

# COVID-19 Tackling Key Legal Issues Faced by Businesses

Nick Chan, Partner, Hong Kong  
Presentation to Hong Kong General  
Chamber of Commerce

[nick.chan@squirepb.com](mailto:nick.chan@squirepb.com)

[squirepattonboggs.com](http://squirepattonboggs.com)

# Agenda

## COVID-19

### Terminating Leases and Other Contractual Obligations by “Force Majeure” Clause or “Frustration”

### Employment Considerations and Special arrangements

- Duty to provide medical or protective products to employees
- Work-from-home arrangement (WFH)
- Cybersecurity, data privacy and legal dimensions of using video conferencing and remote access tools
- Temporary closure of office, furlough or reduction of workforce
- Cross-border travel and quarantine requirements
- Handling of employees who have contracted coronavirus

### Suggested To-do Action Items



# Terminating Leases and Other Existing Contractual Obligations by “Force Majeure” Clause or “Frustration”

---

## Frustration (by law)

A doctrine that operates to discharge a contract when an event for which no party may be faulted occurs to significantly alter parties' intended rights and obligations beyond the party's control.

### Examples

- Supervening illegality
- Cancellation of expected event (*Krell v Henry* [1903] 2 KB 740)
- Illness, incapacity or death

## Force Majeure (contract based in HK)

A contractual majeure clause. Generally provides relief to excuse a party from performing or alters the terms according to which a party shall perform, a contract in whole or in part upon the occurrence of a materially impactful and unforeseeable event

### Examples

- Depends on wording of the clause
- Typically includes war, typhoon, acts of state, etc.

# Terminating Leases and Other Existing Contractual Obligations by “Force Majeure” Clause or “Frustration”

- On 30 January 2020, the China Council for the Promotion of International Trade (CCPIT) announced that it will offer force majeure certificates to Chinese companies struggling to cope with the impact of the coronavirus outbreak
- The certificate issued by CCPIT exonerates companies from not performing or partially performing contractual duties by proving they are suffering from circumstances beyond their control
- Under Hong Kong law, force majeure is regarded as a contractual creation and has no agreed definition
- This is contrasted with PRC law, where force majeure is a defined concept codified in statute



# Terminating Leases and Other Existing Contractual Obligations by “Force Majeure” Clause or “Frustration”

---

According to PRC Contract Law, if the contract cannot be performed due to force majeure, the responsibility shall be exempted from liability in part or in whole in light of the impact of the event of force majeure, except otherwise provided by law

- Where the contract has a specific provision on force majeure, the contract provision will apply to the extent it does not conflict or derogate from the general principles set out under PRC Contract Law

CCPIT and local trade promotion agencies have legal basis to accept and issue force majeure certificate as proof of existence of force majeure

- Article 8 (6) of the Articles of Association of the China Council for the Promotion of International Trade approved by the State Council stipulates that as an independent third party, CCPIT can issue various commercial certificates, including force majeure certificates which have been widely used and fully proved in practice In line with international trade practices

# Terminating Leases and Other Existing Contractual Obligations by “Force Majeure” Clause or “Frustration”

---

Parties can present the certificate to another party of the contract for delay in performance or termination of the contract

- If the party refuses to accept the certificate and a dispute arises between the parties, it can usually be settled through mediation, litigation or arbitration
- CCPIT Commercial Certification Center integrates the forces of the national trade promotion system and legal opinions on the force majeure involving major events to ensure the legality and compliance of each certificate to help enterprises reduce losses



# Common Law vs Civil Law

	Common law	Civil law
Main source of law:	Binding case laws (judicial precedents)	Codified set of laws: statutes, legislations
Role of judge:	Set precedents, make rulings	Establish facts of case and apply codified laws
System	Adversarial	Inquisitorial

# Applicability of Frustration (HK)

---

Some examples that a contract may be frustrated during the coronavirus outbreak:

## **Scenario 1: Government restrictions/policies**

- Area of work under quarantine and staff are not allowed to commence work under local regulations and laws/global travel restrictions **or** employees are under compulsory quarantine

## **Scenario 2: Cancelled events**

- Conferences were cancelled due to coronavirus and no work can be done

## **Scenario 3: Employees contracted coronavirus**

- Short-term employment contract may be frustrated

## **Note: *Li Ching Wing v Xuan Yi Xiong* [2004] 1 HKLRD 754:**

- The court considered whether SARS was a frustrating event to allow a two-year lease to be invoked when the tenant was subject to a 10-day isolation order
- Held: SARS is not a frustrating event as 10 days was insignificant period in a lease that lasts for two years and, thus, did not significantly change the nature of the contractual obligation

# Applicability of Force Majeure (HK)

---

## Consider:

### Whether the clause expressly contemplates an outbreak situation (and to occur in Hong Kong)

- Language is important: performance is “rendered impossible”/“delayed” are two different concepts

### If yes, is there a duty of mitigation or are there notification requirements?

### What is the consequence if there is a force majeure event?

- Is there a duty to continue performance of contract or alternative manners of performance are provided?
- What if one party provided services and has not received payment due to force majeure event? When contract is silent as to parties' arrangement, the affected party may assert a claim for restitution/unjust enrichment

# Applicability of Force Majeure (HK)

---

## **Sample clause:**

- A party affected by an event or events of Force Majeure shall be excused from performance of the obligations under this Tender/ the Contract for so long as such event shall continue. The affected party shall as soon as possible give notice in writing to the other party of the occurrence of the event of Force Majeure.
- In the event that performance of obligations hereunder is delayed by Force Majeure, the parties shall diligently endeavour to achieve expeditiously the normal pursuit of this Tender/the Contract after the event of Force Majeure and to make up for the time lost. The completion date of the Services shall be extended by the number of days of delay actually caused by such event of Force Majeure unless a different extension shall be agreed amongst the parties in writing. In all other respects the obligations of the parties hereunder shall be unaffected.

**No force majeure clause is the same, no “one size fits all”**

**Each relevant contract must be reviewed independently**

# Protection – Contract Drafting

---

## **Parties may wish to consider preparing a standard contingency clause in agreements**

E.g., suspend time from running until expiration of XX in conveyancing transactions

- Agree on when the suspension of time expires
- Agree on the time for performance of completion
- Automatic suspension of time upon certain events



# Employment Considerations and Special Arrangements



# An Employer's General Duty

---

## What is “reasonably practicable”?

Whether an employer has discharged its statutory duty under section 6(1) depends on the facts and circumstances

- See *HKSAR v Gold Ram Engineering & Development Ltd* [2002] 2 HKC 600

## The CFI affirmed that, for the purpose of section 6, the court shall consider:

- What precautions an employer had taken to ensure that it was a safe operation if there was a risk
- Whether those precautions taken, so far as reasonably practicable, were sufficient

Involves consideration in light of the whole circumstances, at the time of the incident, whether the time, trouble and expense of the precautions are proportionate to the risks involved, also to assess the degree of security which the measures may be expected to afford

# Duty to Provide Medical or Protective Products to Employees

---

**No express requirement** under the Occupational Safety and Health Ordinance (Cap. 509) to provide such protective products

**Better assess on a case-by-case basis**

- High-risk industries? Public facing?
- Employee relationship management?

**Be considerate and show understanding to employees' situations and make flexible arrangements**

**Depending on the material and the conditions, human coronaviruses remain infectious for a different period of time**

- At temperatures of 30-40° C, coronaviruses tend to persist for a shorter time
- Less than 5 minutes on human hands under temperatures of 20-30° C?

# An Employer's General Duty

Centre for Health Protection says that N95 respirators are generally not recommended for use by the general public in community settings because special training is required for proper wearing and removal of the mask

Surgical masks are generally considered sufficient

Typical protection standards used:

- BFE/PFE/VFE
- ASTM level 1-3

System protocol/training to employees?



Standard	Size of Particles
BFE Bacteria Filtration Efficiency	3 microns
PFE Particle Filtration Efficiency	0.1 microns
VFE Virus Filtration Efficiency	0.1 – 5 microns (AVG 2.8 microns)

# Work-from-home Arrangement (WFH)

---

## **No legal obligation to allow the employees to work from home**

### **Arrangement with pregnant employees**

- S 15AA of the Employment Ordinance (Cap.57) provides that an employer must not assign to a pregnant employee duties injurious to her pregnancy if she can produce a medical certificate with an opinion indicating her unfitness to do such work.

### **Suggestion: where practicable, allow flexible work arrangements**

- Maintain labour-management relations
- Protect the health of all employees, as well as the community

### **Some policies adopted by companies:**

- Shortened work hours (10 a.m. – 5 p.m.) at office
- Take shifts to attend office
- Allow work from home arrangements with prior approval from supervisor/HR

### **“Best practices”:** allow adequate supervision under WFH arrangement

# Work-from-home Arrangement (WFH)



# Work-from-home Arrangement (WFH)



# Cybersecurity, Data Privacy and Legal Dimensions of Using Video Conferencing and Remote Access Tools

---

## Risks

- Access sensitive data through unprotected Wi-Fi networks
- Transfer files to personal devices to work on
- Pirated Microsoft products used by employees
- Work practices in public places, e.g., work in a café
- Security vulnerabilities in tools
- Remote log-in

## Solutions

- Create a work-from-home security policy
- Multi-factor authentication
- Password manager > use of VPN
- Use of Zoom, Microsoft Team, WeChat, WhatsApp
- Use of firewalls
- Penetration tests
- Cybersecurity insurance



# Temporary Closure of Office, Furlough or Reduction of Workforce

---

**Actions requiring employees to utilize their annual leave now, take unpaid leave or receive pay cut should be very carefully assessed**

- Employment Ordinance (Cap. 57) stipulates clearly the provisions of paid annual leave, statutory holidays and rest days
- If implemented improperly, may give rise to criminal consequences

## **Termination of employees**

- Ensure that none of the affected employees fall within any of the protected categories under Hong Kong law, e.g., the Employment Ordinance (Cap. 57) and the Disability Discrimination Ordinance (Cap. 487)
- An employer is prohibited from terminating the contract of employment of an employee on their paid sickness day under the Employment Ordinance (Cap. 57)
- Employers are under a duty not to subject the employees to any less favourable treatment as a result of their condition

# Temporary Closure of Office, Furlough or Reduction of Workforce

---

## Likely discriminatory and unlawful acts:

- To dismiss an employee on the ground that they are suspected of being infected with coronavirus
- To refuse an application of a candidate because they are suspected of being infected with coronavirus
- **But** requiring employees to work from home after travelling to high-risk places is unlikely to be considered unlawful

## Statutory severance payment

### Example 1

- Employee commenced employment on 6 April 2015
- Notice given on 6 March 2020 to terminate the employment relationship on the ground of redundancy
- Notice period is one month
- Last day of employment is, accordingly, 5 April 2020 and length of employment was five years
- Last month's wages: HK\$18,000
- Statutory severance payment amount =  $\text{HK\$}18,000 \times (2/3) \times 5 = \text{HK\$}60,000$
- Generally speaking, the relevant formula is last month's wages x 2/3 x years of service

# Temporary Closure of Office, Furlough or Reduction of Workforce

---

## Statutory severance payment

### Example 2

- All facts same as Example 1 except the following:
  - Employee employed by Company A on 6 April 2015
  - Employee transferred to Company B on 10 May 2019
  - Company A and Company B are wholly owned by Company C since 2010
  - Company A, Company B and Company C are all Hong Kong companies
  - Given that Company A and Company B are group companies, the employee's service with Company A will be recognized
- The statutory severance payment amount would be the same as Example 1

# Temporary Closure of Office, Furlough or Reduction of Workforce



# Cross-border Travel and Quarantine Requirements

---

The Compulsory Quarantine of Certain Persons Arriving at Hong Kong Regulation (Cap. 599C) (Regulation), made under the Prevention and Control of Disease (Public Health Emergency) Regulation, was effective midnight of 8 February 2020

- All persons having stayed in the Mainland for any period during the 14 days preceding arrival in Hong Kong, regardless of nationality and travel documents used, will be subject to compulsory quarantine for 14 days
- The Regulation will remain in effect until 7 May 2020
- If an employee is required to remain in quarantine, a public health officer may issue them with a quarantine order and a medical certificate
- If employees are able to produce such medical certificate, they may be entitled to the protection of the sick leave regime under the Employment Ordinance (Cap. 57) or WFH can be arranged if it is practical
- Employers can direct employees to take statutory annual leave, but the time of the annual leave should be appointed by the employer after consultation with the employee or their representative and confirmed by a written notice to the employee at least 14 days in advance, unless a shorter period has been mutually agreed

# Cross-border Travel and Quarantine Requirements

---

## **Suggestions for businesses under the newly-enacted Compulsory Quarantine of Certain Persons Arriving at Hong Kong Regulation (Cap. 599C):**

- Cancel/postpone all non-essential business travel through Mainland China
- Update the list of regular business travel employees and their contact details
- Require staff to provide notification of any planned travel in advance
- Revise existing remote working policies, if any

## **Businesses may wish to impose compulsory temperature test or require suspected coronavirus infected employees to visit a doctor**

- Likely lawful to do so if such measures are considered reasonable for ensuring a safe workplace and are implemented in a reasonable manner
- Need to comply with the six data protection principles in the Personal Data (Privacy) Ordinance (Cap. 486)
- Consider whether the temperature test may amount to an unlawful collection of personal data with regard to the purpose and manner of collection, etc.
- Suggestions: amend personal information collection statement and/or data privacy policy, seek the employee's explicit consent to the changes

# Handling of Employees Who Have Contracted Coronavirus

---

If any employees has contracted coronavirus, they will be entitled to sickness allowance under the Employment Ordinance (Cap. 57), provided that the conditions therein are satisfied

- Coronavirus has **yet to be listed** as one of the occupational diseases under the Employees' Compensation Ordinance (Cap 282)

**But:** provided that an employee has contracted coronavirus from a personal injury by accident in the course of their employment, employers may still be liable to pay for compensation and recover from the employee's compensation insurance

- Again, any unwarranted discriminatory act (e.g., immediate dismissal) will likely fall foul of the Disability Discrimination Ordinance (Cap. 487)

# Handling of Employees Who Have Contracted Coronavirus

---

## Sick Leave

### General payment conditions

- Sick leave taken is not less than four consecutive days
- Sick leave is supported by an appropriate medical certificate
- Employee has accumulated sufficient number of paid sickness days

### Formula

- Daily rate of sickness allowance is a sum equivalent to four-fifths of the average daily wages earned by an employee in the 12-month period prior to the sick leave
- The term “wages” is technically defined and it could pose great difficulty, especially for employees who have variable compensation

There are a number of court decisions on the calculation of statutory annual leave/sick leave, e.g., *Cathay Pacific Airways Ltd v Kwan Siu Wa Becky*

# Handling of Employees Who Have Contracted Coronavirus

---

## Sick Leave

### Example 1

- Employee takes sick leave from 9 to 13 March 2020 (five days in total)
- Employee receives only monthly salary
- Total salary received from 1 March 2019 to 29 February 2020 is HK\$366,000
- Employee is regarded as paid in respect of each day during the aforementioned period
- Employee has not taken any sick leave or unpaid leave, etc., during the aforementioned period
- Statutory sick leave pay per day should therefore be  $\text{HK\$}366,000 / 366 \times 0.8 \times 5 = \text{HK\$}4,000$  per day

### Example 2

- Same as the above except that the employee is also entitled to variable contractual commission paid on a monthly basis
- The total amount of contractual commission received from 1 March 2019 to 29 February 2020 is also HK\$366,000
- Statutory sick leave pay per day should therefore be  $\text{HK\$}732,000 / 366 \times 0.8 \times 5 = \text{HK\$}8,000$  per day

# Handling of Employees Who Have Contracted Coronavirus

**Check with insurance providers to see if claims related to coronavirus are covered**

**Consider purchasing specific insurance for infectious diseases**

**COVID-19 has been declared a *notifiable disease* in Hong Kong**

- “severe respiratory disease associated with a novel infectious agent” (COVID-19) was added to the list of scheduled infectious diseases by a notice dated 7 January 2020 and published in the government gazette on 8 January 2020
- Would potentially trigger cover under some wordings of insuring clauses



# Contingency Plan

## Areas to cover:

- Disinfecting the premises
- Quarantining employees who have close contact with the subject employees
- Conference and meeting arrangements
- Emergency office
- Public relations management
- Work-from-home (WFH) arrangement
- Risk management



# AI, Robotics and Coronavirus Crisis

- As some 100 million factory workers return to China's automotive, consumer electronics and smartphone makers, robotics and automation will be useful tools
- Robotics can reduce labour costs and increase productivity



# Going Forward – Swift Planning

## Hong Kong 2020/21 Financial Budget Summary

- The government forecasts real GDP growth of **-1.5 – 0.5%** and nominal GDP growth of **0.5 – 2.5%** in 2020
- Oxford Economics warned that the spread of the virus to regions outside Asia would knock **1.3%** off global growth this year, the equivalent of **US\$1.1 trillion** in lost income.
- Ripple effects across the market expected



# Suggested To-do Action Items

- Review existing contracts (force majeure/frustration) + insurance!
- WFH arrangement/closure of office
- Staff arrangement, policies updating
  - Protection of protective equipment
  - Temperature test
  - Staff under quarantine
  - Termination
  - Sick leave/annual leave/unpaid leave
  - Severance/sick leave pay
  - Cybersecurity
- Contingency plan drafting/updating





## What We Can Do For You

- Provide insight where law, business and government meet
- Provide sound, pragmatic commercial advice based on a deep understanding of your business
- Provide a unique mix of experienced, well-connected lobbying and political capabilities, to give you a voice and achieve your ambitions
- Provide unrivaled access to expertise and invaluable local connections across the globe
- Work alongside you to achieve successful outcomes



Ranked in the top  
10 global law firms  
for the sixth year  
running

*Law360 Global 20*

SQUIRE   
PATTON BOGGS



[squirepattonboggs.com](https://squirepattonboggs.com)