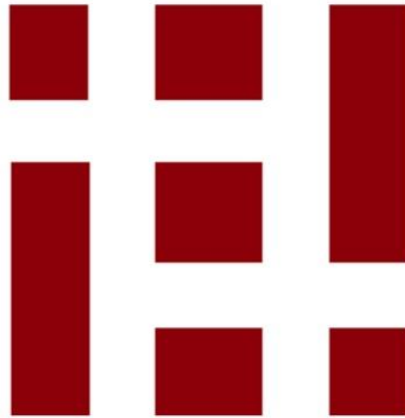


A Legal Guide
for Enterprises to Cope with NCP outbreak



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A Legal Guide

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Since the beginning of the Chinese New Year of 2020, the Novel Coronavirus Pneumonia (NCP) has spread rapidly across China. The central and local governments have taken various measures to control the epidemic, such as postponing production resumption and implementing home quarantine, which however have aroused considerable public concern for the general economic situation of the country. This guide aims to help businesses pull through and cope with the NCP outbreak legally by providing analyses and advice on personnel management and performance of commercial contracts.

Note: This guide is a general collection of our understanding about the relevant laws, regulations, policies as well as legal practice concerning the scenarios which may occur due to the NCP outbreak. In no way should the guide be considered as a formal legal opinion given by our firm. It is highly recommended to consult with a legal professional to address a specific issue.

The different levels of legislatures, courts, procuratorates and governments may keep updating the regulations, interpretations and policies in terms of NCP outbreak. Any information provided in this guide is subject to what is later issued by the aforesaid authorities. Meanwhile, our suggestions included in this guide may change afterwards.

The guide is structured as below:

Part I Questions and Answers for Personnel Management (1-25)

Part II Questions and Answers for Business Operation (26-39)

Part I Questions and Answers for Personnel Management

- 1. Can a business rescind the labor contract with an employee who is in quarantine or receiving treatment due to NCP?**

A: No. According to the Notification on Properly Dealing with Employment Relationships during NCP Control(人社厅明电[2020]5号,hereinafter ‘REN SHE TING MING DIAN [2020]NO.5’), issued by the Ministry of Human Resources and Social Security on Jan 24th 2020, no enterprise shall invoke the Article 40 or 41 of the Labor Contract Law to rescind the labor contract with a known or suspected NCP patient or one in close contact with the infected during the quarantine, treatment, medical observation or any other period where the employee is unable to provide labor as usual because of isolation or other emergent measures adopted by the government.

- 2. Can an employer terminate the employment relationship with an employee if their contract expires during the quarantine or medical observation to the employee?**

A: No. In line with the REN SHE TING MING DIAN [2020]NO.5, if a labor contract expires during the quarantine or medical observation to the contracted employee, the contract shall not be deemed as expired until the end of the medical treatment, observation, quarantine or other emergent measures taken by the government.

- 3. Can an employer send a dispatched worker, who is a known or suspected NCP patient or in close contact with the infected, back to the labor dispatch service provider concerned during the quarantine or medical observation to the worker? Should the employer pay the dispatched worker salaries during the downtime? What is the salary standard to follow?**

A: No. An enterprise shall not lay off an employee or return a dispatched worker who is unable to provide labor as usual because of the measures during NCP control, according to the Article 2 of the Opinion on Stabilizing Employment Relationships during NCP Control and Supporting the Resumption of Production (人社部发〔2020〕8号, hereinafter ‘REN SHE BU FA[2020]No.8’), issued by the Ministry

of Human Resources and Social Security on Feb 7th 2020. A similar provision is included in the Notification on Helping the Employment Situation of Shanghai during NCP Control, issued by The Bureau of Human Resources and Social Security and the Finance Bureau of Shanghai city.

However, a precondition for denying the legitimacy of returning a dispatched worker is that the worker's failure to provide labor as usual only because of the NCP outbreak and control. An employer is entitled to return a dispatched worker, provided that i)the worker concerned comes under the scenarios specified in the Article 39 of the Labor contract Law; ii)the employer is declared bankrupt, revoked of its business license, or ordered to shut down or cancel registration by law, or decides to dissolve in advance or not to continue the business upon expiry of the business period; or iii) The labor dispatch agreement is terminated upon expiry.

To conclude, an employer shall not send back a dispatched worker whose failure to provide labor as usual is caused by the NCP outbreak and control, except for the existence of any of the above scenarios, and the dispatched worker shall be entitled to get salaries during the downtime based on the labor dispatch agreement concerned and the principle of 'equal pay for equal work'.

4. Can an employer dismiss an employee who is suspected of being infected with NCP but refuses to be isolated or treated?

A: As the case may be. Where an employee, as a suspected NCP patient, causes transmission of the disease by negligence as a result of refusing to be isolated or treated and such a behavior is serious enough to endanger public security and constitutes a criminal offense, his/her employer shall be entitled to dismiss him/her as per the Labor Contract Law (Subparagraph 6, Paragraph 1, Article 39).

Where the refusal of a suspected NCP patient to be isolated or treated causes no transmission of the disease or is not serious enough to constitute a criminal offense, the suspected patient's employer shall be still entitled to dismiss him/her as per the Labor Contract Law (Subparagraph 2, Paragraph 1, Article 39) , as long as the above behavior of the suspected patient proves to be a violation of the company's rules or regulations. Otherwise, there might be a lack of a legal reason to dismiss the suspected patient, and we suggest an employer contact with the local residence committee or an epidemic control center under such a circumstance.

5. Can an employer dismiss an employee for transmitting NCP intentionally?

A: As the case may be. Where an employee is held criminally liable for transmitting an infectious disease intentionally, the employer concerned shall be entitled to dismiss him/her as per the Labor Contract Law (Subparagraph 6, Paragraph 1, Article 39). Provided that an employee's intentional transmission of a disease is not serious enough to endanger public security or constitute a criminal offense, the employer concerned shall be still entitled to dismiss him/her as per the Labor Contract Law (Subparagraph 2, Paragraph 1, Article 39) , as long as the above behavior of the employee proves to be a violation of the company's rules or regulations. Otherwise, there might be a lack of a legal reason to dismiss the suspected patient, and we suggest an employer contact with the local residence committee or an epidemic control center under such a circumstance.

6. How about the validity of the separation application submitted by an employee before the 2020 Spring Festival, while the NCP outbreak and control make it temporarily impossible to go through the relevant formalities?

A: The separation application shall be deemed as valid. Every employee is free to determine whether to work and where to work. According to the Article 37 of the Labor Contract Law, an employee shall have the right to rescind the labor contract, and a submitted separation application/notification shall take effect immediately after reaching the employer. In another word, as long as a submitted separation application represents the true intention of an employee, it shall be considered to be valid, regardless of whether the resignation formalities are delayed by NCP control. However, the employer shall help the job leaver complete the formalities as soon as possible after reopening the workplace.

7. Is it advisable for an employer faced with financial difficulties to downsize?

A: Job-cutting can be adopted when necessary, with all legal formalities completed. The REN SHE TING MING DIAN [2020] No.5 makes the following suggestions to enterprises: employers faced with financial difficulties may take such measures as cutting wages, working by turns and shorting working hours upon negotiation with employees in order to save jobs, which means job-cutting should be done as a last option. Meanwhile, according to the REN SHE BU FA [2020] No.8, local governments are encouraged to make good use of job-saving allowances to help medium, small and mini-sized businesses that refrain from job-cutting; for enterprises that have no alternative but to downsize, relevant governmental authorities should help them figure out redundancy packages, complete legal formalities, properly cope with employment relationships and maintain business

operation.

Under the guidance of the latest policies, we suggest employers faced with financial difficulties use alternatives to job-cutting firstly. Where layoffs are necessary, it is recommended to make redundancy packages, complete legal formalities and compensate laid-off employees with the assistance of professionals.

8. Can an employer faced with financial difficulties due to the NCP outbreak?

A: An employer may cut wages upon consensus with the employees concerned. In line with the REN SHE BU FA[2020]No.8, enterprises are encouraged to take such measures as cutting wages, working by turns and shorting working hours upon democratic negotiation with employees in order to save jobs; local governments should encourage businesses lacking affordability to defer wage payments through negotiation with unions or employee representatives and help these companies survive the current financial difficulties.

Considering the impact of the NCP outbreak and control, we make the following suggestions to businesses: 1) they may cut performance-related salaries according to what is prescribed in labor contracts or company regulations; 2) when lacking supporting provisions in labor contracts and company regulations, it is recommended to take such measures as cutting wages, working by turns, shortening working hours and deferring wage payments upon democratic negotiation with employees in order to help businesses pull through.

It is worth noting that cutting wages unilaterally may be considered as a failure to pay wages in full in the absence of supporting provisions in labor contracts and company regulations and in lack of prior consensus with employees. Under such a circumstance, each employee concerned shall be entitled to terminate the labor contract (not necessarily thirty days in advance) and claim severance compensation according to the Article 38 and 46 of the Labor Contract Law.

9. Can a job offer be withdrawn due to the NCP outbreak?

A: The job offer shall not be withdrawn in principle. Where the NCP outbreak causes financial difficulties and a lack of capability and affordability to sustain previously-planned positions, the employer may cancel an offer after explaining the current situation to the job applicant concerned and get his/her forgiveness. However, an employer not faced with financial difficulties should, in good faith, keep a job offer valid. Provided that the NCP outbreak prohibits a new recruit commencing working as planned, another entry date may be appointed upon negotiation.

10. What are the salary standards for known or suspected NCP patients and those in close contact with the infected during the isolation or treatment?

A: In accordance with the Law on Prevention and Treatment of Infectious Diseases (Paragraph 2, Article 41), none employer should stop paying an isolated employee during the period of isolation. The REN SHE MING DIAN[2020]No.5, a known or suspected NCP patient or one in close contact with the infected shall be paid as usual during the quarantine, treatment, medical observation or any other period where the employee is unable to provide ordinary labor because of isolation or other emergent measures adopted by the government. There is little controversy over this issue in the current legal practice.

11. How should enterprises pay workers or employees who still need to stop working for treatment after the end of the quarantine period?

A: After the end of quarantine, if a worker or an employee who still need to stop working for treatment is able to provide a diagnoses certificate given by medical institutions, we suggest that the enterprise shall provide the worker or employee sick pay based on the relevant provisions on the medical treatment period for sick workers or employees. According to the *Circular on Issuing and Distributing the Opinions on Several Issues concerning the Implementation of the Labor Law of the Peoples Republic of China*, any of the workers and staff that suffers from diseases or non-work-related injuries shall enjoy a medical treatment period from 3 to 24 months based on his/her years of participating in work and the length of years serving the enterprise. The employees taking sick leave shall be provided with sick pay or disease relief funds by enterprises during the prescribed medical treatment period, which may be lower than the local minimum wage, but shall not fall below 80% of the minimum wage.

12. How should enterprises pay salaries during the 14-day quarantine, a government-required period to isolate all employees coming back to work from other regions for the purpose of controlling the epidemic?

A:According to the requirements of the REN SHE BU FA [2020] No. 8 file, when an employee cannot return to work on time or the enterprise concerned cannot resume production due to the NCP outbreak, we suggest the enterprise take the following steps to arrange employment and pay wages during this period:

- a) The enterprise can arrange employees to work at home through tele-working

tools such as telephone and internet to complete work. In this case, the salary shall be paid normally.

b) If an enterprise has not been facilitated with telecommuting, the annual leave, welfare leave and other vacations shall be preferentially deducted to offset the days of not working during the quarantine or suspension of production through consultation with employees.

c) If the employees are still not able to return to work or provide work regularly after using up all kinds of leave, the enterprise shall consult with the employees in accordance with the relevant provisions on salary payment during the period of shutdown or production halt and pay salaries according to the standard specified in the employment contract within a pay period, or pay the employees basic living allowances by following the local standards if such shutdown or production halt lasts longer than a pay period.

If not required by the government, or exceeding the quarantine period required by the government, the employee requires more time for self-quarantine. We suggest that the enterprise negotiate with the employee, but the enterprise should have full discretion.

13. How should an enterprise pay salaries if the enterprise has shut down longer than a pay period due to the epidemic?

A: In combination with Article 12 of Interim Provisions on the Payment of Remuneration and Clause 2 of the REN SHE TING DIAN [2020] No. 5 File, where an enterprise's shutdown or production halt lasts shorter than a pay period, the enterprise shall pay the remuneration to employees at the standard as stipulated in the employment contract. Where such shutdown or production halt lasts longer than a pay period and employees provide regular labor, the enterprise shall pay remuneration not lower than the local minimum wage; if employees don't provide regular labor, the enterprise shall pay the employees basic living allowances by following the local standards of different provinces, autonomous regions and centrally-administered municipalities.

14. What should be done if an enterprise is unable to pay wages on the payday due to the NCP outbreak and control?

A: If an enterprise can prove that it is unable to pay wages to its employees due to the epidemic prevention measures taken by the government or relevant departments, it shall be entitled to claim exemption. However, the enterprise shall timely notify the employees of the payment delay caused by the outbreak of NCP

and pay the wages as soon as possible when it is possible to pay.

If the enterprise is short of funds and has no ability to pay wages, it can negotiate with the labor union or employee representatives to postpone the payment according to the REN SHE BU FA [2020] No. 8 File, so as to help the enterprise relieve the pressure of capital turnover.

15. After the resumption of work, if an employee who is not infected with NCP or quarantined or has already recovered from NCP still do not return to work on time, what should the employer do?

A: If an employee can provide a written diagnosis issued by a medical institution which can prove that the employee needs to take a leave, the enterprise can deal with it as sick leave. If the employee fails to provide the medical institution's diagnosis, the enterprise may arrange the employee to take annual leave, compensatory leave or other welfare leave (if any) out of prudence. If the employee does not return to work while failing to provide a medical diagnosis or there is no other holiday available, the enterprise has the right to deal with it according to the company's rules and regulations and the employment contract; if absenteeism without a reason is so serious a violation of the company's rules and regulations that the company has the right to dismiss the employee, the employer can terminate the labor contract with the employee concerned by invoking the Article 39 of the Labor Contract Law of the People's Republic of China.

16. For the employees who did not provide services during the extended Spring Festival holiday from January 31 to February 2, 2020, can the enterprise require the employees to offset the three days with paid annual leave or other paid holidays or to make up for the working hours in the future?

A: No. According to the *Notice on Extending the Spring Festival Holiday in 2020* (GUO BAN FA MING DIAN [2020] No. 1) issued by the general office of the State Council, the Spring Festival holiday in 2020 is extended to February 2. Except that February 2 is originally a weekend off, January 31 and February 1 are additional days given to employees for the need of epidemic prevention and control. Enterprises shall not arrange employees to take paid annual leave within the three-day holiday or require employees to make up for it in the future by means of offsetting compensatory leave or to shift work. If an employee has been arranged or approved to take paid annual leave from January 31 to February 2 prior to the issuance of the above notice, the three-day holiday shall not be included in the actual annual leave.

In addition, according to the REN SHE BU FA [2020] No. 8 File, “for employees who cannot take the extended Spring Festival holiday due to epidemic prevention and control, enterprises shall first arrange the employees to take days off afterwards; otherwise the enterprises shall pay overtime wages according to the law.” That is to say, for the employees who provide labor during the extended Spring Festival holiday, the enterprise shall arrange the employees to take compensatory holidays as it deals with the employees’ working overtime on weekends. If the employees cannot take compensatory holidays, they shall be paid overtime wages.

17. For employees who do not provide labor during the delay of work resumption, from February 3 to February 9, 2020, can the enterprise require the employees to offset with paid annual leave, or require the employees to make up for the working hours by means of offsetting compensatory leave or to shift work in the future?

A: The REN SHE BU FA [2020] No. 8 File encourages enterprises to solve employment-related problems during the extended period through consultation. For enterprises whose employees cannot come back to work on time due to the outbreak of NCP and who have not been facilitated with telecommuting, they shall negotiate with employees to give priority to the use of paid annual leave, welfare leave given by the enterprises and other types of leave. However, there is no clear provision for employees who have no leave to offset. In combination with the reply of Shanghai Human Resources and Social Security Bureau at the press conference of Shanghai prevention and control leading team, the reason for the delay of work resumption is the need of epidemic prevention and control, and it is not caused by personal reasons. The delay of work resumption shall be regarded as rest days. For the employees taking a rest, the enterprise shall pay them wages according to the standard stipulated in the labor contracts; for the employees having no holidays to be offset, we think that before the new policy comes out, the enterprise cannot require the employees to make up for this period by means of offsetting other rest days or working overtime.

18. Can employers affected by the outbreak of NCP apply for a special working hour calculation system?

A: Yes. In the current situation of fighting against the outbreak of NCP and stabilizing employment, the central and local governments have issued a series of policies to support enterprises to alleviate employment pressure by adjusting

working hours and wages through consultation and democratic procedures. For example, the REN SHE BU FA [2020] No. 8 File clearly supports the negotiation of wages between enterprises and employees. For those who are affected by the outbreak of NCP and have difficulties in production and operation, enterprises are encouraged to negotiate with employees through democratic consultation procedures to maintain employment stability by adjusting their salaries, rotating their jobs, shortening working hours, etc.; for those who are temporarily unable to pay wages, enterprises should be suggested to negotiate with labor unions or representatives of employees to postpone payment, so as to help enterprises relieve the pressure of capital turnover. Enterprises preparing to adopt the special working hour calculation system shall report to the local competent department in time after resuming work in order to ensure the legality and compliance of employment.

19. Local governments have different requirements for the time of work resumption. Which requirement should an enterprise that has employees in different places comply with?

A: If there is no special agreement between an employer and an employee in the labor contract, the requirement implemented in the place where the labor contract is performed shall prevail in principle. According to Article 14 of Implementing Regulations of the Labor Contract Law, “where the place of performance of labor contract is different from the place of registration of the employing unit, the minimum wage standard, labor protection, labor conditions, occupational hazard protection and the average monthly wage standard for workers of the previous year of the locality shall refer to the provisions of the place of performance of labor contract. Where the relevant standard of the place of registration of the employing unit is more favorable than that of the place of performance of labor contract, and the employing unit and the worker agree on the application of the provisions of the place of registration of the employing unit, such agreement shall prevail.”

20. What should be done if an employee is unable to come back to work on time due to the outbreak of NCP or the employer decides to postpone the time of resuming work?

A: It is suggested that the employer should negotiate fully with employees, and on the premise of reaching agreement, the following solutions can be adopted:

a) taking annual leave or welfare paid leave or shifting work: give priority to the choice of taking paid annual leave. If the employer has welfare annual leave or

employees can shift work, the enterprise can offset the delay of resuming work with welfare annual leave or arranging employees to shift work later;

b) Furlough: If the employee does not return to work for a long time, the enterprise may arrange the employee on furlough after consultation with the employee. During this period of furlough, the salary shall be determined by both parties through consultation or paid based on the regulations concerning the period of shutdown or production halt:

c) Work at home: for some enterprises operating in a flexible way, if employees can work at home to complete the tasks, enterprises can arrange the employees to work at home;

d) Other lawful solutions agreed by both parties through consultation.

21. Can the employer refuse any employee who was infected with NCP but is cured to return to work, or ask the employee to go to the designated hospital for reexamination?

A: No, the employer cannot discriminate against a cured employee by refusing him or her to resume work. Article 16 of the Law on the Prevention and Treatment of Infectious Diseases explicitly stipulates that no entities or individuals shall discriminate against infectious disease patients, pathogen carriers and suspected infectious victims. Patients who have been cured shall enjoy equal labor rights in accordance with the provisions of the Labor Law. The employer shall not adopt discriminatory policies. The employer shall neither refuse the cured employees to return to work nor require the employees to do a reexamination in the hospital.

22. Based on safety considerations, can the employer decide on its own to restrict the personal freedom of an employee as a suspected NCP patient by compulsory isolation under centralized management?

A: The employer cannot decide on its own to take measures to restrict the personal liberty of individual workers, such as compulsory quarantine under centralized management. The Law on the Prevention and Treatment of Infectious Diseases does not give the employer the above right. For suspected cases, the employer can contact the epidemic prevention and control department of local community in time, and the qualified department shall take necessary measures on suspected patients.

23. Can an employer require an employee concerned to disclose the relevant information about whether (suspected of) being infected with NCP, as well as personal information about travel destination and return route?

A: Yes, the information can be collected. However, the employer shall pay attention to personal information protection. According to Article 12 of Law of the People's Republic of China on the Prevention and Treatment of Infectious Diseases, all entities and individuals within the territory of the People's Republic of China shall accept the preventive and control measures taken by institutions of disease prevention and control and medical institutions for investigation, testing, collection of samples of infectious diseases and for isolated treatment of such diseases, and they shall provide truthful information about the diseases. In line with the requirements of governments at all levels, the company collects some data to jointly prevent and control diseases, and employees are obliged to cooperate in registration, investigation, etc. However, a citizen's right to privacy is protected by law. The right of privacy refers to the right of a natural person to enjoy the peace of private life and the protection of private life information according to law, and not to be disturbed, known, used, revealed or disclosed to the public by others. It includes the right of personal information not to be disclosed. Therefore, relevant information collected by the company cannot be disclosed to other employees without permission.

24. During the prevention and control of NCP, is an employer obligated to take safety measures to prevent and control the epidemic? What would be the legal consequences if the employer fails to perform its legal obligation to prevent and control the epidemic?

A: employers shall take safety measures to prevent and control the epidemic. According to the Article 22 of Emergency Response Law, “ Every entity shall establish a sound safety management system, periodically examine the implementation of all of its preventive safety measures, and timely eliminate hidden incident risks; such entity shall control and timely resolve any of its existing problems likely to cause social safety incidents, and prevent the intensification of conflicts and expansion of situations; such entity shall make a timely report on emergency incidents likely to occur and on preventive safety measures it takes to the people's government at the place where such entity is located or the relevant departments of the people's government in accordance with relevant provisions.”

Employers who fail to fulfill their statutory duties for epidemic prevention and control may bear responsibilities such as damage compensation, suspension or revocation of administrative licenses and business licenses, and fines. The person directly in charge of the entities may also be in administrative detention, fined or even investigated for criminal responsibility.

25. If an employer fails to pay the social insurance for employees, and the employee is infected with the NCP, does the employer need to bear the medical expenses?

A: according to the "Circular about Medical Insurance for New Coronavirus Pneumonia" released by the National Healthcare Security Administration and the Ministry of Finance on January 22, 2020, if patients have been diagnosed with NCP, their medical expenses can be firstly covered by basic medical insurance, serious illness insurance and medical assistance, and the shortfall will be subsidized by the government. If the employer fails to pay medical insurance for the employee in a timely manner, which causes the employee to pay extra costs for it, the employer may need to bear the medical expenses for the employee.

Part II Questions and Answers for Business Operation

26. During the performance of external business contracts, how to properly apply the force majeure as a reason for liability exemption?

A: taking into account the current situation of NCP, this outbreak has met all the legal elements of force majeure, namely, "objective scenario which is unforeseeable, unavoidable and unconquerable" as stipulated in Article 180 of the General Rules of the Civil Law and Article 117 of the Contract Law. The Legal Affairs Committee of the Standing Committee of the National People's Congress and the courts of justice at all levels clearly state that failure to perform contract due to epidemic prevention and control is attributed to force majeure and thus can apply for partial or full exemption of civil liability.

But it is important to note that in addition to meet the three elements, "unforeseeable, unavoidable and unconquerable", the performance period is also required to apply force majeure, which means the event must occur during the performance period of the contract. If force majeure event occurs after one party defaults, the breaching party does not enjoy the counterplea of force majeure.

Therefore, we suggest enterprises that need to declare force majeure on the grounds of the outbreak of NCP note the following:

1) Check the contract terms for the definition of "force majeure" incidents and whether there is any agreement to bear risks. If there is an agreement, clarify the responsibilities and develop a response strategy according to the terms of the contract;

2) Collect relevant evidence of contract performance failure due to the NCP and prove the causality;

3) The scope of the party's request for civil liability exemption should be comparable to the impact caused by the epidemic;

4) In the event of an epidemic outbreak that prevents the contract from being performed, the parties should promptly inform the other party to fulfill the notification obligation.

27. How to define the period of force majeure?

A: in the case of NCP outbreak, the period of force majeure starts from the dates when different regions confirmed the outbreak of NCP and took control measures

in its regions. Therefore, the start date can be the dates when different provinces, autonomous regions and centrally-administered municipalities announcing the initiation of a first-level response to the major public health emergency. For example, the date of Shanghai is January 24, 2020, the date of Jiangsu Province is January 24, 2020, and the date of Zhejiang Province is January 24, 2020.

Regarding to the determination of the end of force majeure, it will be different according to the nature of different commercial contracts, and it can be considered from the following aspects:

1) The extended holidays and time of resumption of work stipulated by regulatory documents issued by local governments (currently such dates are used by CCPIT and its local branches on their documents issued)

2) The dates that later local governments will announce to end the emergency response (that is, terminate first-level response to major public health emergencies) and terminate control measures according to the situation and development trend of NCP.

3) The date that the relevant temporary advice becoming revoked or expired which is given by the World Health Organization since the WHO listed the NCP outbreak as a Public Health Emergency of International Concern and provided advice to the Chinese government following the procedures.

28. How should parties who cannot fulfill their obligations in commercial contracts due to the NCP to fulfill their obligations of providing relevant proof?

A: In general, there is no controversy that the NCP outbreak is a force majeure event. However, the impact of the NCP outbreak on specific contracts still needs case-by-case analysis, and not all liabilities related to business contracts during the NCP outbreak period can be completely exempted. Besides, the period of control measures adopted by local governments also varies. From the legal perspective, each contracting party still needs to initially collect proof related to the NACP as a force majeure event, including mandatory documents issued by local governments at the provincial or lower levels, or orders and notices issued by the municipal government, district government or communities.

In the case of international trade contracts, enterprises should also apply for proof documents related to force majeure from the local CCPIT.

29. What aspects need special attention when using force majeure as a reason for liability exemption in international trade?

A: if "force majeure" is not stipulated in the international trade contract, and the

applicable law stipulated in the contract is not Chinese law, it should be noted that some common law systems and some other countries may not recognize the concept of "force majeure" at the legislative level.

When the concept of "force majeure" cannot be directly invoked, if the nation of the counterparty is a party to the United Nations Convention on Contracts for the International Sale of Goods ("CISG"), then the party can claim for liability exemption by invoking Article 79 of the CISG. But it must be noted that the force majeure article under the CISG can only exempt the liability for damages compensation of the party which is affected by "force majeure", and the counterparty is still entitled to taking relief measures such as requesting the replacement of goods or reducing the payment.

If the nation of the counterparty is not a party to the CISG which cannot be applied as a result, it is recommended that the company consult with the counterparty in accordance with the rule of "hardship" under the "Principles of International Commercial Contracts" to prove that there are increased costs of contract performance or reduced value from contract fulfillment due to the accident. Therefore, the party may request for contract alteration or delayed performance.

30. If a contract cannot be fulfilled due to the impact of NCP, can the contract be terminated or altered?

A: a commercial contract can be terminated if it has been agreed in the contract that "force majeure is one of the conditions for termination of the contract". Or the counterparty has agreed to terminate the contract after the NCP outbreak.

In the absence of the foregoing agreement or failure to reach consensus, according to Article 94 of the Contract Law, "the contractual purpose cannot be achieved due to force majeure, the parties can terminate the contract". In this circumstance, that is, to the extent that the contract has been completely unable to perform, or the subsequent performance is unable to achieve commercial purposes, then the parties can request the termination of the contract. If the NCP only temporarily affects the contract performance in terms of delivery period, method, price, etc., the parties have no right to unilaterally terminate the contract. According to the cases during the SARS outbreak in 2003 and the guidance issued by some high courts based on the circumstance during this NCP, they do not support the termination of the contract if the purpose of the contract can still be achieved.

However, the contracting party may request the court to alter the related matters in the contract by invoking the "principle of changed circumstances" or other related principles.

31. If the contract cannot be fulfilled due to the prevention and control measures for NCP outbreak, after the force majeure effect is eliminated, how to handle the dilemma if one party requests to continue to perform the contract, and the counterparty that failed to fulfill the contract requires to terminate the contract due to changes in the market and business conditions?

A: generally speaking, in order to encourage commercial transactions and promote the spirit of contract, the legal criteria for terminating a contract are very strict in judicial practice. Especially if the original contract can still be fulfilled when the NCP outbreak is over, and it is requested to continue to perform the contract. For example, the Heilongjiang High Court stipulated that when handling the lease relationship, "the parties should be highly suggested to renegotiate and reach a new agreement on the lease contract of factory buildings and sites affected by the NCP to resume the contract performance. Referring to the judicial practice of the courts in all regions during SARS outbreak, it is generally believed that if the outbreak of NCP does not necessarily lead to the failure of contract fulfillment, the parties still need to continue to perform the contract.

32. How to handle the difficult situation if there is a rise of labor and raw materials costs due to the impact of the NCP, and it is obviously unfair to continue to perform the contract?

A: According to the "Interpretation of Contract Law (II)", the "Guiding Opinions of the Supreme People's Court on Several Issues Concerning the Trial of Cases on Disputes over Civil and Commercial Contracts in the Current Situation", and referring to the judicial practice during SARS outbreak in 2003, the principle of fairness can be applied accordingly based on specific circumstances. The specific solutions in judicial practice include changing the terms of the contract, the contracting party sharing the corresponding losses or terminating the contract. Therefore, we recommend that the contracting parties should renegotiate on the relevant clauses of fulfillment, such as time, price, and performance method to promote a fair fulfillment of the contract if it is unfair for one party to continue performing the contract due to the impact of NCP.

Although the "principle of changed circumstances" is not the statutory ground for the termination of the contract and there are strict requirements to apply it in practice, local courts in many regions have been requested to fully utilize their judicial trial functions to actively promote the fair and reasonable performance of contracts considering the impact of NCP. Therefore, the contracting party may request the court to change some terms obviously unfair in the contract.

33. How should a contracting party cope with malicious default of the other party on the pretext of the NCP outbreak?

A: Where an enterprise or individual maliciously breach a contract on the pretext of the outbreak of NCP, we suggest the non-breaching party respond as follows:

- a) gathering information about the epidemic situation, governmental control and work resumption in the region where the other party resides, so as to estimate the impact and loss suffered by the breaching party;
- b) maintaining communication with the other party and meanwhile collecting and preserving relevant evidence as far as possible;
- c) defending your rights actively by making a claim with the breaching party.

34. Can a lessee ask the lessor for partial or complete exemption of the rent? Is it possible to terminate the lease contract in advance?

A: In order to mitigate the impact of the NCP outbreak, all levels of governments have made policies to release the economic burden on enterprises, including without limitation encouraging voluntary exemption of rent, partially or completely. Lessees of housing for business purposes may apply to their lessors for partial or complete exemption of rent in the principle of change of circumstances and the principle of fairness. The parties may enter into a supplementary agreement to confirm the rent exemption with the consent of the lessor. Without consent from the lessor, a lessee shall pay rent as agreed in the contract and declare in writing to reserve the right to take legal action in order to get rent exemption through litigation and arbitration afterwards. A judgment or arbitration should apply.

A lessee whose business really cannot survive the NPC outbreak may negotiate with the lessor to terminate the contract in advance. Where a negotiation fails, the lessee may file a lawsuit or apply for arbitration to determine the proposed rescission of the contract.

35. How to cope with the financial difficulties caused by downstream purchasers who are also faced with the current crisis and retain monies due for their own use?

A: We suggest a supplier confronted with the above question preserve evidence such as sales contract, order form and dispatch bill etc., and demand payments due persistently by calls, emails, visits and attorney letters to ensure the prescribed period for litigation will not expire. The supplier should bring the case

to a court with jurisdiction if the downstream purchaser fails to pay in an extended period (if any), making a request for liquidated damages or overdue interest in accordance with the contract and the Contract Law.

36. How to calculate the time limit for litigation when a contracting party is prohibited by the NCP outbreak from making a claim?

A: The calculation of time limit for litigation shall be suspended where a contracting party (including without limitation a self-employed business owner and the sole shareholder of a one-person company) cannot make a claim as a known or suspected NCP patient or because of being put in quarantine or constrained by traffic control. In accordance with the Article 149 of the General Rule of Civil Law, ‘a limitation of action shall be suspended during the last six months of the limitation if the right of claim cannot be exercised because of force majeure, and the limitation of action shall expire after six months from the date when the obstacles causing the suspension are eliminated.’

Given that the considerable impact of the NCP outbreak, different levels of local courts have repeatedly emphasized the legal application of time limit for litigation to protect the legitimate rights and interests of a non-breaching party during the NCP outbreak and control , we therefore suggest enterprises and individual make claims as soon as possible after work resumption so as to avoid expiration of the prescribed period for litigation .

37. Shall the prescribed period for exercising the right to rescind a contract be suspended or discontinued because the contract dissolution notification fails to be sent to the other party due to the NCP outbreak?

A: Since Wuhan was closed on Jan 23rd, 2020, many other provinces and cities have taken measures such as traffic control and delaying work resumption in succession. Before the outbreak of NCP, a number of contracting parties intended to terminate some contracts in accordance with their agreement with the other party or legal provisions. However, their notifications of terminating the contracts failed to be sent to the other party in time due to traffic control and work resumption delays. It’s worth noting the prescribed period for exercising the right to terminate a contract shall not be suspended or discontinued. In another word, the right to terminate a contract will become invalid immediately after the prescribed period for exercising the right expires.

In accordance with the Article 95 of the Contract Law, ‘where a time period for exercising the right of dissolution is stipulated by laws or has been agreed on

by the parties, and where, upon the expiry of the time period, this right has not been exercised, the said right shall be extinguished. Where a time period for exercising the right of dissolution is not stipulated by laws or has not been agreed on by the parties, and where the other side has been called upon to exercise the right but has not done so within a reasonable period of time, the said right shall be extinguished.’ We therefore suggest enterprises and individuals exercise the right to contract dissolution by emails, messages and the Wechat APP in order to avoid expiration of the prescribed period and incur unnecessary loss.

38. Should the calculation of litigation-related time limits, such as the period for filing an appeal, be suspended during the delays of work resumption?

A: The calculation shall not stop. In accordance with the Article 82 of Civil Procedure Law of the People’s Republic of China, ‘periods shall be computed in hours, days, months and years. The time and date of the commencement of the period shall be excluded from the period. Where the last date of expiry of the period is a public holiday, the first day following the public holiday shall be the date of expiry of the period. Transit time shall be excluded in the period, a litigation document mailed before the date of expiry shall not be deemed as overdue.’

In accordance with the ‘Notification on Extending the 2020 Spring Festival Holiday’ issued by the General Office of the State Council, ‘the 2020 Spring Festival Holiday is extended to Feb 2nd, and the national uniform time of returning to work is Feb 3rd.’ Therefore, the period from Jan 24th to Feb 2nd of 2020 is a nationwide legal holiday of the country. If a litigation-related time limit expires during the aforesaid period, the date of expiry shall be extended to Feb 3rd. Nevertheless, the delays of work resumption are neither national legal holidays nor days off, thus, the calculation of litigation-related time limits shall not be suspended during the delays of work resumption.

39. Can enterprises faced with financial difficulties apply for deferred repayment of loans or interest deduction?

A: Many enterprises are confronted with financial difficulties in business operation and repayment of loans. According to the ‘Notification on banking, insurance and financial services to facilitate the prevention and control of NCP’ (YIN BAO JIAN BAN FA [2020] 10), for wholesale and retail, accommodation and catering, logistics and transportation, cultural and tourism industries which are severely affected by the NCP outbreak, as well as enterprises that have promising prospects but are faced with temporary financial difficulties due to the NCP, banks and other

financial institutions shall not arbitrarily call in loans in advance, or suspend or delay making loans. Banks and other financial institutions are encouraged to support enterprises survive the NCP outbreak by lowering loan interest rates to an appropriate extent, improving policy arrangements, increasing fiduciary loans and medium and long-term loans.

Local governments have successively issued supportive policies to assist enterprises in the fields of tax, finance and social security. For instance, according to a notification issued by Shanghai Municipal Government, ‘the Shanghai Pudong Development Bank, Bank of Shanghai and Shanghai Rural Commercial Bank to increase loans for medium, small and mini-sized business which are greatly affected by the outbreak of NCP. Moreover; the lending rates shall be at least 25 basic points less than the market quoted rate for the same period; other financial institutions shall execute the same standards as required above.’ In addition, financial institutions are guided to support enterprises with repayment difficulties by changing repayment arrangement, extending payment periods, refinancing without repaying principal.

Several banks have expressed their will to implement special policies for enterprises affected by the NCP. Macro policies are well implemented in general, but the specific measures adopted by each bank are different. We therefore suggest the enterprises in need of help keep communicate with banks and get support by reorganization of credit, extension of debt and reduction of overdue interest rates.

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