With the number of infections of the novel coronavirus escalating, both Mainland China and Hong Kong continue to tighten their quarantine measures and restrictions on the movement of populations between cities, provinces and across the border.

Hong Kong construction projects will or have already experienced disruptions to the works on various levels and it is anticipated that there will be delays in many projects.

**Supply of Construction Materials**

Generally speaking, all factories in China are closed originally until 3 February 2020 due to the Chinese New Year but the closure was extended due to the epidemic until 9 February 2020. Most of the factory workers are from provinces in the Northern part of China (including Hubei which capital, Wuhan, is suspected to be the origin of coronavirus) and even if they returned to work, they are subject to either mandatory or voluntary quarantine period of 14 days. Therefore, there is effectively no production in manufacturing businesses in the whole of February 2020.

As a measure to deter the spread of the virus, the Guangdong Provincial Government has asked enterprises in the province, including most quarries in the Pearl River Delta to temporarily suspend their operations. This adversely affects the supply of aggregates resulting in the knock-on effects on the production of concrete products (such as: concrete drainage pipes) and pre-cast concrete products (such as: precast concrete external facades) for the Hong Kong projects.

This is likely to cause disruptions in the supply of other key construction materials and manufacture supplies from Mainland China. A potential shortage of materials may continue until the situation improves.

**Labour and Manpower**

The Hong Kong Government has taken measures to close off certain borders to Mainland China since the Chinese New Year holidays.

In light of the quarantine arrangements announced by the Hong Kong Government and policies put in place by employers in Hong Kong to prevent the spread of the virus, many employees are being confined to work from home and those who have travelled to Mainland China or other overseas countries may not have returned to Hong Kong after the Chinese New Year holidays.

On 5 February 2020, the Hong Kong Government further announced a new quarantine arrangement – effective from midnight, 8 February 2020, whereby all persons entering Hong Kong from Mainland China will have to undergo mandatory quarantine for 14 days. This new mandatory arrangement is also applicable to any person entering from other countries if they have visited Mainland China within the past 14 days. A vast majority of construction workers in Hong Kong are immigrants from Mainland and they may be caught by this mandatory quarantine regime when they return to Hong Kong after visiting their home villages during Chinese New Year.

In response to the epidemic, contractors should put in place measures to enhance health protection at their workplace and construction sites.

It is anticipated that many projects will be or have been temporarily suspended due to present public health concerns, quarantine and work arrangements in the near future.
Buildings Department and Applications for Occupation Permit

In the press release made by the Buildings Department on 8 February 2020, it is stated that “The Building Information Centre and all receipt counters, dispatch counters, general enquiry counters and meeting rooms of the BD will not be open to the public until further notice.”

It is noteworthy that the Buildings Department is not accepting applications for occupation permits during this period and this would have a great impact on the developers and the financial consequences can be serious. The reason behind is probably due to the fact that under the Buildings Ordinance, if the Building Authority does not object to an application within 14 days, an approval for the occupation permit is deemed to be given.

Contractual Significance

In light of the potential impact of shortage of materials and labour mentioned above, employers and contractors are advised to monitor their supplies of materials and consider re-scheduling some of the works with a view to mitigating the impact.

In view of possible delays in projects, employers and contractors should review their contracts and take corresponding measures to manage the delay and the financial consequences likely caused by such delay.

(a) Force Majeure

Given the unprecedented quarantines and massive disruptions to transportation and supply chains, employers and contractors should start reviewing their existing contractual arrangements to determine the legal implications of the outbreak and whether the present situation with the coronavirus would qualify as an event of force majeure in the contract such that a party may not be liable for failing to perform its obligations under the contract.

Translated from the French, the term “force majeure” usually means an external event that is “unforeseeable and unavoidable, and not the result of the actions of the parties” making it impossible for a party to honour a contract. A party to a contract who cannot perform their contractual obligations for extraordinary reasons may declare force majeure.

(b) Extension of Time and Additional Payment

Contractors should notify the Engineer/Architect for the contract and the project managers on the likelihood of any delay to progress of the works and proactively liaise for extension of time for the works where appropriate.

It is important for the contractors seeking extension of time to demonstrate how the present situation with the coronavirus has affected the progress of work rather than merely providing the outbreak as a basis for extension of time.

The coronavirus outbreak may constitute a special circumstance under the contract giving rise to extension of time.

Depending on the form of contract that is used, the following are examples of clauses that parties should pay attention to.

2005 Private Form

If the 2005 Private Form is adopted, employers and contractors should pay attention to the following clauses:-

- Clause 25 (extension of time);
- Clause 26 (delay recovery measures);
- Clause 27 (direct loss and/or expenses); and
- Clause 28 (notice of claims for additional payment).

It should be noted that under Clause 25, the contractor will need to submit its first notice of delay within 28 days of the commencement of an event likely to cause delay. In the notice, the contractual listed event(s) under Clause 25.1 should be stated.

The coronavirus outbreak does not appear to be a ground giving rise to a claim for additional payment under the 2005 Private Form. Nevertheless, for the sake of completeness, if the contractor intends to claim any additional payment under the contract, under Clause 28.1, it will need to give a first notice of claim with details including the contractual provisions upon which the claim is based within 28 days of it becoming apparent to the contractor of the relevant event.

Under Clause 28.2, the contractor is required to submit particulars of the claim within 60 days thereafter. If the event has a continuing effect, the contractor is required to submit interim particulars at intervals not exceeding 28 days.
It should be noted that pursuant to Clause 28.3, the compliance with Clauses 28.1 and 28.2 is a condition precedent to a claim for additional payment.

1999 Government Form

If the 1999 Government Form is used, employers and contractors are advised to check the following provisions:

- Clause 50 (extension of time for completion); and
- Clause 64 (notices of claim).

Under Clause 50(1)(a), the contractor is required to give a notice within 28 days after the cause of any delay has arisen and set out the cause and probable extent of the delay.

The coronavirus outbreak does not seem to be a ground giving rise to a claim for additional payment under the 1999 Government Form. Nevertheless, for the sake of completeness, if the contractor intends to claim any additional payment under the contract, it will need to give a first notice of claim with details including the contractual provisions upon which the claim is based within 28 days after the happening of the events under Clause 64(2). Under Clause 64(4), the contractor also needs to submit particulars of the claim as soon as is reasonable after giving the notice, and thereafter further particulars at such intervals as the Architect may reasonably require.

Giving a notice under Clause 64(2) is a condition precedent to a claim for additional payment under Clause 64(5). If a contractor fails to submit the particulars, under Clause 64(6), the Architect may consider such claim only to the extent that the Architect is able on the information made available.

NEC contracts

Under Clause 60.1(19) of NEC4, coronavirus may be construed as a compensation event for which the Contractor will be compensated on both time and cost.

"60.1(19) An event which

- stops the Contractor completing the whole of the works or
- stops the Contractor completing the whole of the works by the date for planned Completion shown on the Accepted Programme,

and which

- neither Party could prevent,
- an experienced contractor would have judged at the Contract Date to have such a small chance of occurring that it would have been unreasonable to have allowed for it and
- is not one of the other compensation events stated in the contract."

For Hong Kong Government NEC3 contracts, this provision was amended to the effect that the Contractor may be compensated on time only but not on cost.

Pursuant to Clause 61.3 of NEC4, the Contractor is required to notify the Project Manager of the compensation event due to coronavirus and if he fails to do so within 8 weeks, it will be time barred unless the Project Manager or the Supervisor gives an instruction or notification to that effect.

FIDIC contracts

For FIDIC contracts (such as: New Yellow Book (Plant And Design-Build Contract)(1st Edition)(1999) and Silver Book (EPC/Turnkey Projects)(1st Edition)(1999)), the Contractor should notify the Engineer under Clause 19.2 that it is prevented from performing its obligations under the Contract by an event which satisfies the definition of Force Majeure under Clause 19.1. The notice shall be given within 14 days after the Contractor became aware, or should have become aware, of the coronavirus.

Under FIDIC contracts, the Contractor will be compensated on time but not on cost pursuant to Clause 19.2.
Domestic Sub-Contracts – CIC and HKCA Standard Forms

For CIC’s Standard Form of Domestic Sub-contract (Version 1 – February 2016), force majeure is an Excusable Event (for which the Contractor will be compensated on time) but not a Compensable Event (i.e. Contractor will not be compensated on cost) pursuant to item 34 of the Sub-Contract Particulars.

For Hong Kong sub-contracts, where the HKCA Form is used, it is worth noting Clauses 6 (particularly Clause 6.2(a) – any circumstance or occurrence (other than a breach of the Sub-Contract by the Sub-Contractor) entitling the Contractor to an extension of time under the Main Contract) and 10 (notices and claims).

<table>
<thead>
<tr>
<th>Form of contract</th>
<th>2005 Private Form</th>
<th>1999 Government Form</th>
<th>NEC4</th>
<th>HK Govt NEC3</th>
<th>FIDIC</th>
<th>CIC Standard Form of Domestic Sub-contract</th>
<th>HKCA Standard Form of Domestic Sub-contract</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Contractual Grounds</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cl. 25.1</td>
<td>Cl. 50(1)</td>
<td>Cl. 60.1(19)</td>
<td>Cl. 60.1(19)</td>
<td>Cl. 19.1</td>
<td>Item 34 of Sub-Contract Particulars</td>
<td>Cl. 6.2</td>
<td>Cl. 10</td>
</tr>
<tr>
<td><strong>Notice</strong></td>
<td>Cl. 25.1 &amp; 25.2 (28 days)</td>
<td>Cl. 50(1) (28 days)</td>
<td>Cl. 61.3 (8 weeks)</td>
<td>Cl. 61.3 (8 weeks)</td>
<td>Cl. 19.2 (14 days)</td>
<td>Cl. 4.3(a) (14 days)</td>
<td>Cl. 6.2 (21 days)</td>
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**Last but not Least**

Hong Kong is undergoing a particularly difficult period and those in the construction industry has suffered a great deal. However, it is possible to reduce the disruptions and impact on those in the business through proper management and planning. It is necessary for all in the construction industry to work together and strengthen mutual assistance and support during these difficult times.

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