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Impact of Force Majeure on Civil and Commercial Litigations and Arbitrations - Taking the COVID-19 Outbreak as an Example

The coronavirus pneumonia epidemic (COVID-19) has spread rapidly across the country since its outbreak in Wuhan in January 2020. In the face of this war without the smoke of battles, provinces and cities across the country have taken drastic actions. A series of prevention and control measures have been adopted commensurate with the spread of the epidemic in the region, including personnel isolation, delayed resumption of work, and traffic control, to reduce the concentration and mobility of populations. Under these measures, the epidemic has been gradually brought under control.

When it comes to civil and commercial litigation and arbitration, the COVID-19 epidemic has also had an immense impact on the filing, trial and enforcement of civil and commercial cases in China. As this epidemic meets the characteristics of force majeure to a certain extent (i.e., unforeseeable, unavoidable and insurmountable), we intend to use it as an example to explore the impact of force majeure on civil and commercial litigation and arbitration.

I. What kind of situation may be considered as a force majeure event?

The definition of force majeure in China's current civil and commercial law is taken primarily from Article 153 of the General Principles of the Civil Law, Paragraph 2 Article 180 of the General Rules of the Civil Law, and Paragraph 2 Article 117 of the Contract Law, stated as unforeseeable, unavoidable and insurmountable

objective situations. Among them, “unforeseeable” usually refers to “general inability to predict an event according to the current level of technology”[1]. “Inevitable and insurmountable” means “the parties have tried their best and taken all possible measures, but still find it impossible to avoid the occurrence of an event and the consequences of which cannot be overcome.”[2]

Although COVID-19 has certain similarities with

SARS and MERS viruses, it still remains a new type of infectious disease, whose source of infection and modes of transmission have not been fully determined, and no effective medicines nor uniform treatments devised. In addition, the sudden outbreak has flustered medical professionals, who did not foresee its onset. Zang Tiwei, spokesperson of the Legislative Affairs Commission of Standing Committee of the National People's Congress and director of its research office, has also admitted on February 10 2020, "During the current coronavirus - pneumonia epidemic in China, the government has adopted corresponding epidemic prevention and control measures in order to protect public health. For parties who fail to perform the contract, their failure is due to an unforeseeable, unavoidable and insurmountable force majeure."

In summary, although neither Chinese government nor the Supreme People's Court has issued any official documents for the qualitative analysis of the COVID-19 epidemic as well as relevant jurisprudence, we believe that the current epidemic has basically met the characteris-

tics of force majeure. However, several factors such as the locations of the parties, the stage of the epidemic development, or the severity of the epidemic should be taken into account for a comprehensive judgment when determining the application of force majeure concerning individual cases.

II. Impact of Force Majeure on Exercise of Rights of the Parties

According to current Chinese law, the impact of force majeure on the parties' claims of their rights to litigation is mainly reflected in the periods and ways of the claims.

a. The Period of the Claims

In civil and commercial litigation and arbitration, the parties' rights to bring a lawsuit/apply for arbitration, apply for enforcement, file an appeal, and apply for retrial/appeal to revoke an arbitral award are all limited to a certain period of time. We have summarized these rules as follows:

Claims of the Parties	Article	Period
Bring a lawsuit	Article 188 of the General Rules of the Civil Law	3 years. However, if the law provides otherwise, such provisions shall be applied.
Apply for arbitration	Article 198 of the General Rules of the Civil Law; Article 74 of the Arbitration Law	Unless the law provides for the limitations period for arbitrations, the limitations period for lawsuits shall apply.
Apply for enforcement	Article 239 of the Civil Procedure Law	2 years. For the application of suspension and interruption of the limitation period for enforcement, the relevant provisions of the law on suspension and interruption of limitation period of lawsuit shall apply.
File an appeal	Article 164 of the Civil Procedure Law	On the judgments: 15 days On the rulings: 10 days
Apply for retrial	Article 205 of the Civil Procedure Law, Article 384 of the Judicial Interpretation of the Civil Procedure Law	On the judgements and rulings: 6 months On a mediation agreement: 6 months
Appeal to revoke an arbitral award	Article 59 of the Arbitration Law	6 months

i. Bring a lawsuit, apply for arbitration or enforcement

According to Paragraph 1 Article 194 of the General Rules of the Civil Law, force majeure can have the legal effect of suspending the limitation period of lawsuits, provided that force majeure occurs within the last six months of the limitation period of lawsuits. In addition, because these rules apply also for limitation periods of arbitration and enforcement, the legal effects of suspension of limitation period also apply to the parties' applications for arbitration and enforcement. At the same time, since force majeure is often related to emergencies, Article 13 of Emergency Response Law of China also included similar provisions: "When litigation, administrative reconsideration and arbitral activities cannot be carried out normally due to emergency response measures, the provisions concerning the suspension of limitation period and suspension of procedures shall apply, except as otherwise provided by law."

As far as the current epidemic is concerned, if the parties are unable to claim rights because they are diagnosed with COVID-19, suspected cases, isolated according to law, or other reasons seriously affected by the epidemic, where the incident occurred within the last six months of the limitation period, the parties may request that the limitations period (or limitation periods of arbitrations or enforcement) be suspended.

During the period when rights cannot be claimed due to force majeure, the parties should actively collect and keep relevant evidence about force majeure to prevent the other party from filing a defense in the lawsuit on the ground that the limitation period has expired. At the same time, according to Paragraph 2 Article 194 of the General Rules of the Civil Law, the limitation period for lawsuits expires 6 months after the date when the cause of suspension of limitation period is eliminated. Therefore, the parties should also actively exercise their rights within six months from the date of elimination of the cause of suspension, claim the rights from the other party in writing in a timely manner, or apply to the people's court or arbitral institution

to start relevant legal procedures.

ii. File an appeal

Although the suspension, interruption and extension of the limitation period does not apply to the time limit for filing an appeal, according to Article 83 of the Civil Procedure Law, if the party delays the time limit due to irresistible cause or other legitimate reasons, an extension of the time limit can be applied for within 10 days since the cause of obstacles is eliminated, and the decision on whether to allow it or not is up to the people's court.

We believe that force majeure as an unforeseeable, unavoidable, and insurmountable objective situation is the "irresistible cause or other legitimate reasons" stipulated in Article 83 of the Civil Procedure Law. Taking the COVID-19 epidemic as an example, if the parties are severely affected by the epidemic, whether they be patients with COVID-19, suspected patients, or people who have been quarantined according to law and cannot file an appeal, they can be considered to be in the situations compliance with Article 83 of the Civil Procedure Law. According to the Guiding Opinions on the Full Use of the Judicial Function to Provide Judicial Services and Guarantees for the Prevention and Control of Epidemics in Accordance with the Law, the Higher People's Court of Shanghai also issued "A Series of Answers to the Questions on the Legal Application of Cases Related to the COVID-19 Epidemic", which reflects our view.

iii. apply for retrial / appeal to revoke an arbitral award

According to Article 127 of the Judicial Interpretation of the Civil Procedure Law, the 6-month retrial period specified in Article 205 of the Civil Procedure Law and Article 384 of the Judicial Interpretation of the Civil Procedure Law are "peremptory period", and the provisions on suspension, interruption and extension of the limitation period is not applicable. In other words, the parties cannot claim the suspension of the

retrial period in accordance with the regulations regarding limitation period. However, we believe that the parties can still apply for extension of the retrial period in accordance with Article 83 of the Civil Procedure Law. First of all, the Civil Procedure Law itself prevails over its judicial interpretation. The “peremptory period” stipulated in the judicial interpretation of the Civil Procedure Law shall not constitute restrictions on a party’s application for extension under Article 83 of the Civil Procedure Law. Secondly, China’s judicial practice also shows that Article 83 of the Civil Procedure Law can be a reason to extend the “peremptory period”.

Similarly, Article 83 of the Civil Procedure Law shall also apply to the extension of the time limit for applications for the revoke of arbitral awards as provided for in Article 59 of the Arbitration Law. In this regard, the Higher People’s Court of Shanghai also responded affirmatively in “A Series of Answers to the Questions on the Legal Application of Cases Related to the COVID-19 Epidemic”.

Whether the COVID-19 epidemic constitutes force majeure, or the “irresistible cause or other legitimate reasons” referred to in Article 83 of the Civil Procedure Law still needs to be judged according to the circumstances of individual cases. In order to encourage the parties to continue to claim their rights during the epidemic, the Supreme People’s Court and local people’s courts at various levels have successively issued notices about submitting online applications for filing lawsuits. Each arbitral institution has also issued documents to provide parties with online or mail alternatives for arbitral applications. Therefore, if the parties have difficulties in claiming rights on the spot, they can still try to exercise the rights through other means, and thus, force majeure or “irresistible causes or other legitimate reasons” may not be constituted.

b. Ways of Claims for the Parties

Generally speaking, parties can claim their

rights by submitting litigation materials to the people’s court or arbitral institution on the spot. However, affected by the COVID-19 epidemic, the Supreme People’s Court issued the “Notice on Litigation Services and Complaint Letters and Visits During the Period of Prevention and Control of the Epidemic of COVID-19 Epidemic” on January 30 2020, according to which, the court litigation services and reception sites for the masses were closed. Immediately after, the people’s courts in Shanghai, Jiangsu, Zhejiang and other provinces successively issued documents to suspend on-site case filing, litigation services, and reception of letters of petition, and closed case registration halls, litigation service centers, and reception for letters of petition. At the same time, China International Economic and Trade Arbitration Commission, Beijing Arbitration Commission, Shanghai Arbitration Commission and other domestic arbitral institutions have also issued notices, suspending on-site consultation, filing and acceptance of arbitration documents and other services. In addition, local governments at various levels have also adopted various preventive and control measures including personnel isolation and traffic control. This has caused some parties difficulties in claiming their rights.

In order to protect the litigant rights of the parties, the Supreme People’s Court issued the “Notice on Strengthening and Regulating Online Litigation Work during the Prevention and Control of the COVID-19 Epidemic” on February 14 2020, requiring people’s courts at all levels to promote online litigation, which means, the parties can submit the application for filing online. Similar to courts, major domestic arbitral institutions have issued notices providing parties with channels and methods for filing cases online.

It is worth noting that Article 5 (2) of the “Notice of the Supreme People’s Court on Strengthening and Regulating Online Litigation Work during the Prevention and Control of the COVID-19 Epidemic” specifically emphasizes “cross-regional filing”, that is, “if it is essentially difficult for the parties and their litigation agents submit

online to file the case, they can choose to submit the case file to the nearest court. The relevant people's court should handle the case filing process in a timely manner in accordance with the working mechanism and procedures of cross-regional case filing." That is to say, if the parties are unable to submit the case filing online, or cannot go to a court with jurisdiction to file an on-site case because of traffic control and other reasons, or a court with jurisdiction suspends the on-site office, the parties can choose the nearest court to submit the case file, and then the court can act as a cooperative court to check, receive and send an application to the jurisdictional court for cross-regional case filing services.

Due to the differing severity of the epidemic situation and the government's control measures, the impact of the epidemic on specific cases will also vary. We recommend that the parties pay close attention to the various notices issued by the relevant people's court or arbitral institution during the COVID-19 epidemic, or consult the court, clerk, case secretary of the arbitral institution or other staff in a timely manner, to reasonably determine whether there is possibility of claiming rights by online filing, mailing or even "cross-regional case filing" in light of their own circumstances. If impossible, parties should collect and keep relevant evidence, including proof of where they were during the epidemic, local government documents on prevention and control periods and measures, as well as other documents that can prove that the parties claims rights cannot be reached online, by mail, or across the region. They should also claim the rights through a court or arbitral institution immediately after the relevant obstacles are removed.

III. Impact of Force Majeure on Trial Proceedings

In addition to the parties' claims, force majeure may also have many impacts on the trial of cases by people's courts or arbitral institutions, which are mainly reflected in postponement of court hearings, suspension of proceedings / suspension of arbitration procedures, extension of time limits of trials.

a. Postponement of court hearings and suspension of proceedings / suspension of arbitration procedures

Article 146 of Civil Procedure Law of China stipulates: "The court hearings may be postponed in any of the following circumstances: (1) the parties who must be present and other participants in the proceedings have not been present for legitimate reasons; ... (4) Other situations that should lead to postponement." In the first circumstance, considering the unforeseeable, unavoidable, and insurmountable nature of force majeure, it should be considered as one of the "legitimate reasons" referred to here without doubt. Regarding the fourth circumstance, according to Article 2 of the Supreme People's Court's "Regulations on Strictly Regulating the Extension of Trial Limits and Postponement of Civil and Commercial Cases", the "other situations that should lead to postponement" refers to force majeure or accident which results in that the court hearing cannot be normally conducted.

As far as arbitration is concerned, Article 41 of Arbitration Law of China provides that if the parties have a legitimate reason, they can request the postponement of the hearings within the period specified in the arbitration rules. On the basis of this article, the arbitration rules of China's major arbitral institutions have specific provisions on postponing the hearings. Although the Arbitration Law and the arbitration rules of various arbitral institutions have adopted the expression of "legitimate reason" instead of

force majeure, we believe that the scope of the legitimate reason should include force majeure, which can constitute a party's request for postponement of hearings to the arbitral tribunal.

In addition, according to Paragraph 4 Article 150 of China's Civil Procedure Law, if a party is unable to participate in the lawsuit due to force majeure, the people's court shall suspend the lawsuit. The arbitration rules of China's main arbitral institutions also provide for the suspension of arbitration procedures, that is, when the parties apply for or special circumstances arise, the arbitration procedures can be suspended. Force majeure shall belong to the "irresistible cause" or "special circumstances" referred to herein, that is, the force majeure may be the cause of suspension of the lawsuit or arbitration proceedings.

During the period of COVID-19 epidemic prevention and control, people's courts in Zhejiang, Shandong, Jiangsu and other places successively issued guiding documents for parties affected by the epidemic that were unable to participate in litigation activities to apply for postponement of trial or suspension of proceedings in accordance with legal procedures. At the current stage, it is more likely that an application for postponement of the court hearings or suspension of proceedings based on the epidemic situation will be granted. In addition, in some areas severely affected by the epidemic, such as Hubei Province, the local people's court even issued a notice of suspension of litigation activities. On January 29 2020, the Higher People's Court of Hubei Province issued the "Announcement on Adjustments in Litigation Activities During the Prevention and Control of Coronavirus Epidemic", stating that "suspending all court hearings, investigations and other litigation activities, and the specific time for resumption of such activities shall be announced separately based on the needs of epidemic prevention and control.". The Shanghai People's Court has also postponed the court hearings or ruled to suspend the proceedings.

As far as arbitration is concerned, most of the arbitral institutions have cancelled the hearings arranged in February on their own initiative, and the extension time shall be determined separately according to the epidemic situation and local govern-

ment policies. For cases where the beginning of the hearing has not been determined after acceptance, the corresponding timing is also expected to be delayed. Of course, if the parties and their agents are being treated for COVID-19-, are under personnel isolation, or are unable to submit case materials on time due to traffic control and other reasons, and therefore cannot normally participate in arbitration such as court hearings, they may also apply for an extension of the hearing or suspension of arbitration proceedings. The Shanghai Arbitration Commission explicitly mentioned in the "Measures for Safeguarding the Service for Commercial Arbitration Subjects During Epidemic Prevention and Control" that humanitarian considerations should be taken such as the submission by the parties to postpone the hearing beginnings, proof as well as the selection of arbitrators, or to file a counter-arbitration request. The requests concerning the proper substantive or procedural rights of the arbitral parties shall be satisfied as much as possible.

b. Extension of time limits of trials

Articles 149, 176, 180, and 204 of China's Civil Procedure Law stipulate not only different time limits for different stages of civil proceedings, but also that they may be extended under "special circumstances". Similarly, the arbitration rules of China's main arbitral institutions also stipulate that under "special circumstances" or where "legitimate reasons" exist, the time limit for trial may be extended. If force majeure creates difficulties in a case trial of a people's court or an arbitral institution, it should be classified as one of the "special circumstances" or "legitimate reasons" here.

During the prevention and control of the COVID-19 epidemic, the operations of local people's courts and arbitral institutions at various levels have been affected to varying degrees, coupled with the possibility of postponement of trials, extensions of time limits of trials may be quite common.

In addition to postponing the hearings, suspension of litigation/arbitration proceedings, extension of the time limits of trials, force majeure may also have an impact on the time

limit for producing evidence and the way witnesses appear in court. We recommend that parties should try to keep in touch with the court clerk, the judge, or the case secretary of the arbitral institution when they encounter force majeure, and submit prompt applications for postponement of court hearings, suspension of litigation or arbitration proceedings, extension of the time limit for producing evidence, meanwhile collect and preserve the proof of force majeure, so that their rights to litigation are not adversely affected.

IV. Impact of Force Majeure on the Enforcement Procedures

If one party has received a valid judgment, ruling, mediation or arbitration award, yet the other party has not fulfilled their obligations in accordance with the requirements of relevant legal documents, they may apply to the people's court for enforcement. As we mentioned earlier, force majeure will produce the legal effect of suspending the limitation period for such applications by the parties. In addition, force majeure may suspend the enforcement procedures that have been started.

Article 256 of China's Civil Procedure Law stipulates that "in any of the following circumstances, the people's court shall rule to suspend the enforcement: ... (5) other circumstances in which the people's court deems the enforcement to be suspended". Although the relevant judicial interpretation has not yet clarified the connotation and denotation of the "other circumstances" here, referring to the provisions of Article 150 of the Civil Procedure Law regarding the suspension of litigation, we believe that force majeure leads to failure of one party to enforce claims rights on time, which should be deemed as one of the "other circumstances".

Taking the COVID-19 epidemic as an example, if the judgement debtor is a patient infected by the COVID-19 or a suspected patient, or quarantined according to the law, or unable to cooperate with the enforcement of the people's court because of traffic control or other reasons, or the subject mat-

ter of enforcement is to continue the performance but the judgement debtor affected by the epidemic has to suspend the production and has no ability for further performance, or if a third party (such as an auction agency) related to enforcement fails to operate normally due to the epidemic and the judgement debtor thus fails to perform on schedule, it shall be deemed as the "other circumstances" aforementioned.

In addition, due to the special nature of the prevention and control during the epidemic, the Supreme People's Court has explicitly called for the people's courts at various levels in the "Circular on Implementing the Spirit of the Third Meeting of the Central Committee for Comprehensive Rule of Law and Trial Implementation during the Period of Prevention and Control of COVID-19 Epidemic" to temporarily suspended enforcement measures against units, personnel and sites, equipment, materials and funds undertaking epidemic prevention and control tasks, and shall not adopt attachment, freezing, seizure, and transfer of property preservation measures such as funds and materials specifically dedicated to epidemic prevention and control, in order to fully protect the guaranteeing of the prevention and control during the epidemic.

Conclusion

Force majeure has a significant impact on the case filing, hearing and enforcement of civil and commercial litigation and arbitration. However, considering that the constitution of force majeure is often highly demanding and needs to meet the standard of being "unforeseeable", "unavoidable", and "insurmountable", we recommend that parties make specific judgments based on their own circumstances relevant to the case. As governments at all levels across the country have adopted stringent COVID-19 prevention and control measures, the epidemic has gradually been brought under control. Since February 10 2020, enterprises across the country have gradually resumed work and production, while socioeconomic conditions are gradually returning to normal. In this case, the

parties need to comprehensively determine whether they meet the elements of force majeure based on their own objective circumstances, such as the region where they are located, as well as the measures of prevention and control taken by the local government. In the meantime, extra attention should be paid to the notice issued by the people's court or arbitral institution with jurisdiction, and when applicable, an application shall be submitted in a timely manner to protect their own rights to litigation.

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- [1] *Interpretation of the General Rules of the Civil Law of the People's Republic of China*, Law Press, April 2017, p. 561.
- [2] As above.



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不可抗力对民商事诉讼及仲裁的影响 ——以新型冠状病毒肺炎疫情为例

2020年1月在武汉市爆发的新型冠状病毒肺炎疫情（“新冠疫情”）迅速在全国范围蔓延开来。面对这场突如其来的没有硝烟的战争，全国各省市积极应战，根据本地区的疫情蔓延情况陆续采取了包括人员隔离、延迟复工、交通管制在内的一系列防控措施，以达到减少人员聚集流动的目的。在这些举措之下，疫情已经逐步得到了控制。

对于民商事诉讼和仲裁而言，本次新冠疫情对我国民商事案件的立案、审理和执行都造成了很大的影响。由于本次新冠疫情在一定程度上满足不可抗力特征（即不能预见、不能避免且不能克服），我们拟以此为例，探讨不可抗力对于我国民商事诉讼及仲裁的影响。

一、 什么样的情况属于不可抗力？

我国现行民商事法律关于不可抗力的定义主要体现在《民法通则》第153条、《民法总则》第180条第2款以及《合同法》第117条第2款中，具体而言，系指不能预见、不能避免且不能克服的客观情况[1]。其中，不能预见通常指的是“根据现有的技术水平，一般对某事件发生没有预知能力”[2]，而不能避免且不能克服指的是“当事人已经尽到最大努力和采取一切可以采取的措施，仍不能避免某种事件的发生并不能克服事件所造成的后果”[3]。

就本次新冠疫情，新型冠状病毒虽然与SARS和MERS病毒具有一定的相似性，但仍然属于新型的传染病，且至今为止，尚未能够完全确定其传染源及传播途径，目前医学界针对新型冠状病毒也没有统一的确切有效的药物和治疗方法。此外，本次新冠疫情的爆发也具有相当的突发性，即使医学专业人士也无法提前预见。全国人大常委会法工委发言人、研究室主任臧铁伟在2020年2月10日也表示，“当前我国发生新冠肺炎疫情，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，属于不能预见、不能避免并不能克服的不可抗力。”

综上，虽然我国尚未对本次新冠疫情的定性出台任何正式文件，最高人民法院也尚未作出相关判例，但是我们认为新冠疫情已经基本符合不可抗力的特征。当然，就个案而言，不可抗力的认定还需要考虑当事人所在的地点、疫情发展的阶段、受疫情影响的程度等因素进行综合判断。[4]

二、 不可抗力对当事人权利主张的影响

根据我国的现行法律规定，不可抗力对于当事人主张其诉讼权利的影响主要体现在权利主张的期间以及方式两个方面：

1. 当事人主张权利的期间

在民商事诉讼和仲裁中，当事人提起诉讼/申请仲裁、申请执行、提起上诉以及申请再审/申请撤销仲裁裁决的权利都受到一定期限的限制。就此，我们所作整理如下：

当事人的权利主张	法律条款	期限
提起诉讼	《民法总则》第 188 条	三年 。但法律另有规定的，依照其规定。[5]
申请仲裁	《民法总则》第 198 条和《仲裁法》第 74 条	除非法律对仲裁时效有明确规定[6]，否则适用诉讼时效的规定。
申请执行	《民事诉讼法》第 239 条	二年 。申请执行时效的中止、中断，适用法律有关诉讼时效中止、中断的规定。
提起上诉	《民事诉讼法》第 164 条	针对判决： 十五日 针对裁定： 十日
申请再审	《民事诉讼法》第 205 条和《民事诉讼法》司法解释第 384 条	针对判决、裁定： 六个月 针对调解书： 六个月
申请撤销仲裁裁决	《仲裁法》第 59 条	六个月

(1) 提起诉讼、申请仲裁和申请执行

根据《民法总则》第194条第1款的规定，不可抗力可以产生中止诉讼时效的法律效果，但前提是不可抗力发生在诉讼时效期间的最后六个月内。另外，由于仲裁时效和执行时效适用诉讼时效的规定，所以中止时效的法律效果也同样适用于当事人申请仲裁和申请执行。与此同时，由于不可抗力往往与突发事件相关，我国《突发事件应对法》第13条也做了类似的规定：“因采取突发事件应对措施，诉讼、行政复议、仲裁活动不能正常进行的，适用有关时效中止和程序中止的规定，但法律另有规定的除外。”

就本次新冠疫情而言，如果当事人因是新型冠状病毒肺炎患者、疑似患者、被依法隔离或者其他严重受疫情影响的原因而无法主张权利，且该事件发生在诉讼时效期间的最后六个月内，那么当事人可以主张诉讼时效（或仲裁时效、执行时效）中止。

在因不可抗力而无法主张权利的期间，当事人应当积极收集和保存有关不可抗力的相关证据，以防止对方当事人日后在诉讼中以时效届满为由提起抗辩。同时，根据《民法总则》第194条第2款的规定，从中止时效的原因消除之日起，诉讼时效期间满六个月届满。因此，当事人还应在中止时效的原因消除之日六个月内积极行使权利，及时以书面形式向对方当事人主张权利，或者向人民法院或仲裁机构申请启动相关法律程序。

(2) 提起上诉

虽然当事人提起上诉的期限不适用诉讼时效有关中止、中断以及延长的规定，但是根据《民事诉讼法》第83条，当事人因不可抗拒的事由或者其他正当理由耽误期限的，在障碍消除后的十日内，可以申请顺延期限，是否准许，由人民法院决定。

我们认为不可抗力作为不能预见、不能避免且不能克服的客观情况当属《民事诉讼法》第83条中规定的“不可抗拒的事由或者其他正当理由”。以本次新冠疫情为例，如果当事人受新冠疫情严重影响，属于新型冠状病毒肺炎患者、疑似患者或被依法采取隔离措施的人而确实无法提起上诉，那么可以认为符合《民事诉讼法》第83条规定的适用情形。上海市高级人民法院根据《关于充分发挥审判职能作用为依法防控疫情提供司法服务和保障的指导意见》就本次疫情所做的《关于涉新冠肺炎疫情案件法律适用问题的系列问答》[7]中也体现了我们的这一观点。

(3) 申请再审和申请撤销仲裁裁决

根据《民事诉讼法》司法解释第127条，《民事诉讼法》第205条和《民事诉讼法》司法解释第384条规定的六个月再审期限皆为“不变期间”，不适用诉讼时效有关中止、中断、延长的规定。也就是说，当事人不能依据诉讼时效的规定主张中止再审期限。但是，我们认为，当事人仍可依据《民事诉讼法》第83条的规定申请顺延再审期限。首先，《民事诉讼法》司法解释的位阶低于《民事诉讼法》本身，《民事诉讼法》司法解释中规定的“不变期间”不应构成当事人依据《民事诉讼法》第83条申请顺延期限的限制。其次，我国司法实践也认为《民事诉讼法》第83条可以成为顺延“不变期间”的理由[8]。

同样，《民事诉讼法》第83条也应适用于顺延《仲裁法》第59条规定的申请撤销仲裁裁决的期限。就这一点，上海市高级人民法院就本次疫情所做的《关于涉新冠肺炎疫情案件法律适用问题的系列问答》中也做了肯定答复。

当然，本次新冠疫情是否构成不可抗力，或者《民事诉讼法》第83条所指的“不可抗拒的事

由或者其他正当理由”仍然需要进行个案判断。为方便当事人在新冠疫情期间继续主张权利，最高人民法院及地方各级人民法院陆续出台了关于在线提交立案申请的通知，各仲裁机构也先后发布文件向当事人提供通过线上或者邮寄方式申请仲裁的途径。因此，如果当事人现场主张权利存在困难，仍然可以尝试通过其他方式行使权利，而非当然构成不可抗力或“不可抗拒的事由或者其他正当理由”。

2. 当事人主张权利的方式

通常来说，当事人可以通过向人民法院或仲裁机构现场提交诉讼材料的方式主张自己的诉讼权利。然而，受新冠疫情的影响，最高人民法院于2020年1月30日发布《关于新型冠状病毒疫情防控期间诉讼服务和申诉信访工作的通告》，关闭法庭诉讼服务和群众来访接待场所。紧接着，上海、江苏、浙江等地的人民法院陆续发文暂停现场立案、诉讼服务和信访接待工作，关闭立案大厅、诉讼服务中心以及信访接待场所。与此同时，中国国际经济贸易仲裁委员会、北京仲裁委员会、上海仲裁委员会等国内的仲裁机构也陆续发出通知，暂停现场办理咨询、立案、接受仲裁文件等服务。另外，地方各级政府也接连采取了包括人员隔离、交通管制在内的各项防控措施。这都使得当事人的权利主张出现了一定的困难。

为了保障当事人的诉讼权利，最高人民法院于2020年2月14日发布《关于新冠肺炎疫情防控期间加强和规范在线诉讼工作的通知》，要求各级人民法院推进在线诉讼，即当事人可以通过在线方式提交立案申请。与法院类似，国内主要的仲裁机构也先后发出通知，向当事人提供在线立案的渠道和方法。

值得注意的是，最高人民法院《关于新冠肺炎疫情防控期间加强和规范在线诉讼工作的通知》第5条第2款特地强调了“跨域立案”，即“当事人及其诉讼代理人在线提交立案材料确有困难的，可以选择就近一家法院提交立案材料。相关人民法院应当按照跨域立案的工作机制和程序，及时办理立案手续。”也就是说，如果当事人无法在线提交立案申请，并且由于交通管制等原因无法前往有管辖权的法院办理现场立案，或者有管辖权的法院暂停现场办公，那么当事人可以就近选择法院提交立案材料，再由该法院作为协作法院，代为核对、接收并向有管辖权的法院发送跨域立案服务申请。

由于各地受疫情严重程度差异和政府的管控措施不同，疫情对于具体案件的影响也会有差异。我们建议当事人在新冠疫情期间密切关注相关人民法院或仲裁机构发布的各项通知，或者及时咨询法院立案庭、书记员、仲裁机构办案秘书或其他工作人员，结合自身情况，合理判断是否存在通过线上、邮寄甚至“跨域立案”主张权利的可能。如果确实无法主张权利，那么当事人应当收集和保存相关证据，包括疫情期间所处地点的证明，当地政府关于防控期限、防控措施的文件以及其他能够证明当事人无法通过线上、邮寄以及“跨域立案”主张权利的材料，并且在相关障碍消除后立刻通过法院或仲裁机构主张权利。

三、不可抗力对审理程序的影响

除了当事人主张权利之外，不可抗力对人民法院或者仲裁机构审理案件也会带来很多影响，主要体现在延期开庭、中止诉讼/中止仲裁程序、延长审限/延长仲裁裁决作出的期限等方面。

1. 延期开庭和中止诉讼/中止仲裁程序

我国《民事诉讼法》第146条规定：“有下列情形之一的，可以延期开庭审理：（一）必须到庭的当事人和其他诉讼参与人有正当理由没有到庭的；……（四）其他应当延期的情形。”就第一种情形，考虑到不可抗力不能预见、不能避免且不能克服的属性，不可抗力当然属于此处所指的“正当理由”；就第四种情形，根据最高人民法院《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》第2条，此处所指的“其他应当延期的情形”就是指因不可抗力或意外事件而导致庭审无法正常进行的情形。

而就仲裁而言，我国《仲裁法》第41条规定如果当事人有正当理由，则可以在仲裁规则规定的期限内请求延期开庭。在该条的基础之上，我国主要仲裁机构的仲裁规则中均对延期开庭做了具体规定[9]。虽然，《仲裁法》以及各仲裁机构的仲裁规则都采用了“正当理由”的表述而非不可抗力，但是我们认为，正当理由所包含的范围应当包括不可抗力，不可抗力可以构成当事人向仲裁庭延期开庭的理由。

此外，根据我国《民事诉讼法》第150条第4项规定，一方当事人因不可抗拒的事由不能参加诉讼的，人民法院应当中止诉讼。我国主要仲裁机构的仲裁规则中也规定了关于仲裁程序中中止的制度[10]，即在当事人申请或出现特殊情况时，仲裁程序可以中止。不可抗力应当属于此处所称的“不可抗拒的事由”或者“特殊情况”，即不可抗力可以成为诉讼或者仲裁程序中中止的原因。

在新冠疫情防控期间，浙江、山东、江苏等多地人民法院陆续发出指引性文件，引导受疫情影响无法参加诉讼活动的当事人依照法定程序申请延期开庭或者中止诉讼。就现阶段来说，以疫情为由申请延期开庭或中止诉讼的，被准予的可能性较高。另外，在部分受疫情影响较为严重的

地区，如湖北省，当地人民法院甚至出台了暂停诉讼活动的通知。湖北省高级人民法院于2020年1月29日发布《关于新型冠状病毒感染疫情防控期间有关诉讼活动调整事宜的公告》规定，“暂停所有开庭、调查、听证等诉讼活动，具体恢复时间视疫情防控需要，另行公告”。上海地区的人民法院也已经主动延期开庭或者裁定中止诉讼。

就仲裁而言，目前大部分仲裁机构已主动取消了2月份的开庭安排，延期时间需根据疫情和当地政府政策另行确定。对于受理后开庭时间仍未确定的案件，预计相应的开庭时间也会推迟。当然，如果当事人及其代理人因新型冠状病毒感染肺炎正在接受治疗、隔离观察或因交通管制等原因无法按期提交案件材料、无法正常参加庭审等仲裁活动的，也可以根据仲裁规则申请延期开庭或中止仲裁程序。上海仲裁委员会在《关于疫情防控期间服务商事仲裁主体的保障措施》中明确提到应人性化考量仲裁当事人提出的延期开庭、延期举证、延期选定仲裁员或提出仲裁反请求等申请，尽可能满足仲裁当事人合法、正当的法律实体或程序性权利申请。

2. 延长审限/延长仲裁裁决作出的期限

我国《民事诉讼法》第149条、第176条、第180条以及第204条针对民事诉讼程序的不同阶段分别规定了不同审限，也均规定“特殊情况”下可予以延长。与此类似，我国主要仲裁机构的仲裁规则中也规定，在“特殊情况”下或存在“正当理由”的可以延长仲裁裁决作出的期限^[11]。不可抗力如果对人民法院或仲裁机构审理案件确实造成困难，应当属于此处的“特殊情况”或“正当理由”。

在新冠疫情防控期间，地方各级人民法院以及各仲裁机构的运作均受到不同程度的影响，再加上可能出现延期开庭的情况，延长审限/延长仲裁裁决作出的期限的情况可能普遍存在。

除了延期开庭、中止诉讼/中止仲裁程序、延长审限/延长仲裁裁决作出的期限以外，不可抗力还可能对当事人的举证期限、证人出庭的方式等产生影响。我们建议当事人在遭遇不可抗力时应尽量与法院书记员、主审法官或者仲裁机构的办案秘书等保持联系，及时提出延期开庭、中止诉讼或仲裁程序、延长举证期限等申请，并收集和保存有关不可抗力的证明，防止自己的诉讼权利遭受不利影响。

四、不可抗力对执行程序的影响

如果当事人已经取得了生效的判决、裁定、调解书或者仲裁裁决，但是对方当事人并未按照相关法律文书的要求履行义务，那么当事人可以向人民法院申请执行。如我们前文所述，不可抗力会对当事人申请执行的时效产生中止的法律效果。除此之外，不可抗力还可能中止已经启动的执行程序。

我国《民事诉讼法》第256条规定“有下列情形之一的，人民法院应当裁定中止执行：……（五）人民法院认为应当中止执行的其他情形”。虽然相关司法解释尚未对此处“其他情形”的内涵和外延加以明确，但是借鉴《民事诉讼法》第150条有关诉讼中止的规定，我们认为不可抗力导致一方当事人无法按期执行的，应当属于此处的“其他情形”。

以本次新冠疫情为例，被执行人是新型冠状病毒肺炎患者、疑似患者、被依法隔离或者因为交通管制等原因确实无法配合人民法院的执行工作的，或者执行标的为继续履行合同但被执行人

受疫情影响停工停产确实无法继续履行的，或者与执行相关的第三方（如拍卖机构）因疫情原因无法正常运营而致使被执行人无法按期履行的，应当属于此处的“其他情形”。

另外，由于疫情防控的特殊性，最高人民法院《关于认真贯彻落实中央全面依法治国委员会第三次会议精神 切实做好防控新型冠状病毒感染肺炎疫情期间审判执行工作的通知》中明确要求各地人民法院暂缓对承担疫情防控任务的单位、人员以及场所、设备、物资、资金采取执行措施，对明确专用于疫情防治的资金和物资，不得采取查封、冻结、扣押、划拨等财产保全措施和强制执行措施，全力保障疫情防控工作。

结语

不可抗力对民商事诉讼及仲裁的立案、审理以及执行都存在重大影响。但是，考虑到不可抗力的构成往往要求较高，需要符合不能预见、不能避免且不能克服三个要素，我们建议当事人在个案中结合自身情况进行具体判断。以新冠疫情为例，随着全国各级政府陆续采取严格的防控措施，新冠疫情也逐渐得到了控制。自2020年2月10日起，各地企业开始陆续复工复产，社会经济也开始逐渐恢复到正常运转的状态。在这种情况下，当事人需要结合自身的客观情况、所处的地区、当地政府采取的防控措施等综合判断是否符合不可抗力的要素，并关注有管辖权的人民法院或者仲裁机构发布的通知文件，在符合条件的情境下及时向人民法院或仲裁机构提出申请，以保障自身的诉讼权利。

- [1] 虽然我国《民事诉讼法》、《仲裁法》及相关司法解释未对不可抗力加以定义，但是综合考虑我国的法律体系以及《民事诉讼法》及其司法解释中关于不可抗力的条款，我们认为此处关于不可抗力的定义不仅适用于合同等实体法领域，也同样适用于诉讼和仲裁程序。
- [2] 《中华人民共和国民法总则释义》，法律出版社2017年4月版，第561页。
- [3] 同上。
- [4] 有关不可抗力的含义和适用可参见本公众号于2020年2月25日发布的文章《新冠肺炎疫情影响下不可抗力与情事变更规则的适用》
- [5] 除了此处规定的期间为三年的“一般诉讼时效”之外，我国法律还针对保险金的赔偿或给付、国际货物买卖合同、技术进出口合同、专利侵权、产品质量缺陷以及在海商法领域规定了“特殊诉讼时效”
- [6] 我国现行法律关于仲裁时效的规定主要是劳动争议调解仲裁（仲裁时效1年）、国际货物买卖合同和技术进出口合同纠纷（仲裁时效4年）以及农村土地承包经营纠纷调解仲裁（仲裁时效2年）。
- [7] 资料来源：上海市高级人民法院官方澎湃号，查询日期：2020年2月25日，网页链接：https://www.thepaper.cn/newsDetail_forward_6057054
- [8] 四川省高级人民法院（2019）川民再105号民事裁定书：“……该期限系不变期间，即除了《中华人民共和国民事诉讼法》第八十三条规定的因不可抗拒的事由或者其他正当理由耽误期限的情形外，不存在中止、中断与延长问题……”
- [9] 例如中国国际经济贸易仲裁委员会仲裁规则第37条第1项、上海国际经济贸易仲裁委员会仲裁规则第32条第2项、北京仲裁委员会仲裁规则第31条第1项。
- [10] 例如中国国际经济贸易仲裁委员会仲裁规则第45条、上海国际经济贸易仲裁委员会第42条、北京仲裁委员会仲裁规则第45条。
- [11] 例如中国国际经济贸易仲裁委员会仲裁规则第48条、上海国际经济贸易仲裁委员会第44条、北京仲裁委员会仲裁规则第48条。