



# Guidelines on Contract Performance during the Epidemic

## 1. Nature of the epidemic and related government actions

According to Article 117 of the Contract Law and Article 180 of the General Principles of the Civil Law, "force majeure means an objective situation that cannot be foreseen, unavoidable, and insurmountable." Specifically, force majeure mainly refers to natural disasters and social emergencies, such as earthquake, tsunami, plague, riot, martial law, riot, War and other situations agreed in the terms of the contract.

The outbreak of the new coronavirus and the various government-controlled actions are not foreseen, avoided or overcome by the enterprises. On February 10, at the press conference held by the legislative committee of the Standing Committee of the National People's Congress for the prevention and control of the new crown pneumonia epidemic, Zang Tiewei, a spokesperson and director of the research office of the Standing Committee of the National People's Congress, stated that: For the parties who cannot fulfill the contract, the epidemic situation is force majeure which is unforeseeable, unavoidable and insurmountable.

At the same time, the epidemic situation is similar to SARS, with even greater severity and scope of impact. On the June of 2003, Supreme People's Court issued the Notice on Doing Well the Trial and Enforcement of the People's Courts During the Prevention and Control of SARS, which stated that the SARS epidemic constituted force majeure. Refer to the Notice, the new coronavirus epidemic and government actions caused by the epidemic should constitute force majeure as well.

## 2. Impact of the epidemic and related government actions on contract performance

According to the recent information of the epidemic situation, after the outbreak of the epidemic, the central government and some local governments have issued documents requiring enterprises and institutions to postpone the resumption of work and control certain traffic, which will inevitably lead to the inability of many project personnel. Increasing production and transportation costs and lagging schedules of such materials will have varying degrees of impact on the performance of various types of contracts in various industries, and will seriously cause the contract to fail to perform. The specific impacts are based on different industries, periods, and contract performance issues. There may be four types: full failure, partial failure, delay, and performable but unfair.

### 2.1 Full Failure

Full failure to perform all contracts means that the purpose of the contract could not be achieved due to the epidemic situation and related government actions. For example, in order to prevent and control the epidemic, the government explicitly prohibits the opening of movie theaters, KTVs, gyms, gyms and other gathering-type activities and catering units. The service contracts and venue lease contracts of these enterprises cannot be implemented due to government injunctions, which



may constitute that all the contracts cannot be performed.

## 2.2 Partial Failure

Partial failure to perform the contract means that the epidemic situation and related government actions only made part of the contract impossible to perform, and other unaffected parts can still be performed in accordance with the contract. Taking the catering unit as an example, the government of Zhuhai and other regions has announced that the catering unit is prohibited from eating, but the delivery is allowed. In this case, if the catering unit has signed a service contract to provide meals and dining venues, the meals are provided Part of it is not affected by the epidemic situation, but the contractual obligation to provide dining venues cannot be fulfilled in practice, which constitutes part of the contract cannot be fulfilled.

## 2.3 Delay

Delay in performance of a contract usually means that the contract is not performable during the event of force majeure or cannot be performed in accordance with the contract. It can continue to be performed after the event of force majeure and the realization of the purpose of the contract will not be affected. For example, some provinces and cities explicitly require that enterprises shall reopen no earlier than 24:00 on February 9, and some provinces and cities have not yet restored normal transportation order due to measures to close the city. In this case, construction projects in related provinces and cities may Delays in the construction period due to inability to start work in time, or to obtain building materials in a timely manner. If such delays do not affect the realization of the purpose of the contract, it will constitute a delay in the performance of the contract.

## 2.4 Performable but unfair

This situation means that the contract can continue to be performed, but there is a clear unfairness in the continued performance, so the interests of both parties shall be balanced and adjusted. For example, the outdoor advertising contract for buses / commercial districts simply starts from the contract and the advertising has reached the contracted delivery area and frequency, thus fulfilling the delivery obligations under the contract. However, the fundamental purpose of advertising is to achieve publicity effects, which are actually linked to the number of publicity audiences. During the epidemic stage, although public transportation and many shopping malls and office buildings are still functioning normally and advertisements can be displayed normally, the throughput of public transportation and the flow of people in shopping malls and office buildings have been significantly reduced, and the number of viewers watching ads has decreased sharply, which has seriously affected the effectiveness of advertising. Implementation. In this case, if it continues to perform according to the original agreement of the contract, it is essentially unfair to the advertiser.

It is worth noting that although the epidemic situation and the related government actions constitute force majeure, applicable force majeure waivers are limited to contracts that were signed before the epidemic occurred and were not performed at the time of the epidemic. If the breach has occurred before the epidemic situation and related government actions, or occurred for reasons other than the



epidemic situation and government actions, you cannot claim exemption based on the epidemic situation, and you still need to bear the liability for breach of contract. In addition, if the two parties to the contract sign the contract after the epidemic situation and related government actions have occurred, it is deemed that both parties have clearly understood the relevant performance risks. In this case, the two parties to the contract should bear these risks by themselves and when the contract cannot be performed due to the epidemic Liability for breach of contract.

### **3. Legal consequences of failure to performance**

If the contract cannot be normally performed due to the epidemic or government measures, the subsequent performance of the contract, including the right to terminate or modify the contract, shall depend on whether the epidemic and government measures have an impact on the performance of the contract and the actual extent of the impact.

In accordance with the opinion of the Guangdong Higher People's Court, the termination of the contract and the bearing of losses shall be comprehensively determined mainly on the basis of specific cases, taking account to the agreement of parties, the influence degree of the epidemic in the locality and other related factors.

Generally, in the above four cases, for the full failure, both parties have the right to claim exemption from liability and terminate the contract. For the partial failure, the parties may only claim to terminate this part of contract and exempt themselves from liability in part. For the delay, or the performance is obviously unfair, the parties usually do not have the right to terminate the contract, and can only ask for the modification or extension of the performance of the contract from the perspective of facilitating the transaction and reducing the transaction cost.

### **4. Losses sharing when failure to performance**

As mentioned above, in the opinion of the Guangdong Higher People's Court, if one party is unable to perform a contract due to the epidemic or government actions, the loss due to force majeure shall be reasonably shared by both parties based on the principle of fairness. However, such losses are usually limited to economic losses and necessary expenses directly caused by the force majeure. In case of any other loss, both parties shall still bear the risk according to the contract or legal provisions.

For example, the increase in personnel travel expenses and raw material costs directly caused by the epidemic or government actions may be considered as force majeure losses, but the price corresponding to the non-performance during the epidemic period is not considered as force majeure losses. In this circumstance, the other party shall have the right to defend itself on the basis of the "right of defense for performance" and refuse to pay.

### **5. Feasible Measures and Important Notes**

Regarding the performance problems caused by the epidemic, we suggest to take the following

measures:

#### 5.1 To determine the causal relationship between performance problems and the epidemic

Force majeure releases liability only to the extent affected by force majeure, not any contract matter. Therefore, in the case that the performance problem is not directly caused by the epidemic, or the epidemic has actually occurred at the time of signing the contract, both parties shall bear the corresponding liabilities in accordance with the contract and legal provisions, and shall not take force majeure as the defense.

#### 5.2 To assess the impact of the epidemic on contract performance and react based on that assessment

It is recommended to plan in advance to evaluate the actual and potential impact of the outbreak on the contract's performance as soon as possible, including whether the epidemic situation has caused the subsequent failure to perform the contract, and the impact of the subsequent performance on the business interests of the enterprise. As to the outbreak of the epidemic, which causes difficulties in performance, or a contract that can be performed but is obviously unfair, the contract counterparty should be notified as soon as possible, and evidence of performance and communication should be retained, and the contract counterparty should be consulted on matters such as contract modification and termination, if necessary. Take other legal actions such as litigation, arbitration.

#### 5.3 To inform the other party in time and keep the evidence

According to Article 118 of the contract law of PRC, 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. Therefore, no matter whether the contract is agreed or not, if the enterprise has difficulties in performing the contract due to the epidemic, it shall have the legal obligation to notify the other party of the matters that cannot be performed.

In performing the obligation to notify, a written document shall be issued in accordance with the time limit, procedure and mode of notification agreed upon in the contract. The related personnel should ensure that the notification documents are sent and effectively received, and they keep the sending and receiving documents carefully. If the contract is a foreign-related contract, the local lawyer shall be consulted according to the subject matter of the contract and the performance of the contract.

#### 5.4 To apply for a certificate of force majeure in time

According to Article 118 of the contract law of the PRC, the party claiming a force majeure event shall bear the burden of proving the force majeure event.

On January 30, 2020, the CCPIT issued a notice stating that, in accordance with the articles of Association of the China Council for the Promotion of International Trade approved by the state



council, the CCPIT may issue certificates of force majeure. If an international trade contract cannot be fulfilled as scheduled or cannot be fulfilled due to the impact of the epidemic, the relevant enterprise may apply to the CCPIT for proof of fact relating to force majeure. Some notary offices can also issue force majeure event notarization on the NCP epidemic, issued a notarization entrusted notice. For the specific procedures and document requirements of CCPIT certification and notarization, please consult relevant departments.

#### 5.5 To retain the evidence of performance during the epidemic period, the market situations and information affecting contract performance and other supporting documents

Due to the rule of "who advocated and who presents evidence" in civil and commercial litigation procedures, the party who claims to modify or terminate the contract shall bear the relevant burden of proof. So, the relevant personnel shall pay attention to the information of the development of the epidemic, collect and fix the performance evidence such as the enterprise providing services, organizing work and paying the price during the epidemic period, and at the same time retain the market situations and information of the epidemic that affect the performance so as to make preparations for responding to the lawsuit and negotiation.

#### 5.6 To negotiate and communicate with the other party actively to avoid the expansion of losses

When the performance of the contract is affected by the epidemic or government measures, the related party shall actively reduce the total loss through negotiation, instead of immediately taking strong measures such as litigation and arbitration.

Meanwhile, there also are risks and costs in litigation and arbitration. Even if the enterprise has fully performed the contract obligations and the legal obligations related to force majeure, the application of force majeure or the change of circumstances or the modification of the contract may not be supported by the court. The judgment of court depends on the determination of facts and the certifying power of the evidence provided by the enterprise.

On the other hand, the benefits protected by litigation and arbitration are limited. Even if the contract is terminated or modified through litigation or arbitration, the losses under the contract will still increase during the responding period. A considerable part of such losses shall be borne by the parties to the contract on the basis of the principle of fairness or risk distribution. Therefore, we suggest the related personnel to actively negotiate with the other party to determine the alternative plan, and try to solve the difficulties through communication, so as to reduce the subsequent losses and losses borne by each party.

At the same time, positive communication to reduce losses should also be in line with the requirements of the contract law. According to Article 119 of the contract law of PRC, Where a party breached the contract, the other party shall take the appropriate measures to prevent the losses from increasing; where the other party's failure to take appropriate measures results in additional losses, it cannot demand compensation for the additional losses.



Therefore, in the case that the epidemic or government measures have an impact on the performance of the contract, if no communication, negotiation and other measures are taken, resulting in the increase of the loss, it may be necessary to assume the corresponding responsibility for the increase of the loss.

5.7 To sign a supplementary contract with the other party in time. If both parties fail to reach an agreement through negotiation, both parties can protect its legal rights and interests through litigation and arbitration

For the performance problem caused by the epidemic, the parties shall communicate with each other on the subsequent performance plan, performance period and early termination of the contract and other matters. After reaching an agreement, both parties shall promptly sign supplementary agreements and other written documents to avoid subsequent disputes.

If it is impossible to reach an agreement with the other party on the modification or termination of the contract, the party may, after collecting and fixing the relevant evidence for the performance of the contract and communication with the other party, submit the dispute to the court or arbitration institution for settlement in accordance with the dispute settlement method agreed in the contract, so as to safeguard the legitimate rights and interests.

## 关于疫情期间合同履行事宜的初步指引

### （一）前言

2020 新年伊始，武汉发生新型冠状病毒感染肺炎疫情（以下简称“新冠肺炎疫情”），并借春节的大规模人口流动迅速蔓延至全国。为阻断疫情传播，保护人民的生命健康，国务院发布《关于延长 2020 年春节假期的通知》（国办发明电〔2020〕1 号）延长 2020 年春节假期至 2 月 2 日，随后各省市陆续出台对应政策，再次推迟复工时间并对疫情相关地区返工人员提出隔离观察要求。

本次疫情及政府为防控疫情作出的延迟复工、封城、隔离等措施，对企业已签订合同的正常履行造成了极大影响。为有效避免相关纠纷，防控风险，本文将简要分析新冠肺炎疫情及相关政府行为是否构成不可抗力，对合同履行造成的影响，并就各合同负责人、经办人在合同后续履行中应注意事项提供初步指引。

### （二）疫情及相关政府行为性质

根据我国《合同法》第一百一十七条和《民法总则》第一百八十条的规定，“不可抗力是指不能预见、不能避免且不能克服的客观情况”。具体而言，不可抗力主要是指合同当事人在签订合同时无法预见，在合同履行过程中不能避免且不能克服的自然灾害和社会性突发事件，如地震、海啸、瘟疫、骚乱、戒严、暴动、战争和合同条款中约定的其他情形。



本次新冠肺炎疫情的疫情本身及因此导致的各类政府防控疫情行为，都不是企业能预见、避免或克服的。2月10日，全国人大常委会法工委有关部门负责人就新冠肺炎疫情防控相关热点法律问题回答记者提问时，全国人大常委会法工委发言人、研究室主任臧铁伟已明确：对于因疫情不能履行合同的当事人来说，属于不能预见、不能避免并不能克服的不可抗力。

同时，本次疫情与“非典”类似，甚至严重程度及造成影响范围更大，参考2003年6月最高人民法院《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》中就“非典”构成不可抗力的认定，本次新冠疫情及因本次疫情导致的政府行为都应构成不可抗力。

### （三）本次疫情及相关政府行为对合同履行造成的影响

从目前披露的疫情信息来看，本次新冠肺炎疫情发生后，国家和部分地方政府均发文要求企事业单位延迟复工，并对交通进行一定的管制，势必将导致很多项目人员无法及时到位，各类材料的生产和运输成本增加和进度滞后，将对各个行业各类合同的履行产生不同程度的影响，严重的还将导致合同无法履行。具体影响后果基于不同行业、时期及合同履行事项，可能有四种：全部不能履行、部分不能履行、延迟履行，以及可履行但显示失公平。

#### 1. 全部不能履行

合同全部不能履行，是指因疫情及相关政府行为，合同目的无法实现。如政府为防控疫情，明令禁止电影院、KTV、体育馆、健身房等聚集型活动业态及餐饮单位开业。则该等企业相关的服务合同、场地租赁合同等，因政府禁令无法实施，可能构成合同全部不能履行。

#### 2. 部分不能履行

合同部分不能履行，是指疫情及相关政府行为仅使得合同的部分内容无法履行，其他未受影响的部分仍可依约继续履行。同样以餐饮单位为例，珠海等地区政府已公告禁止餐饮单位堂食，但允许外送，在这种情形下，如餐饮单位已签订服务合同对外提供餐点及就餐场馆的，其中提供餐点部分不受疫情影响，但提供就餐场馆这一合同义务则无法实际履行，构成了合同部分不能履行。

#### 3. 延迟履行

合同延迟履行，通常指合同在不可抗力事件期间不可履行或不可依约履行，不可抗力事件结束之后仍可继续履行，且合同目的的实现不会因此受到影响。如部分省市明确要求建设项目开工时间不得早于2月9日24时，且部分省市因封城措施，至今仍未恢复正常运输秩序，在此情形下，相关省市内建设项目可能因无法及时开工、无法及时取得建筑材料等原因发生工期延误，如该等延误不影响合同目的实现，则构成合同延迟履行。

#### 4. 可履行但显失公平

这种情形是指，合同可以继续履行，但继续履行存在明显不公平，须对双方利益进行平衡调整。如公交车/商区户外广告投放合同，单纯从合同约定出发，广告投放达到合同约定的投

放区域及投放频次,即完成了合同项下投放义务。但广告投放的根本目的在于实现宣传效果,而宣传效果实际与宣传受众数量挂钩。在疫情阶段,虽然公共交通及许多商场、写字楼仍正常运作,广告可正常展现,但公共交通吞吐量及商场、写字楼的人流量均大幅减少,观看广告的受众急剧减少,严重影响了广告宣传效果的实现。这种情形下如依照合同原有约定继续履行,实质对广告投放方不公平。

值得注意的是,虽然疫情及疫情相关政府行为构成不可抗力,但可适用不可抗力免责的仅限于疫情发生前签订,且在疫情发生时未履行完毕的合同。如违约行为在疫情及相关政府行为出现之前已经发生,或因疫情及政府行为以外原因发生的,则不得以疫情为由主张免责,仍然需要承担违约责任。另外,如合同双方在疫情及相关政府行为已发生后才签订合同的,即视为双方已明知相关履约风险,在此情形下,合同双方应当自行承担该等风险,在因疫情无法履约时承担违约责任。

#### (四) 合同无法正常履行的法律后果

合同因疫情及相关政府行为无法正常履行的,合同后续履行事项,包括是否有权采取解除、变更等措施,取决于疫情及政府行为对合同履行是否造成影响及实际影响程度。

根据广东省高级人民法院的相关精神,主要根据具体案情,结合当事人约定、所在地疫情的影响程度等因素,综合考虑合同是否解除及损失承担,总体应当适用公平原则处理。

通常而言,在上述四种情形中,因疫情致使合同全部不能履行的,双方有权主张免责并解除合同;如果疫情仅导致合同部分不能履行的,则双方仅可主张解除该不能履行的部分合同并在该部分合同范围内免责。如果疫情导致合同延迟履行,或可以履行但显失公平的,从促成交易、降低交易成本的角度出发,通常合同当事人不享有合同解除权,只能要求变更或延期履行合同。

#### (五) 合同无法正常履行期间的损失分担

如上所述,基于高院精神,合同因疫情及相关政府行为无法正常履行的,不可抗力的损失,由双方基于公平原则合理分担。但通常情况下,该等损失通常仅限于不可抗力直接造成的经济损失和必要费用。就除此之外的其他损失,双方仍需基于合同约定或法律规定各担风险。

例如,因疫情及政府行为直接导致的人员差旅费、原材料成本增加可能属于不可抗力损失,但疫情期间未履行合同义务对应的价款不属于不可抗力损失,且相对方有权基于“履行抗辩权”进行抗辩并拒绝支付。

#### (六) 需采取措施及注意事项

就疫情引起的合同履行问题,建议合同相关负责人、经办人按步骤采取如下措施:

##### 1. 确定合同履行问题与疫情间因果关系

因不可抗力作为免责事由,仅在不可抗力影响所及的范围内不发生责任,而不是任何合同事





项都可因此免责。因此，在合同履行问题并非疫情直接导致的，或双方签约时疫情已实际发生的情形下，双方应当依照合同约定及法律规定承担相应责任，而不能以不可抗力为抗辩。

## 2. 评估此次疫情对合同履行的影响，并基于影响决定需采取行动

建议合同负责人、经办人须提前规划，尽早评估疫情爆发对合同履行的现实和潜在影响，包括疫情是否导致合同后续无法履行，以及后续履行对企业商业利益的影响。就疫情的爆发导致履行存在困难，或可履行但显失公平的合同，应当尽快通知合同相对方，留存履约及沟通的证据，并就合同变更、解除等事项与合同相对方进行磋商，必要时采取诉讼、仲裁等其他法律行动。

## 3. 及时通知合同相对方，并留存通知等书面凭证

《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。因此，不论合同有无约定，如企业因疫情存在履约困难的，就无法履行事项有通知对方的法定义务。

在履行通知义务时，须根据合同约定的通知期限和通知程序、通知方式，发出书面文件；确保通知文件发出、被有效接收，留存发件及收件凭证；如合同属于涉外合同，应基于合同标的及履行情况，酌情寻求当地律师的建议，并积极与合同相对方进行磋商。

## 4. 及时申请开具不可抗力事件的证明

根据《合同法》第一百一十八条，主张不可抗力事件一方负有不可抗力事件的证明责任，合同当事方应尽可能获得政府等部门对不可抗力事件及合同履行影响的说明。

2020年1月30日，中国国际贸易促进委员会发布通知，根据国务院批准的《中国国际贸易促进委员会章程》的规定，中国国际贸易促进委员会可以出具不可抗力证明。受疫情的影响，导致无法如期履行或不能履行国际贸易合同的，相关企业可向中国国际贸易促进委员会申请办理与不可抗力相关的事实性证明。某些公证处也可就新型肺炎疫情可出具不可抗力事件公证，发布了可接受公证委托的通知。关于贸促会证明及公证的具体程序和文件要求，可具体咨询相关部门人员。

## 5. 留存疫情期间合同履行证据、影响合同履行的行情、数据等证明文件

因民商事诉讼“谁主张、谁举证”的证据规则，主张变更或解除合同的一方，负有相关的证明责任。为此，合同负责人、经办人应当注意疫情发展、变化的讯息，搜集、固定疫情期间企业提供服务、组织工作、支付价款等履约证据，同时留存疫情影响合同履行的市场行情、数据等资料，做好应诉、谈判的准备工作。

## 6. 积极与合同相对方协商沟通，避免损失扩大

在合同履行受疫情及相关政府行为影响的情况下，合同负责人、经办人应积极通过协商方式减少总损失的产生，而非第一时间采取诉讼、仲裁等强硬手段，寻求审判机构的裁判结果。



一方面，诉讼仲裁存在一定的风险及成本，即使企业已充分履行合同义务及不可抗力相关法定义务，适用不可抗力或情势变更解除、变更合同也未必能得到法院的支持，实际判决取决于综合事实认定及企业提供证据的证明力；另一方面，法律具有谦抑性，诉讼仲裁保护的利益有限，即使通过诉讼、仲裁途径解除、变更合同，应诉期间合同项下损失仍会扩大，该等损失中相当部分须由合同双方基于公平原则或风险分配各自承担。因此，建议积极与对方协商确定合适的替代方案，尽可能由双方沟通解决困难，从而减少后续损失及双方各自应负担的损失。

同时，积极沟通减少损失也符合合同法的要求。根据《合同法》第一百一十九条，当事人一方违约后，对方应当采取适当措施防止损失的扩大；没有采取适当措施致使损失扩大的，不得就扩大的损失要求赔偿。因此，在疫情及相关政府行为对合同履行产生影响的情况下，如果未采取沟通、协商等措施，导致损失扩大的，可能需对损失扩大部分承担相应的责任。

7. 及时与合同相对方就沟通结果签订补充合同，如双方无法通过协商达成一致，可采取诉讼、仲裁等方式维护企业合法权益

就因疫情爆发导致合同履行的困难，在与合同相对方就合同后续履行方案、履行期限、提前解除等事宜进行沟通，双方达成一致后，应当及时与合同相对方共同签订补充协议等书面文件，避免后续争端。

如确无法与合同相对方就合同变更、解除事项达成一致的，在搜集、固定合同履行及与对方沟通的相关证据后，可以依照合同约定的争议解决方式，将争议事项提交法院或仲裁机构解决，以维护企业合法权益。