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Welcome to our latest bulletin featuring various legal and market updates

- BUD – Funding for your Business (Branding, Upgrading, Restructuring and/or Promoting Sales);
- Impact of COVID-19 on Hong Kong IPO's Listing Applications; and
- Force Majeure and the FIDIC Form of Construction Contract.

MinterEllison Hong Kong has been pleased to assist clients over the past few months through this most challenging of times and we are very thankful for the support we have received from our clients during this period. We look forward to continuing to serve our clients during the rebuilding phase now that the COVID-19 situation is stabilising in Hong Kong.

We hope that you find this edition informative and we welcome your comments and suggestions for future topics.

If you have any questions regarding matters in this publication, please refer to the contact details of the relevant contributing authors.

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BUD – Funding for your Business (Branding, Upgrading, Restructuring and/or Promoting Sales)

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Overview

With a view to providing eligible Hong Kong enterprises with funding support, with which the enterprises can undertake projects to develop brands, upgrade and restructure their business operations and promote sales in Mainland China, the Hong Kong Government set up the Dedicated Fund on Branding, Upgrading and Domestic Sales (the “**BUD Fund**”) in June 2012 (<http://www.bud.hkpc.org/en>). From 20 January 2020 onwards, the geographical scope of the BUD Fund has been expanded to include ASEAN¹ and all economies with which Hong Kong has signed Free Trade Agreements (“**FTA**”)². Depending where their target business opportunities are situated, when applying for funding support under the BUD Fund, eligible Hong Kong enterprises can choose between the Mainland Programme and the FTA Programme, both of which are administered by the Hong Kong Productivity Council. The maximum **funding per project is HK\$1,000,000** with a ceiling of **HK\$4,000,000 per enterprise** for all projects.

Eligibility of Applicants

All non-listed enterprises registered in Hong Kong under the Business Registration Ordinance (Cap. 310) with substantive business operations in Hong Kong are eligible to apply. The programmes are open for application **all year round**. If you are looking to **commence, expand, develop, promote or restructure your business operations**, particularly in Mainland China and other territories mentioned above, the BUD Fund is for you and funding should be sought.

Funding Amount

Funding is to be provided on a matching basis, i.e. the Government pays a maximum of 50% of the total approved project cost and the applicant a minimum of 50% of the cost in cash (except for the audit fee of the approved project); subject to a cap of HK\$1,000,000 per project and HK\$4,000,000 per enterprise.

How We Can Help

All Applications	
Step 1	We know that you are very busy focussing on your business, with little time to attempt securing funding. MinterEllison can help you identify any aspects of your planned Branding, Upgrading, Restructuring and/or Promoting Sales projects that may be eligible for BUD Funding.
Step 2	We can help prepare and manage your BUD Fund applications, and monitor their progress at all stages.
Step 3	With funding secured, we can assist you to implement projects covered by the BUD Fund. Whether it relates to devising a brand protection strategy, registration and protection of intellectual property rights, or providing general contractual and other advice relating to your projects or dealings with third parties, we have the commercial and legal experience to provide the help you need.

¹ ASEAN comprises Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam.

² Australia, Chile, Georgia, Macau, New Zealand and the four member states of the European Free Trade Association (i.e. Iceland, Liechtenstein, Norway and Switzerland).

Impact of COVID-19 on Hong Kong IPO Listing Applications

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At the beginning of the year 2020, Hong Kong capital markets experts generally predicted that Hong Kong would remain among the top three stock exchange forums globally for initial public offerings (IPOs) in 2020, in both the number of companies listed and amount of funds raised. According to the Hong Kong Exchanges and Clearing Limited, 22 companies became listed in January 2020, representing an approximately 69% increment when compared with 13 new listings in the same period in 2019. However, the forecast is now bracing for a significant blow in the face of the COVID-19 pandemic.

As the outbreak of coronavirus evolves, governments around the world have imposed draconian travel restrictions, different degrees of curfew and other social distancing measures which hinder travel and in-person meetings. All of these inevitably impact the business operations of most listing applicants and their listing timetable. Between February and April 2020, only 25 companies became listed in Hong Kong, representing an approximately 32% drop as compared with the same period last year. At present, both the timeframe and extent of the COVID-19 impact on the Hong Kong IPO market are uncertain, but it is likely that the situation will continue to evolve for some time. For companies looking to raising capital in Hong Kong by way of an IPO at this time, they should carefully time their IPO projects and be vigilant to the regulatory requirements. This article will discuss some actual impacts we have observed in recent listing applications resulting from the COVID-19 outbreak.

Impacts on Listing Applications

1. Impact on Due Diligence

The Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited (**Listing Rules**) and Paragraph 17 of the Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission set out the principal requirements of due diligence that a sponsor should typically follow and perform during the IPO application process.

As part of its due diligence plans, the sponsor normally, among other things, (i) conducts site visits and inspections of the listing applicant's operating premises and production facilities as

well as its material assets; (ii) interviews the listing applicant's controlling shareholders, directors and key management, its major customers, suppliers, creditors and bankers; and (iii) retrieves the listing applicant's statutory and compliance record from local government authorities. In addition, the sponsor (with the assistance of its legal advisers) also performs verification of all statements and representations made in the listing document to ascertain their accuracy and completeness as part of its due diligence.

While professional advisers in an IPO may adapt to the travel restrictions by conducting certain due diligence via video conferencing and reviewing documents in scanned electronic version as opposed to original hardcopies, some physical meetings or inspections and independent third party verifications are still inevitable. As the due diligence must be substantially complete before the listing application is lodged with the Hong Kong Stock Exchange, and that subsequent due diligence may also be required to be conducted, the IPO market can be expected to experience certain delays in the IPO timetable.

2. Impact on Audit Work

As required by the Listing Rules, the accountants' report of a listing applicant should cover three complete financial years immediately preceding the issue of the listing document and the latest financial period must not have ended more than six months before the date of such document. The COVID-19 outbreak not only affects the sponsor's due diligence work, it may also cause delay to the reporting accountants' work given that many accounting firms have imposed travel restrictions on their employees and have suspended the face-to-face aspects of audit work, bringing auditing to a halt. The various preventive measures against COVID-19 may also hinder the listing applicant from obtaining sufficient audit evidence (such as counting of inventories, performing vouching and obtaining third party confirmations) in accordance with the relevant auditing standards. As such, the listing applicant will have to consider carefully the impact of potential changes in the reporting period and all consequential changes to its listing application.



3. Impact on Underwriting Agreement

The underwriting agreement between the underwriters and the issuer (i.e. a listing applicant) typically includes a *force majeure* clause which allows the underwriters to back out if, in their opinion, the success of the IPO is or may be threatened by certain material adverse events, such as any act of God, war and outbreak of disease or epidemic.

The COVID-19 outbreak likely falls within the category of *force majeure* events. Since its impacts are generally known to the market, it is unfair for the listing applicant to enter an underwriting agreement with termination provisions that could, arguably, be immediately invoked. To avoid disputes arising from such scenario, the parties may consider amending the typical termination provisions such that the underwriting agreement is terminable only if there is a material deterioration from a specific pre-existing situation. The parties may negotiate the specific triggers or criteria that could be used to determine the materiality of the change, which could include for example, hitting a certain number of infected cases or a general percentage drop in an established stock market index.

4. Impact on Listing Document Disclosure

Another challenge the listing applicant has to deal with is the disclosure of business risk and impacts resulting from COVID-19 in its listing document. We are aware that the Hong Kong Stock Exchange is cautious in assessing the impact of COVID-19 on the listing applicant and whether relevant information is sufficiently disclosed in its listing document. The listing applicant should be reminded that it is its obligation under the Listing Rules to ensure that its listing document contains sufficient information to enable potential investors to make an informed assessment of it and its business.

Additional information regarding the impact of COVID-19 which the listing applicant may be expected to disclose in its listing document include:

- any disruption of its supply chain
- upsurge or drop in market demand for its products and services
- actual and potential impacts of the outbreak on the economic environment and the relevant market

- its business contingency plans
- whether it is able to discharge its obligations under existing contracts
- whether its business operations have been interrupted or suspended
- precautionary measures taken to maintain a safe and hygienic working environment for its employees
- any change of its use of IPO proceeds as a result of the outbreak
- burn rate of its existing cash balance in the worst scenario where its operations are suspended
- inclusion of the impact of COVID-19 as a specific "risk factor"
- enhancing disclosure of "events after the reporting period" in accordance with the Hong Kong accounting standards

The listing applicant should be mindful that the disclosure should be specific to its own circumstances with quantitative information to the extent possible and avoid presenting generic "boilerplate" statements. Furthermore, the sponsor should (i) carry out appropriate and sufficient due diligence to assess the impact of COVID-19 on the listing applicant's business operations and financial performance; (ii) evaluate any change in the listing applicant's use of IPO proceeds and its profit / cashflow forecast; and (iii) ensure the enhanced disclosure in the listing document is verified.

5. Impact on Listing Applicant's Valuation

The COVID-19 pandemic is having a dramatic impact on the economy as well as the equity markets. The recent significant decline in equity values poses difficulties for the valuation of businesses, shares and other equities in the economic environment.

As part of the IPO application process, a listing applicant is required to submit a market comparable analysis of the market capitalisation and price-to-earning (P/E) ratio of the listing applicant and its market peers, taking into account their financial performance, P/E ratio and industry prospects, to demonstrate that the listing applicant's expected market capitalisation and P/E ratio are in line with the market comparables. Given the significant decline in the global stock markets since the COVID-19 outbreak, the financial performance or share price of the listing applicant's market peers may have significantly deteriorated, making it difficult for the listing applicant to prepare a comparable



analysis. Consequently, the listing applicant would have to provide a robust analysis to justify the listing applicant's P/E ratio taking into account the P/E ratios of its comparables, its nature of business, historical and forecast financial performance and growth prospects.

What's Next?

The COVID-19 pandemic is creating drastic global impacts, including the loss of lives and disruption to the financial markets. IPO practitioners may have

to conduct IPOs in a more innovative way, such as conducting roadshow over the internet and making presentations via teleconferencing. Although COVID-19 will invariably slow down the IPO application process, sponsors and other professionals are however reminded not to compromise the expected level of due diligence responsibility. Market participants should closely monitor the situation and are strongly advised to consult their legal advisers for the appropriate and extra considerations in order to satisfy the Listing Rules and other regulatory requirements.

Force Majeure and the FIDIC¹ Form of Construction Contract

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Public health requirements due to COVID-19 causing widespread disruption to commerce have of course affected various construction projects. Disruptions due to business operations closures and stringent transportation restrictions have and will continue to affect various levels of construction projects including availability of labour and materials.

While one hopes that industry members will be understanding and agree to reasonable requests for extensions of time and additional costs, various events could give rise to disputes including employers claiming breach of contract for non-performance and contractors seeking relief on grounds such as force majeure. Contractors exposed to such risks need to anticipate potential problems, review their contracts, and be able to act swiftly to protect their interests and enforce their rights. Employers on the other hand need to be prepared to assess such claims in a timely manner to avoid further delays to projects.

We summarise briefly some potential issues and FIDIC contract provisions one should consider in the context of COVID-19, and the actions which might need to be taken promptly.

Generally, force majeure is a contractual mechanism that:

- excuses a party from performance of an obligation,
- allows a party an extension of time for performance of an obligation, or
- entitles a party to suspend performance of an obligation,

upon the happening of an event beyond that party's reasonable control.

The applicability of the force majeure provision depends on its precise wording. Force majeure clauses are construed strictly and in accordance with the exact terms of the clause. One therefore needs to review the relevant contract and be properly advised as to the applicability of the relevant terms and the practical issues involved.

As FIDIC forms of contract are commonly used for regional projects, we refer below to the MDB² Harmonised Edition (2010).

Definition of force majeure

An epidemic is not specifically stated in the FIDIC form as a force majeure event – however, the definition of force majeure events is not by way of a 'closed' list setting out exhaustively the events of force majeure. Rather, if the conditions set out in Clause 19.1 are met, the event would be deemed to be one of force majeure. Given the unprecedented measures by governments and their effects on movement of people and certain materials, a contractor under the FIDIC contract could argue that a force majeure event has arisen due to the COVID-19 outbreak and/or relevant governmental and administrative decisions.

It is important to note that under the FIDIC contract, even if a sub-contractor to the contractor to the FIDIC (main) contract is entitled under the sub-contract relating to the works to relief for force majeure on terms in addition to or broader than the terms provided in the FIDIC (main) contract, under Clause 19.5 of the FIDIC form, such additional or broader force majeure terms in the sub-contract would not excuse the contractor's non-performance under the FIDIC (main) contract. This confirms the general provision that a contractor is not relieved from its obligation(s) by sub-contracting its work (Clause 4.4 of the FIDIC form), and that the contractor is only entitled to relief under the FIDIC (main) contract on the occurrence of force majeure under the FIDIC (main) contract, and requisite notice having been validly given.

Causation

Once the event is established to be a force majeure event, it then needs to be demonstrated that the force majeure event prevents the party from performing its substantial obligations. The burden of proof is squarely on the affected party to establish this. There must be a causal

¹ Fédération Internationale Des Ingénieurs-Conseils (International Federation of Consulting Engineers)

² Multilateral Development Banks

connection between the force majeure event and the affected party's inability to perform its obligations.

The force majeure event needs to make it legally or physically impossible for the party to perform its obligation. Increased cost of raw materials, or costs of transportation making the performance of a contract uneconomical would not make it impossible for the party to perform its obligation. Courts have held that a party is not prevented from performing a substantial obligation if it could still perform at increased cost or at a loss.

Notice

Under Clause 19.2 of the FIDIC contract, the contractor is:

- to give notice to the other party of the event or circumstance amounting to force majeure event, and
- specify the obligation(s) it is or will be prevented from performing due to the identified force majeure event,

within 14 days after the contractor became aware, or should have become aware, of the identified force majeure event. The notice must comply with the formalities set out (e.g. in writing, delivered in accordance with the contract, copied to the relevant parties, etc). For certainty, contractors should specify that the notice is given under the force majeure clause.

From a non-contractual point of view, it is important for the other party to be notified within a reasonable period of time the force majeure event and the obligations affected by the event, so as to make it easier to address the event, including to explore any options available. With the closure of factories and travel restrictions, contractors should monitor their supply of materials and manpower and give any necessary notices as soon as possible.

Relief and other operative clauses

Having given valid notice, the contractor is excused from performance of its obligations for so long as such force majeure prevents it from performing them. This suspension of the contractor's obligations is only to the extent affected by the force majeure event, and therefore the contractor would still need to fully perform unaffected obligations. Under Clause 19.3, the party is also required to give notice to

the other party when it ceases to be affected by the force majeure event.

It is important to note in particular that the FIDIC contract form expressly states at Clause 19.2 that the force majeure provision does not apply to obligations of either party to make payments to the other party.

Under Clause 19.4, if the contractor suffers delay by reason of a force majeure event, it is entitled to claim for an extension of time (but not necessarily additional costs) for any such delay subject to the engineer's determination.

It is important to note that both parties have a duty under Clause 19.3 to minimise any delay in the performance of the contract as a result of force majeure, which might include monitoring supplies of materials, searching for alternative suppliers and re-scheduling certain works.

Termination of the contract is the most drastic action, and Clause 19.6 affords a limited right to do so. Where force majeure prevents the execution of substantially all of the works in progress for a continuous period of 84 days, or the same force majeure event prevents the execution of substantially all of the works in progress for multiple periods which total more than 140 days, termination of the contract is possible.

Further, Clause 19.7 provides that if any event or circumstance outside the control of the parties (including but not limited to a force majeure event) arises which makes it impossible or unlawful for the parties to fulfil obligations under the contract, or which under the law governing the contract entitles the parties to be released from further performance of the contract, such event or circumstance allows the parties to be released from further performance of the contract upon requisite notice.

In the event of termination due to force majeure or otherwise as noted above, Clause 19.6 provides for the consequences of termination and procedure for final certifications and payments.

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法律动态 – 2020 年 5 月

2020 年 5 月 20 日

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在本期特别通讯中，我们的香港团队撰写了三篇文章，以便您深入了解各项法律和市场动态：

- BUD 企业资助 - 为您的企业提供资助 (品牌、升级、转型及/或拓展内销市场);
- 新型冠状病毒爆发对香港 IPO 上市申请的影响; 和
- 不可抗力及 FIDIC 施工合同。

过去的几个月是极具挑战的一段时期，铭德香港有幸能在这样的特殊时期为客户提供协助，并非常感谢客户的支持。鉴于目前新型冠状病毒疫情的情况渐趋稳定，我们期待在重建阶段继续为客户提供服务。

我们希望本通讯为您提供有用的信息，并欢迎您对今后的主题提出意见和建议。

如果您对本通讯有任何疑问，请参阅相关作者的联系方式。

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BUD 企业资助 - 为您的企业提供资助 (品牌、升级、转型及/或拓展内销市场)

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为了向符合资格的香港企业提供资金援助，助其开展项目，以发展品牌、升级转型及拓展内销市场，香港特别行政区政府在 2012 年 6 月成立了「发展品牌、升级转型及拓展内销市场的专项基金」（「**BUD 专项基金**」）

(<http://www.bud.hkpc.org/zh-hans>)。自 2020 年 1 月 20 日起，BUD 专项基金的资助地域范围扩大至涵盖东盟市场¹和所有与香港签署自由贸易协定（「**自贸协定**」）²的经济体。

符合资格的香港企业可在申请 BUD 专项基金的资助时，按照目标商机的地点而选择内地计划或自贸协定计划，两者均由香港生产力促进局执行。每个项目的资助上限金额为港币一百万元，而每间企业所有项目的最高资助上限金额则为港币四百万元。

申请者的资格要求

所有按照《商业登记条例》（第 310 章）在香港登记，并在香港有实质业务运作的非上市企业均符合资格申请资助。该等计划全年均接受申请。

若您正打算开展、扩展、发展、推广或转型业务，尤其于中国大陆及上述的其他国家，您可考虑申请 BUD 专项基金的资助。

资助金额

资助以对等原则为基础，即政府最多资助某一项目总核准开支的 50%，而企业须以现金形式承担不少于该项目总核准开支的 50%（获批项目所需的账目审计费用除外）；同时还受限于每个项目港币一百万元的资助上限金额及每间企业港币四百万元的资助上限金额。

本所如何提供协助

¹ 东盟的成员国为文莱、柬埔寨、印度尼西亚、老挝、马来西亚、缅甸、菲律宾、新加坡、泰国和越南。

所有计划下的申请

第一步

鉴于您或因业务繁忙而无暇顾及申请资助。本所可助您识别哪些已规划的发展品牌、升级转型及/或拓展市场项目合乎 BUD 专项基金的申请资格。

第二步

本所能协助您准备及管理您的 BUD 专项基金申请，并把握其在不同阶段的进展。

第三步

在您获得资助后，本所能协助您实行 BUD 专项基金涵盖的各类项目。不论是有关订立品牌保护策略、知识产权的注册及保护，或就您的项目或您与第三方交易提供一般合同和其他法律意见，本所均有相应的商业及法律经验为您提供您所需的协助。

² 澳大利亚、智利、格鲁吉亚、澳门、新西兰及欧洲自由贸易联盟 4 国（即冰岛、列支敦士登、挪威和瑞士）。

新型冠状病毒爆发对香港 IPO 上市申请的影响

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在 2020 年初，香港资本市场的专家普遍预测无论是上市公司的数量还是募集的金额，香港在 2020 年将仍然是全球首次公开招股 (IPOs) 的三大证券交易所之一。根据香港交易及结算有限公司的资料，在 2020 年 1 月有 22 家公司上市，与 2019 年同期的 13 家公司上市相比，增幅约为 69%，不过，新型冠状病毒所导致的疫情大大影响了原来的预测。

随着新型冠状病毒的爆发越演越烈，世界各国政府施加了严厉的出行限制、不同程度的宵禁及其他社交隔离措施，对旅游和面对面的会议构成了妨碍，这些措施无可避免地影响大部分上市申请人的业务运作及其上市时间表。在 2020 年 2 月至 2020 年 4 月期间，只有 25 家公司在香港上市，与去年同期相比下降了约 32%。目前新型冠状病毒对香港 IPO 市场的影响，不论是持续多久和程度均为未知之数，但这情况似乎还会继续发展一段时间。拟通过 IPO 在香港筹集资金的公司应谨慎计划 IPO 项目的进度并注意监管的要求。本文将阐述我们在近期的上市申请中观察到的一些新型冠状病毒所引致的实际影响。

对上市申请的影响

1. 对尽职调查的影响

《香港联合交易所有限公司证券上市规则》（《上市规则》）及《证券及期货事务监察委员会持牌人或注册人操守准则》第 17 节列明保荐人在 IPO 申请过程中应遵循并执行的有关尽职调查的主要要求。

作为其尽职调查过程的一部分，保荐人通常会 (i) 对上市申请人的经营场所、生产设施及其重要资产进行实地考察和检查；(ii) 访问上市申请人的控股股东、董事、主要管理层、主要客户、供应商、债权人及银行；及 (iii) 从当地政府机构获取上市申请人的法定及合规记录。此外，保荐人（在其法律顾问的协助下）在其尽职调查的过程中也会核证上市文件中的所有声明及陈述，确保其等为准确的和完整的。

尽管 IPO 项目中的专业顾问可因应旅游限制而改以通过视频会议进行某些尽职调查并改以审阅文档的电子扫描版本代替正本，但一些面对面的会议或实地检查以及独立第三方的核证仍是不可避免的。由于在上市申请人向香港联交所提交上市申请之前，尽职调查

必须已大致完成，且尽职调查可能还要继续进行，因此，就 IPO 市场整体而言，预计 IPO 项目的时间表会有一些的延迟。

2. 对审计工作的影响

根据《上市规则》，上市申请人的会计师报告应涵盖发出上市文件前的三个完整的财政年度，而该会计师报告的最后一个会计期间的终结日期不得超过上市文件刊发日期前的六个月。新型冠状病毒不仅影响保荐人的尽职调查工作，也可能延误申报会计师的工作，因为许多会计师事务所限制其员工出差，并中止有关审计工作中需面对面接洽的部分，因此审计工作陷于停顿。针对新型冠状病毒的各种预防措施也可能会阻碍上市申请人取得根据相关审计标准所须的足够审计证据（例如盘点存货、单证核对及取得第三方确认）。因此，上市申请人必须仔细考虑报告期内可能发生之变化的影响以及因此对其上市申请所产生的变化。

3. 对包销协议的影响

包销商与发行人（即上市申请人）之间的包销协议一般都有不可抗力条款。该条款让包销商在他们认为有关的 IPO 项目已受到或可能受到某些重大不利事件的影响的情况下退出，例如，天灾、战争及爆发疾病或流行病。

新型冠状病毒的爆发很可能属不可抗力事件。由于新型冠状病毒爆发的影响已为市场所知，因此，要上市申请人签订一份含有几乎可以立刻引用的终止条款的包销协议，并不公允。为避免因这种情况所引起的争议，各方可以考虑修改一些常见的终止条款，让包销协议只可在一项具体且为既有的情况发生重大的恶化才可终止。各方也可对用于判断该变化是否重大的具体触发因素或标准进行协商，例如，达到某个确诊病例的数量或一个公认的证券市场的指数总体下降了某一个百分比。

4. 对上市文件披露的影响

上市申请人必须应对的另一个问题是在其上市文件中披露因新型冠状病毒对其业务造成的业务风险和影响。我们知道香港联交所会谨慎评估新型冠状病毒对上市申请人的影响



及上市文件有否充分披露相关的资料。上市申请人应切记，根据《上市规则》，其有义务确保其上市文件包含足够信息，以让潜在投资者能够对上市申请人本身及其业务作出有根据的评估。

上市申请人可能需要在其上市文件中披露有关因新型冠状病毒造成之影响的额外信息，包括：

- 供应链有否中断
- 市场对其产品和服务的需求是上升还是下降
- 疫情对经济环境和相关市场的实际及潜在影响
- 其业务应变计划
- 是否能够履行在现有合同项下的责任
- 其业务运作有否中断或暂停
- 为其雇员维持安全 and 卫生的工作环境所采取的预防措施
- 疫情对其如何运用 IPO 所筹集的款项的任何变化
- 在最坏的情况下（其业务需要暂停），其现有现金余额的消耗率
- 将新型冠状病毒所引起的影响纳入为一项具体的「风险因素」
- 按照香港的会计准则，加强有关「报告期后事项」的披露

上市申请人应注意，其作出的披露必须针对其本身的情况及尽可能提供量化的信息，并避免使用「空泛」的陈述。此外，保荐人应（i）进行适当和充分的尽职调查，以评估新型冠状病毒对上市申请人的业务运作和财务

的影响；（ii）评估上市申请人在运用 IPO 所筹集的款项上的变化及上市申请人的利润或现金流的预测的任何变化；及（iii）确保已核证上市文件中的着重披露的部分。

5. 对上市申请人估值的影响

新型冠状病毒对经济及股市造成了重大影响。近期股权价值大幅下降的情况给企业、股价及其他类别的股权价值评估带来困难。

作为 IPO 申请过程的一部分，上市申请人须提交一份比较上市申请人自身及其同行业公司市值及市盈率的市场分析报告，该报告要考虑到上市申请人和其同业的财务状况、市盈率及行业前景，证明上市申请人的预期市值及市盈率与市场上可比较公司是一致的。由于自新型冠状病毒爆发以来全球股市大幅下跌，上市申请人的同行业公司的财务表现或股价可能已经显著下挫，以致上市申请人难以进行比较分析。因此，上市申请人须交出有力的分析，证明其市盈率是合理的，该分析要考虑与上市申请人可作比较公司的市盈率、上市申请人的业务性质、历史财务数据、未来财务业绩及增长前景。

下一步行动

新型冠状病毒广泛地影响全球，包括人员病亡及对金融市场造成冲击。IPO 从业人员可能不得不以更富创造性的方式进行 IPO 项目，例如在互联网上进行路演及通过电话会议进行演示。虽然新型冠状病毒减慢了全部 IPO 的申请过程，但保荐人和其他专业人员仍须维持应有的尽职调查水平。市场参与者应密切留意情况，并向其法律顾问咨询有关对遵守《上市规则》及其他监管要求所须的适当及额外的考虑。

不可抗力及 FIDIC 施工合同

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新冠疫情引起的公共卫生要求导致了广泛的商业中断，这无疑给许多施工项目造成了影响。由于商业活动的关停及严格的运输限制，许多业务已经处于停摆状态。这种业务中断已经并将持续给施工项目的各阶段带来包括劳动力和材料供应方面的影响。

尽管我们寄希望于业界人士能够理解现状并同意合理地延长工期以及支付附加费用的要求，许多事件都可能引发纠纷，包括建设单位以不能履行合同义务为由提起违约之诉，以及承包方依赖不可抗力等抗辩援引救济。对承包方来说，在面对该等风险时需要对潜在的问题做好预判，审阅合同并迅速作出行动，以保护自身的利益并行使合法权利。另一方面，建设单位也应做好充分准备以及及时评估该等诉求，以避免给项目造成进一步的延期。

我们在下文简要概括了新冠疫情爆发下的某些潜在问题及须考虑的 FIDIC 合同条款，以及需要及时采取的行动和措施。

一般来说，作为一项合同机制，不可抗力可在发生超出合同当事人可合理控制范围的事件时被援引，以

- 免除一方履行其合同义务，
- 允许一方延期履行其合同义务，或
- 使一方有权利暂停履行其合同义务

不可抗力条款是否可被触发取决于其确切的表述方式。由于不可抗力条款需要根据该条款的实际表述严格解释，当事人应当审阅相关合同，并就有关条款的适用及实践中涉及的问题寻求法律意见。

由于 FIDIC 合同在地区性项目中普遍适用，我们将在下文分析《施工合同条件多边开发银行（MDB）协调版》（2010）的应用。

不可抗力的定义

FIDIC 合同既没有将疫情的爆发列为不可抗力事件，也没有以列举方式穷尽不可抗力事件的所有情形。然而，若 FIDIC 合同第 19.1 条列明的条件被满足，该事件即会被视为不可抗力事件。鉴于政府当前采取了前所未有的措施，以及该措施对

人员流动及物资运输方面的影响，FIDIC 合同中的承包方可以提出，新冠疫情的爆发及/或有关政府决定已构成不可抗力事件。

值得注意的是，根据 FIDIC 合同第 19.5 条，即使分包方可以根据分包合同中比 FIDIC 主合同条款更为宽松的条款援引不可抗力抗辩，该等更为宽松的条款并不能免除承包方未能履行 FIDIC 主合同义务的责任。这明确了一项通用条款，即承包方并不能通过分包的方式免除其合同义务（FIDIC 合同第 4.4 条）。承包方仅可根据 FIDIC 主合同项下的不可抗力来援引抗辩，并按要求作出有效的通知。

因果关系

若当事人主张不可抗力事件的发生，其仍需证明该事件对其履行主要合同义务形成了阻碍，而举证责任往往归于受影响一方。不可抗力事件与受影响的当事方不能履行其合同义务之间必须存在因果关系。

另外，不可抗力事件需要在法律上或事实上使一方当事人无法履行其义务。若因为原材料成本的增加，或运输成本的提升而使合同的履行不再符合经济原则，这并不会导致一方当事人无法履行其义务。就此，法院已作出了明确的判决，即若一方当事人可以通过增加成本甚至亏损的方式履行义务，那么该当事人应履行主要合同义务。

通知

根据 FIDIC 合同第 19.2 条，如果承包方已经或将要受到不可抗力的阻碍，难以履行合同基本义务，应该在其察觉或本应察觉到构成不可抗力的有关事件或情况后 14 天内通知对方，

- 说明构成不可抗力的事件或情况，
- 并应说明已经或将因不可抗力的阻碍而无法履行的各项义务。

该通知必须符合合同约定的形式（如以书面形式作出，根据合同的要求送达，并抄送相关当事人等）。为避免歧义，承包方在发出通知时应注明该通知是根据不可抗力条款作出的。

从非合同的角度来说，在合理的时间内告知对方当事人不可抗力事件的产生，以及受此影响不能



履行哪些义务也十分重要。这使得对方当事人更容易应对事件的发生，包括寻找可行的解决办法。随着许多任务厂的关闭以及出行限制，承包方应充分监控其材料及人力资源的供应，并及时地发出必要的通知。

救济措施以及其他执行条款

在发出有效的通知后，如果特定义务的履行受到不可抗力的阻碍，承包方即无须履行该义务。然而，由于承包方只能在不可抗力阻碍其履行合同能力的范围内免除义务，其仍需继续履行其他未受影响的义务。同时，FIDIC 合同第 19.3 条亦要求受影响一方在不可抗力事件结束而不再受其影响时，通知对方。

尤其需要留意，FIDIC 合同在第 19.2 条中明确规定，不可抗力条款并不适用于任何一方当事人向另一方当事人支付款项的义务。

根据 FIDIC 合同第 19.4 条，若承包方因不可抗力使其工期受到延误，承包方有权要求延长任何延误的时间（但无权就增加的成本索赔）。当然，承包方是否能够获得准许延长工期须由工程师决定。

另外，根据 FIDIC 合同第 19.3 条，在不可抗力发生时，合同双方当事人都有将延误减至最小的义务，包括密切关注材料的供应，寻找可替代供应商及重新调整某些工作安排。

由于解除合同是最为严厉的做法，FIDIC 合同第 19.6 条仅提供了有限的解除合同的权利。FIDIC 合同规定，若不可抗力已对正在进行中的绝大部分施工工程持续阻碍 84 天，或同一不可抗力事件在不同阶段对正在进行中的绝大部分施工工程累计阻碍超过 140 天，则当事人可以考虑解除合同。

另外，FIDIC 合同第 19.7 条规定，若发生任何双方当事人无法控制的事件或情况（包括但不限于不可抗力事件）而使合同义务的履行成为不可能或不合法，或根据合同适用的法律合同当事人继续履行合同的义务得以免除，那么在获得特定通知的前提下，合同当事人可以无须继续履行合同义务。

若因不可抗力或上述其他情形而选择解除合同，则需留意 FIDIC 合同第 19.6 条。该条款对解除合同的后果，工程的验收以及付款作出了详尽的规定。

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