

Implications of the novel coronavirus on property transactions in Hong Kong

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Polly Chu

PARTNER | HONG KONG

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The sudden and widespread outbreak of the 2019 Novel Coronavirus has not only caused great disruption to the public health of Hong Kong but has also significantly impacted businesses. With the escalating number of confirmed cases in Hong Kong, the Government and local businesses have ramped up measures to minimize health risks by limiting the exposure of individuals in the public and workplace. These measures include mandatory quarantine of individuals, closing down of offices and limitation of services.

This article aims to explore the potential issues relating to conveyancing transactions in Hong Kong brought about by the outbreak of the novel coronavirus and the available options that parties to a conveyancing transaction may pursue during this challenging time.

How are conveyancing transactions affected by the novel coronavirus?

The spread of the novel coronavirus and the corresponding policies adopted by clients, banks and law firms has raised questions to the parties' ability to comply with the terms under a sale and purchase agreement in conveyancing transactions.

In a typical sale and purchase agreement, a clause giving a party the right to postpone his performance of obligations, or even to rescind the agreement, due to an outbreak of epidemic/pandemic, virus or disease has never been considered. Rather, the timeline of the performance of obligations assigned to the parties must be strictly adhered to, as time is of the essence in the agreement. The circumstances where the timeframes are imposed include: the payment of deposits, time for completion, raising of requisitions in respect of the property, sending of apportionment account, etc. Some timelines are statutory, like the Stamp Duty Ordinance (Cap.117), which prescribes that stamp duty shall be paid within 30 days after the date of execution of the relevant chargeable instruments, or else the parties will be liable to pay for the hefty penalty for late stamping.

Practical difficulties may arise in the delivery of the parties' obligations if a client contracted the virus and is subject to mandatory quarantine, or if banks or law firms decide to suspend their services, limit its business hours, or even close its offices due to the spread of virus in its proximity. Clients may encounter delay in depositing funds into law firms to meet the deadline for deposit payments; banks may delay in their approval of mortgage loans and the release of title deeds; and law firms may not have sufficient time to peruse title deeds and raise requisitions within the prescribed time. The consequences could be detrimental – for example, a requisition not raised in time will be deemed as waived by the purchaser who will potentially be at the risk of taking a defective title from the vendor which will in turn affect subsequent sale or mortgage of the property; and the vendor can rescind the sale when the deposit or balance of purchase price is not received within the business hours as prescribed in the sale and purchase agreement.

It is therefore essential that solicitors, when drafting sale and purchase agreements, be proactive in advising their clients and to negotiate for a fair and flexible approach to be adopted in conveyancing transactions during this circumstance.

What safeguards can be put in place?

Given the widespread and highly contagious nature of the virus, parties may consider the following safeguards:

1. Include an express term in the agreement that contemplates a postponement of obligations as a result of the Government's mandatory quarantine rules

Parties can negotiate putting an express term in the agreement to allow parties that are subject to the Government's mandatory quarantine rules to postpone the performance of obligations under the agreement (including the date for payment of deposit, the completion date, etc.) for a period of 14 days (subject to any changes in the Hong Kong government's mandatory quarantine period). The parties may take the extent of this term further and balance the interest of the other party by entitling the other party to rescind the agreement if the party subject to quarantine becomes a confirmed case of the novel coronavirus infection and his compliance with the Government's quarantine measures will substantially limit or hinder his performance of obligations under the agreement.

However, such provision for postponement must be carefully drafted to prevent abuse by the parties to use this clause as a backdoor for rescission of the agreement. To prevent such abuse, parties should include a provision in the agreement to impose a positive obligation on the parties to promptly disclose and notify each other of any quarantine measures that apply or will apply against them along with the details thereof as soon as they are aware of the same. Furthermore, the provision should require medical proof issued by the relevant healthcare services provider or Government departments. Additionally, the party requesting postponement, especially the purchaser, should also be made liable to pay the other party interest and any other outgoings of the property or costs incurred as a result of any delay in performance or postponement of completion. This is to avoid the purchaser from going to mainland China and returning to Hong Kong with the intention of delaying payment.

It should also be noted that as the statutory prescribed deadline for stamping and registration can by no means be postponed notwithstanding the private agreement by the parties, they shall be strictly followed. Therefore, solicitors shall be more vigilant of those deadlines and arrange stamping and registration of the relevant instruments as soon as possible after their execution.

2. Expanding the definition of "business day"

The definition of "business day" can also be modified to cater for the temporary closure of banks and offices during the novel coronavirus outbreak. "Business day" in an agreement usually refers to a day where licensed banks in Hong Kong are open for business but excludes Saturdays, Sundays or public holidays. Unlike mainland China where the public holiday is prolonged due to the spread of the coronavirus, parties may negotiate for an extension of such exclusion to the definition of "business day" so that "business day" can also exclude a day where the office of either party's solicitors are closed for business as a quarantine measure against the novel coronavirus outbreak. This will ensure that the time limits as prescribed under the agreement will not be affected as a result of the temporary closure.

3. Making early power of attorney arrangements

Solicitors acting for both parties shall also consider all available options to ensure parties' compliance of the agreement whilst achieving reasonable flexibility. Especially where the client is coming from mainland China or overseas countries, the making of a power of attorney can be explored with the client at the early stage of the transaction. In the case of a possible contraction, or client's logistical difficulty to execute the documents due to the cancellation of flight or other transport, having an attorney in place can ensure that the agreement, assignment and other essential documents for completing the transaction be duly executed and other acts which ought to be done as a party to the contract (such as arranging for inspection of property prior to completion, payment of outgoings, etc.) can be properly performed by the attorney.

4. Being proactive with regards to financing

While it is the client's obligation to arrange for mortgage in financing the purchase of property, solicitors shall be proactive in advising their clients to apply for mortgage as soon as agreement for the purchase has been reached.

Conclusion

The suggestions above are just some of the many approaches which can be adopted to ensure flexibility for each party's obligations during a conveyancing transactions. Outside the terms of the contract, the parties should also negotiate in good faith and communicate closely with each other with a view to achieve a mutually acceptable way for a smooth completion of the transaction during this difficult period.

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Authors

Polly Chu

PARTNER | HONG KONG

Corporate

 +852 3711 1633

 polly.chu@withersworldwide.com