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**The New Normal
Law Guide 2020**

Preface

The start of a new decade was envisaged to be paved with high hopes and new opportunities. However, over the first half of 2020, the COVID-19 pandemic has adversely impacted the livelihood of many across the world in an unprecedented manner. With social distancing measures and travel restrictions in place, the pandemic has also caused major disruptions to business operations across all sectors and will fundamentally change the way in which business is conducted as the global economy adjust to this new normal.

In the legal profession, practitioners and clients had to adapt to new modes of work and interaction with each other as a result of the pandemic. While challenges with adverse implications abound, opportunities to adapt to this new normal have likewise begun across various legal disciplines. A prime example being the Hong Kong courts and other dispute resolution institutions could approach affairs such as remote court hearings and electronic document service with the aid of technology.

Through this New Normal Law Guide, LexisNexis, in collaboration with a number of world-class law firms in Hong Kong, seeks to provide the latest insight on a wide variety of legal issues that have arisen as a result of the COVID-19 pandemic and to aid legal professionals in adapting to the new normal.

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A close-up photograph of a hand typing on a laptop keyboard. The image is dark and moody, with the light from the screen illuminating the hand and keys. The years 2019, 2020, and 2021 are overlaid in a large, white, sans-serif font across the middle of the image. The year 2020 is the most prominent and brightly lit, while 2019 and 2021 are slightly dimmer and more faded.

2019 2020 2021

Topic: **Coping with frustration: does a commercial tenant have a legal justification to not pay rent in the “new normal”?**

Firm: **Oldham Li & Nie**

Like the rest of the world, Hong Kong is struggling with the impact caused by the Coronavirus in different facets. The pandemic is not only taking away lives, but also ravaging the economy without mercy. For business owners, did you rent premises you thought you would be able to afford until the Coronavirus changed everything? In view of the prolonged social distancing and the intermittent lockdowns which appear to be the “new normal”, are you planning to get out of the tenancy agreement by reason of the Coronavirus? In this article, we will list out some frequently asked questions and provide you with our answers, so that you might have a grasp of how the rights and obligations of landlords and tenants may be affected as we adjust to a “new normal”.

Q1. Has anyone ever brought a case to Court to terminate the tenancy agreement / get out of his/her rental obligations by reason of a virus outbreak?

Yes, but in the context of a domestic tenancy.

In 2003, Hong Kong was devastated by the outbreak of severe acute respiratory syndrome (SARS), which infected 8,096 worldwide and killed 744. Block E of Amoy Gardens (淘大花園), a private housing multi-storey estate in Hong Kong, was unfortunately hard hit in the epidemic as there were 107 people infected there. In view of the severe situation, the Government imposed a 10-day isolation order on Block E and all the residents therein had to be evacuated. Subsequently, scientific investigations suggested that the U-traps in the sewage systems had been left dry which

allowed the virus to pass from the building sewage system back to the apartments.

The unfortunate tenants of Block E of Amoy Gardens were faced with a dilemma: given the situation, was there a legal justification for them to terminate the tenancy agreements? Or should they continue to stay in the premises which seemed to be unsafe for many after the expiry of the isolation order?

This question went before the District Court of Hong Kong in the case of **Li Chun Wing v Xuan Yi Xiong [2004] 1 HKLRD 754**. In this case, a tenant of Block E (“T”) terminated the 2-year rental agreement after the isolation order lapsed, and the landlord (“L”) applied for summary judgment against T for the accrued rent and damages arising from the alleged repudiation of the tenancy agreement. The question for the Court was therefore whether T was entitled to terminate the tenancy agreement.

The main argument that T relied on was the doctrine of **frustration**. The general doctrine of frustration would kick in when there is a supervening event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the outstanding contractual rights and/or obligations from which the parties could reasonably have contemplated at the time of its execution such that it would be unjust for the parties to further perform the contract. The supervening event, however, must not merely increase the burden of the contracting parties but must be so substantial to discharge

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Anna heads OLN's Tax Advisory Department. She regularly advises on tax and private client issues ranging from tax compliance, tax structuring and trust set up in tax efficient manner.

Apart from her tax practice, Anna is also a Dispute Resolution Partner. Her dual qualification in both law and accounting, coupled with her solid financial and banking background, makes her a perfect litigator for complex commercial disputes especially those requiring forensic accounting and understanding of financials. She has acted

in connection with a number of high profile and landmark cases in the High Court and Court of Appeal, involving shareholders' disputes, debt recovery, civil fraud, derivative actions, contentious regulatory matters, intellectual property disputes and complex probate matters.

Anna is fluent in English, Cantonese and Mandarin. Anna was nominated for Nominated for Young Lawyer of the Year in ALB Hong Kong Law Awards 2018.

the parties from the contract entirely. For instance, the mere fact that the contract has become expensive to perform, even dramatically more expensive, would not be a ground to relieve a party on the ground of frustration (see the English case **Thames Valley Power Ltd v Total Gas & Power Ltd [2006] 1 Lloyd's Rep 441**). In considering the argument of frustration, the Court in *Li Chun Wing* commented that the 10-day isolation order in the case was "quite insignificant in terms of the overall use of the Premises", as the term of the tenancy agreement in question was 2 years. Therefore, the Court rejected the argument of frustration and held that the lease was not frustrated by the isolation order.

Another argument by T was that there should be an implied covenant for the premises to be

fit for human habitation. The Court rejected such argument also because it was unusual for the Court to imply such a term in tenancy, and in any event there was just no evidence to suggest Block E continued to be unsafe for human habitation after the expiry of the isolation order.

Q2. Does the judgment in *Li Chun Wing* debar future tenants from claiming frustration by reason of the Covid-19 pandemic?

Not necessarily.

In *Li Chun Wing*, the Court stressed that "an event which causes an interruption in the expected use of the premises by the lessee will not frustrate the lease, unless the interruption is expected to last for the

unexpired term of the lease, or at least, for a long period of that unexpired term.”

That means, the duration of the epidemic, or more precisely the relative duration of the epidemic comparing to the length of the tenancy, is an important factor for deciding whether a tenancy has been frustrated. As experts of infectious diseases have pointed out, Covid-19 may not go away swiftly and we might have to fight a prolonged war against it. This may be contrasted with the case of SARS epidemic which hit Hong Kong very hard at first but was swiftly alleviated within weeks.

For tenants who have short leases, it may therefore be easier for them to claim frustration. However, this does not necessarily mean that long leases could never be frustrated at all as *Li Chun Wing* is only a decision by the District Court, being a court at a lower level in Hong Kong. On the other hand, in the recent English High Court case of ***Canary Wharf (BP4) T1 Limited & ors v European Medicines Agency [2019] EWHC 335 (Ch)***, it was suggested that it is not simply a question about the length of the tenancy. Instead, the Court should adopt a multi-factorial approach by looking at all the circumstances to decide whether the “common purpose” of the contract has been frustrated. This would require us to look beyond the four corners of the tenancy to consider also:

- The matrix or context when the tenancy was entered into
- The parties’ knowledge, expectations, assumptions and contemplations, in particular as to risk, at the time of the contract
- The nature of the supervening event; and
- The parties’ reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances

Q3. So, how can tenants seek immediate termination of tenancy and request for refund of prepaid rental / deposit?

Unless otherwise provided by the contract, generally landlord and tenant do not have the right to terminate the tenancy anytime before the period contemplated in the contract lapses. In most cases, even if force majeure clauses apply, they would only allow rent suspension or abatement but not termination of the tenancy. However, besides the situation that may give rise to frustration as discussed above, under certain circumstances, where a “repudiatory breach” of the contract has arisen, the non-breaching party may have the right to terminate the tenancy.

Generally, a repudiatory breach would only arise if the breach of the contract is sufficiently significant so as to deprive the non-breaching party of “substantially the whole benefit” of the contract. In the context of tenancy, where the landlord shut down the premises, it may be argued that the landlord has breached the implied covenant of quiet enjoyment where the shutdown is unilaterally decided by the landlord and not authorised by the tenancy. But where the shutdown is mandated by the government, it is difficult to attribute fault to the landlord and claim there is a breach of the tenancy on the part of the landlord.

Insofar as the issue of prepaid rental or deposit that is advanced by the tenant (e.g. two months’ rent) is concerned, first of all, one must turn to the actual tenancy agreement and check if parties have agreed on how the deposit would be dealt with. Where the contract is ambiguous or silent on the issue, it requires a case-by-case analysis of the tenancy agreements and the circumstances. If it is a straight-forward case that the landlord has breached the tenancy agreement so as to give rise to a “repudiatory breach”, the tenant can almost certainly terminate the tenancy and request for refund of the deposit. In contrast, if the tenant is the defaulting party, the

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Martin obtained his BBA(Law) and LLB both at the University of Hong Kong. He was admitted as a solicitor in Hong Kong in March 2017 and joined OLN as an associate in September 2018.

His current practice focuses on commercial litigation. He has experience in handling various contentious matters involving international trade, commercial disputes, land disputes, personal injuries, probate matters, and winding-up proceedings.

Martin's experience also comprises of advising Hong Kong-listed companies on a variety

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Before commencing his legal career, Martin also worked briefly as a project assistant for the Office of the Privacy Commissioner for Personal Data where he gained exposure to data privacy issues.

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landlord may just apply the deposit to cover the tenant's default.

However, as discussed above, very often the answer is less than clear and the tenant may not be certain whether he/she is entitled to rescind or terminate the contract on other ground such as frustration (Please refer to the answer in Question 2 hereinabove). This is where the tenants must be extra cautious because if it was later adjudicated that the breach is not a "repudiatory" one, they may be liable to compensate the landlord, amongst others, the outstanding rents, consequential losses and legal costs.

Q4. In light of the above, what actions should landlords take?

As for landlords, it is important to consider whether your right to collect rental payment has been impacted by Covid-19 before commencing any legal action to collect rent. As discussed below, there may be some 'new normal' contractual provisions (e.g. a force majeure clauses and "material adverse change" clauses) in your tenancy agreement that have contemplated the situation of an epidemic/pandemic and relieve the parties from the performance of the contract. Of course, the answer would very much depend on the intention of the parties and other circumstantial factors.

Q5. What should I pay attention to if I am contemplating to enter into a new tenancy agreement?

Under the “new normal”, besides express contractual provisions regarding termination of contract, parties have to pay attention to force majeure clauses and “material adverse change” (MAC) clauses.

For a discussion of force majeure clause, please refer to the article written by our Senior Partner, Mr. Gordon Oldham: <https://oln-law.com/are-you-frustrated-by-your-force-majeure-clause>. Parties may consider to provide a clear and unambiguous force majeure clause to contemplate the event of epidemic/pandemic.

In addition, very often the contracts would contain a MAC clause which expressly stipulates that certain events that materially change the business, operations, assets, liabilities, condition (e.g. financial condition) of a party may give rise to a right to terminate the agreement. Again, like a force majeure clause, the MAC clause must clearly contemplate the event of epidemic/pandemic if parties wish to rely on it. If MAC clauses are drafted in a generic way, the Court will tend to construe the clause narrowly by excluding Covid-19 as a MAC event. In determining whether a MAC clause is triggered, a case-specific analysis of the following circumstances will also have to be conducted:

- Intention of the parties
- What the parties have discussed on the treatment of Covid-19;
- What the market comparable is for the party's business; and
- How the party's business performance is compared with that of the market comparable.

Concluding thoughts

As we enter a “new normal”, we believe that there might be upcoming cases testing whether the doctrine of frustration could discharge

tenants from tenancy agreements and if so under what circumstances it will happen. Before a clear guidance is laid down, we suggest both landlords and tenants to keep track of the situation and review key tenancy agreements in order to assess what impact had Covid-19 caused to them specifically. Similar to most other disputes, the best way of resolution is always to attempt amicable negotiation and discussion by taking into account various commercial reality and practicality. If the tenant finds it inevitable to renege on rental payments, we suggest that he/she approaches the landlord to initiate a discussion and try to sort out whether rental reduction / deferment would be feasible before taking any legal action.

If you wish to obtain legal advice to assess your current situation, please don't hesitate to contact any of us (at anna.chan@oln-law.com, martin.tse@oln-law.com or lok.ho@oln-law.com) and we will be pleased to answer and assist.

Disclaimer: This article is for reference only. Nothing herein shall be construed as Hong Kong legal advice or any legal advice for that matter to any person. Oldham, Li & Nie shall not be held liable for any loss and/or damage incurred by any person acting as a result of the materials contained in this article.

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Topic: **Coronavirus: remedies for Hong Kong construction contractors**

Firm: **Pinsent Masons**

Construction contractors in Hong Kong have had a difficult year with the slower award of government contracts, social unrest affecting business sentiment and now the need to implement special work measures to prevent the spread of the coronavirus.

The current outbreak of the coronavirus, officially Covid-19, is an issue of concern for construction organisations including the Hong Kong Construction Material Association Limited and the Construction Site Workers General Union, as construction contracts are being badly affected.

While it is hoped that employers will take a sympathetic view of the impact of the outbreak on construction works and grant contractors extensions of time and additional costs, experience shows that contractors need to be ready to protect their own interests if disputes arise. Contractors should take action. Doing nothing and hoping for the best is not an option.

Contractual basis

Common standard form contracts used in Hong Kong include:

- the MTRCL Entrustment Contract (MTRC);
the Hong Kong Government General Conditions of Contract for Civil Engineering Works 1999 edition (GCC 1999);
- the Airport Authority Hong Kong General Conditions of Contract for Building Civil Works August 2011 edition (HKAA 2011);

- the Standard Form Building Contract published by the Hong Kong Institute of Architects 2005 edition (HKIA 2005); and
- the NEC3 ECC (NEC3).

With the exception of MTRC, none of these standard form contracts refer expressly to epidemics or spread of diseases. MTRC clause 55.1 requires the contractor to comply with orders and regulations issued by the government if there is an outbreak of illness of an epidemic nature, but does not provide for extensions of time or payment of additional costs.

‘Outbreak of illness does not fall within the meaning of “excepted risks” used in most of the standard forms ... So contractors may have to rely on other clauses in the contract.’

Tim Hallworth, *Legal Director*

Outbreak of illness does not fall within the meaning of “excepted risks” used in most of the standard forms that might otherwise have entitled contractors to time or money. So contractors may have to rely on other clauses in the contract such as:

- suspension;
- force majeure and prevention;
- change in law;
- instruction by the engineer;
- delay in delivery of materials;
- variation;
- delay as a result of the engineer’s flexible working arrangements; or
- special circumstances.

Consider the relevant contract provisions

The standard forms of contract often provide routes for the granting of extensions of time and additional cost due to the coronavirus on one basis or another. However, contractors will need

to carefully analyse the relevant facts and their particular contract provisions and amendments.

Some examples of possible bases of entitlement under the common standard form contracts used in Hong Kong are:

Event	GCC 1999	MTRC	HKAA 2011	HKIA 2005	NEC3
Suspension (if ordered by employer/ engineer/ architect due to outbreak)	Time and money (clauses 50(1)(b)(viii), 54(2))	Time only (clauses 68.1(h), 72.1 and 72.2)	Time and money (clauses 44.3(a)(xii), 49.1 and 55.1(xii))	Time and money (clauses 23.3(c), 25.1(3)(j) and 27.1(2)(e))	Time and money (clause 60.1(4))
Force majeure (if coronavirus outbreak is a "force majeure" event)	No force majeure clause therefore no time and no money	No force majeure clause therefore no time and no money	No force majeure clause therefore no time and no money	Time only (clause 25.1.3(a))	Time and money: not force majeure but an event neither party could prevent (clause 60.1(19)); clause often amended so only time not money
Change in law (if contractor needs to comply with any new law or regulation in relation to coronavirus)	No time and no money	No time and no money	No time and no money	No time and no money	Potentially time and money if provided for in NEC Option X2/ additional condition
Instruction by the employer/ engineer/ architect to take "special work arrangements"	Potentially time and money if amounts to suspension (see above), access restriction (clause 50(1)(b)(vi)), or variation (see below)	Potentially time and money if amounts to suspension (see above), access restriction (clause 65), or variation (see below)	Potentially time and money if amounts to suspension (see above), access restriction (clause 42), or variation (see below)	Potentially time and money if amounts to suspension (see above), access restriction (clause 25.1.3(s)) or variation (see below)	Potentially time and money if amounts to a suspension (see above), access restriction (clause 60.1(2)), variation (see below), or breach (clause 60.1(18))

Event	GCC 1999	MTRC	HKAA 2011	HKIA 2005	NEC3
Delay in delivery of materials (from China due to the coronavirus)	No time and no money. Contractor is generally responsible for materials and delivery (clause 10) - if material is to be provided by employer then money only (clause 63(e))	No time and no money. Contractor is generally responsible for materials and delivery (clauses 1.1.60 and 10.1(c))	No time and money with no such express provision.	No time and no money Contractor is generally responsible for materials and delivery (clause 8.1.1) - if material is to be provided by the Employer then time and money (clauses 25.1(3)(r) and 27.1(2)(j))	Potentially time and money See under force majeure above, also entitlement where supplies by employer or third parties (clauses 60.1(3), (4), (16) and (18)); but clauses often amended so only time for neutral events and delays by third parties
Variation (if coronavirus led to variation as defined in contract)	Time and money (clauses 50(1)(b)(iv) and 63(b))	Time and money (clauses 68.1(b) and 80)	Time and money (clauses 44.3(a)(xiii) and 55.1(xv))	Time and money (clauses 25.1(3)(h) and 27.1(2)(c))	Time and money (clause 60.1(1))
Delay as a result of engineer/ architect/ employer's flexible working arrangements	Potentially money only (clause 63(a))	Potentially time and money (clauses 7.4, 9.7, 16.4 and 68)	Potentially time and money (clauses 7.5, 44.3(a)(i) and 55.1(ii))	Potentially time and money (clauses 25.1(3)(l) and 27.1(2)(g))	Potentially time and money (clauses 60.1(3), (5), (18) and (19)); clauses often amended so only time for neutral events and delays by third parties
Any other special circumstance	Time only (clause 50(1)(b)(xi))	No similar blanket provisions - not within meaning of "excepted risk"	No similar blanket provisions - not within meaning of "excepted risk"	No similar blanket provisions - not within meaning of "excepted risk"	Potentially time and money : see under force majeure above

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Tim specialises in construction law and international arbitration. His experience covers both contentious and non-contentious roles in the context of construction and engineering. Tim is also a chartered quantity surveyor and close to 30 years' of construction experience of working in the UK, Hong Kong and China. Prior to becoming a lawyer, Tim worked as a commercial manager for Gammon Construction in Shanghai and as a Contracts Administrator for Leighton Contractors. Tim qualified as a chartered surveyor at

the quantity surveying consultancy firm of E.C. Harris in 1993.

Tim has worked on construction sites in the UK, Hong Kong and China as well as being in the senior management of construction groups. His wide range of experience equips him to easily understand project disputes, the client's objectives and bring strong commercial and practical solutions to enhance his legal skills.

Contractors may also consider common law remedies such as claiming damages for breach of an implied term – for example, that the employer will not hinder the contractor from carrying out and completing the works. However, the primary basis of any entitlement should be the relevant and applicable terms of contract.

It is not always clear which route will be the best basis of entitlement for the contractor. Contractors may not be able to point to one clause for a full remedy, and may have to rely on multiple provisions - used in conjunction with the common law - in order to be granted both time and money. Contractors will need to carefully analyse the terms of the contract as well as any special conditions in order to determine their entitlement, and legal advice should be sought if necessary.

Contractors should act promptly to protect their interests by making formal notifications and providing the necessary particulars in accordance with the contract and on time. This is especially important as a number of standard form provisions operate as conditions precedent to entitlement. It is also essential that contractors record the effect of the outbreak of the coronavirus on the works in terms of both time and cost.

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Topic: **Commercial leasing in Hong Kong**

Firm: **Stephenson Harwood**

As Governments around the world continue to announce increasingly restrictive measures in the retail and hospitality sectors to try to slow the spread of COVID-19, landlords and tenants are understandably concerned about the effect of such measures on commercial leases. Most commercial leases in Hong Kong are fixed term.

There are three principal ways in which the situation could be dealt with (a) there is a provision in the contract dealing with the situation (such as force majeure); (b) the parties may renegotiate terms to deal with the situation; (c) a party may be in “fundamental breach” of its obligations; or (d) the lease may be frustrated.

Contractual terms

Some leases may contain terms that anticipate actions such as government restrictions. These may be rent abatement or force majeure clauses.

Rent Abatement

A rent abatement clause may justify non payment of rent by a tenant. The application of such a clause will depend on its wording, however frequently they only apply where the premises have been destroyed or damaged.

Force Majeure

A tenant may also argue that a “force majeure” event has occurred. In Hong Kong force majeure will only apply if there is a force majeure clause in the lease. These are rare. Each clause will turn on its own wording – there

is no “one size fits all”. It is possible that a Government mandatory closure could comprise a force majeure event depending on the clause wording. The consequences of the force majeure event and the notification are normally set out in the clause, as there is no general legal position. These conditions must be strictly complied with.

Frustration

What is frustration?

Frustration is a legal doctrine which has the effect of discharging (entirely) a contract if something occurs which renders it physically or commercially impossible for the contract to be fulfilled, or which transforms the nature of the contractual rights and/or obligations such that they are not what the parties could reasonably have contemplated at the time of its execution. Frustration is a powerful legal doctrine. Accordingly, it applies only in very narrow circumstances. It must occur without the fault of either of the parties. It cannot be invoked to relieve a party from the consequences of an imprudent bargain or for reasons of economic hardship.

Does this apply to leases during COVID-19?

In Hong Kong, we have case law to guide us. In the 2003 case of *Li Ching Wing v Xuan Yi Xiong*¹ the effect of Government restrictions on the use of property during SARS was considered by the Hong Kong Court. A flat in Block E of Amoy Garden was let for a fixed term of two years. As those familiar with the history of SARS in Hong Kong will know, there was a very

¹ [2004] 1 HKLRD 754

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Andrew has a wide range of experience in commercial disputes and international trade and trade finance law. His clients include tenants and landlords and providers of services to the real estate industry dealing with such matters as forfeiture, eviction, recovery of commissions, change of use and new territories ownership. He has

represented clients in the English and Hong Kong high courts and courts of appeal, and in both ad hoc and institutional arbitration in London and Hong Kong and has conducted numerous mediations.

serious SARS cluster in Block E of Amoy Gardens. The Hong Kong Department of Health issued an isolation order and the residents of Block E were compulsorily evacuated for a period of 10 days. The tenant moved out of the property and subsequently sought to terminate the tenancy agreement arguing that it had been frustrated by the making of the isolation order.

The Hong Kong Court held that in the context of a two year fixed term lease, the isolation order duration of 10 days was insufficient to frustrate the lease because it did not significantly alter the nature of the outstanding contractual rights or obligations from those that the parties could reasonably have contemplated. As at the date of this note, we have not seen any Government mandated closures of commercial property in Hong Kong or isolation orders in relation to residential premises. However it is becoming increasingly possible. Whether such action would be

sufficient to frustrate a lease would depend on the severity of the action taken and its duration as compared with the duration of the overall term of the lease.

There is no set answer to this question, and each case will depend on its individual facts. However, we can find guidance from a number of English case authorities which deal with frustration in a leasing context. For example, in the case of *National Carriers v Panalpina (Northern) Ltd*² the English House of Lords considered whether the lease of a commercial warehouse was frustrated when a City Council closed the only access street to the warehouse for a year. They decided it was not. Although the closure was for one year, the lease was for 10 and there would have been three years remaining to run after the street re-opened.

² [1981] AC. 675.

Fundamental breach

A “fundamental” or repudiatory breach of a lease would be one where a party demonstrates their intention no longer to be bound by the terms of the lease. For instance a notice by the tenant that they no longer intended to pay rent, or a refusal by the landlord to allow access to the property. The effect of such a breach would allow the innocent party to terminate the lease and claim damages from the other.

Mutual agreement

The fundamental issue here is that to vary the lease there must be an agreement by the parties. In addition leases may contain “no oral modification” clauses. The English courts have recently decided that if a contract contains such a clause then any variation must be in writing. Further, it is important to note that under the general principles of contract law, any variation must be supported by consideration.

Outside of the above, a landlord is very unlikely to be in breach of a commercial lease

in a Government mandated closure. This is largely because the closure is not something which is within the landlord’s control.

Next steps

If you are a commercial tenant and are facing the situation where your lease is no longer economically viable, review your agreement before making any final decisions. In particular, consider the following:

- Are there any rent abatement clauses or provisions dealing with force majeure? Can you rely on them? Have any of the listed events in such a clause been triggered?
- Is there a break clause in your lease? Is there a sublet/assignment clause? Are you able to arrange a replacement tenant if it is not economically viable to continue the lease?
- Is a commercial solution possible such that a lease variation can be agreed? Consider rent reduction negotiations, and whether it is possible to re-structure rental payment provisions so that can be deferred or delayed.

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The COVID-19 situation is rapidly developing. We will endeavour to keep our clients updated of developments through our insights and regular bulletins.

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Topic: **Covid-19 and the question of Force Majeure**

Firm: **Boase Cohen & Collins**

*The global economy has taken a battering amid the coronavirus pandemic with many enterprises, no matter their size, struggling to fulfil contractual obligations. Boase Cohen & Collins Partner **Susan Cheung** examines some options which Hong Kong business owners may consider.*

With an unprecedented number of governments ordering border lockdowns, closures of non-essential businesses and restricting the movements of their citizens in a scramble to control the spread of Covid-19, business operations across all sectors large or small have experienced major disruptions.

The fallout from the coronavirus has had a huge impact on businesses and, more specifically, their ability to meet ongoing contractual obligations. Here is a brief look at the options which may be available to Hong Kong businesses.

Force Majeure Clause

A Force Majeure event is referred to as exceptional events beyond the parties' control or circumstances that prevent or hinder the performance of an obligation and the occurrence of which entitles one or both parties to cancel the agreement, be excused from performance of it, or suspend or extend the time for performance.

A contract may or may not contain a Force Majeure clause. In Hong Kong, companies seeking to rely on a Force Majeure event can only do so if a Force Majeure clause has been expressly written into the contract. The clause

must be written clearly and precisely and will usually comprise three major components:

1. A list of specific Force Majeure events which triggers the operation of the clause such as "war, acts of God, acts of government, epidemics, diseases";
2. The reporting obligations of the party seeking to invoke and rely on the clause, such as period for reporting and by what method; and
3. The consequences of the occurrence of the Force Majeure event, such as suspension or extension of time to perform.

The Hong Kong courts will, as far as possible, adopt a narrow approach to the interpretation of Force Majeure clauses according to their specific express wording, respecting the freedom of parties to contract on terms as they see fit, so clear and concise wording is essential.

Would the current Covid-19 pandemic be deemed a Force Majeure event entitling companies to relief from fulfilling their contractual obligations? Where an express term such as diseases, epidemics or pandemics has been used then Covid-19 is likely to be covered. Companies may also be able to rely on express wordings such as "acts of government" where governments have made orders/directives concerning closure of businesses, restriction of movement of citizens and stay-at-home orders. However, government advice or recommendations are unlikely to be covered.

Notwithstanding the event of Covid-19, the party seeking to invoke the Force Majeure clause must show it was the event which

prevented them from performing the contract or rendered it impossible to perform, it was unforeseeable and there are no alternative means to perform the contract. Care should also be taken to check the notification requirements in the clause as a failure to give proper or timely notice may mean being barred from relying on the clause.

Doctrine of Frustration

In the absence of a Force Majeure clause, parties may be able to rely on the common law doctrine of frustration. Frustration occurs when (i) without the fault of either party (ii) a contractual obligation has become incapable of being performed (iii) because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.

A party is not excused from performing the contract if, due to some unforeseen event, it has become more difficult, onerous or expensive than originally expected to perform. For example, a builder cannot refuse to perform a contract because extra money is needed due to an unexpected rise in the cost of building materials. The effect of frustration is to bring a valid contract to an abrupt end and both parties are immediately released from further performance from the time of the frustrating event.

Here are some practical steps for business owners to take:

1. Review your contracts and identify any Force Majeure clause;
2. Consider the express wording of the clause, the contract as a whole and the circumstances that have arisen and determine if performance is excused by the clause;

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SOLICITORS & NOTARIES

Born in Wales and raised in Nottingham, England, Susan studied for her law degree at the University of North London, graduating with Honours in 1992. Soon after, she studied for her Bar exams and joined the Honourable Society of Lincoln's Inn, one of the four Inns of Court in London, in 1993. She then worked as a Paralegal in private practice in the City before being called to the Bar in 1996 as a Non-practising Barrister-at-Law in England and Wales. She was admitted as a Solicitor in England and Wales in 1998, shortly after relocating

to Hong Kong – her parents' birthplace – and joining Boase Cohen & Collins as a Paralegal. She was admitted as a Solicitor in Hong Kong in 2002, thus becoming an Assistant Solicitor with the firm. She became a Partner in 2016. Susan's core practice areas include Intellectual Property (Trademarks, Designs, Patents and Copyright), Civil and Commercial Litigation, Information Technology and Trade Secrets. Susan has been a member of APAA since 1999 and INTA since 2001.

Corporate

3. Explore alternative ways of performing the contract;
4. Promptly serve any notices to the other party as required under the clause;
5. Keep good record of all events surrounding the Force Majeure event, your notice and attempts to find alternative ways to perform;
6. Consider your insurance policy to see what you are covered for under your contract;
7. Ensure all future contracts have a Force Majeure clause and carefully consider all wordings to cover every eventuality.

If in doubt, it is wise to obtain professional legal advice so that you fully understand your rights, accountability and potential risk. A well-drafted contract should cover the parties' business and legal obligations, protect your interests and limit your liability.

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**Topic: COVID-19 Coronavirus - Reporting Obligations
for Hong Kong Public Companies****Firm: Dechert**

In light of the global COVID-19 pandemic, some public companies in Hong Kong are struggling to meet their financial reporting obligations under the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited (the "Main Board Rules") as well as the Rules Governing the Listing of Securities on the GEM of The Stock Exchange of Hong Kong Limited (the "GEM Rules"). For the public companies, the risks associated with any delays in disclosing their financial information should be minimized due to public companies' disclosure obligations with respect to inside information under the Securities and Futures Ordinance (Chapter 571 of the Laws of Hong Kong) ("SFO"). Further, there is a group of individuals who may be concerned with an increased exposure – the board of directors, and in particular, the audit committee.

Financial reporting

Under normal circumstances, the preliminary financial results announcement for public companies in Hong Kong are based on the audited financial statements.¹ However, owing to the recent circumstances, particularly due to the imposition of various travel restrictions and inability to access physical books and records, the preparation of audited financial statements might have been hampered. In response, The Stock Exchange of Hong Kong Limited ("SEHK") and the Securities and Futures Commission ("SFC") have jointly issued two statements² and one set of frequently asked

questions³ to provide guidance to public companies in Hong Kong and their auditors in relation to the disclosure of financial information in the midst of the COVID-19 situation. Through both the joint statements and the FAQs, it is clear that the SEHK and SFC are not granting blanket extensions on the publications of the preliminary financial results. Where a public company is unable to obtain agreement from its auditors but is otherwise able to publish its unaudited preliminary results in compliance with other requirements set out in the Main Board Rules or GEM Rules (as applicable), it should publish such preliminary results before the deadline. In such case, the SEHK will normally not suspend trading in its securities. In connection with this, the SEHK provided some suggestions on certain information that the public companies may consider to include when announcing their preliminary financial results. One of the suggestions is to include information on "whether the results have been agreed with the audit committee and if there is disagreement, details of the disagreement". The inclusion of such information does not appear to be compulsory but certainly is considered best practice as endorsed by the SEHK. In other cases where the public company is unable to publish its unaudited preliminary results in compliance with other requirements set out in the Main Board Rules or GEM Rules (as applicable), the public company should consult the SEHK

¹ Main Board Rule 13.49; GEM Rule 18.49.

² SFC, "Joint Statement in relation to Results Announcements in light of Travel Restrictions related to the Severe Respiratory Disease associated with a Novel Infectious Agent", 4 February 2020 (the "February Joint Statement") and "Further Guidance on the Joint Statement in relation to Results Announcements in light of the COVID-19 Pandemic", 16 March 2020 (the "March Joint Statement").

³ SEHK, "Frequently asked questions on the Joint Statement in relation to Results Announcements in light of Travel Restrictions related to the Severe Respiratory Disease associated with a Novel Infectious Agent (Joint Statement)", 28 February 2020 (updated 16 March 2020) (the "FAQs").

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Stephen Chan is a partner in the firm's Hong Kong office. He advises clients on corporate finance transactions, including public and private mergers and acquisitions, private equity, REIT listings, restructuring, takeovers, initial public offerings, H share listing and general compliance matters. Mr. Chan has advised on multiple high-profile public takeovers and global offerings in Hong Kong. He has extensive experience advising clients in a broad spectrum of

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Mr. Chan is recommended in *The Legal 500 Asia Pacific* for his corporate and M&A work in Hong Kong. He has also been recognized as notable practitioner in the Equity Capital Markets area by *IFLR1000*.

as soon as possible to discuss its individual circumstances.

Nonetheless, the SEHK and the SFC have granted a blanket extension for up to 60 days from 16 March 2020 (i.e. until 15 May 2020) to all public companies for the publication of their annual reports, provided that the preliminary results were published on or before 31 March 2020 in accordance with the Main Board Rule 13.49 or GEM Rule 18.49 (as applicable) or the FAQs.⁴ If any further extensions are required, the SEHK and SFC have invited public companies to apply on a case-by-case basis. Depending on the actual circumstances in Hong Kong leading up to the extended deadline of 15 May 2020, we expect further guidance to be published by the SEHK and SFC.

Inside information

"Inside information" is any specific information, regarding the public company (or its shareholder, or officer, or its listed securities, or their derivatives), which is not generally known to the public and is likely to materially affect the price of the listed securities of the public company, including financial results. Additionally, apart from the financial results, the SEHK and SFC have also specifically reminded public companies of their disclosure obligations and to turn their minds to any material disruptions to business operations, reporting controls, systems, processes or procedures due to the COVID-19 outbreak and travel-related restrictions, which may constitute inside information.⁵

⁴ See the March Joint Statement.

⁵ See the February Joint Statement.

Section 307B of the SFO imposes a positive obligation for public companies to disclose, as soon as reasonably practicable after any inside information has come to its knowledge, such inside information to the public.⁶ Therefore, withholding financial information (even unaudited) may expose public companies to a risk of non-compliance of its disclosure requirements under the SFO. Under section 307G of the SFO, directors and officers of public companies may also be held personally liable if their intentional, reckless

or negligent conduct resulted in the breach of disclosure requirement, or if they have not taken reasonable measures from time to time to ensure that proper safeguards exist to prevent such breaches. If directors are found to have contravened section 307G, potential consequences include but are not limited to disqualification orders, prohibition orders and a monetary fine of up to HK\$8 million.⁷

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Maria Sit is a partner in the firm's Hong Kong office. She is the Asia head and global co-leader of Dechert's White Collar, Compliance and Investigations practice. She is a former in-house counsel at the Securities and Futures Commission of Hong Kong. Ms. Sit has expertise in handling joint investigations by a range of regulatory bodies, both in Asia and elsewhere. These include the U.S. Treasury Department's Office of Foreign Assets Control, U.S. Department of Justice, China Securities Regulatory Commission, Securities & Futures Commission of Hong Kong, Hong Kong Monetary Authority, the Commercial Crime Bureau of Hong Kong, the Hong Kong Independent Commission Against Corruption, the Commercial Crime

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⁶ Note that information disclosed that is false or misleading as to a material fact will not be considered as proper disclosure of inside information: section 307B(3) of the SFO.

⁷ Section 307N of the SFO.

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Potential discrepancies and implications for directors

Customarily, directors would have the reassurance of the auditors when fulfilling the financial reporting obligations of the public company. Without the external auditors being able to complete their audits, the foremost exposure to liability is shifted to the audit committee of the public companies, which comprises only non-executive directors, and reliance would be placed on its pre-existing controls and measures. Under the Main Board Rules and GEM Rules, the audit committee is required to have at least one independent non-executive director with appropriate professional qualifications or accounting or financial management expertise.⁸ Nonetheless, even with qualified audit committee members overseeing the financial reporting and disclosure process, the ultimate responsibility rests with all the directors – executive and non-executive.⁹

If the public company's preliminary results are subsequently agreed by auditors and there are adjustments made to the financial results, the public company should publish a further announcement to clearly explain the adjustments and where appropriate, publish the revised results as agreed by the auditors.¹⁰ The SEHK and SFC have indicated that they will not take disciplinary action solely because of material differences between the published preliminary results and the later audited results.¹¹ They will consider whether the public company and its directors have been diligent and reasonable in their treatment of accounts and whether there have been good faith efforts used in providing the available information.¹² Ultimately, as the responsibility of external financial reporting is on the directors, the exposure and risks to disciplinary proceedings and other liability will be higher as the company's internal controls and reporting systems are put to test.

⁸ Main Board Rule 3.21; GEM Rule 5.28.

⁹ Main Board Rule 13.04; GEM Rule 5.03.

¹⁰ Q1(iii) of the FAQs.

¹¹ See the March Joint Statement.

¹² Q5 of the FAQs and the March Joint Statement.

In light of the above, it is vital for all members of the board of directors to be fully engaged and for such engagement to be properly documented. With reference to the advice from Hong Kong Institute of Directors, it is noted that:¹³

- all board members should pay attention to key issues that would affect the company's financial position and cash flow situation;
- non-executive directors especially should have obtained adequate assurance in writing from the appropriate executive members that there have been no failures in internal control, no material inconsistency in financial record keeping, etc. and that there has been no unusual event or occurrence at relevant times that could affect the scope, accuracy and reliability of the financial information;
- the non-executive directors should especially be proactive in audit committee and board meetings to question and check on the information, assumptions and assurances

given by management (including assurances on no failures in internal control, no material inconsistency in financial record keeping and no unusual event or occurrence as mentioned above); and

- each board member should ensure that the audit committee and board deliberations are well recorded in a way that demonstrates they have made the necessary inquiry and met their duty of care.

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¹³ See "Financial Reporting Amidst the Coronavirus Outbreak", 7 February 2020, Hong Kong Institute of Directors.

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Dechert

Topic: **Directors' duties amidst the coronavirus outbreak**

Firm: **Dentons**

The COVID-19 pandemic has affected businesses all over the world. Whilst directors will actually consider that their primary responsibility is to keep the business running during difficult times, it is equally important to bear in mind that this should be done in accordance with the law and via appropriate means. A director should always have regard to the company's financial status and avoid entering into transactions that are in breach of his/her fiduciary duties as director, especially when the company's solvency is open to question. If losses are incurred from such transactions the director may be held personally liable. This article sets out some advice for Hong Kong company directors amidst the current climate.

Directors must always act in the best interests of the company. This generally means that they must act in a way which benefits the shareholders as a whole. However, when a company is insolvent or on the verge of becoming insolvent, directors should be aware of the following:

- **Duty to consider the interests of the company's creditors**

In the context of potential insolvency, directors must take into account the interests of creditors when making decisions on behalf of the company. This duty requires directors to ensure that the company's assets are not exploited or dissipated for their own benefit to the prejudice of the creditors' interests.

Breach of such duty may result in personal liability.

In the case of *Tradepower (Holdings) Ltd (in liq) v. Tradepower (Hong Kong) Ltd and Ors*,¹ the directors implemented a scheme shortly before the company was wound up, stripping the company of a valuable asset in favour of their own company. The court found no justification for the scheme and drew an inference that the directors had acted with an intent to defraud the company's creditors. In the end, the court set aside the scheme and held the directors personally liable for the loss occasioned by the company.

- **Preferential payment to creditors should be avoided**

When a company is insolvent, directors should avoid paying debts to one creditor in preference to another, as such payments may be set aside and recovered as a preference from the recipient². The directors in question may also be held personally liable for a breach of duty in having effected that preference³.

- **Courts' power to disqualify a person from acting as a director**

Where a company becomes insolvent and the court is satisfied that a person's conduct as director makes him/her unfit to be concerned in the management of a company, the Hong Kong courts have power to disqualify him/her from acting as a director of any company for up to 15 years⁴. Such

¹ [2008] HKCU 1715

² Section 266B of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32)

³ Section 276 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32)

⁴ Section 168H of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32)

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Richard is a partner in Dentons' Litigation & Dispute Resolution group based in Hong Kong.

He has more than 20 years' experience in handling litigation, international arbitration and investigations for clients operating in highly regulated environments including the financial services, telecommunications, energy, aviation and life sciences sectors. He has particular niche expertise in:

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- complex disputes in relation to private equity and major infrastructure investments;
- advising listed companies, licensed individuals and senior directors/officers of major corporations and financial institutions in relation to investigations by various regulatory bodies including the SFC, HKMA, CIB and the HKICPA;
- shareholder and boardroom litigation, including in particular cross-border disputes arising out of joint ventures in China; and
- acting in professional disputes and disciplinary proceedings for a wide range of professionals including solicitors, accountants, brokers and licensed individuals.

Richard is recognised as a leading individual for Litigation by *Chambers Asia Pacific 2020* and *Legal 500 Asia Pacific 2018*. *Chambers Asia Pacific 2020* states, "He's very responsive

and handles cases very efficiently, in a way that doesn't incur extra work." He is also ranked as litigation star by *Benchmark Litigation Asia Pacific 2020* and recommended by *Doyle's 2020* in White Collar Crime, Corporate Crime & Regulatory Investigations.

Richard is actively engaged in professional and social bodies. He is a director of the Hong Kong Solicitors Indemnity Fund Limited, a member of the Civil Litigation Committee of the Law Society of Hong Kong, and Chairman of Building Appeals Tribunal (Hong Kong). He is also a member of the Chartered Institute of Arbitrators and of the Hong Kong Institute of Directors.

Prior to joining Dentons Hong Kong LLP, Richard headed the International Dispute Resolution Group in the Asia Pacific region at another international law firm.

disqualification can arise when a director is convicted of an indictable offence, persistently breaches specified provisions of Hong Kong company law, or is guilty of committing fraud or any other breach of duty in the winding-up of a company.

- **Strict requirement to pay employees' wages on time**

It is an offence if an employer wilfully, and without reasonable excuse, fails to pay wages within the statutory time limit⁵. Insolvency is no defence. Any director, manager, secretary or other similar officer of the company is guilty of the same offence if he consents to, connives in or is negligent as to the non-payment of wages⁶.

In the case of *HKSAR v. Li Fung Ching Catherine*⁷, a director was held personally liable for the company's failure to pay wages. The court was of the view that the financial difficulty of the company and the director's desire to restore the company's financial situation by allocating funds to the daily operation of the company did not constitute a "reasonable excuse".

- **Continuous disclosure obligations for listed companies remain**

Under prevailing rules, events (including those related to the COVID-19 pandemic) which could have a material impact on share prices will need to be disclosed by way of announcement. Directors should continue

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Hermia has also assisted in non-contentious probate, employment and SFC licensing application matters.

Prior to joining Dentons, Hermia was a trainee solicitor at King & Wood Mallesons and had rotated through the dispute resolution, corporate & securities and banking & finance departments. Passionate about contentious matter and eager to gain more international exposure, Hermia was seconded to Melbourne for her second dispute resolution seat in 2018.

⁵ Section 63C of the Employment Ordinance (Cap. 57)

⁶ Section 64B of the Employment Ordinance (Cap. 57)

⁷ [2012] HKEC 807

to monitor the company's financial position and maintain close contact with the board and key members of the audit team. Directors who are prevented from travelling to a meeting, possibly because of a travel ban or quarantine, should assess whether they are thereby prevented from properly appraising the company's operations in order

to form an opinion on the subject matter. If so, alternative modes of communication (e.g. virtual meetings) should be considered to ensure the director has met the requisite standard of care.

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Topic: COVID-19: Time for Hong Kong to update its insolvency law and statutory corporate rescue regime**Firm: Hill Dickinson Hong Kong**

The tragically unforeseen current novel coronavirus (COVID-19) global pandemic has brought unprecedented challenges to all aspects of Hong Kong society including the health of its citizens, the economy and the business community. Economic activities across most sectors globally are being devastated. The dire economic situation in Hong Kong has been exacerbated by the trade war between Washington and Beijing and the new national security law. In Hong Kong, the unemployment rate has surged in the second quarter of 2020 hitting 6.2%, the highest in more than 15 years and expected to continue to rise to record levels. This will result in a huge financial burden on the hard working people of Hong Kong and the economy as a whole. The embattled local economy is expected to go into deeper recession as Hong Kong experiences its third wave of COVID-19 infections. The Hong Kong Government has forecast the city's gross domestic product to contract anywhere between 4% and 7% in 2020 after shrinking 8.9% in the first quarter against a year ago, the most for a single quarter since records began in 1974. In these unparalleled circumstances, it is unfortunately inevitable that many businesses in Hong Kong will not survive. Urgent corporate rescue measures are much needed to enable many of these businesses to navigate safely and quickly through the pandemic to hopefully more stable and prosperous times ahead.

In this article, we look at certain new insolvency law measures introduced in other common law jurisdictions to help businesses cope with the serious financial consequences of the COVID-19 pandemic as well as reviewing

the company rescue procedures currently available in Hong Kong.

Insolvency law relief offered in various common law jurisdictions

Many countries have promptly introduced various insolvency law measures to help individuals and businesses to weather the COVID-19 global storm. Some praiseworthy examples are set out below.

Australia

On 23 March 2020, the Australian Government passed the 'Coronavirus Economic Response Package Omnibus Bill 2020' to provide temporary reliefs for financially distressed businesses. The key elements of the package include:

- A temporary increase in the threshold at which creditors can issue a statutory demand on a company (from A\$2,000 to A\$20,000) and the time limit for companies to respond to statutory demands (from 21 days to 6 months);
- A temporary increase in the threshold for creditors to initiate bankruptcy proceedings against an individual (from A\$5,000 to A\$20,000) and the time limit for debtors to respond to bankruptcy notice (from 21 days to 6 months);
- A temporary extension of the moratorium period (from 21 days to 6 months) during which unsecured creditors are prohibited from taking further action to recover debts when a debtor declares an intention to enter into voluntary bankruptcy by making a declaration of intention to present a debtor's petition; and

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Bryan has over 25 years' of legal practice in Hong Kong working at leading global law firms. He has extensive experience in all aspects of dispute resolution including trial preparation, conducting trials, asset tracing and asset recovery and settlement negotiations. He often handles challenging commercial and insolvency related disputes. He has managed numerous high-profile disputes from the Court of First Instance up to the Court of Final Appeal. He also has experience of domestic and international arbitrations and mediations.

He acts primarily for financial services companies, financial institutions, leading insurers and reinsurers, turnaround management firms and court appointed liquidators and receivers and high-net-worth private clients.

Bryan has particular experience of debtor payment defaults, corporate insolvencies, receiverships, corporate fraud, breach of fiduciary duties by directors and officers and trustees, shareholder disputes, professional negligence and sale of goods/commodity disputes. During the global

financial crisis he also acted for leading financial institutions defending investment product 'misselling' claims and the related regulatory/compliance investigation. He also has experience managing multi-jurisdiction litigation including PRC cross-border disputes and cross-border insolvencies and pursuing multiple claims following a corporate collapse as a result of a fraud by the former management. He has experience pursuing claims offshore such as Cayman, BVI and Samoa. He regularly obtains urgent interim relief for clients including asset freezing and disclosure orders.

Bryan is a regular writer, commentator and presenter on dispute resolution and insolvency market trends and developments. He has been a joint contributor to the Hong Kong *White Book* for many years and he authored the Bullen & Leake Chapter on *Insolvencies and Companies* (Hong Kong 2013 First Edition, 2017 Second Edition and the forthcoming 2020 Edition which is underway).

- A 6-month suspension of the statutory insolvent trading provisions to relieve directors from personal liability for debts incurred by an insolvent company in the ordinary course of business of the company.

New Zealand

On 15 May 2020, the New Zealand Government passed the COVID-19 Response (Further Management Measures) Legislation Act 2020, which has introduced changes to the Companies Act to help businesses

facing insolvency due to COVID-19 to remain viable. The changes include:

- A 6-month 'safe harbour' for directors of companies from insolvency duties under the Companies Act. Directors' decisions to keep on trading and to take on new obligations over the next 6 months will not result in breach of duties if:
 - The company is, in the good faith opinion of the directors, facing or is likely to face significant liquidity problems in the next 6 months as a result of the impact of COVID-19 pandemic on them or their creditors;
 - The company was able to pay its debts as they fell due on 31 December 2019; and
 - The directors consider in good faith that it is more likely than not that the company will be able to pay its debts as they fall due within 18 months.
- A COVID-19 business 'debt hibernation' regime to encourage directors of companies to negotiate with their creditors with a view to putting together a simple proposal for putting the business into hibernation and allow directors to retain control of the company. The key features of the regime are:
 - Creditors will have a month from the date of notification of the business hibernation proposal to vote on it, with the proposal going ahead if 50% (by number and value) agree; and
 - There will be a 1-month moratorium on the enforcement of debts from the date the business hibernation proposal is notified, and a further 6-month moratorium if the proposal is passed.
- A reduction of the 'claw-back' periods for insolvent transactions and voidable charges under the Companies Act. A liquidator may challenge an insolvent transaction or a voidable charge if it is entered into within 6 months (or 2 years if the subject

transaction or charge is with a related party) before the commencement of liquidation.

Singapore

On 7 April 2020, the Singapore Parliament passed the COVID-19 (Temporary Measures) Act (the 'Singapore Act'), which has also come into effect on the same day. The Singapore Act offers temporary and targeted reliefs to individuals and businesses who are unable to fulfil certain contractual obligations of specified contracts because of COVID-19. It also introduces temporary adjustments to the monetary thresholds and time limits for bankruptcy and insolvency.

The Singapore Act applies to the following contracts entered into before 24 March 2020:

- Leases or licences for non-residential immovable property;
- Construction contract or supply contract;
- Contracts for the provision of goods and services for events;
- Contracts for goods or services for visitors to Singapore, or promotion of tourism; and
- Certain loan facilities granted by a bank or a finance company to small and medium enterprises.

The Singapore Act prohibits a contracting party from taking the following legal actions against a non-performing party:

- Court and insolvency proceedings;
- Enforcement of security over property that is used for business or trade purposes;
- Call on a performance bond given pursuant to a construction contract; and
- Termination of leases of non-residential premises.

The temporary measures relating to bankruptcy and insolvency under the Singapore Act are:

- Increasing the monetary threshold for bankruptcy (individuals) from S\$15,000 to S\$60,000;

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Adeline was admitted as a solicitor in Hong Kong in 2015. Prior to joining the firm, Adeline was a senior associate in a leading Hong Kong law firm, during which she handled a broad spectrum of contentious matters, including commercial and insolvency related disputes and regulatory investigations.

In relation to commercial disputes, Adeline has vast experience in handling shareholders' and partnership disputes, derivative actions and breach of fiduciary duties and breach of trust claims.

As for insolvency related disputes, Adeline regularly represents and advises creditors in bankruptcy and winding-up proceedings.

She has also acted for court-appointed liquidators in pursuing claims against delinquent directors of wound-up companies.

Adeline is a regular writer and speaker on dispute resolution developments. She obtained her bachelor of business administration (law) (honours) and bachelor of laws (honours) degrees and postgraduate certificate in laws from the University of Hong Kong.

- Increasing the monetary threshold for insolvency (companies / partnerships) from S\$10,000 to S\$100,000;
- Extending the statutory period to respond to demands from creditors from 21 days to 6 months; and
- Directors will be temporarily relieved from their obligations to prevent their companies trading while insolvent if the debts are incurred in the company's ordinary course of business.

The measures prescribed under the Singapore Act will be in place for 6 months and the Government may extend them for a further 6 months in due course, if necessary.

United Kingdom

On 26 June 2020, the Corporate Insolvency and Governance Act (the 'UK Act') came into force. The UK Act is described as 'the largest change to the UK's corporate insolvency regime in more than 20 years'. The new insolvency measures include:

- A temporary suspension of wrongful trading rules to allow directors to continue trading through the COVID-19 crisis period without the threat of personal liability should the company ultimately fall into insolvency. The suspension is to be applied retrospectively from 1 March 2020 for an initial period of 7 months until 30 September 2020 (and may be extended through secondary legislation);

- An introduction of a short moratorium for companies in financial distress to explore rescue and restructuring options free from creditor action. The moratorium will be overseen by an insolvency practitioner acting as a monitor although the directors will remain in charge of running the business on a day-to-day basis;
- An introduction of an additional condition for presenting winding-up petitions on the ground of inability to pay debt. A petitioning creditor seeking a winding-up order must first demonstrate to the court that the company's inability to pay its debts was not caused by the COVID-19 pandemic. This additional condition applies to any winding-up petition presented in the period from 27 April 2020 to 30 September 2020.
- An introduction of wider restrictions on termination clauses in contracts to prevent suppliers of goods and services from terminating contracts due to a company entering a formal restructuring or insolvency procedure. These restrictions aim to help companies trade through a restructuring or insolvency procedure, maximize the opportunities for company rescue or sale of its business as a going concern; and
- An introduction of a 'new restructuring plan', which includes a 'cross-class cram down' feature such that the restructuring plan can be binding on dissenting creditors, subject to court sanction and certain conditions.

The situation in Hong Kong

The Hong Kong Government has announced various significant financial measures to help individuals and businesses cope with the COVID-19 crisis (such as cash pay-outs to Hong Kong permanent residents aged 18 or above, government-guaranteed concessionary low interest rate loans to small and medium enterprises and the establishment of an anti-epidemic fund). On 17 April 2020, the Hong Kong Monetary Authority instructed all banks in Hong Kong to grant a six-month loan repayment holiday to SMEs aimed at helping them survive the worst business

slump in decades. Further, on 18 April 2020, the Legislative Council passed the Hong Kong Government's second round of the anti-epidemic fund and other relief measures worth HKD137.5 billion (USD17.6 billion). The relief measures include, among others, an HKD81 billion employment support scheme providing wage subsidies to eligible employers to retain their employees, subsidies to hard-hit business sectors and an enhanced SME Financing Guarantee Scheme. By late July 2020, the Hong Kong Government has already disbursed HKD34.2 billion wage subsidies (in six batches) to around 121,500 employers under the employment support scheme. Various sectors including the property sector, the food business sector and the art and cultural sector have already received government subsidies under the anti-epidemic fund. So far, the Hong Kong Government has not introduced any new insolvency law relief measures similar to those identified above introduced in other common law jurisdictions.

It is unfortunate that Hong Kong does not at this very uncertain time have any formal or statutory corporate rescue procedure such as can be found in other common law jurisdictions (for example, the administration process in England and Wales, the Chapter 11 process in the United States or the judicial management debt restructuring process in Singapore). At present, it is only possible to achieve a corporate rescue of a financially distressed company in Hong Kong through a scheme of arrangement or following the appointment of provisional liquidators.

Scheme of Arrangement

A scheme of arrangement is an arrangement or compromise between a company and its creditors (or class(es) of its creditors) in respect of the company's debts. A distressed company will collaborate with its legal and financial advisors to formulate a proposal for a compromise of the company's debts for the creditors' approval and the court's sanction. It is an effective tool to implement a financial restructuring, which binds all creditors to

such arrangement or compromise. It will be necessary to prepare a 'liquidation analysis' to compare the rights that the creditors would have under the scheme against the company with their rights against the company in an insolvent liquidation.

The Companies Ordinance (Cap. 622) ('CO') sets out the statutory requirements and procedures for implementing a scheme of arrangement, which includes:

- Obtaining the approval of the court to convene meetings of each class of shareholders and/or creditors to be affected by the scheme;
- Convening the shareholders' and creditors' meetings in accordance with the court's directions;
- Obtaining the requisite shareholders' and creditors' approval at the respective meetings, i.e. a numerical majority of more than 50% and a majority of at least 75% in value; and
- Seeking the court's final sanction of the scheme.

Provisional liquidation

After a winding-up petition has been presented against a company, the court may, upon application, appoint a provisional liquidator if there is a prima facie case for a winding-up order and on the basis of cogent evidence that the assets of the company are in real danger and the appointment is necessary to protect those assets. Provisional liquidation aims to preserve the 'status quo' of the value of the company during the interim period between the presentation of a winding-up petition and the making of a winding-up order. The court usually gives a provisional liquidator extensive powers, including the power to negotiate restructuring proposals with creditors and to deal with the subsidiaries of the company. As such, a provisional liquidator can assist the company to achieve a corporate rescue but the dominant purpose for appointing provisional liquidators should not be for effecting a restructuring. The petitioning creditor will have to inform the court that if a corporate rescue is not possible that it will

proceed to seek a winding-up order from the court.

However, these corporate rescue options in Hong Kong are far from ideal in the current COVID-19 pandemic for the following reasons:

- As may be evident from the above, a scheme of arrangement is a time consuming and costly court-driven process, which requires strict compliance with the statutory procedural requirements under the CO before the scheme can become legally binding and effective. Importantly, there is no statutory moratorium on creditor actions prior to a scheme becoming effective, which practically means that any creditor can take legal action against the company including presenting a petition to seek to wind-up the company, thereby potentially thwarting the company's bona fide restructuring efforts.
- The court will only appoint a provisional liquidator after the presentation of a petition to wind-up the company. Putting a company into a compulsory liquidation process is a draconian step to take since it will ultimately kill the business. It can also have immediate drastic financial consequences for the company. For example, banks will usually freeze company bank accounts as soon as they become aware that a creditor has presented a petition to wind-up the company. Further, the commencement of winding-up proceedings in itself will often be an 'insolvency event of default' in critical finance documents and other commercial contracts. This can result in further creditor enforcement action, which might jeopardise the prospects of a successful restructuring.

Hong Kong's proposed statutory corporate rescue regime has undergone an unfortunate long legislative development process, which is still ongoing. In summary:

- In October 1996, the Law Reform Commission issued the Report on Corporate Rescue and Insolvent Trading, which recommended the introduction of a corporate rescue procedure known as 'provisional supervision',

whereby a moratorium on legal action would be provided to a company in financial difficulty.

- In 2000 and 2001, there were attempts by the Hong Kong Government to legislate a statutory corporate rescue regime and insolvency trading provisions. These attempts were not successful due to, among other things, non-consensus among the accountants, lawyers and business community as regards certain aspects of the proposals including in particular the requirement for companies to pay all employees their unpaid wages and entitlements in full before the commencement of corporate rescue procedure.
- In 2009 to 2010, there was another round of public consultation, which did not lead to any finalization of the proposed corporate rescue law.
- In July 2014, the Hong Kong Government published detailed legislative proposals on the introduction of a statutory corporate rescue regime and insolvency trading provisions, taking into account stakeholders' views on, among others, issues concerning the personal liability of provisional supervisor, employees' outstanding entitlements and statutory defences to insolvent trading offences.
- Since then, there has not been any concrete developments, despite the Hong Kong Government's repeated indications to introduce a corporate rescue bill.

However, as recently as March 2020, there has been a welcome announcement from the Hong Kong Government that it intends to hold a new round of consultation in the coming

months and finalize the corporate rescue bill for the introduction in the first half of the 2020 / 2021 legislative session.

Going forward

The Hong Kong Government's announcement as regards the statutory corporate rescue regime is a welcomed development in the current climate of significant social and economic uncertainty. Completion of the legislative process will inevitably take further time and is unlikely to provide timely relief to distressed businesses in Hong Kong. We can only hope that all relevant stakeholders can reach consensus in the upcoming round of further public consultations and a statutory corporate rescue regime can be enacted in Hong Kong sooner rather than later so that Hong Kong will be on a level playing field with other common law jurisdictions. We shall provide a further update on any material developments in this regard in due course.

The Hong Kong Government should also consider urgently implementing temporary much needed insolvency law relief measures to give businesses and individuals more 'breathing space' to cushion the severe economic impact of COVID-19. This could include increasing the financial threshold and extending the time to respond to statutory demands and granting a short moratorium for companies in financial distress to prevent aggressive creditor enforcement action, including the issue of winding-up petitions, to help create a commercial environment and mind-set conducive to business continuity rather than business destruction.

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Topic: **COVID-19: Protecting Your Child's Data Privacy**

Firm: **Hugill & Ip Solicitors**

To reduce the spread of coronavirus (COVID-19) and safeguard students' health, the Education Bureau of Hong Kong ("**EDB**") first extended the Chinese New Year holidays for all schools to 16 February 2020. As the virus continued to spread and developed into a pandemic, the resumption of schools was indefinitely deferred; classes are suspended until further notice. However, the EDB has advocated for "*suspending classes without suspending learning*" since early February 2020. Most schools have adopted the approach, moving to online learning platforms in addition to video-conferencing between teachers and students. These advanced technological solutions enable children to continue with their education, but concerns have been raised regarding data privacy and protection of students; increased usage of online teaching tools can collect vast amounts of students' data, rendering them vulnerable to misuse or leakage of personal data if unfortunately placed in the hands of a hacker.

Guidance from the Privacy Commissioner

The Privacy Commissioner for Personal Data ("**PCPD**") released a media statement recommending that schools should perform due diligence to ensure that technologies selected (i.e., video conferencing software and online learning platforms that have videotaping functions) protect children's privacy. This may be achieved by, for example, ascertaining whether the selected platform will collect students' personal data and share it with third parties such as software developers and platform service providers. The PCPD reminds users to be vigilant at all times in the online world to protect personal data privacy, particularly

as published data can be duplicated or permanently stored. The PCPD also recommends disabling online tracking and recording functions of software and platforms, and to save such settings as default.

Further guidance was given to answer the concerns that schools and parents may have:

Q. Can teachers record my child's voice or take pictures of them to observe their performance in online classes?

It is recommended that schools collecting students' personal data (including names, images, or voice data) should be on a minimal basis and done in a lawful manner. It should only be done where directly related to the activity, and data collected should be necessary but not excessive. The PCPD also recommends for schools to explicitly inform parents and students in advance (e.g. by way of written notice) if there are such practical needs.

Q. Do teachers need to obtain parental consent before taking pictures or recording students' voices?

Yes, according to the requirements of Data Protection Principle ("**DPP**") 3 of the PDPO, where the data subject is a minor, "*prescribed consent*" should be given on behalf of the data subject (under certain circumstances) by a "*relevant person*." Students must also be informed of such practices, regardless of whether the data collection is obligatory or voluntary.

Q. What steps can I take as a parent to ensure my child is protected during online learning?

1. Install parental controls to manage a child's internet usage and filter inappropriate content or language;
2. discuss with children the risks of clicking suspicious links or downloading suspicious documents;
3. disable tracking functions whenever possible; and
4. disable automatic camera and microphone access, adjusting settings so permission must be gained before cameras or microphones can be accessed.

Parents can also access the Children Privacy website created by the PCPD with your children to help them better understand the importance of personal data privacy, and ways which children can protect themselves.

Q. What steps can we, as schools, take to ensure the students are protected during online learning?

On the other hand, schools should take all practicable steps to protect personal data from unauthorised or accidental access, processing, erasure, loss or use. The PCPD suggests that schools should:

1. Ensure that all devices are installed with latest security patches and anti-virus software, and are protected by firewalls;
2. ensure that network connections are safe and secure (i.e. teachers should not use public Wi-Fi and use strong encryption for Wi-Fi network);
3. set a password for the online learning session which (as well as its link) should only be given to teachers and students participating in the session;
4. not record relatively sensitive biometric data, such as voice data, which could reflect children's emotions or socio-economic background from their accents;

5. store all tracking data and records with encryption, and the personal data collected should be destroyed as soon as possible after the data has fulfilled the original purpose of collection;
6. beware of whether personal data could be accidentally captured on screen when the screen or video sharing function is activated; and
7. formulate policies and guidelines for handling data breaches. Such policies and guidelines should aim to protect students' privacy rights, and ensure that teaching staff get a clear understanding of the correct and secure way to use such tools, and the approach to dealing with incidents of lost devices or hacked/stolen accounts.

Schools can refer to the [publication](#) regarding "Collection and Use of Personal Data through the Internet – Points to Note for Data Users Targeting at Children" published by the PCPD for further information.

TikTok: a fun data privacy risk?

With children and teens across the globe staying at home to reduce the spread of coronavirus, many have turned to social media and mobile apps to entertain themselves and keep in contact with friends. One of the many popular apps is TikTok. While the app is extremely entertaining to children and adults alike, there are ever-increasing concerns regarding the child safety and data privacy, and even national security concerns in the United States.

What is TikTok?

TikTok – owned by ByteDance, a Beijing-based company – allows users to create short 3-15 second lip-syncing videos or 3-60 second looping videos. It has become one of the most popular apps, especially after its merge with musical.ly in August 2018; according to an article published by CNET, TikTok ranked 4th in the 10 most-downloaded apps of 2019, and an article by Forbes stated that TikTok amassed

approximately 24 million active daily users, and a New York Times article states that it has been downloaded more than 1.5 billion times.

What are the data privacy concerns with TikTok?

In an article published by TechCrunch, the CEO and co-founder of Reddit – Steve Huffman – has criticised TikTok for being “*fundamentally parasitic*” in its use of fingerprinting technology. Digital fingerprinting used by TikTok combines audio and browser tracking to determine which users are watching and sharing a video on both the app and on the web.

Cybersecurity firm Check Point published research in early January 2020 exposing a series of vulnerabilities “core to TikTok’s systems.” The research described the vulnerabilities to allow attackers to:

- Get a hold of TikTok accounts and manipulate their content
- Delete users’ videos
- Upload unauthorised videos
- Make private “*hidden*” videos public
- Reveal personal information saved on the account – such as private email addresses
- SMS link spoofing – sending SMS message to any phone number on behalf of TikTok, as users sign up to the platform by entering their mobile number on the company’s website and receiving a text message with a link to download
- Inject malicious scripts into benign and trusted websites, including TikTok’s subdomain

While TikTok supposedly learned of Check Point’s research on November 20, 2019 and fixed all vulnerabilities by December 15, 2019, there are still data privacy concerns that exist, particularly regarding the parent company, ByteDance, which is based in Beijing. The app faces criticism from U.S. lawmakers that it is sharing data with the Chinese government. According to an article by the New York Post, a 2017 Chinese law requires companies

operating in the country (i.e. ByteDance) to cooperate with the government on national intelligence. The company has refuted such claims and stated that U.S. user data is stored in the U.S., and that China does not have jurisdiction over content that is outside of the country. However, the U.S. Government has taken precautions by banning the app from government issued mobile devices (December 2019) including the U.S. military (Navy and Army), and several U.S. politicians have expressed their concern over the data privacy of the app.

Additionally, in February 2019, the U.S. Federal Trade Commission filed a complaint against the app, stating that it illegally collected personal information from minors. TikTok (then Musical.ly) allegedly violated the Children’s Online Privacy Protection Act, which required that “websites and online services directed to children obtain parental consent before collecting personal information from children under the age of 13.” TikTok agreed to pay \$5.7 million USD to settle the complaint – the largest civil penalty ever obtained by the Commission in a children’s privacy case – and said it would abide by the Act. According to the New York Times, the British Information Commissioner’s Office was also investigating whether the app violated European privacy laws designed to protect minors and their data. TikTok stated in its blog that a “**Transparency Centre**” would be opened in the company’s Los Angeles office to offer more details on data privacy and security.

What is TikTok’s Privacy Policy?

TikTok’s Privacy Policy (last updated January 2020) states that it collects the following information for users in Hong Kong:

- Profile information – username, date of birth, email address and/or telephone number, and any information disclosed in the profile (e.g.: photograph).

- How each user engages with the app – e.g., which ads are viewed, what kind of content is preferred and saved to “**My Favourites**”, problems encountered, etc.
- Information from Third Parties – where a user shares certain data from third parties (such as logging in using social network accounts like Facebook, Twitter, Google, etc.), the username and public profile will be accessible by TikTok.
- Technical information – including IP address, browsing history (on the platform), mobile carrier, time zone settings, model of your device, screen resolution, etc. – is automatically collected by TikTok.
- Location – through “**Region**” selected by the user in Settings.
- Cookies are collected – additionally, TikTok’s “*business partners, advertising networks, and other advertising vendors and service providers (including analytics vendors and service providers) [are allowed] to collect information about your online activities through Cookies*”.
- Users should note that the Privacy Policy states that TikTok is “*not responsible for the privacy practices of these third parties, and information practices of these third parties are not covered by [TikTok’s] Privacy Policy*”

The Privacy Policy also states how the personal data is used, shared, stored, and retention period. TikTok has also provided a Privacy Policy for Younger Users (applicable to the U.S.), and states that “*TikTok is not directed at children under the age of 13.*”

How can I maximise TikTok’s safety features to protect my child?

There are several measures parents can take to ensure your child’s account on TikTok is private. Under the Privacy and Safety settings (under the three dots at the top right of your child’s user profile), you can:

- toggle the two “*discoverability*” options – this includes setting your child’s account as private, and disabling the account from being suggested to others

- change the safety settings to limit others’ access to your child’s posts, including:

1. “*Allow your videos to be downloaded*” – **Off**.
2. “*Who can send you direct messages / Duet with your videos / React to your videos / view your liked videos / comment on your videos*” – to **Friends** or **No one**.
3. “*Comment filters*” – turning this **On**, and adding filtered keywords.

It is recommended that parents alter the privacy and safety settings on their children’s TikTok accounts, as they are public by default. Posts made by the user can also be set to “*private*”, so they are only visible to the posting user. Parents can also regularly check the “**Security Alerts**” feature on TikTok (under Privacy and settings – Manage my account – Security).

The risks associated with TikTok’s privacy policy and the vulnerabilities in the apps data protections may be more [significant] than the entertainment value it imparts to children. You may consider permanently deleting your child’s account (via Settings – Manage My Account – Delete Account) as a last measure to protect your child’s personal data privacy. This will disable the account’s login to TikTok and you will lose access to the posted videos. However, TikTok states in its support page that “*shared information, such as chat messages, may still be visible to others*”. TikTok’s data retention policy states that data is kept for 5 years; however, even if you have permanently deleted your account, the company will “*store your information in an aggregated and anonymised format [and] non-personally identifiable information may be retained indefinitely for analytics.*”

Key Takeaways

While the health and safety of our children are of utmost importance during the coronavirus pandemic, we should be cautious that the personal data privacy risks are increasing with the ever-developing technological advances.

Schools and parents should take all practicable steps to ensure that the devices, software, and apps used by children are protecting your child's personal data privacy to the highest possible

degree. Children should also be given guidance on the best data privacy protection practices to reduce the vulnerability of their information being misused or leaked to hackers.

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SOLICITORS

Carmen has worked in both the private and public sectors, including the Government and the Law Society. Qualifying in Hong Kong in 2004 and England and Wales in 2007, she started her legal career working as a commercial litigator where she advised and acted in a wide range of disputes, including those relating to the financial services sector.

Carmen's skills as a litigator led to a call from the Privacy Commissioner for Personal Data and, in 2010, she was appointed Legal Counsel with responsibility for providing legal advice on personal data protection issues arising from complaints or compliance checks. She also advised government organisations on data privacy issues, vetted proposed legislations, and handled appeal cases on the Privacy Commissioner's behalf.

She expanded her legal expertise further in 2012 when she became Investigation Counsel for the Law Society of Hong Kong, leading probes into alleged professional misconduct cases for the Compliance Department. The role also included leading

inspection and intervention exercises and assisting prosecutors in running disciplinary proceedings. After five years as regulatory counsel, in 2017 Carmen returned to private practice as a Senior Associate – then Partner – in both Dispute Resolution and Data Privacy.

Carmen has recently advised and acted on various litigation and probate matters, including shareholders' disputes, inheritance and dependants claims – including contentious probate actions, revocation of grants of representations and succession entitlement under interest. She also regularly advises organisations on all aspects of data protection compliance, and provides opinions on legal malpractice and professional ethics issues.

Carmen is a CEDR accredited Mediator and a member of the International Association of Privacy Professionals (IAPP). She has recently been credited as Certified Information Privacy Professional / Asia (CIPP/A) and Certified Information Privacy Professional / Europe (CIPP/E).

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Topic: **Recovery from cyber fraud loss in the COVID-19 era**
Firm: **Kennedys**

In recent months, COVID-19 has led to a fundamental shift in the way we work. Millions of office workers are working from home or adopting flexible working arrangements on a daily basis. Meet-and-greet opportunities are completed over emails. Team meetings are conducted over video calls. This will be the “new normal” for a number of office workers in the foreseeable future.

With the rapid development of technology in the past decade, businesses are more equipped than before to support their employees in this “new normal”. However, businesses are also considerably more exposed to the risk of fraud resulting from cyber security breaches and technology crimes (“**Cyber Fraud**”) due to: (i) the frequent use of external networks and personal devices; and (ii) the increased difficulty of verifying payment requests from colleagues based in different locations.

In our view, the main risk areas for businesses include:

- i. **CEO impersonation fraud:** This is where an individual (e.g. a financial controller) receives emails from a fraudster impersonating the CEO of the individual’s employer. The fraudster then requests for urgent payment to be made in respect of top-secret, high-value, but fictitious, transactions.
- ii. **Change of payment instructions fraud:** This is when an individual receives emails from a fraudster impersonating the business partner or supplier of the individual’s

employer. The fraudster requests a change of payment instructions and requires payment of actual invoices to be made to companies controlled by the fraudster.

In Hong Kong, 887 cases of a similar nature totalling HK\$1.7 billion were reported in 2018.¹ Due to the increased vulnerabilities of working in this “new normal”, we anticipate a sharp upward trend in the number of cases and amount involved in Cyber Fraud in the near future.

Nonetheless, even if Cyber Fraud occurs, businesses still have a realistic chance of recovering losses if they act quickly upon discovering the fraud. In particular, businesses that have been defrauded to make payments to Hong Kong bank accounts should adopt the following two key steps in order to maximise recovery in Hong Kong.

Step 1: Report to Hong Kong Police

Businesses should file a report with the Hong Kong Police as soon as a Cyber Fraud is discovered. The report can be made in person at the nearest police station in Hong Kong. Alternatively, an electronic report can be submitted online² and later supplemented by a formal statement to the Hong Kong Police.

Upon reviewing the information reported, the Joint Financial Intelligence Unit may issue a letter of “no consent” (“**No Consent Letter**”) to the bank to state that it does not consent

¹ https://www.police.gov.hk/ppp_en/04_crime_matters/tcd/types_12.html

² <https://www1.erc.police.gov.hk/cmiser/CCC/PolicePublicPage?language=en>

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Rudy has continuously been named as a Recommended Lawyer for 'Dispute Resolution: Litigation (Hong Kong) by Legal 500 Asia Pacific from 2015 – 2020. Clients praised Rudy as 'a responsive litigator' and also 'a very sharp, practical and knowledgeable individual'.

to dealings in the Hong Kong bank account which received the payments related to the Cyber Fraud.

While the No Consent Letter strictly speaking does not legally bind the banks, in practice, banks in Hong Kong tend to give effect to the No Consent Letter by temporarily freezing the bank account in question. That said, the Hong Kong Police has full control of whether, and if so when, to issue the No Consent Letter. Further, the Hong Kong Police does not have jurisdiction to recover monies on behalf of businesses and expects businesses to recover monies by instructing lawyers to commence civil action in Hong Kong. Therefore, businesses should not rely on the No Consent Letter other

than as a potential temporary "hold" on the bank account in question and should proceed with Step 2 without delay.

Step 2: Obtain injunction and banker's disclosure orders

At the same time as Step 1, businesses (which are referred to as the "**Plaintiff**" below) should take out legal action in Hong Kong on an urgent basis in order to potentially apply for the following injunction and banker's disclosure orders:

1. **Proprietary injunction** – The Plaintiff has a proprietary claim over the funds that have been defrauded from the Plaintiff by the fraudster pursuant to the Cyber Fraud.

The purpose of a proprietary injunction is to freeze the assets to which the Plaintiff has such a proprietary claim. In order to obtain the proprietary injunction, the Plaintiff is required to demonstrate that:

- a. there is a serious issue to be tried on the merits;
- b. the balance of convenience is in favour of granting a proprietary injunction; and
- c. it is just and convenient to grant the proprietary injunction.

2. **Mareva injunction** – There is a high risk that the fraudster may dissipate its assets such that any judgment eventually obtained cannot be executed against its assets. Thus, it is necessary for the Plaintiff to apply for a Mareva injunction as a “top-up” protection in support of the proprietary injunction. For this application, the Plaintiff is required to prove that:

- a. it has a good arguable case on a substantive claim;
- b. there are assets within the jurisdiction;
- c. the balance of convenience is in favour of granting a Mareva injunction; and
- d. there is a real risk of dissipation of assets or removal of assets from the jurisdiction which would render the Plaintiff’s judgment of no effect.

3. **Banker’s disclosure order** – In order for the Plaintiff to trace the defrauded funds, the Plaintiff will need to apply for disclosure of banking documents against the third-party bank pursuant to section 21 of the Evidence Ordinance (Cap.8). In order to obtain the banker’s disclosure order, the Plaintiff is required to show that:

- a. there is a real prospect that the information may lead to the location or preservation of assets to which it is making a proprietary claim;
- b. the request is sufficiently specific; and
- c. the documents should be disclosed on the balance of prejudice in terms of the

potential advantage to the Plaintiff versus the potential detriment to the fraudster.

Businesses should act promptly and instruct lawyers to prepare the necessary application documents for the injunction and banker’s disclosure orders mentioned above. The applications should then be listed on an urgent basis before the duty judge. If a No Consent Letter is issued, then businesses should be under slightly less time pressure but should still issue the civil action without delay.

Although delay by the Plaintiff may not technically need to be justified, this is a question that the Hong Kong court will likely ask when it is deciding on whether to grant the injunction and banker’s disclosure orders. Any delay by the Plaintiff is also an issue that can be raised by the fraudster if the fraudster objects to the relief applied for from being granted. It is thus in the best interests of businesses to act immediately upon discovering Cyber Fraud.

Conclusion

The total number of cases and total amount involved in Cyber Fraud is projected to be on the rise in the COVID-19 era. Businesses should therefore have in mind the two key steps set out above in relation to payments made to Hong Kong bank accounts as a result of Cyber Fraud. Business should also act swiftly upon discovering Cyber Fraud in order to maximise recovery from Cyber Fraud loss in Hong Kong. However, the factual circumstances relating to each incident of Cyber Fraud will be different and the potential success of recovery may vary depending on multiple factors including when the Cyber Fraud was first discovered. Businesses will ultimately need to balance competing commercial needs in order to develop the most suitable strategy bearing in mind the merits, risks and costs of any potential recovery strategy. Therefore, the best option is to seek legal advice promptly upon discovery of the Cyber Fraud. This will enable businesses and lawyers to proactively work with each other to develop a tailor-made loss recovery strategy at the earliest opportunity.

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Kevin Yam is a Partner at Kennedys and is qualified in Hong Kong in 2005. Prior to joining Kennedys, Kevin was a senior associate at a market-leading disputes and regulatory team of an international law firm as well as an in-house legal counsel at a big four accounting firm in Hong Kong.

Kevin primarily represents financial sector entities, listed companies, professional services firms and their senior personnel. His main specialisation is in advising clients on handling a wide range of investigations and proceedings instituted by financial and professional services regulators, as well as law enforcement agencies. These include: (i) handling inquiries, investigations and proceedings against sponsors, underwriters and bookrunners in initial public offerings; (ii) handling investigations and proceedings relating to allegations of misconduct by financial sector entities and professionals, market misconduct, bribery and/or fraud; (iii) handling investigations into allegations of misconduct in the selling of investment products; and (iv) advising on anti-money laundering compliance issues.

In addition, Kevin is an experienced litigator. His particular focus is on cases and crisis scenarios where an understanding of the wider financial regulatory and law enforcement environment is important, as well as where a strong appreciation of the wider political and publicity context is vital.

Kevin is also one of the joint authors of the Securities & Futures Ordinance (Cap. 571) – Commentary and annotations – 2019 versions, published by Sweet & Maxwell.

Kevin has been named as a Leading Individual for 'Financial Services: Contentious Regulatory (International Firms) – China' by Chambers Asia Pacific, and named as a Recommended Lawyer for 'Regulatory (Hong Kong)' by Legal 500 Asia Pacific from 2017 – 2020. Kevin was praised by clients as 'trilingual, expertly strategic and very experienced in dealing with difficult regulatory investigations'.

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Some work highlights include acting for a listed company director in a highly publicised joint Hong Kong law enforcement agency and financial regulator investigation, and multiple interrelated High Court actions and proceedings; representing a Spanish company in successfully obtaining

a Mareva injunction against the assets of two Hong Kong-based companies in support of its claim against them for over US\$10 million resulting from fraudulent transactions; and acting for foreign individuals and overseas companies in obtaining Mareva injunctions and banker's disclosure orders in support of claims involving cyber security breaches.

Bertha is fluent in English, Cantonese and Putonghua.

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Data Protection

Topic: **Hong Kong Privacy Regulator Responds to Personal Data Privacy Issues Arising From COVID-19**

Firm: **Latham & Watkins**

Hong Kong regulator declares that the disclosure of personal data of potential COVID-19 carriers is permissible under law.

COVID-19 is having a profound impact not only on the way the world interacts socially, but also in the way it interacts in business. Businesses are choosing to protect the health and well-being of their employees by vetting the travel histories and health status of visitors, as well as tracking potential COVID-19 carriers using social media.

Hong Kong's data protection regulator, the Office of Privacy Commissioner for Personal Data (PCPD) has recently published guidance considering the implications of these activities, as described below.

Consent required for use of personal data outside original purpose

"Personal data" is defined in the Personal Data (Privacy) Ordinance (Cap. 486) (PDPO) as information which relates to a living person and can be used to identify that person and exists in a form in which access to or processing of it is practicable.

The PDPO sets out six data protection principles (DPPs) to comply with when one deals with personal data. The third principle (DPP3) prohibits the use of personal data for any new purpose which is not or is unrelated to the original purpose when collecting the data. Prior consent of the relevant parties must be obtained before using the information for a different purpose, e.g., if previously collected information will not be used for tracking potential virus carriers. The purpose

of DPP3 is to protect one's personal data from potential abuse or misuse.

Disclosure of suspected virus carriers' personal data

Notwithstanding the importance of obtaining consent before using personal data for another purpose, the PCPD has instructed that using personal information available on social media to track potential COVID-19 carriers or disclosing their personal information to third parties (e.g., health authorities) is permissible under the PDPO. The PCPD has indicated that this is lawful as it is for the purpose of protecting public interest and public health.

PDPO public health exemption

The PDPO provides for an exception to the general rule in DPP3. That is, a data user (also known as "data controller" in other data protection regimes) may disclose personal data relating to the physical or mental health of the data subject (the individual) to a third party without the data subject's consent if the application of DPP3 would likely cause serious harm to the physical or mental health of the data subject or any other individual.

Pursuant to this, a data user may disclose the identity or location of a data subject to a third party without the data subject's consent. This exemption is designed to enable relevant authorities/persons timely access to a person's personal data, e.g., a suspected carrier's identity, and to take immediate action to protect public health interests.

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Alongside a broad specialism in technology and commercial matters, Mr. Donovan advises clients on fintech projects, with expertise advising on joint ventures, collaboration arrangements, and privacy compliance, in connection with the development of disruptive technologies in the financial services and payments space.

In addition, the PCPD has confirmed that (https://www.pcpd.org.hk/english/news_events/media_statements/press_20200226.html) although the right to personal data privacy is a fundamental right, it is not an absolute right, and it is subject to other competing rights or interests specified under the International Covenant on Civil and Political Rights, such as the absolute right to life and public interest. Therefore, where the right to life and public interest are thrown into the balance, they will prevail over the right to personal data privacy.

PDPO required by law exemption

As COVID-19 has been added to the Prevention and Control of Disease Ordinance (Cap. 599) as a notifiable infectious disease, medical practitioners are required under law to notify the Department of Health of all suspected or confirmed cases of COVID-19.

Therefore, the PCPD has stated that (https://www.pcpd.org.hk/english/media/response/enquiry_20200131.html) medical practitioners may rely on section 60B of the PDPO to disclose a data subject's personal data to the Department of Health without their consent for the purpose of protecting public health. Section 60B provides that DPP3 does not apply if personal data is required to be disclosed under law.

Doxxing is illegal and unethical

Although there are exceptions to DPP3, the PCPD reminds (https://www.pcpd.org.hk/english/media/response/enquiry_20200131.html) the public that, in general, DPP3 should be complied with and, in particular, doxxing (i.e., deliberately posting another person's personal data online with the intention of causing harm) will not be

tolerated. In February 2020, the PCPD received a large number of cases of organized doxing of medical staff, and one complaint of doxing of a suspected COVID-19 patient's personal data. The PCPD has stated that (https://www.pcpd.org.hk/english/news_events/media_statements/press_20200204.html) doxing is a “despicable weaponisation of personal data” and is a contravention of the PDPO. Under section 64(2) of the PDPO, it is an offence for a person to disclose any personal data of a data subject obtained from a data user without the data user's consent and if the disclosure causes psychological harm to the data subject. Breach of this provision can result in a fine of up to HK\$1 million and imprisonment of up to five years. Doxing and cyberbullying may also constitute criminal offences, such as criminal intimidation. Affected persons may claim compensation from the persons involved in respect of the damage suffered.

Guidelines for employers and employees in relation to health data

The COVID-19 outbreak has raised the question of whether employers are permitted to collect health data about their employees to help monitor and prevent the spread of the virus. The PCPD has stated that (https://www.pcpd.org.hk/english/media/media_statements/press_20200330.html) this is permitted as the collection/use of personal data is in the public interest and/or the interest of public health. However, employers must bear in mind that the use and collection of data must adhere to the usual DPPs, including the principles of minimization, purpose specification and use limitation. Most importantly, the measures taken to collect data must be **necessary, appropriate, and proportionate**.

As many employees transition to work from home arrangements, there may be more opportunities for cybercrime. Employers and employees must stay vigilant during these times and the PCPD has set out some advisable

practicable steps (https://www.pcpd.org.hk/english/media/media_statements/press_20200330.html) to take to safeguard personal data security prior to working from home.

Are employers permitted to collect health data from employees, and if so, what kinds of personal data?

Yes, the PCPD confirmed that there is a legitimate basis for employers to collect additional data of their employees to help control the spread of the disease and to protect the health of employees. The kinds of personal data that employers may take include employees' temperature measurements, information on medical symptoms that may reflect COVID-19 symptoms and their travel history if they have returned from overseas.

How should employers collect health data?

A self-reporting system is preferred to an across-the-board mandatory system where health data is collected indiscriminately. Employers should spell out to their employees how the data collected will be handled and a fresh Personal Information Collection Statement must be provided if the collection of data is not covered by the existing privacy notices.

Once the purpose for which personal data is collected is fulfilled (i.e., for the purposes of fighting COVID-19), employers shall “permanently destroy” the personal data collected. To ensure its security, employers should take all practicable steps (e.g., encrypting data) to protect the personal data collected against unauthorized or accidental use. This is particularly important as health data is sensitive personal data and a breach may cause significant harm to the individuals concerned.

Disclosure of employees' health data

As mentioned above, for the purposes of protecting public health, it will not be a breach of DPP3 for employers to disclose the identity, health, and location data of individuals to

the health authorities. If an employee becomes infected, the employer may notify relevant parties at the workplace (e.g., other employees, office and building management etc.) **without** disclosing personally identifiable information of the infected, i.e., disclosure that a staff has been infected is sufficient.

Other privacy questions

Is collecting location data for quarantine purposes lawful?

The PCPD has stated that location data of persons under quarantine is collected for a lawful purpose, which is to enable the government to monitor compliance with quarantine conditions for public interest. Also, as the consent of quarantined individuals was obtained before implementation of the quarantine, the collection of such data is lawful and not excessive.

Can merchants require customers to register their real names when buying masks?

The PCPD has stated that (https://www.pcpd.org.hk/english/news_events/media_statements/press_20200211.html), in accordance with the DPPs, merchants must collect customers' personal data in a lawful and fair manner, should not collect excessive data, and should not retain personal data for longer than necessary to achieve the original purpose. Therefore, merchants should erase the personal data collected as soon as practicable after selling the masks, and if the personal data is to be used for a new purpose, the data subject's prior consent must be obtained.

This post was prepared with the assistance of Malika Sajdik and Bianca Lee in the Hong Kong office of Latham & Watkins LLP.

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Topic: **Covid-19 coronavirus: how the APAC courts and arbitral institutions have adapted to the challenge**

Firm: **Allen & Overy**

This article was first published in Hong Kong Lawyer in April 2020.

As Covid-19 continues to spread across the globe, the various forums for dispute resolution worldwide find themselves presented with novel challenges, in particular relating to issues around physical attendance at hearings. While much of the dispute resolution process is document based, up until this point, hearings have usually involved the parties, experts, witnesses and adjudicators gathering in person.

Having been forced to consider this issue slightly sooner than other parts of the world, the ways in which law courts and arbitration communities in Asia Pacific have coped and adapted to this issue may be instructive for other jurisdictions.

RESPONSES BY THE APAC COURTS

In a simple survey of eight APAC jurisdictions conducted by A&O, the majority of court systems appear to be holding up well so far. Speaking to our colleagues in Australia, mainland China, Hong Kong, Indonesia, Japan, Korea, Myanmar, Singapore and Vietnam, with the exception of Hong Kong, all report that courts are now open with only mild delays or very minimal disruption. Some of them, like Korea and mainland China, substantially reduced operations for an initial period of a month or so but then returned to normal operation. Many, including mainland China and Australia, have, to the extent the rules permit, relied on technology and made attempts to be flexible.

However, as the Chief Justice of the Hong Kong Court of Final Appeal pointed out in a

recent statement, the challenge is to ensure that such flexibility, including considering expanding the scope of hearings via telephone and videoconferencing, is “not only... logistically feasible but also legal in terms of being permitted by applicable court rules and procedures”. In his recent ruling allowing the use of telephone for a directions hearing (Cyberworks Audio Video Technology Ltd v Mei Ah (HK) Co Ltd), the Hon. Mr Justice Coleman adopted a pragmatic approach to the interpretation of the rules and procedures, but his reasoning demonstrated the hurdles faced by the judiciary and parties. A recent decision by the Western Australian Court of Appeal (JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd [2020]WASCA 38) ruled in favour of an appeal hearing proceeding by telephone and provides helpful guidance on how courts can provide “necessary and proportionate alteration to the normal practice and procedure of the court consistent with the due administration of justice”. However, it is noted that the decision is confined to cases where the hearing is on discrete questions of law with agreed facts and documents. A real challenge lies ahead for the conduct of trials in the courts if the current restrictions on personal attendance continue for an extended period of time.

In Hong Kong, the courts closely follow the government’s public health policy and the courts have applied a General Adjournment Period (GAP) since 29 January 2020, restricting services and adjourning all proceedings, other than certain urgent and essential business. The courts have gradually resumed proceedings in batches since early March, but with the

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issues and her sensitivity to cultural differences typically involved in cross-border cases, are unique assets in dispute resolutions involving Chinese parties. Jane is a senior member of the Chartered Institute of Arbitrators (FCI Arb) of the UK and speaks English and Mandarin Chinese.

latest increase in the number of confirmed infections, the GAP has now been extended for three weeks to 13 April. On 2 April 2020, the Hong Kong Judiciary issued a Guidance Note setting out the practice for remote hearings in civil cases in the Court of First Instance and Court of Appeal of the High Court during the GAP. Phase 1 entails using the courts' existing videoconferencing facilities, but the note envisages the possible use of other technology in the future, provided it is feasible and secure. For the time being, the question of whether or not to have a remote hearing is for the court to initiate; parties cannot bring an application seeking one.

Pursuant to the Guidance Note, the Hong Kong Court of Appeal conducted a remote hearing in the Technology Court inside the High Court building on 6 April (CACV318/2019). The judges and clerks sat inside the court room, while the barristers and solicitors attended by video conference. The barristers wore

facial masks as well as their usual wigs and gowns. The hearing lasted for 2 hours reportedly with no major difficulty.

In mainland China, the courts have made good use of a recently introduced intelligent court application system, allowing parties to file documentation using an app, using biometrics for identification purposes. Though far from being commonplace, hearings via videoconference have also been tested and the possibility of using artificial intelligence to assist rulings has even been raised. The Chinese courts led the way in the use of technology in law courts even before the outbreak of the virus, and recent events have accelerated adoption. And thanks to the abating number of virus cases, China's courts are largely back in business.

LITIGATION VERSUS ARBITRATION

With courts at risk of closure and hearings being delayed or postponed across the region, there is an argument that, as a method of dispute resolution, international arbitration is better positioned to adapt to the sort of disruption being seen than litigation. One of the main advantages of international arbitration is its flexibility – the parties are able to agree on the timetable and ground rules by which the dispute will be resolved and are not bound by rules of civil procedure to the same degree as the courts are. Arbitral institutions are also better placed to make swift adjustments to their rules as required, given that they are not state institutions.

Most of the rules in place at the key arbitral institutions around the world grant the tribunal a broad discretion to decide the form of the hearing unless otherwise agreed by the parties, though only the rules of the London Court of International Arbitration (LCIA) (2014 edition) expressly contemplate a hearing by videoconference or telephone. In contrast, the International Chamber of Commerce (ICC) Rules (all editions) provide that the tribunal must meet 'in person' if any of the parties requests it do so, which may tie the hands of the tribunal when deciding on the possibility of a virtual hearing.

For the giving of testimony by witnesses, flexibility is provided by all institutions' rules, again with the exception of the ICC, granting

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Matthew specialises in international arbitration. He has acted as counsel in many commercial and investment treaty arbitrations under all major arbitral rules, including the HKIAC, ICC, LCIA, SCC, SIAC, ICSID and UNCITRAL rules. He is qualified as a solicitor in England & Wales and Hong Kong, and as an attorney in New York.

Matthew has particular experience of disputes relating to energy, infrastructure & construction projects, joint ventures,

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mis-selling. He also deals with complex investigations by law enforcement agencies and by data and financial services regulators. Fai Hung has worked in both our Hong Kong and Shanghai offices and is admitted in both Hong Kong and England & Wales. He speaks Mandarin, Cantonese and English.

tribunals the discretion to unilaterally decide the form in which it is heard.

In practice, most case management hearings and many other procedural hearings in international arbitrations are already conducted by telephone. However, despite the discretion and flexibility of the relevant rules, it has been rare for a full-blown hearing to take the form of telephone or videoconference.

One of the respondents to our survey reported having recently worked on a hearing in an arbitration seated in Singapore under the UNCITRAL Rules 2013 in which videoconferencing was used to hear from witnesses in India. That required a significant amount of planning and coordination to ensure that it went smoothly on the day. For another four-week hearing seated in London, under the UNCITRAL Rules 1976, the parties decided to adjourn the hearing

due to a lack of confidence in a multi-party videoconference, particularly in light of the need to use visuals and to refer to substantial documentation. Many advocates consider that the "impact" of a cross-examination may be significantly reduced if conducted by videoconference. However, with no certainty as to when the pandemic will pass, virtual hearing technology continuing to improve, and uptake progressing through the legal services industry, it is perhaps only a matter of time before all litigants, tribunals and institutions alike will be forced to consider ways to mitigate the downsides of using technology in this way.

LONG TERM IMPLICATIONS

Discussions about the increased use of videoconferencing in dispute resolution are not new, but it has gained limited traction to date. During Hong Kong's Civil Justice Reform

in 2000, it was decided not to dispense with attendance at hearings due to a lack of interest from parties and the cost to the courts of investing in the required technology.

However, the intervening two decades have seen enormous technological developments and it may be that, as Justice Coleman pointed out in his recent ruling, “The Covid-19 crisis is actually an opportunity for the courts and parties to reassess how cases can best be managed. Whilst the ruling [to allow the telephonic hearing] is born of the current circumstances, and addresses those circumstances, there seems to me to be a strong argument for moving matters in a similar way beyond the end of the crisis.”

While the current crisis will, we hope, be shortlived, Covid-19 has the potential to drive adaptations to arbitration and litigation proceedings that could have a much more lasting impact.

TRAFFIC LIGHT REVIEW OF CURRENT LEVELS OF COURT DISRUPTION IN APAC, AS AT 2 APRIL 2020



Australia



China



Hong Kong



Indonesia



Japan



Korea



Myanmar



Singapore



Vietnam

Legend:

- little to no disruption
- some postponements/adjournments
- significant disruption with all but essential cases postponed

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Mark is the head of the Asia Pacific litigation practice and has extensive experience in complex and strategically significant litigation, international arbitration and contentious regulatory work. He has acted for leading corporations in the energy and resources sector in Australia on matters ranging from

major engineering and project disputes, joint venture disputes and arbitrations, through to responding to regulatory investigations and associated civil penalty proceedings. He also acts regularly in director and shareholder disputes.

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Topic: **Novel coronavirus outbreak – New business disruptions to Hong Kong industries**

Firm: **Baker McKenzie**

On 30 January 2020, the World Health Organization declared that the coronavirus outbreak constituted a public health emergency of international concern. The PRC and Hong Kong have been at the forefront of the coronavirus outbreak. Whilst the Hong Kong government, judiciary and many in the private sector are gradually returning to 'business as usual' after a month long work from home, and limited public services, understandably many companies and businesses will be keeping a close eye on the risks which the coronavirus outbreak poses to business in Hong Kong, including management of insolvency risks in the coming months.

Notably, during the 2020 to 2021 Financial Budget Speech¹ in the Legislative Council on 26 February 2020, Financial Secretary Paul Chan noted that whilst he believes that the economy would recover after the coronavirus epidemic was over, its impact could "*possibly be greater than that of the SARS outbreak in 2003*"; and some sectors e.g. tourism and consumption- related sectors, were already entering into a "harsh winter".

What is an insolvency event?

Many in Hong Kong will be aware that 'inability to pay debts' is a ground for winding-up a company under s.177(1)(d) Companies Winding-Up and Miscellaneous Provisions Ordinance (Cap.32)(CWUMPO), and that compulsory liquidation by court winding-up order will be an insolvency event. Under s.178 CWUMPO, a company will be deemed unable to pay its debts under statute

in certain circumstances e.g. failure to pay debts within 21 days of service of a statutory demand for more than HKD10,000.

Other events which may be an insolvency event by law or deemed to be an insolvency event in contractual clauses include:

- Creditors' Voluntary Liquidation (where the company resolves to wind-up in circumstances where the board of directors form the view that the company is unable to pay its debts); or Members' Voluntary Liquidation (where the company resolves to wind-up, notwithstanding the ability to pay its debts as they come due in the next 12 months).
- The company is insolvent on a cash flow and / or balance sheet test.
- The company is served with a statutory demand or served with a winding-up petition (regardless of the grounds or merits of winding-up).
- Where receivers or managers are appointed over the company or its assets.

How will insolvency affect my business?

Whilst many will be aware that a company in liquidation will be unable to continue business as a going concern as a result of liquidation, companies may find themselves unprepared for the wide scope of events that can be caught by "Insolvency Event" clauses and the contractual defaults that may be triggered as a result. Companies should actively review "*Insolvency Event*" and "*Event of Default*" clauses and definitions in existing contracts to

¹ <https://www.budget.gov.hk/2020/eng/budget03.html>

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Kwun Yee Cheung is a partner in the dispute resolution practice at Baker McKenzie in Hong Kong, focusing on company insolvency and commercial litigation.

Kwun Yee's practice includes litigation and advisory work representing insolvency practitioners, corporate clients and banks on a wide range of complex disputes and insolvency and restructuring matters, including compulsory and voluntary liquidations, receiverships, corporate restructuring and schemes of arrangement. She also

focuses on company law and commercial disputes, regularly advising corporate clients, shareholders and directors in relation to matters including shareholders' rights and remedies, directors' duties, joint venture disputes and unfair prejudice petitions.

consider the events or consequences that may be set in motion if those clauses are triggered.

An insolvency event may trigger wide reaching consequences. For instance:

- It will typically be an event of default in contracts, and can trigger breach of contract, although in some circumstances the event of default may be remedied e.g. withdrawal of the statutory demand or petition.
- It can trigger cross-defaults of other contracts e.g. leases, finance agreements, supplier agreements, joint venture agreements, and therefore may require a holistic approach to negotiating waiver of breaches or other means of resolution.
- Due to the public nature of winding-up petitions, which are gazetted and advertised in local newspapers, it may give rise to wide

scale negative publicity and the freezing of bank accounts or other credit lines by creditors who become aware that the company is subject to a winding-up petition. These considerations also apply where the company has given notice of meetings to resolve for voluntary liquidation.

Even in the event of liquidation, directors must remain alert as former directors of a company in liquidation may be liable for breaches that took place before liquidation and will also owe duties in liquidation, for example:

- Duties to deliver assets, books, records and papers to the liquidators;
- Duty to prepare a sworn statement of affairs verifying the company's assets and liabilities; and

- Other duties to assist the liquidators e.g. to attend interviews or meetings, and to co-operate during the liquidation.

What should management do when facing insolvency risks in uncertain times?

While the coronavirus continues to impact local and regional businesses, and the overall global economy remains uncertain, we would recommend companies take the following steps to actively monitor and manage potential insolvency risks (whether their own or those of business stakeholders):

- Review contracts to consider Insolvency Event and Event of Default clauses, noting that different contracts will have clauses of different thresholds, e.g. from threatened to actual liquidation, and some will have remedy provisions.
- Monitor news regarding the financial position of business partners, including news of winding-up petitions or court actions for debt recovery, breaches of other contracts, or closing of business operations.

- Review the business' balance sheet/ fund flow position with financial and legal advisors for early detection of insolvency and cross-default risks and timely financial restructuring.
- Seek legal advice on directors' duties when there is a risk of insolvency, and ensure that the business complies with good corporate governance notwithstanding economic difficulties.
- Consider the implications of an insolvency event on key stakeholders including creditors and employees, where there may be intervention by the Labour Department in appropriate cases, e.g. default in wages.
- Review new contracts and those coming up for renewal with particular attention to whether Event of Default and Insolvency Event clauses need to be specially tailored in times of greater economic uncertainty.
- For multinational companies or companies with cross-border businesses or assets outside of Hong Kong, where insolvency events may be triggered in jurisdictions

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Rachel Hui is a senior associate in the dispute resolution practice at Baker McKenzie in Hong Kong, specializing in contentious insolvency and restructuring; and commercial litigation, in particular companies and shareholder disputes.

She acts for Hong Kong and foreign liquidators in a range of matters including

asset realization; regulatory and compliance; and recognition in Hong Kong. Rachel is also acts for creditors, debtors, receivers and third parties in debt collection, restructuring and distressed situations; including bankruptcy and winding-up proceedings. Her commercial litigation practice focuses on company and shareholder disputes.

outside of Hong Kong, consider cross-border insolvency risks which require Hong Kong and foreign law advice.

- Consider strategies to preserve the value of tangible and intangible assets such as intellectual property rights, especially where different operational assets are held by different entities within a group of companies.

Different considerations will apply depending on the industry in which the company operates – we have subject matter and industry specialists who can assist and offer practical advice.

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Topic: **Remote Hearings in Hong Kong's High Court During COVID-19**

Firm: **Gall**

The Use of Technology in Court Proceedings

Gall recently acted for the Plaintiff in Hong Kong's first telephonic hearing in *Cyberworks Audio Video Technology Limited v Mei Ah (HK) Company Limited & Ors* which was a milestone in the Judiciary's approach towards furthering the objectives of cost-effectiveness of practice and procedure, and expeditious dispute resolution. In this matter, Gall's senior partner Nick Gall and senior associate Felda Yeung acted for the plaintiff. Please refer to our article on this unprecedented approach to case management during GAP here: <https://www.gallhk.com/gall-acts-for-plaintiff/>

In early April, the Judiciary came out with a **Guidance Note for Remote Hearings for Civil Business in the High Court (Phase 1: Video Conferencing Facilities)** ("**Guidelines**") (https://www.judiciary.hk/doc/en/court_services_facilities/guidance_note_for_remote_hearings_phase1_20200402.pdf) which proactively seeks to deal with challenges brought about by the General Adjournment Period ("**GAP**") of court proceedings caused by the COVID-19 situation.

While facilitating the use of technology in the administration of justice, the Guidelines recognise that there are some matters where "*oral submissions are still necessary*". The Courts in Hong Kong are known to use technology and videoconferencing for taking of evidence of witnesses when it is found just and in the interests of the parties. The Courts have the duty to further the underlying objectives by active case management and this includes encouraging the use of technology in the appropriate circumstances.

The Guidelines are a welcome step in the direction of active case management by the Courts and are in line with international judicial practices. In the United Kingdom, video-conferencing and audio proceedings can be directed by Courts and directions for recording may also be given. In Australia, the Court may direct testimony to be given or appearances and submissions to be made by video-conferencing. In Singapore, video conferencing and telephone conferencing with the help of Zoom technology is being encouraged in view of the COVID-19 situation.

The Guidelines: Key Considerations

The Guidelines explore the possibility of using alternative modes of hearing to maintain the continuity of judicial proceedings in civil cases in the High Court during the GAP. Some of the key considerations of the Guidelines include:

- a) a flexible application of the Guidelines on a "technology neutral basis";
- b) video-conferencing facilities ("**VCF**") are recommended in Phase 1 where oral hearings are necessary during the GAP;
- c) for the time being, the Court will decide which cases are suitable for disposal by remote hearings and application for the use of VCF will not be entertained;
- d) trials are not considered suitable for remote hearings. At present it is applicable to interlocutory applications or appeals in the Court of First Instance as well as final hearings dealt with on written evidence. In the Court of Appeal, all civil appeals and interlocutory applications including applications for leave to appeal are to be considered for remote hearing.

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Nick is Senior Partner and Head of Litigation at Gall. He has acted for publicly listed companies, senior employees, the Hong Kong Government, the US Government, major international banks and corporations throughout the world.

Nick has extensive experience in dealing with multi-jurisdictional fraud and international asset tracing litigation. His work often requires making cross-border applications, freezing/gagging applications, urgent injunctive relief, the examination of senior executives/bank officers and recovery and enforcement proceedings generally. He also has extensive experience in forcing banks and financial institutions to provide information to assist in tracing and recovery of funds and fending off vulture funds in respect of international sovereign debt recoveries.

Nick is also regularly instructed to act in respect of investigations and charges arising out of the Independent Commission Against Corruption and other regulatory bodies in Hong Kong.

Nick is consistently ranked as a top tier lawyer in the major legal guides. He has been recognized as a Leading Individual in the dispute resolution category in both Legal 500 Asia Pacific and Chambers Asia Pacific guides since 2011. He is also consistently ranked in Asialaw Leading Lawyer, the ALB Hong Kong Law Awards and Who's Who Legal Asset Recovery.

Nick also serves on the General Committee of the Hong Kong Club.

Challenges in the Use of Technology for Remote Hearings

Privacy

The Guidelines stipulate that “*such hearings will require the use of equipment at the remote locations which is compatible with the Court’s VCF and meets the operational requirements of Court hearings*”. The Guidelines also mention that normally, the proceedings will be recorded using DARTS and that no other person can record the hearing in any form. Apart

from the technical specifications, that the equipment at the remote location are to comply with, no other guidelines have been provided yet.

Zoom is a videoconferencing platform which is widely being used across the world. While technical specifications may be taken care of, privacy issues remain as concerns have been raised that Zoom is not securely encrypted.

Open justice

The impact on the open justice principle has been addressed in the Guidelines as the Court needs to strike a balance when competing fundamental rights are engaged. A continued public dissemination of reasoned decisions is a solution suggested in the Guidelines.

Practical Considerations

The arrangements for an effective remote hearing remain the responsibility of the persons participating (as directed by the Court). Generally, the solicitors would play an important role in facilitating a smooth hearing. The

following practical considerations may be useful:

- a) **Use of technology and privacy:** The equipment to be used must be tested in advance. The parties should be adequately trained for using technology. Only password protected and end-to-end encrypted online platforms should be used. In the event that Zoom is used the following points may be useful:
 - i. the identity of the attendees should be verified at the beginning and access should be given to authenticated users only;
 - ii. the Zoom meeting link should not be posted publicly;

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Felda joined the firm as a trainee solicitor in 2011 and was admitted as a Solicitor in Hong Kong in 2013.

Felda has experience in commercial and civil litigation, with a focus on arbitration, contractual disputes and fraud investigations. Recent arbitration related work includes enforcing foreign arbitration awards in Hong Kong and defending applications to set aside arbitration awards. Recent litigation work includes assisting in large-scale cross-border actions worth in excess of HK\$1 billion at both the Court of Appeal and Court of Final Appeal stage and

obtaining various injunctions and urgent interim relief both in support of Hong Kong proceedings and in aid of foreign proceedings.

Felda completed her LL.B and PC.LL at the University of Hong Kong. She also completed a LL.M in Arbitration and Dispute Resolution at the University of Hong Kong and is a member of the Chartered Institute of Arbitrators. She is also a member of the Hong Kong International Arbitration Centre's HK45 Committee, a group for all young arbitration practitioners in Asia and beyond.

- iii. the 'waiting room' setting should be enabled such that the host retains control of admitting participants;
- iv. the "Enable to join before host" option should be de-selected;
- v. screen sharing should be restricted;
- vi. any unauthorised recording should be strictly prohibited.

b) **Use of e-bundles and focused submissions:**

The Guidelines encourage electronic lodging of documents and this would be facilitated by e-bundles. In fact, the parties in the telephonic ruling in the Cyberworks matter ([https://www.hklii.hk/cgi-bin/sinodisp/eng/hk/cases/hkcfi/2020/347.html?stem=0&synonyms=0&query=title\(cyberworks\)%2520OR%2520oncotherjcititationitles\(cyberworks\)%2520&nocontext=1](https://www.hklii.hk/cgi-bin/sinodisp/eng/hk/cases/hkcfi/2020/347.html?stem=0&synonyms=0&query=title(cyberworks)%2520OR%2520oncotherjcititationitles(cyberworks)%2520&nocontext=1)) used digitised trial bundles. The submissions and evidence should be precise as VCF is considered more suitable for shorter hearings and it is important to ensure that the Court and

the parties can easily access the correct documents during the remote hearing.

- c) **Location:** Given that working from home is prevalent, it is crucial that the remote location is disturbance free and there is stable internet connection which should be tested in advance.

- d) **Flexible approach:** The Guidelines have factored in technical difficulties that participants may face in setting up and conducting proceedings. Accordingly, the date and time of the hearings are subject to change. Therefore, a co-operative attitude and necessary preparation is encouraged.

To conclude, the Judiciary has risen to the challenges presented by the GAP and promoted the use of technology in a phased manner to keep the wheels of justice moving. The success will largely depend on the co-operation of parties to ensure the effectiveness of practice and procedure without compromising the safeguards of conventional Court proceedings.

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Kritika joined the firm in July 2019 as a Legal Analyst with previous experience in civil and commercial litigation as well as mergers and acquisitions. She is qualified as an Advocate under the Indian Advocates Act, 1961.

Kritika supports the team in the commercial and civil litigation practice as well as the employment practice.

She was awarded the University Gold Medal for B.A.LL.B (Hons.) at the National University of Juridical Sciences, Kolkata, a premier law school in India. She also holds the Bachelor of Civil Law (BCL) degree from the University of Oxford.

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Topic: **Hong Kong courts in lockdown – how technology is helping with dispute resolution in the time of COVID-19**

Firm: **Hogan Lovells**

This article was first published in April 2020.

With remote working now the norm across all areas of business, courts and tribunals courts and tribunals have been developing innovative ways to keep the litigation process on track and do their best to ensure that justice is not unduly delayed.

In Hong Kong, the Judiciary has announced a greater use of video-conferencing facilities for remote hearings starting today, 3 April 2020. In its Guidance note, the Judiciary says that “remote hearings using video technology preserve most of the benefits of an oral hearing, allowing parties and their legal representatives to interact with each other on a real-time basis.”

On 1 April 2020, Hong Kong introduced a new electronic platform for the lodging of documents in the High Court and Family Court, extending a scheme that was already up and running in the District Court.

Taken together, these are just two of the measures that courts in Hong Kong, the UK and Australia are putting in place to ensure that justice is not unduly attained, whilst public health measures fully respected.

Despite the inconveniences, it is possible to use the slowdown to your advantage, getting ahead while others risk getting tied up with red tape.

Coronavirus challenges

Travel bans presently in place mean that witnesses are unable to attend court, and

hearings and judgments have been postponed. Where hearings do take place, the need to observe social distancing means that the numbers of people allowed into a court room has to be strictly limited, if physical attendance can be safely permitted at all.

Hong Kong

In Hong Kong, the courts have been closed for more than two months, since 29 January 2020, with a general adjournment in place of all proceedings in all courts and tribunals (the “General Adjourned Period”, or “GAP”). There is an exception for urgent and essential applications (such as for injunctive relief) which will continue to be heard by a Duty Judge. The Judiciary is encouraging litigants to consider using paper disposal in lieu of hearings as far as possible. Where hearings do take place, the time allotted for oral argument will be limited and the numbers permitted to be present will be restricted with social distancing measures in place.

The court registries have also been affected, only beginning to open after about six weeks before suddenly closing again on 22 March following a spike in the infection rate in Hong Kong.

Hong Kong, presently, remains largely dependent on the physical filing of legal documents and although parties can serve documents on each other, filing them at court when the registries are closed, presents a challenge. There is the obvious risk of people

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As part of our Litigation, Arbitration, and Employment practice, Antonia Croke focuses on complex, cross-border litigation for multinational companies and financial institutions.

Antonia is highly experienced in advising on corporate and shareholder disputes, fraud, insolvency/restructuring and financial services litigation. She has recently relocated to our Hong Kong office, where she will practice as a foreign legal consultant.

Antonia has spent the last decade in London assisting multinational companies and financial institutions involved in cross-jurisdictional disputes, investigations, and injunctions. Her calm, commercial, and pragmatic approach means that she is adept at managing global teams on high profile cases across Europe, the UK, US, Singapore, Hong Kong, and Australia.

She is also experienced in conducting internal and regulatory investigations.

Before joining Hogan Lovells, Antonia worked in the London office of an international law firm and as an associate in two leading Australian law firms in Sydney from 2004 to 2010. Antonia also spent time on secondment in the Litigation team at a major UK bank. In 2015 Antonia was featured in the Cambridge Judge Business School magazine, Flux as a "Leading Light" in the legal industry.

Antonia continues to work with global clients to help them understand their shifting risk landscape, as technology disrupts their industries, and helps them to ensure they're maximising the use of technology to mitigate those risks, whether in compliance programmes or through the use of AI in litigation.

then crowding together to file documents once the registries are reopened.

The measures announced on video conferencing demonstrate the ways the courts are trying to keep justice on track. The Court of First Instance recently ordered that a hearing for directions should take place entirely by telephone conference without

the parties or their legal representatives being present in court¹. In a separate case, the Court of First Instance ruled that a continuation of an injunction order would not be granted simply because of the GAP, and that the applicant should have made an application for the matter to be considered on an urgent basis².

¹ *Cyberworks Audio Video Technology Ltd v Mei Ah (HK) Co Ltd* [2020] HKCFI 347

² *Essilor Manufacturing (Thailand) Co Ltd v Wong Kam Wai* [2020] HKCFI 547

UK

On 30 April 2020, the courts put in place a contingency plan dividing the court and tribunal estate into three categories, according to priority:

(a) courts that will remain open for all purposes, including hearings in which the judge and at least some of the participants are present, and to which the public,

solicitors and barristers will continue to have physical access (priority cases);

- (b) courts which will remain staffed and which judges can attend to deal with administrative matters and some remote hearings; and
(c) courts which for the time being will not be staffed and which will be suspended.

Priority cases include, amongst others, matters such as committals, freezing orders,

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A partner in our dispute resolution practice based in Hong Kong, Chris Dobby's practice covers a broad range of cross-border commercial, insolvency, professional negligence and fraud related disputes, investigations, asset tracing and recovery actions throughout Asia. Chris' experience in dealing with complex cross-border issues enables him to 'think around corners' and to identify and resolve issues in a practical and efficient manner.

Over his 20 years of practice in Hong Kong, Chris has earned a reputation as 'a very good operator who has a lot of experience on contentious matters' assisting a broad range of clients to achieve solutions through litigation, negotiations, and alternative dispute resolution.

Chambers Asia-Pacific recognizes Chris as adept at dealing with complex fraud matters,

corporate investigation and asset recovery. Noted in *Chambers Asia-Pacific* for his "strong track record on large insolvency matters," Chris advises on all aspects of contentious insolvency matters and continues to act for the court appointed liquidators of some of Hong Kong's highest profile corporate collapses (including Hong Kong's largest corporate collapse). As one of the few accredited solicitor-advocates with higher rights of audience before the Hong Kong Courts for civil proceedings, Chris frequently represents clients in the superior courts in Hong Kong. Chris is recognized as a leading lawyer by various independent publications including *Chambers Asia-Pacific*, *Chambers Global*, *Legal 500 Asia Pacific* (where he is listed as a leading individual for Restructuring and Insolvency), and *Who's Who Legal*.

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He is not your ordinary litigator. Mark Lin has mastered the art of asking the right questions to find the right solutions. He has been using this solution-driven approach to help various local and multinational clients, particularly those in the financial services and multimedia sectors, since the 1990s.

Mark has regular experience dealing with courts, tribunals, and regulators in Hong Kong, Singapore, and Asia Pacific, as well as dealing with cross-border crises. He is a seasoned advocate who is experienced in handling multi-jurisdictional investigations. He has advocated for clients in international arbitrations in Hong Kong, London, Paris, Gothenburg, Singapore, Shanghai, and Beijing. Mark is a recognized leader in commercial dispute resolution and contentious regulatory

investigations by the leading legal directories, including *Chambers Asia-Pacific* and *Chambers Global* (in which he is listed as Band 1 for dispute resolution), *Legal 500 Asia Pacific*, and *Who's Who Legal*.

Mark has been a partner at Hogan Lovells since 2003 and is a fellow of the Hong Kong Securities Institute.

injunctions and applications with a real-time element such as post-termination employment restrictions and anti-social behaviour or harassment.

The Supreme Court has also conducted a case by videolink for the first time ever after closing its building to the public. The Supreme Court has now said it would use video conferencing exclusively for hearings

and for handing down judgments following the direction by the UK government that people should stay in their homes whenever possible.

In addition, the UK Ministry of Justice has published the 116th Practice Direction (PD) update setting out a new *PD 51Y Video or audio hearings during coronavirus pandemic*³. This short direction allows the court to direct

³ <https://ehoganlovells.com/collect/click.aspx?u=Zm41SE1WRnJvT1BvOGR3QTcrrcUIPS3dlR0ZzVnphZkpwRmw3VmdVZUJJBZVJIUUF0S3Yx-L0F2aTBCM1h3U1N6UjY1VnpGV3hCand4QWp1bFk3VTA3ZzR6dJFvXWxovQTM1RFFTRGxlYnJYkgwQVRJT2NyOTdhMUVacUhGSVnjb-VFJVGDhZkxQMDhLvmMY21lCHNYT1kzMmEOR1ZUTnlaMVfvdHdWmZnNIR6bu1UQzNjQ1BMVepBZlg2bvPmRjFIRWR6eXhUQZVNGx-aSx3U0JOMEFvbWpSNy83TWNBRWxUY3pVK05iOWtPaz0=&ch=d8873f35e77347d198497c7a2f40ead846079325>

that remote hearings take place in private where it is necessary to do so to secure the proper administration of justice and it is not practicable for the hearing to be broadcast in a court building.

Australia

Whilst the High Court of Australia has said it will not be sitting in Canberra or on circuit during the summer months, the Family Court and the Federal Court of Australia say they are continuing operations and developing a new protocol for face-to-face representation in court hearings. The protocol features a

greater use of telephone call over by the presiding judge of all matters listed in their docket, with cases that are assessed to be of a lower priority sent for alternative dispute resolution. The courts are already heavily reliant on telephone hearings but are hoping to increase video conferencing capabilities as soon as possible.

Five top tips to get what you want

Whilst the current situation present challenges, it is still possible to progress litigation. The courts in common law jurisdictions generally have wide discretion

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Byron Phillips is a disputes lawyer and problem solver based in our Hong Kong office with over a decade of experience quelling crises for clients. This includes conducting complex litigation, arbitration, and investigations (both internal investigations and in response to formal investigations brought by regulators) usually of a cross-border nature.

Byron has particular interest and experience in cybersecurity and data privacy, technology-related litigation and arbitration, financial services litigation and investigations, white collar crime and fraud, insolvency litigation, and professional liability disputes.

Technology is influencing all areas of law, including litigation, arbitration and investigations. Byron works with clients to help them understand their shifting risk landscape, as technology disrupts their industries, and helps them to ensure they are maximizing the use of technology to mitigate those risks.

Byron is also a member of the Hogan Lovells Crisis Leadership Team, the firm's multi-disciplinary, global crisis management practice.

Dispute Resolution

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Nigel Sharman's practice is focused in assisting clients in both fee-earning and professional support lawyer roles across litigation and arbitration.

Nigel has advised on a range of commercial matters including financial mis-selling claims, data privacy enquiries, and cross-border arbitrations.

Drawing on his previous experience as a television news producer and journalist,

Nigel writes client publications in an engaging, jargon-free style and explains the impacts of complex developments in a digestible form for the reader.

Nigel joined the firm in March 2018 having practiced in magic and silver-circle law firms in England and Hong Kong for more than 10 years.

Nigel received the Kennedy Scholarship from Harvard University in 1981.

to ensure that the objectives of justice are properly pursued and that cases are proactively managed.

So what can you do to ensure that if you are pursuing litigation, your cases are being properly advanced and brought to a timely resolution? We suggest the following five points to make sure that your interests are being fully progressed:

Know the rules. In Hong Kong, the Rules of the High Court empower the courts to make orders of their own motion, as well as on application. As was noted by Mr Justice Coleman in *Cyberworks*, the Court has "wide case management powers in balancing the [underlying objectives] against healthcare concerns, with the support of technology". There is no express provision in either the High Court Ordinance or the Rules of the

High Court which require court hearings to be held with the parties or their representatives in physical attendance.

Be proactive. Don't be shy about asking the court for what you want to happen and what is in your best interests. With the situation rapidly changing – and announcements often made at the last minute – you or your lawyers may know more than the court staff.

Don't assume the lockdown is an excuse. If court registries are open, you still need to be making court applications in time or risk falling foul of limitation periods or the length of time injunctions will operate. Delay could be costly. Also, remember – the court closures do not affect rules on service.

Communicate regularly with your lawyers. Ask your lawyers what arrangements they have in place for remote working and maintaining

client confidentiality. Most law firms will now have remote working arrangements in place but their effectiveness and robustness may vary. Hogan Lovells operates with a technology infrastructure which enables our lawyers to work remotely anywhere in the world. Plans are in place to ensure that this capability is scalable and that the firm is positioned to work remotely for an extended period of time.

Be innovative and ready for what's to come.

The new e-lodging arrangements should take some of the pressure off the court system. Later in the year, Hong Kong will be launching its own online dispute resolution service. The platform will use artificial intelligence and blockchain technology with the aim of replicating the entire dispute resolution

process online. New technology can already help with tracking down reluctant defendants. In one recent case, the plaintiff was allowed to serve proceedings on defendants through Facebook⁴.

Hogan Lovells can help you respond to any challenges impacting you, across your business, anywhere in the world. We have a set of tools available through our dedicated COVID-19 Topic Centre⁵ discussing issues such as force majeure, supply chain disruption, employment, contract clauses, data protection, insurance and crisis leadership.

To know more, get in touch with us at COVID19@hoganlovells.com or speak to your usual Hogan Lovells contact.

⁴ *Zhuhai Gotech Intelligent Technology Co Ltd v Persons Unknown* (HCZZ 10/2020)

⁵ <https://ehoganlovells.com/collect/click.aspx?u=Zm41SE1WRnJVt1BvOGR3QTrrcUIPS3dlROZzVnphZkzowRmw3VmdVZUJBZDQwTGN2T2Iz-kVsdjM3VG5BdndnM3MrNFJJCWGiTdVR3UjZCYnVFMWJaWUd4dmUrV2tBNXhydFlyZThPY2RuM1V2czZrR3pJQVBDZ3RUcUdxbnRzaOpGd-zlGUGVvK2dhWmw3dUdjUkNRR2FXVzBPWFcOZ0lmdA==&ch=d8873f35e77347d198497c7a2f40ead846079325>

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Topic: **Wrong Place at the Wrong Time – Managing Hong Kong Employee Mobility Issues During COVID-19**

Firm: **Bird & Bird**

With various degrees of lockdowns and border restrictions in place around the world, many organisations are wondering how to navigate the legal landscape and the practicalities resulting from employees or new hires being stranded in geographical locations outside their normal or anticipated places of work. In addition to the mobility restrictions brought about by COVID-19, the current pandemic has altered the needs and wants of both employers and employees.

In this article, we highlight some of the employment and immigration challenges that Hong Kong employers are facing in the pandemic landscape and we provide some guidance on how to navigate this new normal.

Risks and Challenges

Employment

In light of the restrictions on travel presented by COVID-19, many employers have adapted rapidly by implementing or permitting remote working arrangements to enable staff to work from locations outside Hong Kong, which is where they are contractually employed to work.

However, prolonged working from a different jurisdiction could attract the application of labour laws in those overseas locations. In some jurisdictions, performing services for an employer, regardless of the place of the employment contract, could trigger overseas local law entitlements to benefits and protections. In the event of an employment dispute, employees may attempt to “cherry pick” their legal forum by arguing that their employment is covered by the jurisdiction which

provides the most advantageous benefits and protections to them.

Regardless of whether there is any dispute, employers may still come under an obligation to comply with the employment laws of both Hong Kong and the overseas jurisdiction. Some of the common obligations may include compliance with working hours and overtime restrictions, leave entitlements, termination rights and limitations on wage withholding and deductions. For example, it may be a requirement to withhold taxes from employees’ wages in the foreign jurisdiction in which an employee is physically located, but it is unlawful to make such deductions under Hong Kong law. A failure to comply with labour law requirements in either jurisdiction may result in criminal sanctions. Each case will therefore depend on its own facts in terms of the overseas location involved, the work that the employee is performing and the contractual arrangements in place.

If an employee is working from the office of an overseas affiliate, the overseas entity and its directors may be liable for any breaches of local labour laws. If there is no overseas office from which the employee is working, liability may even extend to the Hong Kong entity, depending on whether the relevant legal requirements have extra-territorial effect. This also presents a risk of the Hong Kong company being liable for corporate taxes in the overseas location.

For employers that have an overseas office from which the employee is working, there may be de facto employment concerns depending on the laws of the jurisdiction involved.

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Pattie Walsh is a partner in Bird & Bird's international Employment group and head of the APAC employment team. She is also a member of the firm's Board.

Pattie is qualified to practise in Hong Kong, Australia and England. She has also had a long-term interest and developed expertise in the PRC. As a result, she spends a significant amount of time working with organisations as they navigate the complexities of doing business in China.

Being based in Asia, Bird & Bird tends to work across the whole of APAC and the Employment team manages projects and

employment law challenges wherever their clients have people.

Pattie spent five years as a barrister in London and enjoys both the contentious and advisory side of the practice. Alongside day-to-day employment advice, she also enjoys being part of the key strategic conversations, including at the level of client boards, that are taking place around the globe as organisations seek to embrace a rapidly changing environment.

This may create a risk of dual employment where the employee is deemed an employee in both Hong Kong and the overseas location.

Separate contractual concerns arise in relation to the on-boarding of new hires, either due to border restrictions or delays in obtaining the necessary work visas. This poses many issues from a business standpoint. The Hong Kong organisation may be in urgent need of the talent to fulfil a critical business role, or the employee may have already commenced employment and be undergoing training in another jurisdiction, but may be unable to return to Hong Kong.

Some organisations are managing financial losses and are restructuring their workforce, such that they no longer need to employ

overseas individuals with whom they have signed employment contracts and who may have already resigned from their prior positions.

Immigration

For Hong Kong employees working overseas, employers need to consider the requirement for a working visa in the foreign location. In many jurisdictions, an employee may conduct certain business-related activities (such as attending meetings or conducting site visits) without a work permit, but other types of activity (such as entering into contracts) would require the employee concerned to have a work visa in that jurisdiction.

The breach of local immigration rules could have a significant impact for the employee,

but may also hinder the ability of the employer to hire individuals on work visas in the future. Such breaches typically incur criminal sanctions and may result in the employee being deported from the overseas jurisdiction.

Confidentiality

Remote working also comes with potential risks of data security and confidentiality breaches when employees are allowed to work outside of the secure office premises or where they log into unsecure wifi networks to access work files and systems.

When employees use their own devices to perform work, confidential information may also be exposed when sent to personal email addresses, printed on home devices or left unattended in unsecure environments such as a table top shared by an employee's family members.

Recommendations

Stranded workers and employees who have requested to work overseas

- Prior to allowing an employee to work remotely from an overseas location (and where cross-border travel is permitted), employers should holistically consider and balance the various risks involved, including assessing the applicability of foreign labour laws, immigration permissions and permanent establishment taxation risks.
- If the level of risk is acceptable, the employer may allow the employee to work temporarily overseas, subject to compliance with relevant legal restrictions which should be clearly communicated.
- Where an employee is working at the office of an overseas affiliate, there should be clear documentation in place to delineate the individual's work status (i.e. the employee is not employed by the overseas entity and remains subject to Hong Kong laws). There should also be clarity around the applicable labour benefits and entitlements.

- Alternative methods of engagement are another viable option. If relocation to a foreign jurisdiction is likely to be long-term, the company may consider placing the employee on secondment with the overseas entity or transferring the employee permanently to the overseas affiliate.
- If an employee is stranded overseas and is prevented from returning to Hong Kong or does not wish to return to Hong Kong for personal reasons, and the level of legal risk is high, the employer may seek to agree that the employee be placed on a period of unpaid leave.
- Where an employee is reluctant to work at a pre-agreed location, the employer should endeavour to understand the employee's concerns and to provide support where feasible. With that being said, in Hong Kong, the employer is entitled to request the employee to perform work where reasonable. If the employer has implemented appropriate health and safety measures, the employee may not unreasonably refuse to attend work. In certain circumstances where the refusal to work amounts to a breach of contract, the employer may consider disciplinary measures or even termination.
- To protect confidential information, organisations are recommended to put in place policies (and preferably contractual terms) on the proper usage of personal devices and the handling of company information. Where possible, employees should be equipped with company devices and applications that have the appropriate security protections installed.

New hires

- For new hires or potential hires who are unable to commence employment due to mobility restrictions or immigration issues, the employer may consider rescinding the contract or withdrawing the offer. Before doing so, it is important for the company to review the employment terms to understand its legal rights to do so and to mitigate any risks if this could give rise to a breach of contract.

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Diana is a member of Bird & Bird's international Employment practice based in Hong Kong. She is an experienced employment lawyer, handling both contentious and non-contentious matters, and specialises in investigations, discrimination, data privacy, business protections, restructuring and APAC regional projects.

With 23 years of both litigation and advisory experience, she has counselled companies across a range of industry sectors, including financial services, technology, logistics, pharmaceuticals, manufacturing, education, entertainment, hospitality and media.

Having worked in international private practice for 16 years, and a further 7 years working for a global bank as APAC head of

employment covering 12 jurisdictions, she brings to the table a breadth and depth of insight and pragmatism which clients find valuable.

She is a regular contributor to the firm's client publications and enjoys providing training on a broad spectrum of topics, helping clients to understand the legal landscape and minimise risk for their businesses.

- Ending the employment relationship is a measure of last resort. If possible, the employer may consider postponing the start date by agreement, or to on-board the individual in the foreign jurisdiction in which he/she is located on a temporary basis, or to place the individual on a temporary secondment with its overseas affiliate (if any) after evaluating the employment risks.

During these difficult and uncertain times, managing the talent pool is a balancing act between the operational needs of the company and providing support to employees. Keeping communication lines open will go a long way

in maintaining morale and resolving work tensions. Having said this, even with the best of intentions of providing flexibility to employees, companies can inadvertently fall foul of a miscellany of laws in providing cross-border employment solutions and unknowingly increase their potential costs. It is therefore recommended that legal advice be taken to understand and navigate the risks prior to agreeing on any new remote working arrangements.

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Jenny is a member of Bird & Bird's international Employment practice based in Hong Kong. She advises multi-national clients on a wide range of employment matters, including drafting and reviewing contracts and policies, advising global corporations on a diverse range of contentious and non-contentious employment law matters, and handling employment disputes.

In any given week, she can be found coordinating employment-related regional and global projects and advice, liaising with

Bird & Bird's other offices and external counterparts and ensuring clients receive timely and consistently presented advice.

She enjoys writing legal articles and presenting to the firm's clients on a wide range of employment-related topics.

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Topic: **Hong Kong: A Guide to Employment Support Scheme**
Firm: **Howse Williams**

What is Employment Support Scheme?

To tackle unemployment and loss of income caused by COVID-19, the Hong Kong Special Administrative Region Government (the “**Government**”) introduced an \$80 billion Employment Support Scheme (“**ESS**”) as part of the second round anti-epidemic relief measures on 8 April 2020 with the aim to preserve employment.

The objective of the ESS is to provide time-limited financial support in the form of wage subsidies to “*eligible employers*” to retain employees.

The wage subsidies will be distributed in two tranches. The first tranche of subsidies will cover the period from June to August 2020, while the second tranche will cover the period from September to November 2020.

Am I eligible to apply for ESS?

The Government will provide wage subsidies to any “*eligible employer*” for a period of six months. An “*eligible employer*” is an employer who:

1. has been making Mandatory Provident Fund (“**MPF**”) mandatory contributions for “*regular employees*” (i.e. employees who are at least 18 but under 65 years of age and have been employed in any industry for a continuous period of 60 days or more)
2. has been making MPF mandatory contributions for employees aged 65 or above
3. has set up MPF-exempted Occupational Retirement Schemes (“**ORSO**”) for his/her employees.

In order to be eligible for the first tranche, the relevant MPF or ORSO accounts should have been set up on or before 31 March 2020 (i.e. cannot be backdated to that date or any earlier dates). Those issued afterwards will not be eligible for application.

Generally speaking, employers whose wages are fully funded by the Government and are not affected by the epidemic are not eligible for ESS, for example, the Government, the Legislative Council, the Judiciary, the Liaison Office of the Central People’s Government, specified statutory bodies and specified public organisations, etc.

How to calculate the amount of wage subsidies?

For (i) “regular employees” aged between 18 and 64 and (ii) members of ORSO schemes

The amount of wage subsidies will be calculated based on 50 per cent of actual wages paid to each employee in the “*specified month*” (rather than the average over a few months). An employer can choose any one month from December 2019 to March 2020 as the “*specified month*”. There is a wage cap of HK\$18,000 per month. For example, if employees are paid HK\$18,000 or above in that specific month, the employer will receive a maximum subsidy of HK\$9,000 per month for each employee.

For employees aged 65 or above

If an employer has provided information on the basic salaries of employees when making MPF voluntary contributions, the amount of wage subsidies will be calculated based

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Patricia has focused on employment law since qualifying as a solicitor in 2011, and her experience in employment matters is now widely recognised in Hong Kong. Patricia heads up HW's employment team, which consists of two partners (including Patricia) and three associates.

Patricia regularly advises employers and senior executives on both contentious and non-contentious employment matters. Her practice covers a wide range of work, including drafting employment contracts, handbooks and policies, terminations and advising upon the enforcement of post-termination restrictions and confidentiality obligations. She and her team frequently advise on the employment aspects of M&A deals and business transfers. Many of her clients operate in the financial services sector, and she frequently negotiates exit packages in relation to high-level employees of banks, brokerages and insurance companies. Patricia also advises upon the employment issues arising from discrimination and harassment, personal data related matters and

immigration issues (including prosecutions). She also has experience in assisting employers and employees during the conduct of internal investigations and discrimination/harassment complaints.

Patricia has an in-depth knowledge of the Labour Tribunal, having assisted parties involved in Labour Tribunal proceedings for several years. She has also represented both plaintiffs and defendants in both District and High Court actions involving substantial claims for unpaid bonuses, enforcement of restrictive covenants and claims for injunctive relief in Hong Kong, including applications for injunctive relief. She also advises clients on licencing issues and regulatory investigations involving the SFC and the HKMA.

Patricia is the author of the 'Hong Kong Employment Ordinance - An Annotated Guide', which is published by LexisNexis.

on 50 per cent of the basic salaries actually paid to the relevant employees in the "specified month", with a wage cap at HK\$18,000 per month for each employee. The maximum wage subsidy per employee is HK\$9,000 per month.

If an employer has not provided information on the basic salaries of employees when making

MPF voluntary contributions, the amount of wage subsidies will be calculated on the basis of 10 times of the amount of employers' voluntary contributions made in the "specified month", with a cap at HK\$9,000 per month for each employee.

For “eligible employers” who have made MPF contributions for both “regular employees” and employees aged 65 or above, they must choose the same “specified month” for calculating subsidies.

What are my obligations under the ESS?

An “eligible employer” who participates in the ESS must provide an undertaking:

- a) to spend all the wage subsidies on paying wages to the employees; and
- b) not to make redundancies during the Subsidy Period (i.e. June to August 2020) which means the number of employees on payroll in any one month of the Subsidy Period cannot be less than the number of employees (with or without pay) in March 2020.

(Collectively, the “Undertaking”)

What happens if I fail to comply with the Undertakings?

Claw back

In relation to part (a) of the Undertaking, if an employer fails to use wage subsidies received for a particular month during the Subsidy Period to pay the wages of employees in the same month, the Government will claw back the unspent balance of the subsidies.

The claw back will be calculated using the following formula:

$$\text{Claw Back} = \frac{\text{Subsidies received for a particular month}}{\text{Wages paid to the employees in the same month}}$$

Penalty

In relation to part (b) of the Undertaking, if the number of employees on payroll in any one month of the Subsidy Period is less than the number of employees (with or without pay) in March 2020, then the Government will impose a penalty on the employer.

Penalty will be calculated using the following formula:

$$\text{Penalty} = \frac{\text{Subsidies received for a particular month}}{\text{Headcount Reduction \%}} \times \text{Penalty \%}$$

“Headcount Reduction percentage” is calculated as follows:

$$\text{Headcount Reduction \%} = \left(\frac{\text{Total no. of Paid and Unpaid Staff (as of March 2020)}}{\text{Total no. of Paid Staff in a given month}} - \frac{\text{Total no. of Paid and Unpaid Staff (as of March 2020)}}{\text{Total no. of Paid and Unpaid Staff (as of March 2020)}} \right) \times 100$$

“Penalty percentage” is calculated according to the following table:

Total no. of paid and unpaid staff (as of March 2020)	Penalty Percentage
<10	10%
10-49	20%
50-99	40%
100-499	60%
≥ 500	80%

Criminal liability

Any person who makes a false statement, misinterprets or conceals the facts, or furnishes false documents in an attempt to deceive the Government and/or its appointed agencies could be found guilty of a criminal offence and subject to prosecution.

What happens if employees are dismissed during the Subsidy Period but not by reason of redundancy, for example an employee resigns voluntarily or a fixed employment contract expires?

The employer will likely be in breach of its Undertaking. In the circumstances, the employer would have failed to use all the subsidies received to pay the wages of employees. The Government will therefore claw back the unspent balance of the subsidies. In addition, the employer will also have to

pay a penalty to the Government as the number of employees on the payroll in any one month of the Subsidy Period will be less than the number of staff it had in March 2020.

In essence, the Government will focus on monitoring headcount of participating employers as opposed to the employment status/identity of the employees. In order to avoid penalty and/or clawback, the employer must re-hire individuals to fill the vacancies to maintain the total number of employees as it had in March 2020.

What happens if I hire more employees during the Subsidy Period?

If the number of employees on the payroll in any one month of the Subsidy Period is more than the number of staff the employer had in March 2020, the employer will not be entitled to additional subsidy due to an increase in headcount during the Subsidy Period.

When and where can I apply?

"Eligible employers" may submit online applications for the first tranche of subsidies through the ESS portal (<https://www.ess.gov.hk/en/>) from 7:00 a.m., 25 May 2020 to 11:59 a.m., 14 June 2020.

What are the documents required for online applications?

For private sector employers participating in MPF schemes, the following information is required for the online application:

- a) Business Registration Number (or other registration numbers);
- b) Name of the MPF trustee;
- c) Name of the MPF scheme(s) participated from 1 December 2019 to 31 March 2020, and the scheme registration/ participation number; and
- d) Bank account number of the employer and a scanned copy of the bank statement.

For private sector employers who have set up MPF-exempted ORSO schemes, the following information is required for the online application:

- a) Business registration number (or other registration numbers);
- b) Name of the MPF-exempted ORSO scheme, its MPF exemption number and the ORSO registration/ exemption number;
- c) Bank account number of the employer and a scanned copy of the bank statement; and
- d) A scanned copy of the exemption certificate issued by the MPF Authority.

Employers do not have to declare the number of employees employed or their salaries in the application form. They only have to provide consent for the government's central processing agent (i.e. Pricewaterhouse Coopers Advisory Services Limited) to obtain their MPF records directly from their MPF trustees, which allows the agent, among others, to process and vet the employers' application, calculate the subsidy, claw back and penalty amount, as well as to conduct pre- and post- application verification work.

When can I expect to receive the wage subsidies?

The payment for first tranche is expected to be made within 3 to 4 weeks after the employer submits an application but no later than end of June. For applications involving ORSO schemes, a longer processing time may be required. The second tranche of subsidies will be disbursed in September 2020.

What if I am self-employed?

Subject to certain exceptions, self-employed persons who have a MPF account set up on or before 31 March 2020 and with that account remaining opened as of the day are eligible for a one-off lump-sum subsidy of \$7,500 under the ESS.

Are the application procedures for second tranche same as the ones for first tranche?

The Government has not yet decided on the eligibility and rules for second tranche, and will announce the application details in due course. The Secretary for Labour and Welfare, Dr. Law Chi-kwong stated that the rules for second tranche may be modified depending on the effectiveness and result of the first phrase.

Dr. Law Chi-kwong also suggested that there is a high probability that, if people cannot comply with their commitments they have made during the first tranche application, they may be disqualified from applying for the second tranche.

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Topic: **Managing your business and employees in Hong Kong during COVID-19**

Firm: **Lewis Silkin**

A conversation with Catherine Leung, a partner at Lewis Silkin Hong Kong, on the current employment landscape and how COVID-19 has affected employers in the city.

Almost every industry is suffering during this pandemic, what can employers in Hong Kong do to ride through this storm without having to make employees redundant?

I feel that we have been pretty fortunate in Hong Kong compared to many other cities around the world facing economic hardships during this pandemic, as the number of COVID-19 cases have somewhat stabilised. However, there have been large burdens put upon the travel, tourism and hospitality industries in particular during this crisis and many of them are suffering. I think that for businesses like these and many other businesses who are financially struggling, cash flow is key at the moment.

Although the first instinct may be to make employees redundant in the hopes of cutting costs, there are in fact many other alternatives to redundancy that can be considered which are also cost-saving measures. Considering these could avoid the expense of redundancies in the short-term and any future recruitment and training costs in the long term. Such alternative measures include:

- reduction in pay
- reduction in hours with corresponding reduction in pay
- reduction or removal of fringe benefits
- “withholding” of remuneration
- directing the employees to take unpaid or annual leave.

Reductions in pay, hours and benefits are the most direct way to cut costs. However, when implementing these measures, obtaining consent from the employees would always be advised. Particularly in the case of reducing salary or working hours, as these are contractual obligations and are considered to be material terms of an employment contract.

Another option may be to “withhold” remuneration, where a portion of the employees wages would be reduced initially and a sum equivalent to the reduced amount would be repaid by a certain date in the future. Although we use the term “withhold” generally, from a legal perspective, it would be considered a temporary reduction (which will then be repaid in the future). This would also require the employee’s consent.

One of the options we have seen large companies consider, is directing employees to take unpaid or annual leave. In Hong Kong, annual leave falls into two categories: statutory annual leave, which is the minimum number of annual leave days required to be granted under the Hong Kong Employment Ordinance; and any additional annual leave, which is annual leave granted by a company on top of the statutory annual leave amount. An employer has the right to direct its employees to take statutory annual leave after consultation with the employees. Many employers have encouraged their employees to take their annual leave now to avoid employees accumulating a vast amount of annual towards the end of the year.

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Catherine is a Partner in Lewis Silkin's employment team based in Hong Kong. She is dual qualified in Hong Kong and England & Wales. Her practice is varied with a particular focus on redundancies, bonus entitlement disputes, complex discrimination and sexual harassment cases, sickness absence, grievance and disciplinary matters, team moves, senior terminations, leading regional employment law projects across all major Asia Pacific jurisdictions and data privacy.

The clients she works with come from a range of sectors including financial services, luxury retail and tech firms. She works closely with legal, HR, and senior executives, helping them with all manner of employment issues and providing client-focused solutions in a practical and cost efficient way.

For small and medium enterprises especially, the recently announced Employment Support Scheme may be a great cost-saving assistance. The scheme provides employers with 50% of their employee's wages for 6 months (with a cap of HKD9,000 per employee per month). The first round of applications closes on June 14 for the first tranche which covers wages from June to August. The second tranche, which covers September to November, will be open for applications sometime in August.

What advice do you have for C-suite officers or people in managerial roles to ensure that they can keep their employees motivated during this tough time? Are there any steps / measures for best practice?

There have been great examples around the world of managers of large companies releasing statements or videos to employees to provide

comfort during this difficult time. C-suite officers may want to ensure that they increase communication and transparency with their employees, so that employees don't feel like they are being left in the dark. Heightened communication between managers and employees also minimises the risk of rumours or fear spreading within the company. This tends to happen if managers are internally discussing significant changes to the company and information starts to leak to employees. This can be avoided by implementing changes swiftly (after due consideration on the strategic planning of the company) and ensuring that discussions are kept strictly confidential.

It is also best practice to have managers subject themselves to similar reductions or policies that employees will be undergoing. Applying changes from the top down will not only lead by example, but will make employees more

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comfortable knowing that changes are being implemented across the board.

There is no specific manual on how to deal with circumstances like this, but we have seen some companies that have decided to provide training or resources to employees while they have a reduced workload. This might include internal trainings to keep employees productive or building on their skill sets while they have capacity.

The past few months have forced many employees to adopt a 'Work from Home' policy and now that employees have become accustomed to this, many companies are considering long-term implementations of more flexible policies. What are the advantages or disadvantages of this, and will 'Working from Home' become a big trend in the future?

Although Hong Kong never had a government-imposed work from home policy during COVID-19, there were many companies that felt it was best for employees to work from home. This was probably one of the first times in Hong Kong that a large number of companies had their employees working from home and it was a good way for many of them to test how this would work for them in practice. Although many companies found that employees were still efficiently working at home, this may or may not be an arrangement that will be adopted in the long-term.

Hong Kong in particular is well known for having some of the most compact homes in the world. These small spaces may not be practical for employees to work from home for long periods of time. Working from home also brings about new types of issues, such as whether Workplace safety protocols are met and whether there are any data privacy issues. Employees who are using their own internet networks, rather than office networks which are generally well protected, have increased data privacy risks.

However, this period of working from home has also showcased some advantages. Companies will now be aware that they may not need to pay for larger offices if they can have some of their staff working from home efficiently, which would save costs in the long term. They've also been able to test out how internal systems as well as collaboration between employees has held up while working from home. If people will be required to work from home again, maybe due to a further wave of COVID-19 or returning of protests in Hong Kong, employers and employees will be better equipped.

Any tips for employers to ensure that they are being legally and morally responsible during this time?

It is always important for employers to fulfil their legal and contractual obligations owed to their employees. Employers must ensure that they provide employees with everything that they're entitled to, regardless of whether they are working in the office or from home. If an employer wishes to make any changes to the terms to adapt to the current situation, they must always make this clear to their employees and obtain their written consent when it is appropriate. Communication in this respect is key. If employers do not obtain consent from their employees when making unilateral changes to any material terms of their employment, an employee may claim for constructive dismissal or unreasonable variation of terms.

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Topic: **COVID-19 – Legal issues to consider on the return to the workplace**

Firm: **Simmons & Simmons**

What is the likely timeframe for a return to the workplace?

This is up to the employer to decide. Working from home practices have been encouraged and are currently widely adopted, albeit Hong Kong has not at any time as yet implemented rigid lockdown arrangements which would prohibit working in the office. Depending on the then current situation and factors (e.g. the latest position on active community transmission), an employer may decide to allow its employees to stay away, or to return to the workplace at a time considered appropriate. There will be employee relations issues to take into account. Identification of any factors such as a local cluster will obviously be highly relevant to the timing of any decision to allow and announce “back to normal”, in terms of office or workplace attendance.

What procedures need to be followed prior to a return to the workplace?

It follows from the point made above that there are no prescribed procedures; but it is of course necessary to inform employees in advance about plans and timing for a return to the workplace (especially for employees with caregiving responsibilities).

What will a return to the workplace look like in practice?

Social distancing should be maintained and directions given on issues such as reduction of physical meetings, the wearing of masks in the workplace and so on. If social distancing

is not otherwise possible, employers may consider:

1. cohorting arrangements (team A / team B); and/or
2. adjusted working hours (in particular to avoid travelling at peak times).

Can employees refuse to return to the workplace?

It is possible a worker may argue that returning to work puts him or her (and members of his or her household) at risk and s/he should continue to work from home. We expect it will, however, be difficult for an employee to argue this where all appropriate measures have been put in place by the employer in line with the relevant guidance from the Centre for Health Protection. In practice, plans to bring people back to an office should take into account the time required for the employees to make necessary arrangements and for an employer to take steps to meet its obligations as to health and safety at work, as well as the appropriate means of alleviating any specific concerns; for example, if there has been a case within a nearby business using shared lift or washroom facilities, deep cleansing is likely to need to be considered.

Ultimately employees have a duty to comply with any lawful and reasonable order of the employer, and a continued refusal to return to the office may amount to a breach of duty. It would be extremely important for the employer to make sure that the order is reasonable having regard to the context.

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Fiona has worked in Hong Kong since 1987 and is head of the Simmons & Simmons Asia employment group, as well as head of the Hong Kong office. She established the firm's employment practice in Asia in 1999 and is widely recognised as one of Hong Kong's most experienced labour law specialists, having been among the first solicitors in Hong Kong to specialise in this area, since around 1989. She was admitted as a solicitor in England in 1985, in Hong Kong in 1987 and in Australia (ACT) in 1990.

Fiona has consistently been recognised as a Band 1 "Leading Individual" for Employment Law in Chambers Asia Pacific and Legal 500 Asia-Pacific since their directories began (most recently in the 2020 editions). She is now a member of the Hall of Fame in Legal 500 Asia-Pacific edition. She is recognised as a "Commended External Counsel of the Year,

2016" by the In-House Community. She was named the "Leading Individual" for Hong Kong by PLC Which Lawyer? (2012) and is listed in The International Who's Who of Management Labour & Employment Lawyers. She was recognised as an "Outstanding practitioner" (2014) and "Best in Labour and Employment" (2011) at Asia Women in Business Law Awards, and "External Lawyer of the Year" at the Asian-Counsel In-House Community Awards (2010).

Fiona has chaired, for two two-year terms, the Employment Law Committee of the Hong Kong Law Society, and is also the former Chair of the Legal Committee of the Hong Kong General Chamber of Commerce. She is a trustee of the Firm's Charitable Foundation and a member of the Firm's Pro Bono Committee.

What health and safety measures are likely to be put in place?

No specific new obligations have been imposed, but the Centre for Health Protection recommends that employers adopt the following practices, all of which are sensible and should be considered –

1. flexible working and lunch hours;
2. avoid holding large-scale meetings;
3. reduce face-to-face contact among co-workers; and
4. avoid arranging lunch / social gatherings.

In addition, the following are recommended measures for both the building management of the office premises and employers, as applicable:

1. checking body temperatures of every entrant, on arrival; and
2. maintaining good environmental hygiene, including cleaning and disinfecting common areas (such as lobbies, lifts, washrooms and reception counters) and frequently touched surfaces (such as handrails and lift buttons) at least twice daily and maintaining good ventilation.

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While the above do not constitute legal requirements, all such acts will of course be helpful for establishing that an employer has discharged its duties to take reasonable care of workplace health and safety.

In addition, wearing masks and washing hands are also recommended practices, obviously. Wearing of face coverings has been almost universally observed in Hong Kong, even before the new legislation recently enacted which mandates (broadly speaking) mask-wearing on public transport and indoor public places. Apart from making hand sanitisers available, requiring employees to wear masks whilst in the office can further support that an employer has discharged its duties to protect employees' health and safety.

Employers may also consider periodically reminding employees of 1) the new legal requirements to wear a mask (as mentioned); 2) the need to observe personal hygiene and social distancing measures both in and out of the office; and 3) the need to monitor health, and the health of family members or other persons with whom an employee has close contact. It should be made clear that any symptom at all should be treated as requiring immediate reporting and checking, and in no circumstances should anyone who identifies any symptom, or who has been in touch with anyone who displays a symptom, or who feels unwell, attend the workplace.

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Topic: **Relocation applications: I want to relocate permanently from Hong Kong with my children but my former spouse will not consent**

Firm: **Tanner De Witt**

There comes a time for many when it is time to bid a fond farewell to Hong Kong.

For divorced families, this can be problematic as orders on children's arrangements will usually include a direction that a child may not be removed from Hong Kong without leave of the Family Court in Hong Kong.

The process to relocate with the child from Hong Kong can be simple where both divorcing parents agree – the parents can apply to the Court by consent for an order that the children permanently remain out of the jurisdiction of Hong Kong. Practical and financial arrangements can be reviewed and recorded by an order in Hong Kong and a mirror order in the new location.

What happens though when one parent wants to permanently relocate with the child, but the other parent does not agree? Objection is often taken if the reason for the relocation is that the spouse has a new partner and wishes to go to live in her or his home country. If an agreement is not possible, a parent wishing to relocate permanently with children should make an application to the Family Court. These are known as relocation applications. If a parent removes or retains a child from the jurisdiction of Hong Kong without consent of the other, it may amount to child abduction.

For more information on child abduction, see our article on the [Hague Convention](https://www.tannerdewitt.com/the-hague-convention/): <https://www.tannerdewitt.com/the-hague-convention/>

Considerations

The landmark case on relocation applications is the 2001 *English case of Payne v Payne* (2001) EWCA Civ 166. The case has been applied by the Hong Kong Family Court.

In deciding relocation applications, the Court will assess a number of factors set out in *Payne*, including:

1. Whether the application is genuine in the sense that it is not motivated by some selfish desire to exclude the other parent from the child's life?
2. Whether relocation plans are realistic? In other words, is the plan founded on a practical proposal which is well researched and investigated?
3. There will also be a careful assessment of the other parent's opposition:
 1. Is it motivated by genuine concern for the future of the child's welfare, or is it driven by some ulterior motive?
 2. What would be the extent of the detriment to him/her and his/her future relationship with the child were the application granted?
 3. To what extent would that be offset by extension of the child's relationships with the maternal family and homeland?
 4. What would be the impact on the other parent?
4. An overriding review of the child's welfare as the paramount consideration.

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Joanne is Partner and Head of the Matrimonial and Family Department at independent law firm Tanner De Witt. Joanne advises on all aspects of family law including jurisdictional issues, divorce, separation, financial arrangements for spouse and children, nuptial agreements, custody and other disputes relating to children including applications to remove children from Hong Kong, paternity and adoption cases. She advises a diverse range of clients from HNW individuals and expatriates to locals.

Joanne is a Qualified Practitioner of the Hong Kong Collaborative Law Practice Group, a qualified Parenting Coordinator, HKMAAL Family Mediator and a Committee Member of the Hong Kong Family Law Association.

Joanne was selected as a 'Recommended Family Law Practitioner' in **Doyle's Guide 2020** and was ranked as a 'Recognised Practitioner' in **Chambers Asia Pacific Guide 2019**: Joanne Brown "is very reassuring with clients,

very professional and practical. She is the kind of person that people would go to if they want some very practical advice or if they want the case to be handled by someone with immediate maturity," according to a client.

Ranked as an 'Up and Coming Individual' in **Chambers Asia Pacific Guide 2018**: Joanne is recommended this year by numerous clients and peers, who highlight her negotiation and client management skills. One interviewee notes: "She is great at dealing with highly complex cases and difficult clients," adding that she is "the kind of person you would want to have there, very calm and collected."

Joanne studied Law in England before being admitted as a solicitor in Hong Kong in 2008. Prior to joining Tanner De Witt Joanne spent nine years with a well-established Hong Kong firm obtaining extensive litigation and non-contentious experience. She was awarded a Master of Laws (LLM) from The University of Hong Kong's Faculty of Law in 2018.

These continue to be the main focus of the considerations of the Family Court. The Court will also be aided by the 'Welfare Checklist' (set out in section 1(3) of the English Children's Act 1989).

Practical tips: what can a parent do if they wish to relocate with their child, but there is no consent from the other parent?

1. Consider why and when you wish to move.
Are you unhappy in Hong Kong?
Are you a trailing spouse? This term is sometimes applied to a spouse who came to Hong Kong because their spouse had a good job offer or economic opportunity here.
The Court is generally more inclined to grant an order for permanent removal if the requesting parent is moving back to their

home country and/or the parent can show that they have a good support system in the home country or new location.

Further, consider whether it is the right time to move. Is the intention to move at the end of the academic year or the end of an employment contract or lease expiry?

2. Have a realistic, well-researched and organised plan. Be prepared to inform the Court:
 1. where will you live with the child;
 2. what school the child will attend both immediately and in the future;
 3. what is the care arrangement for the child in the new country;
 4. what are the job prospects / emotional and family support in the new country; and
 5. the proposals for access between the child and the other parent. For example, how will you share holidays with the other parent? How often are the flights between Hong Kong and the new country? Show the Court that you have considered the options and possibilities and that by relocating with the child, the other parent is not deprived of access.
3. It is important that all of the above factors are considered through the lens of the best interest of the child. As can be seen in the *RM (aka RH) v SRM* (see case example below), even where a realistic and well-researched plan is presented, the Court's ultimate decisions will be based on the best interest of the child.
4. Consider options early and have an open and honest discussion with the other parent, including whether mediation is an appropriate means for a resolution to alleviate any concerns the other parent may have. If the other parent does not agree, the process of applying to the Family Court for a relocation order is lengthy and costly. It may take up to 12 months before the application is before a Judge and a trial on the matter can span days or even months.

Recent case example: *RM (aka RH) v SRM* [2020] HKCU 113

The Mother and the Father separated in 2013, and a petition for divorce was filed in 2014. The divorce was finalised in June 2017.

This was the Mother's second relocation application following the rejection of her first application in 2016 to relocate the two children of the family (one aged 12 and one aged 4) from Hong Kong to Japan. The 2016 application was rejected by the Court as the Court considered the Mother had a greater support system and living environment in Hong Kong to care for the children. The Court also noted the Mother did not have any employment opportunities lined up in Japan.

In the new application, the Mother had moved to Japan and sought relocation for both children, before subsequently withdrawing the application for the older child.

The Court considered the *factors set out in Payne in rejecting the Mother's present application and held:*

1. The Mother's application was genuine and not motivated by the desire to exclude the Father from the child's life.
2. The Mother had a realistic plan. The Mother had established a living space which is suitable for her to raise the child in Japan and had located a public primary school in her neighbourhood for the child. Her employer also offered a flexible working schedule which would allow her to pick-up and drop-off the child to school and that the Mother's father is capable of assisting and willing to assist in caring for the child.
3. The Father's opposition was genuine.
4. However, the Court rejected the application and held that relocation was not in the child's best interest.

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Mark is Partner and Head of Litigation and Dispute Resolution at independent law firm Tanner De Witt. With more than thirty years of experience Mark is a highly awarded litigator whose practice today has a strong focus on matrimonial disputes, asset tracing and disputes within professional partnerships. Mark has extensive commercial litigation experience acting for shareholders, high net worth individuals, financial companies, public companies and accountants.

Most recently Mark has conducted landmark employment action in Hong Kong acting for the leaving partner of a well-known Hong Kong firm and for a number of years he has conducted litigation for a major PRC bank handling cases concerning letters of credit and the extent of a banker's duty of care to customers. Sources regard him as a "strategically very strong, mindful of our concerns and [he] always explains the contributing factors to his advice" (Chambers Asia).

Another part of Mark's professional practice involves appearances before the Tribunals and

administrative bodies that control the affairs of many regulated professions and industries in Hong Kong. These include the Liquor Licensing Board, the Municipal Services Appeals Board, the Registration of Persons Tribunal, and the Securities and Futures Appeals Board.

Mark is a CEDR accredited mediator (see the websites at www.CEDR.com and www.CEDR-Asia-Pacific.com). Mark is a member of the CEDR Mediation Panel.

Mark was admitted as a solicitor in England and Wales in 1986 and worked in the City of London before moving to Hong Kong in 1992. After qualifying as a solicitor in Hong Kong, Mark worked at two City of London international law firms. Before joining Tanner De Witt in 2000, Mark headed the litigation department of one of Hong Kong's largest law firms. He was born in England, studied Philosophy, Politics and Economics at Oxford University.

The Court took issue with the following:

1. The Mother sought only to relocate the younger child. It is a recognised principle that, save for exceptional circumstances, it is in the best interest of siblings to remain together.
2. The Mother was not the primary carer of the child. The children had established

a stable routine in Hong Kong, and the Court considered that to disrupt that, particularly in light of separating the children, would not be in the best interest of the child. While the Courts have established that there is no presumption in favour against an applicant parent who is not the primary carer of the child, it is

an also well-established principle that generally speaking if the status quo is found to be satisfactory, the Court will be reluctant to intervene. The Court considered that the Mother has been able to maintain a close relationship with the children since her relocation as she had roughly bi-weekly access with the children and the children could spend extended periods

of time with her in Japan during holidays and therefore did not consider a refusal of the present application would affect the Mother detrimentally.

Disclaimer: This publication is general in nature and is not intended to constitute legal advice. You should seek professional advice before taking any action in relation to the matters dealt with in this publication.

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Joanne is a Solicitor in our Family and Private Client practice. She joined the firm in March 2017, and after completing her training with the firm, she was admitted as a solicitor in 2019.

Joanne's focus within the firm is on matrimonial and family matters. She advises on all aspects of family law matters, including nuptial agreements, divorce and separation, financial arrangements and children's matters. She also assists the firm's general litigation team and has experience in general private client matters, including immigration, probate and employment-related issues. She assists with cases both in the Family Court and in the High Court of Hong Kong and has experience in alternative dispute resolution, including mediation and arbitration.

Joanne has a particular interest in matters relating to mental health law and the surrounding issues, and specifically in relation to the capacity of minors and the elderly.

Joanne read Law at the University of Nottingham and completed her Postgraduate Certificates in Law at the University of Hong Kong. She is fluent in English and Cantonese and speaks conversational Mandarin.

Before commencing her legal career, Joanne worked as a journalist in Hong Kong, where her articles focused on global luxury trends targeted at high net worth individuals. She has interviewed and is experienced in working closely with many high profile and well-known individuals and understands the importance of privacy and discretion. Her work has appeared in the South China Morning Post and the International New York Times amongst other publications. She holds a Master of Journalism from the University of Hong Kong.

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Topic: **Challenging times: The effect of an economic downturn on divorce settlements**

Firm: **Withers**

As if 2019 had not been tough enough for the Hong Kong economy, 2020 has been a terrible year for the world economy leaving Hong Kongers challenged once again. The shops, cafes and restaurants, for which Hong Kong is rightly renowned, are struggling to survive, as is the tourist industry, already suffering from the effects of the protests in 2019 and the more recent political uncertainty. Mainland tourists, who made up 80% of visitors to Hong Kong, have not been visiting since mid-2019. Tourism globally is also severely affected, as is business travel. Many businesses are still running on a part-time basis and employees have learnt how to work from home. Even the courts were closed and only made allowance for urgent and essential court hearings. Hong Kong has fared better with the pandemic than many countries but the future is far from certain.

Add a divorce into the mix and matters will almost certainly become even more stressful. There are significant challenges for many couples seeking an independent life with the division of their marital capital, but when the value of the family pot is much diminished, tensions become ever higher. Financial security following divorce is normally high on the priority list and with a shrinking capital value, both sides will inevitably become more combative.

In addition, a slowdown in the economy may lead to redundancies. This not only affects current divorces but may also have an impact on previous settlements where a party has agreed to pay the other a monthly maintenance sum, normally to the primary carer of children and for the monthly needs of the children.

With a loss of employment, there may well be a flood of variation cases with payers seeking to reduce their liabilities.

Although payment of monthly maintenance may be advisable when the capital available has been reduced and there is not enough available to achieve a clean break, it is vulnerable to variation should matters get even worse. A clean break settlement means that both parties involved in the divorce will have no financial ties to each other once the court order is implemented. This is something that the Courts, and most divorcing couples, would prefer as it allows both parties to move forward and be financially independent of one another.

Currently all businesses, including family-run entities, are suffering and the valuations which they may have achieved this time last year, could be drastically different this year. The same goes for property prices, which are down over 20% from the middle of last year. As a result, the capital value of marital assets will have decreased, as would the dividends from family-run companies and, increasingly, as the downturn continues, rental income from property portfolios. This could dramatically alter a divorcing couple's financial settlement as the available assets may not be enough for the couple to achieve a clean break.

There is no obligation for the Hong Kong courts to put a clean break in place but when there are sufficient funds available it will endeavour to ensure that both parties exit their marriage with enough financial security for the future. The court will assess all assets and income owned by the couple in any location,

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Rita has extensive experience and knowledge in dealing with a wide range of family dispute cases, concerning jurisdiction, divorce, children, ancillary relief etc. She has had experience in high-profile children cases such as *MJB v CWC* (Hague Convention) [2018] HKFLR 331; *YJH v LKHM* [2019] HKEC 2954; and *VK v SAFG* (removal) [2018] HKFLR 485, and was involved in a controversial removal case before the Court of Appeal between Hong Kong and Singapore *LN v SCCM* [2013] HKFLR 358. Many of her cases involve cross-border issues, particularly with the PRC, such as *ML v YJ* [2010] HKEC 1924, which went to the Court of Final Appeal. This case changed the law in Hong Kong in respect of a party's ability to apply for financial provision following a foreign decree. In *CL v ZRC* (Jurisdiction; forum non conveniens) [2015] HKFLR 125, the husband was found to have a substantial connection with Hong Kong but the PRC was the more appropriate forum. She also acted

for the husband's father, the patriarch from a well-known Hong Kong family, in respect of assets held in the PRC: *DX v LN & Ors* (Anti suit injunction) [2015] HKFLR 525. Rita further advises on ancillary relief cases involving complex asset holding structures: *WYSL v FHCBA* [2019] HKEC 2379, and Maintenance Pending Suit which involved third party financial assistance: *CWCC v YKOP* (Maintenance Pending Suit and third parties) [2018] HKFLR 320, and has led various mega financial cases often involving multiple parties, some of which include BVI and Cayman litigation. She also has particular expertise in wealth preservation for ultra-high-net-worth individuals, with experience in preparing pre- and post-nuptial agreements, advising on trust set-ups in the context of matrimonial perspectives for assets planning and to minimize the risk to family wealth posed by divorce proceedings.

either solely or jointly. This can cause difficulty when dealing with individuals residing in Hong Kong as many have assets all over the world, but may be an advantage these days where a geographical spread of the portfolio could be good news.

In order to achieve a clean break, there needs to be an assessment of what the financially weaker party requires on a monthly basis. This may result in a capitalized lump sum

payment. Care must be taken to ensure that there is a fair division of risk as well as assets. With the current economic environment in a state of flux it is important not to leave one party with the more risky illiquid assets and the other with the financial security of cash. It is the court's duty to achieve a fair solution for both parties and to take such factors into consideration, and those advising clients should be aware of the pitfalls.

We saw this in Hong Kong during and following the last financial crisis, where one party may have been left with illiquid investments which had decreased in value, while the other had liquid capital. The court cannot vary the amount of a lump sum, only the terms of the payment, and therefore it was unable to change the orders which had been made. The result in reality was that one party was left with considerably more than half, which had not been the intention of the parties nor the court. Once the order has been made, there is precious little that can be done retrospectively. Particular care should therefore be taken in such an economic environment.

Increasingly, where there is uncertainty around the viability of capital assets, divorce settlements will include the payment of monthly maintenance payments, perhaps in addition

to a more modest lump sum. As the amount of a monthly maintenance can be varied with any change in circumstance, this therefore provides some flexibility in the settlement to allow for external events which may impact the parties' future financial security. It is possible to have a joint lives maintenance agreement or a fixed term depending on what may be appropriate in the circumstances.

The current crisis also has an impact on the practice of family law. We are already feeling the pressure of mounting cases which have been adjourned but there may also be considerable adjustments to the valuations already given to the court. For many cases, new valuations will have to be sought from experts, more papers filed with the court and, regrettably, an impact on legal costs as a result.

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In conclusion, during times of financial uncertainty, careful consideration of what will be a secure settlement is required when balancing liquid and illiquid assets. It might also be more appropriate to use monthly maintenance payments during this period, rather than settle with a clean break. Unsurprisingly, where possible, couples are increasingly looking to put their divorce on

hold until the global economy and politics at home stabilize and the threat from COVID-19 recedes, in order to protect their assets. This could be a very good idea, given the current climate and let's hope for some good news for Hong Kong later in 2020.

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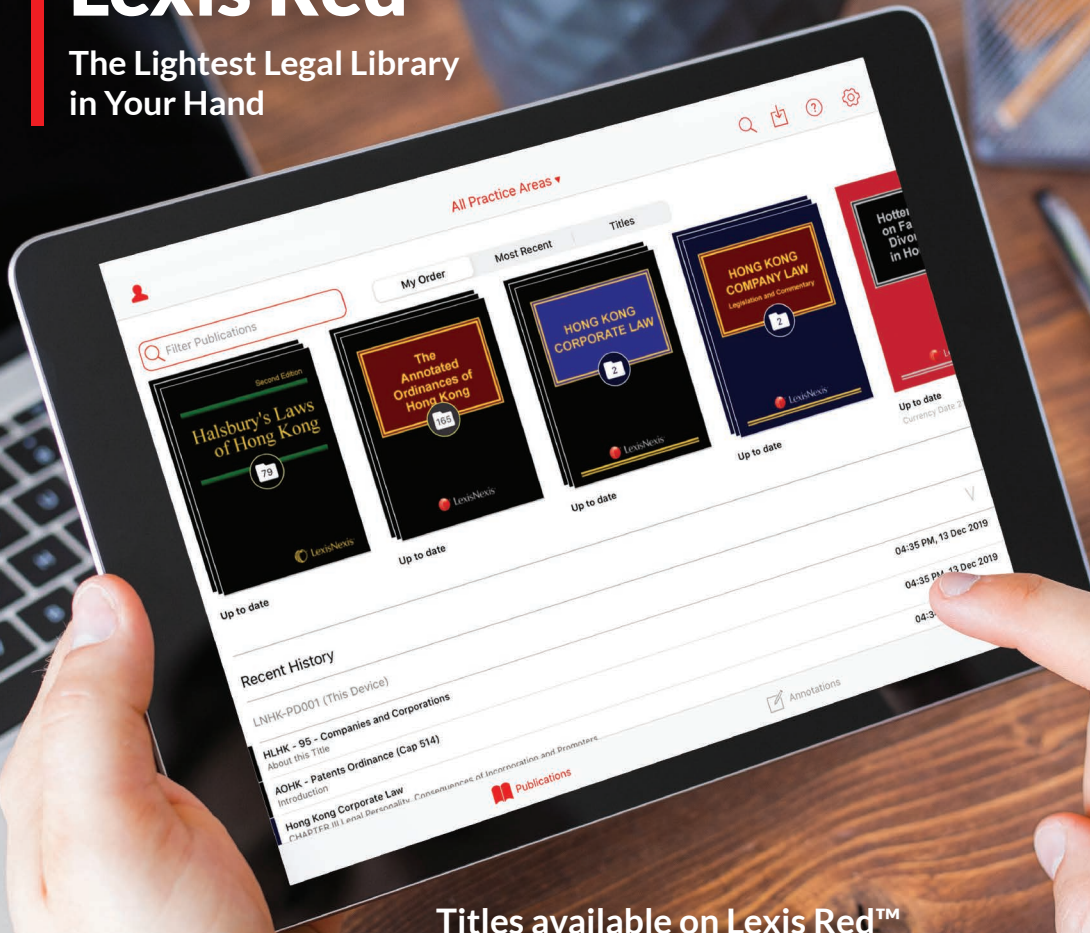
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Topic: **Tips for financial institutions to support customers and thwart criminals benefitting from COVID-19: FATF reports**

Firm: **King & Wood Mallesons**

With multiple jurisdictions on lockdown, desperation for critical supplies such as personal protective equipment (PPE) and increased reliance on digital communications, criminals have spotted an opportunity to exploit compliance weaknesses to launder money and fund terrorists. The Financial Action Task Force (FATF) has published a new paper¹ outlining the challenges that present new money laundering and terrorist financing (ML/TF) risks and the practical and policy responses required of jurisdictions to combat those risks.

This alert provides:

- a summary of the FATF paper, including the causes and effects of COVID-19 implications on predicate crimes and the emerging ML/TF typologies;
- expectations on supporting customers;
- a snapshot of global regulatory responses, including Hong Kong SAR*, Australia, the United Kingdom and the United States; and
- key take-aways and tips for our clients.

Financial institutions are at the coal-face of fraud and ML/TF controls, and must calibrate their customer due diligence (CDD), screening and monitoring tools to account for these emerging threats.

Key crimes emanating from COVID-19

Fraud, cyber-attacks, theft / misappropriation, bribery, corruption, human exploitation and property crime feature heavily in COVID-19-related crimes. The following table provides further details.

Cause	Effect
Lockdown, school closures and work from home initiatives	X Hacking of business email accounts to commit invoice fraud
	X Ransomware attacks including on hospitals that can't afford, in human life terms, to lose access to systems for any length of time
	X Phishing attacks to gain access to networks, personal accounts and passwords
	X Increase in online child exploitation with vulnerable children at home, online and an unexplained increase in demand
	X Organised property crime driven by empty corporate buildings
Social assistance, tax relief, humanitarian aid initiatives and lack of medical supplies	X Impersonation of officials to exploit people for payment information under the false promise they will receive social benefits
	X Counterfeit or fraudulent sale of medical supplies
	X Fraudulent claims on government stimulus measures through shell companies
	X Misappropriation of aid by corrupt officials
	X Redirection of humanitarian aid responses to terrorist groups in high risk jurisdictions

¹ FATF "COVID-19-related Money Laundering and Terrorist Financing: Risks and Policy Responses", May 2020.

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Urszula McCormack is one of Asia's leading financial regulatory lawyers, with a focus on emerging technologies and financial crime. In 2018, she was recognised as a Financial Times Top 10 Legal Innovator of the Year.

Urszula advises global banks, custodians, regulators, multilaterals, developers, payment providers, market makers, asset managers and other innovators on new products, compliance and licensing.

Urszula's work in this arena includes virtual assets, payment technologies, financial services licensing, digital platforms and wallets, brokerages, exchanges, custody solutions, eKYC and digital identity projects. Spanning these areas, she advises on

privacy regulation, digital transformation and algorithmic design.

Urszula is a member of the SFC Fintech Advisory Group, Fintech Association Policy & Advocacy Committee, ASIFMA Fintech Working Group, Global Digital Finance KYC Working Group, and a Steering Committee member for Global Blockchain Convergence. She is regularly called on to brief financial regulators and transnational bodies.

Urszula is admitted in Australia, England & Wales and Hong Kong, and is a Certified Anti-Money Laundering Specialist with ACAMS.

Cause	Effect
Closure of banks and their regulators	X Vulnerable groups less familiar with, or with less access to, online banking become more open to fraud
Economic crisis and unemployment	X Fraudulent investment scams such as claiming publicly listed companies are developing cures
	X Increase in insider trading seeking to profit from large value swings
	X Increase in burglary, theft and wildlife poaching

Cause	Effect
Diversion of government resources	X Exploitation of workers whilst workplace inspections are reduced
	X Increased risk of terrorist attacks
"Kindness and concern"	X Impersonation of hospital officials to exploit payment for medical treatment that is fake
	X Fraudulent charities to exploit people into making donations that never reach the promised recipient but land in the hands of a criminal

Financial Services

The money laundering that flows from these crimes

At this early stage, the risks relate to generating the proceeds of crime from an increase in predicate offences but the FATF paper provides some insight into the emerging money laundering typologies (no terrorist financing typologies are yet identified):



Bypassing AML/CTF controls by exploiting challenges caused by COVID-19, this spans from transaction monitoring challenges at bank level to less supervision and policy reform at government level



Increased use of **unregulated financial services** by those in need of finance, ranging from hawala/xawala use to exploitation by **organised crime gangs**.



Increased use of **online financial services** and **virtual assets** to ML, particularly from the fraudulent sales of medical goods.



Misuse of insolvency mechanisms. For example, the misuse of **corporate insolvency** to free-up illicit cash mingled in **front businesses**, masking the true origins.



There is a current increase in physical cash transactions. When markets recover, there will be a correspondent surge in investment with **illicit investment** potentially masked.



Increased **investment in cheap real-estate** and other property with illicit proceeds.

Responding to the threats

The FATF report suggests several actions to assist supervision and policy development. These focus on coordination between the public and private sector, adopting a risk-based approach to CDD, adaptation and digitisation. We summarise below key examples of efforts taken by jurisdictions that we believe are of most interest to financial institutions.

- **Reporting and dialogue** - Supervisors or financial intelligence units (**FIUs**) have provided financial institutions with a communication line that can be used to report serious challenges in meeting regulatory expectations. The FIs are required to keep relevant records and develop a remediation plan as the situation improves.
- **Taskforces** - A number of countries have introduced special taskforces or other operational coordination measures to deal with COVID-19-related crime, particularly in relation to fraud.
- **Prioritisation** - In some countries, authorities have issued advice to relevant agencies on the prioritisation of investigations and prosecutions.
- **Keywords when reporting suspicions of ML/TR** - Some FIUs have asked regulated entities to use a keyword in suspicious transaction reports to allow them to triage and prioritise as well as develop strategic analysis of bulk data.
- **Redirection of resources** - Some agencies are considering pooling available resources confiscated from criminals. For example, using confiscated properties as temporary medical centres.
- **Risk indicators** - One country has developed risk indicators in relation to aid package exploitation so this can be more easily identified.

Supporting customers

Despite the threats, the FATF also recognises that individuals and corporations are also under significant pressure themselves,

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Leonie specialises in financial crime investigations and compliance. She has investigated and advised in relation to anti-money laundering and counter-terrorist financing (“AML/CTF”), sanctions and bribery issues under UK, US and Hong Kong law and regulations. She has a wealth of experience in assisting clients to respond to enforcement action brought by various global regulators, including the Hong Kong Monetary Authority, US Office of Foreign Assets Control and the UK Financial Conduct Authority.

Leonie has extensive experience in assisting corporates and financial institutions to build or remediate compliance programmes

benchmarking them against regulator expectations. Leonie has conducted a significant number of AML/CTF and bribery audits and risk assessments across various sectors.

Leonie is admitted in Hong Kong and England & Wales.

and that it may be appropriate to take simplified CDD measures or provide reasonable risk-based relaxations.

Examples include the following:

- **Simplified CDD** - Applying simplified CDD where lower risks are identified such as accounts being opened to facilitate government relief payments.
- **Document allowances** - Allowing reporting entities to accept recently expired government-issued identification until further notice to verify identity (though still ensuring the authenticity of it).
- **Reduced or delayed verification** - Allowing reduced / delayed verification measures such as reliance on digital copies of

documents as an interim measure with appropriate controls in place, ie tiered accounts with less functionality and enhanced controls.

- **Remote onboarding** - Encouraging the use of digital identity and non-face-to-face onboarding where the technology is appropriately trustworthy.
- **Going “digital”** - Supporting electronic and digital payment options by increasing limits for contactless payments, point-of-sale purchases and e-wallets and reducing charges for domestic money transfers.

Financial Services

Hong Kong guidance to banks

The Hong Kong Monetary Authority (**HKMA**) issued separate circulars to authorised institutions (**AIs**) and stored value facility (**SVFs**) providers on 7 April 2020.

In summary, the circulars focused on three key themes:

1. Customers

- Facilitate remote onboarding and digital access
- Minimise CDD for government handouts
- Apply SDD where appropriate

2. Risk mitigation

- Remain vigilant to emerging risks
- File timely Suspicious Transaction Reports
- Consider other public-private information sharing

3. Compliance approach

- Flexibility is possible
- Document key decisions
- Document risk mitigants

More specifically, the guidance to AIs encouraged more of them to work closely with the HKMA to provide greater convenience to customers for remote account opening and to provide continued access, physically and digitally, to essential banking services.

The HKMA also encouraged AIs to apply SDD where appropriate, and to apply the least extent of CDD where residents were opening accounts solely for the purpose of receiving the HKD 10,000 government handout. The SVF circular noted the ability for SDD to be conducted by many SVF providers due to the lower risks of a number of SVF products.

The HKMA highlighted the need in both circulars for vigilance in relation to emerging risks, including face-masks scams and the need

to continue filing timely Suspicious Transaction Reports.

The HKMA noted that not all AML/CTF systems may be achievable by AIs or SVF providers and highlighted the flexible approach it was taking to supervision. It also directed that where a particular obligation could not be met, the AI should make a record of the circumstances and risk assessment conducted, as well as any mitigating measures put in place.

Finally, the HKMA stated its commitment to public-private sector information sharing to understand the increased risks of fraud arising from the pandemic.

Global regulatory guidance

Globally, regulators have been issuing targeted guidance in relation to COVID-19 risks and expectations for financial institutions. We consider below examples from Australia, the United States and the United Kingdom.



FinCEN² has:

- issued guidance highlighting COVID-19 related **emerging crime trends**, similar to those identified by FATF, including: imposter, investment and product scams; insider dealing and fraud.
- commenced a series of **thematic advisories**, starting with “medical scams”. The advisory contains known scams, case studies and red flags for identifying suspicious activity.
- put in place a “**Rapid Response Program**”, which supports law enforcement and financial institutions in the recovery of funds stolen via fraud, theft, and other financial crimes related to COVID-19.

² The US Financial Crimes Enforcement Network



The FCA³ has issued some granular guidance, such as:

- individuals in **required functions** (eg the MLRO) should not be furloughed except as a last resort
- financial institutions must not meet operational challenges by adjusting their risk appetite – that is, **transaction and sanctions screening must continue**
- financial institutions may **re-prioritise certain controls**, for example by delaying reviews of transaction monitoring alerts or CDD on an RBA and with a clear plan to return to business as usual;



AUSTRAC⁴ has implemented the following regulatory initiatives:

- **CDD relief for superannuation funds** - a new AML/CTF rule allows superannuation funds to bypass customer identification procedures before paying members under the Government's early release of superannuation initiative.
- **Alternative ID proof** - amendment to Part 4.15 of the AML/CTF rules to enable reporting entities to rely upon alternative proof of identity processes.
- **Timing extension for Compliance Reports** - Extension of the due date for the submission of 2019 Compliance Reports from 31 March 2020 to 30 June 2020 and no compliance action for SMEs affected by the government's social distancing measures for failing to submit a 2019 Compliance Report.

Key take-aways

These are extraordinary times, where customers and financial institutions are vulnerable. On the customer side, it's important to engage and leverage the flexibility and risk-based

approach that is available in existing law and regulatory guidelines. At the same time, a change in criminal and ML/TF typologies always requires an update to policies, procedures and controls to ensure they remain up-to-date and relevant.

Our key tips for financial institutions are therefore as follows:

- ✓ **Be aware** - Consider what the FATF has advised, and look at what the regulators in your jurisdiction are doing (such as the HKMA).
- ✓ **Engage** - Engage industry bodies to drive change or develop solutions where required. Effective (and lawful) information-sharing is a particularly critical piece.
- ✓ **Speak to your regulator** - Timely and transparent communication with the regulator is paramount. If COVID-19 causes a backlog in your transaction monitoring alerts, your compliance teams are furloughed, working-from-home or sick leaving them under-resourced or your systems are overwhelmed with the volume of on-line transactions, speak to the regulator, agree a plan of action.
- ✓ **Embrace change** (and take Compliance on the journey) - A seismic shift is occurring, away from face-to-face banking toward digital, contactless and virtual banking. This is something that technology-focussed jurisdictions such as Hong Kong is already well geared for as the Smart Banking era develops. Financial institutions should embrace the opportunity to truly drive forward their digital transformation agendas. Those that take their Compliance teams on the journey will especially benefit – not only ensuring legal and regulatory requirements are met, but also identifying *opportunities* from pain points within the organisation that are ripe for innovation.

³ The UK Financial Conduct Authority

⁴ The Australian Transactions Reporting and Analysis Centre

As always, contact us if we can help. We are already assisting clients on multiple digitalisation projects, as well as working with industry on standards and information-sharing possibilities to combat financial crime.

**Any reference to "Hong Kong" or "Hong Kong SAR" shall be construed as a reference to "Hong Kong Special Administrative Region of the People's Republic of China".*

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Topic: **COVID-19 – Global Implications for Anti-Money Laundering and Counter-Terrorist Financing**

Firm: **Mayer Brown**

Introduction

The impact of Covid-19 pandemic has resulted in financial institutions and regulators across the globe operating in an entirely new environment. The Financial Action Task Force (“**FATF**”) has identified the potential risk of criminals exploiting the unprecedented situation through cybercrime, fundraising for fake charities and medical scams, and emphasized the importance of financial institutions’ robust Anti-Money Laundering (AML) and Counter-Terrorist Financing (CTF) compliance and controls.

In response to the emerging risks, key regulators across major markets have issued statements encouraging financial institutions to assist consumers and businesses in this time of economic uncertainty, through loosening certain aspects of their AML/CTF requirements such as client onboarding and customer due diligence. At the same time, financial institutions are reminded to remain rigorous in their AML/CTF control and compliance while most supervisors are deferring their onsite examinations and conveying that oversight may be relaxed in the midst of the outbreak.

This article first explores the kind of increased AML/CTF-related threats and vulnerabilities that FATF and national governments have warned about. Next, the article highlights statements issued by regulators notably in the United Kingdom, the United States and Hong Kong and identifies the key themes

emerging from these statements and the factors that should be taken into account.

Increased Covid-19-related Crimes

With criminals trying to take advantage of pandemic fears, regulators and national governments have warned against an increase in criminal scams and laundering opportunities often associated with crises like the current pandemic. In the statement “*Covid-19-related Money Laundering and Terrorist Financing Risks and Policy Response*”¹ issued on 4 May 2020 (FATF May 2020 Statement), FATF has identified how criminals and terrorists might exploit threats and vulnerabilities at a time of economic uncertainty to commit Covid-19-related crimes and fraud by way of²:

- Deliberate attempts to bypass customer due diligence measures;
- Increased misuse of online financial services and virtual assets to move and conceal illicit funds;
- Misuse and misappropriation of domestic and international financial aid and emergency funding; and
- Increased use of the unregulated financial sector, creating additional opportunities for criminals to launder illicit funds.

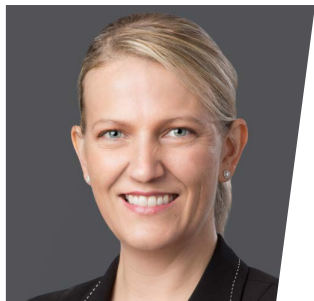
For a broader discussion of the financial crime risks associated with and arising out of the Covid-19 outbreak, as well as related guidance from European and US financial regulators, and

¹ *Covid-19-related Money Laundering and Terrorist Financing – Risks and Policy Responses* (4 May 2020), available at <https://www.fatf-gafi.org/media/fatf/documents/COVID-19-AML-CFT.pdf>

² *ibid.*

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Susanne Harris is a partner in the Hong Kong office of Mayer Brown's Litigation and Dispute Resolution practice. Susanne is experienced in commercial disputes and investigations, with a focus on cross-border, financial regulatory and compliance investigations. She has conducted internal investigations for financial institutions and acted for financial services clients in SFC, HKMA and other regulatory investigations. Susanne has advised on a range of legal, regulatory and reputational issues for banks with a financial crime risks including money laundering and sanctions.

As a litigator, Susanne has advised on disputes concerning banking, tax, shareholder disputes, directors' duties and insolvency related matters. She has worked for clients from a variety of industry sectors including

finance, property, professional services, transportation and retail.

Susanne's experience is recognised by *Legal 500 Asia Pacific*. She is recommended for cross-border financial services sector investigations (2018) and clients have praised her for being 'very thorough' and 'responsive' (2014). In 2018, Susanne was awarded "Government Enforcement/Investigations Lawyer of the Year" by the Asia Legal Awards. *Who's Who Legal: Investigations* (2019, 2020) named Susanne as one of the world's leading practitioners in this field.

Susanne is an accredited mediator and Co-Chair of the Firm's Women's Network in Asia.

strategies to mitigate those risks, please see our client alert *Financial Crime Compliance and Risk Management for Financial Institutions and Other Market Participants Amid the COVID-19 Outbreak*.³

Responses from FATF and National Regulators

(a) FATF

Recognizing the limitations of social distancing,

FATF and national regulators have encouraged or authorized financial institutions to provide risk-based flexibility in the implementation of AML/CTF requirements in response to the effects of the pandemic.

In a statement published on 1 April 2020⁴, FATF encouraged financial institutions to make appropriate use of financial technology such as digital or contactless payments and

³ Available at <https://covid19.mayerbrown.com/financial-crime-compliance-and-risk-financial-services-management-for-financial-institutions-and-other-market-participants-amid-the-covid-19-outbreak/>.

⁴ *Statement by the FATF President: Covid-19 and measures to combat illicit financing* (1 April 2020), available at <https://www.fatf-gafi.org/publications/fatfgeneral/documents/statement-covid-19.html>

digital onboarding to facilitate the delivery of banking and financial services in response to the pandemic while mitigating money-laundering and terrorist financing risks. In relation to customer due diligence (CDD) and risk assessment, FATF has proposed a range of measures to enable financial institutions to use a risk-based approach to their customer due diligence. These include⁵:

- Applying simplified due diligence measures where lower risks are identified, for example, for accounts created specifically to facilitate government economic relief packages;
- Recognizing that there may be legitimate reasons for a customer not to provide information for ongoing due diligence or Know-Your-Customer (KYC) refreshers, for example, if the customer is confined, under quarantine or ill; and
- Rolling out responsible digital identity and other innovative solutions for identifying customers at onboarding and while conducting transactions.

Additionally, in the FATF May 2020 Statement⁶, FATF proposed a range of risk-based measures that regulators and national governments should consider taking in response to the challenges posed by Covid-19. These measures range from identifying, managing and mitigating the new AML/CTF-related risks to adapting operational responses and facilitating charitable activity and financial relief packages in the most pragmatic manner commensurate with the situation.

Guided by FATF, national regulators in key financial markets including the United States, the United Kingdom and Hong Kong have published statements reminding

financial institutions to use the flexibility built into the FATF's risk-based approach to address challenges posed by Covid-19 while remaining alert to new and emerging illicit money-laundering and terrorist financing risks. Highlights of the key statements recently issued by regulators in the United States, the United Kingdom and Hong Kong are set out below.

(b) United States

FinCEN (Financial Crimes Enforcement Network), an agency of the Treasury Department, has issued guidance reminding financial institutions of a prior ruling that exempted certain categories of new accounts from the requirement to identify beneficial owners, and also noted that to the extent "renewal, modification, restructuring, or extension for existing legal entity customers falls outside the scope of that ruling, FinCEN recognizes that a risk-based approach taken by financial institutions may result in reasonable delays in compliance."⁷

FinCEN, in conjunction with the US Small Business Administration, has also clarified that for loans being made pursuant to the US government's Paycheck Protection Program (PPP), if the PPP loan is being made to an existing customer and the necessary CDD information was previously verified, it does not need to be re-verified. In addition, for federally-insured depository institutions and credit unions, if beneficial ownership information had not yet been collected on existing customers, those institutions do not need to collect and verify the information in connection with making a PPP loan, unless otherwise indicated by the lender's risk-based approach to AML compliance.⁸ The questions a regulator is likely to ask in such cases is why CDD has not been collected and what is the risk-based

⁵ *ibid.*

⁶ *op. cit.*, note 1 above.

⁷ *The Financial Crimes Enforcement Network Provides Further Information to Financial Institutions in Response to the Coronavirus Disease 2019 (COVID-19) Pandemic ("FinCEN Further Information")* (3 April 2020), available at <https://www.fincen.gov/news/news-releases/financial-crimes-enforcement-network-provides-further-information-financial>.

⁸ *Payment Protection Program Frequently Asked Questions*, available at https://www.fincen.gov/sites/default/files/2020-04/Paycheck_Protection_Program_FAQs.pdf.

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Ori Lev is a partner in Mayer Brown's Washington DC office and a member of the Financial Services Regulatory & Enforcement practice and the Consumer Financial Services group. He concentrates his practice on representing financial institutions and other companies in government enforcement matters, internal investigations, and litigation, and providing regulatory advice and counsel on federal consumer financial and economic sanctions law. Ori has an extensive regulatory enforcement background, both at the Consumer Financial Protection Bureau (CFPB), of which he was a founding member and where he served as a deputy enforcement director, and at the Office of Foreign Assets Control (OFAC), where he led the Office of Enforcement and served in other leadership positions. He also has substantial litigation experience. In 2019, Ori was identified as one of the 25 "most respected sanctions lawyers" in Washington, DC by Global Investigations Review.

In the consumer-finance space, Ori has worked on matters involving a wide range of legal issues and industries. His matters have included alleged unfair, deceptive and abusive acts or practices (UDAAP), as well as alleged violations of the Real Estate Settlement Procedures Act, the Fair Credit Reporting Act, the Fair Debt Collection Practices Act, the Electronic Fund Transfer Act and the Truth in Lending Act. These matters have involved mortgage, auto and

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With respect to economic sanctions, Ori has led internal investigations, helped companies respond to OFAC subpoenas, drafted license applications and self-disclosures to OFAC, and provided advice and counsel on the applicability of OFAC regulations to a wide range of business conduct. In 2019, he was listed in Who's Who Legal's directory of leading international sanctions lawyers.

Prior to entering private practice, Ori was a founding member of the CFPB, where he served as a deputy enforcement director for litigation. In that capacity, he was part of the CFPB's enforcement leadership team, supervised a team of 20 enforcement attorneys and oversaw enforcement matters from inception through investigation, settlement and litigation. Ori was also one of the principal drafters of the CFPB's Rules of Practice for Adjudication Proceedings, which govern the agency's handling of administrative enforcement actions.

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Before joining the CFPB, Ori served as a senior advisor and then as the head of enforcement at OFAC, where he was involved in OFAC's early dollar-clearing and wire-stripping cases, oversaw and reorganized OFAC's enforcement function and participated in major policy decisions and initiatives. He was also the principal drafter of OFAC's Economic Sanctions

Enforcement Guidelines, which set forth the framework for resolving OFAC enforcement actions.

Ori also served as a litigator at the US Department of Justice and the Federal Trade Commission.

assessment that justifies processing a government-insured loan that is dependent on customer certifications where the lender may not fully understand the customer at the time of issuance of the loan.

FinCEN has also recognized that certain regulatory timing requirements may be challenging during the COVID-19 pandemic and that there may be some reasonable delays in compliance. It has encouraged financial institutions to report to the appropriate regulator if they have compliance concerns as a result of the pandemic. Finally, FinCEN has also encouraged financial institutions to "consider, evaluate, and, where appropriate, responsibly implement innovative approaches to meet their BSA/anti-money laundering compliance obligations, in order to further strengthen the financial system against illicit financial activity and other related fraud."⁹ This appears to be an exhortation to financial institutions to keep up with their AML/CTF compliance framework and programme and ensure that they are not falling behind what may become the standard industry practice.

(c) United Kingdom

In the United Kingdom, the Financial Conduct Authority (FCA) has written to firms that

provide services to retail investors on issues around client identity verification and supervisory flexibility over best execution, among other measures. In the *Dear CEO Letter to firms providing services to retail investors about Covid-19*¹⁰ issued on 31 March 2020, the FCA has provided guidance on appropriate safeguards and additional checks which firms can adopt to carry out client verification remotely. Examples of remote customer verification include:

- Accepting scanned documentation sent by e-mail, preferably as a PDF;
- Seeking third-party verification of identity to corroborate that provided by the client, such as from their lawyer or accountant; or
- Asking clients to submit selfies or videos.

Since then, the FCA has emphasized the importance for firms to maintain effective systems and controls to prevent money-laundering and terrorist financing in the current climate.¹¹

The FCA has also set out its high-level expectations on the application of firms' systems and controls for combatting and preventing financial crime.¹² These are focused on the importance of remaining

⁹ FinCEN Further Information, *supra*.

¹⁰ Dear CEO Letter to firms providing services to retail investors about Covid-19 (31 March 2020), available at: <https://www.fca.org.uk/publication/correspondence/dear-ceo-letter-coronavirus-update-firms-providing-services-retail-investors.pdf>

¹¹ <https://www.fca.org.uk/firms/information-firms-coronavirus-covid-19-response#financial-crime>

¹² <https://www.fca.org.uk/firms/financial-crime/financial-crime-systems-controls-during-coronavirus-situation>

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vigilant to new or emerging threats, while also recognizing that firms may need to re-prioritize or delay some activities according to the risk they pose. As well as remote client identification and verification, the FCA's statement of its expectations also covers other matters, such as the submission of regulatory returns and the need to try to keep certain senior managers responsible for financial crime-related functions in position if possible. There is a warning that "firms should not seek to address operational issues by changing their risk appetite. For example, firms should not change or switch-off current transaction monitoring triggers/thresholds, or sanctions-screening systems, for the sole purpose of reducing the number of alerts generated to address operational issues". However, the FCA

recognizes that it may be necessary to re-prioritize or delay some activities, such as due diligence reviews, or reviews of transaction-monitoring reports, in certain circumstances and subject to limits.

(d) Hong Kong

The Hong Kong Monetary Authority (HKMA) issued a circular¹³ on 7 April 2020 setting out measures financial institutions should take against money-laundering and terrorist financing in light of the Covid-19 outbreak, and HKMA's support for implementing such measures.

In recognition of the FATF standards, the HKMA has encouraged financial institutions to adopt "the least extent of customer due diligence"¹⁴ for prospective customers

¹³ Coronavirus disease (Covid-19) and Anti-Money Laundering and Counter-Financing of Terrorism (AML/CFT) measures (For Als) (7 April 2020), available at <https://www.hkma.gov.hk/media/eng/doc/key-information/guidelines-and-circular/2020/20200407e1.pdf>

¹⁴ *ibid.*

assessed as posing a low risk of money-laundering or terrorist financing risk, for example, customers onboarded solely for the purpose of the government's cash payout scheme. At the same time, the HKMA has also emphasized the importance of financial institutions mitigating risks through information sharing and detecting and reporting suspicious transactions to local legal enforcement agencies.

An added complexity arising out of the HKMA guidance is the impact of Covid-19 on financial institutions' transaction-monitoring systems where customer behavior has dramatically changed. To that end, financial institutions are reminded to detect suspicious activity by:

- Taking steps to modify existing transaction-monitoring scenarios and thresholds to reflect changes in behavior; and
- Staying alert to the risk arising from cross-border flows from countries that are receiving emergency Covid-19-related funding from international organizations and other donors.

Nevertheless, acknowledging the challenges financial institutions face and recognizing that maintaining normal operations of AML/CFT systems may not be achievable in all cases, the HKMA reiterated in the circular that it does not expect a "zero failure"¹⁵ outcome. Where a financial institution is unable to meet a particular short-term obligation, it should maintain a record of the circumstances, the risk assessment performed as well as any mitigation measures being taken.

Key Takeaways

The overriding objective of the statements issued by FATF and national regulators is clear. These are aimed at facilitating access to needed financial products while supporting the swift and effective implementation of

measures to respond to the new and emerging AML/CTF-related risks and vulnerabilities as a result of the Covid-19 crisis. In light of these statements, notably the FATF May 2020 Statement¹⁶, financial institutions are reminded to:

- Use of a risk-based approach to customer onboarding and due diligence;
- Support electronic and digital payment options;
- Review their existing AML and CTF compliance policies and procedures to ensure they are equipped to address all issues arising from the remote means of customer onboarding and due diligence;
- Review their existing transaction-monitoring scenarios and thresholds for improvement of a financial institution's capability to detect suspicious activity more quickly and effectively;
- Document within the prescribed AML and CTF framework of the financial institution any actual or suspected delays or disruptions in the implementation of AML/CTF measures due to potential challenges posed by the pandemic;
- Strengthen communication and coordination with other banks and financial institutions to assess the impact of Covid-19 on AML/CTF risks and systems; and
- Continue with risk mitigation through information sharing and detecting and reporting suspicious transactions to local legal enforcement agencies.

Conclusion

Key regulators across the globe have committed to support financial institutions in their AML and CTF efforts to address the Covid-19 pandemic. Financial institutions are reminded to provide risk-based flexibility in the implementation of AML/CTF requirements while taking proactive steps to address new and emerging illicit money-laundering and

¹⁵ *ibid.*

¹⁶ *opt. cit.*, note 1 above.

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Tom is highly respected for his insightful corporate and regulatory counsel and for his demonstrated success in providing thoughtful strategic advice to organizations facing high-stakes threats to their operational viability or reputational integrity. *Chambers USA 2016* notes that Tom is "an extremely skilled financial adviser."

Tom has been practicing law for more than 25 years, initially as an attorney with the

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terrorist financing risks. In face of a global crisis such as the Covid-19 pandemic, financial institutions should think big but act prudently in response to the current crisis.

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article are intended to provide a general guide to the subject matter and should not be treated as a substitute for specific advice concerning individual situations. Readers should seek legal advice before taking any action with respect to the matters discussed herein. For further information please contact the authors or Mayer Brown at mail to: bernadette.tio@mayerbrown.com.

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Topic: **Financial Intermediaries and Covid-19**

Firm: **Robertsons Solicitors**

As financial intermediaries licensed by the Securities and Futures Commission (SFC), licensed corporations are required to comply with various regulatory requirements.

Two of such requirements have been impacted by the recent COVID-19 pandemic:

- (1) Where a licensed corporation has triggered its business continuity plan; and
- (2) Where licensed representatives of the licensed corporation are asked to work from home (WFH) or work overseas.

The SFC has recently issued an FAQ to address these (and other) questions.

Where a licensed corporation has triggered its business continuity plan

The SFC says that a licensed corporation is required to maintain a business continuity plan for emergency situations, such as where the office premises become damaged or unavailable for use, or where senior management becomes incapacitated or otherwise unavailable to perform their duties.

If the business continuity plan is triggered, say if the office is closed for quarantine purposes against COVID-19, that is a matter which is notifiable to the SFC under the Securities and Futures (Licensing and Registration) (Information) Rules.

In the FAQ, the SFC set out the following non-exhaustive examples whether the licensed corporation is expected to notify the SFC:

- Confirmation of staff infection which may have an impact on the licensed corporation's operations;

- Closing of office premises as a result of staff infection or government lockdown, including overseas office premises, if the closure has implications for the licensed corporation's operations or the carrying on of its regulated activities (for example, temporary closing of overseas office premises which handles back and middle office functions);
- Changes to the licensed corporation's organisational resources (eg, split team arrangements, staff relocation to overseas offices); or
- The triggering of the licensed corporation's business continuity plan.

Where licensed representatives of the licensed corporation are asked to work from home (WFH) or work overseas.

A licensed corporation is by law required to seek the SFC's prior approval for using any premises for the keeping of records or documents relating to the carrying on of the regulated activities for which it is licensed.

In other words, all work premises of a licensed corporation is required to be vetted in advance by the SFC.

This requirement becomes an issue when licensed representatives are either:

- (a) Asked to work from home;
- (b) Sent to work at an overseas office; or
- (c) Prevented from returning to Hong Kong due to quarantine or travel restrictions and are therefore forced to work from overseas

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He also handles a wide range of securities and compliance work, particularly for SFC registered intermediaries and is developing a fast expanding practice revolving around the fintech industry where he has been advising

clients on legal and regulatory issues relating to a variety of fintech products and offerings.

Chris also has considerable experience advising the financial services sector on service conditions and benefits for senior management as well as the enforceability of post termination covenants.

He is a frequent speaker on issues of Hong Kong Corporate Law as well as Directors' Rights, Duties and Responsibilities and sits on the Law Society of Hong Kong's Working Party on Incorporation of Solicitors Practices.

In the FAQ, the SFC accepts that these situations are acceptable as temporary arrangements, but also treats them as situations where business contingency plan is triggered and are therefore notifiable to the SFC as abovementioned.

The SFC also sets out the following matters which the licensed corporation is still required to observe:

- Where a licensed representative is working overseas, both the licensed corporation and the licensed representative are required to comply with the relevant legal and regulatory requirements in that jurisdiction;
- The licensed corporation should ensure that the licensed representative are able to remote access its trading and other systems,

and that all activities are captured in the records generated by such systems;

- Where certain records and documents are brought outside of the approved premises on a temporary basis, they should be sent back to the approved premises as soon as practicable; and
- The licensed corporation remains at all times responsible for the oversight of the conduct of all its licensed representatives.

The FAQ and another Circular from the SFC in relation to extended deadlines as a result of the COVID-19 pandemic can be found at the following links:

The FAQ – <https://www.sfc.hk/web/EN/faqs/intermediaries/licensing/licensing-related-matters-in-light-of-covid-19-pandemic.html#1>

The Circular – <https://www.sfc.hk/edistribution/Web/gateway/EN/circular/intermediaries/supervision/doc?refNo=20EC26>

Robertsons is constantly monitoring the development of the pandemic and its implications and effects. If you have any questions, such as how the pandemic may affect your business from a legal perspective,

please do not hesitate to contact our Chris Lambert or Charles Mok:

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Financial Services

Topic: **Employee's rights to claim against the employer for Novel Coronavirus infection**

Firm: **ONC Lawyers**

Introduction

With the number of infections and death toll climbing in mainland China and Hong Kong, as well as over the globe, the Novel Coronavirus is turning into a major global public health crisis. On 30 January 2020, World Health Organization has declared a global public health emergency over the spread of the Novel Coronavirus.

In Hong Kong, on 25 January 2020, the Chief Executive has raised the response level to Emergency under the "Preparedness and Response Plan for Novel Infectious Disease of Public Health Significance". Further, in late January and February 2020, Hong Kong Government announced that, except for staff of the departments providing emergency and specified public services, all other employees of the Government are not required to return to the offices but to work at home from 29 January 2020 to 23 February 2020. The government also appealed to private organizations to make similar arrangement to reduce the risk of the spread of Novel Coronavirus.

Whilst some employees can work at home under the flexible working arrangement, some employees still have to go to offices to work in the absence of such arrangement or due to the nature of the work. Employees in some of the industries may even be at a higher risk of infection because of frequent contacts with suspected cases of Novel Coronavirus and people coming from mainland China and different countries, for example people working in hospitals, clinics, immigration

areas, hotels and transportation hubs. This article will discuss whether employees can claim against their employers for getting infected of Novel Coronavirus during work or travel between place of residence and place of work.

Claim under the Employees' Compensation Ordinance ("ECO")

The ECO governs the rights and obligations of employees and employers, and forms of compensations in the context of work-related injuries. Section 5 of the ECO provides that an employee can claim employees' compensation for injury by accident which can be proved to have arisen out of and in the course of employment.

Different from SARS which is recognized as an occupational disease under the Second Schedule of the ECO, Novel Coronavirus is not an occupational disease prescribed under the ECO. Nonetheless, section 36 of the ECO gives employees the right to recover compensation under the ECO in respect of a disease which is not prescribed as an occupational disease, if the disease is a personal injury by accident arising out of and in the course of employment within the meaning of section 5 of the ECO.

Therefore, in order to bring a claim for employees' compensation in respect of a disease, the employee has to prove that he contracted the disease by accident arising out of and in the course of employment.

For the requirement of “by accident”, in *Sit Wing Yi Sibly v Berton Industrial Ltd* (2013) 16 HKCFAR 104, the Court of Final Appeal held that “injury by accident” shall comprise cause and effect, with the accident being at least a contributory cause and injury being the effect. Whether or not an injury is sustained by accident is a mixed question of law and facts.

Regarding “arising out of and in the course of employment”, the requirement that an injury arose “out of” employment is distinct from the requirement that it arose “in the course of” employment. Whilst arising “out of” employment requires some causal relationship between the work and the injury, arising “in the course of” employment relates to time conditioned by reference to the employee’s service. Section 5(4)(a) of the ECO provides that an accident arising in the course of an employee’s employment shall be deemed to also have arisen out of the employment, in the absence of evidence to the contrary.

As such, an employee who has contracted Novel Coronavirus and can prove that he has contracted the disease by accident arising out of and in the course of employment will be covered by the ECO and may make a claim against his employer under the ECO. For example, a doctor working in a public hospital or a front desk receptionist working in a hotel who get infected of the Novel Coronavirus during employment and can prove the above requirements may claim the Hospital Authority and the hotel owner employer respectively under the ECO.

Employees should note that the burden of proof is on the applicants, i.e. employees, to prove on the balance of probabilities that they have contracted the Novel Coronavirus by accident both arising out of and in the course of their employment, for example because of the contact with customers or patients during the employment.

Nonetheless, it must be noted that, in general, an employee is not considered to be

in the course of his employment when the employee travels between place of residence and place of work before or after the work, except in some exceptional circumstances, such as when the employee travels as a passenger by any means of transport which is being operated by his employer other than as part of a public transport service (section 5(4)(d), ECO), drives or operates any means of transport arranged or provided by his employer (section 5(4)(e), ECO), or within the duration of a gale warning or a rainstorm warning (section 5(4)(f), ECO). Therefore, if an employee has contracted the Novel Coronavirus when he travels between the place of residence and place of work, generally he is not covered under the ECO and may not make a claim for employees’ compensation against the employer.

It is acknowledged that in practice it may be difficult to pinpoint precisely when and where an employee was infected. If the dispute comes before the court, the court would have to make a judgment based on all the circumstantial evidence. E.g., if the employee works in a hotel where a confirmed patient had stayed and several of his colleagues are also infected, whilst the employee’s residential area is free from confirmed case and he has not travelled to China, then the court would be entitled to draw the inference that the employee contracted the virus in the course of employment.

Common law negligence claim

An employee who has contracted Novel Coronavirus during the work may also bring a common law claim for damages against the employer if the infection is caused by the negligence, breach of statutory duty, wrongful acts or omissions of the employer.

Employers have non-delegable duty to take reasonable care of their employees’ safety, including the provision of competent staff of employees, a safe place of work, safe equipment, a safe system of work, proper

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Ray has handled a number of claims involving multiple parties, claims by

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instructions and supervision, and adequate training.

To discharge the employers' duty in this regard, the employers shall take a number of measures, such as those advised by the Centre for Health Protection, at the workplace, including but not limited to cleaning and disinfecting workplace regularly, providing face masks and other personal protective equipment to employees, and circulating relevant guidelines to employees. Nevertheless, it should be noted that the employers' duty is not absolute. The employers are only required to take steps which are reasonably practical to ensure the employees' safety.

For example, in view of the shortage of face masks in the region, even though an employer

cannot provide sufficient face masks to its employees, it is unlikely the employer will be found negligent if it has taken reasonable steps to source the face masks and has taken other measures to ensure the employees' safety.

On the contrary, if an employer does not take any measures at all in relation to the outspread of Novel Coronavirus and an employee has

contracted the disease during the work, it is very likely the employer will be found negligent.

Insurance

Under section 40 of the ECO, all employers are obliged to take out a policy of insurance to cover themselves in respect of their liability to pay employees' compensation under the

ECO and to pay damages under common law. If the employee has contracted the Novel Coronavirus during the work and can prove his claim for employees' compensation under the ECO and for damages under common law as discussed above, the employer can seek indemnity from his insurer. The employer should notify the insurer as soon as possible when his employee claims to have contracted the Novel Coronavirus during the work.

Conclusion

An employee who has contracted the Novel Coronavirus may claim against his employer by (a) making a claim for employees' compensation under the ECO if he can prove that he has contracted the disease by accident arising out of and in the course of the

employment, and (b) bringing a common law claim for damages if he can prove that the infection is caused by the negligence, breach of statutory duty, wrongful acts or omissions of his employer.

SARS was added as an occupational disease under the ECO under an amendment of the ECO with effect on 8 February 2005, nearly 2 years after the outbreak of SARS in 2003. We shall keep an eye on any similar amendment to be made on the ECO to include the Novel Coronavirus as prescribed occupational disease under the ECO in the future, which will provide better protection to employees and expedite the compensation process for employees infected with the Novel Coronavirus during their work in the specified high-risk occupations.

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Topic: **The Right to Property and Potential Legal Challenges against Forced Closure of Certain Business Premises amid Public Health Crisis**

Chambers: **Denis Chang's Chambers**

This article discusses the shortcomings of the Government's order of forced closure of certain business premises amid the recent public health crisis and how it may disproportionately affect individual's property rights.

Background

In the leadup to enacting emergency regulations to impose social distancing measures, the Chief Executive of the HKSAR announced plans to ban the sale of alcohol at bars and restaurants on 23 March 2020. However, no such ban was found in the cluster of new regulations announced on 27 March 2020. Instead, the Government sought to, *inter alia*, order closure of six types of business premises perceived to be "with higher infection risks of COVID-19"¹ by making the Prevention and Control of Disease (Requirements and Directions) (Business and Premises) Regulation, Cap 599F ("**the Business and Premises Regulation**"), which was published in the Gazette at the night of 27 March 2020.² The scope of the closure order was later extended to cover other types of premises.

Forced Closure

The Business and Premises Regulation provides for a list of "scheduled premises" in Part 1 of Schedule 2 ("**Scheduled Premises**"),

and the definitions of the different types of Scheduled Premises are given in Part 2 of Schedule 2. Initially, there were six types of Scheduled Premises, namely: (1) amusement game centre, (2) bathroom, (3) fitness centre, (4) place of amusement, (5) place of public entertainment, and (6) premises (commonly known as party room) that are maintained or intended to be maintained for hire for holding social gatherings.

Section 8 of the Business and Premises Regulation empowers the Secretary for Food and Health to issue a direction imposing requirements or restrictions, for a period specified in the direction, in relation to any or all of the following: (1) the mode of operation of any business or activity carried on at any Scheduled Premises; (2) the closing of any Scheduled Premises, or part of the Scheduled Premises; (3) the opening hours of any Scheduled Premises on a day.

By a notice published in the Gazette on 27 March 2020, the Secretary for Food and Health directed that all Scheduled Premises "must be closed for a period of 14 days beginning at 6:00 p.m. on 28 March 2020" ("**the Forced Closure**").³ Given the fluidity of the public health situation, it was then uncertain whether any further direction(s)

¹ See Government Press Release entitled "Prevention and Control of Disease (Requirement and Directions) (Business and Premises) Regulation gazetted" issued on 27 March 2020.

² The Business and Premises Regulation came into operation on 28 March 2020 and would originally expire at midnight on 27 June 2020; see sections 1 and 14 of the then Business and Premises Regulation contained in L.N. 31 of 2020. Subsequently on 2 June 2020, section 14 was amended by extending the expiry date to 31 August 2020; see L.N. 118 of 2020.

³ See G.N. (E.) 17 of 2020.

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Hectar has served on the Bar Council of the Hong Kong Bar Association as well as a number of its subcommittees. He was the Chairman of the Standing Committee on

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would be issued to extend the Forced Closure after this 14-day period.⁴

As it later turned out, the Secretary for Food and Health issued further directions on 1 April 2020 to expand the definition of Scheduled Premises to include three more types of premises, namely: (1) karaoke establishment,

(2) mahjong-tin kau premises, and (3) establishment (commonly known as club or nightclub) that is open late into the night, usually for drinking, and dancing or other entertainment.⁵

On 8 April 2020, the Secretary for Food and Health further expanded the definition

⁴ According to section 8(2) of the Business and Premises Regulation, "a period specified in any direction issued under subsection (1) must not exceed 14 days".

⁵ See G.N. (E) 22 of 2020.

of Scheduled Premises to cover two more types of premises, namely beauty parlour and massage establishment; and extended the Forced Closure for a period of 14 days beginning at 10 April 2020 to 23 April 2020.⁶ The Forced Closure was subsequently renewed for several times.⁷ Notwithstanding that the Forced Closure came to a temporary end on 28 May 2020, the Government announced on 13 July 2020 that the Forced Closure will be fully resumed on 15 July 2020 due to the re-emergence of local cases.

Right to Property

In Hong Kong, the right to property is constitutionally entrenched by Articles 6 and 105 of the Basic Law of the HKSAR. The central feature of Articles 6 and 105 is that they impose an obligation on the HKSAR to protect private property rights.⁸ The overall intention is the protection of an individual in the use of his property, which is not confined to tangible assets but includes any right which has an economic value.⁹ It is also well established that economic interests connected with the running of a business constitute property.¹⁰

Where there is an encroachment on an individual's private property rights, the encroaching measure's validity is determined by a proportionality analysis involving four steps, namely: (1) whether the intrusive measure pursues a legitimate aim; (2) if so, whether it is rationally connected with advancing that aim; (3) whether the measure is no more than necessary for that purpose; and (4) whether a reasonable balance has been struck between the societal benefits of the encroachment and the inroads made into the constitutionally protected rights of the individual, asking in particular whether

pursuit of the societal interest results in an unacceptably harsh burden on the individual.¹¹

Potential Legal Challenges

By virtue of the Forced Closure, the rights of owners of Scheduled Premises to use their private properties (such as their premises and the equipment set up therein) to carry on businesses were clearly encroached upon. While the Forced Closure forms part of the Government's "temporary measures to address the current situation of public health emergency",¹² it is questionable whether the Forced Closure, if challenged by way of judicial review, could survive the proportionality test.

The burden falls squarely on the Government to justify the encroachment. It has to show that the Forced Closure is "no more than necessary". In this connection, it is arguable that at least some of the Scheduled Premises do not pose "higher infection risks of COVID-19" than catering premises, in that the activities at some of the Scheduled Premises do not require the removal of masks at all. It thus begs the question why measures similar to those imposed on catering premises¹³ (such as mandatory wearing of masks, body temperature screening, provision of hand sanitisers and maintenance of an appropriate distance, etc) could not, as an alternative to forced closure, be imposed on those Scheduled Premises so as to reduce infection risks.

Further, the lack of compensation for the Forced Closure will no doubt cause serious financial difficulties to many proprietors such as to amount to "an unacceptably harsh burden" on them. In this regard, it is arguable that the Government may have failed to

⁶ See G.N. (E.) 26 of 2020.

⁷ See G.N. (E.) 29 of 2020, G.N. (E.) 39 of 2020 and G.N. (E.) 44 of 2020.

⁸ See *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372 at §29.

⁹ See *Interush Ltd v Commissioner of Police* [2019] 1 HKLRD 892 at §6.18.

¹⁰ See *Tre Traktörer Aktiebolag v Sweden* (1991) 13 EHRR 309 at §53.

¹¹ See *Hysan* at §§132-135.

¹² See note 1 above.

¹³ See G.N. (E.) 16 of 2020.

About Author



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Anson obtained his Bachelor of Business Administration (Law) and Bachelor of Laws double degrees, as well as his Postgraduate Certificate in Laws (Full-time), at the University of Hong Kong. He served his pupillage with Ms Audrey Eu SC of Sir Oswald Cheung's Chambers, Mr Hectar Pun SC and Mr Samuel KY Chan of Denis Chang's Chambers, and Mr Samuel CH Yip of Plowman Chambers. He was called to the Hong Kong Bar in 2015.

Anson has developed a broad civil practice with an emphasis on public law, intellectual property litigations and competition law matters. He is experienced in handling complex public law issues, including human rights, regulatory, disciplinary, immigration, discrimination and election-related matters, etc. For example, he acted for the applicants in the landmark judicial review cases challenging the constitutionality of the Emergency Regulations Ordinance and the "anti-mask" law (see *Leung Kwok Hung v Secretary for Justice* [2020] 2 HKLRD 771; [2020] 1 HKLRD 1), as well as the constitutionality of the police power to search without warrant the digital contents of a mobile phone or similar device upon arrest (see *Sham Wing Kan v Commissioner of Police* [2020] 2 HKLRD 529).

Apart from public law, Anson is also experienced in handling both civil and criminal matters involving complex issues of law. For example, he acted for an appellant in a civil appeal raising novel issues concerning common intention constructive trust and proprietary estoppel which have never been dealt with by any cases before (see *Cheung Lai Mui v Cheung Wai Shing* [2020] 2 HKLRD 15). He also appeared in one of the first two enforcement actions before the Competition Tribunal, arguing issues relating to the burden and standard of proof as well as the proper approach for the determination of pecuniary penalties (see *Competition Commission v W Hing Construction Co Ltd* [2019] 3 HKLRD 46; [2020] HKCT 1).

Anson is a member of the Committee on Constitutional Affairs and Human Rights, Committee on Intellectual Property and Committee on Competition Law of the Hong Kong Bar Association.

strike a reasonable balance, especially when the Forced Closure was ordered without consultation with the relevant stakeholders.

Concluding Remarks

The unprecedented measures imposed by the Government to control community spread may be made with good intention. However, it is in these times of crisis that the rule of law must be cherished and an important facet of the rule of law is the effective protection of human rights, which are

enshrined in the Basic Law as well as the Hong Kong Bill of Rights.

Should any measures amount to an excessive or unnecessary interference with constitutionally protected human rights, such measures may not withstand scrutiny and are liable to be struck down if challenged in court.

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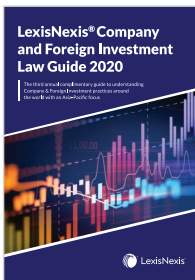
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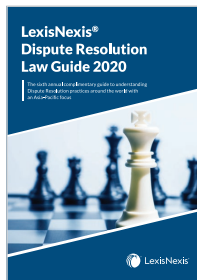
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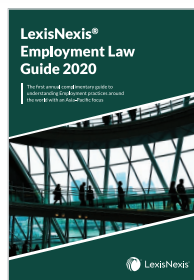
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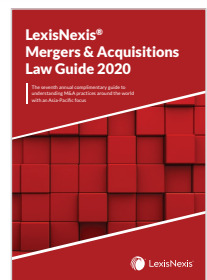
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