合同当事人通常很难论证自己对疫情以及疫情可能对合同履行造成的影响“不能预见”；反之，如果在合同订立时尚未出现任何病例，则一般可以认为疫情于彼时尚“不能预见”。例如，沈阳市中级人民法院（2005）沈民（2）房终字第802号判决书中认为，“虽然2003年春夏之间我国爆发‘非典’疫情，但新中城公司在与张晓薇签订《协议书》时（2003年5月26日）应当预见‘非典’疫

情可能对其正常施工造成影响” [2]。而如果合同是在疫情发展之初订立，则应结合当事人住所、合同订立地点和履行地点等客观因素，以当时当地的疫情发展情况以及相应的政府应对措施为判断基础。例如，在权威专家对本次新冠肺炎作出能够“人传人”的判断获得官宣，至迟于国家卫生部门宣布将其纳入乙类传染病、按甲类管理乃至武汉主管部门于 2020 年 1 月 23 日公告开始对武汉实施“封城”开始，当事人对于疫情发展的预见能力就显然与之前不同了。

（二）能否以不可抗力为由主张免除责任？

即使能够确定当事人在订立合同时无法预见此次疫情及相关事件的发生，若以不可抗力为由主张免除责任，还须注意以下几点：

1. 前提：疫情或相关事件造成合同根本不能履行

在此次疫情背景下，发生了一系列大大小小的事件，其中对合同履行带来困难的具体事实情形各不相同，可能是政府延迟复工、封城封路、强制隔离的强制措施，也可能是人们出于自身安全考虑而不愿出门的“软因素”。合同的履行或完全履行是否尚有可能，应依合同性质、外部因素及一般社会观念综合判断，而不能仅凭债务人的主观状态加以断定。不同地区的疫情发展程度不同，政府行为的力度不同，合同履行涉及的行业领域不同，则合同履行受到的阻力大小也会有所不同。

例如，山西省高级人民法院在（2017）晋民终 93 号判决书中以“‘非典’期间并未封锁交通、限制货物交易”否定了华垦公司基于不可抗力而免责的主张。

2. 合同履行受到疫情影响并非因债务人迟延所致

依《合同法》第 117 条规定，当事人迟延履行后发生不可抗力的，不能免除责任。

3. 仅在直接受不可抗力事件影响的范围内免责

一方面，如果合同的履行虽然受到此次疫情的影响，但并非完全不可能履行（例如，合同部分履行尚有可能，或者债权人愿意接受迟延履行），则违约责任的免除范围应仅限于债务人无法履行的部分的或者履行迟延，而不是全面免除债务人的履行义务。

另一方面，疫情对于社会经济生活的影响是广泛而深远的，常常存在“多米诺骨牌效应”，而不可抗力事件作为连锁反应的外部推动力，能够阻却的违约责任仅限于“第一张骨牌”。

以供应链为例，如果某个疫情严重地区的一家上游（二级）供应商甲企业前期正常组织某种通用配件的生产，而当地政府因疫情防控需要规定企业必须推迟复工时间，导致其无法按时供货，则甲企业的供货义务履行受阻是疫情直接影响的结果，因此可主张免除其迟延交付的责任。对于其买方（乙企业，同时又是某境外下游客户的一级供应商；假设其所在地受疫情影响较轻，

得以在原定配件到货之日正常开工)而言,其无法及时从甲企业获得配件供应,从而导致既定的装配、生产计划无法按期完成,因而无法按期向其自身下游客户(丙企业)交货,但其仍有可能从其他供应商处紧急采购同类配件、装配成品后向丙企业交付;在这样的情形下,乙企业无法按照原合同约定面向客户丙企业履约并非是出于自身直接受到疫情影响,也就并非当然可以不可抗力为由免除违约责任了。

4. 及时通知并提供证明

债务人发现自己因受疫情影响无法正常履行合同义务后,应当及时向债权人发送通知,并在合理期间内提供相关的证明。此次新冠肺炎疫情下,中国贸促会在各地的分会应当当地企业申请签发了多份证明当地政府规定推迟复工的证书,即为一例。

在检索到的与 2003 年“非典”相关的法院裁判中,虽未发现仅以债务人未履行通知义务就否定不可抗力主张的情形,但在前引之山西省高级人民法院在(2017)晋民终 93 号判决书中,也将“华垦公司并未举证证明通知伦达公司不能履行合同”作为否定其不可抗力主张的理由之一。

(三) 能否以不可抗力为由单方面解除合同?

对受到新冠肺炎疫情影响的合同当事人而言,除了可以考虑以不可抗力为依据主张免除其违约责任,还可以考察是否得以《合同法》第 94 条为依据,以“因不可抗力致使不能实现合同目的”为由主张解除合同。

从合同解除方式来看,如果合同双方均同意解除合同,自然没有问题。如果仅一方当事人希望解除合同,我国立法采取了对当事人较为便宜的模式:在不可抗力致使合同目的不能实现时,无须经法院判决才能解除,而是允许当事人通过向对方发送解除通知,自主行使解除权。

然而,从构成要件来看,这一解除权并不轻易产生——其核心要求在于(因不可抗力)“**致使合同目的不能实现**”。疫情的爆发虽然会对各类合同义务的履行产生影响,但并不一定导致合同目的完全不能实现。

例如,在 2003 年“非典”疫情影响下产生的大连鹏程假日大沐有限公司与大连正典表业有限公司房屋租赁合同纠纷中,承租人正典公司因受疫情影响而无法经营其与野生动物有关的餐饮业务,并据此主张单方解除合同。抗诉机关也持同一立场。但辽宁省高级人民法院的再审判决认为,“大连市林业局和工商行政管理局下发的紧急通知,仅是停止野生动物的经营活动,受到影响的只是正典公司的餐饮部分,客房经营仍可正常进行……因‘非典’疫情和政府有关部门因此而下发的停止野生动物经营的通知,只是对正典公司的部分经营活动造成影响,尚不足以导致其与鹏程公司之间的租赁合同‘直接’或‘根本’不能履行”。

又例如,孟元诉中佳旅行社旅游合同纠纷二审案中,系争合同为旅游合同。当事人孟元因疫情而提出退团,并要求返还费用。北京市第一中级人民法院认为“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。”这也间接表明，北京市一中院不认为“非典”疫情导致旅游合同的目的不能实现。

因此，受此次新冠肺炎疫情影响的合同当事人如希望解除合同，应尽可能与对方协商一致解除。协商不成时，也可以单方发出解除通知。此时，收到解除通知的一方如有异议，应当在约定的异议期间或收到通知后三个月内请求法院或仲裁机构确认解除无效。发出解除通知的一方则要面临解除无效进而须承担违约责任的风险。

二、情事变更规则的适用

前文已经说到，若要将新冠肺炎疫情或疫情下的某项政府行为或其他事件认定为“不可抗力”，前提是合同根本不能履行。而事实上，在许多情况下，疫情并不当然导致合同根本不能履行，而只是造成“重大影响”，对某方当事人来说大幅度地增加了履行合同的难度或成本。此时，如果继续执行原合同则可能造成事实上的不公平。因此，《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26条（理论上将这一规则称为“情事变更”）为当事人在此种情形下请求变更、解除合同提供了依据。但是，情事变更规则的适用有着更为严格的条件，其原因在于，情事变更规则是对特殊情况下当事人利益的事后调整，是公权力对私法自治的一种较强的干预，当慎用之。

（一）权利行使方式

首先，从权利行使方式来看，在合同当事人无法达成一致的情形下，依据情事变更规则变更、解除合同须向人民法院提出请求，由人民法院裁判，而非当事人自行变更或解除。

（二）考察因素

其次，人民法院进行裁判时，须综合评价诸多要件，考量多种因素。以下几点尤其值得关注：

1. 客观条件的变化是否属于一方当事人应当承担的商业风险？

若无明确约定，对于一般的合同而言，大规模疫情的爆发不属于任何一方合同主体应当承担的商业风险，因此才有“情事变更规则”进行事后风险分配的空间。但不排除存在特殊的合同场合，当事人对这一商业风险的分配提前进行了约定；或在其他领域存在特定的交易习惯，即某种不可预见事件所带来的风险应当由某一方当事人承担。此时，就没有适用情事变更规则的余地了。

此外，也可能存在一些中间地带，需要人民法院结合实际情况，特别是当事人的举证，具体判断疫情带来的客观条件的变化是否属于一方当事人应当承担的商业风险。

2. 继续履行是否对一方当事人明显不公平？合同目的是否不能实现？

在这一条件的分析和判断上，人民法院拥有很大的自由裁量空间，而这种裁量空间也是合理的。对于当事人而言，如希望解除合同，则应当力图论

证合同目的已经完全不能实现。而作为第二道防线，也应当力证继续履行原合同会对己方造成严重的不公平，从而请求对合同进行变更。

从涉及 2003 年“非典”的一些法院裁判来看，人民法院对于此种情形下解除合同的立场倾向于保守，但通常都会支持对合同进行变更，例如要求出租人降低某一时期的租金等。在本次疫情爆发后，多家知名的商业房地产企业主动宣布在一定期限内对其旗下商铺的租户免租或减租，积极地响应了“共克时艰”的呼声。如果从法律角度观察，这一举措也不失为基于情事变更规则、对未来可能发生的租赁合同争议及相关诉累的一种有力防范。

三、律师建议

合同订立后爆发疫情或者发生其他不可抗力事件，从而对合同履行造成影响，这种情形下对当事人权利义务的分配本质上是风险分配的问题。

从事后解决的角度来看，履行受阻而面临违约风险的当事人（例如供应商）应当及时向对方（例如客户）发出通知，并及时提供相关证明（例如向中国贸促会申请开具不可抗力证明）。而对方（客户）应当及时采取措施以避免损失的扩大，否则应自行承担扩大部分的损失。与此同时，如一方当事人希望变更或解除合同，可取的方式是首先与对方当事人积极沟通，以期达成对合同变更或解除的合意。协商不成时，可考虑本文中提及的单方解除以及相关的诉讼或仲裁手段。反之，对于未遭受不可抗力影响的另一方当事人（例如前例之客户）而

言，也需要有意识地对供应商可能会因对相关概念的误解扩大甚至滥用不可抗力主张免责的做法作出防范，必要时针对供应商“因直接受不可抗力影响而根本不能履约”这一主张要求供应商全面举证，并对此进行深入调查，以确保自身面向供应链下游的履约能力和相关利益。

从事前安排的角度来看，相信本次疫情会再次提醒广大企业在日后订立合同时更加重视不可抗力条款乃至合同变更、解除条款，合理地争取在合同中作出对己方更为有利的约定。具体而言，当事人在订立合同时，可以综合考虑己方或对方可能受到何种不可抗力影响（例如台风）、受影响的概率大小（例如我国东南沿海地区在特定季节内受台风影响的可能性显然会大于西部地区）、各方在交易中的谈判地位、谈判效率等因素，决定是否要求设置或如何设置相应的合同内容，例如将特定类型的不可抗力事件纳入合同的解除或变更条件、免责条款等（甚至是争取将上游供应商因受不可抗力影响而不能供货的情形纳入本企业与下游客户的供货合同的解除或变更条件、免责条款），对相关风险进行分配，并决定该类条款的详简程度。

[1] 需要说明的是，合同中通常都会设置不可抗力条款、合同解除条款以及免责条款，不能排除合同本身对类似于此次疫情的情况作出特殊安排的可能。但从整体来看，对于此次疫情下的具体情形而言，绝大部分合同的上述条款一般都比较抽象，且往往大同小异，甚至只是法律规定的重述。因此，本文在对不可抗力规则与

情事规则的适用进行讨论时，不对特殊的合同安排作单独考察。

- [2] 截至本文首次发表之日，国家立法和司法机关尚未专门针对本次新冠肺炎疫情出台涉及本文论题的规定或指导性意见，但 2003 年爆发的“非典”疫情与此次新冠肺炎疫情对合同履行造成的影响具有较高的相似性，因此该时期最

高院出台的指导意见以及各地人民法院在涉“非典”民商事案件中的裁判思路对于本次疫情背景下“不可抗力”或“情事变更”规则的适用也具有较高的参考价值。



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