



Novel coronavirus: practice guide of significant commercial and legal issues

February 2020

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# Novel coronavirus: practice guide of significant commercial and legal issues

The recent outbreak of the novel coronavirus (the “**NCV-Outbreak**” and the “**NCV**” respectively) has caused disruption across greater China and the region. In connection with this, governments in the region and worldwide have imposed a series of containment measures, including lockdown of certain cities in the People’s Republic of China Mainland (“**Mainland China**”), extension of public holidays, closure of public services (e.g. courts), unprecedented “work from home” arrangements in the Hong Kong Special Administrative Region (“**Hong Kong SAR**”), as well as international travel restrictions or quarantine measures imposed by Australia, Italy, Singapore, the United States, and Vietnam (amongst others) on travellers to and from regions affected by the NCV-Outbreak.

To assist businesses and their legal teams in tackling the challenges presented by the NCV-Outbreak, we have prepared this guide, organised in accordance with practice areas, to highlight some of the main issues that businesses should be thinking about in light of the current environment, as well as some practical tips to be considered. The principles and requirements discussed in this guide refer to the law in Hong Kong SAR (unless expressly noted otherwise); however, many of the issues discussed will similarly apply to businesses operating in other jurisdictions.

Please refer to the contact details of the relevant experts for each practice area if you have any questions on the matters highlighted in this guide.



# Crisis management



# Crisis management

As the NCV-Outbreak continues to spread across the region, the likelihood of your organisation being directly impacted by the NCV-Outbreak (e.g., an infected customer, employee, etc.) also increases.

Each organisation should ensure it has in place a crisis management policy that addresses the following, and review existing policies to ensure that key employees and management are familiar with their operation:

- (i) What has happened and how can the organisation gather the facts in a timely fashion?
- (ii) What are the organisation's immediate priorities?
- (iii) What steps are being taken to contain the impact of the crisis?
- (iv) Who are the key stakeholders – both internal and external – that you need to communicate to? Develop a consistent and controlled communication strategy.
- (v) What expertise/advice is required to address the crisis?
- (vi) Who has authority to make immediate decisions with respect to the crisis?

Please refer to the graphic below, and [our crisis management website](#), for guidance on how a situation like the NCV-Outbreak may be approached from a crisis management perspective.

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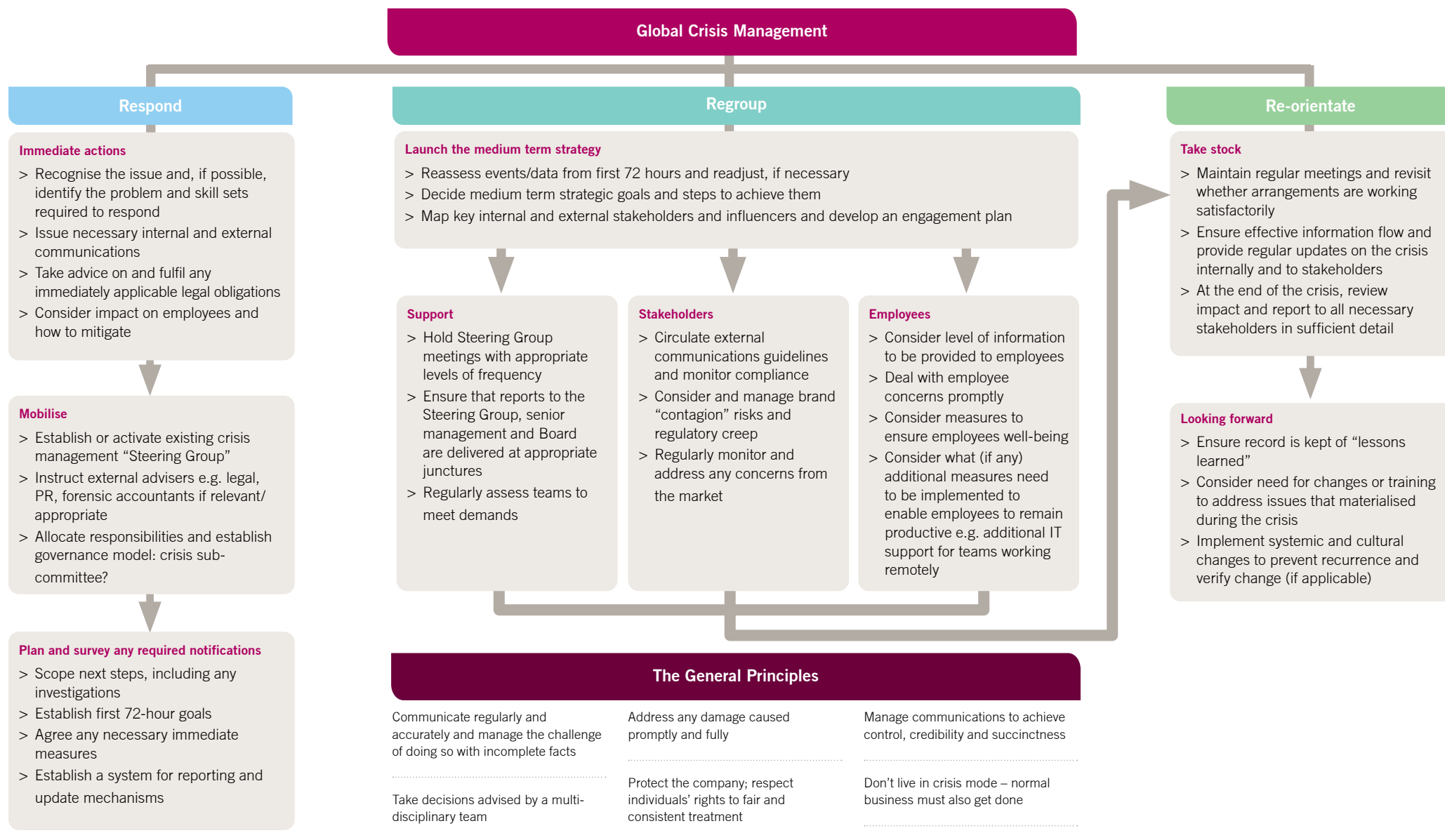
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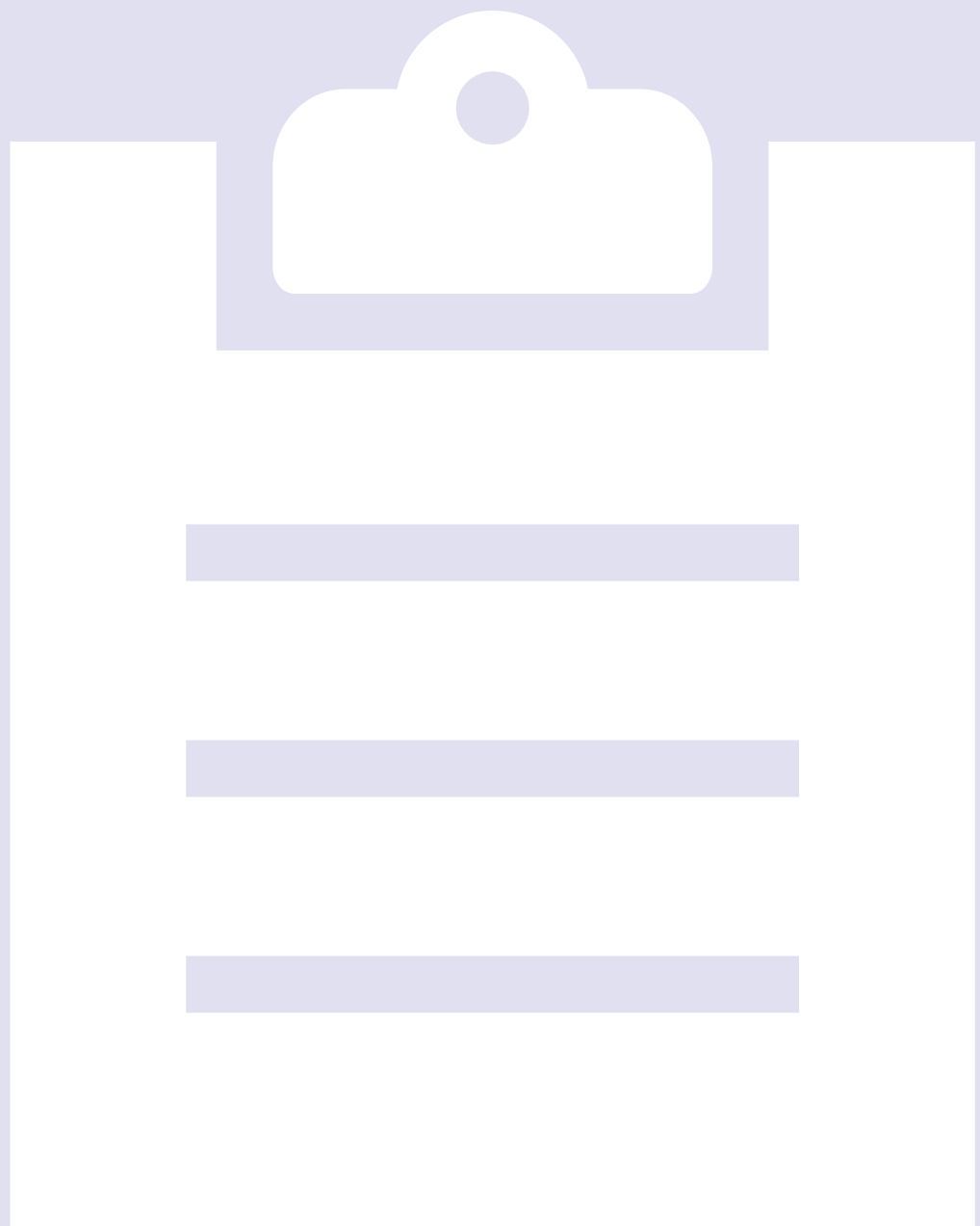
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# Corporate and equities



# Corporate and equities

The NCV-Outbreak may impact companies in a number of ways and may give rise to operational issues. We set out below a list of topics that legal teams should be alert to during these times.

## DISCLOSURE OF INSIDE INFORMATION

For a company listed on The Stock Exchange of Hong Kong Limited (the “SEHK”), its key obligations include the making of timely and accurate disclosure of information which may have a material effect on the price or trading volume of the securities of the company (“**inside information**”). A listed company is under a continuous obligation to disclose, as soon as reasonably practicable, to the market upon knowledge of any inside information. There are very limited circumstances when disclosure of inside information may be delayed and the Securities and Futures Commission (“SFC”) has taken multiple enforcement actions in relation to the failure to disclose inside information in the past.

In relation to the NCV-Outbreak, there may be certain developments or events which may amount to inside information, for example:

- (i) a company has material operations in, or has a heavy reliance on supply chains situated in, areas severely affected by the NCV-Outbreak, which has resulted in or is likely to result in material disruption to the company’s business;
- (ii) a company’s business performance or outlook has been, or is likely to be, materially impacted – for example, due to a reduction in customer demand or the offering of cancellations/refunds following the NCV-Outbreak;
- (iii) a material change in the company’s strategy or business plan in response to the NCV-Outbreak; or
- (iv) a pending transaction which has been or is likely to be delayed or cancelled as a result of the NCV-Outbreak.

It will be a question of judgement for the directors of the company as to whether or not the relevant development or event amounts to inside information. There are no fixed thresholds or quantitative criteria to determine the materiality of any price or trading volume movement.

Once the directors of the company have determined that the relevant development or event amounts to inside information, the company will need to control dissemination of the information internally and to publicly announce it as soon as practicable, unless the company can lawfully delay public disclosure.



### Inside information

Businesses to be mindful of the need to identify, manage, and (if necessary) disclose inside information arising as a result of disruptions.



### Financial reporting

Coordinate closely with auditors and regulators to identify and resolve any potential delay in publication of accounts.



Each listed company is reminded to review its inside information identification and escalation processes to ensure that all parts of its business are actively monitoring and identifying potential inside information and escalating this to the directors for assessment.

## FINANCIAL REPORTING

For a company listed on the SEHK with its financial year end on 31 December 2019, the upcoming deadlines for the publication of its financial results will be 31 March 2020 for the preliminary announcement of the results and 30 April 2020 for the audited financial statements (together with the annual report). Given the extended Lunar New Year holiday in Mainland China and the difficulty in travelling across the region, listed companies may be concerned about meeting these deadlines. In particular, auditors have faced travel restrictions in Mainland China following the NCV-Outbreak and they typically carry out on-site auditing during the two months following the relevant financial year-end.

Ordinarily, the SEHK requires a suspension of trading in a listed company's securities if it fails to publish its financial information in accordance with the above deadlines, with the suspension continuing until the listed company publishes an announcement containing the requisite financial information.

In response to the unique circumstances of the NCV-Outbreak and in view of travel and other restrictions that have arisen in response to the NCV-Outbreak, the SFC and the SEHK have issued a [joint statement](#) on 4 February which provides guidance to companies listed on the SEHK on the disclosure of their year-end financial information.

If a listed company believes there is a real possibility that, due to the travel and other restrictions, it will be unable to publish a preliminary announcement of results, it should contact the SEHK as soon as possible and provide the following information:

- (i) a description of the travel and other restrictions, and how they have affected the issuer's auditing or reporting process;
- (ii) where available, an explanation of why the travel and other restrictions affect its compliance with the applicable financial information disclosure requirements;
- (iii) the financial information that it is nevertheless able to publicly disclose; and
- (iv) an explanation of whether the accuracy, completeness, and presentation of the financial information available is believed to have been adversely affected and, if so, to what extent.

If a listed company is in all respects able to publish its preliminary results in full compliance with the reporting requirements set out in the Listing Rules of the SEHK, other than reaching agreement with its auditors, it should publish such preliminary results on or before the applicable deadline and include appropriate caution statements. In such cases, the SEHK said it will normally allow trading in the securities of the issuer to continue.

In all other cases, that is, the available financial information of a listed company may not be in full compliance with all reporting requirements of the Listing Rules of the SEHK, upon receiving the information listed in points (i) to (iv) above, the SEHK would consult with the SFC and assess whether publication of the listed company's available information will be sufficient to maintain an orderly, informed, and fair market so that trading in the listed company's securities can continue. A listed company should therefore be reasonably satisfied that the available information is accurate and complete in all material respects. For example, if there are uncertainties relating to the valuation of assets or liabilities, the listed company should describe those uncertainties and state how they may affect the valuation of such items in order to allow investors to evaluate their significance.

## IMPACT ON TRANSACTIONS

Impact on the execution of transactions should be taken into account. In particular, do the travel and other restrictions impact the ability to carry out physical due diligence? Do travel restrictions prevent physical meetings from taking place? These factors should be taken into account when devising a transaction timetable; and where a transaction is between signing and closing, being alert to any long-stop dates will be important.

The outbreak could also impact on the commerciality of a transaction. In such circumstances, where relevant, consider whether a “material adverse change” condition precedent or termination right can be triggered. Where no such provisions apply, consider whether a “*force majeure*” argument is available to terminate a transaction (see “**Dispute resolution – Commercial contracts**” below).

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# Capital markets and loan financing



# Capital markets and loan financing

Issuers or underwriters working on international offerings of securities and agents or lenders on loan financings would benefit from considering certain commercial, practical, and legal issues that may arise from the NCV-Outbreak. Market volatility, economic outlook, and investor sentiment are no doubt important factors, but the following issues should also be considered by market participants at this time.



## Diligence/disclosure issues

Expect additional diligence and disclosure requirements (and possibly delays) relating to business impacts of the NCV-Outbreak.



## Validity of approvals or consents

To the extent that an issuer or borrower has obtained any approval or consent from regulators or third parties for a proposed bond issue or loan financing, it should review any validity period of such approval or consent in case timing of the transaction is delayed in light of the NCV-Outbreak. For offshore debt issuers specifically, the National Development and Reform Commission (“**NDRC**”) in Mainland China has published a **notice** to the effect that any affected company may submit a written application within a prescribed period for an extension of up to six months of the registration certificate for corporate foreign debt.



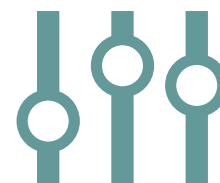
## Consents, approvals, and termination

Carefully monitor approval, consent, and termination or default provisions to ensure strict compliance in light of the unprecedented events; do **not** assume “business as usual”.



## Due diligence and disclosure

- > Due diligence – any logistical issues on the due diligence process should be discussed at the outset of a proposed bond issue – e.g. practical difficulties with on-site visits, etc. Enhanced due diligence requirements (if any) also need to be addressed – e.g. to assess the impact on, or the disruption to, a company’s business or those of its suppliers and/or customers, etc.
- > Disclosure – the outcome of these due diligence issues may in turn impact the disclosure and risk factors included in the offering circular. It is common for offering circulars to include an existing risk factor on outbreaks of health epidemics and contagious diseases – e.g. SARS. Market participants should consider whether such risk factor needs to be enhanced in light of recent developments.



## Derivatives

Unscheduled holidays may impact settlement dates, and/or impact transactions in other ways. Parties should make sure to be familiar with the specific terms of their chosen master instrument, especially around market disruptions.



## Timing of results announcements

There has been recent news coverage on the possibility of an extension to the reporting deadline for results announcements by certain listed companies in Hong Kong SAR in light of travel and other restrictions that have arisen recently. In addition, the SFC and the SEHK have issued a joint statement – see “**Corporate and equities – Financial reporting**” above. No blanket extension has been issued and it is possible that an affected issuer may still need to adhere to the reporting deadline (albeit without the agreement of its auditors). The Singapore Exchange Regulation (“**SGX RegCo**”) has also **announced** that a listed company is still required to release its December 2019 financial year end (“**FY Dec 2019**”) results announcement by 29 February 2020. However, in response to the practical difficulties in performing statutory audits of affected companies, the SGX RegCo may grant, to any listed company with a principal place of business in Mainland China or if it has business with significant operations in Mainland China, a time extension of up to two months (i.e. until 30 June 2020) to hold an annual general meeting to approve its FY Dec 2019 financial results if certain prescribed conditions are met (the annual report must be issued to shareholders at least 14 days before the date of its annual general meeting). An affected issuer contemplating or working on an issue of securities should discuss upfront with its auditors and the underwriters any consequential issues that this may have on the proposed issue of securities – e.g. on any issuing blackout period (whether imposed by regulations or as a matter of market practice), auditors’ comfort letter coverage, and offering circular disclosure of financials.



## Termination and *force majeure*

Market participants may also wish to consider the impact of any termination, *force majeure*, material adverse effect, and market disruption clauses in an underwriting agreement or loan agreement, and whether there is a risk that parties would elect to exercise any termination or walk-away rights - see “**Dispute resolution – Commercial contracts**” below).

In addition, to the extent that any back-to-back swap or hedging is being put in place in connection with the proposed issue of securities or loan, parties should also consider any termination and *force majeure* clauses in the related swap or hedging for potential mismatches.



## Interest payments, etc.

Market participants may wish to revisit clauses relating to funding requirements – e.g. definition of business days in the context of funding an interest payment or relevant grace period before a default scenario kicks in for non-payment, etc., to deal with any *ad hoc* or extension of public holidays in the relevant jurisdiction.



## Roadshows

Any logistical issues with roadshows should be considered and workarounds agreed upfront if possible – e.g. net roadshows and investor conference calls. In addition, underwriters should re-examine their existing deal roadshow guidelines given the increased interactions with potential investors through net roadshows and investor conference calls.



## Settlement and closing

Physical signing and closing are rare these days on issues of securities and loan financings. However, if one is contemplated, then market participants should consider the need for any potential workarounds – e.g. signing and closing by email or the use of e-signing platforms, etc. Issuers and borrowers may also consider appointing a power of attorney prior to a signing, to ensure availability of an authorised signatory in the relevant jurisdiction. In addition, the logistics for the delivery of originals of any transaction document should also be discussed and agreed upfront before signing and closing. To the extent there is any related swap or hedging as mentioned above, market participants should also consider any business day convention or definition to ensure that there is no mismatch on settlement dates.



## Post-issuance/financing obligations

It is common on issues of securities and loan financings to require issuers and borrowers to comply with certain post-settlement obligations – e.g. NDRC filing, registrations with the State Administration of Foreign Exchange in Mainland China, registration of security, delivery of financials, etc. Market participants should review such post-settlement obligations in light of recent developments – e.g. notice period requirements, definition of business days, closure of government registry offices, etc.



## Derivatives

The government in Mainland China announced on Monday 27 January 2020 (itself a public holiday) that the Lunar New Year holiday is extended to Sunday 2 February 2020 (inclusive).

This unscheduled holiday caused a potential impact on derivatives transactions where settlements and valuations were scheduled to be carried out on such date. In particular, because the announcement was made during the Lunar New Year holiday, parties had no time to adjust.

### *Currency and interest rate derivatives*

Where Beijing is a relevant financial centre for the purposes of the Modified Following Business Day Convention or the Preceding Business Day Convention, the application of that convention to a Payment Date falling on 31 January 2020 would strictly require the relevant payment to be made on a date that has already passed (i.e. 23 January 2020, being the previous Business Day). However, parties clearly are unable to act on that basis after the announcement was made on 27 January, and so it may be reasonable for the payment to be made on the first day on which payment can be made that falls on or after 31 January 2020.

Having said this, the approach for period end dates (i.e. the end of an accrual period) can be different and there is some debate in the market as to whether this should continue to follow Modified Following or move with the payment date.

### *Equity derivatives*

Market participants would have to consider whether the event was a Market Disruption Event, Settlement Disruption Event, or other similar event, for trades referencing equity listed on exchanges in Mainland China which had closed for a longer period than expected.

### *Commodity derivatives and others*

In general, market participants would have to consider whether market closure would affect payment dates and valuation dates, and whether it triggers a disruption event and what the applicable fall-back is.

### *Force majeure and other potential default events*

Market participants have been considering how the event has impacted their performance of obligations under documentation such as the International Swaps and Derivatives Association, Inc. (“ISDA”) or National Association of Financial Market Institutional Investors or other market standard documentation.

In order to assess the rights of the parties, typically two levels of inquiries are to be made:

- > first, whether such an event (or any consequent non-performance) would constitute an event of default or a termination event under the relevant master agreement; and
- > second, whether any particular disruption event which is already provided for in the transaction has been triggered, and if so, whether those provisions will take precedence over the termination provisions in the applicable master agreement.

### *Differences in market terms*

In considering the above, market participants should bear in mind any technical differences in terms for transactions which are done under different documentation. For example, it is possible for uncleared transactions and cleared transactions to have terms which differ, thereby giving rise to different consequences. Similarly, cleared transactions on different clearing services may have different terms. It will be important to consider the detailed provisions of each set of terms in order to analyse the issues above.

### *Market guidance*

ISDA has produced market guidance in the interest of mitigating market risks and the promotion of orderly and efficient valuation and settlement of positions by market participants – see their website at <https://www.isda.org/2020/01/30/market-closure-announcement-chinese-new-year/>. The China Foreign Exchange Trade System and the Shanghai Stock Exchange have also produced guidance.



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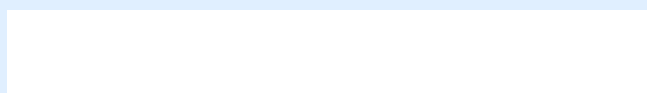
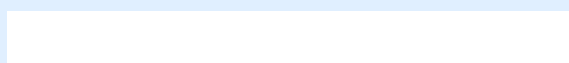


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# Dispute resolution





# Dispute resolution

Any event that leads to public disruption can be a fertile breeding ground for disputes to arise, whether through missed obligations, disruption to services and supply chains, or default arising from financial distress. We set out below a selection of topics that businesses should be alert to during these times.

## COMMERCIAL CONTRACTS

**Partial performance, non-performance, or disruptions:** the following contractual and common law principles may be relevant in circumstances where one party to a contract is seeking to avoid its performance obligations. Note that similar concepts may exist under agreements governed by civil law, e.g. principles around hardship.

- > **Frustration:** a party may wish to set aside a contract altogether arguing that it is frustrated in its entirety (e.g. in respect of time-is-of-the-essence contracts where performance is not considered feasible). The threshold for frustration to succeed is high, and the legal challenges are onerous.
- > **Force majeure:** a *force majeure* clause typically excuses one or both parties from performance of the contract in some way following the occurrence of certain events. The relevant events are often defined as acts, events, or circumstances beyond the reasonable control of the party concerned.

For both frustration and *force majeure*, a careful assessment of the facts, the contractual provisions, and the legal principles is required to form a view on whether such arguments might succeed.



### Contractual variations/waivers

Care must be taken when interacting with counterparties that are reporting difficulties performing their contractual obligations to ensure that you do not make promises or provide assurances that could later be argued to amount to a variation of contract or a waiver of rights. If a variation or waiver is intended, make sure to follow up in writing. The risk may be mitigated if the contract contains an anti-oral variation clause; however, the enforceability of such clauses is fact-sensitive, and the clause may be susceptible to equitable challenges such as estoppel. If you are the party struggling to perform, consider whether it is appropriate to negotiate a waiver or variation to the agreement before a default occurs.



### Avoidance of contractual obligations

While mechanisms exist to avoid performance of obligations under certain circumstances, the hurdles are high and the requirements are fact-specific; seek advice at an early stage.



### Preservation of rights

Take extra care in communications with counterparties seeking relief from performance of their obligations such that no variation or waiver is agreed or offered without being clear as to the intended scope and legal consequences.



## Notice requirements

Extra care should be given should you be required to give, or are expecting to receive, a notice under your contract. Many standard form contracts do not envisage a situation in which delay in giving notice may be excused. In light of the extension of the Lunar New Year holidays in Mainland China (and the possibility of additional, unexpected holidays), it is important to check whether the contractual notice period incorporates the concept of business days. If the contract requires physical delivery of the notice (rather than via email or fax) in Mainland China, be conscious of the travel and other restrictions in place, e.g. in relation to mailing delivery arrangements.



## Insurance contracts

Disputes might arise as to whether an insurance policy covers losses suffered during the NCV-Outbreak, such as by reason of border control or transport disruption. Some insurance policies exclude losses caused directly or indirectly by an epidemic, but a careful analysis is required to check whether and when an exclusionary clause is indeed triggered. Following the outbreak of SARS in 2003, certain disputes arose as to the interpretation of insurance policies, including e.g. when the disease became a notifiable event for the purpose of insurance coverage, or how one determines the relevant “loss period”.



## Practitioner tips

Make sure you pay close attention to any deadline or notice period under your contracts. If performance is an issue, review whether the contract contains a *force majeure* or frustration clause. Some contracts expressly seek to limit the application of such provisions. Make sure you are familiar with what discretions exist under your contracts and whether they apply to your situation.

## EXISTING LEGAL PROCEEDINGS

The Judiciary of the Hong Kong SAR announced that all hearings of the courts and tribunals originally scheduled from 3 to 16 February 2020 (the “**Adjourned Period**”) will be adjourned. The registries and offices of the courts and tribunals are also closed during the Adjourned Period except for urgent and essential court matters.



**Court hearings:** during the Adjourned Period, non-urgent hearings are to be re-scheduled to a date to be fixed. The courts remain available to handle urgent matters, including applications for *ex parte* injunctions.



**Filing deadlines:** if you have a specific filing date that falls within the Adjourned Period, such deadline will, in general, be postponed automatically to the first day the court re-opens. However, where the specific filing date is stipulated in a manner that gives a period of seven days or less, the Adjourned Period would be excluded from the computation of the filing deadline.



**Service of documents:** Hong Kong Post has published a **notice** on 1 February 2020 that mail delivery will only be provided on alternate days. Parties intending to serve by post should be aware of the practical implications, such as when the date of service should be deemed effective. If in doubt, parties are advised to clarify and agree on service deadlines with the relevant counterparties, and keep a written record of any agreement reached and/or seek an appropriate undertaking.



**Signing of witness statements and affidavits:** you should keep in close communications with your solicitors on whether you have any upcoming Court deadlines for filing of affirmations/affidavits and witness statements. Affirmations/affidavits are commonly sworn before a solicitor in Hong Kong SAR, and witness statements must contain the original signature page when filed with the court. If you foresee any difficulty for the maker of an affidavit/witness statement to do so, e.g. due to any travel or postal restrictions, it is key to inform your solicitors in a timely manner who can then make alternative arrangements to ensure your compliance with court deadlines.



**Limitation periods:** the NCV-Outbreak does not stop time from running under the statutory limitation periods. Make sure you have a record of any potential claims that you might wish to pursue, and for which time is about to run out. Should the last day of a limitation period fall on a day on which the court is closed, an originating process (e.g. a writ) issued on the first day of the court's resumption remains valid and would (ordinarily) not be time-barred.



**Arbitrations administered by the HKIAC:** unlike the courts and tribunals in Hong Kong SAR, the Hong Kong International Arbitration Centre (the “**HKIAC**”) has not announced any alternative operation arrangement during the NCV-Outbreak. If you have an upcoming hearing at the HKIAC, you should keep close contact with the HKIAC and assess whether any persons required to attend the hearing can travel to the hearing venue in light of the travel restrictions currently in place in Mainland China and Hong Kong SAR. Where it is not possible or unsafe to do so, the party should, at the first instance, liaise with the other party(ies) and the HKIAC to agree on an adjournment of the hearing or alternative arrangements, e.g. conducting the hearing via video link.



**Arbitrations administered by the CIETAC:** on 28 January 2020, the China International Economic and Trade Arbitration Commission (the “**CIETAC**”) has published an **emergency notice**, which is currently only available in Chinese, in respect of their operation arrangement. Amongst other things, it has announced that: (i) notices of arbitration can still be filed with the CIETAC, although e-filings are preferred; (ii) arbitration hearings (other than online hearings) that were scheduled for 15 February 2020 or before are postponed until further notice; and (iii) parties who are unable to file materials or attend hearings due to the NCV-Outbreak or travel restrictions, etc. should apply for a time extension.



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# Employment



# Employment

Employers generally owe a non-delegable duty to ensure that reasonable care is taken to safeguard the safety and health of employees at work, whether at common law (where applicable) and/or under statutes. Below is a high-level overview of the major relevant employers' duties that you should consider in light of the NCV-Outbreak.

## WORKPLACE HEALTH AND SAFETY OBLIGATIONS



### General obligation

You should take reasonably practical actions to provide a proper system of work and a safe workplace, and to ensure that implemented safety measures are enforced and followed by employees. Failure to comply with such obligations may expose you to a claim under tort or potential offences under workplace health and safety legislation.



### Workers' compensation in case of a workplace accident

If an employee contracts the NCV as an "accident" arising out of or in the course of employment, you should check whether you are required to report the accident to the local labour authority and whether you are liable under any applicable workers' compensation scheme. It is unclear whether an epidemic can ever be classified as a workplace "accident". However, if it is suspected that an employee contracted the NCV due to his/her employment (e.g. if an employee is infected after having contact with a colleague who contracted the virus), then it would be prudent for you to consider your potential contractual and/or statutory obligations and review your staff health insurance coverage arrangements.



### Notification requirements to authorities and isolation/quarantine arrangements

Local legislation and regulatory guidelines may impose notification obligations on you to inform the relevant health and/or immigration authorities of high-risk employees (e.g. those who have, within the 14-day incubation period, visited a high-risk country/region or been in close contact with anyone who visited such country/region) and/or report suspected or actual cases of infectious diseases in the workplace, and may impose isolation/quarantine obligations (e.g. in Hong Kong SAR, it will be an offence if a person obstructs the health authorities in their exercise of powers in respect of any gazetted infectious disease).



### Workplace health and safety

Particular care should be given to an employer's usual obligations to ensure workplace health and safety in the current environment; consider statutory reporting and record-keeping obligations in the event an employee becomes sick, but attention should be given to ensure that data privacy obligations are complied with.



### Remote working

Issues related to work visas, local tax/permanent establishment, licensing, and others arise where employees are working from a location other than their usual workplace; care should be given to how such arrangements interact with employment benefits.

## EMPLOYMENT LAW AND DISCRIMINATORY RISKS



### **Review employee management policies**

You should review and assess what changes may be necessary or appropriate for your HR policies such as absenteeism, leave, flexible work, and overseas travel.



### **Work from home**

In line with the employer general duties highlighted above, you should consider whether to request high-risk employees to work from home to comply with your duty to provide a safe working environment. As the situation evolves, this may become a legal requirement from local authorities and this should be monitored.



### **Remote-working and immigration considerations**

When you consider a remote-working request from an employee to work from an overseas location, the potential tax or permanent establishment implications as well as work visa requirements and licensing (for those in a regulated profession/industry) should be taken into account. You may also need to check that employee emergency contact numbers are up-to-date in your HR records.



### **Suspension from employment/leave of absence**

Your power to suspend an employee without pay or to request employees to take no-pay leave may be limited (e.g. it is unlikely to be permissible in Hong Kong SAR or Singapore). Doing so without the employees' express consent may lead to risks of claims. Sick pay considerations (whether contractual or statutory) should be borne in mind depending on the circumstances of your employee's absence from work.



## Discriminatory risks

If you terminate, suspend, or treat an employee less favourably due to certain protected characteristics (e.g. suspending an employee without pay because the employee has a family member who has contracted the NCV), this may be in breach of applicable anti-discrimination legislation. While there may be available defences for discriminatory actions to protect public health in case of an infectious disease (e.g. in Hong Kong SAR, under the Disability Discrimination Ordinance), such defences would likely have their limits (e.g. a decision to terminate the employment of an employee who comes from a city with widespread NCV-Outbreak would unlikely be justifiable).

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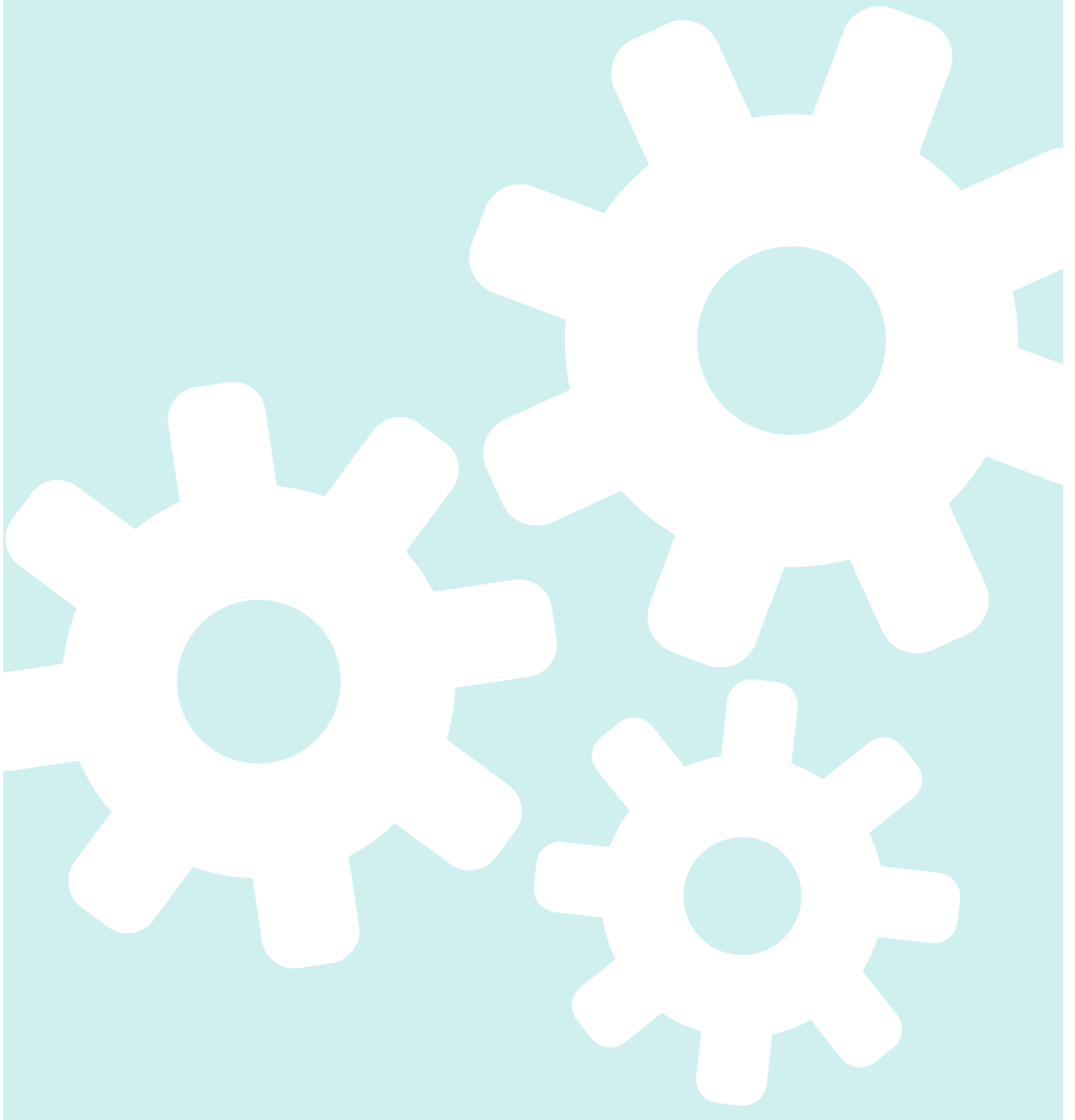
## Record-keeping

While you are obliged to keep proper sick leave records, such records should only be accessed by employees on a need-to-know basis and particular care should be taken to comply with data privacy obligations given the sensitive nature of health-related data. You should also avoid disclosing information in a way that would identify particular employees in any internal or external communications (i.e. which makes such information “personal data”), unless there is a legal basis or requirement to do so (e.g. the employees’ consent or for legal compliance reasons).





## Financial regulatory



# Financial regulatory

Serious communicable diseases such as the NCV may lead to potential disruption to financial institutions' operations as a result of travel restrictions, quarantine measures and/or staff members' infection. The SFC and the Hong Kong Monetary Authority (the "HKMA") have previously issued guidance in relation to precautions that should be taken in relation to outbreaks of serious communicable diseases, which focuses on business continuity planning ("BCP"). Effective BCP appropriate to the scale of business and contingency measures should be in place to ensure that the operation of intermediaries is not affected and to minimise potential damage to their clients. Below we set out a list of topics that regulatory/compliance teams of licensed corporations, registered institutions, and authorised institutions ("AI") should be alert to during these times.

This summary focuses on Hong Kong SAR regulatory issues, but similar issues might arise in relation to regulated businesses in other jurisdictions as well.



## Business continuity planning

Regulators have provided clear guidance on their expectations for regulated businesses; close attention to these requirements and the involvement of senior management is critical.



## DELAYS TO "BUSINESS AS USUAL"

The SFC has issued a [press release](#) on 5 February 2020 acknowledging that there may be delays to "business as usual" operations for both the SFC and the licensed corporations and applicants.

While the press release states that the SFC expects generally that all reasonable efforts should be taken to maintain "business as usual" in relation to licensed corporations' regulatory obligations and all regulatory filing, reporting, and other deadlines, if delays are expected they should be communicated promptly to the usual contact points at the SFC.

The SFC notes that there may be delays in response times in relation to, amongst others, licensing applications, product applications, and the public complaints and enquiry service.

Similarly, the HKMA has [noted](#) that AIs may encounter operational difficulties in meeting statutory deadlines for the filing of annual accounts and related documents due to the impact of the NCV-Outbreak; the HKMA has announced that it is open to considering extensions on a case-by-case basis, but AIs should apply in writing as soon as practicable. The HKMA is similarly encouraging AIs to discuss with it as soon as possible should they anticipate any difficulties in making prescribed disclosures under the Banking (Disclosure) Rules on time.

## Notification and record keeping

There are strict requirements regarding notification of certain events, the keeping of records, and the conduct of businesses from an approved premise; given the "work from home" and remote working practices in place, care should be taken to comply with these obligations.

## TREATING CUSTOMERS FAIRLY

In circumstances where their client base may be experiencing periods of difficulty as a result of the impact of the NCV-Outbreak, intermediaries should be mindful of their obligations to treat customers fairly.

The HKMA has **specifically asked** AIs to adopt a sympathetic stance in dealing with customers facing financial stress due to the NCV-Outbreak by, for example, considering requests from borrowers for temporary relief arrangements favourably. The HKMA has welcomed the temporary relief measures deployed by some AIs to help their customers during this time (for example, allowing a principal moratorium for residential and commercial mortgages, reducing fees for credit card borrowing and restructuring of repayment schedules for corporate loans), and has encouraged other AIs to consider taking similar action.

## NOTIFICATION OBLIGATIONS

You are advised to consider whether any regulatory notification requirement arises as a result of any impact on or changes to your operation or as a result of the NCV-Outbreak itself. For example, according to previous SFC circulars issued during the time of SARS and Human Swine Influenza, intermediaries should notify their licensing relationship manager immediately if any staff members are either suspected of having or have been diagnosed as having a serious communicable disease, and should keep the SFC informed of any subsequent developments.

Further, intermediaries should consider whether any changes resulting from the NCV-Outbreak will trigger notification requirements to the SFC and/or the HKMA. For example, under the Securities and Futures (Licensing and Registration) (Information) Rules, certain changes must be notified within seven business days. In the context of the current situation, intermediaries might wish to consider whether notifications are needed as a result of significant changes in the nature of the business carried out, or as a result of significant changes in their business plan relating to internal

controls, organisational structure, contingency plans, and related matters. Similarly, the HKMA expects notification in advance of any substantive changes in AI's activities, structure, and overall condition, or as soon as they become aware of any material adverse developments (as noted in the HKMA's **22 October 2013 circular**).

In addition, you should ensure that your emergency contact person details are up to date with the SFC and HKMA. Licensed corporations should promptly notify the SFC in writing within seven business days if there have been changes in their emergency contact person. For registered institutions, they are required to notify both the SFC and the HKMA in writing within seven business days upon any changes to their emergency contacts.

## REMOTE WORKING ARRANGEMENTS

If employees who are usually resident in Hong Kong SAR are working remotely overseas, firms should also consider whether their activities overseas give rise to any local licensing and work visa issues in these jurisdictions. In addition, firms will need to be mindful of taxation issues which may arise as a result of employees working from overseas, such as accidentally establishing an overseas presence for tax purposes, as well as the potential for triggering an individual income tax liability.

## RECORD-KEEPING

Where alternative working arrangements are in place, such as remote working in Hong Kong SAR or overseas, or alternative/back-up office sites, licensed corporations should be mindful of their obligations to ensure that regulatory records are kept at their SFC-approved premises in Hong Kong SAR. Where employees are not working in approved premises, they should be reminded to produce and save documents only in accordance with secure procedures set out by the firm to ensure compliance with relevant statutory and regulatory requirements. Particular care should be taken around the preservation and security of any hard copy material.

## BCP



### BCP policies and procedures

Ensure BCPs are adequate to prevent material disruption to your operation in the event of travel restrictions, quarantine measures, and/or staff infection. The areas that the BCP should address include:

- > *Oversight and monitoring:*
  - > a crisis management structure for information sharing, corporate decision making, and revising arrangements in accordance with changing circumstances.
- > *Staff arrangement:*
  - > establishing appropriate contingency measures with a view to ensuring that at least bare minimum services can continue to be provided to clients in a worst-case scenario, such as:
    - making split team arrangements;
    - establishing an alternative site office;
    - enabling staff to work from home;
  - > assessing the impact of high absentee and loss of key staff and setting up back-up arrangement for all key staff;
  - > put in place a clear emergency contact arrangement to cover all key staff members, and ensuring that contact details are kept up-to-date;
  - > following the guidance issued by the authorities in maintaining a clean and healthy working environment (for example, in Hong Kong SAR, the guidance issued by the Department of Health); and
  - > encouraging staff to maintain good personal hygiene.
- > *Service providers or other third parties:*
  - > arranging with counterparts or exchanges on contingency closing-out of positions, clearing, and settlement matters;
  - > for operations outsourced to third parties, ensuring that the service providers have appropriate contingency plans in place; and
  - > checking that your critical suppliers and service providers are equally prepared.
- > *Client services:*
  - > encouraging clients to use telephone or online facilities in place of physical visits;
  - > ensuring reliability of telephone recording systems and sufficiency of back-up discs/tapes, etc.; and
  - > establishing client notification procedures upon staff infection and advising clients on the relevant contingency measures.
- > *Infrastructure capacity:*
  - > reviewing system capacity to cater for potential upsurge in transaction volume in the event of clients massively switching to using electronic channels;
  - > ensuring adequate back-up facilities, mobile computing/communication devices and network bandwidth;
  - > arranging for rehearsal and testing of contingency plans, systems, and equipment; and
  - > implementing back-up plans of your critical business and transaction data and measures to ensure the back-up data can be available for use in your back-up computer system within a reasonable timeframe.
- > *Other issues:*
  - > assessing the likelihood of any potential claims from clients if the firm cannot provide the same level of service to them and assessing the adequacy of existing insurance coverage.



### Senior member of staff as a person-in-charge of BCP

Intermediaries should ensure that there is a senior member of staff in charge of the planning and implementation of BCP, as well as a clear command structure to facilitate decision-making and communication to all levels of the business.

## Als

In addition to the above, Als should refer to [Supervisory Policy Manual TM-G-2](#) which covers BCP, as well as other guidance<sup>1</sup> from the HKMA issued in earlier years in response to SARS and Human Swine Influenza which remains relevant. In particular, Als may need to consider closing certain branches, possibly at short notice, due to healthcare concerns (e.g. where there is suspected infection by staff working at a branch), and ensure that there are clear communications on this with customers. Als should also address the possible impact such closures may have on customers.

## SENIOR MANAGEMENT

Senior management of intermediaries (such as directors, responsible/executive officers, managers-in-charge, s.72B managers, etc.) need to be kept informed of developments that could affect the operations of the business as a result of the disruption which serious communicable diseases can cause, in particular, in relation to the area of the business they are responsible for. Effective communication lines are therefore vital, including steps such as:

- > ensuring that senior management is receiving frequent updates on the progress of the disease, government measures, travel restrictions, etc; and
- > the person in charge of BCP ensuring that information on BCP arrangements and implementation are circulated to senior management (and the firm's staff).

<sup>1</sup> See the relevant HKMA's circulars at  
[https://www.hkma.gov.hk/eng/regulatory-resources/regulatory-guides/circulars/2003/04/circu\\_20030402-1/](https://www.hkma.gov.hk/eng/regulatory-resources/regulatory-guides/circulars/2003/04/circu_20030402-1/),  
[https://www.hkma.gov.hk/eng/regulatory-resources/regulatory-guides/circulars/2003/10/circu\\_20031008-1/](https://www.hkma.gov.hk/eng/regulatory-resources/regulatory-guides/circulars/2003/10/circu_20031008-1/),  
[https://www.hkma.gov.hk/eng/regulatory-resources/regulatory-guides/circulars/2005/11/circu\\_20051124-1/#2](https://www.hkma.gov.hk/eng/regulatory-resources/regulatory-guides/circulars/2005/11/circu_20051124-1/#2)

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