

Legal issues in times of an epidemic

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Welcome to our special bulletin in response to the coronavirus (COVID-19) outbreak

The outbreak of COVID-19 has given rise to a number of issues which businesses of all sizes and industries ought to consider and respond to.

During this period, we aim to provide an overview of the legal issues which may arise from the COVID-19 outbreak from different perspectives. In this bulletin, we will draw your attention to certain issues relating to (i) employment, (ii) corporate and financial regulatory, and (iii) general commercial contracts. The issues highlighted in this bulletin refer to the law in Hong Kong.

As the COVID-19 outbreak continues to spread and wider social, economic and developmental implications from the outbreak become clearer, we will continue to issue bulletins on related legal issues. We welcome your comments and suggestions for future topics. In the meantime we hope that you find this edition informative, and most importantly, stay safe and healthy.

If you have any questions regarding matters in this publication, please refer to the contact details of the relevant contributing authors.

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Frequently asked questions from employers in light of the COVID-19 outbreak

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Can employers require employees to complete health declaration forms or questionnaires and/or to have their temperatures checked?

Yes, in the circumstances. However, employers should comply with the provisions of the Personal Data (Privacy) Ordinance and ensure that the questions asked are reasonable, appropriate, and relevant to ensuring a safe and healthy working environment.

Can employers require employees to stay out of the office and work from home?

Yes, in the circumstances. Employers should continue to pay normal wages and benefits. Employees should be reminded of their confidentiality obligations when working out of the office, and ensure that access to confidential information is secure, and that it is not lost or otherwise transferred to an unauthorised medium. In particular, SFC licensed corporations and their employees are reminded to observe their obligations to keep and preserve regulatory records at their SFC-approved premises.

If there is a safety/health concern, employers should consider whether to require employees to work from home.

If an employee has had prior contact with a person diagnosed with or suspected to have COVID-19, or develops symptoms of the virus, the employer should require him/her to work from home.

Business is bad, can employers require employees to take annual leave?

Under the Employment Ordinance, an employer may require an employee to take his/her statutory paid annual leave upon giving 14 days' advance notice. Employers should explain the business reasons and try to give more than 14 days' advance notice. For annual leave in excess of the statutory annual leave days, it depends on the terms of the contract. Care should be taken that it does not result in employees being constructively dismissed or being made redundant.

It is always possible to discuss and agree that employees take unpaid leave on a voluntary basis.

COVID-19 – Public knowledge or inside information?

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Why would this public health issue be considered inside information of a listed company?

The COVID-19 outbreak has caused disruption to people's livelihood and businesses. Listed companies are reminded to observe their disclosure obligations under the Securities and Futures Ordinance ("**SFO**") and Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited ("**Listing Rules**") should inside information arise as a result of disruption to their businesses caused by the epidemic.

While the COVID-19 outbreak and the havoc brought by it to the affected communities are generally known to the public, the severity of its impact on each listed company's operation and financial performance may differ significantly. Such specific information about a listed company may not generally be known to its investors but if known, may materially affect the price of its securities.

Common examples

The measures taken in mainland China to prevent the spread of the disease, such as temporary

(Continued – COVID-19 – Public Knowledge or inside information?)

suspension of work, travel-related restrictions and limited service of transportation facilities, will impact companies globally due to China's integral role in the global supply chain. A listed company may have to make an inside information announcement if such impacts result in material changes in its business performance, financial condition, expected earnings, etc., or if material adverse changes can be expected as a consequence of the cancellation of its supply lines, customer orders or banking facilities, or the insolvency of its debtors.



Live examples

The Ministry of Transport of the PRC has implemented a nation-wide toll fee exemption for vehicles on all toll roads effective from 17 February 2020 until the end of the containment of the epidemic. Recently, we have seen several listed companies, the primary source of revenue of which is derived from toll income, publish inside information announcements on this toll fee exemption. In one instance, where toll fee revenue represents approximately 38% of the listed group's attributable operating profit, the listed company's inside information announcement stated that the exemption was expected to have an immediate impact on the results of the road projects segment of the group, although it was not expected to have a significant impact on the overall operations of the group in the long term.

The COVID-19 outbreak has also affected the operations of mines located both in the PRC and overseas, such as Myanmar. Many mines employ Chinese workers and the recent travel restrictions have resulted in Chinese employees not being able to return to work as scheduled or until physical check and quarantines have been completed. As a result, several listed mining companies have published inside information announcements disclosing how the epidemic has adversely affected their operations and financial positions.

Some relevant factors to take into account

If a listed company has production plants or supply chains in the PRC, or if its major customers are situated in the epicentre of this outbreak (say cities in the Hubei Province), some of the questions a listed company can consider to determine whether inside information has arisen include:-

- (a) Is there a drop in production capacity as a result of the containment measures? Will there be material delays in production schedule and late delivery of products?
- (b) Are there any disruptions faced by the other participants in the supply chain? Is there shortage in the supply of some essential parts or raw material due to the prolonged closure or part closure of factories or delays in delivery from locked down cities?
- (c) Will there be major changes in sales orders (such as cancellation or adjustment in delivery time) placed by customers?

The retail industry is also badly hit by the COVID-19 outbreak. If a listed company decides to downsize its retail store network to cut overhead costs, reduce staff costs and/or lower inventory level, the company should consider whether the extent of such closures and cost reduction initiatives will constitute inside information.

Crisis management

Directors, company secretaries and other members of management of a listed company must closely assess the COVID-19 outbreak's specific impact on the company's operation and financial performance, and continually monitor the company's exposure to risks amid the current uncertainties. They are reminded to follow their company's inside information policy and determine if and when inside information has arisen, and if so, make an inside information announcement as soon as reasonably practicable, unless any of the 'safe harbour' exceptions under Section 307D of the SFO apply.

A listed company may consider setting up a crisis management committee to continually assess the impact of the epidemic on the group's operation and financial performance and provide strategic direction to mitigate the negative impact of the epidemic in all aspects.

Impact of COVID-19 outbreak on commercial contracts

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In the wake of the coronavirus, contracting parties may find it difficult or impossible to continue to perform their contractual obligations. Companies and businesses should be alert to the following issues.

Force majeure

Unlike in many civil law jurisdictions (for example mainland China), there is no general right under Hong Kong law to invoke force majeure. However, international commercial contracts typically contain a "force majeure" clause which may provide relief to a party whose performance has been impacted by a specified force majeure event. Force majeure events commonly provided for in commercial contracts include "acts of God", "war", "invasion", "riots", "strikes" and "other circumstances beyond the parties' control". Some contracts might include "diseases" and "epidemics" as "force majeure" events. The force majeure clause typically also sets out the contracting parties' respective rights, obligations and reliefs upon the occurrence of a specific force majeure event.

Force Majeure is not a legal term of act. Whether a contracting party can rely on a force majeure clause depends on a careful consideration of the contractual language used, and the facts and circumstances of each individual case. Usually, one would have to determine:-

- (a) whether or not the COVID-19 outbreak (or a specific event) is an event falling within the scope of the force majeure clause;
- (b) whether the COVID-19 outbreak (or a specific event) prevented the performance of the contract or was it some other reason;
- (c) whether the party who wishes to invoke the protection of the clause had fulfilled its reporting obligations in accordance with the contractual provision; and
- (d) what the consequences for the parties are, e.g. whether parties are given an extension of time to perform their obligations, or whether the parties are discharged from their contractual obligations.

Frustration

If a contract does not include a force majeure clause, a contracting party may still be able to rely on the common law doctrine of frustration to argue that a contract has been discharged. A contract can be discharged by frustration when without default of either party, some supervening and unforeseen event fundamentally changes the nature of the outstanding contractual rights and obligations from what the contracting parties could reasonably have contemplated at the time when the contract was entered into.

The contracting party seeking to rely on the doctrine of frustration has the burden of proof and the threshold is high. For example, a contracting party may not be able to rely on frustration simply by saying that there were increased costs and expenses in performing the contract, or by showing that there was simply more hardship or inconvenience in performing the contract. If frustration is successfully established, it has the effect of terminating the contract and discharging both parties from any further obligations.



Suggestions to contracting parties

Businesses affected by the COVID-19 outbreak should consider the terms of their contracts, giving particular consideration to the force majeure clause. Where appropriate, the party having difficulty performing its contractual obligations should seek to negotiate a solution with the other contracting party prior to a default, for example seek agreement on a waiver or variation to the contract. When negotiating, contracting parties should be mindful of their communication and conduct as they may inadvertently evince an intention of non-performance which may give the other contracting parties rights on the basis of anticipatory breach.

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