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# Contractual obligations and employment issues amid COVID-19 outbreak in Hong Kong

A brief insight on whether businesses may excuse from existing contractual obligations



by [Agnes Lau & Michael Lau](#) on 29 June 2020

The recent COVID-19 pandemic has wreaked havoc to the economy globally, with many cities' governments imposing lockdown requirements in their jurisdictions to contain the virus. Business activities have been severely affected and this would in turn affect their respective contractual and employment obligations.

This Newsletter attempts to briefly discuss the relevant challenges facing the businesses and some of the options including but not limited to invoking the doctrines of *force majeure* or frustration which may be available to them. Many businesses have recently sought to rely on the doctrine of *force majeure* to avoid further contractual performance. We will discuss the basic principles of the two doctrines in the following.

## CONTRACTUAL ISSUES

### Force Majeure

Under common law (as opposed to civil law), *force majeure* is not implied in a contract and therefore it has to be expressly incorporated into a contract. Force majeure clauses are usually contractual clauses which specify certain events which, if they occur (usually beyond the control of either party), would prevent the contracting parties from performing part or whole of the contract. Examples of *force majeure* events include acts of God, pandemic, war, riot and so forth. COVID-19 is likely deemed a *force majeure* event, depending on the drafting and the wording of the clause, which may vary from cases to cases.

To rely on the doctrine of *force majeure*, the party relying on it should prove that the (1) circumstances which were beyond the parties' control actually occurred; and (2) that the circumstances would prevent or delay the performance of the contract.

A *force majeure* clause would usually list out the consequences of such an event including suspension of the contract and even termination of the contract. In some cases, an extension of time for contractual performance may be granted under such clause after which the parties can decide whether to proceed with the contract or terminate it.

It must be borne in mind that *force majeure* only applies in situations where the performance of a contract is hindered, impeded, suspended or impossible but it does not provide a way out for contracting party who seeks to avoid contractual obligations simply because it becomes more expensive and/or inconvenient to perform the contract.

### Frustration

Where the contract contains no *force majeure* provision, the common law doctrine of frustration can be resorted to. The doctrine applies where an unforeseen event (through no fault of either party) occurs which renders contractual obligations impossible, or radically different from what the contracting parties originally contracted for and contemplated.

The threshold of frustration is very high and is not to be construed and relied upon by the court lightly. The consequence of invoking frustration would be the termination of the contract. If a contract contains a *force majeure* clause, the Court will not enforce the doctrine of frustration as the former is a matter that the contracting parties have expressly and freely negotiated and agreed upon to provide relief for the parties when an unforeseen event takes place.

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## EMPLOYMENT ISSUES

### Unpaid leave and reduction in wages

Due to the COVID-19 and a reduction in economic activities, the media reported that some employees are forced by their employer to take unpaid leave and/or receive a reduction in wages. Pursuant to the Employment Ordinance (EO) and/or the employment contracts, employers have a duty to pay wages and employees have an implied right to work. As such, an employer's unilateral decision to require the employee to take unpaid leave may constitute a breach of the employment contract and the EO. As for an employer's unilateral decision to reduce the employee's wages, this may constitute an unreasonable variation to the terms of the employment contract. To eliminate legal risks and potential claims from the employees, it would be wise for the employers to seek consent from the employees before taking out the above measures.

### Self-isolating employees

For employees who are self-isolating, they are generally not entitled to statutory sick pay from their employers. Statutory sick pay is only payable when an employee can produce a medical certificate showing that he/she is unable to attend work. One of the solutions for the employers would be to arrange those employees to work from home and continue to pay the employees normal pay.

### Paid sick leave

If an employee is on paid sick leave, the employer shall not dismiss the employee because this will constitute a breach of the EO and the Disability Discrimination Ordinance and expose the employer to legal claims or complaints by the employee.

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There is no one-size-fits-all solution in relation to these areas. This newsletter is not intended to be taken as legal advice. Clients are advised to consult their own legal advice when invoking the doctrine of *force majeure* or frustration in excusing their contractual obligations and when dealing with employment issues which may have far-reaching legal implications.

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