

# Why Use Hong Kong Law For Infrastructure Projects ?

**Paul Starr, Partner & Practice Leader DR/ HK Infrastructure/  
Co-head of International Arbitration | King & Wood Mallesons**



- **“Laws of England and Wales, LCIA Arbitration”**
- **“英格兰和威尔士法律，伦敦国际仲裁院仲裁”**
  
- **“New York Law, Singapore Arbitration”**
- **“纽约法律，新加坡仲裁”**

# No Matter Which Laws You Choose ...

**Political** 政治

**Natural disasters** 自然灾害

**Design** 设计

**Quantity** 数量

**Cost** 成本

**Operational profit** 运营利润

**Supervising officer's unforeseen** 监察人员未能预见的因素

**Contractor's third party engagement** 承包商的第三方参与

**Geotechnical** 岩土工程技术

**Definition of site / Site access** 场地定义 / 场地进入

**Contract documents / order of precedence** 合同文件 / 先后顺序

**Suspension / termination** 暂停 / 终止

**Change of law** 法律变更

**Inconsistency and ambiguity** 不一致及模糊不清

**Impossibility** 不可能

**Indemnities** 赔偿

**Limitation of liability** 责任的限度

**Liquidated damages** 算定损害赔偿金

**Permits and approvals** 许可及批准

**Materials & workmanship** 材料及做工

**Subcontractor performance or price** 承包商表现或价格

**IP** 知识产权

**Force majeure** 不可抗力

**Confidentiality** 保密

# But Hong Kong Law very capable of resolving risk problems if you have not drafted them out at tender: e.g. Design Risk 设计风险

- What comprises the Basic or Outline Design?
- 基本设计或大纲设计的组成部分?
- What is the approvals process?
- 审批流程如何?
- When to Order Plant and Materials?
- 何时订购机械设备及材料?
- Which Standards to use for that ordering?
- 订购时使用哪些标准?

# No Matter Which Laws You Choose

DRAFTING ...

~~LOI~~

~~意向书~~

~~MOU~~

~~谅解备忘录~~

# Drafting Problems

## Liquidated Damages 算定损害赔偿金

“If either Party breaches any of its warranties or undertakings ... it shall be liable to pay liquidated damages in the amount of USD250,000 per each case of breach ...”

“如果任何一方违反其任何保证或承诺.....其有责任就每一违约情形支付250,000美元的算定损害赔偿金...”

# No Matter Which Laws You Choose ...

## Records Records Records 记录记录记录

- Make a list of every record which the contract mandates 列出合同要求的每一项记录
- ... or which as a matter of good prudence should be kept 或作为良好的施工谨慎而应保持的每一项记录
- Financial records 财务记录
- Date stamp photographs 印有日期的照片
- Emails and email destruction policies 电子邮件及电子邮件的销毁政策
- WeChat 微信
- Personal site diary 个人场地日期
- Repetitive Minutes / Content not agreed 不断重复的会议记录 / 未达成一致的内容
- Hong Kong Court Case: Multimillion Dollar deal done by WeChat

# HK Law Advisable where HK Arbitration

Contracting with a Mainland party **Hong Kong**

与内地当事人订立合约 **香港**

If Claimant is a Mainland party **Hong Kong**

如果申请人是内地当事人 **香港**

Disputes not involving Mainland parties **Hong Kong**

争议不涉及内地当事人 **香港**

## Why ?

为什么？

- **Rule of Law and Judicial Independence: Ancillary relief; CFA**
- **Consistently ranked as one of the top arbitral seats in Asia Pacific and in the world**
- **Availability of third party funding for arbitrations**
- **Excellent track record of award enforcement**
- **Mutual arrangement for enforcement of arbitral awards between HK and PRC (MAEE)**
- **Supplemental Arrangement Concerning MEAA**
- **New interim measures arrangement between HK and China Mainland**

- 法治及司法独立：附属救济；CFA
- 一直被评为亚太地区及世界首选的仲裁地之一
- 可利用第三者资助仲裁
- 良好的裁决执行往绩
- 《关于内地与香港特别行政区相互执行仲裁裁决的安排》
- 《關於內地與香港特別行政區相互執行仲裁裁決的補充安排》
- 《关于内地与香港特别行政区法院就仲裁程序相互协助保全的安排》



WHY USE  
HONG KONG  
LAW



# Other reasons to use HK Law

Hong Kong's Common Law basis sits well with the commonly used forms of contract

FIDIC

Hong Kong Government Forms

RICS Forms: Royal Institution of Chartered Surveyors

Airport Authority

JCC Forms: The Joint Contracts Committee (JCC) which comprises HKIA, HKIS and HKICM

MTRC

NEC Forms: The New Engineering Contract (NEC):

- Option A: Priced w/ activity schedule
- Option B: Priced w/ BOQ
- Option C: Target contract w/ activity schedule
- Option D: Target w/ BOQ
- Option E: Cost reimbursable
- Option F: Management contract

# Why Use HK Law ?

International Consultants

ARCHITECTS

ENGINEERS

LAWYERS

ARBITRATOR / MEDIATORS

INDEPENDENT  
EXPERTS

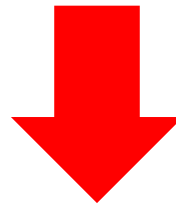
OTHERS CONSULTANCIES e.g.  
TRAFFIC ANALYSIS AND REVENUE  
PROJECTIONS

# Key Aspects of HK Construction Law: Defects



# Key Aspects of HK Construction Law: Defects

Cause of action	Limitation Period under the Limitation Ordinance (Cap. 347)	When does cause of action accrue ?
Breach of simple contract	6 years	From date of breach
Breach of deed	12 years	From date of breach



Defects caused by negligent building designs may not surface until years after construction works have been completed

**When does cause of action arise in latent defects case ?**

# Key Aspects of HK Construction Law: Defects

Time limit for negligence actions where facts were relevant to cause of action are not known at date of accrual is the later of:

- 6 years from the date on which the cause of action accrued; or
- 3 years from the earliest date on which the claimant knew, or reasonably ought to have known, material facts necessary to bring an action right to bring such action.

*(s.31 of Limitation Ordinance (Cap. 347))*

# Key Aspects of HK Construction Law: Defects

**Overall limit:**

**15 years from the (last) date on which there occurred any act or omission:**

- (a) which is alleged to constitute negligence; and**
- (a) to which the damage in respect of which damages are claimed is alleged to be attributable (in whole or in part).**

***(s.32 of Limitation Ordinance (Cap. 347))***

# *Bank of East Asia Ltd v Tsien Wui Marble Factory Ltd* *[2000] 1 HKLRD 268, CFA*

Bank of East Asia Ltd



Tsien Wui  
(nominated  
Subcontractor)

Palmer and  
Turner  
(Architect)

- Building defect claim on defective cladding works, allegedly caused by negligent designs by the nominated Subcontractor or Architect.
- Claim: HK\$38 million, being costs to rectify the defects.

# Bank of East Asia Ltd v Tsien Wui Marble Factory Ltd [2000] 1 HKLRD 268, CFA

Court	View adopted in determining <u>when</u> the cause of action arises	Decision
Court of First Instance (CFI)	When defects were discovered or became discoverable with reasonable diligence by the owner.	<ul style="list-style-type: none"> <li>The bank was not too late to sue the architect</li> <li>Since the independent sub-contractor of Tsien Wui did the design work, Tsien Wui was not liable for this design.</li> </ul>
Court of Appeal (CA)	When the building was practically completed.	<ul style="list-style-type: none"> <li>Affirmed the decision below regarding Tsien Wui.</li> <li>Held that the bank was too late to sue the architect.</li> </ul>
Court of Final Appeal (CFA)	<p>When physical damage in a real and substantial sense first occurred (<u>not</u> when discovered or should have been discovered).</p> <p>In case of latent defects, cause of action arises when the defects becomes patent.</p>	<ul style="list-style-type: none"> <li>The bank was too late to sue either the architect or Tsien Wui.</li> </ul>



# *Bank of East Asia Ltd v Tsien Wui Marble Factory Ltd* *[2000] 1 HKLRD 268, CFA*

**Held:**

***“The cause of action accrued in 1985 when physical damage in a real and substantial sense first occurred, not when the damage was discovered or should, with reasonable diligence have been discovered or when the building was completed or paid for.”***

**(Per Litton PJ)**

# *Bank of East Asia Ltd v Tsien Wui Marble Factory Ltd* *[2000] 1 HKLRD 268, CFA*

**Held:**

***“In cases of latent building defects, the building owner’s cause of action accrued when the latent defects became patent. It was not a question of postponing the accrual of the cause of action until the loss was discovered or discoverable.”***

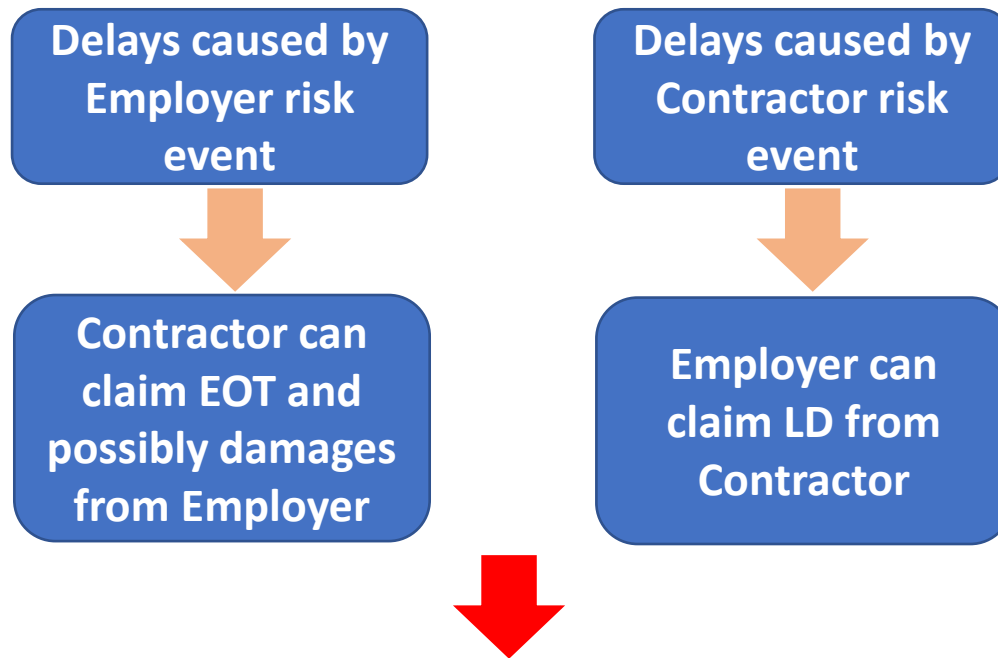
**(Per Bokhary PJ and Lord Nicholls of Birkenhead NPJ)**

# Key Aspects of HK Construction Law: Extension of Time (EOT) and Liquidated Damages (LDs)



# Key Aspects of HK Construction Law: EOT& LDs

Typically, construction contracts provide that:



**Question: What if there is a concurrent delay ?**

# Concurrent Delay in Hong Kong

- **“A period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency.”**  
*(Adyard Abu Dhabi v SD Marine Services [2011] EWHC 848 (Comm))*
- **Delaying effects of the two events (ie. employer risk event and contractor risk event) must occur simultaneously.**
- **“For concurrent delay to exist, each of the Employer Risk Event and the Contractor Risk Event must be an effective cause of Delay to Completion (i.e. the delays must both affect the critical path). Where Contractor Delay to Completion occurs or has an effect concurrently with Employer Delay to Completion, the Contractor’s concurrent delay should not reduce any EOT due.”**  
*(Society of Construction Law Delay and Disruption Protocol, 2<sup>nd</sup> edition)*

# Concurrent Delay in Hong Kong

## Approach in Hong Kong

- Likely to borrow law from other common law jurisdictions (e.g. UK, Australia).
- In *W. Hing Construction Co Ltd v Boost Investments Ltd (2009) 2 HKLR*, Deputy Judge Simon Westbrook made a passing remark regarding concurrent delays and appeared to be in favour of the **apportionment approach** in assessing delays.
- *KH Foundations Ltd v Chun Yip Construction Co Ltd [2020] HKCU 4211*: possibly the first Hong Kong Court case deciding on concurrent delay if the matter goes to trial in May 2022.

## Landmark UK case: *Walter Lily & Co Ltd v Mackay [2012] BLR 503*

- **Held**: where there is an EOT entitlement on terms of the clause and where delay was caused by two or more effective causes, one of which entitles the Contractor to EOT as being a Relevant Event, the Contractor is entitled to full EOT.
- Did not recognise the apportionment approach adopted in Scottish case, *City Inn Ltd v Shepherd Construction Ltd [2010] ScotCS CSIH 68*, as law of England.

# Concurrent Delay

**“Where Employer Delay to Completion and Contractor Delay to Completion are concurrent and, as a result of that delay the Contractor incurs additional costs, then the Contractor should only recover compensation if it is able to separate the additional costs caused by the Employer Delay from those caused by the Contractor Delay.**

**If it would have incurred the additional costs in any event as a result of Contractor Delay, the Contractor will not be entitled to recover those additional costs.”**

***(Society of Construction Law Delay and Disruption Protocol, 2<sup>nd</sup> edition)***

# *North Midland Building Ltd v Cyden Homes Ltd [2017] EWHC 2414 (TCC)*

- **Cyden (Employer) instructed North Midland (Contractor) to design and construct a house in the Midlands under an amended JCT Design and Build Contract 2005.**
- **The EOT clause (clause 2.25.3(b)) of the Contract provides that:**  
*“any delay caused by a Relevant Event which is concurrent with another delay for which the Contractor is responsible shall not be taken into account.”*
- **There were multiple occurrence of Relevant Events causing delay to the works, and Completion Date being missed.**



# *North Midland Building Ltd v Cyden Homes Ltd* *[2017] EWHC 2414 (TCC)*

- The Employer argued that while the Contractor is entitled to EOT from inclement weather, as it ran concurrently with other delays which the Contractor was responsible, no EOT should be granted.

- **Held:**

**1** The Contractor's claim for EOT in cases of concurrent delay was dismissed.

**2** Wording of Cl. 2.25.3(b)) of the Contract was clear and unambiguous.

Parties are bound by the EOT mechanism as agreed in the Contract.

No implied term preventing Employer from levying the LD.

**3** The prevention principle is not a matter of legal policy which would operate "to rescue the [Contractor] from the clause to which it had freely agreed.

# *W. Hing Construction Co Ltd v Boost Investments Ltd (2009) 2 HKLRD*

- The main contractor claimed an EOT of 84 days owing to the employer's change of building plans and design.
- Although the Hong Kong Court was not ultimately called upon to decide on the matter of concurrent delay, Deputy Judge Simon Westbrook QC stated:

***“where there is true concurrency in delaying events it may, in some cases, be appropriate to apportion responsibility for the delays between the two parties so as to arrive at a fair and reasonable assessment”.***

# ***KH Foundations Ltd v Chun Yip Construction Co Ltd [2020] HKCU 4211***

- **An interlocutory decision regarding the Claimant's Request for Further and Better Particulars (F&BP) in relation to concurrent delays.**
- **Approx. \$146 million dispute regarding piling/foundation works for a residential development in Deep Water Bay Drive.**
- **If this case goes to trial in May 2022, it may become the first Hong Kong Court case deciding on concurrent delay in construction projects.**

# Concurrent Delay in Hong Kong: Key Takeaway

- When negotiating a construction contract, parties will need to consider carefully whether or not they are going to expressly allocate the risk of concurrent delay.
- Be aware of the effect of concurrent delay exclusions as it will have an impact on any potential EOT claims.
- Be aware of the notice provisions and condition precedents for claiming EOT (see *Maeda v Bauer* case in later slides).

# Key Aspects of HK Construction Law: Notice



# Key Aspects of HK Construction Law: Notice

- Most construction contracts in Hong Kong require the contractor/subcontractor to give notice that it intends to make a claim (e.g. for an extension of time or additional payment).
- The contract will set out the timeframe for providing the notice and what the notice needs to cover.
- The contract may say that the notice is a condition precedent to making a claim (i.e. the contractor/subcontractor cannot make a claim unless the notice provision has been complied with).

## ***Maeda Corporation and Another v Bauer Hong Kong [2020] HKCA 830, Court of Appeal***

- **The Hong Kong Court of Appeal has recently ruled that notice provisions must be strictly complied with: *Maeda Corporation and Another v Bauer Hong Kong*. [Application for leave to appeal to Court of Final Appeal refused on 7 May 2021.]**
- **In that case, the subcontractor had to provide notice if it intended to claim any additional payment or loss and expense due to breach of subcontract, delay, prevention or variation.**

# *Maeda Corporation and Another v Bauer Hong Kong [2020] HKCA 830, Court of Appeal*

## **First Notice**

Within 14 days of event giving rise to claim

Notice of intention to claim

## **Second Notice**

Within 28 days of first notice

Contractual basis for claim

Full and detailed particulars and evaluation of claim

Documents in support of claim



## ***Maeda Corporation and Another v Bauer Hong Kong [2020] HKCA 830, Court of Appeal***

- **The subcontractor issued a notice of claim, but failed to set out all the contractual basis of the claim.**
- **The subcontractor later commenced an arbitration and tried to present a new contractual basis for the claim.**
- **The subcontract said that the subcontractor “*shall have no right to any additional or extra payment, loss and expense... unless [the notice provisions] have been strictly complied with.*”**

# *Maeda Corporation and Another v Bauer Hong Kong [2020] HKCA 830, Court of Appeal*

The Court of Appeal held:

**Contractual basis of claim must be raised in earlier notices**

- The subcontractor was not permitted to pursue claims in arbitration where it had not raised the particular contractual basis of the claim in its earlier notice.

**Strict compliance of notice provisions required**

- There had to be strict compliance with the clear and unambiguous wording of the notice provisions.

**Court/Tribunal will not rewrite the contract terms**

- There is commercial sense in allocating risks and attaining finality by designating strict time limits for claims to be made and for the contractual basis of claims to be specified. There is no basis for a court or tribunal to rewrite the subcontract.

# *Maeda Corporation and Another v Bauer Hong Kong [2020] HKCA 830, Court of Appeal*

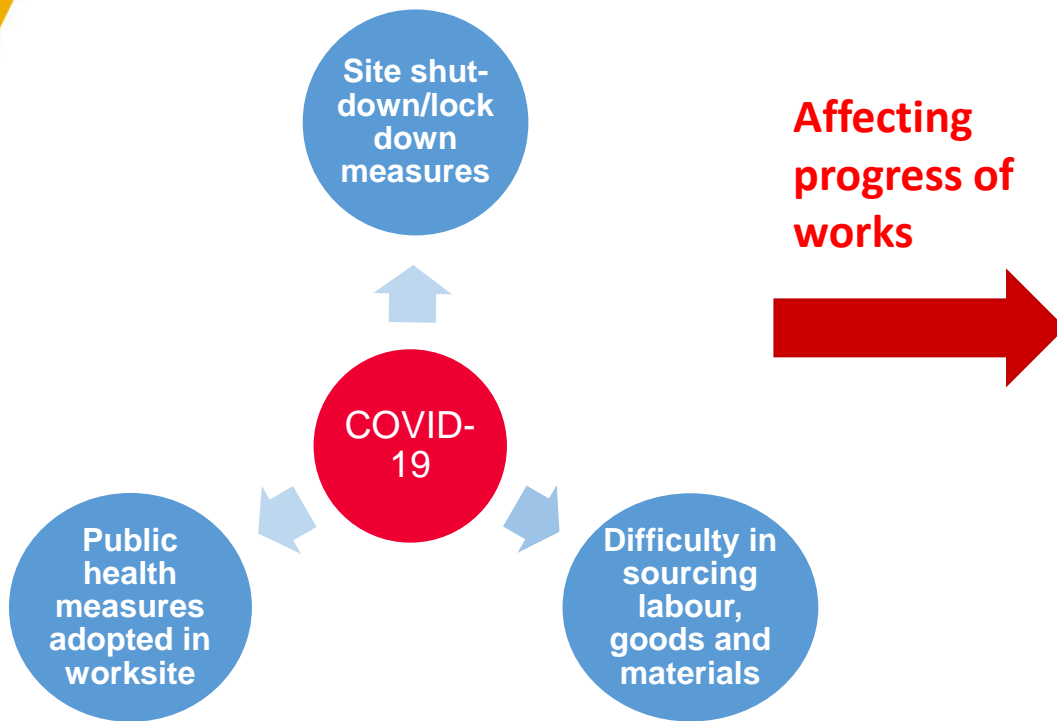
## Key takeaways

- ✓ When drafting time bar and notice provisions, use clear and unambiguous language and where intended to be strictly applied, identify the clause as a 'condition precedent' to entitlement.
- ✓ Ensure project managers are intimately aware of the notice and claim provisions in their contracts. If in doubt, consider issuing notices for each contractual basis of the potential claim.
- ✓ Arbitrators should consider and apply the contractual terms as agreed by the parties, because it appears likely that the Hong Kong courts will when considering a challenge to an arbitral award.

# Key Aspects of HK Construction Law: COVID-19 & Force Majeure



# Key Aspects of HK Construction Law: COVID-19 & Force Majeure



## Question 1:

Can a party rely on force majeure in light of Covid-19 outbreak ?

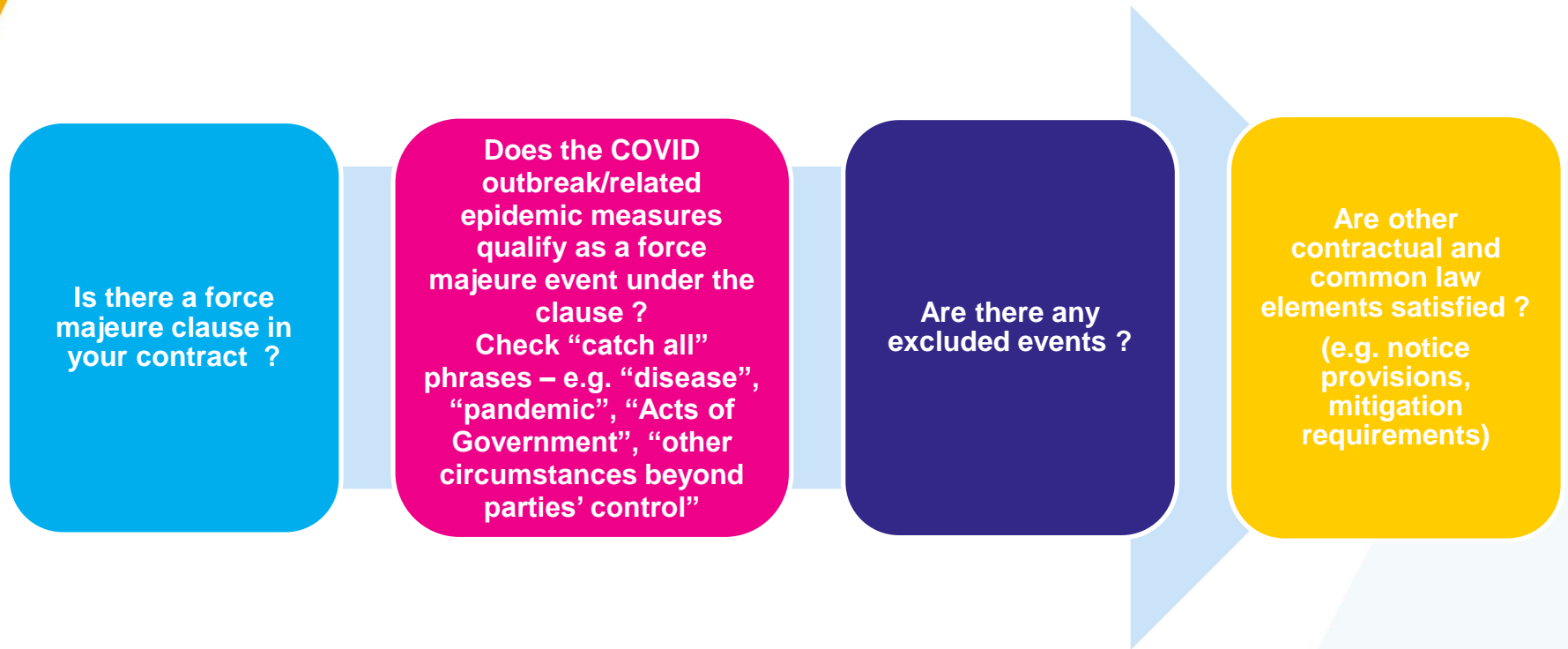
## Question 2:

Can the contractor claim EOT and/or additional monies ?

# Force Majeure Concept in Hong Kong

- Force majeure is a contractual creation in Hong Kong.
- This is different from PRC law where force majeure is a defined concept codified in statute.
- Parties are free to define and agree, via contract the circumstances/events that constitute as force majeure.
- Other common law requirements – e.g. causation, inability to perform the contract beyond its control, mitigation requirements etc.
- Consequences of force majeure depends on what the clause says.

# Force Majeure Concept in Hong Kong



# In **Absence** of a Force Majeure Clause ...

- Check other clause(s) that may provide an avenue for the contractor to apply for EOT and/or compensation.
- Generally, standard-form contracts allow contractors to claim EOT – but not additional monies, whereas the unamended NEC standard-form contract allow for both time and costs.
- Burden is on the party relying on the clause to prove that the particular event (that relates to COVID-19) falls within the terms/clause of the contract.
- Possible argument of frustration and temporary impossibility.



# In **Absence** of a Force Majeure Clause ...

For example:

Clause 50(1)(b)(xi) of GCC 1999 provides list of events which qualify for EOT, including “*any special circumstance of any kind whatsoever*”.

It is arguable that this term is wide enough to encompass the COVID situation, though this would depend on the particular nature of the works in question, and the particular impact of Covid-19 on the works in question.

# In **Absence** of a Force Majeure Clause ...

	GCC 1999	HKIA 2006	Un-amended NEC3/ NEC4
Force majeure clause/term expressly used ?	No.	Yes.  “ <i>Force majeure</i> ” is referred to as a list of events that qualify for EOT, though the term “force majeure” is not defined.  (Cl. 25.1.(3)(a))	No.

# In **Absence** of a Force Majeure Clause ...

	GCC 1999	HKIA 2006	Un-amended NEC3/ NEC4
Any contract provision(s) that shares similar characteristic of a force majeure clause ?	<p>Yes.</p> <p>Recognises “<i>any special circumstance of any kind whatsoever</i>” as a qualifying event for EOT.</p> <p>(Cl. 50)</p>	<p>Yes.</p> <p>“<i>Force majeure</i>” is referred to as a list of events that qualify for EOT, though the term “force majeure” is not defined.</p> <p>(Cl. 25.1.3)</p>	<p>Yes.</p> <p>Allows “<i>an event neither party could prevent</i>” to give rise to a compensation event and consequently, an award of EOT and additional money.</p> <p>(Cl. 60.1(19))</p>

# Frustration Concept in Hong Kong

## Two – Stage Test Under Common Law

### Stage 1

Was the particular event/situation provided for in the contract?

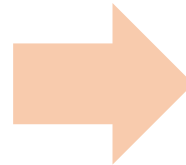
If **YES**, frustration is not possible.

If **NO**, proceed to the next stage.

### Stage 2

Was it an event of such nature that continued performance of the contract was rendered impossible or such that performance was rendered so *radically different* from what was originally contemplated that it would be unjust to hold that the parties remain bound by the contract?

If **YES**, the contract may be frustrated.



## Outcome of Frustration

- Contract brought to an end automatically.
- Parties discharged from further performance.

# Frustration of Building Contracts

Hong Kong courts apply principle of frustration in very narrow limits.

Period of interruption (e.g. delays from quarantine, site lock-down) benchmarked against outstanding period for performance in determining whether such delay caused radical change in nature of contract.

Events that makes performance more onerous, or leads to a delay that is merely transient, and does not qualify to frustrate a contract.

## High threshold

“A reasonable probability from the nature of the interruption that it will be of *indefinite* duration”.

# COVID-19 and Force Majeure: Key Takeaway

- **Mere existence of Covid-19 does not automatically trigger force majeure clauses, EOT or additional money.**
- **Depending on the terms of the relevant contract, actions taken by the parties as a result of the pandemic and measures introduced by authorities may entitle a contractor to claim.**
- **The courts typically interpret force majeure clauses strictly. For example, where a party's inability to perform is caused by multiple factors, only some of which are force majeure events, the party may not be able to rely on force majeure to excuse non-performance.**

# Key Aspects of HK Construction Law: When is completion ?



# Key Aspects of HK Construction Law: When is completion ?

- When is completion achieved? “Substantial” or “Practical” completion?
- *Mariner International Hotels Ltd v Atlas Ltd* [2007] 1 HKLRD 413
  - went all the way to CFA
  - CA said ‘defects ok, as long as they don’t interfere with use of the premises’
  - CFA said ‘no defects allowed other than those which can be ignored as trifling’
- When does DLP start and end?

Query whether DLP for a part of the Work remedied during the DLP restarts from the date of rectification works



# Most Important of All: Dispute Resolution



Esp: when dealing with PRC parties anywhere in the world

HK Law  
Asset Preservation

Enforcement



WHY USE  
HONG KONG  
LAW