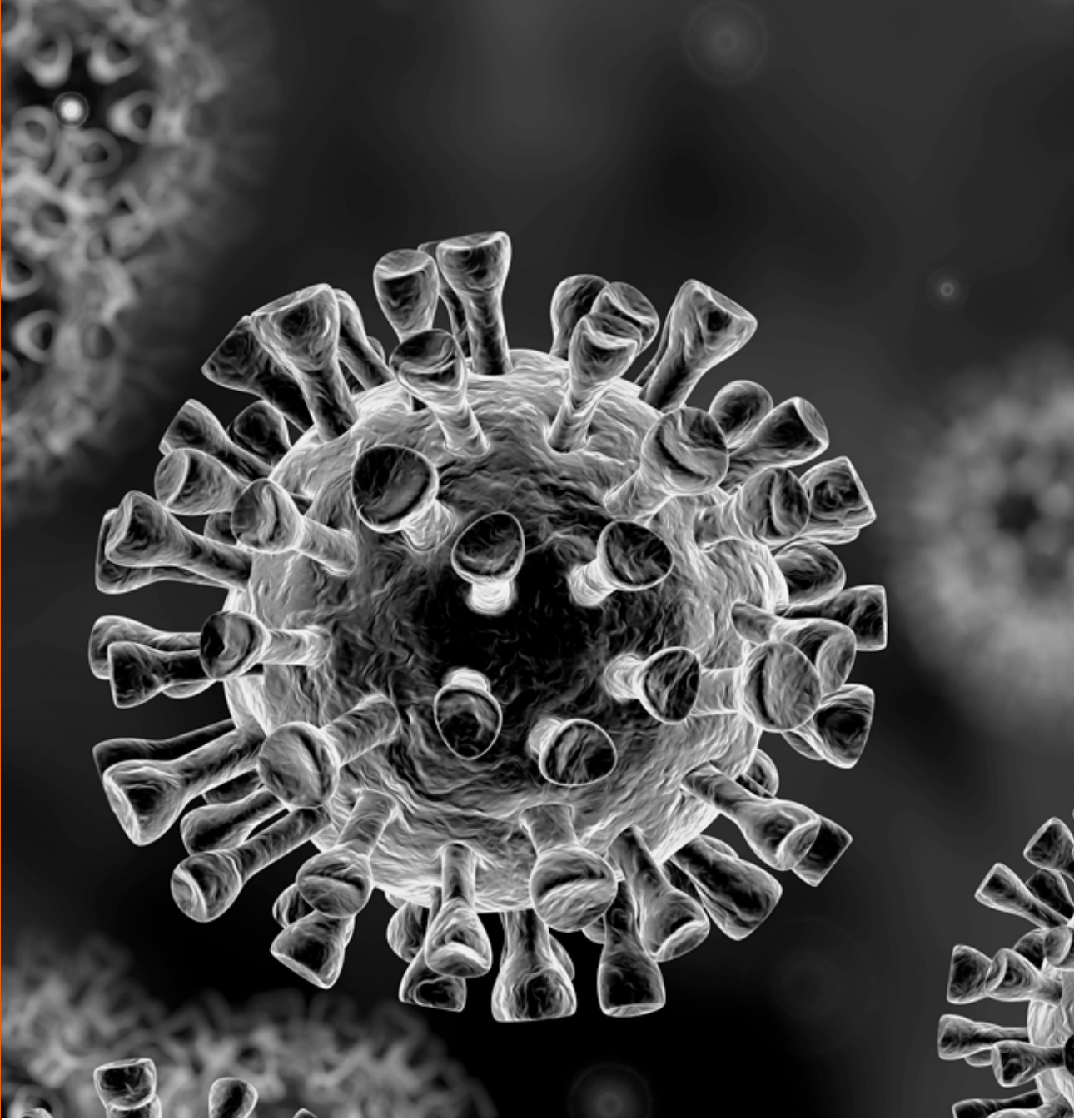


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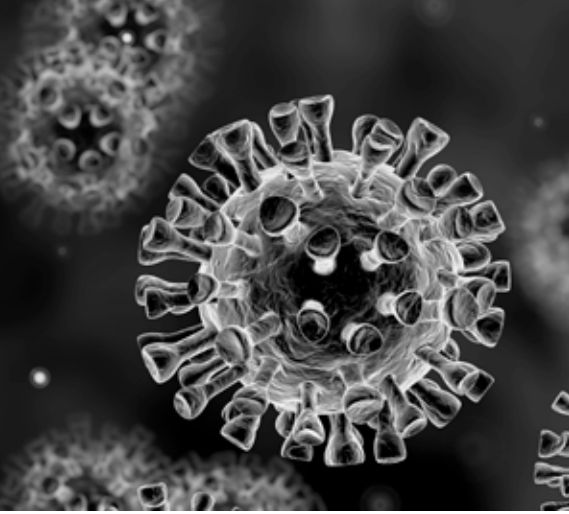


CONSTRUCTION COVID-19 BULLETIN
APRIL 2020 (HONG KONG VERSION)



**A COVID-19 Legal Toolkit for the
Construction Industry**

In the first of several bulletins, HFW advises how the construction industry can safely navigate the unprecedented challenges of the COVID-19 pandemic.



COVID-19 CONSTRUCTION TOOLKIT

The COVID-19 pandemic is one of the most significant events of our time. Amidst the constant flood of new developments and the uncertainty these bring, businesses can easily feel overwhelmed and threatened. The construction industry is no different. The good news is that there are clear actions available to manage – and minimise – the impact of COVID-19 on your business.

Despite the challenges posed by COVID-19, HFW is fully mobilised and ready to advise on all contractual issues arising from the pandemic to minimise its impact. Whether you need advice for ongoing projects or on the terms of future contracts – HFW has the expertise and resources to help your business safely navigate the unprecedented challenges of the COVID-19 pandemic.



DELAYS & DISRUPTION TO ONGOING PROJECTS

Contractors and employers mid-way through a project face substantial delays, disruption and uncertainty.

Force Majeure: The COVID-19 pandemic might qualify as a 'Force Majeure' event under a construction contract. Some standard-form contracts allow contractors to claim extensions of time – but not additional monies, whereas an unamended NEC standard-form contract permits the recovery of both time and losses.

Change in law: The governmental response to COVID-19 may amount to a Change in Laws, in which case contractors can claim an extension of time and also additional monies.

Cash flow: COVID-19 is likely to lead to an increase in material and labour costs for current projects, in addition to costs caused by delay, disruption and instructions from the Employer. These costs can be sometimes recovered through mechanisms in, for example, the NEC form contract.

Termination: If COVID-19 causes long-term suspensions to Projects, parties may become entitled to terminate.

Frustration: In extreme cases the common law doctrine of frustration may apply, allowing parties to terminate and recover amounts paid up to the point when COVID-19 made performance impossible.



NEGOTIATING FUTURE CONTRACTS

COVID-19 raises potential fundamental issues as to the allocation of risk under construction contracts.

Careful and precise drafting is needed to meet this new challenge.

'Corona Clauses': contracts for future projects will need to consider how COVID-19 affects the allocation of risk between the parties. Contracts must address the pandemic's effect on labour and material shortages, site and yard closures, and changes in law as governments legislate to deal with the crisis.

Renegotiating contracts: for ongoing projects there may be a commercial imperative for the parties to negotiate an amendment to the contract or a side agreement to deal with the changed working environment and allow a halt to work on agreed terms rather than operate normal contract procedures.



IMPACT ON TRIBUNALS AND COURTS

Courts and Tribunals have adjusted by accepting online filings, postponing hearings or holding remote hearings.

Arbitration: bodies such as the HKIAC, ICC, LCIA and SIAC are moving to online dispute resolution and are accepting submissions and new referrals by email. However, the ICC has suspended or postponed all pending hearings at its Hearing Centre in Paris until April 2020.

Extended timetables: Disputes that are currently in arbitration may run on extended timetables due to the difficulty of consulting with lawyers, counsel, experts and witnesses.

Court Hearings and Filings: The Judiciary has announced that from 3 April 2020 onwards, it will start the use of videoconferencing facilities for remote hearings for suitable civil cases of the High Court.

Winding-up Orders: Issuance of winding up orders may be delayed – seek further guidance where necessary.

THE CURRENT LANDSCAPE AND BULLETINS TO COME

As the situation develops over the coming months, we will be providing regular bulletins on these key issues and the impact of COVID-19 on the Construction Industry in general.

At a glance: COVID-19 and the Construction Industry in Hong Kong

In Hong Kong, the impact of the coronavirus has been felt in the construction sector since at least 8 February 2020, when the Government first took steps to restrict the movement of goods and people across the border with the Mainland. This led to delays in obtaining necessary labour and materials and, in some instances, increased supply costs.

The knock-on effect of those early delays continues to be felt. However, the impact of coronavirus has been broader and more significant in recent weeks with the outbreak having become global. Many Government offices are closed, or partially so, and contractors have reported delays obtaining licences and permissions. This is in addition to inevitable disruption caused by subcontractors, suppliers and consultants adopting flexible working arrangements. In addition, whilst recent regulations in Hong Kong enforcing social distancing do not apply to offices or building sites, there is a prospect for further regulations which may have a greater impact.

Contractors are also concerned about their 'pipelines' in an environment where there have been long delays in obtaining approval for budgets for new projects. Delays with budget approvals were reported long before the COVID-19 outbreak in the wake of pro-democracy protests, which have rocked the city since June 2019. This is one of a number of consequences for the construction industry of these two seismic issues being experienced at around the same time.

Future bulletins

COVID-19 will substantially impact the construction industry. To help clients overcome these challenges, HFW will provide regular bulletins with advice on:

- **Delay & Disruption:** COVID-19 will inevitably cause extensive

delay and disruption to ongoing projects. We will advise on the key issues, such as: (1) COVID-19 as a grounds for extension of time and additional costs, and the key issue of foreseeability; (2) whether the COVID-19 response amounts to a change in laws under particular contracts; (3) the evidence required to link delays and disruption to the pandemic; (4) recovering additional material and labour costs; (5) termination and frustration of contracts, including Force Majeure.

- **Future Contracts:** COVID-19 fundamentally challenges the way current standard-form contracts allocate risk between the contractor and employer. We will advise on how these contracts can be amended to include 'Corona Clauses' to deal with disrupted supply chains, labour and material shortages, insurances and site closures.
- **Live disputes and claims:** Formal disputes arising from construction projects can run for months or even years. COVID-19 is already extending the timetables of ongoing arbitrations and court proceedings. Our bulletins will provide practical updates concerning the running of disputes in the new environment. In particular, extended timetables, online submissions and hearings, and good practice for remote consulting with experts and witnesses.
- **Contract management health checks:** Good contract management and record keeping is vital in the best of times but crucial if contractors are to run viable claims arising from COVID-19. We will give some basic and easy-to-follow tips for keeping e-records, submitting electronic notices and an overview on when COVID-19 related notices should be given with reference to standard form construction contracts, including NEC.

Pandemic notwithstanding, it's very much 'business as usual' at HFW and we are working with clients across our international network to help them minimise the impact of COVID-19 on their businesses – and to prepare for what's next. We pride ourselves on actively maintaining

contact with our clients and providing advice tailored to their needs. For any advice in relation to COVID-19, or construction advice in general, our team is ready to assist.



For further information or assistance, please do not hesitate to contact any of the contributors to this bulletin or your usual contact at HFW.



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