



## Legal Tools for Managing Cross-Border Risk in a COVID-19 World

Today's webinar begins at 10:00 am CT.

**To listen to the audio, please refer to Dorsey's webinar reminder. U.S. dial-in: 800-536-9136; Access Code: 4925722.**

Materials, sign-in and dial-in numbers were included in the reminder email sent Wednesday, March 25 from Dorsey Events. To submit a question before or during the webinar, email [dorseyu@dorsey.com](mailto:dorseyu@dorsey.com) and your question will be addressed by the presenters by email after the webinar.

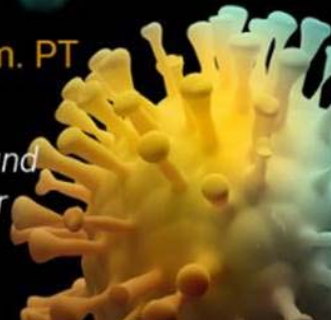
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## Legal Tools for Managing Cross-border Risk in a COVID-19 World

Thursday, March 26, 10-11 a.m. CT / 8-9 a.m. PT

*Partners Simon Chan, Peter Corne and Ray Liu will discuss which legal issues to prioritize around manufacturing, transportation and cross-border supply chains, as well as when to use force majeure to achieve your strategic goals.*



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## interactive dialogue

# Legal Tools for Managing Cross-border Risk in a COVID-19 World

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Dorsey & Whitney LLP

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## This is the ultimate VUCA situation for business (Volatility. Uncertainty. Complexity. Ambiguity.)



## Key Issues

1. What financial relief is available to help your business through the COVID-19 crisis and how do you access it?
2. How can you position your business to get most benefit out of force majeure clauses in your contracts?
3. How do you best manage the impact of government imposed COVID-19 measures and associated employment issues?

## 1. Financial Relief

**What sort of financial relief has been made available to business, and by whom?**

- relief from taxes, rates and government fees?
- any financial support such as low interest loans?
- any relief from utility fees or rental costs?
- how about initiatives to improve the convenience of and access to government functions and data?
- initiatives to put more money in the pockets of consumers?

## 1. Financial Relief

**Hong Kong – Government vs Private**

***Laissez-faire – Let do economy.***

- Covid-19 is expected to hit the Hong Kong and worldwide economics, according to Paul Chan, HK Financial Secretary.
- Cash-flow pressure is expected in the economy.
- HK Government released as relief package worth HKD30 billion (or USD3.7 billion package)
  - One off funding to hard hit industries such as retail, F&B, transport, arts, culture and tourism.
  - Covid-19 combat measures such as mask production and support for Hospital Authority.
- HKD10,000 cash handout for all permanent residents, over 18.



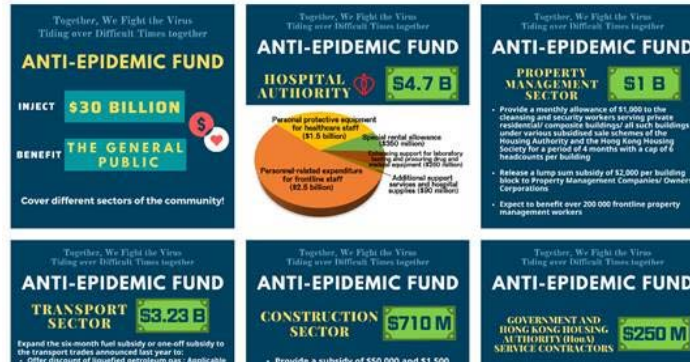
## 4. Financial Relief (Cont.)

### Hong Kong Government Anti-epidemic Fund

QUOTE from Hong Kong Government dedicated page on Coronavirus:

To enhance Hong Kong's ongoing work in the fight against the novel coronavirus infection and to provide support and assistance to industries and members of the public affected by the epidemic, the Government will set up a **\$30 billion Anti-epidemic Fund**. The Fund will provide additional resources to strengthen the territorial-wide anti-epidemic work and will render support to the affected industries and employees. Funding approval was given by the Finance Committee of the Legislative Council on February 21. (Finance Committee paper: <https://www.legco.gov.hk/yr19-20/english/fc/fc/papers/f19-46e.pdf>)

Samples :



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## 1. Financial Relief (Cont.)



### Hong Kong Government Relief

Relief measures for business:

- Profits tax will be reduced by 100 per cent for the 2019-20 year to benefit 141,000 taxpayers at a cost of HK\$2 billion.
- Business registration fees will be waived for 2020-21, benefitting 1.5 million business owners at a cost of HK\$3 billion. Company registry fees for annual tax returns will be waived for two years to benefit 1.4 million firms at a cost of HK\$212 million.
- A concessional low-interest loan of up to HK\$2 million will be provided to enterprises under the SME Financing Guarantee Scheme.
- Rates for non-domestic properties for 2020-21 will be waived up to a ceiling of HK\$5,000 per quarter in the first two quarters and a ceiling of \$1,500 per quarter in the remaining two quarters for each non-domestic property. 420,000 properties will benefit, at a cost of HK\$3.2 billion.
- Non-domestic electricity accounts will enjoy a 75 per cent discount up to a ceiling of HK\$5,000 for four months, at a cost of HK\$2.9 billion. Likewise, water and sewage costs will be discounted by 75 per cent up to a cap of HK\$20,000 and HK\$12,500 respectively, costing HK\$340 million.
- Local recycling firms will see a rental subsidy for six months, costing HK\$100 million.
- Tenants of government properties, government land and EcoPark will see rent discounts of 50 per cent, costing HK\$573 million. Rent and fees for eligible operators of properties will be slashed by 50 per cent, costing HK\$265 million.
- Hirers of civic centres under the Leisure and Cultural Services Department will enjoy discounts of 50 per cent for six months, costing HK\$23 million.

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## 1. Financial Relief (Cont.)

*Hong Kong is a Laissez-faire - Let Do economy and jurisdiction*

**Private Sector Examples :**

**Banks have offered Relief to Customers**

- Hong Kong Monetary Authority convened special teleconferences of the Banking Sector to discuss ways to support bank customers during Covid 19 latest developments. Measures include:
  - SME: SME loan lending. Unsecured. Faster approval
  - Home owners: repayment of interest only plans

**Commercial Landlords have offered Relief – lowering rent to tenants in retail.  
(Business association/ industries will play key roles to synergize private sector help.)**



## 1. Financial Relief (Cont.)

**Mainland China**

- National central governments and local governmental authorities have released numerous policies in various aspects to help the recovery of economy affected by COVID-19 pandemic and relieve the financial burdens on enterprises, especially small and medium enterprises ("SME"). According to Ministry of Industry and Information Technology of PRC, by the end of 2018, SMEs contribute over 50% of the tax, over 60% of the GDP, over 70% of the technology innovations, and over 80% of the employment in China.
  - **National Central Governments**
    - The People's Bank of China, the Ministry of Finance, China Banking and Insurance Regulatory Commission, China Securities Regulatory Commission, and the State Administration of Foreign Exchange released "Notice on Strengthening Financial Support for the Prevention and Control of the COVID-19" on February 1, 2020, with 5 sections and 30 concrete measures.
  - **Local Government Authorities**
    - Hubei Province (where Wuhan City is located) released "Several Policies and Measures to Promote Economic and Social Development in Hubei Province."
    - Beijing, Shanghai, Suzhou, and other cities also released respective policies and measures in support of the operations of SME.



## 1. Financial Relief (Cont.)

### Mainland China (Cont.)

#### Major Policies by Central Financial Authorities in Supporting SME Amid COVID-19

Effective Date	Department	Policy
Jan. 26, 2020	The China Banking and Insurance Regulatory Commission	Notice by the General Office of the China Banking and Insurance Regulatory Commission of Strengthening Financial Services in Banking and Insurance Industry and Cooperating with the Prevention and Control of the COVID-19 《关于加强银行业保险业金融服务 配合做好新型冠状病毒感染的肺炎疫情防控工作的通知》
Feb. 1, 2020	The People's Bank of China, the Ministry of Finance, the Banking and Insurance Regulatory Commission, China Securities Regulatory Commission, and the State Administration of Foreign Exchange	<b>Notice on Strengthening Financial Support for the Prevention and Control of the COVID -19</b> <b>《关于进一步强化金融支持防控新型冠状病毒感染肺炎疫情的通知》</b>
Feb. 2, 2020	The Ministry of Finance	Notice by the Ministry of Finance of Support for Financial Enhancement Services and Support the Effective Prevention and Control of COVID-19 《关于支持金融强化服务 做好新型冠状病毒感染肺炎疫情防控工作的通知》

## 1. Financial Relief (Cont.)

### Mainland China (Cont.)

#### Major Policies by Central Tax and Finance Authorities on Tax and Government Fee Benefits

Effective Date	Department	Policy
Mar. 13, 2020	The State Taxation Administration	Notice of the State Administration of Taxation on Extension of the Declaration Period of Withholding Tax Fees of 2019 《国家税务总局关于延长2019年度代扣代收代缴税款手续费申报期限的通知》
Feb. 28, 2020	Ministry of Finance and The State Taxation Administration	Notice on Value-Add Tax Policy for Supporting Individual Business's Continuity 《关于支持个体工商户复工复产增值税政策的公告》
Mar. 3, 2020 Jan. 30, 2020	The State Taxation Administration	Notice of the State Administration of Taxation on Extension of the Tax Declaration Period in March/February 2020 《国家税务总局关于延长2020年3月/2月纳税申报期限有关事项的通知》

## 1. Financial Relief (Cont.)

### Mainland China (Cont.)

#### Policies released by local authorities in support of SME

#### Hubei Province — Several Policies and Measures to Promote Economic and Social Development in Hubei Province (“Hubei Measures”) 《湖北省促进经济社会加快发展若干政策措施》

On March 12, 2020, as the province that worst affected by COVID-19 outbreak, Hubei Province released Hubei Measures, which contains 30 detailed measures on the recovery of economy and business continuity, etc.

#### Key points

1. Increase fiscal and financial support to enterprises
2. Help market participants reduce their operation costs
3. Make every effort to promote the employment rate and stabilize the job market
4. Stimulate the economy to realize a speedy and healthy recovery
5. Accurately increase effective investments
6. Ensure smooth spring ploughing activities and agricultural production
7. Secure and improve people's livelihood
8. Optimize business environment

## 1. Financial Relief (Cont.)

### Mainland China (Cont.)

#### Policies released by local authorities in support of SME (Cont.)

##### • Suzhou City

- On February 2, 2020, the People's Government of Suzhou City issued the "Ten Policy Opinions on Supporting Small and Medium-Sized Enterprises to Solve the Pneumonia Epidemic of COVID-19."
- The policy covers 10 small and medium-sized enterprises affected by the epidemic and having difficulties in production and operation. The support measures involve increasing financial support, stabilizing the workforce, and reducing the burden on enterprises

##### • Beijing, Shanghai, and other cities

- On February 3, Beijing, Shanghai and other cities/provinces began to release policies in support of SMEs under pressure in the epidemic.
- Beijing's policy encourage innovations on science and technology to prevent and control the epidemic. It includes three directions:
  - Encourage and support research and development and technical research on epidemic prevention drugs.
  - Provide more docking channels for pharmaceutical research enterprises and medical device product manufacturers, as demanded by epidemic prevention and control.
  - Promote big data and artificial intelligence applications, and provide access to government data to jointly carry out research and development of applications in this area.



## 1. Financial Relief (Cont.)

### Mainland China (Cont.) Summary of Tax Reliefs Amid COVID-19

Purpose	Recipient	Item	Tax Benefit
Supporting Prevention and Treatment of COVID-19	Medical professionals who engaged in control and treatment of COVID-19	Temporary allowance and bonus	Income tax exempted
	Other people participated in control and treatment of COVID-19	Temporary allowance and bonus	Income tax exempted
Supporting Supply of Life Essentials and Materials	Key manufacturers of logistical products for control of COVID-19	Withholding Value-Added Tax; Costs on expanding production	Exempted
	Public transportation providers; Life service providers, and logistic services providers for life supplies	Service income	Value-Added Tax Exempted

## 1. Financial Relief (Cont.)

### Mainland China (Cont.) Summary of Tax Reliefs Amid COVID-19 (Cont.)

Purpose	Recipient	Item	Tax Benefit
Encouraging Public Interest Donations	Individuals and enterprises	Cash and goods donated through public interest organizations or governments	Deducted pre-tax
	Other people participated in control and treatment of COVID-19	Imported goods donated for control of COVID-19	Tariff, Value-Added Tax, and Consumption Tax exempted

## 1. Financial Relief (Cont.)

### Mainland China (Cont.) Summary of Tax Reliefs Amid COVID-19 (Cont.)

Purpose	Recipient	Item	Tax Benefit
Supporting the Resumption of Work and Production	Enterprises in the industries that largely affected by COVID-19	Losses incurred in 2020	Roll-over period extended from 5 years to 8 years
	Small-scale Value-Added Taxpayer	Taxable income	For value-add taxpayers in Hubei Province, tax exempted;  For taxpayers in other provinces, the tax rate is reduced from 3% to 1%

## 1. Financial Relief (Cont.)

### Mainland China (Cont.) Financial Relief — Benefits on Loan Interests and Repayments

#### Nation-wide Policies

- People's Bank of China ("PBOC"), China's central bank, requires all banks and financial institutions to make plans in advance and communicate with enterprises regarding their financial status. PBOC also requires banks to reasonably extend loan repayment schedules, and effectively reduce the interests and fees to support the enterprises affected by COVID-19 resume operations and productions efficiently.
- The borrowers infected by COVID-19 virus are allowed to apply for extension of repayment of loan for a period no longer than 1 year, and the local finance department of government should give subsidy on the interest payments
- For the key enterprises for the control and treatment of COVID-19 listed by Ministry of Industry and Information Technology and other government departments, government will give subsidy on the interest payments in order to support their resumption of production. Among these enterprises, central enterprises should apply the subsidy from Ministry of Finance, and local enterprises should apply from local finance departments.

## 1. Financial Relief (Cont.)

### Mainland China (Cont.)

#### Financial Relief — Benefits on Loan Interests and Repayments (Cont.)

##### Policies and Implementation Measures by Commercial Banks in PRC

- Responding to PBOC and other central financial authorities' requirements, numerous commercial banks in PRC has released policies and measures to support SMEs, reasonably reduce interest rates for loans, and increase credit loans and mid to long term loans.
  - Bank of China
  - Industrial and Commercial Bank of China
  - Agricultural Bank of China
  - China Construction Bank
  - China Merchants Bank
  - Bank of Communications
  - Everbright Bank of China
  - CITIC Bank



中国人民银行  
THE PEOPLE'S BANK OF CHINA

## 1. Financial Relief (Cont.)

### Mainland China (Cont.)

#### Relief from Rental Costs

##### Local Policies or Guidelines

- There is no nation-wide policy on reduction or exemption of rental costs for individuals and enterprises, however, some local governments have released relevant policies or guidelines, including Beijing, Shanghai, Hubei, Shenzhen, Guangzhou, Hangzhou, etc.
- Based on the Measures to Support the Healthy Development of SMEs and Control the Effect of COVID-19 released by Beijing government, SMEs that rent state-owned properties in Beijing as office for operation and production will be exempted for rent payment of February, if they comply with the requirement from the government on operation and employment issues. For private properties, it is encouraged the landlord reduce or exempt rent payments for the tenants, but this is not required.
- Some of the biggest property owners in PRC, including Wanda, Longhu, China Resources, Poly, has voluntarily reduced or exempted rent payments for SME tenants to respond to the initiatives of the local governments.

## 1. Financial Relief (Cont.)

### Mainland China (Cont.) Initiatives to Increase Consumption

In order to stimulate the economy by increasing consumptions, some local governments have introduced measures like consumer vouchers.

- The Nanjing Municipal Government announced that it would issue consumer vouchers to citizens and needy groups equivalent to over RMB 300 million.
- The consumption vouchers consist of different categories, including catering vouchers, sports vouchers, book vouchers, rural travel vouchers, etc.
- The consumer vouchers are issued in electronic forms. The citizens of Nanjing can register to apply for the vouchers through specific mobile applications.

## 2. How to take advantage of Force Majeure (“FM”) Clauses in your Contracts?

- what is FM and how can it help you?
- how do you work out if FM covers COVID-19?
- to what extent must “performance” be affected to be covered by FM? what if your contracts do not have a FM clause?
- what do you need to do to invoke FM?
- what happens after you invoke FM?
  - if one party has performed already?
  - if performance is merely delayed?

## 2. Force Majeure

### **WHAT IS Force Majeure Clause (HK common law)**

- Force majeure clause generally provides a relief to excuse a party from performing or altering the terms according to which a party shall perform, a contract in whole or in part upon the occurrence of a materially impactful and unforeseeable event beyond the party's control.



## 2. Force Majeure (cont.)

### **HOW : Hong Kong – COVID-19 and the Operation of Force Majeure : NOTICE**

- Parties relying on the contractual *force majeure* clauses to “excuse” themselves from performing ‘onerous or impossible’ contracts.
- Commission of Legislative Affairs of the National People’s Congress Standing Committee’s indication on February 10, 2020, confirming that COVID-19 is indeed an “*unforeseeable, unavoidable and insurmountable*” event that could exempt parties from performing contracts. (EG : Useful for HK – China contracts or US/ EU and China governed by HK laws)
- World Health Organizations’ declaration on January 30, 2020 classifying the COVID-19 outbreak as a public health emergency of international concern.
- WHO declared Covid-19 a Pandemic on March 11, 2020.
- HOW DOES THIS HELP WITH HONG KONG LAW AND RELATED applicability of and practical issues related to *force majeure* clauses in contracts governed by Hong Kong laws



## 2. Force Majeure (cont.)

**Hong Kong FM TOOL – Whether a Force Majeure Clause Applies to COVID-19 in a Hong Kong Governed Contract? DEPENDS!**

- In Hong Kong, as with all contractual clauses, the full effect and applicability of a force majeure clause requires **precise language**.  
**Principle: Parties' intent must be contained in the four corners of the contract.**
- **TIPS:** Party seeking to enforce a force majeure clause should consider the following:
  - Whether the force majeure clause '**expressly**' contemplates an epidemic or health crisis situation.
  - **Coverage.** One should, however, be mindful of whether the clause provides that the crisis must have occurred in Hong Kong or other parts covered by the contract – if this is cross-border contract.
  - **Catch-all.** Lastly, look for clause that may have a 'catch-all' provision referring to all events or circumstances not within the foresight or control of the parties. Depending on the language, COVID-19 (and its impact on travel and transportation restrictions, quarantines etc.) may fall within the ambit of the clause.



## 2. Force Majeure (cont.)



### **Hong Kong – Whether a Force Majeure Clause Applies to the Party's Performance**

Once it is established that the definition of *force majeure* extends to or covers COVID-19, a party should then consider whether the act of performance sought to be avoided is a failure of performance covered by the clause:

- The language of the clause may provide relief if performance is "rendered impossible", or "prevented". In this case, relief will only be available if performance is legally or actually impossible.
- On the other hand, if the choice of word is "hindered" or "delayed", then the relief will apply when performance is rendered substantially more difficult and burdensome.

## 2. Force Majeure (cont.)

### Force Majeure in Hong Kong — Burden of Proof

- It is the responsibility of the party seeking to invoke a *force majeure* clause to compile evidence and demonstrate exactly how COVID-19 has affected performance of its obligations.



## 2. Force Majeure (cont.)

### SUGGESTIONS on Force Majeure — Hong Kong Law

#### Is there a duty of mitigation?

- A party may not be entitled to simply abandon the contract and claim *force majeure* upon the occurrence of an event. Mitigation may be a precondition to invoking a *force majeure* clause, in that a party is required to first take reasonable measures to reduce the loss caused and effects of the *force majeure* event.

#### Are there specific notification requirements?

- A *force majeure* clause may require timely notification within a certain period of time of the occurrence of the event. The clause may also require periodic updates.
- If notification should be made within a number of days, it may be relevant to consider whether these are business days or calendar days, in view of how the Chinese New Year holidays had been extended by different extents in the Mainland, Hong Kong, and Macau.
- If service of notification is to be effected personally or by post, one should be conscious of the travel restrictions in force in the Mainland, and the limited service being offered by the post offices in the Mainland and Hong Kong.

#### Is there a duty to continue performing?

- Contracts may specify that the parties should continue to perform other obligations under the contract which are not affected by the *force majeure*. If so, the *force majeure* clause will not shield the party from a breach of contract claim for the non-performance of such obligations.
- Contracts may also provide for alternative manners of performance. A party should make sure it has exhausted all contemplated ways of performance.

## 2. Force Majeure (cont.)

### SUGGESTIONS on *Force Majeure* — Hong Kong Law

#### PLAN AHEAD! PLAN FOR THE UNKNOWN

- COVID 19 is still an unknown for Hong Kong, China or the rest of the world. There is likely to be knock-on impacts on countries, cities, companies, business, commercial activities, people and contracts.
- Proactive management of contractual and legal obligations will be very important to navigate the unknown –U-VUCA.
- Parties should consult with counterparties and be understanding of each other's situation as well as contractual obligations during this time.



## 2. Force Majeure (cont.)

### Mainland China – *Force Majeure* under PRC Law

- According to the Contract Law of the PRC (《中华人民共和国合同法》) and the General Principles of the Civil Law of the PRC (《中华人民共和国民法总则》), a force majeure event refers to an objective event or circumstance that is:
  - **Unforeseeable** (force majeure event occurs after contracts were signed)
  - **Unavoidable**
  - **Insurmountable** (parties could not avoid or overcome it through the obligation of reasonable care or taking reasonable measures during the period of exercising force majeure defense)
- In practice, force majeure events usually include:
  - Natural disasters (earthquakes, floods, etc.)
  - Wars
  - Government actions (government restriction, government requisition, etc.)
  - Social anomalies (strikes, riots, etc.).
- Contract party may claim **partial or full exemption from the liability for breach of contract** in light of the impact of a force majeure event and may even **terminate contract** if the purpose of the contract is rendered impossible due to an event of force majeure.

## 2. Force Majeure (cont.)

### Under PRC Law — Statutory *versus* Contract-based

- Under PRC Law, force majeure is a **statutory exemption** (not based on case laws).
  - ❑ *Article 180 of the General Provisions of Civil Law of the PRC and Article 117 of the Contract Law of the PRC provide the definition of Force Majeure.*
- **On one hand**, parties may choose to provide a **force majeure clause in their contract** and expand the scope of the force majeure events by mutual agreement.
- **On the other hand**, if a **contract does not contain a force majeure clause**, the court will make judgment in accordance with default rules in relevant laws and regulations.
- Parties could explicitly contemplate a COVID-19 or epidemic situation by referring to '**public health emergency**,' '**disease**' or '**epidemic/pandemic**' in the contract.
- Although Chinese courts and other authorities generally recognize that COVID-19 and the relevant government control measures are force majeure events even if there is no such precise languages in the contract, the courts will have to examine causation and other elements in determining exemption and termination issues on a case by case basis.

## 2. Force Majeure (cont.)

### Under PRC Law — Legal Effects of *Force Majeure*

#### Exemption of Liabilities

- Parties may be partially or fully exempted from liabilities after **such parties showing** that the contract performance is **prevented, hindered or delayed** by the occurrence of a force majeure event (no matter where the force majeure occurred).
- The scope of the exemption of contract liabilities is limited to the part that was caused by force majeure.
- Liabilities **cannot be exempted** if parties have already **delayed performance of contract before the force majeure event occurred**, the party who has delayed the performance shall be liable for breach of contract.
- **Continue Performance of Contract After a Force Majeure Event:**
  - If the performance **is only delayed** due to a force majeure event and the contract purpose has not been frustrated, unless agreed by both parties, parties shall perform the contract after a force majeure event is eliminated, otherwise, there will be liabilities for breaching the contract. Parties would be partially or fully exempted from liabilities of delaying the performance of the contract.

#### Termination of Contracts

- If contract purpose cannot be achieved due to force majeure, either party has the right to terminate the contract.
- The contract would not be terminated automatically, the affected is required to give notice to the other party or file a complaint to the court. Upon the other party receives the notice and does not object within objection period (the default objection period is 3 months), the contract is terminated.
- After the contract being terminated, contract performance would be discharged.

#### Loss Allocation

- If a contract is terminated because the purpose of the contract cannot be achieved due to FM, neither party shall be liable to the other party for breach of contract or damages. However, such losses shall be borne by both parties in accordance with the principle of fairness.

## 2. Force Majeure (cont.)

### Under PRC Law — Burden of Proof and Statutory Elements (*Things to Bear In Mind in Invoking or objecting to Force Majeure*)

#### The Invoking Party bears the obligation to:

- **Prove a Force Majeure Event**  
A force majeure event occurs after the contract has been entered into.
- **Prove Causation**  
The contracts could have been performed but for the occurrence of the force majeure.
- **Give Notice**  
Parties that unable to perform contracts due to force majeure shall notify the other party promptly, and if the party wants to terminate the contract, the intent of terminating the contract shall be clearly expressed in the notice.  
Such parties may also file complaints to court.
- **Provide Evidence**  
The affected party shall also provide evidence to prove the occurrence of force majeure in a timely manner, and show how the force majeure event has prevented, hindered or delayed contract performance.
- **Conduct Duty of Mitigation**  
The affected party must take reasonable steps to mitigate damages in a timely manner.

#### The other party could make objections to a termination notice within objection period, otherwise the contract will be terminated

- The other party may file an objection to court within the objection period.
  - The objection period may be provided in the contract, otherwise, it shall be within three months after receiving a notice of termination or a copy of the complaint.
  - The other party could make objections by showing to the court that the party who intent to invoke force majeure doctrine did not make sufficient effort to reduce potential losses.

## 2. Force Majeure (cont.)

### Mainland China — China Council for the Promotion of International Trade (“CCPIT”) Notice on COVID-19

- CCPIT was founded in 1952 and is a national foreign trade and investment promotion agency.
- On January 30 2020, the CCPIT issued a notice stating that contract parties who are affected by the COVID-19 and therefore unable to fulfill contractual obligation of international trade contracts on time could apply for force majeure certificates from CCPIT via <http://www.rzccpit.com/>.
- On February 2, 2020, CCPIT issued its first certificate to a Zhejiang-based auto parts manufacturer within one day of its application.
- As of March 11, 2020, CCPIT issued 5,637 certificates covering commercial contracts with a combined value of RMB 503.5bn (\$71.2bn).

To obtain a force majeure certificate, a party is required to submit the following supporting documents to CCPIT online:

- Certificates and/or announcements issued by municipal government agencies or institutions.
- Notices and/or certificates on delay or cancellation of sea, land or air freight.
- Export sales contracts, cargo booking agreements, freight forwarding agreements, customs declarations, or any other relevant contract (electronic order forms or emails are acceptable if there is no written contract).

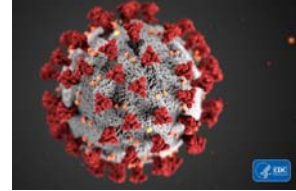




## 2. Force Majeure (cont.)

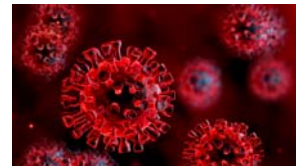
### Mainland China — The Legal Effect of a CCPIT Certificate

- **It is a PROOF OF OBJECTIVE FACTS**, such as quarantine directives, travel restrictions, and shipping delays, that may impact a company's ability to perform, adding certain authenticity and persuasiveness in proving a Force Majeure event.
- **Not conclusive evidence** from the perspectives of PRC courts either as to the existence of the relevant Force Majeure event or the effect of the event on the affected party's non-performance.
- A contract might require the provision of such a FM certificate issued by a relevant government authority as a prerequisite to the to invoke a Force Majeure clause and the contractual remedies.
- The applying party is still required to prove that there has been an objective circumstance that was unforeseeable, unavoidable, and insurmountable rendering the performance impossible.



### Overseas — The Legal Effect of a CCPIT Certificate

- CCPIT Under U.S. Law (NY Law)
  - A CCPIT certificate could serve as evidence of the existence and scope of the government measures in question, but the affected party would still need to prove that such measures had in fact rendered performance impossible.
- A U.K. Law Case:
  - In the case of *Hoecheong Products Co. Ltd. v. Cargill Hong Kong Ltd.*, [1993] 2 HKC 103, the contract provided a force majeure clause stipulating that the occurrence of force majeure event can be proved by certificates issued by CCPIT or an independent competent authorities in PRC. However, the Judicial Committee of The Privy Council (JCPC) of the Court of Appeal issued the opinion that the CCPIT certificate was only a supplementary proof of the occurrence of force majeure events and was not conclusive.



## 2. Force Majeure (cont.)

### PRC Law — Possible relief for non-performance of contracts if the court found COVID-19 is not a FM event

- Change of Circumstances
  - Where a party to a contract request the court to modify or terminate the contract on the grounds that the continuing performance of the contract is obviously unfair to the party, or the purpose of the contract would not be achieved due to occurrence of any material change of circumstances, which is unforeseeable, but not caused by a force majeure event, nor caused by a commercial risk after the contract takes effect, the court shall decide whether the contract shall be modified or terminated according to the principle of fairness on a case-by-case basis.

— *Article 26 of the Interpretation of the Supreme Court on  
Certain Issues Concerning the Application of the PRC Contract Law (II)*

## 2. Force Majeure (cont.)

### SUGGESTIONS on Force Majeure — PRC Law

- Review form contracts to ensure the FM clauses **explicitly include** a COVID-19, epidemic, public health crisis situation as well as other government measures (e.g., quarantine and lock down) countering the situation;
- Particular attention must be paid to any **notice requirements** set forth in the contract;
- Promptly **notify** the other party of the force majeure event, and if you have an intent to terminate the contract, it shall be clearly expressed in the notice;
- Take reasonable steps to **mitigate** impacts or damages immediately after learning the FM event, and keep track of the measures of mitigation;
- Prepare **evidence** of force majeure event and its causation to non-performance of the contract as soon as possible; and
- Obtain a force majeure **certificate** from CCPIT.

## 3A. Risks Under Quarantine Measures

- what are the risks for businesses and individuals for non-compliance?
- what are the implications for your business if your implementation systems fail?
- how can government measures help your business limit its exposure?

### 3A. Impact of Quarantine Measures – Hong Kong

Hong Kong has Limited Quarantine measures compared to China, EU, UK and rest of the world so far.

No city order to stop Commercial Activities, or stay at home orders.

*Laissez-faire – Let do mindset. And the desire to stay open for business as a city.*

*How? Huge impact.*

*Since HK is an international finance, capital markets and trading hub, (with many Fortune 1000 regional HQ based here) the quarantine measures have either slowed or stopped some activities whereby flow of international travelers is part of blood life. Going on line is the new model.*

So far, the Quarantine Measures apply to travelers coming to HK ONLY. Two Phases so far.

#### Hong Kong – Phase One Quarantine (Closed links with China)

- On January 30, 2020, the Hong Kong government closed certain transportation links and border checkpoints connecting Hong Kong with mainland China.
- On February 4, 2020, ferry services between Hong Kong and Macau were suspended.
- On February 8, 2020, the Hong Kong government began enforcing a compulsory 14-day quarantine for anyone, regardless of nationality, arriving in Hong Kong who has visited mainland China within a 14-day period.

### 3A. Impact of Quarantine Measures (cont.)

#### Hong Kong – Phase Two Quarantine (Closing Links with World, to combat the Second Wave new cases)

- Covid-19 cases numbers were relatively low for a city of over 7 million people. Foreign press praised the efforts and results. Saw HK as an example. People start to come back to the free port island regarded as safe from Covid19. That was short lived (VERY).
- Around mid-March as imported cases start to increase sharply in Hong Kong coming from new outbreak zones around the world, new measures were put in place (if not early enough):
  - Effective for a 14-day period beginning at 12:00 am on March 25, 2020, all non-Hong Kong residents arriving by air from any location other than mainland China, Macau, and Taiwan will be **denied entry**.
  - Non-Hong Kong residents arriving from mainland China, Macau, or Taiwan will be denied entry if they have been to any overseas countries and regions in the past 14 days.
  - Hong Kong residents and non-Hong Kong residents arriving from mainland China, Macau, or Taiwan with no travel to any overseas countries and regions in the past 14 days will be subject to a **14-day compulsory quarantine**.
  - The Hong Kong International Airport will suspend all transit services.
  - (All this hugely impacted international businesses including local businesses that relied on air delivered cargos).
- Other than school closures until further notice, the city (HK) has no order to shut down commercial activities.
- We expect more new measures will be in place in the next few days to weeks, to enforce 'social distancing' to control the second wave outbreak situation.



### 3A. Impact of Quarantine Measures (cont.)

#### Overview of the Measures Taken by Mainland China Government

- Most of the cities in Mainland China other than the cities in Hubei have adopted special regulations on preventing the spread of epidemic, including requiring residents to stay indoor and reduce outdoor activities.
- At community level, many communities require its residents to apply for "health certificate" and accept regular temperature check before entering into communities. Residents are requested to disclose their recent travel histories to communities.
- Business other than essential business for epidemic prevention is suspended and shall await further government instructions on business resumption.
- School openings are postponed.



### 3A. Impact of Quarantine Measures (cont.)

#### The Latest Developments of Epidemic Prevention Measures in Mainland China

- Given the epidemic situation in Mainland China has been effectively controlled, the governments have shifted focuses to the prevention of foreign imported cases.
- Taking Beijing as an example, from Mar 25, 2020:
  - All passengers (including Chinese residents) who arrive at Beijing Capital International Airport (PEK) are required to undergo a 14-day quarantine, either at home or at the designated area.
  - Foreign nationals travelling for business purposes, are not permitted to leave the assigned hotel before the coronavirus (COVID-19) clearance.
  - All passengers who are transiting through Beijing Capital International Airport (PEK), are also required to conduct medical health checks at the transfer area.
- From March 25, 2020, Shanghai Hongqiao Airport (SHA) will suspend all international, Hong Kong, Macao and Taiwan flights, and transfer all international, Hong Kong, Macao and Taiwan flights of Shanghai Hongqiao Airport to Shanghai Pudong Airport (PVG).

### 3A. Impact of Quarantine Measures (cont.)

#### Quarantine Measures imposed by the Government, or the building etc.



##### In Mainland China:

- Implement personnel classification regulation
  - High risk (hospitalization quarantine)
  - Medium risk (14-day home quarantine)
  - Low risk (regular temperature check)
- “Early 4” principle:  
Early discovery, early report, early quarantine, early medical treatment
- Dynamic health certification  
Online application for personal E-code

### 3A. Impact of Quarantine Measures (cont.)

#### Potential Consequence for Non-compliance of Quarantine Measures in Mainland China

- **Business provider**
  - Shut down by authority
  - License revocation
  - Fine
- **Individual**
  - Warning
  - Administrative detention
  - Criminal liabilities
  - Cancellation of foreigner’s residence permit/Force to leave within time limit



## 3A. Impact of Quarantine Measures (cont.)

### Legal Basis for Consequences for Non-compliance under PRC Laws

- **Civil Liabilities**

Where a unit or individual violates the provisions of this Law, thus leading to the spread and prevalence of infectious diseases or causing harm or property losses to another person, it/he shall bear civil responsibility according to law.

———— (Article 77 of *Law of the People's Republic of China on Prevention and Treatment of Contagious Diseases*)

- **Administrative Liabilities**

A person who commits one of the following acts shall be detained for not less than 5 days but not more than 10 days and may, in addition, be fined not more than 500 yuan; and if the circumstances are relatively minor, he shall be detained for not more than 5 days or be fined not more than 500 yuan:

- (1) intentionally disturbing public order by spreading rumors, making false reports of dangerous situations and epidemic situations or raising false alarms or by other means;
- (2) disturbing public order by putting in...pathogens of infectious diseases; or...

———— (Article 25 of *Law of the People's Republic of China on Administrative Penalties for Public Security*)

## 3A. Impact of Quarantine Measures (cont.)

### Legal Basis for Consequences for Non-compliance under PRC Laws

- **Criminal Liabilities**

Whoever violates the provisions of *Law of the People's Republic of China on Prevention and Treatment of Contagious Diseases* and has one of the following cases, causing the spread of A-category contagious diseases or causing a serious danger of the spread of contagious diseases is to be sentenced to not more than three years of fixed-term imprisonment or criminal detention; when the consequences are particularly serious, the sentence is to be not less than three years and not more than seven years of fixed-term imprisonment.

...(4) refusing to implement the prevention and control measures set by the sanitation and epidemic control organs in accordance with *the Law of the People's Republic of China on Prevention and Treatment of Contagious Diseases*.

Any unit that commits the preceding crimes is to be sentenced to a fine and the person in direct charge of the unit and other persons directly involved in the case for responsibility are to be punished according to the provisions of the preceding article.

———— (Article 330 of *Criminal Law of the People's Republic of China*)

## 3B. Key Workplace and Employment Issues

- any limitation on right of business to collect personal data for health purposes?
- do you need to still pay employees while you have suspended business operations?
- how does the law require your business to treat employees who have been infected with COVID-19?
- any relief for businesses from paying social security payments?

## 3B. Key Workplace and Employment Issues

Hong Kong is a service industry economy.

Human Capital is the core asset for the economy, and most industries.

Human Capital = People. Covid 19 will be about proactive Human Capital Management

**KEY NOTE :** Hong Kong is 'AT WILL' Employment, subject to statutory protection.

Month to month renewal.

Hong Kong – *Laissez-faire* – *LET DO*



## 3B. Workplace and Employment



### Hong Kong –

- Early on Hong Kong Government took the decision to require civil servants to stay home until first week of March. Normal work resumed in March as Wave One stabilized. However, remote work arrangement is back in place as of Monday March 23, 2020.
- Many private sector employers followed suit with employees being asked, or given the option, to work from home.
  - Some businesses lack the business traffic to stay open.
- Companies need to take steps to prepare themselves for business disruption and how that can impact HR management.
- Employers will need to ensure that they are fully aware of their legal obligations and to adopt a flexible approach to situations as and when they arise.
- **KEY : Communications** between employers and employees will be key during this VUCA situation of the century.
  - EG : Forced no pay leave. Employer to keep staff.
  - We expect the HK Labor Department and Labor Tribunal to show sympathy towards both sides while following common law based legal precedents from Asia Financial crisis, SARS, GFC and other past crises. There will be grey areas. As such, international common law and practices will play a role in outcome of future disputed cases.

## 3B. Workplace and Employment (cont.) Hong Kong REFERENCE NOTES on HK Best Practice

Hong Kong has best practice guidelines for maintaining a safe workplace which covers viral outbreak

The Occupational Safety and Health Branch of the Labour Department in Hong Kong has previously issued:

1. [Guidelines for Employers and Employees on the Prevention of Avian Influenza](#)
2. [The Prevention of Human Swine Influenza](#)
3. [Guidelines on Prevention of Severe Respiratory Disease associated with a Novel Infectious Agent for the General Public](#)

The Guidelines contain practical measures to enhance personal and workplace hygiene and safety, such as maintaining good ventilation, disinfecting commonly-used equipment, providing hand soap in toilets, providing face masks when necessary, communicating relevant guidelines to employees, and reminding employees with fever not to attend work.

The Guidelines do not have the force of law, employers are encouraged to follow them to the extent possible.

The Labour Department appealed to employers to help reduce the spread of the disease; for example, by providing surgical masks and other protective equipment as needed to frontline staff.

(Notes : Following the guidelines can help demonstrate that employers have discharged their duty of care under statute and under common law.)

### 3B. Workplace and Employment (cont.)

#### Mainland China – Collection and use of personal data for anti-virus purposes

##### Prior consent needed?

- Law is silent
- National standard on protection of personal information regards collection of personal information for the purposes of “public health” as an exception to the “prior consent” requirement
- Different opinions among legal practitioners regarding whether employers may collect personal information from employees without prior consent to contain virus transmission



### 3B. Workplace and Employment (cont.)



#### Mainland China – Collection and use of personal data for anti-virus purposes (cont.)

Necessary steps to protect the privacy and safety of personal data collected during COVID-19 outbreak:

- Inform employees about scope, purposes and methods for use and collection of their personal data and obtain prior consent from employees if possible;
- Refrain from using the collected personal data for other purposes without employees' consent
- Limit the scope of information collected to the minimum extent necessary;
- Take necessary measures (encryption, restriction of access) to protect the security of the information collected
- Carefully evaluate before disclosing or transferring personal data to third parties

## 3B. Workplace and Employment (cont.)

### Mainland China – Special payroll rules

- If a company remains closed due to the impact of COVID-19, the following payroll rules may apply until its reopening unless otherwise agreed by the parties:
  - Where no work was assigned to employees:
    - ❖ Have employees use annual leave or other leave benefits
    - ❖ Suspend employees' work (安排待岗), with regular salary to be paid in first month and a life supporting fees (local minimum salary or an lower amount) to be paid to off-duty employees in the following months during the suspension
  - Where work was assigned to and performed by employees:
    - ❖ Regular salary should be paid for work performed during regular working hours
    - ❖ OT benefits under law apply to extra hours worked

## 3B. Workplace and Employment (cont.)

### Mainland China – Protection of infected employees

- Protection of infected employees:
  - Regular salary shall be paid to them during the quarantined medical treatment period
  - May not be terminated based on reasons provided by Article 40, 41 of PRC Employment Contract (such as termination based on performance issues or restructuring) during such period
  - Expiring employment contracts will be automatically extended until the end of such period

Similar protections also apply to (1) suspected COVID-19 patients under quarantined medical treatment or observation, (2) those having close contact with confirmed or suspected COVID-19 patients under quarantined medical observation, and (3) those who cannot return to work due to quarantine or other emergency measures implemented by the government

### 3B. Workplace and Employment (cont.)

#### Mainland China – Employment-related Incentives implemented by government (some examples)

- Reduction and Exemption for Certain Social Insurance Contributions
  - For example, in Beijing, Shanghai and Guangdong, the employer's portion of contributions for pension fund, unemployment insurance and work-related injury insurance payable by large-size enterprises will be halved from February to April, while those payable by medium, small or micro size entities ("MSM Entities") will be exempted from February to June
- Grace Periods for Social Security and Housing Fund Contributions
- Incentives for Retaining Employees for MSM Entities (such as partial refund of unemployment insurance contributions, one-off subsidies)



### 3B. Workplace and Employment (cont.)

#### Mainland China – Businesses are gradually getting back to normal

- In February: holiday extended, reopening schedule put off
- In March:
  - In places other than Hubei province: most types of businesses have resumed operations with certain high-risk businesses still prohibited from reopening
  - In Hubei province: large scale reopening started from Mar. 10 with different timetables for different types of entities depending on their risks and nature
- Although businesses are gradually getting back to normal, it is still important for employers to take precautions.
- Several workplace infection cases have been reported, under which employers suffered great losses



## 3B. Workplace and Employment (cont.)

### Mainland China – Employer's obligations under law to combat COVID-19

- To provide a safe working environment to its employees. (*PRC Employment Contract Law, PRC Labor Law*)
- To timely report any confirmed or suspected infection of contagious disease to the medical institutions or disease prevention and control organizations (*Law of the PRC on Prevention and Control of Contagious Disease*)
- To cooperate with requests from medical institutions or disease prevention and control organizations in preventing and curbing the spread of the contagious disease (*Law of the PRC on Prevention and Control of Contagious Disease*)

## 3B. Workplace and Employment (cont.)

### Mainland China – Best practices to prevent and control workplace virus spread

Many local governments have released detailed guidelines regarding precautions to be taken to prevent and control workplace virus infection, the key points under which have been summarized below:

- Obtain guidance from the local government regarding virus prevention and control in advance
- Form an anti-virus working group (or at least designate several responsible persons)
- Formulate plans and policies for workplace disease prevention and control



### 3B. Workplace and Employment (cont.)

#### Mainland China – Best practices to prevent and control workplace virus spread (cont.)

- Collect travel information from employees and comply with local requirements for medical observation
- Have necessary supplies (such as face masks, thermometers, sanitizers) for disease prevention and control in place
- Educate employees on the precautions to be taken
- Closely monitor health conditions of employees and visitors



### 3B. Workplace and Employment (cont.)

#### Mainland China – Best practices to prevent and control workplace virus spread (cont.)

- Appropriately ventilate, clean and sanitize the working space and dormitories on a regular basis
- Reduce employees' in-person interaction with colleagues and business partners to the extent possible
- Immediately report any confirmed or suspected infection and provide other necessary information to disease prevention and control organizations



## Key take-away:



### 1. Financial Support

Proactive business management & administration of this U-VUCA will be key. Search for government or private sector relief programs.

### 2. Making use of Force Majeure

Communication. Proactive. Call your friendly Dorsey lawyer for help.

### 3. Avoiding Risks Under Quarantine Measures

Proactive Communications, Collaboration and Care. Full Compliance.

### 4. Obligations to staff and taking advantage of payroll relief

Proactive Communications. Proactive Collaboration & Caring for workforce – your human capital. “Heartcount” over Headcount amid COVID-19.

## Thank you and follow up questions



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