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How the coronavirus outbreak might affect your business contracts



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Contracts are the lifeblood of businesses

Contracts are a key part of doing business, as they set out expectations and govern relationships between business partners.

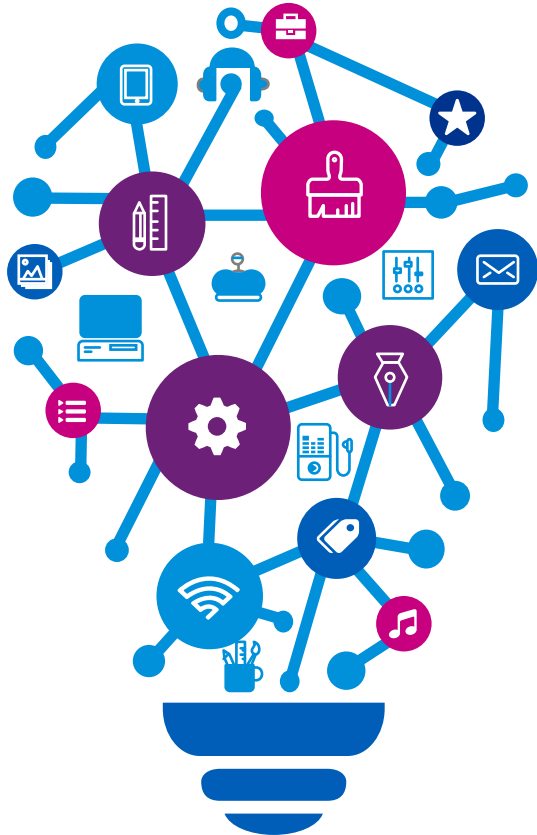
The rapid outbreak of the novel coronavirus is becoming a significant business challenge. Some businesses are finding it difficult to perform their contractual obligations despite their best intentions. Industries that may be particularly affected include events, tourism, manufacturing, logistics, retail and F&B. Your business may now be facing similar difficult questions in terms of how to comply with its contracts and dealing with business partners who are unable to perform.

In this pack, we will discuss some of the most common issues that businesses are encountering right now. Our aim is to support businesses to comply with their obligations, and to make legally responsible decisions.

Our team of experts in corporate and commercial laws has extensive experience in assisting businesses in the greater China region, and will be ready to assist you anytime. We hope that this pack provides you with helpful support during these turbulent times.



Common contractual issues facing businesses in challenging times



- (purple circle with briefcase icon) Approving and signing contracts
- (blue circle with gear icon) Complying with contractual time limits
- (purple circle with magnifying glass icon) Suspending or terminating contracts
- (blue circle with tag icon) Dealing with potential breaches of contract

Approving and signing contracts

Regardless of how challenging the environment may be, businesses will do their best to run as smoothly as they can, both in terms of external and internal matters. For example, they may need to sign contracts urgently, but their business partner may be unable or unwilling to arrange a face to face meeting to sign. More significant contracts will often also require approval from a company's board of directors (and sometimes even shareholders), but nowadays frequent travel is a norm, and given travel restrictions during virus outbreaks it may not be possible to have everyone physically present at the same time.

Legal Considerations

1. Hong Kong law has a flexible approach to contract formation. Generally speaking, you can discuss with your business partner on what type of electronic or digital signature works for you. What is most important is that the parties are able to show proof that they have mutually agreed to be legally bound by a contract.
2. This approach applies to general commercial contracts, however there are certain exceptions for important documents that still require handwritten signatures under Hong Kong law, for instance testamentary documents, certain trust documents, documents about land and property transactions, and powers of attorney.
3. As for board or shareholder meetings, first examine your company's articles of association (its constitution) carefully. This document sets out rules on how your company should be run. Generally speaking, subject to those articles of association, you may host meetings virtually via telephone or videoconference, or you may also pass a written resolution instead of holding a meeting. In all cases, businesses must follow proper procedures under Hong Kong laws and your company's articles of association.

Complying with contractual time limits

Many commercial contracts contain requirements about time, such as for the service of notices, for payment terms, for termination, for the exercise of option periods, or for time extensions. How are those time periods affected by the coronavirus outbreak or other major events?

Legal Considerations

1. Many contracts use the concept of “Business Days” to count the amount of time that you have to fulfil certain obligations. You should review the definition of “Business Days” and all the places in the contract where this term is used, and consider whether you can still meet those time limits.
2. The PRC central government has extended the Chinese New Year public holidays until 2 February 2020. Certain local authorities have also declared additional extensions of the holiday period until at least 9 February 2020. Therefore, if part or all of your contract involves performance in mainland China, it is possible that these extended public holiday periods may not constitute “Business Days”. This will in turn affect key parts of your contract such as the notice period, payment terms and performance period.
3. In all cases, the precise effect will depend on the specific wording of your contract and where exactly the contract needs to be performed.
4. Finally, where there may be uncertainty from a contractual perspective, it is recommended to engage in discussions with contracting parties – recognising the importance of longer-term relationships and the reality of the challenges faced by many businesses in the current environment.

Suspending or terminating contracts

Virus outbreaks and other major events may disrupt supply chains, trigger cancellations and generally dampen the economic mood for investment and spending. Businesses under financial pressure may face challenges when trying to uphold their contracts. If they determine that continued performance is not possible, they may try to look for ways to suspend or terminate their obligations.

Legal Considerations

1. Most contracts, for example those for the supply of goods or services, will contain a “force majeure” clause. There is no universal definition for force majeure, so it is important to check the clause carefully to see if it specifically covers your situation. Generally speaking, “force majeure” refers to an extreme event beyond the parties’ reasonable control that delays or prevents performance of the contract. This clause may have different effects depending on how it is worded, and may for example allow the parties not to perform certain contractual obligations while the event is taking place, or may allow you to terminate the contract. Common situations that may be covered include epidemics, government actions, strikes, and natural disasters. Based on the specific wording of your contract, it is possible that the coronavirus outbreak may be interpreted as a “force majeure” event.
2. Businesses in mainland China may in certain cases be able to apply for a certificate from local authorities (e.g. The China Council for the Promotion of International Trade) as further proof of “force majeure”.
3. Apart from “force majeure”, a contract may also set out certain grounds for termination. If there is an option in the contract to terminate without giving a reason, then often the parties will just need to give sufficient prior written notice in accordance with the contract.
4. In all cases, you are recommended to assess the impact of suspending or ceasing performance of the contract on your business, and also explore options with the other party before you use the “force majeure” clause or otherwise terminate the contract.

Dealing with potential breaches of contract

Despite the best intentions of business partners, it is possible that businesses will fail to meet their obligations under a contract and therefore technically be in breach. This is not an ideal situation for either party, however it is important to remain proactive and practical in finding a way out, and not necessarily resort to legal remedies immediately.

Legal Considerations

1. If you believe you may not be able to perform a contract due to the coronavirus outbreak, you should consider when it is realistically likely that you can resume being in compliance. Review the contract to assess the impact on you due to your non-performance. Communicate early with the other party on a good faith basis in an attempt to resolve the situation.
2. If your business partner is the one who may breach a contract, you should review the contract carefully to evaluate available options, and take all reasonable steps to mitigate your losses as far as possible. Consider whether failure of this contract may in turn affect your own performance under your other contracts, in which case you should also take the actions in paragraph 1 above.
3. In any case, you should document in writing all the circumstances leading up to the current situation. If both parties still want the contract to proceed, there are other options that could be explored through good faith negotiations, for example time extensions, contractual amendments, or waivers of certain obligations. If you reach agreement on the way forward, do get it in writing.
4. If you can get results through a good faith negotiation, this is preferable to a formal dispute resolution process. It is important to preserve long-term business relationships and recognise that all businesses are facing difficulty in this environment. That said, if there are signs that the relationship is breaking down, consider whether you need professional advice about your legal rights to better inform your discussions with business partners.



Contact Us



Shirley Fu
Partner, M&A and Corporate
shirley.fu@kpmglegal.com.cn

SF Lawyers
In Association with KPMG Law
1125-1127 Prince's Building
10 Chater Road
Central, Hong Kong



Leo Tian
Partner, M&A and Corporate
leo.tian@kpmglegal.com.cn

SF Lawyers
In Association with KPMG Law
1125-1127 Prince's Building
10 Chater Road
Central, Hong Kong



David Murray
Partner, Data Privacy
david.murray@kpmglegal.com.cn

SF Lawyers
In Association with KPMG Law
1125-1127 Prince's Building
10 Chater Road
Central, Hong Kong



符莎莉律師事務所
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