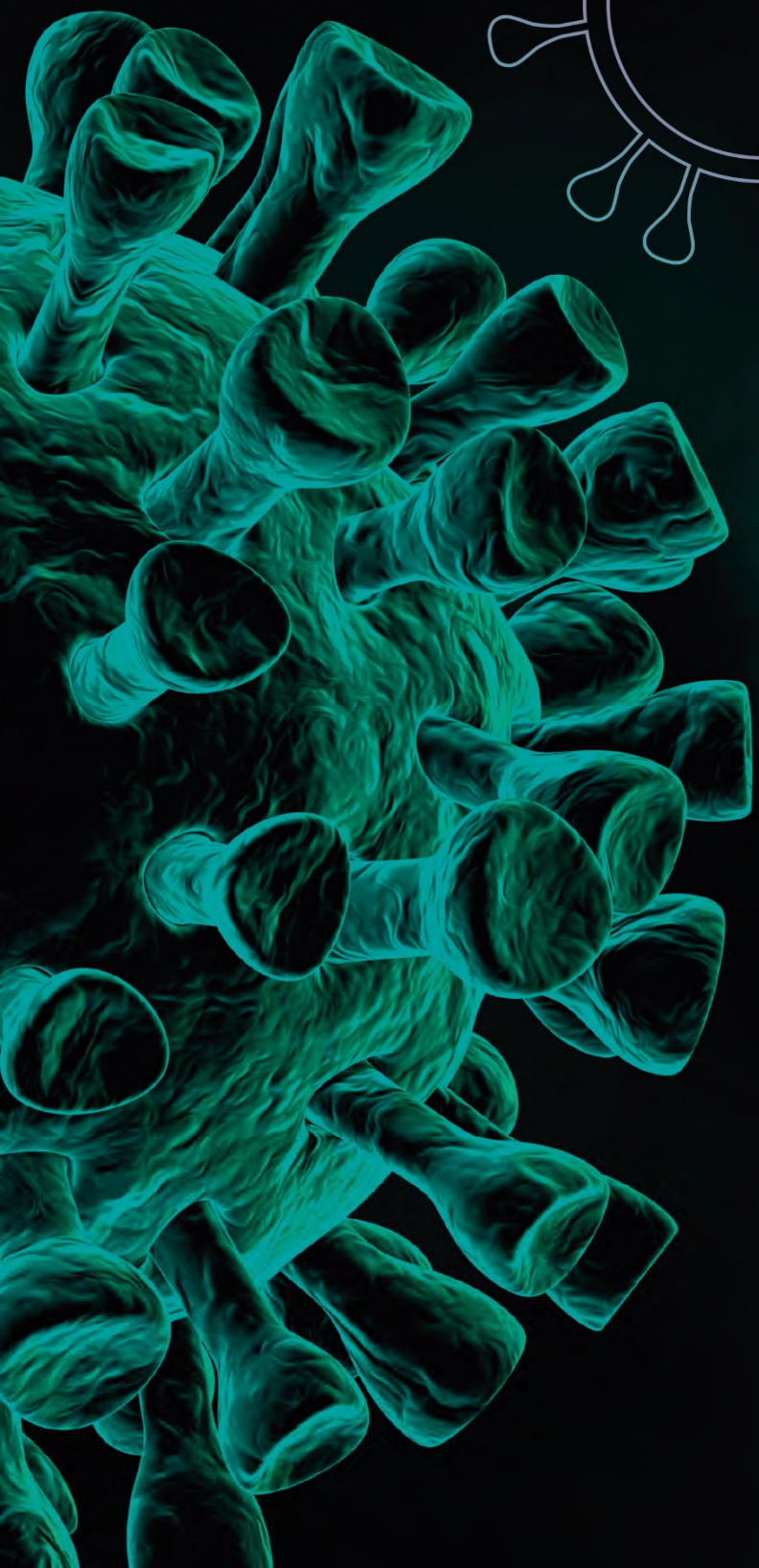
Pinsent Masons

Managing the business impact of Covid-19



8 June 2020

Managing the business impact of Covid-19

The Coronavirus (Covid-19) is having a profound impact on business globally. Supply chains, employees, event staging and travel are all already affected and have a significant impact on operation of businesses. The situation remains unpredictable and businesses need to act promptly to rapidly changing circumstances.

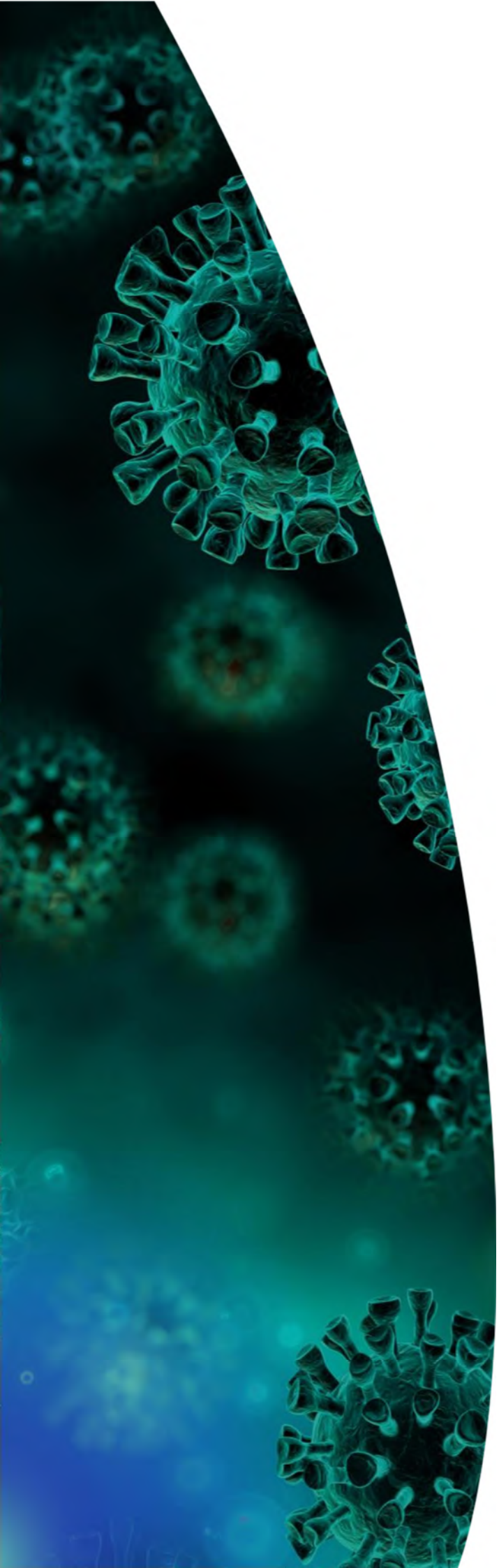
As the situation develops a close eye should be kept on Government guidance and measures that may be introduced within relevant countries in order to contain or reduce the spread of the virus. These may range from self-isolation through to mandated quarantine or forced cancellation of events. Businesses will need to monitor these carefully in jurisdictions that they operate in so that the overall global impact can be factored into the business planning and response.

The situation remains fluid. Governments around the World continue to keep the situation under review taking advice from international organisations and health officials on the best course of action. In some jurisdictions we have already seen Government mandated shutdowns, quarantine or travel restrictions. Businesses need to keep a close watch on these developments and adjust their plans accordingly as these changes may impact on their legal rights and obligations.

Overall we recommend that businesses establish a working group to review and assess the impact of Coronavirus and develop how the business will respond. This is particularly critical to ensure a consistent communications message with customers, stakeholders and suppliers.

In this guide we look at the key areas a business' working group should consider and the actions that they should take in order to respond to situation. It is not intended to be an exhaustive guide but give an indication of the key issues applicable to most businesses. We cover various jurisdictions, each in a separate chapter, with the key issues relevant to such jurisdiction ranging from contracts and supply chain, employment through to insurance and event staging.

For those preparing to return to work after lockdown you can also access our separate guide on Unlocking Business after Lockdown.



This guide is split into eight Chapters, each with a contents page at the start:

Given how rapidly Covid-19 is impacting on everyone, Pinsent Masons has also set up an enquiry line to support clients and to advise in relation to Covid-19. GCs, in-house legal and operational teams can use this service to seek advice on specific Covid-19 related issues.

If you would like further advice or guidance please contact one of our Coronavirus team listed at the back of this guide or Clare Francis who will be able to direct you to the relevant member of our team focusing on supporting businesses in responding to the Coronavirus.

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CHAPTER 1 – UNITED KINGDOM

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1. CONTRACTS AND SUPPLY CHAIN (UK)

Many products and services in the UK depend fundamentally on fast, efficient supply chains. Any supply chain is only as good as its weakest link. The Coronavirus is disrupting supply chains in terms of parts, labour and by Government restrictions.

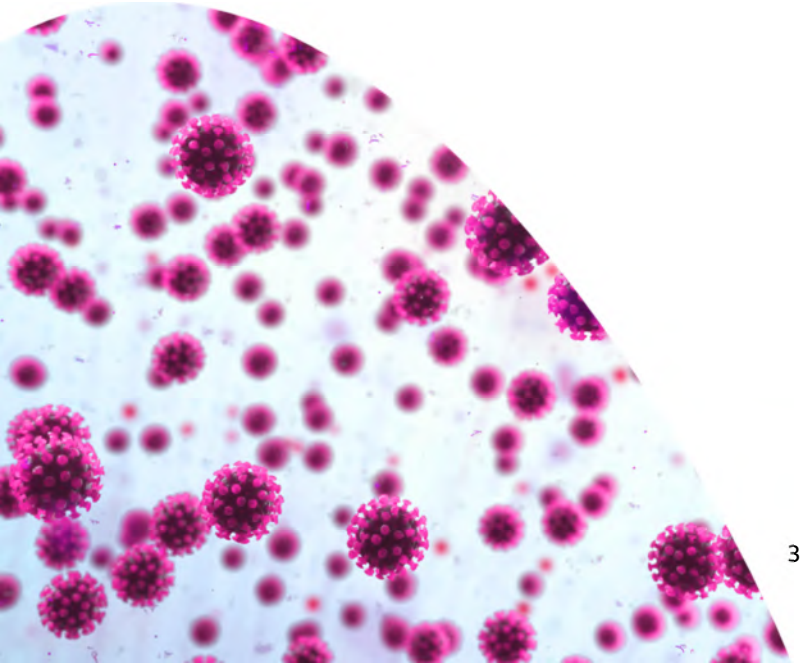
Companies should act promptly to assess the risk to their supply chains and their ability to meet obligations under customer contracts. Modern supply chains are highly integrated, often cross-border and companies have increasingly come to rely on fast, lean, efficient supply chains. Supply chain failure can be catastrophic.

Commercial Contracts and Force Majeure

The exact position will vary from contract to contract and the relevant governing law of such. There is no overriding concept of force majeure in English law. Therefore, the ability to claim 'force majeure' in an English law contract rests solely on the drafting in the relevant contract. If the contract is silent then force majeure is not implied. In other words the contract would need to specifically refer to force majeure in its terms and/or give a termination right for this to be exercisable. Equally if you are looking to rely on force majeure as a concept of relief for non-performance or under-performance, an English law contract would need to specifically refer to a force majeure event as providing such relief. There is also a concept of frustration under English law which may be implied but the threshold for this is high and we currently consider this unlikely to be applicable.

Although this note provides an English law overview, it is important to note that in jurisdictions governed by civil law (including in the People's Republic of China ("PRC")), the principles of force majeure are implied into such civil law contracts. Obtaining relief from obligations tends to require that the event or circumstance(s) is beyond the party's control and, further that the event or circumstance (a) was not reasonably foreseeable at the time of entry into the contract; (b) the effects of such cannot be avoided by appropriate measures; and (c) it prevents performance.

It is worth noting that in the aftermath of the SARs outbreak in 2003, courts in the PRC held that the outbreak **was** in the category of an epidemic for the purposes of force majeure. Given the governmental measures being put in place, and the declaration by the WHO, the Coronavirus will almost certainly be classed as a qualifying event. Businesses should consider the response to SARs and any specific actions taken with customers or suppliers at this time as this could prove valuable intelligence for their response at this time.



Under English law (and other jurisdictions based on common law) it is vital to consider carefully the specific terms of the force majeure clause. There is no one-size fits all approach. In reviewing contractual provisions the areas we would recommend you look at in your contracts are as follows:-

Force Majeure Topic	Points to consider
Trigger event - plague, epidemic or pandemic	The WHO declared Coronavirus formally as a pandemic on 11 March 2020. Therefore, from this date Coronavirus will be a trigger event where the clause refers to epidemic or pandemic.
Trigger event – acts of government	The UK Government has put in place restrictions – travel restrictions or cancellation of events due to social distancing – therefore if this is specifically referenced in the contract it could be relied on if that is the event affecting performance.
Trigger event – shortage of labour or raw materials	There may be actions resulting in a shortage of labour (e.g. the UK Government has instructed people to stay at home/not go to work (similar to current situation in PRC and Italy)) or the supply of raw materials (e.g. port restrictions). If so this may be relied upon if it is the shortage of labour/raw materials that affects ability to perform the contract.
Trigger event – beyond the reasonable control of the party	Many contracts under English law will include a catch all of anything that is beyond the reasonable control of the party. Given the current spread of the virus outbreak in the UK then this may be a relevant trigger event as the impacts of the virus would be *beyond control* of the parties.
Standard of proof	It will also be critical to identify the standard of proof the contract requires. Typically under English law this would be that the force majeure event "hinders", "prevents" or "delays" performance. The distinction between these terms is important. Must the affected party be prevented from performing in order to claim or it is merely enough that they are hindered or disrupted? To be 'prevented' it would need to be physically or legally impossible to perform so this sets a much higher threshold. The wording of the contract needs to be carefully considered.
Notification requirements and timelines	It will be important to consider notice requirements and follow these carefully to ensure that the right to rely on the force majeure event and/or the relief event is not lost by not following the correct processes.
Consequences and termination rights	In general, force majeure clauses in English law contracts provide that neither party shall be liable under the contract for any failure during the period of the force majeure event (although the drafting of the contract will specify the actual remedy). Under many contracts there is a backstop termination right if the services are suspended for a specified period of time or longer. These should be noted and diarised to ensure that relevant action can be taken closer to the deadline to reassess the situation and either make use of such rights or take steps to prevent them being exercised by a counter party.
Mitigation	It will be important to take steps to mitigate any impact. Customers should be pressing their suppliers to take steps in mitigation. However, in the context of the Coronavirus careful thought will need to be given to what steps practically can be taken to implement mitigation steps given the wide application.

It is vital to consider the terms of the force majeure clause. There is no one-size fits all approach

Businesses should take care in interacting with counterparties that are reporting difficulties to ensure that you do not waive rights or confirm obligations which might later prove to be a waiver of obligations or a variation to the underlying contract provisions.

It will be important to quickly identify the position under contracts at all levels and how they interact with one another. As well as force majeure clauses, businesses should consider short term termination rights, performance measures and guarantees to get a full picture of the likely position and liability under each contract. A clear understanding of contractual terms will enable businesses to plan and prioritise their response.

As the constraints on standard working practices increase, businesses should consider the options open to them for validly executing documents and legal contracts electronically. Whilst many organisations already make at least some use of electronic signature protocols or third party operated platforms, for many, an electronic signature will be a new departure raising concerns as to the legal enforceability of the signature process and how best to prove that the signature was validly given. Businesses could also consider putting in place relevant powers of attorney.

The most common form of electronic signature involves typing a name into the electronic form of a document or electronically pasting a signature (in the form of an image) into a soft copy version of a contract in the appropriate place, often using a web-based platform such as Docusign.

As a general rule, across England, Wales and Scotland, the electronic signature of a contract, including a Deed, is effective and legally enforceable. Indeed, where an external system or bespoke internal process is used, the watermarking of documents and the electronic record created through the execution process, provide a very high standard of evidential proof of exactly what was signed, by whom and when. However, there are certain limits which mean that further legal advice may be required before using an electronic signature of any kind is used so businesses should consider this early and plan accordingly.

IMMEDIATE THINGS TO DO

- Review terms of contracts – what is the governing law and which contracts have force majeure provisions that could be relied on and where is there exposure?
- Diarise any backstop termination rights identified in contracts to ensure the risk can be managed.
- Prepare template force majeure notices which can be populated quickly if there is a need to respond to a changing situation rapidly.
- Map supply chain through to customers – use this to inform a supply chain strategy that can be implemented in order to ensure, so far as possible, the business can operate seamlessly.
- Consider steps that could be taken to mitigate exposure – such as dual sourcing, stock piling or obtaining goods from another source.
- Put in place processes to spot any early warning signs of challenges within the supply chain so that action can be taken pro-actively.
- Consider whether any specific provisions detailing with Covid-19 (a Coronavirus clause) may be required in new agreements that are being entered into by the business.
- Provide training to account and contract management teams to ensure that they do not inadvertently waive contractual rights or create binding variations through actions to respond.
- Legal teams should also consider whether there will be any issues caused with signatory availability (e.g. if workforce are remote working) and whether any workarounds need to be put in place to address this.
- Consider putting in place processes for electronic signatures and identify where the business has contracts that will not be capable of being executed by an electronic signature.

Supply Chain

As well as looking at their own contracts businesses should consider carefully the potential impact on its wider supply chain. If a business in the wider supply chain is heavily impacted this could have a significant impact on your business' operations.

Gathering information on key questions from your supply chain is critical to assess the impact and be able to take action. We recommend you put in place holistic processes to ensure all information is collated centrally so that you have an overall view and do not miss information which on its own may look innocuous but when considered together with other information demonstrates a potential critical supply chain failure.

Businesses should be vigilant for the following. Any of these signs may indicate potential difficulties and should act as a trigger point for further investigation and action on your part in relation to suppliers.

- **Service of force majeure or release notices** – make sure the business know to look out for these and pass them to an escalation point promptly so that they can be assessed, validated and the impact can be mapped into business operations so far as possible.
- **Requests for changes in payment terms** – Requests for accelerated payment or for deposits, up-front pre-payments or reduced retentions can be a key indicator of cash-flow problems. The reasons behind any such requests should be explored fully and quickly.
- **Non-delivery** – Where supply chain members are not delivering in accordance with agreed schedules or contract terms this can be an indication of a more endemic problem. Investigate this early and ensure that lenience is only applied where appropriate so that performance of suppliers does not slide.
- **Lack of communication** – Silence, particularly after persistent enquiry, can be a key indicator that the supplier is avoiding contact and busy focussed on other things.
- **Market intelligence** – Rumour and gossip must be treated with caution and are best supported by information received from more authoritative sources. However such market intelligence may be a 'real time' indication of events occurring at your supplier. This may come from sources as diverse as your contacts at the supplier, other customers or even the media and the internet.

We are also already seeing activity where customers are pro-actively contacting suppliers requesting information on their plans to deal with the virus. This helps the customer get early insight. Savvy suppliers are developing robust plans and sharing these with customers in order to provide the customer confidence in how the supplier is dealing with the outbreak and how it will be able to continue to serve the customers business.

IMMEDIATE THINGS TO DO

- Identify critical suppliers to the business – priority tier 1 but also vital links in lower tiers of the supply chain;
- Put in place processes to centrally co-ordinate information received to ensure that critical information is not missed and early warning signs can be responding to accordingly. Ensure that this information is funnelled to the correct decision makers that are able to take action fast if a failing supplier is identified;
- Communicate with critical suppliers to understand their potential exposure to the impact of Coronavirus and work collaboratively with the supply chain to minimise these exposures.
- Consider requesting from suppliers details of their Coronavirus contingency measures to gain an increased understanding of the steps suppliers are taking in order to mitigate the impact.
- Where you are a supplier be pro-active in talking to customers about the contingency measures you are implementing in order to maintain customer confidence and business.
- Remain agile and consider innovative solutions if a failing supplier is identified. For example, can critical IPR or tooling be purchased to allow in-house sourcing, is there an opportunity to buy critical suppliers;
- Consider customer propositions and how these may be affected by the impact on the supply chain. For example, can next day delivery be sustained? Do longer delivery times need to be factored into the sales process? How can these disruptions be managed? Ensure that customer complaint departments are fully briefed on any likely challenges to provide a consistent approach to queries from customers.

2. EMPLOYMENT, IMMIGRATION & PENSIONS (UK)

As more Coronavirus cases are detected in more countries, employers with globally connected workforces will need to monitor the impact of the outbreak and take steps to protect their employees where necessary. The outbreak raises points of employment law, immigration, health and safety and data protection law – businesses should take professional advice.

Sickness and self-isolation

Where workers have contracted Coronavirus they would be entitled to sick leave and sick pay in the usual way. Many company sick pay policies will include a requirement for the employee to obtain a fit note from a doctor. An employee who is following official guidance to self-isolate and who has flu-like symptoms may have difficulty obtaining a fit note. As such, employers may need to consider making exceptions to their usual sick pay policies, although we understand GPs are using phone consultations rather than requiring attendance at surgery.

At the UK Budget on 11 March, Chancellor Rishi Sunak announced that Statutory Sick Pay (SSP) will be temporarily extended to cover:

- individuals who are unable to work because they have been advised to self-isolate; and
- people caring for those within the same household who display coronavirus symptoms and have been told to self isolate.

The latter point would make provision for, for example, carers of children or elderly relatives who live with the absent employee.

Regulations have since confirmed these changes, so from 13 March 2020, employees who self-isolate in accordance with guidance from Public Health England, NHS National Services Scotland, or Public Health Wales will be eligible to receive SSP, which is currently paid at a rate of £94.25 per week. In terms of evidence available for the reason for absence, government guidance from 12 March 2020 is that those self-isolating with minor symptoms should not call their GP or NHS 111. Employees will not be able to provide any documentary evidence for the first seven days of absence, and it is unlawful to require medical certification for the first week of absence. New SSP Regulations were published on 15 April 2020, which now make those who are shielding eligible for SSP.

Due to another change announced, SSP will be payable from the first day of absence without the need for waiting days. Draft legislation confirms 13 March 2020 as the effective date for this change. This change appears to be temporary and will only apply during the coronavirus epidemic, after which sick pay may revert to the previous position, which is that it is only paid from the fourth day of absence

Workers required by their employer to stay home (for example, because, according to government guidance, the worker should

be self-isolating) will not be classed as being on 'medical suspension', as this is only available on very limited grounds.

However, workers are entitled to be paid for any period that they stay away at their employer's request, provided that they are otherwise available and ready to work. Employers are unlikely to be able to require workers to take holiday during any period of self-isolation in the absence of a contractual right to do so.

Where an employee has been advised to self-isolate but continues to come into contact with other employees or clients then employers must bear in mind the duties that they owe to other employees under UK health and safety law. If employers knowingly allow an individual who has been advised to self-isolate to attend their premises or come into contact with other employees, they may be in breach of those duties, particularly where any of those other employees are more vulnerable to infection - for example, pregnant employees, those with long-term health conditions. Suspension may be an option where an individual who has been advised to self-isolate refuses to do so, but employers should consider whether they have a right to suspend in these circumstances. Where no express contractual right exists, legal advice should be sought.

Coronavirus Job Retention Scheme

The Coronavirus Job Retention Scheme ("CJRS") is a temporary scheme open to all UK starting from 1 March 2020 until the end of October 2020 (although with modifications from August). The scheme will entail classifying staff as "furloughed workers" – that is employees temporarily away from work due to the exceptional economic conditions. It means staff can be kept on the payroll, rather than being laid off.

Under the CJRS employers will be able to receive up to 80% of an employee's wages (up to a total of £2,500) per month, plus the employer's National Insurance contributions and minimum auto-enrolment employer pension contributions on that 80%. There is no obligation, under the scheme, for employers to top up the pay of any furloughed employee to 100%, but some employers may choose to do so, not least because it may be helpful when seeking to change the status of employees to that of furloughed employees (more on this below).

Pay is determined on the following basis:

- For salaried employees, pay is their normal salary. Commissions and bonuses are excluded.
- For employees who pay varies, their pay is the higher of the pay from the equivalent pay period last year or the average pay of the last 12 months.

The guidance that was issued on the CJRS clearly set out that, in order to be eligible for the scheme, employers must confirm in writing to their employee that they have been furloughed. The Treasury Direction, which was issued on 15 April 2020, adopted a different position, suggesting that the employer and employee must have agreed in writing that the employee will cease all work, which caused concern for many businesses. The guidance has subsequently been amended to state that there needs to a written record of the furlough, but that the employee does not need to have provided a written response, which suggests that there is no requirement to obtain the employees written agreement to the furlough. Further, employers are only required to confirm, when submitting a claim through the CJRS portal that their claim is in accordance with HMRC's published guidance (and not the Treasury Direction). Given this, our view is that HMRC is likely to rely on the position as set out in the Guidance when assessing claims.

It remains the case that employees who have had their hours reduced (either through a short-time provision or by agreement with their employer) but who are still working will not qualify for the scheme (because they will continue to carry out some work for their employer).

As well as being a "furloughed employee", the employee must have been on the employer's payroll as at 19 March 2020. The Treasury Direction on the CJRS suggests that any employee must also have been included on an RTI submission on or before 19 March 2020, which may cause difficulties in respect of employees who have commenced employment in February/March 2020 but have only been included in the payroll after 19 March 2020.The latest guidance has clarified that if an employee was made redundant or stopped working for an employer on or after 28 February 2020, the employer can re-employ them, put them on furlough and claim for their

wages through the scheme. (It is important for employers to be aware that this is an option for consideration, rather than it being mandatory for them to re-engage in these circumstances and employers should ensure that they are consistent in their approach to this issue to minimise the risks of discrimination.)

CJRS - Are employer pension contributions covered?

Yes – but only based on the subsidised wage covered by the government grant.

However, it is important to note that the grant covers only the minimum mandatory employer contribution of 3% of income above the lower limit of qualifying earnings (which is £512 per month until 5th April and will be £520 per month from 6th April 2020 onwards).

Employers will continue to have to pay contributions as normal to their pension schemes in accordance with the terms of employment contracts and pension scheme rules. This will be the case even if an employer has been paying more into its pension scheme than is allowed for by the grant

The grant is focused on DC contributions. This may prove a challenge to those who still have ongoing DB accrual, where the cost of accrual is usually greater.

CJRS - What elements of pensionable pay will be covered?

Fees, commission and bonuses should not be included in the calculation of salary that is covered by the government grant. HMRC has confirmed that pension contributions paid under a salary sacrifice arrangement should not be included either. However, commission and bonuses feature in the statutory definition of qualifying earnings which is used in automatic enrolment for DC employees:

- to determine eligibility for scheme membership; and
- to determine pension contribution amounts (unless these are based on "basic pay" or some other definition of pensionable pay which expressly excludes them).

Active members of a defined benefit scheme could experience a fall in the amount of pension eventually payable both because of a possible drop in the length of pensionable service and in the amount used for calculating final pensionable salary.

CJRS - What about employee pension contributions?

Employee contributions are deducted from a worker's pay by the employer, but are not borne by the employer as a cost. These are **not** covered by the government grant. Employees will pay pension contributions under the terms of the scheme.

CJRS - Employee options for pensions

Some of the workforce may experience hardship in the coming months. Any employee may have the option of leaving a pension scheme and then opting back in when life and pay return to normal – though this is not always on the same terms.

Employees can also remain in active membership but on a non-contributory basis if scheme rules (and employment contract terms) permit.

It is important that employees understand the full implications of this, in particular for dependants' benefits.

CJRS - Legal/contractual terms

It is important to consider how the CJRS, and any other changes, interact with the scheme rules and relevant employment contracts.

For example, rules of DC schemes may require the continued payment of "full" contributions even though the government grant covers only minimum contributions calculated by reference to subsidised wages under the Job Retention Scheme.

If an employer intends to make contributions only to the extent they are covered by the grant, this may trigger 60 day consultation with the workforce under pensions legislation. The Pensions Regulator has published guidance waiving the requirement for consultation in certain circumstances.

Temporary absence provisions in scheme rules should be checked. They may have an impact on payment of

contributions, and on whether and how active members of DB schemes continue to accrue pensionable service.

CJRS - Salary sacrifice

Under salary sacrifice, the employee gives up a portion of salary in exchange for the employer paying a corresponding amount into the pension scheme. As a result of the reduction in pay, no deduction is made from the employee's pay for pension contribution purposes.

In these cases, DC employers pay the full (generally) 8% statutory minimum auto-enrolment pension contribution. However, the government grant only covers the **minimum** statutory employer contribution of 3%. So employers would still be liable for the remainder under the terms of the salary sacrifice arrangement entered into with employees unless other arrangements are made.

CJRS - Death benefits

Employers can also be required to bear the cost of death in service benefits. These are typically provided by way of a lump sum based on a multiple of salary. Where these lump sums are insured, trustees and employers should check whether furloughed workers will be covered at all and, if so, for the correct amount.

Regardless of funding, it is important that employees understand any changes in the nature of their cover, either due to a reduction in earnings or to a change in their employment status. Trustees and employers will need to communicate appropriately once the impact on employees' benefits is clear.

Emergency Volunteer Leave

Separately from the job retention scheme, the government has passed legislation to allow workers to take emergency volunteer leave to help in health or social care. This period of time can be in blocks of two, three or four consecutive weeks' statutory unpaid leave during a single volunteering period. The volunteering period will initially be for 16 weeks, but the government can extend this by further 16 week periods. A volunteer may not be absent from work more than once during any volunteering period. There will be a UK-wide compensation fund to cover loss of earnings and expenses incurred, at a flat rate, for those who volunteer.

A worker on emergency volunteer leave has a right to return to work with the same terms and rights (including pension rights) as if he or she had not been absent. Pension schemes have to treat the time such workers are absent as if they were not absent. In other words, these workers are treated for pensions purposes in a similar way to those on paid maternity leave.

Other pensions matters

The employers of some defined benefit pension schemes have been struggling to afford contributions designed to pay off scheme deficits. The Pensions Regulator has published guidance setting out the circumstances in which these contributions can be delayed. Employers and those managing these pension schemes must take specialist legal advice to ensure that the correct steps are taken and the delay is validly implemented. We at Pinsent Masons have experience of advising in these difficult circumstances. We have also helped those managing pension schemes to deal with funding, investment and scheme administration challenges arising from the Covid-19 outbreak. We can help all parties concerned make sure that any changes are implemented, and (where appropriate) communicated to pension scheme members, in ways that reduce the risk of future legal challenges."

Business travel

Employers should consider restricting employees from travelling unless absolutely necessary (particularly in respect of high risk destinations). Where employees need to travel employers should provide them with additional advice on how to ensure they are following best practice in respect of hygiene; contact with sick people and any other advice relevant to their destination.

Employers should consider carefully where employees are refusing to travel on business. Whilst the law varies depending on the jurisdiction it is fair to say that worldwide employers are expected to take proportionate and sensible action to protect employees. This may include cancelling business trips where

government and insurance guidelines advise against travel to specific destinations.

Communicating with employees

Under UK data protection law, personal data concerning health is 'special category data'. This means that employers need to ensure that any employer-wide communication does not include any data about the individual who is absent. For example, while it would be fine to let employees know that there has been a confirmed coronavirus case within its workforce in London, it would not be appropriate to provide any details from which the individual might be identified.

Employers that seek information from employees about travel need to be careful not to discriminate while doing so. For example, an employer is likely to be able to justify a request for all employees to declare any travel from an area in respect of which the UK government advises an individual to self-isolate. However, enquiring about travel only to certain areas - for example, China - or seeking information only from certain sections of your employee population is likely to amount to discrimination or harassment.

Discrimination and harassment

There have been reports of an uptake in racism and prejudice being shown towards those of Chinese origin since the outbreak began. There is therefore an increased risk of such behaviour occurring in the workplace. Employers will be liable for harassment or discrimination by their employees towards other employees, save where they have taken reasonable steps to prevent the conduct. Employers will be unable to rely simply on a policy that states that discrimination and harassment is not tolerated. Further steps, such as training and evidence of inappropriate behaviour being tackled, must also be taken for an employer to avoid liability.

Employers in the financial services sector must also be aware that any failure to deal with these issues appropriately may have implications for the fitness and propriety of the senior managers who are responsible for these areas of the business.

Immigration rules

The Home Office has introduced a variety of relaxations to cater for the immigration challenges the situation is presenting. Initially these primarily related to China and Chinese nationalities, but they have now been extended to cover all nationalities. However, a number of practical issues have still not been addressed and the situation is fast evolving. The current guidance covers the period to 31 May 2020 but must be monitored closely for updates as the situation develops.

Visa holders in the UK

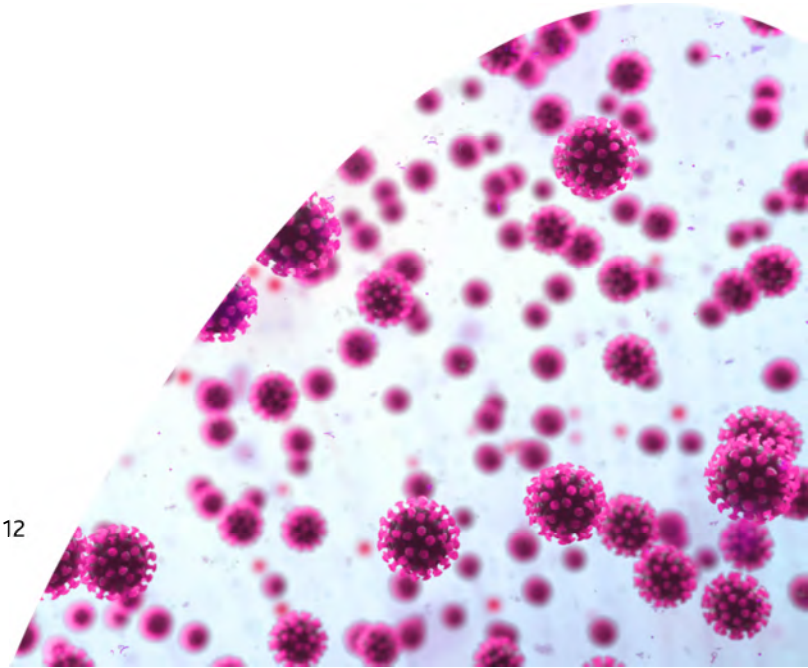
Extensions

The Home Office has provided reassurance that those in the UK legally, but whose visa is due to expire, or has already expired, and who cannot leave due to the Covid-19 situation, will not be regarded as an overstayer, or suffer any detriment in the future.

Those whose visas expire between 24 January and 31 July and cannot leave the UK are eligible for a visa extension to 31 July 2020.

However, unlike the original stance taken for many Chinese nationals, this does not appear to be automatically applied.

Those affected, of all nationalities, must contact the Home Office Coronavirus Immigration Team to request this by completing the form at this link (which requires details of the reason why an extension is required): https://gov.smartwebportal.co.uk/homeoffice/public/webform.asp?id=199&id2=5C97E7



We understand those successful will receive the following confirmation: *"Your leave has been extended under existing conditions until 31 July 2020. You will not be regarded as an overstayer or suffer any detriment in any future applications. However, you must make plans to leave as soon as you are able to do so. This will only apply where you hold an existing valid visa which has already expired or is due to do between 24 January and 31 July."*

This extension would appear to be intended for those who cannot otherwise extend/switch to another category in the usual way and did not intend (or were not eligible) to remain in the UK long-term, were it not for the ongoing pandemic. Anyone who already had their visa extended to 31 May 2020, under the previous guidance, will get an automatic further extension to 31 July 2020.

Right to work checks must be kept up to date and employers should verify with the Home Office the status of those with expiring leave who are still employed.

The original guidance applicable to Chinese nationals provided that long-term visit visas would be automatically extended such that those who have reached their maximum stay in the UK (180 days), albeit their visa may not have expired, would get an extension. The updated guidance does not reference this and so we recommend affected individuals reach out to the Home Office Coronavirus Immigration Team for guidance on their position.

New guidance issued by the Home Office on 31 March (https://www.gov.uk/government/news/nhs-frontline-workers-visas-extended-so-they-can-focus-on-fighting-coronavirus) confirmed that NHS frontline workers (and their families) with visas expiring between 31 March and 1 October 2020 have an automatic extension for one year to enable them to focus on fighting coronavirus. Although the legal basis for this is unclear, it is confirmed that such an extension does not have to be requested – it will be automatically applied. Initially this was said to cover doctors, nurses and paramedics employed by the NHS. On 1 May the list of frontline workers was expanded to include biochemists, physiotherapists, therapists , social workers and many more. The update confirms that those eligible can be employed by the NHS or the independent sector.

This extension will apply to any relevant individual affected, so not just those on sponsored Tier 2 or 5 visas, for example. The update also confirmed that frontline workers can work at any NHS hospital during the coronavirus outbreak if their sponsor can maintain their sponsorship duties, and sponsors are not required to update the SMS with their new work location. Frontline workers can carry out supplementary work in any role at any skill level during the coronavirus outbreak and there is no restriction on the number of hours they are able to work.

Finally, pre-registered overseas nurses who are currently required to sit their 'first skills' test within three months, and to pass the test within eight months, will now have this deadline extended to the end of the year. It has been confirmed that f they do not pass on the first attempt they will have until 31 May 2021 to pass the exam.

The Home Office has confirmed that original visa terms and conditions will continue to apply where an individual is able to benefit from an extension (automatic or otherwise) due to the pandemic, although the precise legal basis for this is not yet clear. Crucially for those extensions which must be requested due to the pandemic, it must be noted that if the applicant's reasons are not accepted they will become an overstayer and so will not be in the UK on the basis of their original visa terms (e.g. the right to work). Our advice remains that anyone whose visa is about to expire and who is eligible to extend or switch to another category should do so instead of relying on the coronavirus extension. It is not yet known if these will be further extended as this situation develops. It is therefore important that visa holders ensure that they submit any extension applications they are eligible for in time. Although applications can be submitted online, all application centres in the UK are now closed and so biometric appointments cannot be made – we await guidance from the Home Office as to whether they will continue to process applications in the absence of fresh biometrics but have heard anecdotal evidence of this occurring. Those not eligible to do so should be prepared to leave the UK at short notice if expiries kick in.

Switching

Migrants in the UK and looking to move to a long-term UK immigration category (e.g. moving from a Tier 2 Intra-Company Transfer to Tier 2 General) often cannot switch within the UK, they must leave and apply from their home country. The Home Office is exceptionally allowing those who cannot leave the UK, due to travel restrictions or self-isolation, to switch in-country until 31 July if their visa expires between 24 January 2020 and 31 July 2020 (including those whose leave has already been extended to 31 July). All other eligibility rules for the category will apply (including, we assume, those as to cooling off provisions). As noted above, applicants will not be able to attend biometric appointments due to the current situation as all application centres in the UK are temporarily closed due to the current situation. The Home Office has confirmed they will not be regarded as overstayers or subject to enforcement action as a result of this.

Sponsoring an employee waiting for their Tier 2 or 5 visa application to be decided

The Home Office has now released guidance allowing sponsors to have employees start work before their visa application has been decided if the following conditions are met:

- sponsors have assigned them a CoS
- the employee submitted their visa application before their current visa expired
- the role they are employed in is the same as the one on their CoS.

It appears that this would apply to sponsors in a range of useful scenarios at present including that of migrants waiting for the decision on Tier 2 Change of Employment applications. Employers should be mindful that sponsor's reporting responsibilities start from the date of the individuals employment, not from the date that their application is granted. Employers should refer to our Right to Work Check guidance (https://www.pinsentmasons.com/out-law/guides/coronavirus-immigration-implications) below to ensure they are complying with current regulations.

If an employee commences work on the basis of their assigned CoS and then subsequently their visa application is refused, sponsors must terminate their employment and should keep full written records of their prompt action taken following a refusal for compliance and future audit purposes.

Sponsorship considerations

Tier 4 students

On 20 April, the Home Office published guidance on temporary provisions for Tier 4 sponsors and those on student visas affected by Covid-19.

The guidance contains many welcome concessions which will be withdrawn "once the situation returns to normal". Key points to note are:

- concession introduced on 14 April reaffirmed allowing new students who are applying to switch into Tier 4 in the UK to commence study ahead of their application being decided. The guidance provides more detail on the requirements which need to be satisfied in order to use this concession;
- the Home Office will not consider it a breach if Tier 4 sponsors offer distance learning to existing students in the UK or those who have chosen to return home overseas and wish to continue their studies. Sponsors will not have to withdraw sponsorship under these circumstances. The same would apply to new Tier 4 students who have been issued a visa but are unable to travel to the UK. Missed contact points as a result of this will not need to be reported (although online contact points are expected to be in use as far as possible);
- the Home Office will not take enforcement action against sponsors who continue to sponsor students absent due to coronavirus. Such absences do not need to be reported - that could be due to illness, self-isolation or inability to travel due to travel restrictions. Further, sponsors do not need to withdraw sponsorship if a student is unable to attend their studies for more than 60 days. A clear record and paper trail should be kept in all circumstances;

- Tier 4 visas can be extended in line with the Home Office's current general policy. Students who need to repeat a year, retake a module, or resit an exam are exempt from demonstrating academic progression as would usually be required for those applying in the UK;
- the Home Office may apply discretion if an individual applies for an extension that would take them over the normal maximum period permitted on a Tier 4 (General) visa. As such a concession is discretionary, care should be taken by applicants in providing detailed evidence to justify why an extension beyond the maximum period of leave should be granted;
- "higher education providers with a track record of compliance will be able to self-assess students as having a B1 level of English";
- Tier 4 students normally required to register with the police (or update their police registration) will not be required to do so whilst social distancing remains in place but will have to when it ends; and
- the restriction on students working up to 20 hours a week has been lifted for doctors, nurses, paramedics and those whose sponsor has suspended all study. Volunteering is also permitted for NHS Volunteer Responders.

Tier 2 migrants and furlough

Employers will be relieved to hear that on 3 April, the Home Office finally published some guidance on the application of furlough to sponsored migrants in the UK. The guidance confirmed:

- if you cannot pay the salaries of sponsored employees because you have temporarily reduced or ceased trading you can temporarily reduce the pay of your sponsored employees to 80% of their salary or £2,500 per month, whichever is the lower (although not expressly stated, by implication we assume this means it will not be a breach in such circumstances where a sponsored migrant's salary falls below the applicable minimum threshold);
- any reductions must be part of a company-wide policy to avoid redundancies and in which all workers are treated the same; and
- these reductions must be temporary, and the employee's pay must return to at least previous levels once these arrangements have ended.

Frustratingly this guidance is silent on whether employers should report the changes to salary. Until guidance is published to the contrary we would recommend that employers err on the side of caution and that any changes to salary are reported against the relevant migrant's Certificate of Sponsorship, as usual, using the Sponsor Management System. It will be important to confirm the reason for the reduction in the 'free text' section of the report, and to keep a copy of the wording submitted as part of the report for compliance purposes.

Employers should also retain a copy of the company-wide policy that is being implemented to avoid redundancies so that employers are able to justify any salary decreases in a Home Office audit.

Looking ahead, we recommend that the date at which salary reductions are due to come to an end should be diarised so that employers remember to report the increase on within 10 working days of salary being increased.

Certificate of Sponsorship (CoS) and confirmation of acceptance for studies (CAS) expiring whilst applications are unable to be submitted

The 3 April Home Office guidance also confirms that if you have issued a CoS or CAS and the sponsored employee or student has not yet applied for a visa they will still be able to do so. Where the start date for the employment or course has changed, the Home Office will not automatically refuse such cases. The example provided in the guidance is that the Home Office may accept a CoS which has become invalid because the employee was unable to travel as a result of coronavirus.

Caution should be taken in respect of this update as the Home Office has caveated this guidance stating that "such situations will be considered on a case by case basis".

Employers wishing to use this concession are advised to keep full details of why an application has not been submitted. This could be a paper trail of the discussions that took place as well as evidence of the relevant visa application centre being closed within the timeframe the application was required to be submitted. More details are set out in the Home Office guidance of 20 April.

Sponsors should note that the Home Office sponsor priority service, which aims to fast track certain administrative applications within five working days for a £200 fee, is temporarily closed and it is unclear when this will reopen. Sponsors should therefore be mindful that any updates submitted (such as change of Authorising Officer) will be subject to the 18 week service standard. It is extremely important for sponsors to ensure they are on top of their sponsor administrative duties at this time.

Affected employees overseas

Many UK visa application centres overseas are currently closed, as are English language testing facilities. Alongside travel restrictions, this will naturally delay the ability to bring people from other countries to the UK. The situation in a particular country should be checked on a case by case basis. A practical issue to bear in mind for this group is that if such affected individuals are sponsored, their certificate of sponsorship must be used to apply for a visa within three months or it expires. This is one of many practical points we await Home Office guidance on.

Similarly, those whose passports are with closed visa application centres may be prevented from travelling until it is returned to them. A practical consideration for employers is that sponsored migrants are generally given a 30-day entry clearance vignette to come to the UK. Such issues and travel restrictions may prevent individuals from being able to travel within that 30-day period. The Home Office has now confirmed that those affected can request a replacement vignette, with revised validity dates, free of charge until the end of 2020. This can be requested by emailing CIH@homeoffice.gov.uk. Such emails should detail the individual's name, nationality, date of birth, GWF reference number and "REPLACEMENT 30 DAY VISA" in the subject line. The replacement visa itself can be obtained when visa application centres reopen. This does not apply to visit visas. British nationals overseas cannot currently apply for British passports from certain jurisdictions due to reduced staffing levels at the British Embassy and Consulates and application centre closures. Those who need a new passport for urgent travel will instead have to apply for an emergency travel document.

Right to work checks

The Home Office has made temporary changes to the employer process for conducting right to work checks in response to the coronavirus pandemic.

As of 30 March 2020, the following temporary changes apply:

- checks can now be carried out over video calls;
- job applicants and existing workers can send scanned documents or a photo of documents for checks using email or a mobile app, rather than sending originals;
- employers should use the Employer Checking Service online if a prospective or existing employee cannot provide any of the accepted documents - https://www.gov.uk/employee-immigration-employment-status .
- Checks continue to be necessary, and employers must continue to check the prescribed documents listed in the government's right to work checks guidance - https://www.gov.uk/government/publications/right-to-work-checks-employers-guide . It remains an offence to knowingly employ anyone who does not have the right to work in the UK.

The temporary process

The new temporary process for conducting right to work checks is:

- ask the worker to submit a scanned copy or a photo of their original documents via email or using a mobile app;

- arrange a video call with the worker - ask them to hold up the original documents to the camera and check them against the digital copy of the documents;
- record the date you made the check and mark it as "adjusted check undertaken on [insert date] due to Covid-19;
- if the worker has a current Biometric Residence Permit or Biometric Residence Card or status under the EU Settlement Scheme you can use the online right to work checking service while doing a video call. The applicant must give you permission to view their details - https://www.gov.uk/view-right-to-work.

If a job applicant or existing worker cannot show their documents then employers must contact the Home Office Employer Checking Service. If the person has a right to work, the Employer Checking Service will send employers a 'Positive Verification Notice'. This provides them with a statutory excuse for six months from the date in the notice.

This guidance was issued on 30 March and is not stated to be retrospective. Given some employers may have taken a commercial view and followed this approach prior to the guidance being issued, where this was due to the current coronavirus pandemic, we suggest such records note that it was an "adjusted check undertaken due to Covid-19" as referenced above to address any potential future challenges as to the rationale for the format of check undertaken. Follow up checks should be completed as referenced below.

Following up once restrictions are lifted

The Home Office has stressed that this is a temporary measure. It will release further guidance in advance of the concessions ending to give employers sufficient time to revert back to the previous right to work check process.

Employers should keep a record of all individuals checked using this new process, as they will be asked to carry out retrospective checks on existing employees who:

- started working while the temporary measures applied; or
- required a follow-up right to work check while the temporary measures applied.

Employers should mark the retrospective check: "The individual's contract commenced on [insert date]. The prescribed right to work check was undertaken on [insert date] due to Covid-19".

The retrospective check must be carried out within eight weeks of the Covid-19 temporary measures ending, and both checks should be kept for the employer's records. The employer must end the employment if it finds the employee does not have permission to be in the UK when the retrospective check is completed.

Things to do

- Regular updated staff communications;
- Identify and support affected staff / new recruits;
- Monitor Home Office guidance and amended rules;
- Maintain clear record of visa expiry dates;
- Keep on top of right to work checks;
- Prepare for disruption and required flexibility (e.g. to start dates);
- Monitor absences and maintain clear records and paper trail;
- Comply with sponsor duties.

The Home Office has a Coronavirus helpline: 0800 678 1767 / CIH@homeoffice.gov.uk

Please note they will only speak to an employer regarding an individual with that individual's written consent.

Planning for return to work

Whilst some businesses have continued to operate during the lockdown period, many have taken steps to either limit or

entirely reduce the number of employees in their premises through a variety of means, including furloughing or asking staff to work from home. Whilst we have no certainty about when the lockdown will end, employers may wish to begin planning for the return to work, whilst recognising that any plans may need to be adapted, as necessary, given the changing landscape.

Returning from furlough / working from home

Where employees have been furloughed, employers may wish to consider whether it is appropriate to operate a phased return. This may be appropriate, for example, because it is necessary to reduce the numbers of people at the workplace to facilitate social distancing, or because the workload is likely to ramp up over time, rather than immediately returning to pre-COVID-19 levels.

Any selection exercise that is required to identify which employees will return from furlough must be fair. Employers will also need to consider how they will deal with vulnerable workers, taking account of the risk of age and disability discrimination and, in particular, the duty to make reasonable adjustments, and those with caring responsibilities, taking account of any possible sex discrimination issues.

Similarly, where employers are selecting employees to return to the workplace (rather than requiring everyone to do so at the same time), they must ensure that employees are selected fairly, taking account of vulnerable workers and those with caring responsibilities.

Given the inherent risks associated with these selection exercises, employers will want to ensure that those who are making these decisions are protected by any Directors and Officers insurance that the business has.

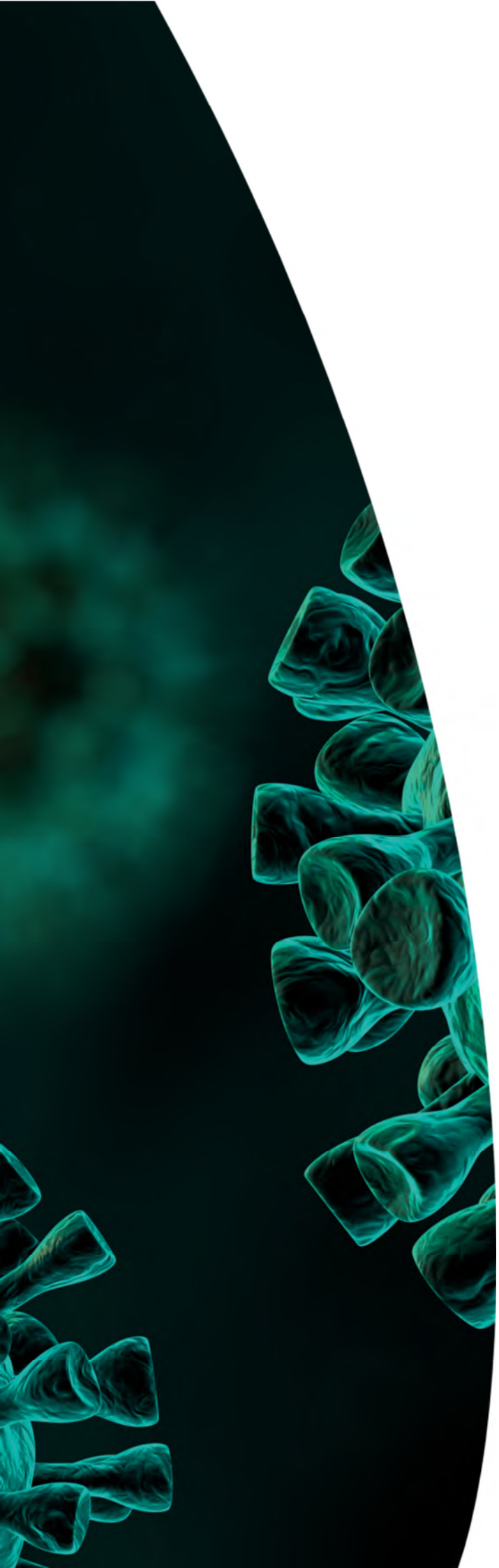
Ensuring safe workplaces on return

Businesses requiring their employees to work from their usual workplaces will need to ensure that they have conducted appropriate Health and Safety Assessments to identify and manage risks appropriately. Given that social distancing is likely to continue to apply, some employers may need to consider the use of shifts and other atypical working patterns to ensure that the numbers of people on their premises allow social distancing to occur. When deciding whether this is an appropriate strategy, employers should bear in mind that their employees may have contractually agreed working hours and changes to these may require employee agreement.

Ending employment

Some businesses will face the unfortunate reality that redundancies are necessary as result of a decline in workload. Those businesses may want to consider whether they commence redundancy consultation before employees start to return, for example, from furlough. The usual redundancy considerations will apply here and employers need to bear in mind that, where there are 20 or more redundancies in a 90 day period, the collective redundancy consultation obligations will apply. These mean that for 20 or more redundancies, there must be a minimum of 30 days' consultation and, for 100 or more redundancies, in GB, there must be a minimum of 45 days' consultation, whilst in Northern Ireland, there must be a minimum of 90 days' consultation. (Employers that do not already have trade union or employee representatives in place for this purpose will also need to factor in time for the process of electing appropriate employee representatives.) Collective consultation should be possible during any period of furlough (and we would take the view that carrying out the duties of an employee representative in these circumstances is not "work").

Employers will also need to bear in mind that as well as the consultation process, they will also need to factor in notice periods and any enhanced or statutory redundancy costs.



IMMEDIATE THINGS TO DO

- Conduct a risk assessment on health and safety and put in place relevant measures to ensure the health and safety of employees in line with Public Health England guidance.
- Communicate clearly with the workforce on any updated absence procedures – for example ability to notify remotely of absence (to avoid infection), any requirement to notify Coronavirus related absences to a central inbox in order to track centrally potential workforce impact.
- Brief line managers and HR staff on company policy – using an FAQ guidance sheet. Ensure there is a consistent message to all employees on process and company policy.
- Remote working – consider if any steps required in order to facilitate home working (e.g. issue of laptops and/or network capacity for increased home working)
- Consider testing resilience through a test of part or whole of company to identify any weaknesses or lessons learned that could be resolved in advance of the situation becoming worse.
- Where relevant advise staff to take home laptops/chargers/work mobile phones each time they leave the office during the period of instability.
- Consider working arrangements and whether the company can consider patterns which reduce the risk of infection – e.g. creating two cohorts with half of department working from home and half in office each day in order to balance operations with practical measures.
- Provide additional guidance on business travel and the expectations of the company in order to ensure employees have sufficient guidance on business trips.
- Re-visit discrimination and harassment policies and ensure processes are in place and publicised for employees to raise any concerns.
- Ensure accurate records are kept in respect of any employees on visas that may need an extension due to travel restrictions. Support such employees in understanding what they need to do to remain compliant.
- Keep clear records and audit trails of all actions and decisions that can later be used as evidence of compliance with the relevant immigration and Home Office requirements.

3. HEALTH AND SAFETY (UK)

For as long as the threat of infection from COVID-19 remains, businesses will have to perform a balancing act between safeguarding the health risks employees face in the workplace from potential exposure to the virus and the safety risks that new working practices may present to employees and to others.

Businesses planning on returning to work will have to review and assess what the risks to employees and others will be from a return to work when the lockdown restrictions are eased, taking account of any guidance. The UK Department for Business has set up a number of working groups and has now published guidance for various sectors which apply in England. Separate guidance has been published for Wales, Scotland and Northern Ireland.

General duties

Employers have clear legal duties under health and safety law. There are three overlapping general obligations:

- duty to protect the health, as well as safety, of their employees;
- duty to protect others who may be exposed to health risks as a result of the employer's activities, including members of the public, service users and contractors; and
- duty to manage the health and safety risks from workplaces under the employer's control, which includes the means of access to the workplace and any such as lifts and air conditioning system. The extent of the duty depends on the level of control.

The duty is to do everything "reasonably practicable" to manage these risks. The onus of demonstrating that everything reasonably practicable has been done falls to the employer. Following Government and industry-led guidance wherever possible is usually the best way to demonstrate compliance with the law.

Legislation introduced by the UK Government and devolved administrations also has safety implications. Scotland and Wales have written certain social distancing requirements into law, for example the duty to maintain 2 metres between workers wherever possible. In England and Wales, these requirements are contained within guidance from Public Health England.

Central role of risk assessment

The role and importance of risk assessments is crucial. Employers need to conduct a risk assessment to determine the likelihood and consequences of exposure to the coronavirus associated with their business activities.

The level of risk will vary depending on factors such as travel and the type of work, and particularly the potential for close contact with infected individuals or body fluids. Employers must identify control measures which will eliminate or, where this is not possible, minimise the risks which emerge from the risk assessment. These control measures must then be monitored to ensure they are being complied with in practice. Employees who are clinically vulnerable should be given separate consideration.

As well as minimising the risk of the workforce contracting COVID-19, employers need to be mindful of the potential risks associated with working in new ways in order to implement

social distancing rules, and with managing the absence of key supervisory / first-aid trained staff due to self-isolation requirements.

For businesses that have been closed, once a decision has been taken to return to work, it will be vital for businesses to carry out a thorough review of risk assessments to ensure that the risks associated with returning to work and that appropriate control measures are put in place to eliminate the risks completely or, if that is not possible, to minimise them.

Risk assessments and working practices should take account of the latest guidance from the UK Government and devolved administrations. They will need to be kept under close review to ensure that they are effective in practice, and to respond to likely changes in law and guidance around which businesses can open, use of public transport and PPE requirements as restrictions are lifted and/or tightened again.

Employers are required to consult with their employees about any arrangements put in place to control the risks associated with the coronavirus, and good communication will be essential to ensuring that these measures are effective.

Specific duties

Employers have specific legal duties which might be impacted, including:

- Management of health and safety, including risk assessment and providing information, instruction, supervision and training to employees;
- The provision and use of personal protective equipment (PPE);
- The safe use and maintenance of equipment and machinery at work;
- Management of the workplace, including cleanliness, ventilation, sufficient space, toilet and wash facilities and safe pedestrian routes; and
- The use of chemicals and substances hazardous to health, and managing the risks posed by biological agents such as COVID-19.

Government Guidance

On 11 May 2020, the Government issued guidance to help employers get their businesses back up and running and workplaces operating safely. There are 8 separate guides for different types of work available at https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19. Further guides are to be published for other work in the coming months. All of the guidance focusses around 5 key points:

1) People should work from home where they can.

2) Employers should carry out a Covid-19 risk assessment, in consultation with workers or trade unions (businesses with more than 50 employees are expected to publish the results of this risk assessment on their website).

3) 2 metre social distancing should be maintained, where possible (this may require employers to re-design workspaces, stagger start times, create one-way systems, open more exits / entrances and change seating in breakout rooms).

4) Where 2 metres cannot be maintained, the transmission risk should be managed (such as barriers in shared spaces, changing shift patterns, fixing teams to minimise contact or ensuring colleagues face away from each other).

5) Reinforcing cleaning processes and providing more handwashing facilities / hand sanitiser.

Additional guidance has been published by the UK Health and Safety Executive (HSE). It identifies issues employers should c onsider when assessing risk and potential control measures (available at here).

RIDDOR Reporting

The HSE has issued guidance on reporting cases of Covid-19 under the 2013 Reporting of Injuries, Diseases and Dangerous Occurrences Regulations (RIDDOR). The guidance states that a report must only be made if:

- an unintended incident at work has led to someone's possible or actual exposure to coronavirus. This must be reported as a dangerous occurrence; or
- a worker has been diagnosed as having Covid 19 and there is reasonable evidence that it was caused by exposure at work. This must be reported as a case of disease.

The examples given by the HSE in the guidance relate to workers who are directly in contact with the virus in a laboratory (for dangerous occurrence reporting) or in a healthcare setting (for disease reporting). It is therefore not envisaged that every case of Covid 19 in the workplace is reported and detailed consideration must be given to the individual circumstances when they arise for a decision on reporting to be made. Businesses should follow Public Health England and industry specific guidelines to manage the workplace environment, for example by invoking social distancing wherever possible. This will limit the likelihood of a RIDDOR report being required.

Enforcement

Where HSE identifies employers who are not taking action to comply with the relevant PHE guidance to control public health risks, eg employers not taking appropriate action to socially distance or ensure workers in the shielded category can follow the NHS advice to self-isolate for the period specified, they will consider taking a range of actions to improve control of workplace risks. This includes the provision advice to employers through to issuing enforcement notices to help secure improvements with the PHE guidance.

The Police can also enforce social distancing in the workplace in Scotland and Wales.

Health and safety when working from home

Return to work is likely to be phased. Those who can work from home may need to continue to do so for a period while others begin to return to the workplace.

The HSE has issued specific guidance on working from home which can be found here.

Employers have the same health and safety responsibilities for those at home as for any other workers. Employers should consider:

- how will you keep in touch?
- what work activity will be done and for how long?
- can it be done safely?
- do you need to put control measures in place?

It is important to keep in touch with lone workers and ensure regular contact to make sure they are healthy and safe. Lack of contact can affect stress levels and mental health and it is important to put systems in place to recognise signs of stress as early as possible.

If workers are working at home on a long term basis the risks associated with using display screen equipment must be controlled. This includes carrying out workplace assessments, however this is not necessary in temporary situations. The HSE has published a workstation checklist which will assist with this.

Mental Health

Health and safety law requires employers to look after the mental health of employees, as well as physical health.

Employers should ensure that they have conducted an overall high level risk assessment or updated existing risk assessments and implemented reasonably practicable control measures in relation to managing mental health and wellbeing. This is particularly important at this time for employees with new working arrangements (whether that be at work or from home), but also those continuing with previous working arrangements (who may be at higher risk from catching covid-19 or who may still be impacted by the coronavirus in other ways) and also employees that have been furloughed.

Employers need to take both:

1. pro-active steps - including implementing or reviewing policies and procedures, keeping in contact with employees and signposting them to help and support that is available and making sure all staff are aware of the causes of stress (which could well be different in the current climate) and how to avoid them; and

2. re-active steps - recognising the signs or responding when employees raise concerns or are demonstrating symptoms of poor mental health so that early interventions can be made and appropriate support provided.

If an employer becomes aware of particular employees struggling with their mental health, the Company should conduct individual risk assessments, working with the employee. This should be monitored by the Company and updated as and when the need arises – such as if the Company becomes aware that the risk has increased (for example, the employees mental health difficulties have become worse) or the control measures implemented aren't effective and need to be reviewed.

Infected employees and Health Surveillance

Employees need to be reminded of the rules for self-isolating if they or a member of their household suffers from a new continuous cough or a high temperature (7 days isolation for someone showing symptoms from the date the symptoms started and 14 days isolation if a member of their household has symptoms).

Employers may be considering whether to implement some form of health surveillance to check for symptoms, such as temperature checks. This should only be considered if a risk assessment deems it to be an appropriate control measure (such as in workplaces where employees can not work from home and social distancing rules can not be implemented). Care must however be taken with this approach as results could be unreliable and not everyone that is infected will have a temperature. It also raises issues around consent, invasions of privacy and data protection.

PRACTICAL ADVICE

Limiting numbers

- Social distancing will almost certainly restrict the number of people who can safety be in the workplace at any one time. Reassess the layout of work station to implement physical distancing and take a realistic view of how many workers can be accommodated.
- Assess the risks around third parties entering the workplace, as there is a legal obligation to ensure their health and safety too.
- Where employees continue to work from home, continue to consider their needs in terms of display screen equipment and lone working.

Information, Instruction, Supervision and Training

- Communicate clearly and early with employees on your plans to reopen and any new policies you wish to introduce. Consider providing guidance and establishing protocols on any workplace measures to be adopted.
- Early engagement with trade unions should help ensure understanding or cooperation, whether or not the employer recognises the trade union. Union engagement may be required where changes to working hours and other terms and conditions are needed. More generally, unions and staff representative bodies may help to communicate guidance to employees and provide a route for them to raise questions or concerns.
- brief line managers and HR staff on company policy, using an FAQ guidance sheet. Ensure there is a consistent message to all employees on the process and company policy.
- display HSE signage around the workplace to raise awareness of measures to prevent the spread of Covid-19.

PPE

- keep up to date with the latest guidance on the use of personal protective equipment (PPE). Employees must be given the correct PPE and work equipment for their job if they are required to come into work. Employers should also ensure that they have adequate stocks of PPE, and may need to consider what other measures to put in place if the supply of PPE is disrupted.

Cleaning

- put in place practical measures to support workplace cleanliness such as hand washing facilities, additional hand sanitiser stations, antibacterial wipes and appropriate signage, and check and re-stock these regularly.
- consider how access to communal areas such as toilets, coffee points canteens, gyms and other staff facilities can be controlled. Increased cleaning will be necessary.

Travel

- Getting to work, and business travel is a key risk area. Consider working hours and arrangements, which may include ways to limit the number of staff commuting at peak travel hours or staggering start and end times to minimise the risk of infection - for example, creating two cohorts with half the department working from home and half in the office each day in order to balance operations with practical measures.
- Continue to reduce or cancel non-essential business travel and encourage employees to conduct meetings via video conferencing software. Where this is not possible, provide additional guidance on essential business travel and the expectations of the company in order to ensure employees have sufficient guidance.
- where employees and contractors are required to complete questionnaires on recent travel and health information, third parties should also complete these before entering the premises. Employers must ensure any questionnaires are compliant with data protection legislation.

4. PUBLIC DISCLOSURE REQUIREMENTS (UK)

Businesses should reflect on new guidance issued by the UK's Financial Reporting Council (FRC) to better understand the disclosures they may need to include concerning the Coronavirus in their annual accounts and accompanying reports. The FRC's new guidance is a reminder of the need to monitor developing risks and keep investors informed.

Public listed companies are obliged under the UK Companies Act to include details of the principal risks and uncertainties facing the company in their annual reports. The FRC's guidance reflected on this obligation in the context of Covid-19, as well as the changes businesses might need to make within their balance sheets.

The FRC's guidance is that companies should consider whether to refer to the possible impact of Covid-19 on their business in their reporting of principal risks and uncertainties. Where mitigating actions can be taken, these should also be reported alongside the description of the risk itself.

As well as possible inclusion within a company's disclosures of principal risks and uncertainties, the carrying value of assets and liabilities might also be affected with a need to perform additional impairment tests and to assess whether leases have become onerous.

For December year-end reporters these events would be likely to represent non-adjusting post balance sheet events as at 31 December 2019, given that, at that date, few cases had been confirmed and the virus only just identified. However, for companies with later reporting dates, year-end balances might be affected. The FRC urged UK businesses to monitor responsible developments and ensure that they are providing up-to-date and meaningful disclosure when preparing their year-end reports.

However, given the rapidly changing global situation, a disclosure that is sufficiently up to date to be meaningful will be challenging to get the right balance. The FRC acknowledges that the extent of the risk and the degree to which it might crystallise depends on particular circumstances. Where the impact has been felt by year end and is quantifiable – for example around staff shortages and production delays – these should be reflected in relevant disclosures without intervention.

For companies registered in other markets (e.g. the Stock Exchange of Hong Kong Limited) businesses should consider the equivalent provisions relevant to the requirements of the relevant Stock Exchange.

IMMEDIATE THINGS TO DO

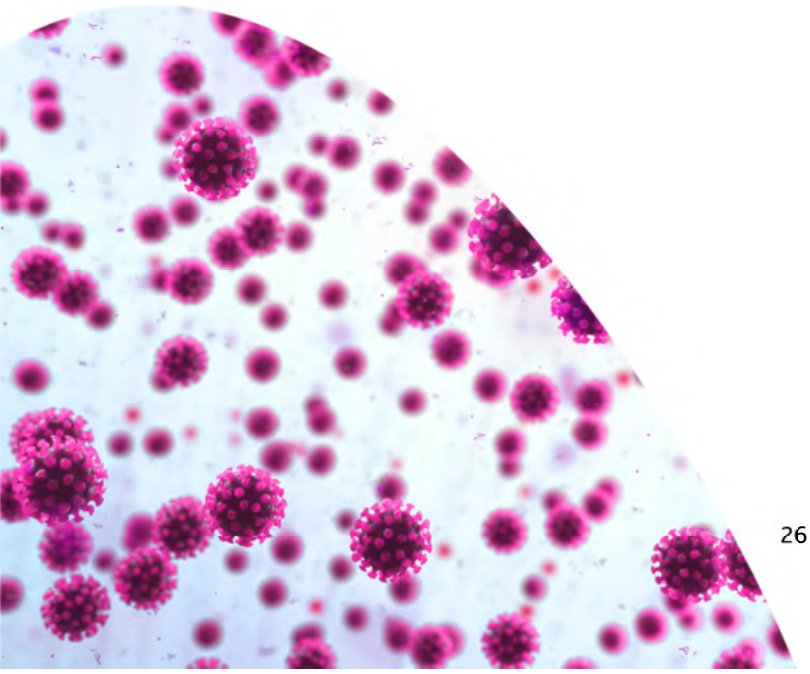
- Put in place processes to monitor developing risks and keep evidence of impact and mitigating actions
- Ensure these are considered in full in light of end of year reporting. Where such reporting is imminent a summary of immediate impact on the business. This can then be updated in the next reporting cycle.
- Work with professional advisors to consider impact on accounts so that this can be clearly articulated in good time.
- Consider whether virtual annual shareholder meetings may be requiring in light of the Coronavirus

5. EVENT STAGING (UK)

Businesses need to consider carefully events that they are staging where there may be a large number of attendees. This may range from sports events to conferences or training sessions. Given the efforts of authorities to contain or minimise the spread of the virus many Governments are restricting large scale gatherings so many businesses are postponing or cancelling planned events at short notice.

Many businesses are considering postponing or cancelling events. If you need to postpone or cancel an event consider the following:

- **Use of Technology** - is it possible to host the event using technology rather than postponing or cancelling all together? This may be possible for training sessions or some conferences. If you choose to do this you will need to consider carefully the timing of the decision and the communication in order to ensure all attendees are made aware in good time and avoid the need to travel.



- **Contract with venue provider** – if you are hosting the event at a third party venue consider carefully the contract with your venue provider. Would you be entitled to a refund if the event was cancelled and in what circumstances? Factor this into your decision making process in determining whether or not to cancel the relevant event.

- **Refunds** – what refunds would be required to be given to customers or attendees. If you are cancelling the event you may well be required to provide a refund to attendees or customers. This will primarily be driven by the contract in place. However, it is also important to bear in mind that where the attendees are consumers they may have additional statutory rights – for example, in England consumer rights laws would entitle the attendees to a refund (excluding any booking fee). Where the contract is a business to business contract does it provide for relief (e.g. force majeure – see our contracts section above for more information).

- **Communications** – a clear communications policy around any decision will be critical. The timing of the decision, whilst not necessarily a legal requirement, could have significant impact on reputation and good will. It should, therefore, be considered carefully in taking the decision whether to cancel or postpone any event.

- **Insurance** – consider early on whether or not insurance is likely to cover any cancellation or postponement. You should liaise carefully with your insurers or brokers in order to consider the specific terms of your policy. See our insurance section for more information.

- **Supply chain** – you should consider carefully the knock on impact on other suppliers. For example catering or hospitality suppliers for the event. Could they bring a claim in respect of any cancellation and what steps can be taken in order to mitigate this?

- **Commercial rights** – for sporting or music events consider carefully what rights have been granted in relation to the event. If the event does not go ahead how will this impact on sponsorship or commercial rights contracts that may have been entered into? Do these contain force majeure provisions and/or are there obligations to provide alternative rights?

For organisations which have public sector stakeholders or funders, keep such stakeholders or funders up to date on plans. They may well have already provided guidance and, subject to state aid requirements, may be able to provide hardship funds to cover any short term cancellation.

Where events are going ahead then businesses should consider carefully the steps that they should take to ensure the health & safety of attendees and to ensure that they are meeting their statutory obligations. In particular see the facilities section below. The Sports sector in particular has been impacted by Covid-19, with events and matches postponed or cancelled. In this situation businesses will need to consider in particular:

- **Ticket refunds** – what ticket refunds may be required and how would these be processed legally and in line with contracts – see above section on refunds also.

- **Supply chain arrangements** – which contracts with caterers, security staff and other venue logistics providers can be cancelled in order to minimise financial and contractual exposure.

- **Staffing** – consider employment issues for staff who are not working due to events being postponed or cancelled.

IMMEDIATE THINGS TO DO

- Plot out the events you are hosting in the short (next 1 – 4 weeks) and medium term (1 – 6 months) so that you can consider each in turn and put in place contingency plans to address issues as the situation develops.

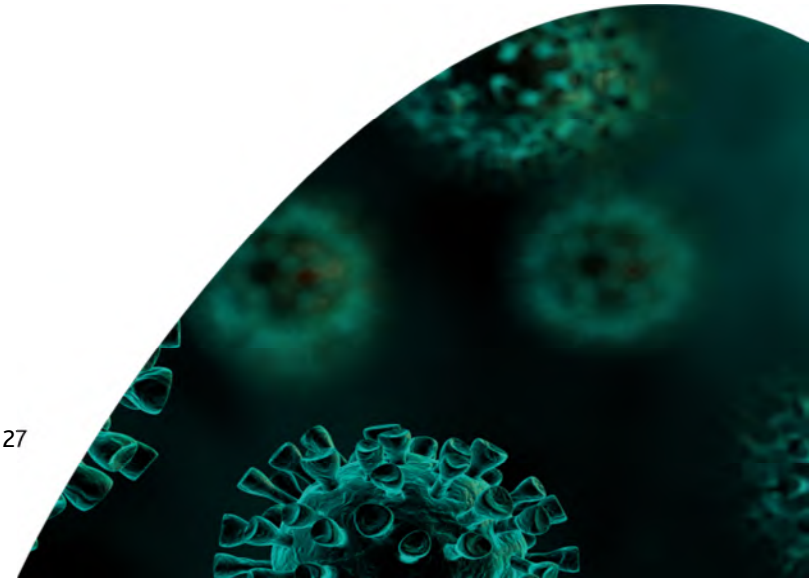
- Consider alternative means to hold each event – e.g. use of technology – in order to ensure it can go ahead but minimising the number of people travelling.

- Review contractual provisions with venue provider, customers and supply chain in order to assess the impact of cancelling or postponing the event. Keep a full impact assessment and economic analysis for each event to help inform decision making and options analysis.

- Liaise with communications team to ensure a clear and aligned communications strategy for any event cancellation which minimises impact on brand and reputation.

- Check with insurers/brokers whether insurance is likely to cover any cancellation or postponement of events and keep them abreast of your planning activities.

- Create a schedule of commercial rights for relevant events so that decisions can be taken in this context and where relevant commercial rights holders are consulted and/or offered alternative rights in replacement of any cancelled or postponed event.



6. INSURANCE OBLIGATIONS (UK)

UK businesses should check their insurance policy wordings carefully to find out if they are protected against Coronavirus related disruption.

On 5 March 2020, the UK Government has designated Coronavirus, officially Covid-19, as a 'notifiable disease' adding it to the Health Protection (Notification) Regulations 2010. This change in law now requires GPs to report all cases of Covid-19 to Public Health England and can be a critical distinction in interpreting insurance contracts.

Understanding whether you have relevant insurance cover is likely to influence a business in the actions it takes to contain the spread of Coronavirus. Businesses may look for cover under a number of different products such as business interruption cover or directors and officers insurance when considering, for example, whether to cancel planned events or to limit staff movement.

However, whether losses caused by Coronavirus are covered will depend on the specific terms of each policy. There is no consistent industry-wide approach to how policies deal with pandemic illness. Some policies exclude infectious diseases explicitly, whilst others are conditional upon a public body declaring either that the outbreak amounts to a pandemic or is a 'notifiable disease'. For businesses, it is important that they review their insurance cover to understand whether losses relating to the Coronavirus are covered at an early stage.

The World Health Organisation (WHO) declared the virus a public health emergency of international concern (PHEIC) on 30 January. On 11 March the virus was declared by the WHO as a 'pandemic', which is a term used to describe an infection disease which has spread globally.

Businesses should liaise with their brokers or insurance providers in respect of the relevant products likely to be affected by Coronavirus, such as travel insurance policies, in order to get clarity on whether their policies would cover Coronavirus-related losses and in what circumstances.

Claims arising from Coronavirus have the potential to be complex in nature so ensuring advice is sought based on the current status of the disease, and how policies respond to it, will be important in enabling businesses to understand what coverage they may have.

In addition, it is worth noting that travel insurance providers which are members of the Association of British Insurers (ABI) have made a number of public commitments intended to address the concerns of customers due to travel overseas. They include commitments to direct customers to routes to claim compensation for cancelled transport or holidays; considering all valid travel insurance claims for costs not recoverable from elsewhere quickly and fairly; putting business continuity plans in place; and considering appropriate alternative evidence where standard medical certification is unavailable.

IMMEDIATE THINGS TO DO

- Monitor closely the classification of the virus by the Government and international agencies such as the World Health Organisation (WHO)
- Liaise closely with insurers and brokers to understand the cover that the business has in place and where this might be applicable to broader business decision making around event cancellation or staff movements.
- In particular consider carefully business travel insurance policies and coverage in light of FCO guidance on travel and any restrictions.
- Bear in mind claims relating to Coronavirus are likely to be complex and businesses should seek advice in how to respond and in respect of any claims.

7. CONSTRUCTION CONTRACTS (UK)

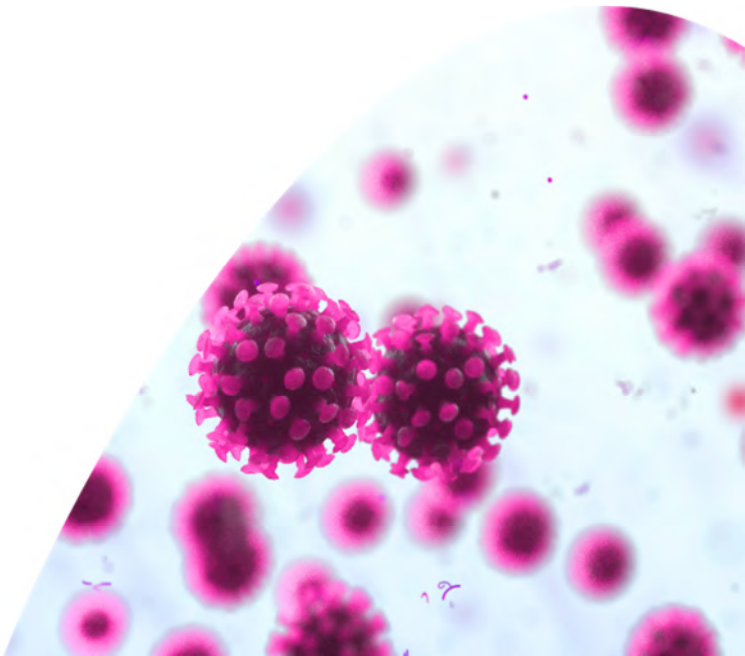
Coronavirus will impact the delivery of construction projects to time and relationships will be tested where contracts have not clearly allocated key risks such as force majeure. Clauses in standard forms and bespoke amendments addressing force majeure and other relief events will need to be carefully scrutinised by employers and contractors.

Section 1 (Contracts and Supply Chain above) sets out key guidance on force majeure and related matters which applies equally in the context of UK construction contracting. Key issues that are likely to arise specifically in the construction contracting context are:

- the unavailability of staff (at both the client and contractors) and the non-availability of materials because of disruption to supply chains
- delays in contractual obligations being complied with (by either the contractor or the employer) and these leading to consequences under the contract (for example a lack of timely responses by the employer to claims under the contract due to non-availability of key personnel such as employer's representatives (or project manager under NEC contracts))
- the prospect of works being temporarily suspended on site due for example to government orders with the possibility that such suspension is indefinite and
- the possibility that such suspension may continue for a prolonged period such as to trigger a right of termination under the contract.

Under NEC and JCT forms, the key standard forms of contract used in the UK construction industry, certain provisions should be carefully scrutinised to ensure that key risk allocations are properly understood. These include provisions addressing:

- force majeure or exceptional events or acts of prevention
- exercise of governmental or other public authority powers
- other compensation or relief events that may be applicable



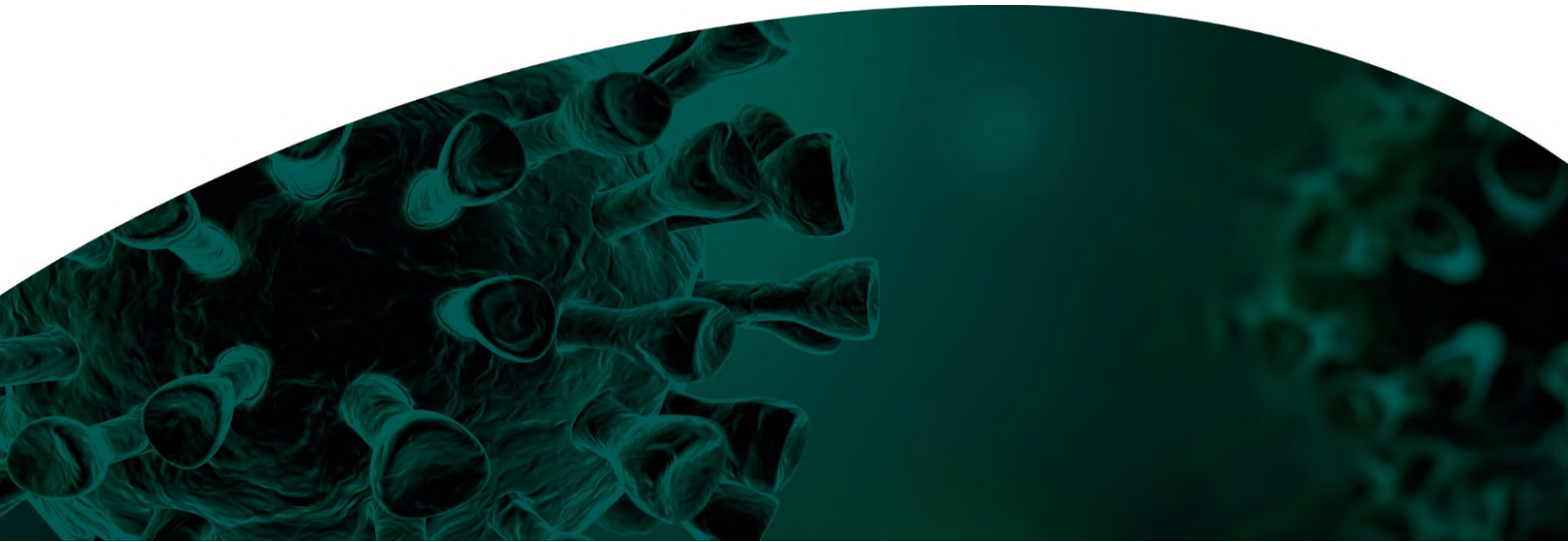
Construction Contracts and force majeure

The availability of claims under Construction Contracts will be dependent upon the form of contract, and any amendments to the standard clauses. Whilst below we have examined specifically the JCT Design & Build 2016 form and the NEC 4 Engineering and Construction Contract (ECC), typically contracts include significant bespoke amendments to the standard forms and those should be carefully considered. The notes below do not address typical bespoke drafting.

Force Majeure Topic	Points to consider
Trigger event – general force majeure clause	This is undefined in JCT Design & Build 2016 but under case law is likely to include epidemics such as Covid-19. A claim under force majeure can be made for time but not costs. Under the NEC4 Engineering and Construction Contract (ECC), standard provisions include a general Compensation Event for events that meet certain requirements including that the event stops the Contractor from completing the whole of the works that neither party could prevent. Consider what needs to be demonstrated to constitute force majeure. Under JCT (2.26.14): • Undefined in the standard provisions • Likely to include epidemics, including Covid-19 on the basis of English law (*Lebeaupin v Richard Crispin & Co* [1920] 2 K.B. 714) Under NEC (cl 19 & cl 60.1(19)): • Must "stop" the Contractor completing "the whole of the *works*", either at all or within the contractually agreed time; • Must be one neither party could prevent; and • Must be one which "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" It is worth noting that that the above provisions are specific to the particular contracts described above. Whilst the risk allocation is broadly similar in other forms of NEC 4 or JCT 2016 forms, any other forms must be specifically reviewed for the approach taken in them.

Force Majeure Topic	Points to consider
Trigger event – government instructions	This may include a change to the opening hours of a Site by local or public authorities, such as national government, or statutory bodies (such as local authorities). JCT Design & Build 2016 provides standard clauses under which Contractors can claim for an extension of time, but not for an entitlement to costs. Under NEC4 ECC, governmental action will only lead to an entitlement to time and costs, if covered under Option X2 (change in law), or under another specific compensation event.
Trigger event – change in scope of works	A change in the scope of works under a contract which arises from any event (which could include something that arose from a need to mitigate the consequences of Covid-19) may result in a free-standing right to relief. This may include changes in the programing of the supply chain of any materials or components used by the Contractor or changes to the requirement for a licence or consent required. JCT Design & Build 2016 allows for an entitlement for both time and costs in relation to changes in the scope of Works through a Change (cl 5.1) (known as a Variation in other JCT forms). Under NEC, standard provisions allow for changes to the Scope instructed by the Project Manager, such as a compensation event (60.1(1)), save where such change is to accept a defect, or where the Contractor requires a change to its design in order to comply with the Scope, or for its own reasons.
Trigger event – changes in law	Government reaction to Covid-19 may include changes to existing legislation or the introduction of new laws. Changes in the law of the country where the Site is located or a new requirement to comply with existing law of the country where the Site is located or where that existing law ceases to apply may attract relief under a construction contract. Under JCT, claims can be made for time and money, where changes to Statutory Requirements (as defined) occur after the Base Date (Cl 2.15). Under NEC, claims for time and money are possible if Option X2 is selected. Changes in the law of the country in which the Site is located will be a compensation event, if they occur after the Contract Date.

Force Majeure Topic	Points to consider
Notification and general claim requirements	Timely compliance with notice requirements under the contracts is critical. Often notification of a potential claim within a defined period of time will be a condition precedent to claiming time and money. Under JCT, there is a requirement to provide a notice and subsequent particulars (Cl 2.24). A requirement to notify is often accompanied by a requirement to use best endeavours to prevent delay and proceed with Works (Cl 2.25.6). Under NEC, contractors (and employers) should consider the timely preparation of early warning notices. These should be prepared in line with the contract provisions as soon as either party becomes aware of a matter which could increase the price, delay completion or "impair the performance of the works in use". A failure to issue an early warning notice in relation to a matter which becomes a compensation event will be taken into account in the Project Manager's assessment (see 63.7 which provides that "If the Project Manager has stated in the instruction to submit quotations that the Contractor did not give an early warning of the event which an experienced contractor could have given, the compensation event is assessed as if the Contractor had given the early warning). A prudent Contractor should issue an early warning notice as soon as possible in any event, to allow for a risk reduction meeting and mitigation of risk, which could avoid the need for a compensation event at a later date. As cl 63.7 makes clear, in assessing the compensation event, the Project Manager will assume the early warning had been issued and appropriate mitigation that results had been taken into account. Notices to the Employer should be issued under the relevant notice provisions within eight weeks of becoming aware of the compensation event, as under NEC this is a strict time bar (cl 61.3).
Contractual variations	Where possible, the parties may wish to consider specifically including by way of formal contract variation, provisions that clarify relief for specifically Covid-19 related risks. For example changes in law, government instructions, as well as changes in the programming of the supply chain of materials, changes to the licence or consent required by Contractor to deliver the works, and the non-availability of materials, equipment, goods and workforce.



IMMEDIATE THINGS TO DO

- Consider practically, where your project is practically in terms of life-cycle (for example is it at the start or close to completion?) What personnel and the plans are in place to maintain continuity? Such matters will influence for both parties the approach that will be taken in contract negotiations.
- Review and understand the contracts terms. Does the contract allocate the risk of force majeure and other events and circumstances that may arise from Covid-19? What relief is available and what areas are not clear and require discussions/negotiation between the parties to resolve?
- Consider strategies to communicate with project parties, such as the Project Manager to ensure contractual provisions are complied with and positions preserved.
- Prepare and send notices as soon as possible to ensure compliance with the underlying contract and to ensure claims are not compromised by procedural barriers such as time-bars.
- Keep records – collate evidence, and ensure that records are being kept to evidence force majeure or issues encountered with complying with contract conditions as a result of Covid-19. Do they reflect the costs incurred in maintaining the Site, such as for idle equipment and staff, and what cannot be delivered as a result of disruption?
- Consider whether the parties need to clarify or agree through a variation to the existing contract the impact of Covid-19 to ensure the viability of the relationship and to ensure that the project can successfully achieve completion.

Consider strategies to communicate with project parties, such as the Project Manager, to ensure contractual provisions are complied with and positions preserved

8. LITIGATION AND COURTS (UK)

Broadly speaking, the courts in England & Wales remain operational. Experience of remote hearings is growing rapidly. While the focus in Northern Ireland remains on 'essential' business, in Scotland moves are being made to increase the use of remote hearings and written submissions to progress matters.

In England & Wales, the default position is generally that hearings in civil cases are taking place remotely, either by telephone or video conference. While there have been some closures of County Courts and the Court of Appeal is currently only dealing with urgent matters, the High Court is currently trying to operate as far as possible on a 'business as usual' basis. A significant number of hearings have already taken place, or will be taking place, by video conference, including major trials involving witnesses. In the High Court, these are generally taking place via Skype for Business, although some tribunals favour other platforms and the courts service is also starting to roll out a new, more bespoke platform for hearings called Cloud Video Platform ('CVP'). A growing body of rules and guidance on conducting remote hearings is being published and the coming into force of the Coronavirus Act has increased the options for making remote hearings accessible to the public, for example by permitting such hearings to be live-streamed online. The High Court is showing reluctance to adjourn hearings, seeking wherever possible to avoid a backlog of business once the current restrictions are lifted. However, not least because remote hearings can take longer than those conducted in person, it will have to undertake some prioritisation of cases, and is likely to prioritise urgent matters such as applications for injunctions, leading to adjournments of some other matters.

In the civil courts in Scotland, there has been resumption of some business in the Court of Session using video/telephone hearings and written submissions. In the Sheriff Courts, whilst the focus remains on 'essential' civil business at the moment, some cases that were sisted (stayed) or administratively adjourned, including in the commercial court and corporate insolvency proceedings, can be restarted where the court is satisfied there is good reason for so doing so, the action can be progressed remotely and a hearing requiring the leading of evidence is not required.

Across the UK, we are likely to see more applications/motions being dealt with without a hearing.

As regards criminal cases, in England and Wales jury trials have now re-started in a number of courts, under special arrangements to maintain the safety of participants. The first of these courts included the Central Criminal Court at the Old Bailey in London and Crown Courts in Cardiff, Bristol and Manchester, but further courts are now also listing new jury trials. In Scotland, plans are being put in place to restart some High Court jury trials in July. The Coronavirus Act and the Coronavirus (Scotland) Act increase the scope for telephone and video hearings in criminal matters.

The position in Northern Ireland is that only urgent matters, such as applications for interim injunctions, will be dealt with by way of court hearing. Such hearings will be dealt with remotely and close liaison with the court is required to facilitate this.

As regards filing of court documents, in the High Court in England & Wales most documents are already filed electronically and arrangements are in place for the existing system to continue to operate as normally as possible, with court staff working remotely, albeit there may be some impact on turnaround times and there are some specific challenges such as the current closure of the Foreign Process Section of the High Court, which in normal times is frequently used to effect service of court documents in other jurisdictions. In Scotland, documents required for essential business can generally be lodged electronically. In Northern Ireland it is possible to email certain documents to the court office, such as directions agreed between the parties.

The courts are likely to have some sympathy, in the current circumstances, with parties who need more time to meet deadlines or even those who miss deadlines or otherwise breach procedural rules. In England & Wales, a new Practice Direction has been introduced which increases litigating parties' freedom in certain circumstances to agree extensions of time between themselves, and requires the courts to take the impact of the pandemic into account when considering applications for extensions of time, adjournments of hearings and applications for relief from sanctions imposed for breach of a procedural rule or court order. However, judges are likely to scrutinise parties' reasons for any delay or breach. In addition, in all the UK jurisdictions, limitation/prescription periods still apply, so care is needed where a limitation/prescription date is approaching. In all the circumstances, therefore, businesses are well advised to contact their legal advisors, and/or respond to communications from their legal advisors, as promptly as possible about potential litigation and upcoming procedural steps or hearings, as there may be additional hurdles and delay to navigate.

It is, of course, possible also to conduct arbitrations, mediations and other negotiations remotely, through the use of appropriate conferencing tools and email correspondence.

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9. LANDLORD FAQS (UK)

Coronavirus will impact the ongoing use of properties for a number of businesses. This raises a significant number of questions for how a business can manage its property portfolio to ensure the best use of assets. We have set out below some of the most common questions.

Can my tenant terminate their lease arguing that it has been frustrated?

It is unlikely that a tenant can argue that the lease has been frustrated. The bar for termination of a lease by "frustration" is high. It is unlikely that a temporary inability to occupy the premises would meet the test for frustration, which applies where supervening events unprovided for in the lease significantly alter the parties' obligations and bring the lease to an end. However, the terms of the lease and the length of the interruption to occupation may be relevant.

Where the tenant has a contractual break, it may make it more likely that the tenant exercises that break.

Can a tenant claim a reduction in rent if they are unable to use the premises?

Probably not. Very few leases contain a force majeure clause which would allow either party to say that the lease covenants (obligations in Scotland) are suspended because of Covid-19.

In most leases the obligation to pay the rent is only suspended, or the amount of rent reduced, where there has been "damage" to or "destruction" of the premises by an insured risk (or in some cases an uninsured risk). Covid-19 itself does not cause physical damage or destruction to premises, so these provisions are unlikely to be engaged.

As a landlord you may decide to defer, reduce or entirely suspend the rent for a period to avoid tenant insolvency - but this should be documented very carefully.

Clearly turnover rents in retail leases will be affected as turnover is affected by the virus.

Do I still have to provide services to the tenant?

As mentioned above, very few leases contain a force majeure clause which would allow the landlord to suspend its obligation to provide the services.

However, check the lease to see if the obligation to provide services contains exclusions, for instance in respect of matters outside the landlord's control or if the obligation is only to use reasonable endeavours to provide the services. In the latter event, if Covid-19 makes it impossible, using reasonable endeavours, to provide the services (e.g. due to staff or contractor sickness) you should not be liable for any failure to provide the services.

What and how to provide services should be considered taking account of the restrictions and requirements for social distancing under the Coronavirus Act 2020 and the Public Health England (PHE) guidance https://www.gov.uk/government/publications/guidance-to-employers-and-businesses-about-covid-19 or Health Protection Scotland (HPS) guidance https://www.hps.scot.nhs.uk/a-to-z-topics/covid-19/ as appropriate.

Please be aware that the guidance is being reviewed and updated regularly and so you should monitor this.

Do I have to provide any additional services, such as extra or deep cleaning?

This will depend on the terms of the lease. An obligation to clean (and keep safe) the common parts may well cover deep

cleaning. It would be unusual for there to be any obligation on a landlord to clean the demised premises as opposed to common parts or any right of access to enable the landlord to do so.

However, it may not be practical to deep clean the common parts without also cleaning the demised premises. You need to have regard also to obligations under the Health and Safety at Work Act 1974 which requires a landlord to do everything reasonably practicable to ensure the health and safety of its employees and to ensure people working in or visiting a building are not exposed to risks to their health to the extent the landlord has control of premises. But to the extent you do not have control, your tenants also therefore need to have regard to their own obligations under the Health and Safety at Work Act.

You should keep up to date with any relevant government guidance on workplace Covid-19 related measures.

If I do provide those extra services, can I recover the cost from the tenant?

Again this will depend on the terms of the lease. Landlords will often have the right to provide and charge for additional services (e.g. for good estate management or other reasonable reasons) and this may extend to deep cleaning or other protective measures. Equally, where the lease provides for the recovery of costs incurred in the supply of services the landlord considers it has become usual to provide in similar buildings or where enhanced cleaning follows government recommendations, then it should be possible for the landlord to recover the additional cost.

Can I close the building?

Some premises are required by law to be closed to members of the public. Under the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 and corresponding regulations for each of Wales, Scotland and Northern Ireland these include:

a) premises used for the consumption of food and drink except that they can remain open to provide take away services only;

b) specified types of leisure premises (which in fact include most types of such premises); and

c) specified non-essential retail premises.

Closure of a building might mean you face claims from tenants for breaches of landlord covenants, in particular covenants for quiet enjoyment (and in Scotland landlord obligations particularly those regarding quiet enjoyment) and not to derogate from grant.

If closure is required by law or in accordance with PHE (or HPS in Scotland) advice, then this could provide a defence to any claim for breach of landlord obligations under the lease. If closure goes beyond what is legally required or recommended by the guidance, then the landlord may be liable for tenants' losses as a result of breach of covenant (or obligation in Scotland).

Closure, whether or not in accordance with PHE (or HPS in Scotland) guidance or legally required, will not usually result in the rent suspension or termination rights under the insurance provisions becoming relevant unless there is physical damage to the premises although the lease drafting, and where that is tied to insured risks (as defined in a lease) possibly the relevant insurance policy, should be checked. However, as mentioned above, where closure goes beyond what is legally required or recommended in PHE (or HPS in Scotland) guidance, the tenant may have a claim for breach of covenant (or obligation in Scotland).

Where there are landlord's employees working in a building the landlord will have health and safety law duties relating to them.

Can the tenant refuse to pay the rent if I close the building?

Probably not. Even if the tenant has a claim for breach of covenant (or obligation in Scotland), if (as is common) the

lease says that rent is payable without deduction or set off, they should continue to pay the rent and then seek to recover damages for breach of covenant (or obligation in Scotland) as a separate action.

Rent suspension provisions are unlikely to apply but the wording of the lease should be checked.

Where there is no legal requirement for the building to be closed, consultation with the tenant in relation to any potential closure may help to minimise the risk of litigation in the future.

Can the tenant close their premises?

Where the relevant Health Protection Regulations 2020 require closure, the tenant must close the premises to members of the public. This does not mean the premises cannot be used for aspects of the tenant's business which do not involve the public having access to the premises, for example processing online orders.

Otherwise, the tenant can choose to close premises unless the lease contains a keep open clause or clause requiring the premises not to be left empty for a period which the closure exceeds. Courts are reluctant to enforce keep open covenants by requiring tenants to open, but damages may still be awarded for breaches. If the closure is required by law or in line with PHE (or HPS in Scotland) guidance, it is unlikely that any keep open covenant or covenant (or clause or obligation in Scotland) not to leave the building empty would be enforceable.

You should check that leases provide for the tenants to notify the landlord if the premises are left empty as this may affect your insurance. It would be prudent to liaise with tenants, where possible, about their intentions so that you can inform the insurers when buildings are empty.

What happens where the government has forced the closure of premises?

Without specific legislation this would not alter the parties' obligations in the lease. However, the obligation to comply with statute may remove the right of either party to enforce any covenant (or obligation in Scotland) that had been breached.

Government intervention may make it easier for tenants to claim on their business interruption insurance.

Can I change the operating/opening hours of the premises?

This will depend entirely on the provisions of the lease.

If the lease contains a tenant's covenant (or obligation in Scotland) to comply with reasonable regulations the landlord makes from time to time, a regulation which required tenants to follow PHE (or HPS in Scotland) guidance would be reasonable.

Do I have to act in good faith if the tenant asks for variations to the lease and rent to reflect the current situation?

Not unless there is a specific provision in the lease, which would be unusual. However, there may be commercial or reputational reasons why you would want to engage with the tenants in respect of any request, particularly where necessary to avoid tenant insolvency.

Do I still have the same remedies against the tenant for breach of obligations that remain unchanged?

Significant changes have been made, or are in the course of being made, to landlords' remedies during the Covid-19 pandemic. The following changes have been made to a landlord's ability to end a lease and secure possession of premises.

Forfeiture: Sections 82 & 83 of the Coronavirus Act 2020 impose a three month moratorium on landlords' ability to forfeit leases of commercial property for non-payment of rent in England and Wales, and Northern Ireland, respectively.

The relevant provisions of the Coronavirus Act apply to the vast majority of commercial leases (but not to most commercial leases for terms of less than 6 months) and prevent landlords from taking any action to forfeit for non-payment of rent or

other sums, including service charge and insurance rent, from 26 March until 30 June 2020 (subject to extension). The Act provides that in any existing proceedings there can be no order for possession before 30 June (although in England and Wales this now appears to be superseded by the new measures relating to possession proceedings referred to below).

Despite sections 82 and 83, forfeiture by peaceable re-entry would still be available to a landlord for breaches unrelated to non-payment of rent or other sums due.

Possession Proceedings: A new Practice Direction under the Civil Procedure Rules (PD 51Z) issued on 27 March 2020 and amended on 17 April provides for a stay for all possession proceedings in England and Wales for 90 days from 27 March 2020. It does not apply, however, to possession proceedings for trespass against "persons unknown" or to applications for interim possession orders against trespassers and does not prevent case management directions being agreed by the parties.

In Scotland, a landlord may only terminate, or "irritate", a lease after it has given the tenant a period of time within which to remedy the breach. The Coronavirus (Scotland) Act 2020 extends the period of time to 14 weeks for non-payment of rent, effectively creating a block on landlords terminating during that period. Previously landlords only had to give 14 days' notice before bringing the lease to an end. The 14 week period may be extended by the Scottish government under the Coronavirus (Scotland) Act. There is no statutory relief from irritancy in Scotland so if the tenant does not clear the rental arrears within the 14 week period the landlord will be entitled to issue a notice to terminate the lease should they wish to do so.

Will I need to stop demanding rent once any arrears fall due to preserve my right to forfeit when the moratorium ends?

The Coronavirus Act 2020 protects landlords from inadvertently waiving the right to forfeit for non-payment of rent (or service charge etc) during the moratorium period. You can therefore continue to demand rent and deal with requests for consent etc under the lease without waiving the right to forfeit for non-payment of arrears. However, if you want to forfeit for some other breach of the lease, the usual rules apply and you will need to stop demanding rent or taking any other action consistent with the continuation of the lease.

In Scotland, there have been no changes to the procedure regarding non-financial irritancy under the Coronavirus (Scotland) Act 2020. Acceptance of rent after the lease has been irritated can be construed as a waiver of the irritancy in certain circumstances. You should exercise caution after an irritancy notice has been served if the tenant attempts to make further payments of rent.

Do I still have the other landlord remedies to recover sums due and unpaid under the lease?

It is important to note that the Coronavirus Act 2020 does not suspend the right to rent or other payments, only the right to forfeit the lease for non-payment until the moratorium ends. While the moratorium applies, landlords retain the right to charge interest on the arrears at a rate specified in the lease, to bring debt recovery proceedings against tenants and to have recourse to guarantors, rent deposits or other forms of security for payment. However, the following changes have been made, or are due to be made, which affect other landlords' remedies.

Commercial Rent Arrears Recovery (CRAR): The minimum amount of net unpaid rent required before you can exercise CRAR in England and Wales has been increased to an amount equal to 90 days' rent. However, remember it is not possible to enter unoccupied premises in order to exercise rights under CRAR.

Statutory Demands and Winding-Up Petitions. On 23 April 2020 the government proposed a temporary halt to the use of statutory demands (made between 1 March and 30 June 2020) and winding up petitions (from 27 April 2020) where the company was unable to pay its bills because of Covid-19 which it proposed would be in force until 30 June, subject to any extension in line with the moratorium on forfeiture. The draft legislation has now been published in the form of the Corporate Insolvency and Governance Bill and is expected to be

in place shortly. In the meantime, courts are already taking the government guidance on this into account in applications for winding up petitions but have recently refused injunctions to prevent such petitions in respect of debts owed long before the pandemic arose.

The draft Bill provides that during the period from 27 April until 30 June 2020 no petition to wind up a company in England, Wales, Scotland or Northern Ireland can be presented on the ground that the company has not paid sums due under a statutory demand served after 1 March 2020. It further provides that a winding up petition cannot be presented during the period from 27 April until 30 June 2020 or one month after the coming into force of the Bill (whichever is later) unless the creditor has reasonable grounds to believe that Covid-19 has not had a financial effect on the debtor or that the debtor would have been unable to pay its debts even if Covid-19 has not had a financial effect on it. If a petition is presented and it appears to the court that Covid 19 has had a financial effect on the debtor, the Bill prevents a winding up order being made unless the court is satisfied the debtor could not have paid its debts even if there had been no such financial effect. Parliament has power to extend these periods.

All other landlord remedies for non-payment of rent in Scotland remain available, for example penalty interest, summary diligence. However, guidance issued by the professional organisation for Sheriff Officers (process servers) in Scotland is that only urgent work will be undertaken by their members at present and debt recovery work is not considered to fall within the 'urgent' category. In light of this guidance, although this work is not restricted by the coronavirus legislation, a number of firms of Sheriff Officers are not carrying out debt recovery work or enforcement activity at this time.

IMMEDIATE THINGS TO DO

- Ensure that all relevant documentation is centrally stored and easily accessible so that the relevant terms of leases can be reviewed quickly where queries arise
- Put in place a system for bringing any requests for changes to premises (e.g. closures, termination, change of opening hours) to a central place and team so that your business has central oversight and can manage the risks and opportunities accordingly.
- Consider whether to pro-actively communicate with tenants to remind them of their obligations and their ongoing requirement to pay rents.
- Determine a strategy for how to manage any premises closures (whether through Government requirement or for deep cleaning) or reduced opening hours and brief relevant operational teams on this.

10. FINANCIAL DISTRESS AND DIRECTORS DUTIES (UK)

Many are concerned about the severe financial strain that is being placed on their businesses. Companies that had previously never considered their solvency to be in question are reassessing their position. What should directors do in these circumstances?

UK company law requires directors to act in a way most likely to promote the success of the company for the benefit of its shareholders. If the company is in financial difficulty, that duty is replaced by an obligation to act in the best interests of the creditors of the company. The duty to shareholders effectively evaporates.

What does this mean in practice? The directors must ensure that the interests of the creditors as a class are protected insofar as they possibly can be. That does not automatically mean that the business must stop trading- indeed, that may specifically not be in the interests of the creditors. What to do will depend entirely on the circumstances of the business. The extraordinary present situation complicates matters still further, since the indications from Government are that businesses should continue to trade and, moreover, not lay off employees. There have never been stronger indications from ministers that businesses should simply carry on, apparently irrespective as to what the legal position might have been only a few days before.

That said, there has been only a limited relaxation of directors' duties and the sanctions possible against individuals. In particular, the wrongful trading provisions have been suspended for three months from 1 March 2020. These render directors liable for a proportion of a company's debts if they permit the business to continue to trade if there is no reasonable prospect of the company avoiding insolvent liquidation. However, those who act in breach of their fiduciary duties to creditors can also be subject to personal financial sanction and directors can be liable to disqualification if judgments made are later proved to be seriously wrong. Directors' and Officers' insurance will not automatically provide a respite, either. Particular care needs to be taken with groups of companies which previously have been run together as each have separate boards of directors and separate duties to their own creditors; a new discipline may need to be installed. Directors ought also to bear in mind that the Government's apparent relaxation of elements of the insolvency regime is aimed at providing relief from the symptoms of Covid-19 to an otherwise healthy business, not propping up those which would have failed in any event.

Directors may have a number of tools to deploy in the event of financial distress to formulate a turnaround strategy. These include negotiations with creditors; lenders and statutory authorities such as HMRC are being directed by Government to be sympathetic, proactive and supportive. Other businesses such as landlords and trade creditors will have financial pressures of their own, but they in turn should be able to enlist the support of creditors the Government are

pressuring to support. There are likely to be other steps which can be taken to reduce the impact of financial strain- cost cutting and overhead reductions, freezing new expenditure and negotiations with employees and supply contracts are examples. Those with whom the company trades may be prepared to extend payment terms or reduce inward costs, particularly if the alternative is no customer at all.

The key is, however, the taking of advice. Directors can take particular comfort if they are advised and guided by restructuring professionals at this time; their mere engagement provides at least some defence from subsequent criticism and possible claims in relation to director behaviour. If every step undertaken is guided by minuted professional advice, directly referable to the law on directors' duties may be unimpeachable.

IMMEDIATE THINGS TO DO

- Boards should assess the financial position of the company immediately, by reference to its present assets and liabilities and future cashflow, assuming a "lockdown" period of at least three months and up to at least six.
- Seek professional advice in the formulation of a survival strategy; this will involve the review of supply contracts, customers, any key contracts at risk of termination and creditors. Where might efficiencies be obtained and concessions agreed? Remember that Governmental pressure is being applied to lenders and statutory authorities to be supportive.
- In conjunction with your advisers, consult your employees as much as you sensibly can.
- Any steps taken must be subsequently objectively justifiable. Whilst it may be necessary to act quickly, kneejerk reactions are always best avoided.
- Ensure that up to date financial information is made readily available to the board and that it is accurate and easily comprehensible. The clearer the information, the easier the decision making process can be. Is your finance team properly resourced?
- Particular care needs to be taken if you are obtaining customer deposits for goods or services; these may need to be ring-fenced in case of subsequent formal insolvency process. You will need specific advice on this.
- In the present situation, the landscape changes daily, sometimes even more frequently. Be prepared to meet and discuss at short notice, often daily.
- Make sure every decision taken is minuted and justified, ideally by reference to professional advice from your lawyers and financial advisers.

11. COMPETITION AND BUSINESS PRACTICES (UK & EU)

UK and EU competition law permits limited cooperation between competitors to address the challenges of Covid-19

The Covid-19 pandemic has given rise to unprecedented issues around the need to produce, supply, source and transport essential products and equipment, including personal protective equipment ("PPE") and ventilators, and to ensure the continued supply of food and groceries to consumers, as well as a variety of other business continuity challenges in almost every sector. In many cases, this has necessitated competitors coming together to collaborate in a way that would normally raise competition law risks. However, competition authorities have been quick to provide pragmatic guidance in order to provide businesses with greater legal certainty and assurances on how they can deal with these challenges within the bounds of competition law.

General UK competition law guidance for businesses

The UK's Competition and Markets Authority ("CMA") has issued guidance for businesses on its general approach to enforcing existing competition law during the pandemic. It is not sector-specific and could extend to agreements that do not fall within the scope of sector-specific exemption orders (see below).

The CMA will not take enforcement action where temporary, necessary measures to coordinate activities are taken by businesses in order to ensure the supply and fair distribution of scarce or essential products and services affected by the crisis to all consumers. This could include joint production initiatives. However, the coordination must be:

- appropriate and necessary in order to avoid a shortage, or ensure security, of supply;
- clearly in the public interest;
- contribute to the benefit or wellbeing of consumers;
- deal with critical issues that arise as a result of the Covid-19 pandemic; and
- last no longer than is necessary to deal with these critical issues.

The key factor for the CMA will be the potential for coordination to cause harm to consumers or to the wider economy. Where the coordination is necessary (for example) to ensure that essential supplies find their way to consumers or that key workers can travel safely to their place of work, it is unlikely that it would cause harm to consumers. This applies even if the coordination leads to a reduction in the range of products available to consumers so long as the reduction is necessary to avoid supply shortages of the relevant product or service.

The CMA's approach does not give a 'free pass' to businesses to engage in conduct that could lead to harm to consumers in other ways. Likewise, the CMA will not tolerate businesses that attempt to exploit the crisis as a 'cover' for non-essential collusion. Examples of conduct that are still likely to infringe competition law include:

- competing businesses exchanging commercially sensitive information on future pricing or business strategies, where this is not necessary to meet the needs of the current Covid-19 situation;

- retailers excluding smaller rivals from any efforts to cooperate or collaborate in order to achieve security of supply, or denying rivals access to supplies or services;
- a business abusing its dominant position in a market to raise prices significantly above normal competitive levels (dominant status may be unwittingly achieved as a result of the crisis);
- collusion between businesses that seeks to mitigate the commercial consequences of a fall in demand by artificially keeping prices high to the detriment of consumers; or
- coordination between businesses that is wider in scope than what is actually needed to address the critical issue; for example, if coordination extends to goods or services that are not affected by the pandemic.

The CMA has said it will target unscrupulous businesses seeking to take advantage of the current situation. This includes businesses that collude to keep prices high, particularly where the products or services are essential to protect the health of consumers (e.g. face masks and sanitising gel). The CMA has suggested that manufacturers can also take steps to help combat 'price gouging' or excessive pricing by setting maximum prices at which retailers may sell their products.

The CMA's guidance only applies to enforcement action and does not protect against private litigation claims for perceived competition law breaches. However, conduct falling within parameters of this guidance is in practice unlikely to attract such claims given the extraordinary circumstances of the pandemic.

UK exemptions for grocery and healthcare sectors, Solent ferry services and the dairy industry

The UK government has temporarily relaxed UK competition rules, on public policy grounds, to enable cooperation among businesses in the grocery, healthcare and maritime transport sectors and, most recently, in the dairy industry. The measures are intended to help ensure the security of supply of groceries to consumers; to enable independent healthcare providers to support the National Health Service ("NHS") by expanding its capacity to respond to the crisis; to ensure the operation of passenger and freight crossing services across the Solent between the Isle of Wight and ports in mainland UK during the pandemic (including essential 'lifeline services' such as transportation of medical supplies or of residents to access healthcare); and, finally, to allow the dairy industry to collaborate to minimise waste of surplus milk and to prevent harm to the environment.

These changes are embodied in a number of exemption orders ("Orders"). The Orders have retrospective effect from 1 March 2020 for the grocery and healthcare sectors, and from 16 March 2020 for maritime transport in the Solent, in respect of certain types of agreements (referred to as "qualifying activities"). Similar measures have been introduced to assist the dairy industry, with retrospective effect from 1 April 2020.

The Groceries Order applies UK-wide and permits eight qualifying activities among grocery suppliers, and five qualifying activities among providers of logistics services, for the purposes of responding to coronavirus.

Groceries suppliers can coordinate on: (1) quantities of certain groceries to be supplied; (2) deployment of staff; (3) the range of groceries to be supplied; (4) supply to particularly critical or vulnerable consumers; (5) store opening hours; and (6) supply to consumers in geographically vulnerable areas. They can also share information about (7) stock levels and (8) the services of logistic service providers.

Logistic service providers can share information about (1) staff availability; (2) storage and warehouse capacity; (3) potential storage or warehouse capacity; (4) vehicles; and they can also (5) coordinate on deployment of staff.

The Healthcare Order (England) is limited to the provision of healthcare services to the NHS in England; therefore, unlike the groceries Order, it does not apply UK-wide. The Order permits five qualifying activities between independent healthcare providers and between independent healthcare providers and NHS bodies, for the purpose of responding to coronavirus.

These comprise agreements relating to: (1) sharing information about capacity to provide certain services; (2) coordination on deployment of staff; (3) sharing or loan of facilities; (4) joint purchasing of goods, facilities or services; and (5) division of activities, including agreement to limit or expand the scale or range of services supplied by one or more providers.

A similar healthcare Order in relation to NHS Services in Wales (only) came into force on 21 April 2020, having retrospective effect from 1 March 2020. The types of agreements that are encompassed by the definition of "qualifying activities" in the Healthcare Order (Wales) are identical to those in the healthcare Order (England) (see above).

The Maritime Transport Order permits three qualifying activities between five specific maritime transport operators ("Solent operators"), for the purposes of responding to coronavirus. The Solent operators can coordinate on the: (1) use of timetables; (2) routes operated by any Solent operator; and (3) deployment of labour or facilities.

The Dairy Order permits six qualifying activities between dairy produce suppliers – and three related qualifying activities between logistics service providers – for the purpose of maximising the processing, transport and storage efficiency and the storage capacity of dairy produce, and to prevent or mitigate the need for the disposal of milk resulting from a disruption in demand caused by Covid-19. The qualifying activities are similar to those permitted under the groceries Order. The Order also permits two further qualifying activities between dairy produce suppliers relating to the need to dispose of surplus milk or to limit the environmental impacts: (1) coordination on the temporary reduction of milk production insofar as it does not involve coordination with the object of excluding one or more dairy produce suppliers from the market; and (2) sharing information on best practices of limiting the environmental impact of milk disposal.

Agreements that fall within the scope of these Orders are exempted from the prohibition on anti-competitive agreements, and thus provide more legal certainty for UK businesses than the CMA's non-sector specific guidance (see above). They also protect businesses from potential private litigation claims for perceived competition law breaches. However, the Orders do not exempt cooperation that is not in response to the Covid-19 crisis, and do not cover the direct sharing of prices or costs information among businesses; such conduct may still infringe competition law.

To be exempted under the grocery, dairy or the two healthcare Orders, agreements must be notified in writing to the Secretary of State within 14 days of the Order coming into effect (if the agreement was already implemented before the Order came into force) or, otherwise, within 14 days from the date the agreement is made. For Solent operators, the 14 day period runs from the date the Order entered into force or the date that the agreement was made, whichever is later. The notifications must contain information specified in the applicable Order.

The Secretary of State maintains a register of agreements that have been notified pursuant to the various Orders. Letters notifying relevant agreements are publicly available on the UK government website. This includes notifications by major supermarket chains describing agreements relating to: information sharing on stock positions, grocery shortages and logistics services; coordination on assistance for particular customer groups; coordination on limiting consumer purchases of certain groceries; and coordination on temporary store closures or adjustments to store opening hours.

The Orders are designed to be temporary measures only. In respect of the grocery, healthcare and maritime transport Orders, the Secretary of State will issue a notice announcing their termination once the Orders are no longer considered necessary. The Orders will cease to have legal effect 28 days from the date of such notice. It is envisaged the Orders will be in force for less than 12 months. Unlike the other Orders, the dairy Order will expire on 2 August 2020, unless the Secretary of State considers (more than 28 days before the expiry date) that there is no longer significant disruption or threat of significant disruption to demand for dairy produce caused by Covid-19 and the measures should end sooner. In such circumstances, the Secretary of State will issue a notice announcing the termination of the dairy Order on a specific date (at least 28 days from the date of the notice), at which

point any agreements taking advantage of the exemption must be brought to an end.

UK merger control guidance

The CMA has also issued specific guidance relating to how it intends to approach merger assessments.

Although the normal framework and procedures for such assessments will continue to apply, the guidance sets out various practical concessions to the difficulties posed by the current crisis, including case-by-case adjustments. For example, cases may spend longer in the pre-notification process and, where companies are able the demonstrate that they are experiencing Covid-19-related issues in responding to requests for information, the CMA is not likely to impose penalties and may well choose to "stop the clock" where merging parties are struggling to provide information by the specified deadlines.

It is important to note that the CMA specifically states that its normal criteria or standards for assessing mergers remain unchanged, and that the CMA's objectives in considering mergers remain the same. However, it recognises that it is likely to receive a greater volume of submissions asserting that businesses, at risk of failure due to Covid-19 disruption, are likely to exit the market but for the merger in question. In response, the CMA has prepared a summary of the principles (annexed to the wider guidance) that govern how it will assess such 'failing firm' claims (i.e., where firms involved in mergers are failing financially and would have exited the market absent the merger in question).

CMA is targeting opportunistic, unfair or abusive business practices

The UK's CMA has also established a dedicated Covid-19 Taskforce ("Taskforce") to rapidly tackle business practices that exploit the Covid-19 crisis by, for example, charging excessive prices or making misleading claims about their products. The Taskforce will:

- scrutinise market developments to identify harmful sales and pricing practices as they emerge;
- warn firms suspected of exploiting these exceptional circumstances – and people's vulnerability – through unjustifiable prices or misleading claims;
- take enforcement action if there is evidence that firms have breached competition or consumer protection law and fail to respond to warnings;
- equip the CMA to advise government on emergency legislation if there are negative impacts for people which cannot be addressed through existing powers;
- advise government on how to ensure competition law does not stand in the way of legitimate measures that protect public health and support the supply of essential goods and services. It will also advise on further policy and legislative measures to ensure markets function as well as possible in the coming months.

The CMA has launched a dedicated email address for reporting suspected breaches of competition or consumer protection law relating to the Covid-19 situation. The CMA has indicated that it has received a high volume of reports from members of the public in relation to suspected unlawful conduct during the pandemic, and will be staying vigilant.

The CMA has indicated that the majority of the reports received by the Taskforce have related to concerns over cancellations and refunds arising from Covid-19 disruption. In its most recent update on the Taskforce's activities, the CMA has noted that three-quarters of complaints relate to air travel and holidays, and it expects an increase in the potential for consumer's cancellation rights to be harmed as the summer months approach.

The CMA has published guidance as to the CMA's expectations of businesses whose provision of services to consumers has been impacted by the crisis. The guidance states that the CMA would expect a consumer to be offered a full refund where: (1) a business has cancelled a contract without providing any of the promised goods or services; (2) no service is provided by a business (where, for example, it is prevented by government public health measures); or (3) a consumer cancels, or is

prevented from receiving any services, because government public health measures mean they are not allowed to use the services. Businesses are permitted to offer alternatives to a refund, such as credits, vouchers, re-booking or re-scheduling, but the option of a refund should be "as clearly and easily available". The CMA also acknowledged that it may take businesses longer than normal to process refunds, but that any delay should be clearly communicated and the refund should still be processed within a reasonable time. Four sectors have been prioritised as particular areas of concern to the CMA that require investigating namely: weddings and private events, holiday accommodation; nursery and childcare services; and package holidays.

Finally, the CMA also wrote an open letter to the pharmaceuticals and food and drink industries urging companies to report cases of unjustifiably high price rises, and said it will use its powers "to tackle bad behaviour".

Commission guidance under EU law

On 8 April 2020, the Commission published a Communication for assessing potential antitrust issues under a Temporary Framework. The Communication has temporarily re-introduced the "comfort letter" system which was previously abolished in 2003. This will allow companies, who intend to cooperate with a competitor in the context of Covid-19 but are unsure about complying with applicable competition law while doing so, to directly, and pre-emptively, approach the Commission for guidance in order to attain greater legal certainty.

The Communication covers possible forms of cooperation between businesses in order to ensure the supply, and adequate distribution, of "essential scarce products and services during the Covid-19 outbreak". This is designed to address the shortage of products and services resulting from the recent rapid spike in demand. This includes medicines and medical equipment used to test and treat Covid-19 patients or necessary to mitigate the outbreak; but the Temporary Framework's scope is not limited to a specific industry sector.

The Commission has made it clear that it is prepared to accept greater levels of cooperation between competitors in order to overcome or avoid a shortage (e.g. businesses may discuss the conversion of their respective production lines so as to increase overall production of scarce products).

While companies may continue to self-assess, the ability to seek guidance in the form of a comfort letter will be helpful where it may be unclear if a specific initiative is compatible with EU competition law. Certain types of collaboration that would normally be problematic, will be deemed compliant if they are:

a) designed and objectively necessary to actually increase output in the most efficient way to address or avoid a shortage of supply of essential products or services, such as those that are used to treat Covid-19 patients;

b) temporary in nature (i.e. to be applied only as long there is a risk of shortage or in any event during the Covid-19 outbreak); and

c) strictly necessary to achieve the objective of addressing or avoiding the shortage of supply.

In particular, the Commission has provided a comfort letter to Medicines for Europe, the EU's largest trade association for producers of generic pharmaceuticals, addressing a voluntary cooperation project among pharmaceutical producers which targets the potential shortage of critical hospital medicines for the treatment of coronavirus patients.

On 15 April 2020, the Commission also published a Joint European Roadmap towards lifting Covid-19 containment measures, stating the Commission is and will be providing, as necessary, antitrust guidance and comfort for cooperation between firms to overcome shortages on goods and services required to enable the gradual de-escalation from Covid-19 related containment measures. This implies the Commission is prepared to issue further antitrust comfort letters to businesses as the Covid-19 containment measures are lifted, particularly in the life sciences/healthcare sector. The Roadmap notes that all further EU guidance "will take into account the evolution of the health emergency and the impact on the Single Market".

The Commission has also launched (on 30 March 2020) a dedicated website on coronavirus and EU competition law which provides high-level guidance for businesses during the Covid-19 crisis. It builds on a joint statement previously issued by the European Competition Network ("ECN") (see below).

The dedicated website refers to the Temporary Framework Communication, as well as general Commission guidance on the assessment of agreements that could be exempted from EU competition rules if the competitive harm resulting from an agreement is outweighed by consumer benefits. The restriction of competition must also go no further than necessary to achieve the agreement's objectives. The website also references Commission guidance on cooperation agreements between competitors ('horizontal agreements'); agreements between parties at different levels of the supply chain ('vertical agreements'); and procedural aspects of competition law enforcement (for example, whistleblowing or seeking leniency). EU material on consumer protection issues that fall outside the scope of EU competition law is also included.

Additionally, the Commission has established a dedicated email address enabling businesses to seek informal guidance from the Commission on EU antitrust issues, and specifies the information that needs to be provided in such guidance requests. With the announcement of the Temporary Framework, this dedicated email address is also to be used to obtain guidance (including seeking comfort letters) on the permissibility of specific initiatives intended to address any shortage of essential products or services.

The Commission has also announced, on 22 April 2020, an

The Commission has also adopted an exceptional derogation from certain competition rules, under Article 222 of the Common Markets Organisation Regulation, in relation to the milk, flowers and potatoes sectors. These derogations allow market participants in these sectors, which have seen precipitous falls in demand, to cooperate in order to stabilise the market. For example, milk producers will be allowed to coordinate production with rivals, and potato and flower growers will be permitted to collaborate to withdraw products from the market. In addition, private operators will also be authorised to store these sectors' products. Such collaboration will only be permitted for a maximum of six months and the impact on consumer prices will be monitored closely by the Commission to safeguard against any adverse effects. This derogation is part of a wider programme of measures adopted by the Commission to help support the agri-food industry, which includes allowing private operators to store a range of dairy and meat products (allowing for their temporary withdrawal from the market in order to rebalance supply) and the introduction of flexibility in a number of market support programmes (e.g. those covering wine, olive oil and apiculture) to allow for funding to be redistributed to better combat the current crisis.

In a move not specifically related to Covid-19 (although it has acquired new significance with the pandemic as a backdrop), the Commission has signalled its intention to issue specific guidance for the agricultural sector on what cooperation to promote greater sustainability is permissible under the EU's antitrust rules. In a Communication announcing the EU's 'Farm to Fork' strategy, the Commission has said that it hopes to provide guidance clarifying competition rules for collective initiatives that promote sustainability in supply chains by Q3 2022.

EU merger control

Although the Commission has yet to set out any specific guidance on its approach to mergers in the context of Covid-19, it has signalled its intention to continue to review those cases where there are compelling reasons for the merger to continue without delay. Otherwise, given the difficulties that it faces in gathering information, the Commission has requested that firms consider the timing of their notifications so as to allow it to manage its caseload.

Coordinated approach by national competition authorities across EU

The ECN comprises national competition authorities of all EU Member States. The ECN's joint statement, published on 23 March 2020, which the Commission has endorsed:

- acknowledges the social and economic consequences triggered by the Covid-19 outbreak in the EU/EEA; and notes that this extraordinary situation may trigger the need for companies to cooperate in order to ensure the supply and fair distribution of scarce products to all consumers.
- states that in the current circumstances the ECN will not actively intervene against necessary and temporary
- measures put in place in order to avoid a shortage of supply. Considering the current circumstances, such measures are
- unlikely to be problematic, since they would either not amount to a restriction of EU/EEA competition law or generate efficiencies that would most likely outweigh any such restriction of competition.
- recommends businesses that have doubts about the compatibility of such cooperation initiatives with EU/EEA competition law contact the Commission or the EFTA Surveillance Authority or the relevant national competition authority for informal guidance.
- emphasises the "utmost importance" of ensuring that products considered essential for protecting the health of consumers in the current situation (e.g. face masks and sanitising gel) remain available at competitive prices. The ECN warns that it will not hesitate to take action against businesses taking advantage of the current situation by cartelising or abusing their dominant position.
- reminds manufacturers that under existing competition laws they are able to set maximum (but not minimum) prices for their products to help limit unjustified price increases at the distribution level.

IMMEDIATE THINGS TO DO

- Ensure continued compliance with competition and consumer protection law; ensure any coordinated conduct goes no further than necessary; and note examples listed in the CMA and EU/ECN guidance of anticompetitive behaviour that is not exempted and may be investigated by competition authorities. Anticompetitive conduct of the nature described in the guidance is likely to also fall outside the scope of the UK exemption Orders.

- For any cooperation that could raise concerns under EU competition law, consider whether one of the exemptions could apply or the need to seek informal guidance (or in the case of the European Commission, a comfort letter). Also consider if EU sector-specific derogations may be applicable (e.g. in the milk, flowers and potatoes sectors). Always seek legal advice before approaching the authorities, particularly as it can sometimes be unclear whether or not an agreement fits within the relevant scopes for exemption. Businesses should also document all exchanges and agreements between them and make them available to the Commission on request.

- Refrain from unduly increasing prices where this is not justified by commensurately increased costs (e.g. production or transport costs) as this conduct could be investigated if it is perceived as opportunistic, unfair or abusive. Extra care needs to be taken when dealing with food, drink, pharmaceuticals or products designed to protect health.

- Review existing supply and distribution arrangements to identify potential supply chain weakness that may require cooperation, within the parameters of one of the UK exemption Orders; or the CMA or EU/ECN guidance. For example, joint production initiatives.

- Businesses active in a UK sector covered by an exemption Order should urgently consider if any of their existing or anticipated agreements fall within the scope of such Order. They must ensure prompt notification of agreements to the Secretary of State within the relevant 14 day deadline.

- If supply chain or related market risks are identified in sectors other than those covered by the UK exemption Orders or the EU derogations, businesses contemplating cooperation with competitors should first conduct a competition law assessment to ensure any action falls within relevant legal exemptions outlined in the CMA's guidance (or the EU/ECN guidance if applicable). Coordinated actions implemented during the exceptional circumstances of the Covid-19 pandemic that (i) avoid a shortage, or ensure security, of supply; (ii) ensure a fair distribution of scarce products; (iii) continue essential services; or (iv) provide new services such as food delivery to vulnerable consumers, are most likely to be unproblematic from a competition law perspective provided that they do not go further than what is considered necessary.

- Manufacturers can consider imposing maximum (but not minimum) resale prices for the resale of their products to help prevent price gouging.

- Consider seeking legal advice if faced with an unjustified increase in price from a supplier particularly if this increase relates to food, drink, pharmaceuticals or products designed to protect health. In the UK, suspected infringements may be reported in the first instance to relevant sectoral regulators. For example, the Financial Conduct Authority concerning the financial services sector; or the Civil Aviation Authority regarding the aviation industry.

- If contemplating a merger or acquisition in the near future, whether under the UK or EU regimes, always consider seeking legal advice, and engage proactively with the CMA or the Commission. It will be vital to clearly communicate whether Covid-19-related disruption is likely to affect the business's ability to respond to information requests or otherwise engage with the assessment process. It will also be important to consider, and communicate to the relevant competition authority, if an urgent 'failing firm' scenario may be applicable (e.g. if due to the pandemic a business cannot remain financially viable absent the transaction

12. HOW TO PROTECT YOUR BUSINESSES AGAINST CYBER BREACHES DURING THE CORONAVIRUS PANDEMIC (WORLDWIDE)

Before the outbreak of the Covid-19 pandemic, the threat of cyber breaches was a concern for businesses (for instance, as early as 2018, The World Economic Forum ranked breaches of cyber security as the third biggest global risk to businesses in its Global Risk Report of the same year).

The Pinsent Masons cyber team, along with others, have seen breaches steadily increase in recent years. Now, as many businesses shift towards remote working in response to the Coronavirus outbreak, it is increasingly important for businesses to review and strengthen cybersecurity measures that are already in place.

Unsurprisingly, remote working has offered opportunities for cyber criminals to capitalise on as employees work away from the security of the office. Action Fraud has indicated that Coronavirus-related fraud reports increased by 400% in March. The National Cyber Security Centre (NCSC) has warned that 'phishing' attacks are likely to rise as the Coronavirus outbreak intensifies. The NCSC said it had taken recent steps "to automatically discover and remove malicious sites which serve phishing and malware" and that those sites used Coronavirus and Covid-19 "as a lure to make victims 'click the link'". Phishing is often the first attempt by attackers to deliver a malicious payload intended to gather user credentials in order to perpetrate cyber crime. Cyber crime motivations may also include the collection of financial and/or personal data to affect payment diversion frauds, send spam, or even launch attacks on the organisation's supply chain. Intelligence is often gathered by an attacker before the main attack; we are aware of cases where internal documents regarding the organisation's financial performance were evaluated to help determine the level of the ransom payment subsequently demanded.

Coronavirus is, therefore, just the latest topic or hook for attackers, who are cynically preying on users' fears, thirst for information or good nature, in their attempts to commit fraud.

The threat of cyber attacks were ubiquitous before the Coronavirus pandemic, however, the pandemic has presented new challenges and exacerbated the existing threat for businesses. Below, we have set out some guidance on how to minimise the threat of cyber attacks during this challenging time.

How businesses can reduce the risk of cyber breaches

Asking employees to work from home provides additional cyber security challenges to employers because employees are more relaxed at home and less guarded, coupled with technology arrangements not configured for a mobile workforce. However, there are measures that can be put in place to help minimise the cyber security risks. Whilst employee security culture is key to deal with the first point, technology can also help mitigate the risks. NCSC guidance has stated that businesses should ensure that existing accounts have strong passwords and two-factor (also known as multi-factor) authentication is in place in order to control access to important systems and data. Support

should be available to help employees navigate technical issues they are having remotely.

Using technology further to safeguard your data can also help. Businesses should consider the security controls on endpoints. Laptops, tablets, mobile and other connected devices should have effective controls to stop malware, restrict account usage, detect abnormalities and respond to these appropriately. This may include machine learning agents that detect when content is being encrypted or software being installed is hazardous. Email controls should also be hardened with Domain-based Message Authentication, Reporting, and Conformance (DMARC), Sender Policy Framework (SPF) and Domain Keys Identified Mail (DKIM) to ensure legitimate traffic comes in and out of your organisation. Additionally, technology teams must have sufficient resilience and bandwidth to deal with technology issues and queries from users and so it is important to check the resiliency of your technology systems. A visible and easy-to-use tool should also be made available to enable staff to report phishing, and there should be regular phishing campaigns and tests to raise awareness. To ensure that connections and data are only seen by its intended recipients, the use of a virtual private network (VPN) is encouraged such as having a remote user authenticate themselves at home, using multiple factors if required, and then accessing an encrypted VPN service to interact with business applications in a trusted environment.

Employees should also be aware that there is a lot that they can be doing to help minimise the threat of cyber attacks. Employers should engage with employees to ensure they understand the right behaviours that need to be displayed when working on business technology.

For example, they should only be using the business' approved method for communicating and sharing files: personal accounts should not be used to send or receive the firm's information. Additionally, employees should ensure that their screens are always locked and that other members of their household do not have access to sensitive work data to ensure confidential information is not shared. Employees should be made aware that they should not open emails from unknown sources. Working on enhancing employee security culture is one of the hardest aspects of information security, but the most rewarding and successful if you get it right.

How we can help - Pinsent Masons' cyber response line

Our cyber team is well equipped to deal with any cyber risks your business may face through our global network. We have set up a 24/7/365 Breach Response Helpline for clients with local telephone numbers and in local languages in our key cyber territories. This can be used to contact our team in the event of a cyber event or data breach. The breach response contact numbers are:

Country / Details	Phone number
UAE	+971 4 373 9761
UK	+44 (0)20 7741 6127
Germany	+49 89 262074600
Ireland	+353 1525 5000
Singapore	+65 3165 6500
HK	+852 5806 7000
Spain	+34 902676197

CHAPTER 2 – IRELAND

CONTENTS

1. CONTRACTS AND SUPPLY CHAIN (IRELAND)

The position under Irish law is largely the same as under UK law, however please see below with reference to e-signatures. For any other contract and supply chain related guidance, please refer to the UK Chapter. If you require any specific guidance, please feel free to contact a member of our team.

E-Signatures (Ireland)

Contracts: Under Irish Law DocuSign / simple electronic signatures can be used for simple contracts as long as the counterparty to the contract agrees to their use.

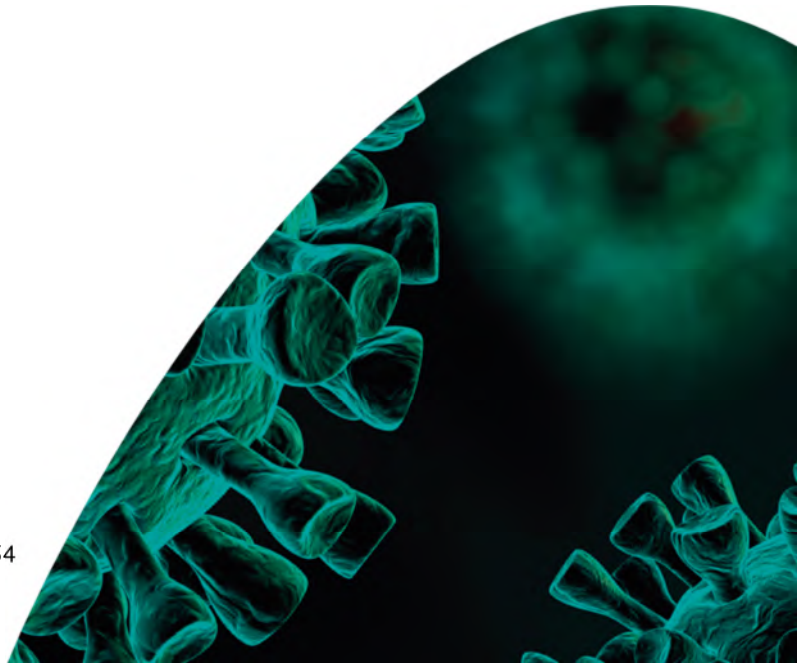
Deeds: At the moment, Docusign cannot be used to validly create documents to be executed under seal as an advanced electronic signature based on a qualified certificate is to be used to execute such documents.

To avoid execution issues, an Irish company could appoint an attorney to execute documents on its behalf. The power of attorney does not need to be under seal and can be signed in writing or electronically using a simple electronic signature. The attorney can execute a deed on behalf of an Irish company by signing the document pursuant to the Power of Attorney in the presence of a witness and thereby avoiding the need to affix a seal. The Irish Law Society's most recent guidance provides that an attorney and witness can utilise simple electronic signatures for this purpose. It remains to be seen if this approach will be followed in practice in the Irish market.

Witnessing: Execution of documents by individuals appointed as attorneys or deeds by individuals must be witnessed. A witness must be physically present (respecting social distancing) when the signatory signs the document. It is best practice for a witness who attests a signature to be independent of the signatory and the transaction.

Other Documents: Certain other documents have their own execution formalities, for example wills, and documents creating, acquiring or disposing of an interest in real property cannot be executed electronically.

Virtual Execution: It is important where parties to a transaction are not physically together and signed documents are circulated by e-mail, to comply with the guidance of the Law Society of Ireland on virtual execution of documents to ensure all documents are properly and validly executed under Irish law.



2. EMPLOYMENT AND IMMIGRATION (IRELAND)

As the Coronavirus outbreak continues to have an impact globally, employers will need to monitor the spread of Coronavirus and take steps to protect their employees. The outbreak raises points of employment law, immigration, health and safety and data protection law – businesses should take professional advice.

Sickness and self-isolation

Where workers have contracted Coronavirus (COVID-19) or have been diagnosed with COVID-19 symptoms by a doctor they should be on sick leave and their entitlement to sick pay will depend on their employer's sick pay policy. In Ireland, there is no legal obligation for an employer to pay an employee while on sick leave, unless the employer has agreed to do so in a contract or policy. If sick pay is paid, it tends to be paid for a capped period of time and net of any benefit receivable from the Department of Employment Affairs and Social Protection (the Department). If the employee is not entitled to sick pay from their employer, they may be entitled to a benefit- such as the new COVID-19 Illness Benefit- from the Department if they meet certain eligibility criteria (as discussed below). If any sick pay is payable from the employer to the employee it may be net of this benefit.

Where an employee is self-isolating on the instruction of a doctor or the HSE or has been diagnosed with COVID-19 and is absent from work, the employee may be eligible to receive the COVID-19 Illness Benefit, which will be paid at a rate of €350 per week. It will be paid for a maximum of two weeks where a person is self-isolating on the instruction of a doctor or the HSE, and will be paid for a maximum of 10 weeks if a person has been diagnosed with COVID-19. If an employee returns from travel abroad and follows the HSE self-isolation advice, and they are not being paid by their employer, the employee will need their GP to complete a medical certificate on their behalf. The worker must have been in paid employment immediately prior to the claim and be absent from work and confined to home or a medical facility. The COVID-19 Illness Benefit will be paid from the first day of absence without the need for waiting days. This COVID-19 Illness Benefit has only been implemented for a temporary period.

If an employee is self-isolating an employer may be able to require that employee to work from home if they have the facilities and are not symptomatic (if they are symptomatic then they should be on sick leave and not working). Many employees are already working from home, since the Taoiseach on 24 March, announced the closure of non-essential businesses and facilities and the government continues to encourage people to work from home where possible.

If an employer requires an asymptomatic employee to stay at home (not on the instruction of the doctor or the HSE), how should this leave be treated? As these employees are not "sick", it is unlikely that they will be eligible for company sick leave. Instead, the employee is likely to be on a period of leave, assuming that they have been advised to self-isolate by public health guidance. This leave is likely to need to be paid at full pay by the employer, unless the employer has a contractual right to place the employee on a period of unpaid leave - such as a contractual lay-off provision – or some other arrangement is agreed with the employee. Any such period should therefore be kept to a minimum - i.e. no longer than the recommended two week period of self-isolation. If, however,

the employee becomes symptomatic during or after that period the above sick leave provisions should apply.

Where an employee has been advised to self-isolate, for example by a doctor, but continues to come into work and into contact with other employees or clients then employers must bear in mind the duties that they owe to other employees under Irish health and safety law. If they knowingly allow an individual who has been advised to self-isolate to attend their premises or come into contact with other employees, they may be in breach of those duties, particularly where any of those other employees are more vulnerable to infection - for example, pregnant employees, those with long-term health conditions. Suspension may be an option where an individual who has been advised to self-isolate refuses to do so, but employers should consider whether they have a right to suspend in these circumstances. Where no express contractual right to do so exists, legal advice should be sought.

The Health (Preservation and Protection and Other Emergency Measures in the Public Interest) Act 2020 states that a medical officer may order the detention and isolation of a person in a hospital or other place until such time as the medical officer certifies that the person's detention is no longer required. Such an order may be made where the medical officer believes in good faith that a person is a potential source of infection, is a potential risk to public health and that the detention/isolation is appropriate to prevent, limit, minimise or slow down the spread of Coronavirus and minimise the risk to human life and public health. Such a person may also be detained if they cannot be effectively isolated or refuses or appears unlikely to remain isolated. A person who is detained may also request that his/her detention is reviewed by another medical officer. Where a medical officer makes such an order, they shall ensure that a medical examination of the person is carried out as soon as possible and in any event no later than fourteen days from the time of their detention.

Employee Benefits- The Temporary Wage Subsidy Scheme

The Temporary Wage Subsidy Scheme (the Scheme) replaces the previous COVID-19 Refund Scheme and will run for 12 weeks from 26 March 2020. Government guidance is expected shortly, however, it is understood that the Scheme will be extended beyond its original June expiry date. It is available to employers from all sectors, excluding the public service and non-commercial semi-state sector, whose business is being financially impacted by the COVID-19 pandemic.

The Scheme will be implemented in two phases. Phase 1 (the transitional phase), has now concluded and relates to all Scheme submissions received on or before 3 May. During phase 1, Revenue refunded eligible employers who were registered with Revenue €410 per week for each eligible employee that they had made a PRSI Class J9 submission for, regardless of the amount of the subsidy actually paid to the employee. In some cases this amount exceeded the subsidy that the employee was entitled to receive for that week and in those cases, Revenue has advised that the employer is obliged to hold the excess of the subsidy payment received over the amount of subsidy actually paid to the employee. Revenue may take this excess amount into account when paying future subsidy payments to the employer or require it to be repaid directly to Revenue.

Phase 2 (the operational phase) of the Scheme, applies to Scheme submissions received by Revenue on or after 4 May.

During the operational phase the subsidy amount paid to employers will be based on each individual employee's Average Net Weekly Pay and any additional gross payment (top-up) paid by the employer. Average Net Weekly Pay for the purposes of the Scheme is based on January and February payroll submissions made by the employer to Revenue. Bonuses, commissions and other payments will be taken into account in the calculation of the Average Net Weekly Pay if these were included as part of gross pay in the January and February payroll submissions.

For submissions made during the operational phase, Revenue will calculate the employee's Average Net Weekly Pay and Maximum Weekly Wage Subsidy (MWWS) and provide this to the employer in the employer CSV file, which is available for download from Revenue Online Service (ROS). A CSV file is a Comma Separated Values file that will assist employers in inputting data on their payroll software.

During Phase 2 the following subsidy amounts will apply:

1) Employees with net pay less than €586 per week (€38,000)

Employees with an Average Net Weekly Pay:

a) of up to €412 per week (approx. €24,400 per annum) – a subsidy refund 85% of Average Net Weekly Pay, to a maximum of €350, is applicable: If an employer wishes to top-up this payment, by the remaining 15%, to bring the employee's pay up to €350 per week, then tapering, or reduction will not apply to the subsidy (where the combined wage subsidy plus the top-up does not exceed €350).

b) between €412 and €500 per week (between approx. €24,400- €31,000 per annum) – the subsidy refund amount will be up to €350 per week.

c) between €500 and €586 per week (equivalent to €31,000-€38,000) – the subsidy refund amount will be up to 70% of Average Net Weekly Pay, up to a cap of €410 per week.

2) Employees with net pay in excess of €586 per week (€38,000)

The maximum subsidy refund for these employees remains at €350 per week. However, the following tiered approach will apply, which takes into account the amount paid by the employer and the level of reduction in pay borne by that employee:

Gross Pay paid by Employer	Subsidy
60% or less of employee's previous Average Net Weekly Pay	Up to €350 per week
Between 60% and 80% of employee's previous Average Net Weekly Pay	Up to €205 per week
Over 80% of employee's previous Average Net Weekly Pay	No subsidy payable

Gross pay means total remuneration which includes emoluments and notional emoluments but without reference to any deduction for pension contributions payable by the employee or any salary sacrifice deduction, as reported in the payroll submission.

3) Employees with net pay in excess of €960 per week (€76,000)

The wage subsidy is available to support employees whose Average Net Weekly Pay was greater than €960 pre-Covid but their current gross pay is below €960 per week, subject to the tiered and tapering arrangements set out above in section 2.

The maximum additional gross payment an employer can make to receive the full subsidy is the difference between €960 and their MWWS.

Topping-up and Tapering

Employers are encouraged by Revenue to make best efforts to maintain the employee's net income as close as possible to normal net income for the period of the Scheme. However, if the gross pay paid by the employer and the subsidy is greater than the employee's Average Net Weekly Pay the subsidy amount may be tapered or may not apply.

Tapering, or a reduction, of the subsidy will apply to all cases (excluding those whose Average Net Weekly Pay does not exceed €412) where the gross pay paid by the employer and the subsidy exceed the employee's Average Net Weekly Pay. This is to ensure that no employee would be better off under the Scheme. Where the subsidy is tapered to €0, as the subsidy is not payable, PRSI Class J9 should not be applied and the normal PRSI class applicable to the employee should be applied.

Revenue has published useful guidance documents on how the Scheme will operate including a sample calculator to demonstrate the calculation of the wage subsidy, along with information on employer eligibility and supporting proofs.

Eligibility Criteria

To qualify for the Scheme, an employers' business must have been adversely affected by COVID-19 to a significant extent with the result that the employer is unable to pay their employees their usual pay; the employer must intend to continue to employ the employee (and to pay them); and the employer must have registered for the Scheme (or the previous COVID Refund Scheme) with Revenue on ROS.

The Scheme is confined to employees who were on the employer's payroll as at 29 February 2020, and for whom a payroll submission has already been made to Revenue in the period from 1 February 2020 to 15 March 2020. If for some reason the 15 March deadline was missed, Revenue will allow employers who qualified under all the other rules and are otherwise tax compliant enter the scheme provided: (i) the employees were included on the employer's payroll on 29 February 2020; (ii) the February 2020 payroll submission was submitted to Revenue before 1 April 2020; and (iii) payroll submissions for all previous months were submitted to Revenue before 15 March 2020.The reimbursement will, in general, be made within two working days after receipt of the payroll submission. If an employer made a submission within this period and after 1 April 2020 amended or deleted that submission, that original submission any subsequent amendments are not valid submissions for the purposes of employee eligibility for the Scheme.

Following an announcement on 29 May by the Minister for Finance, Revenue will implement a change to the operation of the Scheme to accommodate employees returning to work

following maternity or adoptive leave. Revenue will put in place the necessary processes to enable employers to receive appropriate subsidy payments in respect of affected employees. These changes are expected to be operational from 12 June 2020. Further guidance is expected shortly.

The business of an employer shall be treated as being adversely affected where the employer can demonstrate to the satisfaction of Revenue that, by reason of COVID-19 and the disruption that is being caused, there will occur in the period of 14 March to 30 June 2020 at least a 25% reduction either in the turnover of the employer's business or in customer orders being received by the employer. The 25% reduction in turnover or customer orders may be applied at the level of the company or, if a company is formally structured into individual "business divisions", at the level of the individual business division. Each business division of the company may be eligible for the subsidy, however, each business division of the company must be capable of being separately identified, or otherwise the company as a whole will be looked at. Each business division in a company must have a clearly defined and separate management structure separate to the other business divisions in the company and those structures must have been formalised and established before the outbreak of the pandemic. Revenue have also advised that an "alternative basis" test be applied where application of the "turnover" and "customer orders" tests do not adequately demonstrate a negative economic disruption.

Application for the Scheme is based on self-assessment principles and a qualifying employer will need to declare that it is significantly impacted by the crisis when applying for the Scheme, but Revenue has advised that this is not a declaration of solvency.

While Revenue does not currently require proof of financial difficulty, it may do so in future. Consequently, employers should retain copies of all records and documents which provide evidence of the negative impact of Covid-19 on their business and their eligibility for the Scheme.

The Scheme is available for employers who retain staff on payroll. Some of the staff may be on fulltime hours, temporarily not working- for example-, if they are non-essential employees and cannot work at home- or some may be on reduced hours or reduced pay. Unlike the furloughing scheme introduced in the UK, it is not a condition of the Scheme that the employee cannot do any work.

Rehiring employees

Revenue has recently noted that employees, who were laid off after 29 February, can be taken back onto the payroll for the purposes of the Scheme. From 18 May 2020, Revenue will include in the Employer CSV file information on employees who were on the employer's payroll on 29 February, were laid off and subsequently rehired after 1 May 2020. Revenue has updated the Employer CSV files to include rehired employees notified to Revenue between 2 May 2020 and 17 May 2020. From 21 May 2020 Revenue will commence a daily refresh of the Employer CSV file to include the employee values for rehired employees notified to Revenue and to update the date on the CSV file to reflect when it was refreshed. To be included in this refresh, employers must ensure that the rehired employees are on the Payroll and a Revenue Payroll Notification has been received the day before the employer calculates and submits to Revenue the first payroll payment for the rehired employee. Revenue will reprocess all the J9 submissions for rehired employees, received between 2 May 2020 and 18 May 2020 and refunds will be made as appropriate.

Employers must not operate this Scheme for any employee who is making a claim for duplicate support from the Department - for example, Pandemic Unemployment Payment.

Employers can claim the subsidy in respect employees where the employee is exercising an Irish contract of employment in the State, and where the employer satisfies the conditions of the Scheme.

Tax

Income tax and USC will not be applied to the subsidy payment through the payroll. However, the subsidy will be liable to income tax and USC on review at the end of the year. Employee PRSI will not apply to the subsidy or any top up payment by the employer. Employers PRSI will not apply to the subsidy and will be reduced from 11.05% to 0.5% on any top up payment. Top-up payments cannot be re-grossed and are subject to income tax and USC in the normal way.

Revenue has indicated that in many cases the payment of the subsidy and any additional income paid by the employer will result in the refund of income tax or USC already paid by the employee. Any income tax and USC refunds that arise as a result of the application of tax credits and rate bands can be repaid by the employer and Revenue will also refund this amount to the employer.

Employee Benefits- The COVID-19 Pandemic Unemployment Payment

The COVID-19 Pandemic Unemployment Payment is available to all employees and the self-employed who have lost their job and are on unpaid lay-off due to the COVID-19 pandemic. It will be paid at €350 per week. Those who are self-employed will be paid the payment of €350 through the Department rather than through the Revenue scheme. The payment was originally available until at least 8 June, but it is understood that this date will be extended. The government are also due to announce how the COVID-19 Pandemic Unemployment Payment will be amended, it is understood that those who were working full-time hours before the pandemic will not see a change to their payment, however, those who were working part-time will see their payments reduced to €203 a week.

The government has issued guidelines on those who can apply for the payment.

Those who are self-employed will be paid the payment of €350 through the Department rather than through the Revenue scheme.

If an employee has one adult and one or more dependent children they have been advised to claim a Jobseeker's Payment instead of the COVID-19 Pandemic Payment. This is because the employee may claim an additional allowance for their adult dependent and child dependents, which will bring their weekly payment to in excess of the €350 weekly payment due under the emergency COVID-19 Pandemic Unemployment Payment.

Employees who are put on short-term working by their employer due to a reduction in business activity related to COVID-19 may apply for a Short-time Work Support. Employees must work three days per week or less to qualify for the Short-Time Work Support Payment and will be eligible for up to €81.20 for the two days they are no longer working.

Lay-Off

The Redundancy Payments Act 1967 permits an employer to lay an employee off if the employer:

i. is unable to provide work;

ii. reasonably believes that it will not be permanent; and

iii. gives prior notice of the lay off using the RP9 form.

A period of lay off must be paid leave, unless the employer is permitted by policy, contract or custom and practice to lay the employee off without pay or the employee consents to it being unpaid.

Generally, where employees are laid off or placed on short time working, they can rely on the Redundancy Acts to convert lay-off or short-time working to a redundancy situation. Employees who have been laid off or placed on short-time working for four or more consecutive weeks or six weeks in any 13-week period can notify their employer of their intention to claim redundancy. Further to this, an employer can prevent this if within four weeks of this notice, the employer can guarantee the employee 13 consecutive weeks of work without lay-off or short-time working.

However, The Emergency Measures in the Public Interest (COVID-19) Act 2020 has amended the Redundancy Acts by providing that persons who have been laid off or kept on short-time due to the effects of measures taken by their employer in order to comply with, or as a consequence of, Government policy to prevent, limit, minimise or slow the spread of infection of COVID-19 cannot trigger a redundancy situation during the 'emergency period'. This emergency period means the period beginning on 13 March and ending on 31 May 2020. However, it was announced on 29 May that this period will be extended until 10 August. This is to prevent a situation where if a redundancy was triggered an employer may not be in a position to afford to pay redundancy due to cash-flow issues and in some cases would propel businesses into insolvency. We are expecting guidance on whether this date will be extended shortly.

Business travel

Employers should restrict employees from business travel unless absolutely necessary and they are an essential service provider or class of worker (outdoor work etc.) which has been permitted to return to work. Employers should encourage meetings via video-link, if possible. Essential service employees when travelling to and from work, should carry at all times either work identification or a letter from their employer indicating that they are an essential employee, as well as one other form of identification. If an employee is not engaged in the provision of essential services or are not a class of worker permitted to return to work, then they are not permitted to travel to and from work. The 'roadmap for reopening society and business' sets out when different workers and sectors will be permitted to return to work.

The government has advised against all non-essential travel to other countries until further notice. Where your employees need to travel provide them with additional advice on how to ensure they are following best practice in respect of hygiene; contact with sick people and any other advice relevant to their destination.

The Health Act 1947 (Section 31a – Temporary Requirements) (Covid-19 Passenger Locator Form) Regulations 2020 (the Passenger Locator Form Regulations) commenced on 28 May and specify the information that a passenger will need to provide when arriving in the Republic of Ireland from another country between 28 May and 18 June. Passengers arriving or returning to Ireland from overseas via port or airport must provide their travel and contact details (via a COVID-19 Passenger Locator Form) to an officer at their port of entry.

The passenger locator form may be used by health authorities to contact the passenger to verify their location in the country. It will also enable contact tracers get in touch with the passenger should someone on their flight or ferry be confirmed as having COVID-19.

There are a number of exceptions to fully completing the passenger locator form which include:

- passengers arriving from Northern Ireland;
- passengers arriving in the Republic of Ireland from overseas and travelling to another country without exiting the port or airport in the Republic of Ireland;
- holders of a Certificate for International Transport Workers, or drivers of a heavy goods vehicle, who are in the Republic of Ireland in the course of performing their duties;
- aircraft crew, including the pilot, who are in the Republic of Ireland in the course of performing their duties;
- ship crew, including the maritime master, who are in the Republic of Ireland in the course of performing their duties; and
- foreign diplomats.

Failure to provide the required details on the passenger locator form or providing inaccurate, incomplete or misleading information may result in a €2,500 fine and/or imprisonment of up to 6 months. Data collected on the passenger locator form will be securely stored for 28 days before it is permanently deleted, unless it is required for longer for the purpose of investigating, preventing, detecting or prosecuting a criminal offence.

The Department of Foreign Affairs and Trade is currently advising against all non-essential travel overseas and the above Passenger Locator Form Regulations also apply to Irish citizens returning home. The Health Service Executive (HSE) and Government also expect those arriving in the Republic of Ireland from overseas regardless of whether they have no symptoms or have tested negative for COVID-19 in another country to self-isolate for 14 days.

Employers should consider carefully where employees are refusing to travel on business. Whilst the law varies depending on the jurisdiction it's fair to say that worldwide employers are expected to take proportionate and sensible action to protect employees. This may include cancelling business trips where government and insurance guidelines advise against travel to specific destinations.

Communicating with employees

Under the General Data Protection Regulation (GDPR) and the Data Protection Acts 1988-2018, personal data concerning health is 'special category data'. This means that employers need to ensure that any employer-wide communication does not include any data about the individual who is absent. For example, while it would be fine to let employees know that there has been a confirmed COVID-19 case within its workforce in Dublin, it would not be appropriate to provide any details from which the individual might be identified.

The Data Protection Commissioner has issued guidance, which advises that employers have a legal obligation to protect the health of their employees and maintain a safe place of work. In this regard, and in the current circumstances, employers would be justified in asking employees and visitors to inform them if they have visited an affected area and/or are experiencing symptoms. However, if the employer wanted to collect data over and above that, it would have to have a strong justification based on necessity and proportionality and on an assessment of risk. The data protection principles would also need to be observed in collecting the data. For example – being transparent in relation to why and what purposes the data is being collected for and having measures in place to ensure the security and confidentiality of the data.

Employers that seek information from employees about travel need to be careful not to discriminate while doing so. For example, an employer is likely to be able to justify a request for all employees to declare any travel from an area in respect

of which the Irish government advises an individual to self-isolate. However, enquiring about travel only to certain areas - for example, China - or seeking information only from certain sections of your employee population is likely to amount to discrimination or harassment.

Employees and medical examinations

The right to have employees medically examined will depend on the particular contract or policy that the employer has in place. Where such a provision is in place, and where an examination is justified taking into account all of the circumstances, the employee cannot reasonably refuse to be medically examined. Where no such contractual or policy provision exists, and the employer believes that there is a need to medically examine the employee in light of the status of the risk, then this should be conveyed to the employee and explained that it is in the best interests of the employee - and their colleagues - to agree to a medical examination to assess whether they are symptomatic. Information gathered about the health of an employee will be classified as "special category data". It should be handled as such, and kept strictly confidential.

Discrimination and harassment

There have been reports of an uptake in racism and prejudice being shown towards those of Chinese origin since the outbreak began. There is therefore an increased risk of such behaviour occurring in the workplace. Employers will be liable for harassment or discrimination by their employees towards other employees, save where they have taken reasonable steps to prevent the conduct. Employers will be unable to rely simply on a policy that states that discrimination and harassment is not tolerated. Further steps, such as training and evidence of inappropriate behaviour being tackled, must also be taken for an employer to avoid liability.

Roadmap for Reopening Society and Business

Under Ireland's 'roadmap for reopening society and business', restrictions will be eased on a phased basis, beginning on 18 May. There will be five separate phases, each spaced three weeks apart. The government are due to implement Phase 2 of the roadmap on 8 June. Employers should begin preparing how they will manage the return to work phase when the restrictions are eventually lifted as discussed in our 'return to work' chapter. A list of essential service providers has been provided by the government, which is not exhaustive. A revised retail list and, personal and commercial activities list have also been published and there are a number of retailers who are limited to offering emergency call-out or delivery services on that basis only. The government has also published an updated list of retailers and facilities that can open as part of Phase 1 of the roadmap. However, the Government continue to encourage employees to work from home where possible. Where employees are working from home, the employer should ensure that the employees have the correct set-up to be able to work from home, including a way of logging on to secure systems from home. Employers should also consider how best to stay connected with its employees and increase its virtual communications with employees. Simply measures can be taken such as calling an employee rather than emailing or setting up video conferencing facilities.

Immigration

Irish Immigration Service Delivery

The Irish Immigration Service Delivery ("ISD") announced that it has taken the decision to close the registration office in Burgh Quay in Dublin and temporarily cease accepting new visa applications with effect from 20 March 2020 and it will continue to review the situation. It has taken this measure to seek to interrupt the transmission of COVID-19 and to ensure customer safety. All registration offices for non-Dublin residents operated by An Garda Síochána have also temporarily closed. While individuals may still apply for an Irish visa online, the application will not be processed until such time as the restriction on accepting new visa applications has ceased. However, as a temporary measure until 20 July 2020, the ISD will allow applicants to change their immigration permission and these applications can be submitted electronically. Further information can be found on the ISD website.

ISD will, however, continue to process "Priority/Emergency" cases, which include the following:

- Visas for healthcare professionals, health researchers, and elderly care professionals;
- Visas for immediate family members of Irish citizens, persons legally resident in Ireland and persons entitled to avail of the provision of the EU Free Movement Directive;
- Visas for Transport personnel engaged in haulage of goods and other transport staff; and
- Visas for diplomats, staff of international organisations, military personnel and humanitarian aid workers in the exercise of their functions.

ISD has advised that persons who have a current valid permission which is due to expire between 20 May and 20 July 2020, their permission will be automatically renewed for two months. The renewal of the permission will be on the same basis as the existing permission with the same conditions attached. This notice supplements the notice of 20 March which renewed permissions due to expire between 20 March and 20 May 2020Any permission which was renewed by the notice of 20 March 2020 and which therefore has a new expiry date between 20 May and 20 July 2020is automatically renewed by this notice for a further 2 months. Further to this, as a temporary measure between 21 May and 20 July 2020, anyone in Ireland awaiting their first registration for the categories listed on the ISD website, and who has a current, valid permission to remain, but does not have a current permission letter can apply to the Registration Office to request a letter confirming their permission to remain in Ireland and the conditions attached. Applications may be submitted electronically. . These measures also apply to immigration registrations and renewals taking place outside Dublin in local Garda stations by the local Immigration Officers. The new measures will apply to three primary categories of persons: those who hold a current valid permission; those awaiting first registration; and those on short-stay visas who may be unable to leave the country due to uncertainties caused by the coronavirus pandemic.

ISD has also advised that until 20 July2020 they will allow EU Treaty Rights and Domestic applications to be submitted by email together with scanned copies of supporting documentation. EU Treaty Rights will require the original application to be submitted by post in due course.

The Department of Justice and Equality has published a helpful FAQ guide on the impact of COVID-19 on Immigration and International Protection.

Department of Business, Enterprise and Innovation

The Department of Business, Enterprise and Innovation (the "DBEI") has advised that is receiving a high volume of applications and this is currently leading to delays in processing times, namely 3 weeks for Trusted Partners applications and 9 weeks for Standard applications. The DBEI has also advised that it has implemented a contingency plan to ensure the continued processing of employment permit applications and the continuation of the employment permits system for the duration of this pandemic.

The main points of the contingency plan are:

- An Electronic (PDF) copy permit will issue by e-mail;
- The Employment Permits Section will facilitate the changing of start dates to applications that have been received but not yet processed;
- The DBEI will refund 100% of the application fee if an application is withdrawn due to the pandemic, before it is processed;
- Applications for Stamp 4 Letters of Support can be submitted electronically;
- Applications to review a decision of an employment permit can be submitted electronically; and
- Applications and renewals for Trusted Partner Status will be accepted electronically and do not require a hard copy to be submitted within a ten day period.

Further information can be found in the COVID-19 Employment Permits System Contingency Arrangement.

Health and safety

Employers have clear legal duties under health and safety law. There are three overlapping general obligations:

- duty to protect the health, as well as safety, of their employees.
- duty to protect others who may be exposed to health risks as a result of the employer's activities, including members of the public, service users and contractors.
- duty to manage safety risks from workplaces under the employer's control. Further information on this third strand can be found in the Facilities section of this guide.

Employers who remain open need to conduct a risk assessment to determine the likelihood and consequences of exposure to the Coronavirus associated with their business activities.

From a regulatory perspective, the new Coronavirus is classed as a biological agent under the Safety, Health and Welfare at Work (Biological Agents) Regulations 2013. This means that potential exposure through work activities directly involving the virus must be carefully controlled.

The Health and Safety Authority (HSA) has a section on its website dedicated to biological agents

a section on its website dedicated to infections at work, containing useful guidance and code of practice on biological agents. The code of practice is particularly helpful for employers in terms of conducting a risk assessment and identifying appropriate control measures. The HSA have also published a helpful FAQ for employees and employers in relation to home-working.

The risk assessment should take account of the latest guidance from the Department of Public Health Ireland/HSE, and should be reviewed as advice changes. The level of risk will vary depending on factors such as travel and the type of work, and particularly the potential for close contact with infected individuals or body fluids. The employer must identify control measures which will eliminate or, where this is not possible, minimise the risks which emerge from the risk assessment. For example, supermarkets in Ireland are currently putting in place screens to protect cashiers and customers and social distancing measures such as limiting the number of people who can access the premises.

Employers are required to consult with their employees about any arrangements put in place to control the risks associated with the Coronavirus, and good communication will be essential to ensuring that these measures are effective.

Employers have specific legal duties which might be impacted. For example, employees must be given the correct personal protective equipment ("PPE") and work equipment for their job. Employers should ensure that they have adequate stocks of the PPE, and may need to consider what other measures need to be put in place if the supply of PPE is disrupted.

Employers are required to consult with their employees about any arrangements put in place to control the risks associated with the Coronavirus, and good communication will be essential to ensuring that these measures are effective.

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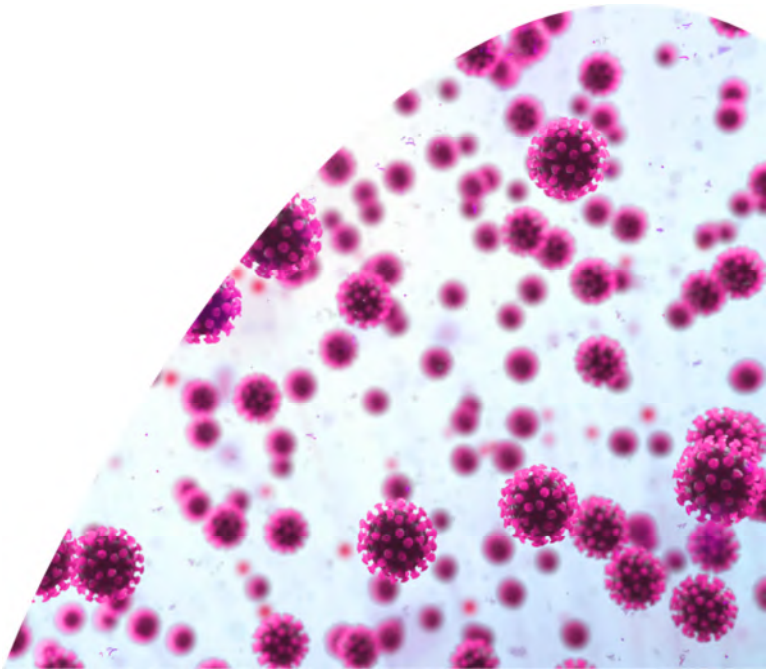

IMMEDIATE THINGS TO DO

- Refer to government guidance and decide whether your organisation is providing an essential service
- If you are providing an essential service, you should identify those employees (including sub-contractors) who are essential to the provision of that service and notify them and provide them with a letter to confirm this.
- If you are not engaged in the provision of essential services or have not been advised that you may reopen according to the roadmap for reopening society and business, employees are not permitted to travel to and from work. Work should be carried out remotely where possible.

For those who may return to work or are remote working:

- Display the posters which have been produced by the HSE to raise awareness of measures preventing the spread of COVID-19
- Conduct a risk assessment on health and safety and put in place relevant measures to ensure the health and safety of employees in line with Health and Safety law and guidance and HSE guidance.
- Keep up to date with the latest public health guidance, local government advice as well as World Health Organisation (WHO) updates and communicate these to employees.
- Communicate clearly with the workforce on any updated absence procedures – for example ability to notify remotely of absence (to avoid infection), any requirement to notify Coronavirus related absences to a central inbox or a designated Human Resources team member in order to track centrally potential workforce impact.
- Brief line managers and HR staff on company policy – using an FAQ guidance sheet. Ensure there is a consistent message to all employees on process and company policy.
- Remote working – consider if any steps required in order to facilitate home working (e.g. issue of laptops and/or network capacity for increased home working) and virtual communications.
- Where relevant advise staff to take home laptops/chargers/work mobile phones and work remotely, if possible, during the period of instability.
- Consider working arrangements and whether the company can consider patterns which reduce the risk of infection – e.g. creating two cohorts with half of department working from home and half in office each day in order to balance operations with practical measures.
- Reducing to the absolute minimum or cancelling non-essential business travel or conducting meetings via video-link and where this is not possible providing additional guidance on essential business travel and the expectations of the company in order to ensure employees have sufficient guidance.
- Re-visit bullying, discrimination and harassment policies and ensure processes are in place and publicised for employees to raise any concerns.
- Ensure accurate records are kept in respect of any employees on visas that may need an extension due to travel restrictions. Support such employees in understanding what they need to do to remain compliant.
- Keep clear records and audit trails of all actions and decisions that can later be used as evidence of compliance with the relevant immigration and government requirements.
- Provide employees with details of any Employee Assistance Programme that is in place.

3. RETURN TO WORK (IRELAND)

The Irish government has published its plan for lifting its COVID-19 lockdown restrictions and re-opening businesses over the coming weeks.

Under Ireland's 'roadmap for reopening society and business', restrictions will be eased on a phased basis, beginning on 18 May. There will be five separate phases, each spaced three weeks apart. Employers should be planning how they will manage the return to work phase when the restrictions are eventually lifted for their business. Employers will need to put in place measures for a gradual and phased return to the workplace, with social distancing measures remaining in place.

Ireland's Phase 1 COVID-19 regulations came into operation on 18 May 2020. Phase 2 is due to be implemented on 8 June. The regulations will continue to limit travel in Ireland unless it is for the following reasons: to go to work, if your place of work is open and you cannot work from home; to shop for items you need; to exercise within twenty kilometres of your home; for medical reasons or to care for others; and to meet friends or family outside, within twenty kilometres of your home, in groups of no more than four. Workers, like those who work on their own, as well as other workers who can keep a 2 metre distance from others can return to work. Small retail outlets can also reopen with a small number of staff on the basis that the retailer can control the number of individuals that staff and customers interact with at any one time. It is understood that major retail outlets that have an entrance on to a street may be allowed to reopen during Phase 2 rather than Phase 3 but this has yet to be confirmed. Social distancing requirements will continue to apply in Phase 2. These regulations were introduced to prevent, limit, minimise and slow down the spread of COVID-19, as well as impose penalties on individuals and businesses breaching the regulations.

Return To Work Safely Protocol

A 'Return to Work Safely Protocol' has been produced to assist employers to implement safeguards for their employees. The protocol is a live document, which will be updated regularly and should be used by employers to adapt their workplace procedures and practices to comply with the COVID-19 related public health protection measures identified as necessary by the HSE. In all circumstances, an employee should not return to their workplace if they have symptoms of COVID-19, are self-isolating or they have not spoken with their employer before returning to the workplace.

The protocol advises that in preparation of returning to work, employers should:

- appoint and train at least one clearly identifiable lead worker representative charged with ensuring that COVID-19 measures are strictly adhered to in their place of work;
- provide a COVID-19 training induction for all workers;
- develop or update their COVID-19 response plan. This should include any updates to health and safety risk assessments and safety statements as discussed below;
- keep a log of any group work in order to facilitate contract tracing;
- consult with workers and safety representatives on safety measures to be implemented and any updates should be communicated to all staff members and personnel as appropriate;
- develop or amend policies and procedures for prompt identification and isolation of workers who develop symptoms of COVID-19;
- develop, consult, communicate and implement workplace changes or policies with workers to include a response plan to deal with suspected cases of COVID-19 in the workplace and what to do if a worker displays symptoms during work hours; and
- implement COVID-19 prevention and control measures to minimise risk to workers including:

- establishing and issuing a pre-return to work form for workers to complete at least three days in advance of the return to work;
- putting in place necessary controls as identified in the risk assessment to prevent the spread of COVID-19 such as staggered breaks, facilitating social distancing and/or installation of physical barriers; and
- implementing temperature testing in line with Public Health advice.

Employers should also be aware that information gathered about the health of an employee- for example- when filling out pre-return to work health questionnaires or temperature checking is "special category data" under the General Data Protection Regulation (GDPR) and Data Protection Acts 1988-2018. It should be kept strictly confidential and collected and processed in accordance with data protection requirements.

The protocol also provides that employers should enable vulnerable workers (although not defined) to work from home where possible. If a vulnerable worker must be in the workplace, employers must ensure that they are preferentially supported to maintain a physical distance of 2 metres.

The HSA will oversee compliance with the protocol in the workplace and if a business doesn't cooperate and comply with the public health guidelines after being asked to make improvements by HSA inspectors; the HSA can order them to shut down the workplace.

The HSA has also published checklists and templates to help employers, business owners and managers to get their business up and running again and to inform workers about what they need to do to help prevent the spread of Covid-19 in the workplace. They should be read in conjunction with the Return to Work Safety Protocol.

Employers' Health and Safety Obligations

A mentioned in our earlier chapter, employers have a number of legal duties under health and safety law, including the:

- duty to protect the health, as well as safety, of their employees;
- duty to protect others who may be exposed to health risks as a result of the employer's activities, including members of the public, service users and contractors; and
- duty to manage safety risks from workplaces under the employer's control.

As a result, protecting the health and safety of employees and others in the workplace will be paramount for employers.

Here are some of the main steps employers should take in conjunction with the Return to Work Safely Protocol:

- Keep up to date with the latest public health guidance, local government advice as well as World Health Organisation (WHO) updates and communicate these to employees. The HSA has helpful guidance for employers on its website, which is frequently being updated.
- Before any return to the workplace, conduct a risk assessment and put in place relevant measures to ensure the health and safety of employees in line with Health and Safety law and guidance and HSE guidance. The assessment should cover risks posed by premises, working conditions and the composition of the workplace. For example - to ensure there is a 2m distance, workstations may need to be moved.
- Communicate clearly and early with employees on your plans to reopen and any new policies you wish to introduce, for example - consider providing guidance and establishing protocols on workplace measures you will adopt.
- Brief line managers and HR staff on company policy – using an FAQ guidance document. Ensure there is a consistent message to all employees on the process and company policy.
- Assess who will return. The greater the number of people who enter the workplace, the greater the risk. Careful

consideration will need to be given to how employers will select which employees are to return to work or to come off lay-off, bearing in mind issues such as potential discrimination or procedural fairness. Some employees may also not want to return to work due to caring responsibilities or health reasons and consideration should be given as to whether these employees can continue to work from home or remain on temporary lay-off, if applicable.

- Once an employer has assessed who will return, they should consider working hours and arrangements and whether the company can consider patterns which reduce the staff commuting at peak travel hours or staggering start and end times to minimise the risk of infection – e.g. creating two cohorts with half of department working from home and half in the office each day in order to balance operations with practical measures. If the employer needs to change the employees' working hours it should consult with the employees and get their consent to any changes to their contractual hours.
- Display the posters which have been produced by the HSE around the workplace to raise awareness of measures preventing the spread of COVID-19.
- Keep up to date with latest public health guidance, government advice as well as the WHO in relation to personal protective equipment (PPE). For example, employees must be given the correct PPE and work equipment for their job if they are required to come into work. Employers should also ensure that they have adequate stocks of the PPE, and may need to consider what other measures need to be put in place if the supply of PPE is disrupted.
- Put in place practical measures to support those on site, such as hand washing facilities, additional hand sanitiser stations, antibacterial wipes and appropriate signage, and check and re-stock these regularly.
- Organise for work areas to be cleaned at regular intervals including frequently touched surfaces.
- Consider whether staff facilities (e.g. canteen or gym) should re-open. There may be contractual commitments in outsourced contracts to have facilities open if the building is in use.
- Continue to reduce to the absolute minimum, or cancel non-essential business travel and encourage employees to conduct meetings via video-link. Where this is not possible, provide additional guidance on essential business travel and the expectations of the company in order to ensure employees have sufficient guidance.
- Assess the risks around third parties entering the workplace, as there is an obligation to ensure their health and safety.
- Whether or not an employer recognises a trade union, early engagement on its plans with employees should help ensure understanding and co-operation. If an employer has a health and safety committee they may provide input on the proposals. Union engagement may be required where changes to terms and conditions are needed, (e.g. reduced hours or shifts etc.). If there is no union in place, agreement or consent to changes in contractual terms and conditions will still be required. More generally, the union representative (or staff representative body, if there is one) may help communicate guidance to employees and provide a route for them to raise questions or concerns.
- If an employer is requiring employees and/or contractors to complete questionnaires regarding recent travel and health information, these questionnaires should also be completed by third parties before entering the premises and employers must ensure such questionnaires are compliant with data protection legislation.
- Consider whether any employees can work from home. If they can, the employer should satisfy itself that it is a safe place of work. The HSA has issued guidance for employers to understand their duties in relation to home workers.

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4. FACILITIES - HEALTH AND SAFETY OBLIGATIONS (IRELAND)

Health and safety laws will apply to property owners. They should ensure that they are complying with relevant statutory duties and responding to the immediate impact of the Coronavirus on users of their premises. These obligations are additional to those as an employer (set out above).

Information

Facility owners will have duties under the Safety, Health and Welfare at Work Act, 2005. These include:

- to do everything reasonably practicable to ensure that people working in or visiting the building are not exposed to risks to their health (which includes exposure to Covid-19); and
- to the extent that they have any control of the premises (e.g. managing the common areas) to take reasonable measures to ensure, so far as is reasonably practicable, that the building, all means of access to and egress from the premises, and any plant (e.g. lifts) within the building are without risks to health.

As mentioned in our earlier chapter, on 24 March, the Taoiseach announced the closure of non-essential businesses and facilities effective from midnight. Further to this, on 27 March the Taoiseach announced additional restrictions prohibiting people from leaving their homes except in specific circumstances. However, the Government has now created a roadmap for reopening society and business and restrictions are being eased on a phased basis starting from 18 May. Ireland is due to enter Phase 2 of the roadmap for reopening society and business on 8 June. In Phase 1, in addition to the essential service providers being permitted to be open, outdoor workers (such as construction workers and gardeners) were able to return to work and additional retailers and facilities re-opened (such as garden centres, hardware stores and retail sale of vehicle and office products). As part of Phase 2, small retail outlets will be able to reopen if they can control the number of individuals that staff and customers interact with. Workers, like those who work alone or who can keep a 2 meter distance from others can also return to work.

Since these announcements we have seen an increase in facility owners ensuring that attendees at premises are provided with adequate hand washing facilities and an increased prominence of notices reminding visitors of the importance of regular hand washing with soap and water and social distancing. The Health Service Executive has issued posters for owners to display in premises, including a hand hygiene poster, 2 metre social distancing poster and Coronavirus symptoms poster. Owners can find these resources on the HSE website and this page should be frequently checked as the posters and resources are being updated as the situation evolves.

The extent of the facility owner's duties depends on how much control they retain under the lease. For buildings with multiple tenants, the property owner may well have duties in relation to the common areas. A risk assessment should be conducted. As part of the risk assessment, it should be borne in mind that people entering the workplace are a significant risk and consideration must be placed on what hygiene facilities will be made available and how social distancing can be maintained. Special consideration should also be placed on those who are "high-risk" or less-abled. Accommodations may need to be made so that only these individuals can use the lifts and all other staff use the stairs, or a one-person per lift rule could be

implemented. Cleaning is a key consideration. The property owner should also put in place a system in which it can co-ordinate its actions and share information between tenants in different parts of the building and if necessary inform the tenants of any risks to their safety, health and welfare.

A greater level of duty arises where the property owner is more active in managing the premises, for example serviced offices. In that case, the property should take advice from a competent health and safety professional on how to manage risks within the premises.

If it becomes necessary to close premises, official advice should be followed and a cooperative approach adopted. Inspectors have powers to prohibit access to premises, for example if continued use poses a risk of serious personal injury.

Immediate things to do

- Check the government guidelines on what is considered an essential service provider.
- Check the government guidelines on what is considered an essential retail outlet.
- Check whether your business is on the list of retailers and facilities that can open as part of Phase 2.
- Carry out a risk assessment to ensure that essential service personnel working in or visiting the building are not exposed to risks to their health.
- If employees are working from home, employers should consult with employees to ensure they have a safe work environment and any safety measures needed are implemented.
- Put in place practical measures to support those on site such as:
- ensuring hand washing facilities are available, regularly stocked with soap and checked regularly;
- provide additional hand sanitiser stations as appropriate
- include signage advising of hand washing protocols and reminding those on site to wash hands in line with Government guidance
- Implementing physical distancing protocols
- Add signage advice on coughing and use of tissues (catch it, kill it, bin it) and provide closed bins for disposal of tissues.
- Consider whether any additional screening or protocols are required for essential service visitors to site (e.g. if food preparation or other site)
- Where appropriate restrict access to premises to essential service personnel only.
- Follow Government advice and guidance in respect of facilities (such as any guidance or advice on closure of facilities for non-essential retail outlets or service providers.

5. EVENT STAGING (IRELAND)

Businesses must reconsider large scale events. This may range from sports events to conferences or training sessions. Given the social distancing warnings and restrictions on mass gatherings of 100 people indoors and 500 outdoors there will in most cases be a need to scale back, cancel or postpone events at short notice.

Many businesses are postponing or cancelling events either because of Irish Government and HSE guidance or due to potential low attendance numbers. If you may need to postpone or cancel an event consider the following:

- Use of Technology - is it possible to host the event using technology rather than postponing or cancelling all together? This may be possible for training sessions or some conferences. If you choose to do this you will need to consider carefully the timing of the decision and the communication in order to ensure all attendees are made aware in good time and avoid the need to travel.

- Contract with venue provider – if you are hosting the event at a third party venue consider carefully the contract with your venue provider. Would you be entitled to a refund if the event was cancelled and in what circumstances? Factor this into your decision making process in determining whether or not to cancel the relevant event.

- Refunds – what refunds would be required to be given to customers or attendees? If you are cancelling the event (whether due to Government or HSE guidance or low attendance numbers) you may well be required to provide a refund to attendees or customers. This will primarily be driven by the contract in place. However, it is also important to bear in mind that where the attendees are consumers they will be entitled to a face value refund. Where the contract is a business to business contract does it provide for relief (e.g. force majeure – see our contracts section above for more information)?

- Communications – a clear communications policy around any decision will be critical. The timing of the decision, whilst not necessarily a legal requirement, could have significant impact on reputation and good will.

- Insurance – consider early on whether or not insurance is likely to cover any cancellation or postponement. You should liaise carefully with your insurers or brokers in order to consider the specific terms of your policy. See our insurance section for more information.

- Supply chain – you should consider carefully the knock on impact on other suppliers. For example catering or hospitality suppliers for the event. Could they bring a claim in respect of any cancellation and what steps can be taken in order to mitigate this.

- Commercial rights – for sporting or music events consider carefully what rights have been granted in relation to the event. If the event does not go ahead how will this impact on sponsorship or commercial rights contracts that may have been entered into. Do these contain force majeure provisions and/or are there obligations to provide alternative rights.

For organisations who have public sector stakeholders or funders keep such stakeholders or funders up to date on plans. The cancellation of a large scale event could have a major financial impact on a business. All Irish banks have announced that they will provide flexibility to their customers and they may be able to provide loan payment holidays or emergency working capital facilities. Businesses can also look at Irish Government's working capital supports:

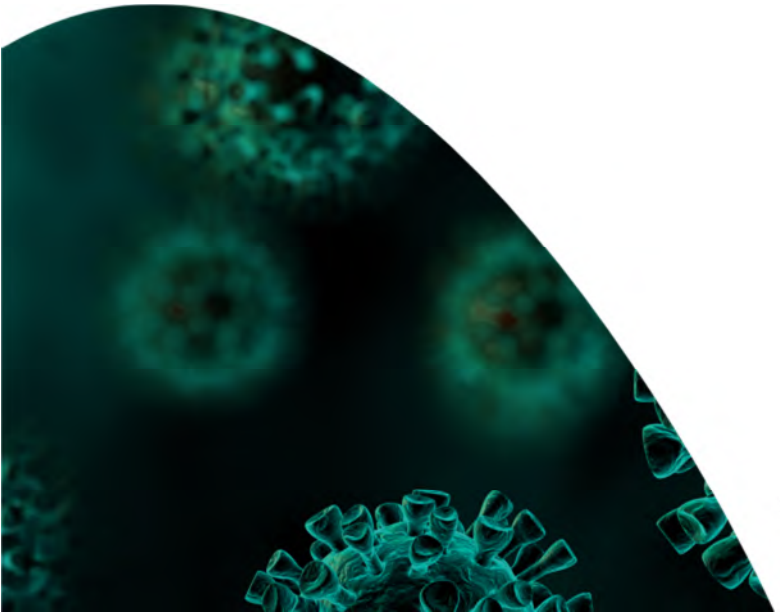
- The Credit Guarantee Scheme has been repurposed to assist SME businesses with access to working capital (loans up to €1m).

- Microenterprises can access Covid-19 Business Loans of up to €50,000 from MicroFinance Ireland.

- The €200m SBCI Covid-19 Working Capital Scheme for eligible businesses will be available within the next week (loans up to €1.5m with the first €500,000 unsecured).

In the Sports sector in particular businesses will need to consider in particular:

- Broadcast options – what are the broadcast options and the contractual arrangements (if relevant) to ensure that members of the public are still able to enjoy the sporting event even without attending.
- Ticket refunds – what ticket refunds may be required and how would these be processed legally and in line with contracts – see above section on refunds also.
- Supply chain arrangements – which contracts with caterers, security staff and other venue logistics providers can be cancelled in order to minimise financial and contractual exposure.
- Staffing – consider carefully the minimum number of staff that will be required in any event to safely stage the event behind closed doors and ensure that there are processes in place to manage the well being and safety of all athletes, officials, staff and volunteers at the event and to manage the relevant logistics.



IMMEDIATE THINGS TO DO

- Plot out the events you are hosting in the short (next 1 – 4 weeks) and medium term (1 – 6 months) so that you can consider each in turn and put in place contingency plans to address issues as the situation develops.
- Consider alternative means to hold each event – e.g. use of technology – in order to ensure it can go ahead but minimising the number of people travelling.
- Review contractual provisions with venue provider, customers and supply chain in order to assess the impact of cancelling or postponing the event. Keep a full impact assessment and economic analysis for each event to help inform decision making and options analysis.
- Liaise with communications team to ensure a clear and aligned communications strategy for any event cancellation which minimises impact on brand and reputation.
- Check with insurers/brokers whether insurance is likely to cover any cancellation or postponement of events and keep them abreast of your planning activities.
- Create a schedule of commercial rights for relevant events so that decisions can be taken in this context and where relevant commercial rights holders are consulted and/or offered alternative rights in replacement of any cancelled or postponed event.
- Keep funders updated and consider bank and government schemes that may apply to assist with the financial fallout from the cancellation of major events.

6. INSURANCE OBLIGATIONS (IRELAND)

Irish businesses should check their insurance policy wordings carefully to find out if they are protected against Coronavirus related disruption.

On 20 February 2020, the Irish Government designated Coronavirus, officially Covid-19, as a 'notifiable disease' adding it to the Infectious Diseases Regulations 1981 (as amended). This change in law now requires all medical practitioners to report all cases of Covid-19 to the Chief Medical Officer in Ireland and can be a critical distinction in interpreting insurance contracts.

Understanding whether you have relevant insurance cover is likely to influence a business in the actions it takes to contain the spread of Coronavirus. Businesses may look for cover under a number of different products such as business interruption cover or directors and officers insurance when considering, for example, whether to cancel planned events or to limit staff movement.

However, whether losses caused by Coronavirus are covered will depend on the specific terms of each policy. There is no consistent industry-wide approach to how policies deal with pandemic illness. Some policies exclude infectious diseases explicitly, whilst others are conditional upon a public body declaring either that the outbreak amounts to a pandemic or is a 'notifiable disease'. For businesses, it is important that they review their insurance cover to understand whether losses relating to the Coronavirus are covered at an early stage.

The World Health Organisation (WHO) declared the virus a public health emergency of international concern (PHEIC) on 30 January. On 11 March the virus was declared by the WHO as a 'pandemic', which is a term used to describe an infection disease which has spread globally.

Businesses should liaise with their brokers or insurance providers in respect of the relevant products likely to be affected by Coronavirus, such as travel insurance policies, in order to get clarity on whether their policies would cover Coronavirus-related losses and in what circumstances.

There has been a significant amount of media coverage in the Irish market regarding business interruption insurance citing consumer bodies and politicians making the argument that since the outbreak of Covid-19 Irish insurers are seeking to avoid valid cover provided for in business interruption policies. Insurance companies have been arguing that the majority of business interruption policies in the Irish market provide cover for physical risks to premises such as fire damage which will not be triggered by the Covid-19 outbreak.

Some insurers have also acknowledged that there are extensions to standard business interruption policies which provide cover from infectious diseases but only in circumstances where there has been an outbreak of a named infectious disease on the business premises. Insurers have confirmed that cover is unlikely to be available to businesses which have closed their premises on the basis of advice from the Irish government to do so under the terms of most business interruption policies and this would even have been the case had the closure of such businesses been ordered by the Irish government.

There has been a suggestion of intervention by the Irish government and the Central Bank of Ireland in relation to business interruption insurance claims arising from Covid-19 given the current difficulties Irish businesses are experiencing. Pending any such intervention, businesses should review the wording of their business interruption policies (including the extensions) carefully and engage with their brokers or insurance providers in the first instance to determine whether cover will be available or not on the basis of the contractual terms of their respective business interruption policies.

Claims arising from Coronavirus have the potential to be complex in nature so ensuring advice is sought based on the current status of the disease, and how policies respond to it, will be important in enabling businesses to understand what coverage they may have.

IMMEDIATE THINGS TO DO

- Monitor closely the classification of the virus by the Government and international agencies such as the World Health Organisation (WHO).
- Liaise closely with insurers and brokers to understand the cover that the business has in place and where this might be applicable to broader business decision making around event cancellation or staff movements.
- In particular consider carefully business travel insurance policies and coverage.
- Bear in mind claims relating to Coronavirus are likely to be complex and businesses should seek advice in how to respond and in respect of any claims.

7. LITIGATION AND COURTS (IRELAND)

The Irish Courts remain open, though courts services have gradually been scaled back. From Wednesday 18 March, only urgent applications will be heard by the Courts. Judges are available to hear urgent civil cases, for example, injunctions and their enforcement and urgent applications for judicial review.

In the High Court, no trials will begin. Almost all civil cases (including commercial cases) due to be heard during this term (which ends on 3 April 2020) have been adjourned.

Businesses should check with their legal advisors on any ongoing litigation as it is likely that upcoming hearings may have been adjourned.

New proceedings may still be issued and businesses should be aware that the time continues to run in respect of the usual statutory limitation periods e.g. 6 years from when the breach occurred for breach of contract proceedings. Court offices remain open and a drop-box procedure has been introduced for filing pleadings.

The Covid-19 pandemic has resulted in all Courts using electronic means of communication. For example, all case management issues in the Court of Appeal will be dealt with remotely unless it is absolutely necessary that there be a hearing.

Urgent applications

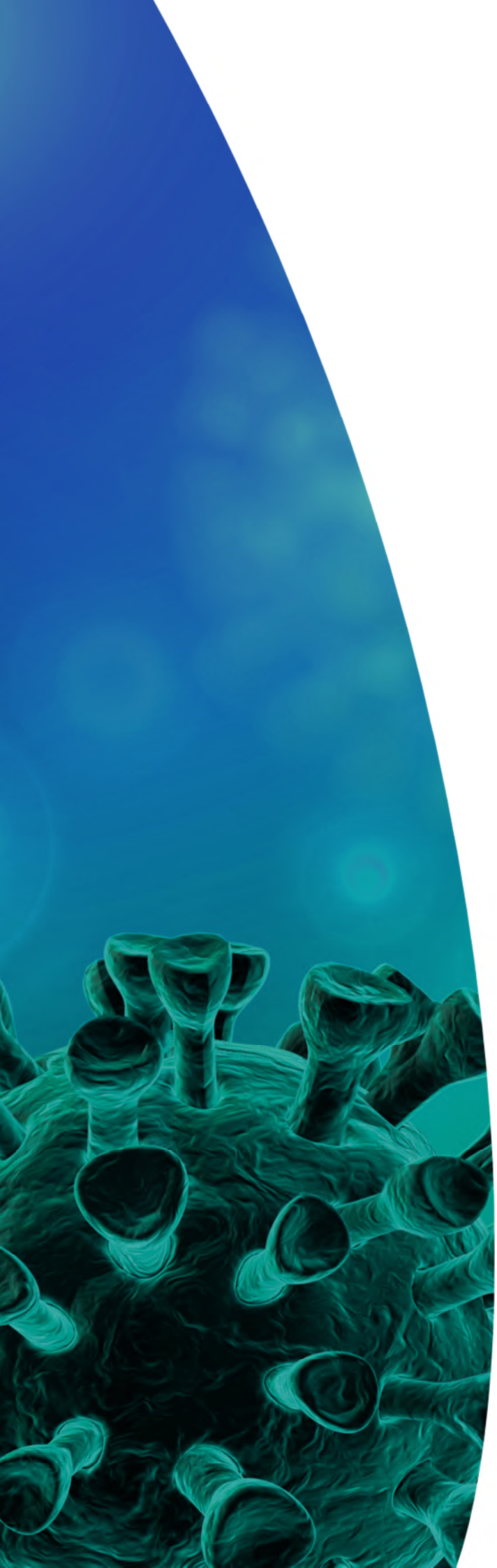
Urgent applications will continue to be heard in the coming weeks. It is conceivable, for example, that in the current climate a party might need to seek an urgent injunction to protect rights. For example, it is still possible to seek the following remedies in the Irish Courts:

- **Interim injunctions** - In an urgent case, a party can apply for an interim injunction, typically on an ex parte basis i.e. without the other side present. Due to the urgency of the procedure and the fact that the defendant is not present for the hearing, there is a particular duty on the applicant make full and frank disclosure of all the relevant facts.
- **Quia timet injunctions** - A quia timet injunction may be granted by the Irish Courts to prohibit an actionable wrongful act where such act is threatened, apprehended or imminent.
- **Anton Piller orders** - This is a type of mandatory injunction, granted in very limited circumstances, where there is a need to preserve key evidence for litigation. It provides the right to search premises and seize evidence without prior warning, in order to prevent its destruction. Typically, Anton Piller orders are applied for ex parte and there is a requirement for full and frank disclosure by the applicant.
- **Mareva injunctions** – The Courts can grant this type of injunction to prevent a defendant from removing, concealing or dissipating assets prior to an attempt to enforce a judgment against it.

Alternative Dispute Resolution Mechanisms – resolving disputes using virtual technologies

The Covid-19 pandemic is causing practitioners and clients to consider replacing in-person ADR with virtual ADR.

- **Mediation** – a number of Irish mediators offer online mediation services or mediation by conference call. Mediation is confidential, and is often a quick and cost effective means of resolving a commercial dispute.



- **Negotiation** – legal teams can continue to negotiate settlements on behalf of their clients though teleconferencing, video conferences and email correspondence.
- **Arbitration** - arbitration can take place via video conferencing and by evidential documents being emailed to the arbitrator, who can then ask questions by email.

8. LANDLORD FAQ'S (IRELAND)

The Irish government has yet to announce any form of insolvency protection, rent holiday or rent control measures for commercial landlords. A certain number of steps have been taken to protect residential tenants including a short term (90 day) ban on rent increases and on termination of residential tenancies.

As in most countries at this stage, the Irish government has recommended widespread restrictions to minimise social interaction to slow the progression of the virus such as closing non-essential business which cannot be run from home including hotels, pubs, restaurants, offices and non-essential retail premises.

This will have a profound effect on the businesses of many tenants and as a result on the security of the rental income for many commercial landlords. Some of the possible implications for landlords of commercial properties are included in this chapter.

Can my tenant terminate their lease arguing that it has been frustrated?

It is unlikely that a tenant will be able to argue that the lease has been frustrated.

The bar for termination of a lease by 'frustration' is high: it applies where supervening events unprovided for in the lease significantly alter the parties' obligations and bring the lease to an end. It is unlikely that a temporary inability to occupy the premises would meet this test.

Where the tenant has a contractual break, the pandemic may make it more likely that the tenant exercises that break.

Does my tenant have a right to a rent reduction or holiday if it cannot use the premises?

Most commercial leases do not provide that cases of 'force majeure' will suspend the general obligations of the parties to the lease. There are very limited circumstances in which a tenant can claim that the obligation to pay rent must be suspended.

Typically the right to suspend rent for all or part of a leased property only arises where the property is damaged or destroyed by an insured risk (or in some cases an uninsured risk) so as to be unusable. Whilst the impacts of Covid-19 are widespread and very serious it is doubtful that it could be argued that the virus amounts to damage to or destruction of the property.

Turnover based rents, which are a feature of many retail and some leisure sector leases, could be significantly impacted during the Covid-19 outbreak as premises are required or advised to close although some level of turnover may be might be maintained through other sales channels such as online orders.

Many landlords may decide to work with tenants to defer, reduce or suspend rents temporarily to avoid tenant insolvency and possible vacancy. Before fixing the terms of any concession with a tenant it is important to take appropriate legal advice and also to document the exact terms of the arrangement, such as conditions attached to the deal or the duration of any arrangement, to avoid potential disputes during or after the current unprecedented situation.

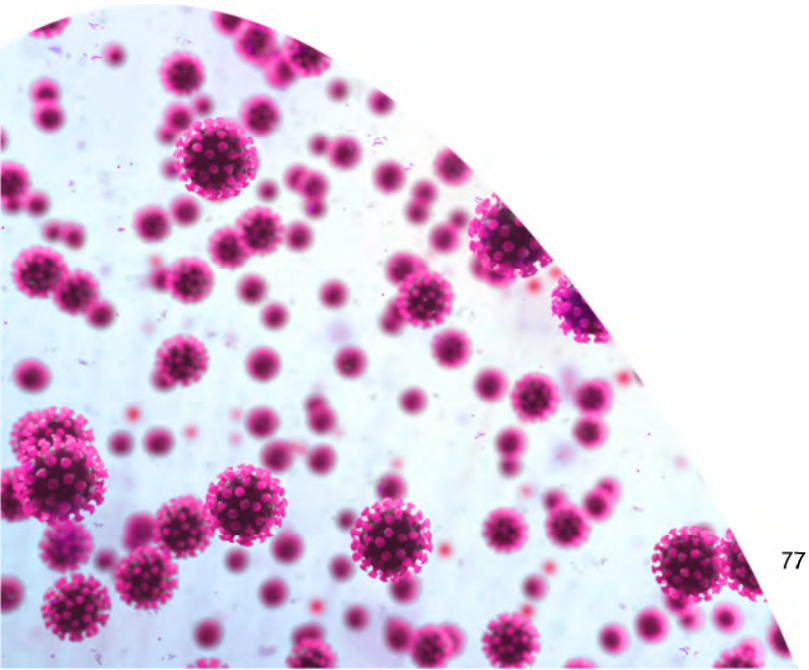
Do I still have to provide services to my tenants?

Most commercial leases will only require the landlord to use reasonable endeavours to provide services such as repair and maintenance of common areas or security. If the current pandemic means that the landlord is not able to continue to provide services using reasonable endeavours, for example due to a shortage of supplies, government restrictions or staff sickness, the landlord should not be liable for a failure to provide services.

The landlord should ensure that the guidance issued by the Health Service Executive is followed when providing services.

Do I have to provide deep cleaning or other additional services?

Whether or not the Landlord is under an obligation to provide additional services to tenants will depend on the precise wording of the lease in each case. An obligation to clean and keep the common parts of a property safe may include deep cleaning. It would be unusual for there to be any obligation on the part of a landlord to clean the parts of a building leased to individual tenants in addition to the common parts, or for there to be any right of access to enable the landlord to do so. However, it may be more effective in controlling the spread of the virus and more efficient to deep clean the entire of the property, including common parts and those parts leased to tenants, provided the tenants will allow the Landlord to do so.



You must also comply with your obligations under Irish health and safety law, which require landlords to do everything reasonably practicable to ensure the health and safety of their employees and to ensure people working in or visiting a building are not exposed to risks to their health to the extent that the landlord has control of the premises. To the extent that you do not have control, your tenants must also comply with their own health and safety law obligations.

If I do provide extra services, can I recover the cost from my tenant?

Again, this will depend on the terms of the lease. Landlords of multi-tenanted buildings will often have the right to provide and charge for additional services which are for the benefit of the tenants as a whole and which are in the interests of good estate management. This may extend to deep cleaning and/or other protective measures.

Where the lease provides for the recovery of costs incurred in the supply of services which include compliance with legal requirements (such as health and safety legislation as described above) then it should be possible for the landlord to recover the additional costs.

Can I close the building?

Closure of the building might mean you face claims from tenants for breaches of landlord covenants, in particular covenants for quiet enjoyment and for 24/7 access.

If closure is required by law or in accordance with HSE guidance, then this could provide a defence to any claim for breach of landlord obligations under the lease. If closure goes beyond what is legally required or recommended by the guidance, then the landlord may be liable for tenants' losses as a result of breach of covenant.

Closure, whether or not in accordance with HSE guidance or legally required, will not usually result in rent suspension or termination rights under the insurance provisions becoming relevant unless there is physical damage to the premises although the lease drafting and relevant insurance policy

should be checked. Again, where closure goes beyond what is legally required or recommended in HSE guidance the tenant may have a claim for breach of covenant.

The landlord's obligations under the health and safety laws, including those which require the protection of the landlord's employees working in the building, will also be relevant.

Can my tenant refuse to pay rent if I close the building?

Probably not. Even if the tenant has a claim for breach of covenant, if, as is common, the lease says that rent is payable without deduction or set off, they should continue to pay the rent and then seek to recover damages for breach of covenant as a separate action.

Rent suspension provisions are unlikely to apply, but the wording of the lease should be checked.

Consultation with the tenant in relation to any potential closure may help to minimise the risk of litigation in the future.

Can my tenant close its premises?

Yes, unless the lease contains a 'keep open' clause or clause requiring the premises not to be left empty for a period which the closure exceeds. However, if the closure is required by law or in line with HSE guidance, it is unlikely that any keep open covenant or covenant not to leave the building empty would be enforceable.

You should check whether leases provide for the tenants to notify the landlord if the premises are left empty, as this may affect your insurance. It is a good idea to liaise with tenants where possible about their intentions, so that you can inform the insurers when buildings are empty.

Do I have to act in good faith if the tenant asks for variations to the lease and rent to reflect coronavirus?

Not unless there is a specific provision in the lease, which would be unusual. However, there may be commercial or reputational reasons why you would want to engage with the tenants in respect of any request, particularly where necessary to avoid tenant insolvency.

What happens if the government forces the closure of premises?

Without specific legislation, this would not alter the parties' obligations under the lease. However, the obligation to comply with statute may remove the right of either party to enforce any covenant that had been breached.

Government intervention may make it easier for tenants to claim on their business interruption insurance.

Can I change the opening hours of the premises?

This will depend on the provisions of the lease.

If the lease contains a tenant's covenant to comply with reasonable regulations the landlord makes from time to time, a regulation which required tenants to follow HSE guidance would be reasonable.

Do I still have the same remedies against the tenant for breach of obligations that remain unchanged?

Yes. The Irish government has not yet introduced protections for non-residential tenants against forfeiture or termination of leases by landlords. Some such protections have been introduced already for residential tenants.

9. FINANCIAL DISTRESS AND DIRECTORS DUTIES (IRELAND)

It is particularly important in a challenging or potentially challenging economic environment that directors of Irish companies are aware of their duties under the Irish Companies Act 2014 (CA2014).

It is particularly important in a challenging or potentially challenging economic environment that directors of Irish companies are aware of their duties under the Irish Companies Act 2014 (CA2014). In any period where a trading company may be facing potential insolvency directors need to be mindful of their duties to creditors. Directors should take appropriate action to minimise potential losses to creditors. In particular directors need to be aware of the provisions of CA2014 which can result in personal liability, restriction or disqualification. Here we set out the main provisions of CA2014 for directors to be aware of when a company is trading through financially challenging times.

Fraudulent Transfer:

A liquidator or creditor of an insolvent company may apply to court to reverse any improper transfer of company assets where the effect is to perpetrate a fraud on the company, its creditors or members. A court may order the return of the assets or the payment of a sum to the liquidator.

Unfair Preference:

A transaction which shows a preference to one particular creditor over other creditors shall be deemed to be an unfair preference if:

a) the company is wound up within 6 months after the date of the transaction and the company at the time of commencement of the winding up is unable to pay its debts (taking into account the contingent and prospective liabilities); or

b) the transaction is in favour of a connected person and was done within two years of the company being wound up.

These provisions are designed to dissuade directors from unlawfully asset stripping a company in the run up to insolvency.

Fraudulent/ Reckless Trading:

A director may be held personally liable for the debts or other liabilities of a company in the course of a winding up or an examinership if that director was knowingly party to the carrying on of any business of the company: in a reckless manner (reckless trading); or with intent to defraud creditors of the company, or creditors of any other person or for any fraudulent purpose (fraudulent trading).

Interestingly, the UK Government have announced the temporary suspension of wrongful trading rules. This initiative is in reaction to the Covid-19 crisis and appears to be with a view to allowing directors trade and incur debt and thereby make decisions which would outside of this suspension cause concerns in respect of personal liability under the UK Insolvency Act 1986. The Irish Government has not to date announced a similar initiative.

Failure to keep proper books of account:

Where a director's actions contribute to a company not keeping adequate accounting records resulting in an insolvent

liquidation (where the amount involved exceeds €1m or 10% of net assets), such director will be guilty of a category 1 offence. A court may hold a director of such a company personally liable.

Misapplication of property:

Where a director of a company which is being wound-up is found to have misapplied or retained or become liable or accountable for any money or property of the company or has been guilty of any misfeasance or other breach of duty or trust in relation to the company, the court can compel the director to repay or restore the money or property (with interest as the court think appropriate) or pay compensation to the value of such money or property.

Restriction Orders:

Applications for restriction of a director may be brought by the Director of Corporate Enforcement, the liquidator of the insolvent company or a receiver of the property of the company. A court can impose a restriction order on a director of an insolvent company for a period of 5 years.

Disqualification Orders:

Applications for disqualification of a director may be brought by the Director of Corporate Enforcement, the DPP, the Registrar of Companies or any member, officer, employee, receiver, liquidator, examiner or creditor of any company which the director has been or is a director of. A court can make such an order for such a period as it sees fit (which is usually 5 years) if satisfied of certain criteria.

Automatic disqualification:

A director is automatically disqualified if that director is convicted on indictment of any offence under CA 2014 in relation to a company, or any offence involving fraud or dishonesty.

Actions to take:

In order to protect themselves and indeed the business of their companies in financially challenging times, directors must act to limit and if possible reduce financial strain. In this Covid-19 crisis directors should explore and where appropriate utilise all governmental financial and funder supports.

- The Irish domestic banks and main retail credit firms and credit servicing firms have announced that they will provide flexibility to their customers and they may be able to provide loan payment holidays or emergency working capital facilities.

Directors managing trading companies can also look at Irish Government's working capital supports:

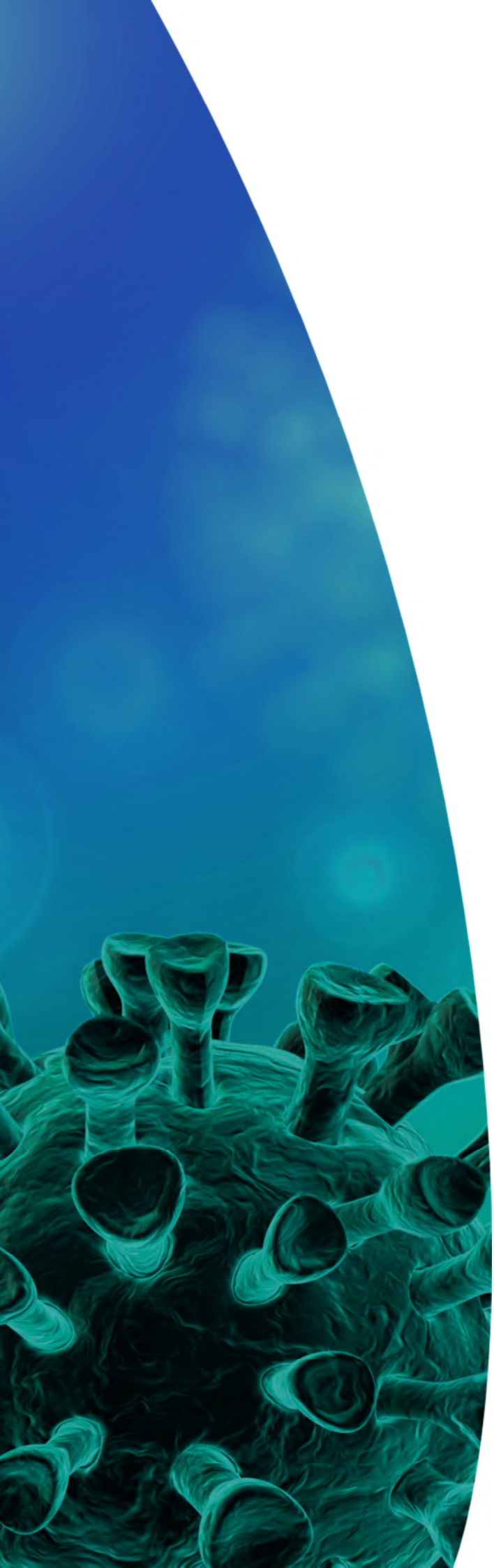
- The credit guarantee scheme has been repurposed to assist SME businesses with access to working capital (loans up to €1m) – https://dbei.gov.ie/en/What-We-Do/Supports-for-SMEs/Covid-19-supports/Credit-Guarantee-Scheme-and-Covid-19-FAQ.html

- Microenterprises can access Covid-19 loans of up to €50,000 from MicroFinance Ireland - https://dbei.gov.ie/en/What-We-Do/Supports-for-SMEs/Covid-19-supports/Microfinance-Ireland-Covid-19-Business-Loan.html

- The €450m SBCI Covid-19 Working Capital Scheme for eligible businesses is now accepting applications through the SBCI website at www.sbci.gov.ie (loans up to €1.5m with the first €500,000 unsecured) - https://dbei.gov.ie/en/What-We-Do/Supports-for-SMEs/Covid-19-supports/SBCI-Covid19-Working-Capital-Scheme-FAQ.html

Enterprise Ireland have announced a number of enterprise supports including:

- A Sustaining Enterprise Fund of €180m for manufacturing and internationally traded services companies which have been impacted by Covid-19 that are vulnerable but viable



(repayable advances of up to €800,000) - https://globalambition.ie/supports/innovation-support/sustaining-enterprise-fund/

- An additional €200m in Covid-19 funding for the Future Growth Loan Scheme, which will be released in tranches, will provide longer-term loans to Covid-19 impacted businesses (loans up to €3m)

- A €2m Retail Online Scheme will be open to retailers employing over 10 people with a pre-existing online presence to support them respond to domestic and international consumer demand for a competitive online offer (grants from €10,000 up to €40,000) - https://www.enterprise-ireland.com/en/funding-supports/online-retail/online-retail-scheme/online-retail-scheme.html

- A Business Financial Planning Grant of up to €5m for existing Enterprise Ireland clients and manufacturing and internationally traded services companies to help companies to develop a robust financial plan - https://globalambition.ie/supports/innovation-support/covid-19-business-planning-grant/

It is also important to take the advice of insolvency and restructuring specialists. The engagement of appropriate insolvency and restructuring professionals will indicate the intention on the part of a director to act in the best interests of stakeholders and in compliance with CA2014.

CHAPTER 3 – FRANCE

CONTENTS

1. CONTRACTS AND SUPPLY CHAIN (FRANCE)

On 28 February 2020, France's Minister of Economy and Finance, Bruno Lemaire, announced that Coronavirus will be considered as a case of force majeure for businesses and that in case of late deliveries in the context of public procurement contracts, liquidated damages will not be levied.

This declaration was followed by the adoption of Ordinance No. 2020-306 of 25 March 2020 relating to the extension of deadlines that expire during the period of the state of health emergency and to the procedural adjustment of proceedings during that same period *("Ordonnance n° 2020-306 du 25 mars 2020 relative à la prorogation des délais échus pendant la période d'urgence sanitaire et à l'adaptation des procédures pendant cette même période")* which *inter alia* provides for the temporary non-enforcement of penalty/liquidated damages or termination clauses in the event of failure to perform an obligation if the deadline for the performance of the obligation is between 12 March 2020 and the month following the end of the state of health emergency (currently expected to occur on 24 May 2020), that is, 24 June 2020.

However, neither the declaration, nor the Ordinance has any bearing on private contracts and is without prejudice to the courts' individual appreciation of each case. As a matter of fact, Ordinance No. 2020-306 was issued pursuant to Article 11 of the Emergency Law of 23 March 2020, which *inter alia*, aims at adapting the provisions of the public procurement code and public contracts relating to procurement, payment, performance and termination (including those relating to liquidated damages).

The recent Guidelines on Health and Safety Recommendations for the Continuity of Construction Activities published by the Organisme Professionnel de Prévention du Bâtiment et des Travaux Publics (OPPBTP) on 2 April 2020, which are designed to clarify the conditions in terms of health and safety that would allow the continuity of construction operations, do foreshadow the adoption of a forthcoming ordinance addressing the application of penalties in private contracts. In the meantime, under French law, parties to commercial contracts and businesses whose supply chain have been adversely impacted by the outbreak of the Coronavirus can avail themselves of a number of remedies at law such as force majeure and hardship ("*imprévision*") even if their contracts do not contain any force majeure or hardship clauses.

Force Majeure

The legal concept of force majeure is enshrined in Article 1218 of the French Civil Code which defines force majeure as "*an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of the conclusion of the contract and whose effects could not be avoided by appropriate measures, prevents performance of his obligation by the debtor.*"

For the Coronavirus to qualify as a force majeure event pursuant to this provision, contracting parties will need to demonstrate that the four conditions set out in Article 1218 of the French Civil Code above have been met. In other words, they will need to show that:

i. the outbreak constitutes an event which was beyond their control;

ii. the outbreak could not have been reasonably foreseen at the time of entering into the contract;

iii. the ensuing effects of the outbreak could not be avoided by appropriate measures, that is, there were no

alternative means to perform the obligation owing to the outbreak; and that

iv. there is a causal link between the outbreak and their impossibility to perform their obligations under the contract.

In the past, French courts have had to deal with similar issues regarding the Ebola and H1N1 virus and have for instance held that force majeure was not characterised;

- in a case involving the Ebola virus owing to the party's failure to demonstrate the existence of a causal link between the outbreak of the virus and the decline in production (Paris Court of Appeal, 17 March 2016, no. 15/04263); and

- in a case involving the H1N1 virus owing to the party's failure to show that the outbreak was unforeseeable (Besançon Court of Appeal, 8 January 2014, no. 12/02291).

In the case of the Coronavirus outbreak, the unforeseeability requirement might prove particularly problematic for contracts signed after the outbreak of the epidemic. Indeed, while it is likely that for contracts signed well before the outbreak, French courts would characterise the present Coronavirus outbreak as a force majeure event given the direct impact that the measures of confinement imposed by the French government have had on the ability of parties to continue the performance of their contracts, this might not be systematic for contracts entered into at the beginning of epidemic or after the outbreak of the epidemic. For contracts signed at the beginning of the epidemic, the assessment of the unforeseeabiity requirement will be made on a case-by-case basis. For contracts signed after the outbreak, the unforeseeability requirement will most likely be held not to be fulfilled and as a result force majeure will be excluded on this ground.

If the parties are able to demonstrate that the four conditions set out above are met and that the Coronavirus outbreak therefore qualifies as a force majeure event, they can ask for the suspension or the termination of the contract depending on whether the impediment is temporary or permanent. Thus, in accordance with Article 1218 of the French Civil Code:

- if the impediment is temporary, the contract may be suspended unless the resulting delay justifies the termination of the contract: and

- if the impediment is permanent, the contract may be terminated.

In addition, pursuant to Article 1231-1 of the French Civil Code, if it is effectively shown that the outbreak qualifies as a force majeure, the party which was prevented from performing its contractual obligation will be exempted from the payment of liquidated damages.

However, since Article 1218 of the French Civil Code is not a mandatory provision, parties are free to amend or adapt it as they see fit. Therefore, if there is a force majeure clause in the contract, parties would first need to have regard to the specific clause and its wording in order to see if events similar to the present pandemic is covered. If it is, they will need to abide by any applicable notice provisions set out under the contract in order to avail themselves of the specified remedies, which for instance could include extensions of time or suspension of the contract.

In the absence of any force majeure clause, it is recommended that parties seek legal advice before terminating or suspending the contract in order to avoid any potential claims.

Imprévision (Hardship)

The concept of "*imprévision*", as set out under Article 1195 of the French Civil Code allows contracting parties to obtain the renegotiation of their contracts in certain limited circumstances. Article 1195 provides that "*If a change of circumstances which was unforeseeable at the time of entering into the contract renders performance exceedingly onerous for a party who had not accepted the risk of such a change, that party may ask the other contracting party to renegotiate the contract* [...]" Failing such renegotiations:

- the parties may agree to terminate the contract or ask the court to adapt it; or

- in the absence of any agreement, either party may apply to the court to have the contract revised or terminated.

In order for the Coronavirus to qualify as an "*imprévision*" pursuant to this provision, parties must first check whether their contracts expressly exclude the provisions of Article 1195 of the French Civil Code, which are not mandatory.

If their contracts do not contain any such exclusion, the parties would need to show that the two conditions listed by Article 1195 of the French Civil Code are met. In other words, they will need to show that;

- the outbreak was unforeseeable at the time of entering into the contract, and

- that the outbreak has rendered the performance of the contract excessively onerous.

Just like in the case of force majeure, the condition pertaining to the unforeseeability of the outbreak will obviously not be met for contracts entered into after the outbreak.

Moreover, notwithstanding the date at which the contract was entered into, parties should be mindful of the fact that persuading French courts that the second condition has been met will not be easy, for if the outbreak has simply rendered performance of the contract simply onerous without being excessively onerous, the standard will not be met.

IMMEDIATE THINGS TO DO

- Check your contract for any relevant clauses such as force majeure or hardship clauses.
- Abide by any notification requirements set down under the contract.
- In the absence of any relevant clauses, seek legal advice to consider your remedies.

2. EMPLOYMENT AND IMMIGRATION (FRANCE)

The great difficulty of the current situation is the uncertainty we are experiencing. Of course, the French Labour Code contains applicable provisions but none which envisaged such a crisis, which is fortunately unprecedented.

Moreover, every day the French government is implementing measures with almost immediate effect, which calls into question the direct application of these legislative provisions. For example, this has been the case with the closure of businesses and it will be even more so with the containment rules severely restricting the movement of individuals. Finally, the circumstances are very complex. They are often specific to businesses and even to individuals.

Nevertheless, we can look at the employer's and the employee's action in order to adapt to the situation: **it means homeworking, sick leave, partial reductions of the activity and the right of withdrawal.**

Remote working

The emergency health crisis makes remote working virtually the only way for a large number of companies to continue operations. Nevertheless, it is far from a universal remedy since retail, hospitality, tourism and industrial manufacturing sectors cannot benefit from it, for the most part.

Nevertheless, at least part of the economy can continue to operate by way of remote working. However, entitlements and obligations with regard to remote working were created to promote flexibility and not to manage a health risk such as the one we are currently experiencing.

Theoretically, remote working is set up within the framework of a collective agreement negotiated in consultation with employees' representative committee or by an agreement between the individual employee and the employer. For example, remote working requires the company to provide its employees with all the means to work remotely and to cover part of the costs. The agreement must also normally provide for measures to avoid the isolation of the employee, and define the number of home or remote working days per week or month.

With the Covid-19 crisis, companies must implement the measures dictated by the French government. **While remote working has not been strictly imposed by the government, it is strongly recommended. It is no doubt even more significant in light of the containment measures recently imposed**. However, some employees may wish to work remotely from home to avoid risk of exposure at work or while travelling, or to look after their children. In cases where an employer refuses such a request, employees have several options, the first of which is sick leave.

Sick Leave

Limited cases can give rise to the daily sick leaves allowances (*IJSS*) payment, which are listed below:

Employee suffering from Covid-19

An employee suffering from coronavirus justified by a sick note issued by doctor will receive the daily sick leave allowances (*indemnités journalières de sécurité sociale* or "*IJSS*") due to him. The employer must in any case maintain the employee's salary under the legal or CBA conditions (if this regime is more favourable).

Employee the subject of an isolation, deviation or home care measure

This situation gives rise to a sick note as well, issued by a doctor from the regional health agency (*Agence Régionale de Santé, "ARS"*).

The daily sick leave allowances (*IJSS*) paid in this scenario, have been put in place by a derogatory regime applicable until 30 April 2020, which is the following:

- The usual conditions for eligibility (i.e., minimum contribution base, minimum period of affiliation) are not required;
- The 3-days waiting period (délai de carence) does not apply;
- IJSS are only paid for a maximum period of 20 days.

Until 30 April 2020, employers must maintain the employee's salary without any waiting period and under the legal or CBA conditions.

Employee classified as a "vulnerable person"

An employee who: (i) has an underlying pathology which makes him more exposed to virus exposure (the complete list is available at: People at Risk), or (ii) is pregnant, is not required to produce a sick note.

Consequently, the employer should implement a remote working (télétravail) arrangement. If such arrangement is not possible, the employer should ensure that the employee avoids unnecessary outings or meetings, and close contacts (canteen, elevators etc.). If the employer cannot adapt the job of an employee "at risk", in order to limit contacts and if telework is not compatible with the activity, he can ask the employee to stay at home. In this case, the employee is eligible for the online declaration service explained in the next section.

Employee who has to care for children under age 16 at home

As part of the measures to limit Covid-19 spread, the public authorities have decided to close all childcare facilities and schools until further notice.

An online declaration service, (https://declare.ameli.fr/), has been set up by the French Health Insurance (Sécurité Sociale) to enable employers to declare their employees who are obliged to stay at home to care for their children following the closure of schools and childcare facilities and for whom a remote working arrangement is not possible. This declaration serves as sick note, which enters into force immediately, without waiting period (jour de carence) and automatically, without examining the conditions for entitlement.

It applies to parents of children under 16 years of age at the first day of the sick note. It also applies to parents of disabled children under the age of 18 who are normally placed in a specialised establishment.

The declaration may be issued for a period from 1 to 14 days. Beyond this period, the declaration must be renewed as much as necessary. It is possible to split the declaration or to share it between the parents during the establishment closure. This declaration can only be issued to one parent at a time.

The online declaration service applies to employees under the general scheme, agricultural employees, seamen, clerks and

notary employees, self-employed workers, self-employed agricultural workers and contract workers in the public service. Self-employed workers can declare themselves via the same online service.

This declaration procedure does not apply to other special schemes, including civil servants.

The declarations made through this online declaration service do not trigger for automatic compensation for the concerned employees.

- Indeed, the daily sick leave allowances (IJSS) payment is subject to the sending of a "sickness" salary certificate, through a sick note notification via the DSN (nominative social declaration).
- The conditions of subrogation by the French Health Insurance remain unchanged.
- The employer will receive an email back with the confirmation of the declaration.
- He will then, have to comply with the usual formalities for any sick note to trigger the compensation.

The employee will receive the daily sick leave allowances and the gap with his regular salary paid by the employer, without any waiting period.

Short-time working ("activité partielle" or "chomage partiel")

To limit the economic consequences of a drop in activity due to the Covid-19 pandemic, or to cope with the administrative closures of businesses announced on 14 March 2020 and the confinement restrictions announced on 16 March 2020, it is possible for companies to use the short-time working (*chômage partiel- activité partielle*) scheme.

This scheme already exists in French employment law but has been recently dramatically updated and modified to face the crisis situation to Covid 19 pandemic.

The scheme allows employers to reduce the working week or to temporarily close all or part of their establishment in order to cope with events impacting the company's activity.

Since the beginning of the coronavirus epidemic, nearly 900 companies have already applied for this scheme, representing 15,000 employees. In this context, the French government has announced measures to adapt the scheme and facilitate access to this specific help for companies by increasing the amount of compensation paid to companies and by modifying the deadline for processing applications.

(a) Conditions of applicability

The short-time working (*chômage partiel*) scheme aims to help companies in facing a particular economic situation, difficulties in the supply of raw materials or energy, a disaster or bad weather of an exceptional nature, etc. This mechanism can be used in the current situation to deal with the Covid-19 epidemic as an exceptional circumstance.

The administration refers to hypotheses of an administrative closure of establishments; massive absences of employees which enable the continuity of the economic activity.

(b) Employees concerned

(i) All employees of the company may be concerned by the short-time working.

(ii) All employees or only some of the employees of the company may be concerned during several days or every day, depending on their activity and workload. For the needs of a permanent position within the company, it is possible to plan different planning's for the employees.

(iii) Employees with an hour-per-year arrangement (*forfait annuel en heures*) or day-per-year arrangement (*forfait annuel en jours*) are eligible, but only if the establishment is closed or if a full day is not worked.

(c) Short-time working application process adjustments

By way of derogation, the application can be submitted **within a 30-days period after the short-time working started in the company**.

The applications will then be examined as a matter of priority and the processing time should be reduced to **48 hours**.

(d) Compensation for reduced activity

From a payroll point of view, employees under short-time working arrangements receive compensation from the employer for each hour they do not work. Only hours within the legal limit (i.e., 35 hours per week) will be compensated.

The employer is then reimbursed by a lump-sum allowance co-financed by French State and the French government agency in charge of unemployment insurance (*Pôle Emploi*).

Given the current context, and according to the latest press release from the Labour Ministry on 16 March 2020, an ordinance will be issued in few days to reform the current system of short-time working, in order to cover 100% of the indemnities paid to employees by companies, capped at 4.5 times the minimum wage.

Also, by way of derogation, the allowance reimbursed to the employer has been raised to €8.04 per hour.

As an example, please see below a table showing the various allocation amounts in consideration of the new rules in force (this should be verified once the latest government decree is published):

	Gross Month Salary	Short time working paid by the company (70%)	Allocation from French Government	Balance for the company to pay
Gross SMIC	1 539,42	1 077,59	1 219,00	0,00
	1 650,00	1 155,00	1 219,00	0,00
	1 741,43	1 219,00	1 219,00	0,00
	2 000,00	1 400,00	1 400,00	0,00
	2 500,00	1 750,00	1 750,00	0,00
	3 000,00	2 100,00	2 100,00	0,00
	3 500,00	2 450,00	2 450,00	0,00
	4 000,00	2 800,00	2 800,00	0,00
	4 500,00	3 150,00	3 150,00	0,00
	5 000,00	3 500,00	3 500,00	0,00
	5 500,00	3 850,00	3 850,00	0,00
	6 000,00	4 200,00	4 200,00	0,00
	6 500,00	4 550,00	4 550,00	0,00
4.5x SMIC gross	6 927,39	4 849,17	4 849,17	0,00
	7 500,00	5 250,00	4 849,17	400,83
	8 000,00	5 600,00	4 849,17	750,83
	8 500,00	5 950,00	4 849,17	1 100,83
	9 000,00	6 300,00	4 849,17	1 450,83
	9 500,00	6 650,00	4 849,17	1 800,83
	10 000,00	7 000,00	4 849,17	2 150,83
	10 500,00	7 350,00	4 849,17	2 500,83
	11 000,00	7 700,00	4 849,17	2 850,83
	11 500,00	8 050,00	4 849,17	3 200,83
	12 000,00	8 400,00	4 849,17	3 550,83

(e) What is the procedure?

(i) Employees' information

- Simple information to the employees for companies under 50.
- Information-consultation of the staff representatives body (i.e., CSE) for companies with more than 50 employees.

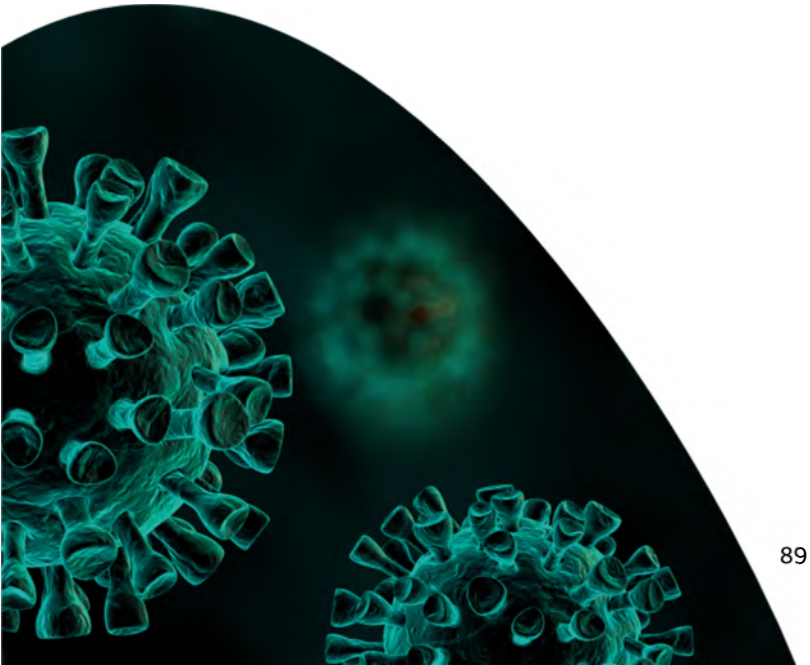
Given the circumstances, the French government has indicated that the information consultation can take place after the request (contemplated date to be indicated when the request is made). Minutes of the consultation should then be sent to the Labor Administration afterwards. In any case, decision of the Administration should be given to the CSE as soon as it is available.

(ii) Request authorisation for short-time working from the DIRECCTE

The request is made online via the Dedicated Portal.

Monitoring annual leave

To date, the French Labour Code provides for a minimum period of one month for changing the dates of paid leave once they have been set. This provision applies by default, in the



absence of a company, branch or collective agreement that sets a different duration.

However, the employer may be able to overcome this constraint by justifying exceptional circumstances. Presumably, the coronavirus outbreak could meet this definition, and this is what the proposed emergency health emergencies bill contemplates.

This bill provides for the possibility of fixing and requiring employees to take annual leave days during the confinement period up to a maximum of 6 working days (i.e. one week corresponding to the fifth week).

The procedure for compensatory rest days (JRTT) is laid down in a company agreement or collective agreement, as the Labour Code does not provide for a minimum period of time for their amendment.

Immigration rules

The French President announced the closure of European borders from 17 March 2020 for a period of 30 days. French citizens as well as citizens of other EU countries, the Schengen Area and the UK and their spouses and children are still permitted to enter France to return home. Nationals from all other countries will only be permitted to enter France in exceptional circumstances – for example, if their permanent residence is in France. There are no restrictions on anyone wishing to leave France.

The French Minister for Europe and Foreign Affairs, and the French Secretary of State for Transport recommend that French citizens living abroad should avoid international travel to the largest extent possible, even for the purpose of returning to France, unless for imperative reasons. This recommendation also applies to French citizens living in European and Schengen Area countries.

As many other European and Schengen Area member states have recently imposed border controls and measures severely restricting the movement of individuals, it is also recommended for French citizens to avoid intra-European travel unless for imperative reasons.

By contrast, French citizens currently outside of France for temporary reasons are advised to return to France as soon as possible. As many airlines have cancelled flights or suspended operations in recent days, the French Minister for Transport and Minister for Europe and Foreign Affairs have mobilised diplomatic and consular staff to obtain necessary authorisations for special flights to ensure French citizens temporarily abroad can return home, and are working to implement a coordinated global initiative with Air France for this purpose.

Foreign nationals in France

The Paris Prefecture of Police announced on 16 March 2020 that all current visas and residency permits will be extended by 3 months. The extension applies to long stay visas, titres de séjour, requests for asylum and receipts for residency applications. The French Office of Immigration and Integration also announced the suspension of all administrative processes open to the general public, apart from asylum applications. Measures to extend current visas and residency permits due to expire on or before 15 May 2020 by six months form part of the draft emergency legislation currently before the French Government.

IMMEDIATE THINGS TO DO

- Remote working – consider what steps are required in order to accommodate employees working from home (e.g. issue of laptops and/or network capacity for increased remote working).
- All travel in the Paris region or outside is prohibited (except for imperative reasons for the performance of the work in the case of travel in the Paris region).
- Unless there is a compelling reason, no physical meetings are permitted. Meetings are to be held by teleconference or other remote means.

3. TAX ISSUES (FRANCE)

Following to the France's Lockdown decided by the French government on 14 and 15 March 2020, the government has made several announcements regarding the provision of financial aid to companies and other business organizations in France. From 25 March, several bills are being passed in order to implement the measures as explained below.

A - Tax deferral measures

Q- Under which circumstances can the taxpayer benefit from an extended time period to pay its taxes?

Companies may benefit, upon simple request to the competent tax service and with no justification needed, from a deferral, without penalty, of their next direct tax payments.

As a counterpart, "large companies" must commit, amongst others, not to distribute dividends (please refer to "How to benefit from this payment deferal?")

Q - Which taxes are concerned?

The measure concerns the following taxes: corporation income tax, payroll taxes, business tax *(Contribution sur la Valeur Ajoutée des Entreprises – "CVAE" and "CFE" - Cotisation Foncière des Entreprises)*, property taxes ("taxe foncière").

VAT and assimilated taxes are excluded from the measure, as is the repayment by the collectors (the employers) of the withholding tax on salaries.

Q- What is the new deadline to pay these taxes?

An extended period of three months is granted to all companies, upon simple request.

Q - How to benefit from this payment deferral?

The deferral of payment deadlines by three months is granted upon simple request, with no need of any justification. This request must be made using the form "*Difficulties linked to Coronavirus - Covid 19 Request for payment deadline and/or tax remission*" (In French: *"Difficultés liées au Coronavirus – Covid 19 Demande de délai de paiement et/ou de remise d'impôt"*) available on the French website www.impôts.gouv.

By requesting a tax payment deferral, companies undertake not to payout any dividends to French and non-French shareholders– including interim dividends and exceptional distributions of reserves - or to perform any share buy-back in 2020. Companies should not be based or operating through a subsidiary located in a Non-Cooperative Jurisdiction - this additional requirement has been added in an updated version dated May, 5th of the FAQ ("*Foire aux questions*") available on the Economic Ministry website.This restriction applies on a group scale.

Q – From which companies is the commitment required?

a) Large companies :

Any company (or group of companies) which, during the last financial, meets one of the following criteria :

- having employed at least 5,000 employees or
- having realized consolidated revenue exceeding €1,5bn in France.

[1] Enforceability of such inclusion could be questionable in so far this requirement has been introduced in the FAQ and nor in the law or the administrative guidelines.

b) When such companies have benefited from :

- deferral of (or rebates to) tax payments or social security contributions, this being precised that accelerated refund of tax credits and tax receivables are not taken into consideration.
- a guarantee from the State on loans they have taken on

Q – What are the penalties if the company fails to comply with this commitment?

Immediate tax payment and/or social security contributions benefiting from the rebate or postponement;

5% penalty plus 0,2% monthly late interest

Q -What if the Company is unable to fill in its VAT return?

If the company is unable to gather the necessary documentation to submit the VAT return it has two options:

Option 1 - Make an estimate of the amount of VAT due for the month and make a prepayment of this amount the following month. The accepted room for error is 20%.

Option 2 - Companies that suffered a loss of turnover due to Covid 19 may pay a flat-rate VAT instalment as follows:

- For April's March declaration:
  - flat rate amount of 80% of the amount declared for February ; or, if the company has made instalments for February, 80% of the VAT declared for January.
  - If the business has been shut down since mid-March or has suffered large losses of turnover (50% or more), a flat amount of 50% of the amount declared for February or January.
- The same measures apply for VAT due in May.
- Regularization: Adjustment of the VAT due on the basis of the actual amounts due during the previous months by deducting down payments that were already made.

Q - How to speed up the processing of an application for a tax credit refund (VAT, CIR/CII, CICE, etc.)?

Companies can use the simplified tax form "*difficulties related to Coronavirus - Covid 19*", box 3, mentioning the amount of the debt pending payment, the corresponding debtor, and send it to the competent corporate tax department *("Service des Impôts des Entreprises")* by email. It is also possible to attach the forms to the request.

B - Measures postponing social security payments

Q - What measures are planned for the payment of social security contributions due on the 15th of the month?

Employers whose URSSAF due date falls on the 15th of the month may postpone, without penalty, all or part of the payment of their employees and employer's contributions up to 3 months. Furthermore, the employer may adapt the amount of the payment according to their financial situation.

Q - What measures are planned for the payment of social security contributions due on the 5th of the month?

The same measures are applied for employers with a due date on the 5th of the month.

Q - What if the employer does not wish to opt for a deferral of all of the contributions?

If the employer does not wish to opt for a deferral of all contributions and prefers to pay the employees' contributions, the employer may pay the employer's contributions in installments as usual. To do this, companies shall login to their online space on "*urssaf.fr*" and report their situation via the messaging system: "*New message*" / "*A reporting formality*" / "*Report an exceptional situation*". It is also possible to contact URSSAF by phone dialing 3957.

Q - What measures are planned for the payment of additional pension contributions?

A postponement or an extension of the deadline is also possible for additional pension contributions. Employers are invited to reach their additional pension organism.

C - Tax rebates may be granted

Q - Under what circumstances may the companies benefit from tax rebates?

Applications for direct tax rebates must be justified by proper documentation. Tax relief will only be granted in cases of serious difficulties and provided that the taxpayer justifies that a simple deferral of the payment would not be sufficient to remedy the company's financial situation. Such measures will therefore be taken individually after examination of each taxpayer's situation.

By requesting a tax rebate, companies undertake not to payout any dividends to (French and non-French) shareholders – including interim dividends and exceptional distributions of reserves - or to perform any share buy-back in 2020. This restriction applies on a group scale.

It shall be noted that for the payment of social security taxes as from the 5th and 15th of May on, no postponement will be granted to Companies based or operating through a subsidiary located in a Non-Cooperative Jurisdiction ("Etat ou Territoire Non Cooperatif").

Q - Which taxes are concerned?

The measure concerns the payment of all direct taxes: CIT, Taxes on salaries, CFE and CVAE, excluding VAT.

Q - How to benefit from a tax rebate?

The request must be made using the same form "*Difficulties related to Coronavirus - Covid 19 Request for payment deadline and/or tax remission*", available on the website " *fiscal.gouv* ". The application must be completed with relevant information and documents needed to assess the economic situation of the requester and the consequences of the health crisis on its tax debt situation.

D - Measures for self-employed workers

Q - What measures are available to self-employed?

Workers can modulate the rate and instalments of withholding tax on salaries *(Prélèvement à la Source - "PAS")* at any time. It is also possible to defer the payment of withholding tax instalments on professional income up to three times each month if the instalments are made on a monthly basis, or from one quarter to the next if the instalments are made on a quarterly basis.

Q - What steps should be undertaken to benefit from these measures?

The measures are accessible via the taxpayer's individual area on *impots.gouv.fr*, under the heading "*Manage my direct debit at source*" - *("Gérer mon Prélèvement à la Source")*: any action made before the 22nd of the month will be considered for the following month.

E - Impact on accounts closed on 31 December 2019

Q - May the accounts closed on 31 December 2019 be adjusted to reflect the difficulties related to the health crisis?

No, the health crisis and its consequences are events occurring after the closing of the 2019 financial year and do not allow the results for the financial year ending 31 December 2019 to be lowered. However, they should be mentioned in the notes ("*annexes*") to the financial statements and in the management reports of the companies.

Q – Does the date for filing corporate tax returns remain unchanged?

No. The date to file corporate tax returns for companies that closed their accounts on 31 December 2019, January 2020 and February 2020 is postponed to 30 June2020. The returns

concerned by this deferral are: CIT returns as well as "BIC" (Industrial and Commercial Revenues), "BA" (Agricultural Revenues) and "BNC" (Non-commercial Revenues) returns. Partnerships submitted to personal income tax are also concerned by this deferral measure.

Q – Does the deadline for election of the tax consolidation regime postpone?

Yes. Filing deadline for election to the tax consolidation regime is postponed until 30 June 2020 for fiscal years ending in December, January and February 2020.

This election could be submitted to the French Tax Administration via the secure messaging system of the company's tax account rather than sending by mail the letter with acknowledgement of receipt.

Q – Does the deadline to submit election letter for the Corporate Income Tax ('CIT") regime postpone?

An extended period may be granted to submit the election to the CIT regime upon request by the company subject to justification evidencing that the company has not be able to file such option (e.g. premises or accounting firm are closed).

F - Measures concerning individuals

Q- What actions have been taken regarding Personal Income Taxes?

Deadlines to fill personal income tax returns have been postponed. The deadlines for e-filing are the following:

- Zone 1 (*Dpts. 01-19*) and non-residents: 4 June 2020
- Zone 2 (*Dpts. 20 to 54*): 8 June 2020
- Zone 3 (*Dpts. 55 to 974/976*): 11 June 2020

The deadline to file paper returns has been differed to 14 June 2020. The deadline to file paper returns has been differed to 12 June 2020.As a reminder, the deadline to file professional income returns (BIC, BNC or BA) is delayed to the 30 June 2020.

The second amendment to the Financial Act for 2020 increased the exemption of income tax from €5.000 to €7.500 on overtime worked during the sanitary crisis

G – Measures concerning tax procedures

Q – What actions have been taken regarding ongoing tax procedures?

Deadlines granted to the tax administration and to taxpayers during the health crisis to accomplish any action relating to a tax audit procedure are suspended until one month after the termination of the health emergency period.

Q – Are there any impacts on the tax statutory limitation period?

Yes. The tax statutory limitation period that is acquired at the end of 2020 is suspended from 12 March 2020 until the end of the state of emergency period plus one month. This measure only applies to fiscal years for which statutory limitation is acquired on 31 December 2020.

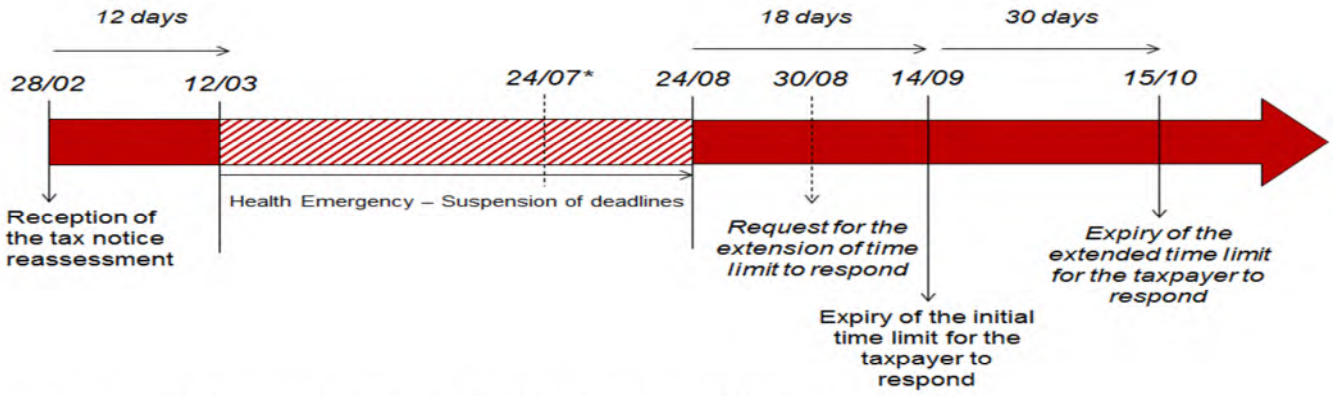
The state of emergency should be extended until 24 July 2020[2]. Therefore, the statutory limitation is suspended until 24 August 2020 (5 months and 19 days). This would mean that the concerned fiscal years would acquire prescription in May 2021 (31 December 2020 + 5 and a half months).

2 The extension period of the state emergency is still pending to discussion before the French Parliament

Example:

Reception of a tax notice reassessment:

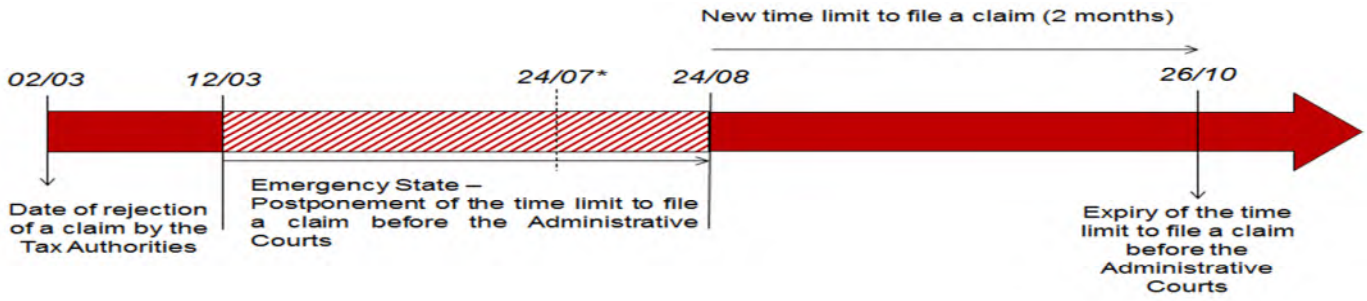
The time limit is affected as follows:



**Initial and non-extended period of the health emergency state*

Time limits to bring a case before the Administrative Tribunal after a preliminary claim was rejected:

Once the tax Authorities have rejected a claim made by the taxpayer, the latter has a time period of 2 months from the date of rejection to file a claim before the Administrative Courts. Time limits are affected as follows:



**Initial and non-extended period of the health emergency state*

[3] *Assuming (i) the state emergency is extended to July, 24th and (ii) the initial time limit expired on a non- working day, the deadline is postponed to the first business day.*

H – Measures concerning commercial leases

Q – What measures have been taken to support Companies for the payment of their rent?

The general rule is that rents are still due by the tenants. However the second amended financial Act for 2020, enacted on 25 April 2020, allows Landlords to deduct from their taxable profits, the loss resulting from a rent waiver without the said landlord needing to have a commercial motive subject to the landlord and the lessee cannot be considered as related entities within the meaning of Article 39,12 of the French Tax Code.

The aim of this measure is to encourage landlords to help lessees to reduce their indebtedness.

From a VAT perspective, if the rents are subject to VAT, waived rents do not, in principle, give rise to VAT collection.

Q – Do these measures only apply to rent waivers granted during the state of emergency?

No, the measures concern rent waivers granted from1 April 2020 until 31 December 2020.

Q – **Does this measure apply to all landlords and lessees ?**

No, the measure only applies to rent waivers granted to Companies and excludes those that may be granted to individuals.

In practice, the rent waiver should be formalised with the lessee via an amendment of the lease agreement.

Q – To what extent do the waivers impact the loss carry-forward mechanism of the lessee?

Generally speaking, a rent waiver gives rise to a taxable profit. However, a temporary increase has been provided in the capacity to carry forward tax losses. The standard €1,000,000 threshold is increased, for a lessee who has been granted a waiver, by an amount equal to the amount of rent waived.

IMMEDIATE THINGS TO DO

1. Focus on litigation proceedings:

- In order to avoid a clustering of actions at the end of the state of emergency, it would be appropriate for taxpayers not to delay, to the extent possible, those actions that should have been completed during the emergency period.
- Warning: taxpayers shall closely monitor the expiry of the legally protected period which is conditioned by the end of the state of health emergency.

2. Submit tax refund requests and others initiatives:

- Taxpayers should as soon as possible submit their request for the refund of their VAT ,CIR, CICE tax credits.
- If concerned, the taxpayers should inform its landlord and amend the lease agreement accordingly.

4. PUBLIC DISCLOSURE REQUIREMENTS (FRANCE)

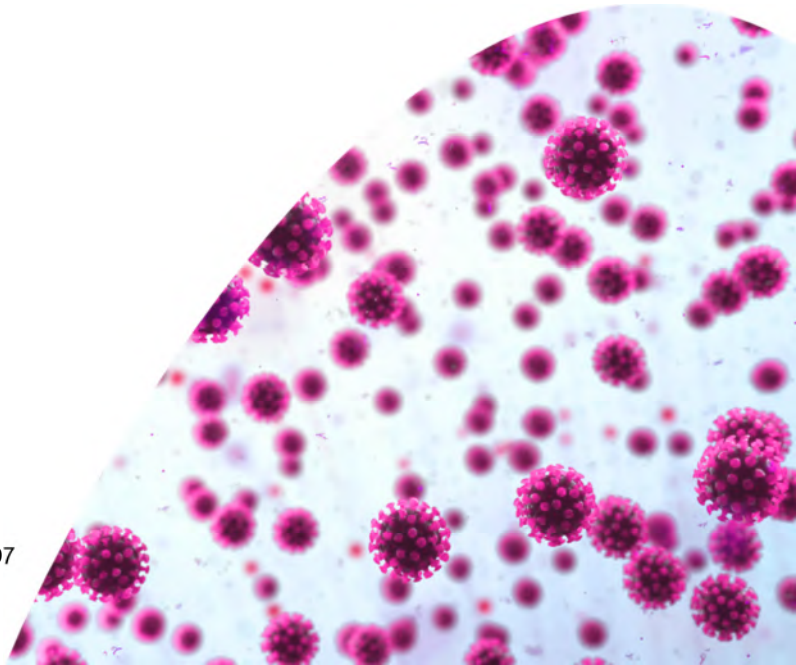
As at 19 March 2020, the French supervisor Autorité des Marchés Financiers (AMF) has not published any particular guidance for listed companies in respect of public disclosure and market information in respect of Covid-19 pandemic.

Accordingly, listed companies should stick to the usual market information requirements in France as provided under the French Code de commerce, the Réglement Général of AMF and ancillary AMF documentation. Any events or circumstances of a significant impact on their operations related to Covid-19 pandemic shall be disclosed to the market.

The same rules apply to disclosure of risk factors to be identified and disclosed in the context of public offerings and to annual reports and accounts of listed companies.

IMMEDIATE THINGS TO DO

- Immediate-things-to-do items referred in the corresponding UK section to this section shall apply to companies the securities of which are listed on French markets.
- On a separate note, it can be noted that AMF has published a few notes since the beginning of March in relation to Covid-19 and its indirect impact on various topics such as the conduct of annual shareholders' meetings and the continuity of business for market securities trading operations. It is more than likely that the AMF will carry on producing guidance in many aspects of corporate finance areas as concerns will arise.



5. EVENT STAGING (FRANCE)

Businesses often stage events where there may be a large number of attendees. This may range from sports events to conferences or training sessions. The measures in place in France designed to minimise the spread of the virus mean that business have to rethink – or cancel / postpone all such events.

Many businesses must now cancel or postpone all in-person events due to the stay-at-home measures ordered by the French Government. If you need to postpone or cancel an event consider the following:

- Contract with venue provider – if you are hosting the event at a third party venue consider carefully the contract with your venue provider. Would you be entitled to a refund if the event was cancelled and in what circumstances.

- Refunds – what refunds would be required to be given to customers or attendees. If you are cancelling the event due to Government guidance you may well be required to provide a refund to attendees or customers. This will primarily be driven by the contract in place. However, it is also important to bear in mind that where the attendees are consumers they may have additional statutory rights. Where the contract is a business to business contract does it provide for relief (e.g. force majeure)?

- Communications – a clear communications policy around any decision will be critical. The timing of the decision, whilst not necessarily a legal requirement, could have significant impact on reputation and good will. It should,

therefore, be considered carefully in taking the decision whether to cancel or postpone any event.

- Insurance – consider early on whether or not insurance is likely to cover any cancellation or postponement. You should liaise carefully with your insurers or brokers in order to consider the specific terms of your policy. See insurance section for more information.

- Supply chain – you should consider carefully the knock on impact on other suppliers. For example catering or hospitality suppliers for the event. Could they bring a claim in respect of any cancellation and what steps can be taken in order to mitigate this.

- Commercial rights – for sporting or music events consider carefully what rights have been granted in relation to the event. If the event does not go ahead, how will this impact on sponsorship or commercial rights contracts that may have been entered into? Do these contain force majeure provisions and/or are there obligations to provide alternative rights?

All of the above does not mean you need to entirely cancel all events. Consider the use of technology - is it possible to host the event using technology, such as webinars and the like. If you choose to do this you will need to consider carefully the timing of the decision and the communication in order to ensure all attendees are able to participate.

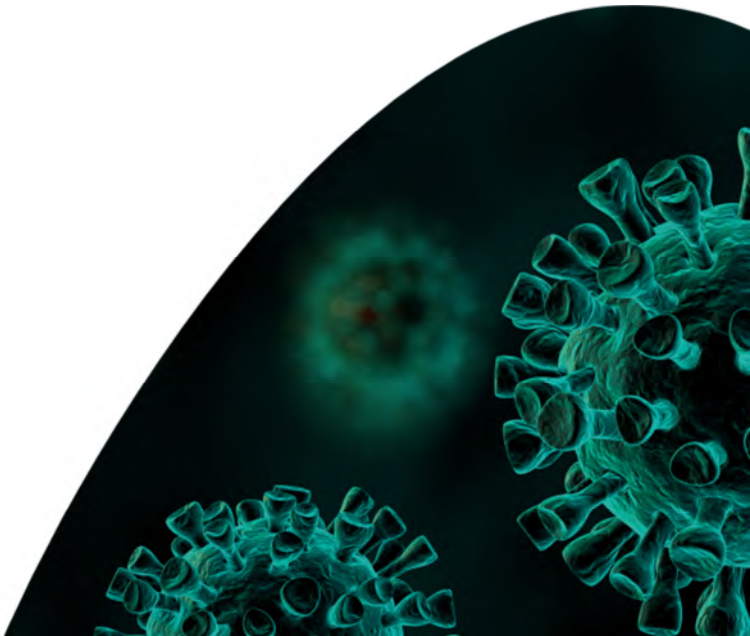
That being said, where a large number of attendees would have necessarily needed to travel to attend the event, cancelation or postponement is of course the best course of action. A recent example of this is Paris Arbitration Week which was scheduled to take place during the week starting on 30 March 2020, gathering hundreds of arbitration practitioners from around the globe to attend multiple conferences and training sessions in Paris over five days. The Paris Arbitration Week organizing committee decided to push back the event several months.

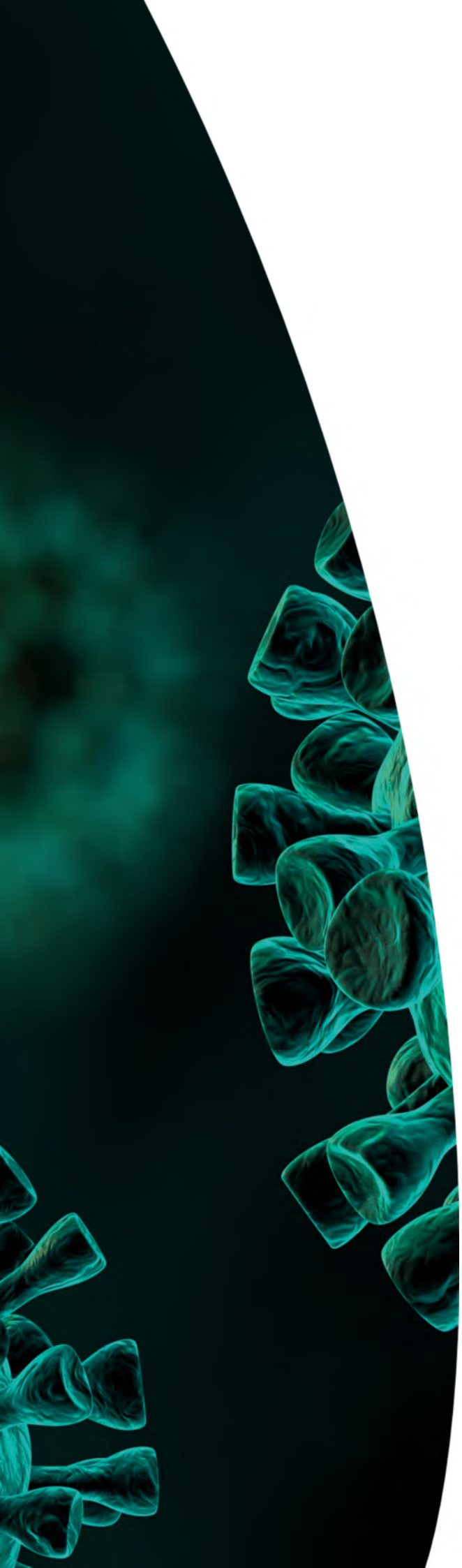
For organisations that have public sector stakeholders or funders, keep such stakeholders or funders up to date on plans. They may well have already provided guidance and, subject to state aid requirements, may be able to provide hardship funds to cover any short term cancellation.

In the Sports sector, all sporting events in France have now been cancelled. In this situation businesses will need to consider in particular:

- Ticket refunds – what ticket refunds may be required and how would these be processed legally and in line with contracts – see above section on refunds also.

- Supply chain arrangements – which contracts with caterers, security staff and other venue logistics providers can be cancelled in order to minimise financial and contractual exposure.





IMMEDIATE THINGS TO DO

- Plot out the events you are hosting in the short (next 1 – 4 weeks) and medium term (1 – 6 months) so that you can consider each in turn and put in place contingency plans to address issues as the situation develops.
- Consider alternative means to hold each event – e.g. use of technology – in order to ensure it can go ahead in an alternative fashion and in spite of the stay-at-home order.
- Review contractual provisions with venue provider, customers and supply chain in order to assess the impact of cancelling or postponing the event. Keep a full impact assessment and economic analysis for each event to help inform decision making and options analysis.
- Liaise with communications team to ensure a clear and aligned communications strategy for any event cancellation which minimises impact on brand and reputation.
- Check with insurers/brokers whether insurance is likely to cover any cancellation or postponement of events and keep them abreast of your planning activities.
- Create a schedule of commercial rights for relevant events so that decisions can be taken in this context and where relevant commercial rights holders are consulted and/or offered alternative rights in replacement of any cancelled or postponed event.

6. INSURANCE OBLIGATIONS (FRANCE)

On 23 March 2020, the French government passed Decree No. 2020-293 prescribing requisite general measures to deal with the covid-19 epidemic in the context of a state of health emergency ("*Décret n° 2020-293 du 23 mars 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans le cadre de l'état d'urgence sanitaire*"). This decree implemented a severe lockdown by prohibiting in principle the free movement of individuals outside of their homes save for a limited number of listed exceptions until 31st March 2020. The Decree No. 2020-293 was followed by Decree No. 2020-344 of 27 March 2020, which has extends the lockdown until 15 April 2020.

Businesses across different sectors which have already been hard hit by the virus owing to the closures imposed by the State will continue to experience more financial difficulties on account of these new measures.

In light of the current situation, companies which have already experienced a sharp decline in their activities owing to the Coronavirus outbreak might logically wonder whether their operating losses will be covered by their insurance policies. Most of these companies might be in for some bad news. Most insurance policies only cover losses resulting from physical damage owing to fire or natural disasters for example and the Coronavirus does not necessarily cause physical damage.

A study published in February by the French Association for Corporate Risks and Insurance Management (AMRAE) shows that nearly 70% of companies which were interviewed are only insured against losses resulting from physical damage. Of the remaining 30% which might have taken out insurance for losses not necessarily entailing physical damage, notably after the H1N1 virus outbreak in 2009, most of these insurance policies might exclude losses arising from epidemics or pandemics. Even if epidemics or pandemics are covered, the insurance policy might exclude certain viruses, such as the SARS virus which appeared in 2002, and depending on how the exclusion clause is framed, it may be broad enough to encompass the Coronavirus. As for companies which have only recently taken out insurance against the consequences of Covid-19, such insurance will only be valid for future outbreaks and not the current outbreak.

In consideration of this fact, the French Minister of Economy and Finance, Bruno Lemaire informed the President of the French Insurance Federation on 17 March that he expected insurers to participate in the efforts of national solidarity. In response, the French Insurance Federation indicated on 23 March 2020 that insurers have undertaken to apply the following three measures principally aimed at helping small and medium-sized enterprises (SMEs) and micro-enterprises: (i) deferring the rental payments of SMEs and micro-enterprises which have had to suspend their activity since 15 March 2020 owing to the lockdown measures implemented by the French government; (ii) undertaking not to terminate the contracts of companies in case of late payments owing to the Coronavirus outbreak for the duration of the lockdown – this measure is generally targeted at micro-enterprises and the self-employed; and (iii) pledging to contribute $200m to the Solidarity Fund set up by the public authorities to support micro-enterprises and the self-employed confronted to financial difficulties.

So far, insurers have steadfastly refused to cover companies' operating losses. The French government and the French Insurance Federation have agreed to work together on developing an insurance product that would help cover major health risks in the future. However, this would not apply to the Covid-19 virus.

7. IMPACT ON REAL ESTATE (FRANCE)

On 23 March 2020, the French Parliament enacted a law which provides for a 2-month state of emergency from 24 March until 24 May 2020. Following the state of sanitary emergency enactment, a lockdown has been declared and is still currently enforced nationwide until 11 May 2020, as provided under article 3-I of the decree n° 2020-293 dated 23 March 2020 amended by the decree n° 2020-423 dated 14 April 2020. This lockdown also applies to certain businesses, with article 8-I of the decree n° 2020-293 dated 23 March 2020 prohibiting certain commercial premises from being opened to the public.

Main businesses affected by the public opening ban:

- Bars and Restaurants (except for take-away, home deliveries and hotel room services)
- Non-essential supermarkets and commercial centres
- Conference centres and music halls
- Museums
- Schools and universities

Hotels are not affected by the ban, however French Prefects currently exercise their requisition right on both hotel premises and hotel services under article L. 2215-1 of the French General Local Authorities Code in order to accommodate medical staffs and persons infected whose lives are no longer in danger.

Postponement of the enforceability of clauses sanctioning non-performance of contractual obligations that are due until 24 June 2020 (Ordinance n° 2020-306 dated 25 March 2020 amended by an ordinance n° 2020-427 dated 15 April 2020)

Clauses providing for periodic penalty payments ("*astreintes*"), penalty clauses, termination clauses or clauses providing for forfeiture triggered by the non-performance of a contractual obligation (the ***Default Clauses***) during the period as from 12 March 2020 until 24 June 2020 (the ***Protected Period***) are not enforceable during this Protected Period.

Ordinance 2020-427 specifies when the Default Clauses shall resume depending on as to whether the contractual obligation to be performed during the Protected Period was due prior to, or after the beginning of the Protected Period (i.e.12 March 2020) as follows:

- for contractual obligations due prior to 12 March 2020: Default Clauses will resume after the expiry of the Protected Period increased by the notice period set forth in the agreement (i.e. period left to the debtor to perform its obligation once it is due) as reduced by the time between the day where the obligation became due and 12 March 2020;
- for contractual obligations due after 12 March 2020: Default Clauses will resume after the expiry of the Protected Period as increased by the notice period set forth in the agreement.
  - ➢ In practical terms, this new ordinance means that:
    - for a development agreement entered into prior to 12 March 2020 with an obligation for the developer to complete the works on 20 March 2020, no late delivery penalty will be due if the works are completed by 2 July 2020 (i.e. expiry of the Protected Period increased by 8 days);

- for a commercial lease providing for an obligation for the tenant (not eligible to benefit from the ordinance mentioned in Section 3 below) to pay its quarterly rent by the 15 April 2020, no late penalty will be due if the tenant pays its rent by the 9 July 2020 (i.e. the expiry of the Protected Period increased by 15 days).

Postponement of the enforceability of clauses sanctioning non-performance of contractual obligations that will be due after 24 June 2020 (Ordinance n° 2020-306 dated 25 March 2020 amended by an ordinance n° 2020-427 dated 15 April 2020)

Ordinance n° 2020-427 also covers the obligations - other than payment obligations – that are to be performed after the expiry of the Protected Period.

In this respect, Ordinance 2020-427 specifies that the application the Default Clauses triggered by the non-performance of a contractual obligation due to be performed after the Protected Period will be postponed:

- by the duration of the protected period (i.e.: 3 months and 13 days) regarding obligation entered into prior to the Protected Period;
- by the time period lapsed between the date on which the obligation is entered into and the expiry of the Protected Period regarding obligation entered into during the Protected Period.
  - ➢ In practical terms, for a development contract providing for a practical completion to occur on 25 July 2020,
    - o if the development contract was entered into prior to 12 March 2020, no late delivery penalty will be due if the works are completed by 7 November 2020 (i.e. 25 July + 3 months and 13 days);
    - o if the development contract was entered into on 11 May 2020, no late delivery penalty will be due if the works are completed by 6 August 2020 (1 month and 13 days after the Protected Period).

Extension of the time period for terminating or not renewing contracts (ordinance n° 2020-306 dated 25 March 2020)

Longstop dates or time windows to either terminate or oppose to the automatic renewal of contracts which fall during the Protected Period are extended until two months after the end of the Protected Period (i.e.: 24 August 2020).

- ➢ In practical terms, for a commercial lease which started on 21 October 2017 which provides the tenant with a termination right for 20 October 2020 subject to a 6-month prior notice, i.e.: by 20 April 2020, such a termination right is extended until 24 August 2020.

Suspension of statutory time periods that are to expire during the Protected Period (Ordinance n° 2020-306 dated 25 March 2020)

All the statutory time periods during which formalities, declarations, notifications or publications are to be carried out under penalty of being declared null and void, which are to expire during the legally protected period, are suspended.

These time periods will resume after the expiry of the Protected Period, it being specified that such a postponement is limited to 2 months after the expiry of the said period.

Please note that this provision is neither applicable to statutory withdrawal periods nor to monetary obligations resulting from the exercise of such withdrawal rights.

- ➢ In practical terms, in the event that a landlord contemplates to sell a single-tenant building subject to a commercial lease, and notified to the tenant its statutory pre-emption right on 20 March 2020, the time period of 1 month during which the tenant shall answer pursuant to French law is suspended. This one-month period will start after the expiry of the Protected Period (i.e.: 24 June 2020) and will therefore expire on 24 July 2020.

Suspension of time periods during which the administration is to issue a pre-emption decision (Ordinance n° 2020-306 dated 25 March 2020 as amended by the ordinance n° 2020-427 dated 15 April 2020)

Time periods during which an administration is required to issue a decision regarding the exercise of its pre-emption right (municipality and SAFER pre-emption rights) are suspended only during the state of emergency (i.e. until 24 May 2020) and will resume after 24 May 2020.

If such time periods should have started after 12 March 2020, their starting point will be postponed to 24 May 2020.

- In practical terms:
  - the 2-month time period during which a municipality is to issue its decision of pre-emption, which started on 3 March 2020, is suspended until 24 May 2020 and will expire on 15 July 2020 (i.e. 1 month and 22 days);
  - the 2-month time period during which a municipality is to issue its decision of pre-emption which should have started during the state of emergency will start on 24 May 2020 and expire on 23 July 2020.

Neutralization of clauses set forth in commercial and professional leases which sanction the payment default of rents and services charges (ordinance n° 2020-316 dated 25 March 2020)

This concerns small businesses tenants who are subject to bankruptcy proceedings or eligible to the solidarity fund ("*fonds de solidarité*") meeting the certain specific criteria (tenants with notably less than 10 employees and a turnover excluding taxes during the last financial year lower than €1,000,000, who suffered a loss of turnover of at least 50% between 1 and 31 March 2020).

These small businesses tenants may not incur financial penalties or interests for late payment, damages, periodic penalty payments ("*astreinte*"), performance of a termination clause ("*clause résolutoire*"), penalty clause or any clause providing for forfeiture, or activation of guarantees, as a result of the non-payment of rent or rental charges relating to their business and commercial premises due between 12 March 2020 until two months after the end of the state of emergency (i.e.: 24 July 2020).

In this case, rent and charges are still due but landlords will not be able to rely on such default to exercise the abovementioned clauses. They will have the ability to request their payment pursuant to general law in front of the judge.

- In practical terms:
  - these measures shall impact in majority the ground-floor retail premises segment and shall not impact the office logistics premises segments which are rented by stronger tenants that do not meet the abovementioned criteria.
  - landlords will have to reinvoice the amounts unpaid during the neutralization period on the 25 July so as to reactivate their rights as they will not be in a position to rely on a payment default which occurred during the period from 12 March until 24 July 2020.

Covid-19 and *Force majeure* (act of god)

Article 1218 of the French Civil Code provides for a lawful excuse to non-performance of a contract in case of *force majeure* without the need for a specific clause to be provided in the agreement.

An event meets the *force majeure* test under French law when it (i) is beyond the control of the debtor, (ii) could not have been reasonably foreseen at the time the parties entered into the contract, (iii) prevents the debtor from performing its contractual duties and (iv) the effects of which cannot be avoided.

In practice, French courts seem to have been reluctant to recognise epidemics such as Chikungunya and Ebola cases of *force majeure*, notably by adopting a subjective test by which if the debtor himself did not contract the disease the *force majeure* test was not satisfied. It remains to be confirmed

whether French courts in the case of the Covid-19 pandemic retain this subjective test.

However, the measures taken by the French government to limit the spread of the virus may be considered as a *force majeure* situation depending on the relevant situations (closure of the premises opened to public, employees required to work remotely except if their work cannot be performed in these conditions) being specified that an official note from the government dated 17 March 2020 asked for constructions sites to be completed.

- In practical terms:
  - tenants will not be in a position to raise the *force majeure* excuse to justify payment defaults unless they operate a commercial activity opened to the public and concerned by the lockdown to the extent that this measure prevents them from exercising their activity;
  - contractors or developers might not be able to raise successfully the *force majeure* excuse before French courts in order to justify late contractual performance of a construction contract, except if their employees effectively suffer from the Covid-19.

In any event, the existence of a *force majeure* situation in the context of a private law contract will remain subject to the French courts discretion on a case-by-case basis.

Covid-19 and Hardship ("*imprévision*")

Article 1195 of the French Civil Code, applicable to contracts entered into as from 1 October 2016, provides for a renegotiation right of the contractual terms in case of an unforeseen hardship rendering the execution of the contractual obligations excessively onerous to a party which did not choose to bear such a risk.

By triggering this provision, a party activates this renegotiation mechanism. If the parties reach an agreement, the contract is deemed renegotiated and its contractual performance will continue under the new negotiated terms. Should the parties fail to reach an agreement, a second phase opens during which they may agree to terminate the contract on a date and conditions they agree on, or ask together the courts to adapt the contractual terms. If parties still fail to find an agreement within a reasonable time period, a third phase opens allowing any party to request the courts to either adapt the contractual terms or terminate the contract altogether.

Please note that the application of Article 1195 of the French Civil Code is not of public order so that it is most of the time waived by the parties.

- In practical terms:
  - tenants which can no longer pay their rent due to a loss of business caused by the lockdown will seek the application of article 1195 of the French Civil Code;
  - institutional landlords shall review their leases entered into as from 1 October 2016 to check whether they provide for an express waiver to article 1195 of the French Civil Code or not.

8. CONSTRUCTION CONTRACTING (FRANCE)

The coronavirus epidemic is likely to have significant impacts on construction projects, both in public procurement contracts and private contracts, in particular with regard to supply delays, containment measures applicable to employees, but also relationship with suppliers, co-contractors or subcontractors. Clauses in standard forms and bespoke amendments addressing force majeure and other relief events will need to be carefully scrutinised by employers and contractors.

Construction Contracts and force majeure

Force Majeure Topic	Points to consider
Trigger event – general force majeure clause	**Public procurement contracts** Definition of force majeure in Public Law In public law, the public courts define force majeure as an unforeseeable, irresistible event external to the contracting parties. Consequently, the Coronavirus could be qualified as force majeure if the contractor who invokes it demonstrates that: • the event does not result from its fact and is therefore an external event - this condition is met for Coronavirus; • the consequences arising from the Coronavirus epidemic were unforeseeable at the time of conclusion of the contract - this condition could raise some difficulties for recently concluded contracts and, • the Coronavirus epidemic constitutes an irresistible event making the performance of its contractual obligations impossible, either temporarily or permanently. Following the spread of the Coronavirus epidemic in France, the State and territorial public entities (*collectivités territoriales*) have already recognized the Coronavirus as a force majeure event for their public contracts. However, in the context of contracts concluded with public entities other than

Force Majeure Topic	Points to consider
	the State and territorial public entities (*collectivités territoriales*), vigilance is required insofar as they may have a different approach. Consequences associated with the occurrence of force majeure in public procurement contracts • Under the Book for Public Procurement Works General Conditions (*Cahier des Clauses Administratives Générales Travaux*) approved by the ministerial order of 8 September 2009 (amended in 2014) - the contractual document that constitutes the standard general conditions that may be used by public entities in the context of public procurement, the contractor is entitled to extension of time. • The State and territorial public entities *(collectivités territoriales*), who have already recognized the Coronavirus as a force majeure, have announced that penalties for delays will not be applied. **Private contracts** Definition of a force majeure in Private Law Under Article 1218 of the French Civil Code, force majeure is characterised as: • an event beyond the debtor's control (external condition); • which could not have been reasonably foreseen at the time of the conclusion of the contract, • the effects of which could not be avoided by appropriate measures (irresistibility condition), and • which prevents performance of the debtor's obligation (causal link requirement). These four conditions must be met for the Coronavirus to qualify as force majeure. Consequences associated with the occurrence of force majeure in Public Law • Private contracts referring to the AFNOR NF P03-001 or NFP 03-002 standards, this norm provides for:

Force Majeure Topic	Points to consider
	- execution of time for the duration of the impediments (art. 10.5.1.2 of standard NFP 03-002 private contracts for civil engineering works and art. 10.3.1.2 of standard NFP 03-001 private contracts for building works). • Contracts that do not refer to a specific norm, the contractor may rely on the French Civil Code (Article 1231-1 and 1218) which provides for: - extension of time and no penalties applicable or damages payable; - if the impediment is temporary, performance of the obligation should be suspended; - possibility to terminate the contract if the impediment is permanent.
Trigger event – government instructions	**Organisation on the construction site** • The Decree No. 2020-344 of 27 March 2020 incorporating Decree No. 2020-293 adopted on 23 March 2020 prohibits movements or travel until 15 April 2020, except for employees forced to be physically present at work. • A joint FNTP/FFB/CAPEB (organisations representing the construction sector) press release dated 17 March, published recommendations applicable to employees working on a construction site, including: o respect of basic protective measures (washing hands very regularly, coughing or sneezing into the elbow or into a handkerchief, greeting without shaking hands etc.); o reorganization of the site (limiting meetings to the necessary minimum, compliance with the rules of distance, shift rotation, etc.). • On 2 April 2020, the Organisme Professionnel de Prévention du Bâtiment et des Travaux Publics (OPPBTP) published new guidelines for health and safety in the construction industry entitled "Guidelines on Health and Safety Recommendations for the Continuity of Construction Activities." The guidelines were approved by several ministries, including the ministry of health and the ministry of labour. They set out specific and practical measures designed to allow

Force Majeure Topic	Points to consider
	construction works to continue while ensuring the safety of workers. These include for example limiting the number of workers on site and the number of interfaces to reduce the risk of encounters and contact, or wearing protective glasses and specific surgical masks if adequate distance between workers cannot be maintained. • In the absence of the recognition of the coronavirus as a force majeure event in the context of private works contracts, the publication of the guidelines may further complicate matters for private contractors. Indeed, the guidelines may have an impact on the assessment of the third and fourth conditions for the characterisation of a force majeure event in private contracts as set out above. Employers may now seek to argue that contractors have now been given adequate preventative measures which should allow them to resume works under safe conditions, therefore ending the period of force majeure

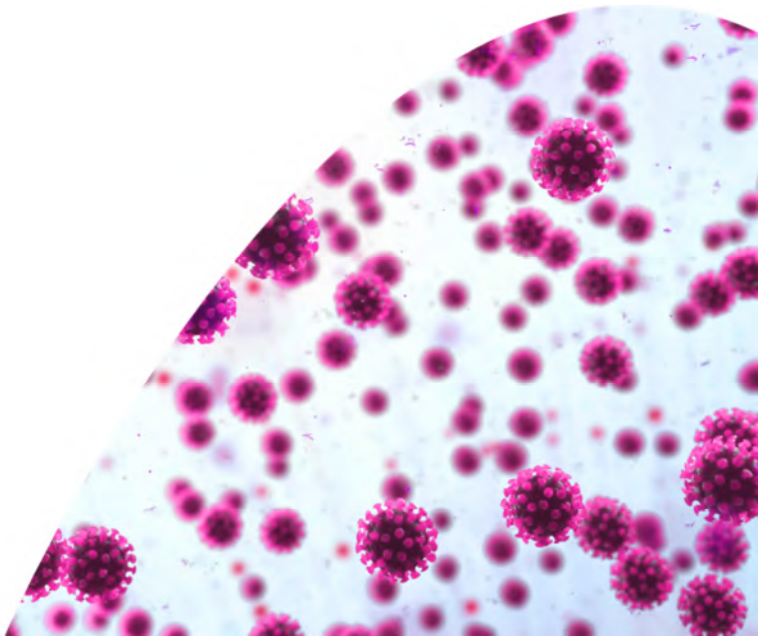
Covid-19 –related regulations impacting public works contracts

On 23 March 2020, Law No. 2020-290 of 23 March 2020 on emergency measures to deal with the covid-19 epidemic ("*Loi n° 2020-290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de covid-19*") was enacted in France, with the aim of declaring a public health emergency and addressing various health and economic issues arising from the Covid-19 epidemic and subsequent lockdowns. Article 11 of this statute authorises the Government to *inter alia* (i) issue an ordinance within three months following its enactment in order to take all necessary measures to tackle the covid-19 health epidemic crisis, including retroactive measures which may apply as from 12 March 2020; and (ii) adapt by ordinance the provisions of the public procurement code and public contracts pertaining to contract procurement, payment deadlines, performance and termination.

On the basis of this provision, the French government has adopted the following two Ordinances, among others, which are of particular relevance to public works contracts:

- **Ordinance No. 2020-319 of 25 March 2020** on various measures for adapting the rules for the procurement, procedure or performance of contracts subject to the Public Procurement Code and public contracts not covered by it during the health crisis caused by the covid-19 epidemic ("*Ordonnance n° 2020-319 du 25 mars 2020 portant diverses mesures d'adaptation des règles de passation, de procédure ou d'exécution des contrats soumis au code de la commande publique et des contrats publics qui n'en relèvent pas pendant la crise sanitaire née de l'épidémie de covid-19*"): notably, Article 6.2 a) of this Ordinance provides that contractors who are faced with the impossibility of wholly or partly performing the contract owing to the coronavirus crisis, will be exempt from the payment of liquidated damages and/or will not incur any contractual liability on this account.

- **Ordinance No. 2020-306 of 25 March 2020** relating to the extension of deadlines that expire during the period of the state of health emergency and to the procedural adjustment of proceedings during that same period ("*Ordonnance n° 2020-306 du 25 mars 2020 relative à la prorogation des délais échus pendant la période d'urgence sanitaire et à l'adaptation des procédures pendant cette même période*") which *inter alia* provides for (i) the neutralization of certain contractual provisions pertaining to periodic penalty payments ("astreintes"), liquidated damages ("clauses pénales"), termination ("clauses résolutoires") and forfeiture of rights ("clauses prévoyant une déchéance") expiring during the period of 12 March 2020 and the month following the end of the state of health emergency (currently expected to occur on 24 May 2020), that is, 24 June 2020; and (ii) the extension of contract termination dates which were to occur within this specified period.



9. LITIGATION AND COURTS (FRANCE)

On 17 March 2020, France adopted strict measures of confinement. But what does this mean for ongoing and future disputes? A large part of the regime to be applied has been adopted by ordinances dated 25 March 2020.

In practice, the judicial activity will be limited to summary proceedings and to emergency measures, in particular review of custodial measures.

Are French courts open? If yes, which courts and in what circumstances?

In accordance with the continuity plans in each jurisdiction, only '**essential litigation**' court hearings are to be maintained:

- Summary civil and commercial proceedings if they are urgent;
- Regarding criminal procedures, in particular :
  - Correctional hearings for pre-trial custody and judicial review;
  - Criminal immediate summary trial hearings ("*comparution immediate*");
  - Presentations before enquiring judges ("*juge d'insruction*") and hearings before the liberty and custody judge ("*juge des libertés et de la detention*") or the enquiring chamber for custody cases ("chambre d'instruction");
  - Hearings before the judge responsible for the enforcement of sentences ("*juge d'application des peines*");
  - Public prosecutor's permanencies;
  - Hearings before the chamber of correctional appeals and before the chamber for the enforcement of sentences for emergency management.
- Regarding juvenile Courts:
  - Hearings of the juvenile court and of the juvenile judge for emergencies;
  - The juvenile court's permanent services, emergency educational assistance;
  - Urgent measures from the family judge.
- Criminal trial sessions will be cancelled. Trials may be adjourned, within reasonable time limits and within the time limits for pre-trial detention.

What does it mean for civil and commercial pending procedures?

They will be postponed except if they fall within the definition of "**essential litigation**", i.e., if they are extremely urgent.

In addition, **all procedural time limits in civil and commercial procedures**, which are sanctioned by a potential cancellation, statute of limitation, foreclosing, forfeiture of the term, non-opposability, **should be adapted, suspended or interrupted** retroactively as from 12 March 2020 until three months after the end of the governmental measures to slow the spread of the virus.

Indeed, the **Order No. 2020-306 of 25 March 2020** provides for additional time to perform acts which, if not performed, would entail significant legal consequences for the parties to a contract or legal proceedings.

The Order specifically applies to acts:

- "prescribed by law or regulation" – excluding acts provided for by contractual stipulations: time-limits, payment due dates, etc.; and
- which should have been performed between 12 March and 24 June 2020 – i.e. 'the legally protected period'

The acts "prescribed by law or regulation" will not be considered to be late as long as they are performed within their respective legally prescribed period, within a two month time limit beginning on 24 June 2020.

A hard deadline of 24 August 2020 therefore applies.

Example one:

A debt has been due since 14 March 2015. A five-year limitation period for raising legal action applies under Article 2224 of the French Civil Code. This limitation period was due to expire on 14 March 2020, but it will now run until 24 August 2020 in light of the Order. This corresponds to the duration of the legally protected period plus two months.

Therefore, the business out of pocket will be able to file an action up until this date without their action being declared inadmissible because of the statute of limitations.

Example two:

A judgment was served on a business on 25 February 2020. In line with most cases where the time limit for lodging an appeal is one month from the service of the judgment, the business had until 25 March to file a corresponding appeal. However, in light of the Order, the time period to file the appeal will now run until 24 July 2020,–which corresponds to the duration of the legally protected period' plus the one month additional for filing the appeal.

For judicial acts, such as the filing of a brief or an appeal, this Order provides for two main deadlines: 24 July and 24 August 2020. This may lead to the overload of jurisdictions on these dates. It is therefore recommended that, while taking into account the additional time granted, parties and their counsels organise their filing prior to that date.

Also, provisional, investigative, conciliation or mediation measures – provided that they have expired within the legally protected period – are automatically extended, until the expiry of a period of two months following the end of this protected period – i.e. to 24 August 2020 at the latest.

Exceptions

The Order refers only to acts prescribed "by law or regulation" and time limits "legally prescribed for acting", and to payments prescribed "by law or regulation for the acquisition or retention of a right".

Some exceptions apply, however.

Firstly, contractually prescribed time limits are not affected by the Order. For instance, the time limit for exercising the option of a unilateral promise of sale, expiring during the legally protected period (12 March – 24 June 2020), is not extended by the Order.

Secondly, time limits set by a judge, such as dates of a procedural calendar, do not benefit from the Order's extension. However, judges retain the power to decide on such extensions on a case-by-case basis, taking into account the confinement's constraints.

Also, payment of contractual obligations is not suspended during the legally protected period. Contractual deadlines must still be respected, with some exceptions.

Firstly, the Order provides that the operation of certain contractual provisions – meant to penalise failure to fulfil an obligation within a specified period, such as penalty clauses, termination clauses and forfeiture clauses – is paralysed during the legally protected period (12 March – 24 June 2020), provided that their deadline was reached during this period.

These contractual provisions will be 'reactivated' on 24 July 2020, if the debtor has not fulfilled his obligation by that time.

Also, penalty payments and penalty clauses that had begun to run before 12 March 2020 will see their courses suspended during the legally protected period (12 March – 24 June 2020). They will take effect again on 25 June 2020.

A second exception in relation to contractual deadlines also applies. French law, via Article 1218 of the French Civil Code, provides for the impact of force majeure events in the context

of contractual obligations. However, it does come with conditions.

The force majeure exception

An impediment constitutes an event of force majeure only if it has, for the debtor who invokes it, three characteristics: it must be unforeseeable, unavoidable and beyond his control. These characteristics will be closely examined by the courts that may reflect on previous case law in relation to recent epidemics

- In 2006, the Paris Court of Appeal considered the SARS epidemic affecting Asia in 2003 with regards to an organised trip to Thailand. The court considered that there was no health risk in Thailand at the date scheduled for the trip based on a General Health Administration's communiqué indicating that only travel to Hong Kong and China was not recommended. There was therefore considered to be no force majeure event in the case.
- In 2009 the Court of Appeal of Saint-Denis de la Réunion said that the unpredictability of the event qualified as 'force majeure' must be assessed on the day of conclusion of the contract. For contracts concluded after the beginning of an epidemic, it may not be considered as an unforeseeable event justifying the termination of the contract.
- In 2016, the Paris Court of Appeal considered a case where a company requested payment delays due to the Ebola virus epidemic. The court required the claimant to sufficiently establish that such epidemic had led to the decline or lack of cash flow in order to demonstrate the causation link between the force majeure event and the non-payment.

If it is demonstrated that performance of the contract has been prevented by a force majeure event, the defaulting party is exonerated from their contractual liability.

In French law, a force majeure event can also be relied upon to resort to the suspension of limitation periods. Indeed, a litigant can see his action, normally time-barred, admissible if he demonstrates that, for instance, he was prevented from filing it by a force majeure event.

If all conditions of the force majeure cannot be met, there remains the possibility for litigants to petition the courts in order to have the payment of the sums due postponed or staggered within a limit of two years. This option is open to litigants under Article 1343-5 of the French Civil Code.

What are the plans for dealing with disputes in response to Covid-19 in courts and how long will they be in place?

To avoid physical contact in these times of confinement and reduced activity continuity plans, **Order No. 2020-304 of 25 March 2020** lightens the functioning of civil and commercial jurisdictions.

This Order specifies the same 'legally protected period' as **Order No. 2020-306**, i.e. 12 March 2020 to 24 June 2020.

Unless otherwise provided for in the Order, it applies in first instance courts, both civil and commercial, and on appeal.

Order No. 2020-304provides for measures such as the followings:

- **Referral of hearings**

  In accordance with the continuity plans in each jurisdiction, only 'essential litigation' court hearings are to be maintained. A number of hearings that have either not been, or will not be, held must therefore be referred back at a later date.

  Parties will be notified of the referral by any means, which might include through the virtual private network for lawyers (RPVA), email, simple letter or any other means of ensuring effective communication of information.

- **Single-judge decisions**

  For hearings that are maintained in a context of social distancing, the Order extends the possibility of single-judge decisions. It provides that when a case management

hearing date or a pleadings' hearing is to be held during the legally protected period of 12 March – 24 June 2020, the president of the court may decide that the case be heard and decided by a single judge.

- **The exchange of briefs and exhibits between litigants**

  The Order also introduces flexibility in way briefs and exhibits can be exchanged between the parties to a dispute. These may be exchanged by any means provided that the judge is able to ensure compliance with the adversarial principle. Whatever the means of communication chosen by the parties, it is nevertheless prudent for them to be able to prove that they have indeed transmitted their briefs and exhibits to the opposing party, and the date on which they did so, in order to prevent any future dispute.

- **Hearings and social distancing**

  Also in light of instructions on social distancing, the Order provides an exception to the general principle that judicial debates are public.

  The president of each court is granted wide latitude to decide the degree of publicity for each hearing, going as far as to allow for hearings to be held in the judge's chambers.

  Judicial debates could in their entirety be affected as judgments may now be rendered without pleadings. If the written portion of the proceedings comes to an end in these coming weeks of confinement, the judge may suggest that a judgment be rendered without the need for a prior hearing.

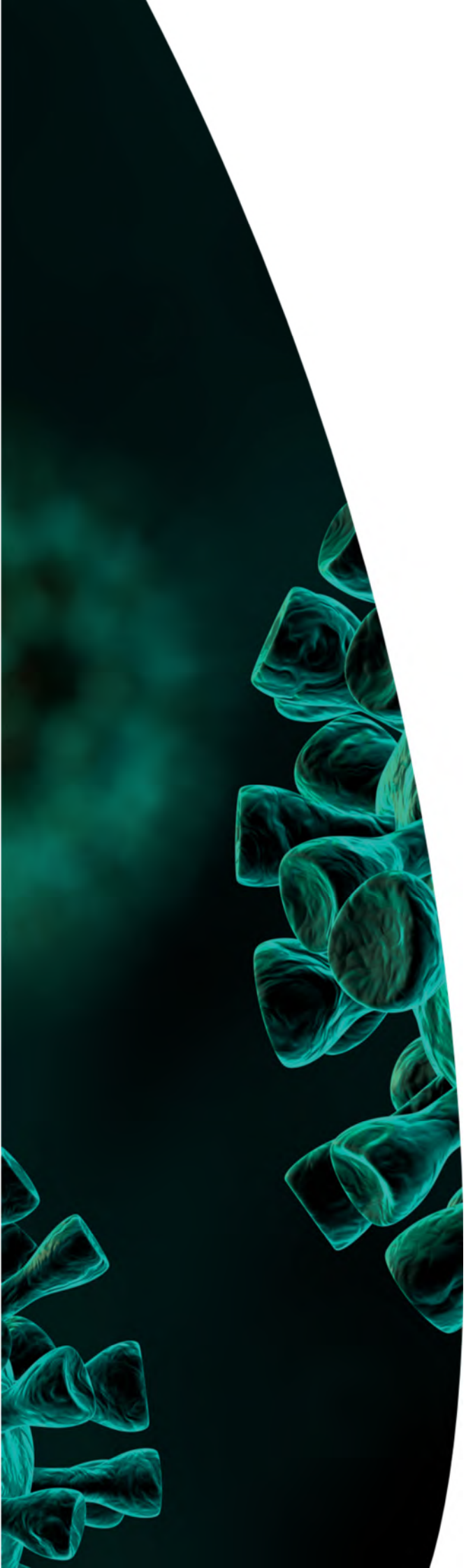
  However, this is subject to the parties' consent. Parties will therefore have to communicate their refusal to forego the possibility of a hearing within 15 days of the judge's proposal to render a judgment without it.

  By way of exception, the parties may not object to the court's decision to rule without a hearing in three cases: in summary proceedings, in the expedited proceedings on the merits, or when the judge has a fixed time limit within which to render his ruling, which might arise with liberty and detention judges and in, funeral litigation, for example

  Nevertheless, it is not all or nothing; the Order also allows for hearings to be held by means of audio-visual communication, i.e. by videoconference and, where it is technically or materially impossible to use them, by any electronic means of communication, including telephone.

- **Transfers to another jurisdiction**

  Finally, should courts be significantly affected by a lack of personnel, the Order provides that the activity of courts of first instance wholly or partially unable to function may be transferred to another jurisdiction of the same nature. The use of this provision is intended to remain exceptional. Taken in the context of the confinement measures, these orders allow for the French judicial system to continue functioning in difficult conditions However, practical enforcement of these measures will prove challenging due to the backlog of hearings that will have been delayed and the disorganisation resulting from the confinement measures. The extension of time limits therefore offers litigants sufficient flexibility to see how the health crisis will unfold over the next few weeks and adapt accordingly.



Can civil or commercial proceedings still be introduced?

As of 20 March 2020, no existing statute prohibits the introduction of new judicial proceedings; however, constraints stemming from confinement largely limit such possibilities.

Urgency will have to be clearly demonstrated.

In addition, initiating proceedings requires the delivery of a summons by a bailiff to the defendant. This particular point is largely affected by confinement measures and should limit the launch of new proceedings.

International Arbitration

France is home to the International Chamber of Commerce ("ICC'), the world's leading international commercial arbitration institution. ICC arbitration is provided for in many international standard form construction contracts, such as FIDIC.

The ICC is still fully operational during the coronavirus outbreak. As with most international arbitral institutions, the ICC has requested that all communications should be conducted by primarily by email during this time. This includes the filing of requests for arbitration, emergency arbitration, and other ADR services, which should be addressed to arb@iccwbo.org, emergencyarbitrator@iccwbo.org, and adr@iccwbo.org respectively. During the outbreak, there is no longer the obligation to send hard copies by post or courier following submission by email.

All hearings scheduled to take place in Paris at the ICC Hearing Centre before 13 April 2020 have been postponed or cancelled. Meetings scheduled at other ICC locations will be conducted virtually.

The ICC has issued an informative notice which is available on the ICC website here

10. SUSPENSION OF TIME LIMITS - FOREIGN INVESTMENTS - MERGER CONTROL – FORCE MAJEURE – MAC (FRANCE)

We wanted to share with you some brief thoughts regarding the impact of the current circumstances on different aspects of French M&A transactions. We will try to provide answers to some of your queries but we also wanted to provide "food for thought" concerning ongoing transactions and transactions that have already been completed.

Suspension of time limits in sanction clauses

Article 4 of the French ordinance No. 2020-306 dated 25 March 2020 provides for the suspension of legal, regulatory and contractual time limits.

Health emergency times provided for under French law No. 2020-290 dated 23 March 2020 have been retroactively set up for a period from 12 March 2020 to 24 May 2020, subject to potential prorogation. The scope of the ordinance covers only the suspension of time limits during the health emergency times plus 1 month.

Only the time limits expired between 12 March 2020 and 24 June 2020 (the "Reference Period") fall into the scope of the ordinance.

In contractual matters, periodic penalty payments (*astreintes*), penalty clauses (*clauses pénales*), termination clauses (*clauses résolutoires*) or any clause providing for a forfeiture of enforceable rights, assuming that the contractual obligations remained are not performed during any contractual grace period which expires during the Reference Period are suspended until the term of the Reference Period. The periodic penalty payments (*astreintes*) and penalty clauses (*clauses prénales*) which were effective prior to the beginning of the Reference Period shall be effective again after a period of one month as from the term of the Reference Period in the event the default has still not been remedied at this date.

Impacts on M&A transactions:

- **late interest** could be considered as periodic penalty payments (*astreintes*) and therefore may be suspended during the Reference Period.
- **MAC clauses** that are drafted in such a way that they may be considered as conditions subsequent to the undertaking of purchase may be suspended during the Reference Period.
- failure to comply with the time limits for notification of claims under the terms of the **locked-box or warranties and indemnities provisions** resulting in the forfeiture of rights for indemnification may be suspended during the Reference Period.
- **break-up fee** provisions when they are considered as penalty clauses (*clauses pénales*) sanctioning failure to meet the conditions precedents within the contractual time limit may be suspended during the Reference Period.

Suspension of statutes of limitation for tax and social charges matters

Article 10 of the ordinance No. 2020-306 dated 25 March 2020 provides for the suspension of statutes of limitation in relation to tax audit matters.

Limitations which started running before 12 March 2020 are suspended as from 12 March 2020 until the term of the Reference Period and limitations which were due to start during the Reference Period are postponed until the term of the Reference Period. This provision only covers limitations that were to expire on 31 December 2020 at the latest.

The same provisions apply to French social administration (*URSAFF*) audit matters under article 4 of the ordinance No. 2020-312, without limiting such provisions to limitations that were to expire on 31 December 2020.

Impacts on M&A transactions:

- duration for **warranties and indemnities in relation to tax matters** which are defined with reference to statutes of limitation are extended by the term of the Reference Period, assuming that the limitations were to expire on 31 December 2020 at the latest.
- duration for **warranties and indemnities in relation to social matters** which are defined with reference to statutes of limitation are extended by the term the Reference Period.
- negotiations regarding ongoing transactions shall not provide for a fixed term regarding warranties and indemnities in relation to tax and social matters.

Foreign investments in sensitive sectors and merger control

Article 7 of the French ordinance No. 2020-306 provides for the suspension of time limits during which an administrative decision, agreement or opinion may or shall be granted or is deemed to be implicitly granted and that do not elapse between 12 March 2020 and the term of the Reference Period. The starting point for time limits of the same nature which should have started running during the Reference Period are postponed until the term of the Reference Period. The same rules apply to time limits at the end of which the French administration is bound to confirm the completeness of a filing or to require complementary information/documents.

Consequently, such provisions shall apply to **prior approval of foreign investments in France** in sensitive sectors (which has been amended since 1 April 2020 by a French *décret* no 2019-1590 and a French *arrêté* dated 31 December 2019).

However, the French Ministry of Economy and Finance indicated orally that the departments in charge of such investigations do not contemplate implementing these time limit suspensions for the time being and that they intend to carry out due diligence in the usual legal and regulatory timeframes to the extent possible. However, delays should be anticipated as the due diligence process requires the cooperation of several other administrative departments that may be locked down.

In the context of **merger control filings**, the French *Autorité de la Concurence* published on 27 March 2020 a statement in relation to the adjustment of its merger control process (https://www.autoritedelaconcurrence.fr/fr/communiques-de-presse/adaptation-des-delais-et-procedures-de-lautorite-de-la-concurrence-pendant-la). They indicated that the timing for the due diligence and the answers on merger control filings will be suspended as from 12 March 2020 until the term of the Reference Period. However, the *French Autorité de la Concurrence* will do its best efforts to deliver, to the extent possible, its opinions or decisions without delays and without waiting for the expiration of the additional time limits provided under these provisions.

Impacts on M&A transactions:

- for ongoing negotiations, the **long-stop date** shall be considered carefully.
- **cooperation clauses** to carry out merger control filings shall be enhanced in order to assist the buyer to obtain these prior approvals and therefore to enable French administrations to reduce the time needed to deliver their approval, without generating any confusion in the responsibilities borne by each party in these processes.

Price structure

The uncertainty of the current circumstances shall lead the buyers to prefer adjustment of the purchase price based on completion accounts.

In the circumstances where sellers push back on such price structure, a price structure combining both **locked-box mechanism and adjustment on completion accounts** may be considered, so that the price based on locked-box accounts may be adjusted if either the net cash position or the working capital requirement falls below a materiality threshold agreed between the parties.

Depending on the circumstances and the involvement of the sellers in the conduct of the business of the target company post-completion, a significant fraction of the consideration may be shifted towards **earn out**.

MAC clause and force majeure

Is the Covid-19 pandemic a reason to implement MAC clauses? A general answer cannot be given to this question as it depends on the wording of such clauses and notably on the exclusions provided therein. The idea remains that these clauses can only be enforced by the buyers because of the occurrence of unforeseeable circumstances having a significant adverse effect on the conduct of the business of the target company.

For executed MAC clauses in which the change of the market conditions has not been excluded, the reluctance of French courts to approve the enforcement of such clauses should result in the fact that the knowledge by the buyers for the past several weeks of the adverse effects of the current pandemic shall ruin the effectiveness of these clauses.

It is now market practice to exclude the ongoing pandemic as a reason for termination of contract for breach of contract. This exclusion is justified as we are now aware of the negative impact on the economy. In the event that this pandemic were considered as a termination cause under the negotiated MAC clauses, we believe that this could only be accepted if a materiality threshold on the negative effects imposed to the target company is provided under the SPA.

Force majeure as defined under article 1218 of the French *Code civil* shall apply to purchase agreements and guarantees. However, force majeure shall exempt the debtor from its obligation (the buyer for the payment of the consideration, the seller for the delivery of the shares and indemnification under the warranties and indemnities) only if the event, which shall be out of control of the debtor, was reasonably unforeseeable at the date of execution of the agreement.

Is the pandemic beyond the debtor's control? It certainly is. Is it unpredictable at the time of the execution of the agreement?

From now, the parties to the SPAs to be executed or executed after 12 March 2020 (or at least from the first external signs of feverishness of the French government) will not be able to take advantage of the unpredictability. In our opinion, it is advisable to provide for a contractual definition of force majeure in ongoing transactions in order to avoid the application of the general definition in the French *Code civil*.

What about agreements executed under conditions precedent prior to 12 March 2020? It seems that force majeure may be usefully claimed in this event. Which party may claim force majeure under these agreements?

At the time of the transfer of ownership of the shares, only the buyer may face difficulties. In this respect, force majeure may be a better ground than MAC clause to put on hold the enforcement of the SPA and to terminate it if need be. Post completion, the seller may face difficulties to pay indemnities, even if he has acknowledged that it shall pay it and successfully claim for force majeure.

No hardship

Article L. 211-40-1 of the French *Code monétaire et financier* excludes sales of financial instruments, notably shares issued by French *sociétés anonymes* and French *sociétés par actions simplifiées* from the scope of French hardship provided under article 1195 of the French *Code civil*.

Consequently, hardship does not seem to be particularly relevant to withdraw from an M&A transaction, except if the transaction relates to French *sociétés à responsabilité limitée*, French *sociétés en nom collectif* and French *sociétés civiles* which do not fall within the scope of article L. 211-40-1 of the French *Code monétaire et financier*.

Undertakings between signing and closing

The current circumstances may lead the buyer to reinforce its control over the conduct of the business of the target company during the interim period between signing and closing.

However, buyers shall be careful not to interfere excessively in the conduct of the business of the target company during this interim period so as not to incur too much liability in the event of further difficulties in the event that the conditions precedents are not met and completion does not occur.

Financing

Current circumstances are likely to make debt financing more complicated than in the past.

The provisions of a condition precedent related to financing shall be considered carefully.

In addition, it may be considered to negotiate a condition precedent in relation to the absence of event of default of the target company regarding its financings.

11. CORONAVIRUS: IMPACT ON CORPORATE LAW AND GOVERNANCE (FRANCE)

Measures adopted by the French government in response to the coronavirus health emergency will simplify some company law requirements, while having possible negative effects on others.

The French government adopted several ordinances on 25 March 2020 in order to adapt, amend and simplify some requirements of French corporate law. These ordinances followed the adoption of the French health emergency law no. 2020-290 dated 23 March 2020. The measures introduced by the ordinances will simplify some corporate law requirements, such as those around the organisation of shareholders' meetings, but may have negative impacts on others, including the rules around intra-group reorganisation.

Extension of time limits for the approval of statutory accounts

Article 3 of French ordinance no. 2020-318 dated 25 March 2020 extends by an additional three months the time limits set by laws, regulations or bylaws of commercial companies for approving their statutory accounts and related corporate documents, or convening a shareholders' meeting to approve the statutory accounts.

To take advantage of the extension:

- the company's financial year end must be between 30 September 2019 and 24 June 2020;
- the company's statutory accounts should not have been approved as of 12 March 2020; and
- the company's statutory auditors, if any, should not have issued their report before 12 March 2020.

To make it easier to hold annual ordinary shareholders' meetings, French ordinance no. 2020-321 dated 25 March 2020 provides that shareholders can attend and vote at such meetings by telephone or video conference. In addition, written consultation of the shareholders is permitted even if the company's articles of association (statuts) do not provide for the possibility, or expressly exclude written consultation.

Where a company has benefitted from a court ordered extension of the timeframe to approve its statutory accounts and that extension is to expire between 12 March and 24 June 2020, the company cannot claim for the additional three-month extension. It must approve its statutory accounts before the date provided for in the court order.

Under article 2 of French ordinance no. 2020-306 dated 25 March 2020, filing of statutory accounts with the greffe of the relevant commercial court is also subject to a suspension of time limits. Consequently, the filing formalities will be deemed to be completed within the legal timeframe when they are completed within one month of 24 June 2020.

Prohibition on allocation of dividends or interim dividends

Certain companies will not be able to allocate dividends in 2020 to their shareholders located in France or abroad, in line with a statement by the Ministere Ministère de l'Economie et des Finances provided under the Q&A section of its website.

The prohibition applies to companies which have requested, in the context of the allocation of state assistance, the postponement of the repayment schedule of tax and social charges or the granting of loans secured by the French state.

Only large companies – those with a consolidated turnover at least equal to €1.5 billion or having at least 5,000 employees as of the closing date of the financial year during which the shareholders have decided to allocate dividends or complete a

share buyback - are affected. However, within a corporate group, the prohibition applies to the whole group even if only one entity has benefitted from state assistance.

The prohibition applies when the decision to allocate dividends or interim dividends was taken after 27 March 2020, unless the allocation of dividends is a legal requirement.

Prohibition on share buybacks

The same rules prohibiting the allocation of dividends or interim dividends will also apply to share buybacks in 2020.

Share buyback schemes in the context of the allocation of free shares to employees approved before 27 March 2020 do not fall within the scope of this prohibition and can be implemented, even though the buybacks themselves will be completed after 27 March 2020.

Reorganisation

As above, the attendance of and casting of votes by shareholders at shareholders' meetings deciding reorganisation transactions - including mergers, partial contribution of assets, demergers and transfer of assets and liabilities by operation of law (transmission universelle de patrimoine) - may be held by written consultation of the shareholders or by telephone or video conference.

Filing required documents with the French tax administration

Article 10 of French ordinance no. 2020-306 dated 25 March 2020, which provides for the extension of some statutes of limitation in relation to tax matters, does not apply to the registration formalities of corporate documents arising from reorganisations. Consequently, registration formalities must be carried out within the month following the date of the corporate document.

Each local French tax desk has its own policy in this respect. Therefore, you should liaise with the relevant tax desk having jurisdiction in the place of the registered office of the company to confirm its approach at this unprecedented time. Some tax desks may accept copies of original documents certified as true by a lawyer using the acte d'avocat (AA) process in order to avoid sending original copies.

Delays are anticipated, but it is recommended that original documents are sent to the tax desk for tax filing purposes.

Time limits for creditors to lodge objections

Where a dissolution without liquidation with transfer of all the assets and liabilities by operation of law (transmission universelle du patrimoine, or TUP) to the sole shareholder takes place under article 1844-5 of the French civil code, completion of the TUP occurs after a 30-day period calculated from the publication of the decision of dissolution in a legal gazette (journal d'annonces legatles, or JAL). During this period, the creditors may lodge an objection (opposition) to the dissolution.

Articles 1 and 2 of French ordinance no 2020-306 dated 25 March 2020 provide that any timeframe set out by applicable law or regulation to lodge a claim or exercise a right, the expiry of which should occur between 12 March and 24 June 2020 shall be renewed on 24 June 2020 for the same period.

Consequently, if a decision of dissolution is published in a JAL before 24 May 2020 (this date included), the 30-day objection period will expire before 24 June and the transfer of the assets and liabilities to the sole shareholder by operation of law (TUP) will be completed on 25 July 2020 at the earliest, assuming that no objection (opposition) will have been lodged by any creditor during the extended 30-day term starting on 24 June 2020.

To the contrary, if the decision of dissolution is published in a JAL at any time after 25 May 2020 (this date included), the 30-day objection period will expire after 24 June and the transferring entity should be able to complete the transfer of the assets and liabilities to its sole shareholder upon any corresponding date after 25 June 2020 assuming that no objection (opposition) will have been lodged by any of its creditors during the 30-day objection period.

It is likely that this discrepancy between timelines was not intended by the Government and that correcting measures may be taken in the coming months.

The creditors may claim that the objection period should start on 24 June 2020 and expire on 24 July 2020 where the transaction was published during the health emergency period, from 12 March to 24 June. The greffe of the Paris commercial court may consider issuing a non-objection certificate with reserves at the end of the 30-day period where the period was to expire before 24 June. However, aArticle 1844-5 states that a TUP cannot be completed until the objections have been either rejected by the court of first instance or paid or guaranteed. It therefore appears that no TUP resulting from a decision of dissolution under article 1844-5 taken after 12 March 2020 can be completed (i) before 25 July 2020 if the publication in a JAL is completed before 24 May 2020 (this date included) and (ii) before 25 June 2020, if the publication in a JAL is completed after 25 May 2020 (this date included), assuming that the end of the health emergency state (24 May 2020) is not extended.

A statement from the National Council of the Clerks of the Commercial Courts (Conseil National des Greffiers des Tribunaux de Commerce) is expected to fix the doctrine in this respect.

Mergers, partial contribution of assets and demergers

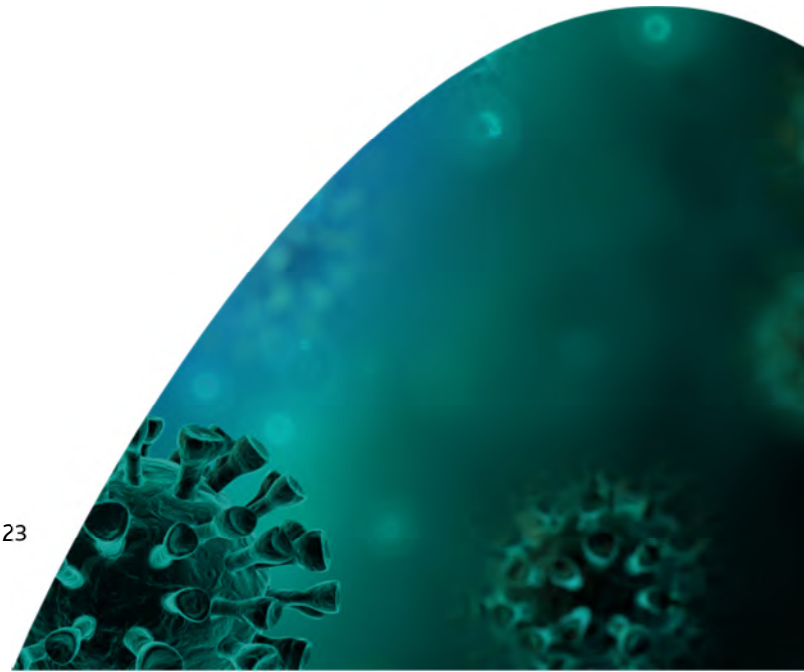
The right of creditors to lodge objections does not prevent the final completion of mergers, partial contribution of assets and demergers under article L. 236-14 of the French commercial code. Therefore, these transactions may be completed between 12 March 2020 and 24 June 2020. However, the beneficiary should provide relevant guarantees in the event of potential objections lodged by the creditors between the date of the decision and 24 July 2020the end of the objection period as potentially extended.

Share capital increase or reduction

As above, the attendance of and casting of votes by shareholders at shareholders' meetings deciding a share capital increase or share capital reduction may be held by written consultation of the shareholders or by telephone or video conference.

The minutes of the decisions of the shareholders are subject to filing with the relevant tax administration within the month following the date of the decision.

The completion of a share capital reduction which is not intended to absorb previous losses will take place at the end of a period allowing objections by the creditors (20 days as of the filing of the minutes of the shareholders with the greffe of the commercial court). Again, the creditors may claim that this objection period should start running on 24 June 2020 and expire on 24 July 2020 if the publication is complete before 5 June 2020 (this date included). Share capital reductions will therefore be deemed completed as from 25 July 2020 if the filing is made before 5 June 2020 and in the event no objection has been lodged by any creditor before 24 July 2020, as above.



12. THE IMPACT OF FRENCH MEASURES ON FINANCING AGREEMENTS (FRANCE)

French mitigation measures in support of businesses affected by the Covid-19 pandemic will impact on the rights and obligations of both borrowers and lenders under project financing and other loan agreements.

Ordinance no. 2020-306 (link to ordinance in French), which was adopted by the French government on 25 March 2020, introduced protective measures for borrowers which will override the contractual position. These measures will be binding on both individuals exercising an economic activity in France and legal entities registered in France, irrespective of the law governing the loan agreement.

The government has also introduced a state guarantee system for new loans as part of a package of measures to support businesses in France during the pandemic.

New laws and regulations may be adopted during the health emergency period, so the situation should be continuously monitored.

Measures impacting existing loan agreements

As the coronavirus continues, borrowers will be keen to ensure that they can continue to access undrawn loan facilities, particularly where needed for cashflow purposes. For lenders, there is an increased risk that borrowers may be unable to repay their loans in the long term.

The ordinance has a direct impact on events of default which can be triggered by lenders under loan agreements. Under section 4 of the ordinance penalty clauses, termination clauses and clauses provided for forfeiture, when their purpose is to punish the non-performance of an obligation to be complied with within a specified period, shall be deemed not to have taken effect or to have been effective if that period expired during the 'reference period' set out in the ordinance. The reference period, which had retrospective effect, runs from 12 March 2020 until one month following the date of cessation of the declared state of health emergency, 24 June 2020, subject to any potential extension.

The date on which the clause will become effective has been clarified by the French ordinance no 2020-427 of 15 April 2020.

- If the debtor has not performed its obligation, the date on which the clause will become effective is postponed at the end of the reference period, 24 June 2020, for a period equal to the time elapsed between, on the one hand, 12 March 2020 or, if later, the date on which the obligation arose and, on the other hand, the date on which it should have been performed.

- The date on which the clause will become effective, when its purpose is to punish the non-performance of an obligation, other than the payment of sums of money, is postponed at the end of the reference period, 24 June 2020, for a period equal to the time elapsed between, on the one hand, 12 March 2020 or, if later, the date on which the obligation arose and, on the other hand, the end of that period.

The effect of the ordinance in real terms is to impose a 'standstill period' related to the health emergency in order to protect borrowers under loan agreements and, where the borrower's main obligation is to repay the loan within a specified period, to suspend that obligation.

However, application of the ordinance is not always clear-cut and it leaves much room for interpretation in certain cases, making decision making for both borrowers and lenders challenging.

Moratorium on payment default and default interest

The ordinance established a legal moratorium, in favour of the borrower, neutralising contractual sanctions related to any non-payment default which occurs during the reference period. Failure by the borrower to make a payment on the due date as provided for under the terms of the loan agreement, whether payment of the principal borrowed or contractual or late interest resulting therefrom, on its due date during the reference period will not be an immediate event of default and payment of the relevant sums by the borrower, in principal and interest, is deferred as set out above.

Other defaults

The ordinance applies to provisions in loan agreements "when their purpose is to punish the non-performance of an obligation within a specified period". Accordingly, lenders remain entitled to demand immediate repayment under the loan agreement following the occurrence of any other event of default applicable during the loan – for example, a breach of some undertakings or negative covenants, or a material adverse change or material adverse effect default.

Material adverse change or material adverse effect

Loan agreements usually do not include force majeure clauses. However, many include an event of default where the lender believes that there has been a material adverse change (MAC) in circumstances or that a change in circumstances has caused, or is reasonably likely to cause, a material adverse effect (MAE). The concept may also be framed as a repeating representation.

Depending on how the definition of the term was negotiated, the lender may be unable to proceed with the loan once a MAC or MAE clause is triggered. Any such provisions will therefore have to be considered on a case by case, fact- and language-specific basis.

MAC and MAE clauses serve as a 'sweep up' protection for lenders against unpredictable or unforeseen events or changes in a borrower's circumstances. Lenders are generally reluctant to rely solely on an event, or series of events, having or being reasonably likely to have an MAE as the sole event of default entitling them to accelerate debt and enforce security.

The Covid-19 pandemic should not by itself cause a MAC or MAE breach, but the impact of the pandemic on the borrower and its operations could be a MAC or MAE. The lender would need to be able to demonstrate that the pandemic will have a MAE on the borrower's business for a sustained period of time. The borrower will need to provide information to the lender to help in that assessment.

Information undertakings

Loan agreements generally contain an obligation on the borrower to provide as much information regarding the finances, assets and operations of its group as lenders may reasonably require. This undertaking can enable lenders to obtain details on the performance of the business in the face of a sharp downturn in trading, allowing them to evaluate the risk. Failure to inform the lender could be a breach of these reporting requirements, which can lead to an event of default.

Accordingly, in the absence of a clear MAC, it is advisable for borrowers to keep lenders informed of their position as the Covid-19 situation evolves, to ensure they have the best information available for making any decisions.

Financial covenants

Many loan agreements include an obligation on the borrower to demonstrate that it is maintaining certain prescribed financial ratios. These are usually objectively determined by the initial financial reports that borrowers are required to provide to their lenders on a periodic basis. A borrower in financial difficulties may breach these covenants during the reference period. Given that the underlying rationale of the ordinance is to provide protective measures to businesses during the pandemic, financial covenant breach defaults will most likely be suspended.

Depending on the circumstances, borrowers may need to consider altering their short term business strategies in order to ensure that financial covenants are not breached after the

reference period – for example, delaying dividend distributions or asset acquisitions. The parties to the loan agreement should also check whether any 'cure' rights are included - for example, an 'equity cure' provision where a sponsor or shareholder of the borrower can inject additional capital, by way of equity or subordinated debt, so that the financial covenant will be deemed not to be breached after the legal grace period offered to borrowers by the ordinance has passed.

Amendments and waivers

As the economic disruption caused by the Covid-19 pandemic continues to affect businesses, parties will need to carefully consider the possible ramifications of the outbreak under their finance documents. Lenders can expect a flow of amendment and waiver requests from borrowers. The parties should make themselves familiar with the amendment and waiver provisions in their loan documentation - including the voting requirements for different types of amendments or waivers - and look to adapt the contractual situation of the parties to the new circumstances.

Borrowers should also be aware of local stimulus packages and consider seeking alternative financing to introduce new money into the business under the loan schemes implemented by the French government in response to the pandemic. The French state guarantee scheme for new loans is one of those measures.

Scope of the French state guarantee scheme for new loans

The French government has set up a €300 billion state guarantee scheme for new loans granted by financial institutions to help businesses seeking help to overcome the near-total shutdown of the economy during the Covid-19 pandemic through loans and credit lines.

State guaranteed loans are available to companies between 16 March and 31 December 2020. The conditions of the state guarantee are defined by law no. 2020-289 of 23 March 2020 (link to law in French) followed by a decree.

Bpifrance Financement SA, a public bank, is in charge of the administration of the scheme on behalf of the state.

Borrower eligibility criteria

Eligibility extends to legal entities and individuals having an economic activity and duly registered, with a SIRENE number, with a French trade and companies register. Real estate companies (SCI), credit institutions and distressed businesses are excluded.

Companies held by private equity funds are also eligible for the state guarantee.

Lender eligibility criteria

Eligible loans must be granted by French or 'passported' foreign credit institutions or financing companies. Intercompany loans are therefore excluded from the scope of the state guarantee.

Main features of the loans

The total amount of state guaranteed loans that can be granted to an individual business cannot exceed 25% of the 2019 total revenue of the borrower or that of the last financial year available. Specific caps are applicable to some innovative companies or businesses created after 1 January 2019.

Eligible loans must not be secured or guaranteed by any other security interests or guarantees, and must include no principal repayment for at least 12 months - only interest should be payable by the borrower. The borrower will be given an option to amortise the loan over an additional period of between one and five years at the end of the first year.

The state guarantee gives rise to a fee, determined by decree and payable by the borrower.

The percentage of guaranteed outstanding loan in principal, interest and ancillary costs, is:

- 90% for companies with less than 5,000 employees and revenue of less than €1.5bn in the last financial year;
- 80% for companies with revenue between €1.5bn and €5bn in the last financial year; and
- 70% for other businesses.

13. DATA PROTECTION AND EMPLOYEE MONITORING (FRANCE)

Coronavirus: data protection should shape employee monitoring

ANALYSIS: Employers in France will understandably be exploring ways to limit the spread of the coronavirus on their premises and across their employee population. Consideration must be given to their data protection obligations.

Ultimately, a balance must be struck between the public health and safety interests in being able to monitor individuals' health and the spread of the virus with the rights people enjoy to liberty and the protection of their personal data.

Employers using data to implement monitoring tools

The CNIL, the French data protection authority, was very active with regard to the coronavirus even before the beginning of the lockdown and reported having to respond to "numerous questions by professionals and individuals concerning the possibility, outside of any medical care, of collecting data concerning employees/ personnel or visitors in order to determine if persons are presenting symptoms of coronavirus, or data concerning movements or events that may relate to personal privacy".

The Labour Code in France requires employers to take measures necessary to ensure the safety of workers and to protect their physical and mental health. On this basis, the temptation to put in place very intrusive measures because of the health crisis may be great.

However, CNIL has said that "measures that may harm the privacy of the data subjects, particularly by collecting heath data that may go beyond the management of suspicions of exposure to the virus are prohibited".

Other actions that employers may consider to ensure the safety of their employees include implementing awareness-raising actions, by making it possible under strict conditions for an employee to notify his or her employer on a personal and individual basis if he or she may have been exposed to the virus, and by facilitating teleworking, for example.

These actions most frequently involve processing of personal data that must be implemented in compliance with data protection rules.

Observing principles of the protection of personal data

The fundamental principles of data protection set out in Article 5 of the General Data Protection Regulation (GDPR) form a framework for asking the right questions before implementing any data processing. Considering the following questions will allow employers to correctly calibrate their plans to implement processing of personal data and to evaluate potential discrepancies from the aims.

1 Are the data that I have collected being processed in a legal, fair and transparent manner with regard to the data subject?

In the context of the coronavirus, the legal basis for processing may in certain cases be to comply with a legal obligation. For the processing of health data by an employer, this must be authorised by a special text and not by a general provision, such as that ensuring the safety of the employee under Article L4121-1 of the Labour Code.

To meet the requirements for fairness and transparency, employees must also have been provided with access to specific information relating to the processing.

2 Are the purposes for which I collect and process the data well-defined, explicit and legitimate? Will they be re-used for another purpose later?

It is not possible under data protection law to select a wider purpose for collecting personal data in order to justify several potential types of processing at a later date. One type of processing corresponds to one purpose. It is necessary to be all the more attentive since certain processing implemented in connection with the pandemic may involve sensitive data. The purpose of the processing must be as precise as possible.

Processing that should only be carried out by a health professional cannot be undertaken by an employer instead, as this would represent an illegitimate purpose for processing and be illegal.

If the data must be re-used for a later purpose that is different from the initial purpose, then the employees must be informed of this later purpose.

3 Is my data collection limited strictly to the data necessary with regard to the purposes for which they are processed?

Not all personal data that can be collected may be collected.

Once the purpose of the collection is defined, explicit and legitimate, employers must ask themselves what data are absolutely necessary in order to fulfil the initial purpose.

4 Are the data accurate? Can I update them if necessary?

The data must be accurate. For this reason it is best to collect the data directly from the data subjects; here, the employees. Data subjects possess a right to rectification, so it is advisable to allow them to be able to directly update their data themselves.

5 Is the retention period for the data strictly limited to what is necessary with regard to the purposes for which the data are processed?

The GDPR sets a general principle of limitation of retention of the data which provides employers with flexibility to determine the duration. However, data retention policies must be justified. In the current circumstances, for instance, it is likely to be justified to retain data until the official end of the health crisis. The subsequent archiving of the data, under certain conditions, may also be justified to avoid its definitive erasure.

6 Are the data processed in such a way as to guarantee appropriate security?

The more the data present a high degree of sensitivity, the more the data controller must apply significant security measures. Data potentially connected with a person's health is considered special category data for which particular attention must be given, particularly in relation to data security.

Transparency by providing information to employees

The obligations on transparency still apply in a crisis, and perhaps take on even greater importance in such circumstances. Employers must not be tempted to disregard their duty to provide data subjects with an information notice about intended data processing before the processing is implemented. The more the employer is transparent, the more the employee will be in a situation to understand and comply.

A list of the information to be provided to the employees is set out in Articles 13 and 14 of the GDPR, which respectively concern cases where data is collected directly from employees and cases where it is indirectly collected.

This transparency principle is also present in the Labour Code, which states that "no information concerning an employee personally may be collected by a mechanism that was not previously brought to his/her attention". The Code also provides that the Economic and Social Committee must be informed and consulted particularly concerning issues relating to the introduction of new technologies or any significant change in the health and safety conditions or the labour conditions.

The rules mean that no processing may be planned if the Personnel Representative Bodies (IRP) have not been consulted in advance.

To accord with the principle of accountability, employers should ensure that they can prove they have provided this information to employees.

Proportionality and data protection impact assessments

As with any implementation of personal data processing, the principle of proportionality must apply and the theory of the least harm must prevail.

To get to the heart of this, employers should also ask themselves what the goal is that they are seeking to achieve, and by what means they can achieve that goal by least affecting individual liberties.

This principle is distilled in many French legislative texts, including Article 1121-1 of the Labour Code, which provides: "No one may apply restrictions on the rights of persons and individual and collective liberties which are not justified by the character of the task to be accomplished or proportionate with the goal being sought."

If the employer is not sure of the proportionality of the planned processing, they can undertake a data protection impact assessment (DPIA).

The study is mandatory when the planned processing may create heightened risks for the privacy of the data subjects. The CNIL has published a list of processing activities for which a DPIA is required, and further criteria has been established by the European Data Protection Board, but other examples include where the processing involves:

- evaluation/ scoring, including profiling;
- automatic decisions with legal or similar effects;
- systematic monitoring;
- collection of sensitive data or highly personal data;
- wide scale collection of personal data;
- cross-referencing of data;
- vulnerable persons, such as patients, elderly persons, and children;
- innovative use – the use of a new technology;
- exclusion of the benefit of a right or contract.

Focus on health data

Any data relating to the past, present, or future physical or mental health of a person are considered to be health data.

The GDPR considers health data to be "a special category of data" to which a reinforced level of security must be applied.

In this case, a special regime applies which is found in part in the GDPR and the French Data Protection Act and in part in the Public Health Code, specifically the provisions concerning secrecy, references for security and interoperability of health data, and concerning the hosting of health data, for example.

CHAPTER 4 – GERMANY

CONTENTS

1. CONTRACTS AND SUPPLY CHAIN (GERMANY)

Disruptions caused by the outbreak of the new Coronavirus have a significant impact to a business's supply relationships. They may lead, as the case may be, to termination rights, cancellation rights, contract adjustments, repayment claims, etc. and even damages.

Under German law, much will depend on whether the parties to a contract have agreed on a force majeure clause – e.g. in a framework agreement or in their general terms and conditions. However, there are also statutory provisions that may apply to this specific situation – particularly if there are no valid and enforceable force majeure clauses between the parties.

What if there is a force majeure clause in the Contract?

Contractual agreements take precedence over the provisions of statutory law. Therefore, in case that a business faces disruptions in its supply chain and/or is unable to fulfil its delivery obligations, the contract documentation should be reviewed carefully:

- Is there a force majeure clause in the (framework) agreement with the supplier/customer?
- If yes, the clause needs to be read carefully. In contracts under German law, the interpretation of a force majeure clause will essentially be identical to the interpretation of a force majeure clause under UK law. We can therefore refer to the explanations in Chapter 1, Section 1.

  Basically, three aspects of a force majeure clause require a closer look:

- Can the Corona pandemic be considered a force majeure event according to the specific wording of the clause?
- What steps need to be taken according to the clause (notifications, etc.)? Are there specific form requirements that need to be complied with (e.g. written form, etc.)?
- What are the legal consequences according to the force majeure clause (e.g. cancellation rights, termination rights, negotiation obligations, etc.)?
- If the force majeure clause is included in general terms and conditions of purchase or sale, the following aspects play an additional role:
  - Were the general terms and conditions effectively incorporated into the business relationship, for example by referring to them prior (!) to the conclusion of the contract, indicating where they can be found and making them available, for example on a website?
  - Are there contradicting force majeure provisions in the contract partner's general terms and provisions?
  - The clause may be invalid if it is "unreasonably disadvantageous", for example because it is too broad, or if it is unclear.

What if there is NO force majeure clause?

In the absence of a force majeure clause, statutory provisions will apply, notably Art. **79 CISG (United Nations Convention on Contracts for the International Sale of Goods).** International supply contracts between companies from different European Union Member States will generally be governed by the law of the country where the seller has his habitual residence (cf. Article 4 Section (1) (a) of regulation 593/2008 (Rome I regulation). International supply contracts with companies from outside the European Union will be

governed by the United Nations Conventions for the International Sale of Goods ("**CISG**"),

- if the contract does not provide for a choice of law clause; or
- if the contract refers to German law without specifically and expressly exempting the CISG.

Art. 79 of the CISG provides that a party is not liable for a failure to perform any of its obligations if it proves that the failure was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences. In so far, the following points should be noted:

- The threshold to assume that there is an "impediment beyond [a party's] control" is rather low and likely to be met at least in the overwhelming number of Coronal-related cases.
- The decisive question will be, whether it could reasonably be expected by a party to overcome the impediment. In that context, it may play a role, whether efforts to mitigate the effects of the impediment could have been taken.

German Statutory Law

The legal consequences vary from case to case. Much will depend on the specific facts. Essentially, one can distinguish three scenarios:

- **Scenario 1:** The performance of the contractual obligations (i.e. delivery, rendering of services) is impossible due the Coronavirus-crisis. This scenario generally includes all cases, where the performance of the contractual obligation would violate any laws or regulations passed on grounds of the Coronavirus-crisis. This scenario also covers cases, where the expense and effort for the performance of the obligation, taking into account the subject matter of the obligation and the requirements of good faith, is grossly disproportionate to the other party's interest in the performance.
  - **Examples** are (1) the stopping of production according to governmental orders, (2) the contract goods cannot be sourced from other sources or suppliers - not even at higher prices, or (3) the costs of (partial) remedial measures exceeded the purchase price by more than 100 % or the required remedial measure triggers follow-up expenses of an undetermined amount for an indefinite period.
  - **Legal consequences** are (1) The **supplier** is entitled to refuse to deliver the contract goods or to render the contract services (Sec. 275 of the German Civil Code), (2) the **purchaser/customer** is entitled (a) to revoke from the agreement (Sec. 326 (5) of the German Civil Code), (b) to refuse payment (Sec. 326 (1) of the German Civil Code) and/or to reclaim the payments already made (Sec. 326 (4) of the German Civil Code), (c) to claim damages in case that the supplier has guaranteed the performance or acted wilfully or negligently (e.g. Sec. 280 (3), 283 of the German Civil Code), and (d) to claim the reimbursement of futile expenses instead of damages (Sec. 284 of the German Civil Code).
- **Scenario 2:** Delivery of the goods or rendering of the services is possible but not economically reasonable due to unforeseen (!) Coronavirus-related disruptions. It is an important feature of this scenario that the disruptions were really unforeseen. Supply chain issues in contracts that were concluded after WHO declared Coronavirus formally as a pandemic on 11 March 2020 do not fall under this scenario.
  - Examples are (1) supplier becoming able to source the contract goods from other sources but at disproportionately high prices and (2) contract goods not beinge

Alternative means of transport (e.g. air freight) are possible but the costs would be disproportionately high

- Legal consequences are (1) adjustment of the agreement (Sec. 313 of the German Civil Code), and (2) in cases where an adjustment is not possible or unacceptable, revocation or termination of the agreement (Sec. 313 (3), 314 of the German Civil Code

- **Scenario 3:** All other cases. For cases that do not fall under Scenario 1 or Scenario 2, German statutory law does not provide for any to refuse payment or request an adjustment of the agreement.

IMMEDIATE THINGS TO DO

- Try Identify possible Coronavirus-related disruptions in your supply chain or in relation to your customers.
- Review the contract documentation (incl. general terms and conditions) carefully. Evaluate your legal position and potential legal risks.
- Inform your customers about your difficulties to supply so that they are able to take measures to mitigate the damage potential. Phrase your communication carefully. It may be used as evidence in court. Communicate preferably in writing, by fax or e-mail.
- Document the reasons for the disruptions, e.g. cancellation of orders with your sub-suppliers, border closures, governmental actions, etc.
- Document your efforts to fulfil the agreement, e.g. search for alternative sources, transport routes, sub-suppliers, etc.

2. EMPLOYMENT AND IMMIGRATION (GERMANY)

Also in Germany, the Coronavirus outbreak significantly affects employment relations and causes a wide range of complex questions for the HR professionals' day to day work. The most important ones are addressed in the following paragraphs:

Employees in self-isolation and in Quarantine

In the event an employee is self-isolating at the employer's request (e.g. to protect colleagues' health and safety), the employee would remain to be entitled to full pay.

To the contrary, employees who have been banned from work by the responsible authorities, or quarantined in line with the German Protection Against Infection Act (*"Infektionsschutzgesetz"*), receive a compensation claim against the employer. The compensation amounts, for up to six weeks, to the full net loss of earnings plus social security benefits. Upon application, the employer may receive corresponding reimbursement from the authorities. Again upon respective application, the responsible authority is obliged to grant the employer an advance amounting to the anticipated amount of reimbursement.

Company closure

In the event the employer decides to preventively close its business operation, as a matter of principle, such course of action lies within the employer's sphere of risk ('business risk theory'). Accordingly, the employer must generally continue to pay the salary.

However, it has not yet been clarified by courts (and there are also no specific statutory provisions) whether the claim for reimbursement under the Protection Against Infection Act (*see above*) also applies (to all employees of a company) in the event of a company being closed down by administrative order in the course of preventive measures. Certain authorities take the approach that there is no entitlement to reimbursement under the Protection against Infection Act in such case. The Federal Ministry of Labour and Social Affairs and the Federal Employment Agency also appear to take the approach that employees being affected by an officially ordered preventive closure of a business are entitled to short-time work compensation by the employer (*see below*).

Childcare for healthy children

The Coronavirus outbreak and the subsequent closure of all schools and nurseries in Germany has resulted in the parents' need to care for their children during regular working time. Where there is no public emergency childcare available (which is currently offered only to parents working in critical sectors such as healthcare and security), employees should be given the opportunity – as far as the specific activity allows – to work agile from home. Since home office generally requires the employer's consent and in the light of the wider legal consequences of such agile working scheme we recommend creating a corresponding regulatory framework (shop agreement or amendment agreement to the employment contract).

In the event home office is not feasible (or employer and employee cannot reach agreement), but employees are unable to work due to the need to care for children, employees are entitled to continued remuneration for a rather short period of time (in line with court decisions, two to five days) as sec. 616 of the German Civil Code grants paid leave for a "relatively short period of time" if employees are prevented from

performing their work for personal reasons. This applies if inability, as in the present scenario, is not caused by the employee's fault.

As a result of an initiative by the Federal Ministry of Labour and Social Affairs as of 23 March 2020, which has been approved by the German Bundestag on 25 March 2020, a compensation claim for loss of earnings in the event of official closure of schools and nurseries to contain the current pandemic is to be included in the Protection Against Infection Act in the short term. This is intended to mitigate the loss of earnings suffered by working parents of children up to the age of 12 when they have to look after their children themselves due to the closure and are therefore unable to pursue their professional activities.

According to the current plan, no compensation is available if the person concerned is able to organise other reasonable care (e.g. by the other parent or emergency care in the facilities). The same is true if there are other ways of staying away from work temporarily on a paid basis, such as reducing time credits. Also, there is a (priority) entitlement to short-time work compensation and for times, when the institution would be closed for school holidays anyway.

Risk groups such as the child's grandparents do not have to nor should they be involved in childcare. The compensation amounting to 67 percent of net income is granted for up to six weeks and is limited to a maximum monthly amount of EUR 2.016,00. Payment is made by the employer, who can submit a refund application to the responsible authorities.

Childcare for sick children

In this case the employee can claim unpaid leave of absence in accordance with sec. 45 Social Code ("*Sozialgesetzbuch*") V. For the duration of the unpaid leave of absence, the employee receives sickness benefit from the health insurance.

Short-Time work

Short-time work allowance is paid as (partial) compensation for the salaries lost due to a temporary loss or a temporary reduction of work. This allows employers to be relieved from costs and employees to continue to be employed even in times of crisis. The aim is to avoid dismissals. According to sec. 95 Social Code III, employees are entitled to short-time work compensation if (1) there is a considerable loss of working hours with loss of pay, (2) the operational and personal requirements are fulfilled, and (3) the absence from work has been reported to the Employment agency.

The amount of the short-time allowance is 67 percent of the net remuneration difference for employees with at least one child and 60 percent for employees without a child, capped, however, at the social security contribution ceiling. Short-time work cannot be ordered unilaterally by the employer, but must be agreed with the employees. Such a legal basis can be established by collective agreements, shop agreements, regulations in the employment contract or subsequent supplementary agreements to the employment contract.

Accordingly, the calculation of the short-time working allowance is based on the difference between the actual remuneration (actual gross remuneration in the month of short-time working) and the target remuneration (gross remuneration which the employee would have earned in the month of entitlement without the loss of work).

As in the case of unemployment benefit, the short-time working allowance is intended to cover loss of earnings up to the social security ceiling. At present, short-time work benefits can be drawn for a maximum period of 12 months. By order of the Federal Ministry of Labour and Social Affairs, the period of entitlement could be extended to up to 24 months. We assume that this extension will be adopted in due course.

Business travel

In Germany, there is currently a comprehensive and very far-reaching ban on personal contact which comes close to a curfew. This means that any stay in groups of more than two persons is prohibited. This includes that business trips are generally forbidden (except for "key workers"), which is backed by exit restrictions. However, even in the case of the current restrictions being lifted to some extent, employees can still refuse going on business trips if travel to a risk area is ordered.

Communicating with employees

According to the applicable data protection regulations, health data is a so-called "special category of personal data". This means that the data is subject to higher protection and employers must therefore ensure, at least in principle, that an employer-wide communication does not contain such data. For example, it would be permissible and, under certain circumstances, also useful from a welfare point of view, to inform employees that there is a confirmed case of coronavirus within the workforce. However, the name of the specific person should only be mentioned within a narrow circle if this is necessary for the traceability of infection chains and the further protection of other employees.

Co-Determination rights and capacity to ACT of the works council

If there is a works council in the company, the works council has numerous co-determination rights on issues that are currently very relevant in the company, e.g. health protection, the introduction of hygiene regulations and the introduction of short or overtime work.

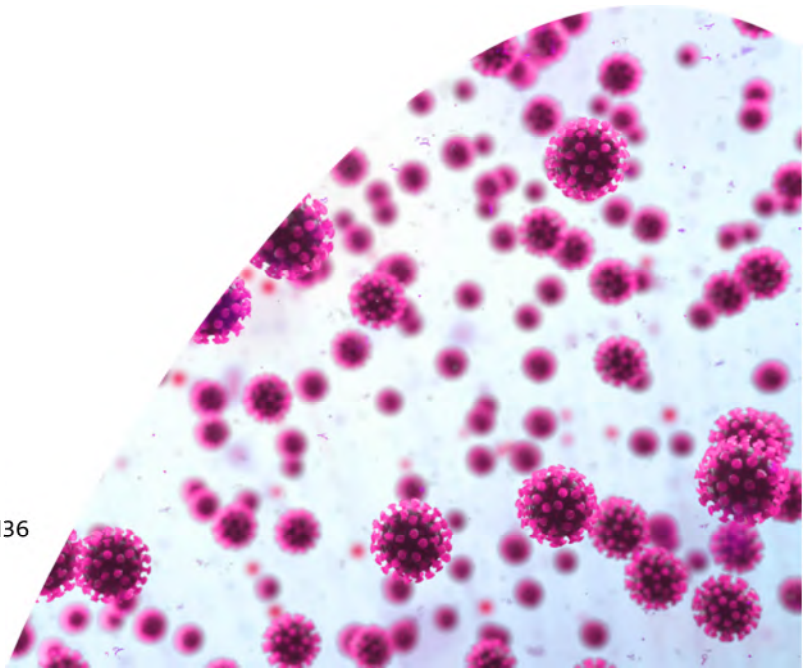
Under German law, the members of the works council must meet face-to-face. The presence of at least 50 percent of the members of the works council is required to constitute a quorum. A current problem for many companies is that the works council intends to cease its activities completely with reference to existing health restrictions. Whether resolutions are effective, for example on the basis of video conferences, is currently still controversial. This leads to the problem that works councils either do not want to meet at all or their resolutions are ineffective. However, the Federal Minister of Labour has recently issued a "ministerial declaration" stating that he considers decisions taken by works councils via video conference or on a similar way to be effective in the current emergency situation.

Furthermore, pragmatic solutions are required. A categorical refusal by the works council to meet or to exercise its co-determination rights is unlikely to comply with the requirement of cooperation based on trust. If decisions are made by video conference, they should be confirmed in person - as soon as possible - following the known procedure.

Health and safety

The employer has a duty of care for its employees and must therefore take protective measures to minimise risks within the scope of its possibilities. Although no absolute protection can be afforded, the employer should take measures to prevent infection and inform about the risk of illness and infection. The following measures are taken regularly:

- Notes on the observance of hygiene regulations (e.g. no shaking hands in greeting, frequent and correct disinfection and washing of hands), provision of disinfectants and close cooperation with local health authorities is necessary, especially information in case of suspicious cases
- Information on the typical symptoms of the disease (information on this can be found on the website of the Robert Koch Institute, available at: https://www.rki.de/EN/Home/homepage_node.html;jsessionid=879D0ADBDC569445F63AAEEFA060162E.internet062
- Identification of risk groups, in particular employees living in or having travelled to risk regions and ordering a medical examination
- issuing binding (written) guidelines for dealing with the current situation
- Development of an emergency plan (with the works council)



- Provision of protective clothing and means of protection as far as possible
- Spatial separation of employees or arrangement of home office

Immediate things to do

- As far as it has not happened yet: Carry out a risk assessment with regard to health and safety and introduce relevant measures to ensure the health and safety of employees in accordance with the guidelines of the German health system.
- Clear communication with the employees about all updated absence procedures - e.g. the possibility to report absences remotely (to avoid infection), any request to report coronavirus-related absences to a central inbox to centrally track possible effects on the workforce.
- Informing managers and executives about company policies - with the help of an FAQ guide. Ensure that all employees receive a consistent message about the process and company policy.
- Mobile working/home office - check if steps are needed to facilitate home working (e.g., issue laptops and/or network capacity for more home working)
- Keep clear records and test protocols of all actions and decisions that can later be used as evidence of compliance with the relevant requirements.
- Inform yourself about possibilities to prevent or limit the economic damage. This includes in particular the possible introduction of short-time work, use of crediting possibilities for existing working time credits and holiday entitlements, insofar as this is legally possible in individual cases.
- Involve the works council - where it exists - in your deliberations in order to achieve the broadest possible agreement and support from employees in overcoming the crisis.

3. EVENT STAGING (GERMANY)

Event management is an industry of its own with numerous individual service providers rendering their specific service to the benefit of a glitteringly event such as a music festival, a sports event, an auto show or any other type of fair or conference. Due to the worldwide spread of Covid-19, these events have been cancelled or postponed to later in the year.

Some occasions had to be cancelled only days before the actual venue. Sometimes, exhibitioners, attendees and caterers were informed well in advance. Particularly those informed on short notice had already substantially invested in their participation. Organisers had planned with the revenue deriving from the tickets and stand fee. Literally all stakeholders are now faced with the same question; who will pay for the loss? A difficult question to be answered, and one very much depending on the facts of the individual case.

In Germany, the first fairs were cancelled and postponed in early February 2020. Such cancellations were seen as thoughtful precautionary measures or, depending on the respective view taken, as unnecessary scaremongering. Since then, the situation as changed dramatically. On 22 March 2020, a nationwide curfew (*Ausgangssperre*) that was imposed by German government limiting closer human contact in the public to a minimum of two people. Gatherings of people living in the household remain permissible, however. There are only very few exemptions, e.g. for certain work purposes. As in many other countries, it cannot be foreseen how long these limitations will remain in force.

Germany is particularly known for its rich tradition of national and international trade fairs (*Messen*). Organisers book event locations years in advance, and exhibitors spend substantial funds on marketing concepts, exhibition booths, trade fair construction, travel and accommodation for their employees. As mentioned above, it is an entire industry of its own being dependent on those events taking place. Cancellations do jeopardize the related business, even more of announced at very short notice. Often, long-standing partnerships and business are put to a hard test when the fair, conference or other event happen to be postponed despite of substantial investments already having been made.

What we see happening at the time being is prudent conversations leading to sensible solutions and shared bearing of losses. However, one cannot take it for granted that such amicable solutions are always reached. Notably, in situations where entire businesses are at stake, the principle of bearing and sharing of costs may not work. In these cases, one need to look into and interpret the contractual situation very closely.

Analysing the contractual situation

Under German civil law, contractual arrangements come first when analysing the exact legal position the contractual partners are in. Usually, contracts hold clauses dealing with default. In most cases, those clauses will not explicitly refer to pandemic situations. However, some general language will be available for interpretation.

Only if (1) existing contractual language is sufficiently broad and vague, (2) no provision at all is dealing with such matter, or (3) the respective clauses must be deemed void, statutory law comes into play. Notably in respect to contractual clauses referring to 'Force Majeure' we see room for reference being made to statutory law. For, these clauses are commonly drafted in a rather open way with examples given rather than a carved-in-stone definition what shall be understood as forming 'Force Majeure'. However, there are also other means than 'Force Majeure' allowing for contracts to be amended due to a

rapid and unforeseen change of situation. Thus, it would be wrong to only look at 'Force Majeure' in times of Covid-19.

No statutory 'Force Majeure' clauses in German law, but guiding case law

German civil law does not include a specific statutory definition of 'Force Majeure'. However, the case law pretty much follows the same criteria as set out in the UK chapter above. Thus, rather than repeating the same principles, we refer to the above considerations.

At the time being with no gatherings of substance being allowed, the organizers of events may very well rely on 'Force Majeure'. For, they are simply prevented from running the fair, show or other event. In consequence, they are not liable for damages. However, they can neither keep the ticket prices or booth fee. The primary contractual obligations fade away. Even that may cause severe financial losses and can lead to bankruptcy.

German statutory law

The general law of obligations wihtin the German Civil Code (*Bürgerliches Gesetzbuch – BGB*) contains provisions regarding the '*exclusion of the duty of performance*' in Section 275 BGB and the '*interference with the basis of the transaction*' pursuant to Section 313 BGB, which are both highly relevant in this context.

If the realisation of an event is still possible from an objective and subjective point of view, but the overall circumstances have heavily changed, Section 313(1) BGB is likely apply. Under the condition that the *basis of the contract* has significantly changed since the contractual obligations were entered into, either party may ask for reasonable amendments provided that the parties would not have entered into the contract or would have agreed on different terms had they foreseen this change. However, if the amending of the contract is not possible or one party cannot reasonably be expected to accept the change, the disadvantaged party may revoke the contract according to Section 313 (3) BGB.

In many cases, both sides will be in the position to ask for an amendment if an event is cancelled on short notice. The service cannot be rendered as intended or it can be rendered but it is of no value to the recipient at the time being. Therefore, the core of the amendment will be the time of delivery and render. If the fair or show is merely postponed, such amendment will be reasonable for both sides. There is of course the risk of numerous events being moved from Q1 or Q2 to Q3 2020. Thus, finding a date not conflicting with other commitments may result in new conflict. This might eventually lead to later withdrawal from the contract. Losses without anyone's fault can easily arise from those scenarios. Under German contractual law, such situations may very well leave the service provider without any promising remedy. However, these are the cases where indeed the governmental Covid-19 measures need to make up for the losses.

A more imminent problem are expenses and investments that turn out to be lost due to cancellations at last minute. Notably, caterers need to plan well in advance. They need to have perishable goods ready when needed. The postponement of an event inevitably leads to those goods perishing. The money is lost. Once again, the first glance need to be directed to the contractual arrangements. If the parties end up discussing the question of whether reasonable amendments can be made to the agreement, the losses from goods having perished already need to be considered. We recommend looking beyond the bilateral relation amongst the parties and to jointly engage in taking benefit of the governmental Covid-19 measures.

Immediate things to do

- If using technology as a surrogate for physical meetings is not an option for your event, postponing may be a better choice than cancelling it for good.
- Minimising damages and reimbursement claims from attendees, exhibitors or service providers should be a key focus, as well as strategic communication. Start by checking the contractual situation with the event location and other providers for 'Force Majeure' clauses and other possibilities for adjustments.
- If the concluded agreements do not offer such possibilities, civil law provisions like Section 275 or Section 313 BGB could apply and minimise duties and damage claims.
- There will be occasions where amending the contract by way of changing the time of delivery and rendering of service will not satisfy the needs of the parties. We recommend looking beyond the bilateral relation amongst the parties and to jointly engage in taking benefit of the governmental Covid-19 measures.

4. COMMERCIAL LEASES (GERMANY)

The corona virus (*SARS-CoV-2*) continues to spread. The economic impact on the real estate sector is tremendous. All federal states of Germany have issued general orders for the (temporary) shutdown of retail stores not necessary for supplying the population with essential goods.

The gastronomy also suffers from either mandatory closures or limited services (take-away) or opening hours. The (financial) situation for many tenants has deteriorated since nationwide restrictions on social and physical contact have been imposed.

For both landlords and tenants the question arises as to how the situation affects existing leases. It is foreseeable that lack of revenue on the part of the tenant will have a detrimental effect on the existing business relationship. The parties of commercial lease agreements should therefore be aware of the applicable legal framework.

Obligation of the tenant to pay rent

To the extent that the landlord has fulfilled its obligation to grant use of the leased premises to the tenant, the tenant is obliged to pay the agreed rent despite the current situation.

In principle no grounds for a reduction of rent

Loss of sales due to fewer customers does not justify a reduction of rent. The tenant bears the risk of utilisation of the leased premises, as well as the risk for the profitability of its business. Officially ordered shutdowns or restrictions on use do not qualify as a reason for a reduction either. Public law impediments to use and restrictions of use only constitute a defect justifying the reduction, if they are related to a specific quality, condition or location of the leased premises itself (German Federal Supreme Court, judgement of 13 July 2011-case XII ZR 189/09). The orders enacted as a result of the corona pandemic do not prohibit the use of the leased premises as such. The leased premises remain generally suitable for the lease purpose. This is comparable to not obtaining an operating concession, contractually falling within the risk and responsibility of the tenant.

Rental reduction conceivable in the event of a breach of the obligation to grant the use of the premises

A reduction of rent is conceivable if the landlord does not fulfil its obligation to grant the use of the premises. Without an official order addressed specifically to them, landlords should therefore not impose any restrictions on the use of the leased premises and the common areas (e.g. closure of parts of the property).

Right of the tenant to adapt the contract

It is open whether the corona crisis qualifies as an event which might entitle the tenant to ask for adaption according to the general principles of interference with the basis of the transaction according to Section 313 German Civil Code (*BGB*). The fact that the legislator has recently redistributed the risks itself through new legislation argues against the application of Section 313 German Civil Code (*BGB*).

Obligation of the tenant to operate the business

If a closure of the business has been ordered by the authorities, the landlord can not insist on a contractually agreed operating obligation. Fulfilment would be objectively impossible for the tenant in this respect. If the use of the business is not completely prohibited, a contractually agreed operating obligation remains applicable.

Temporary exclusion of the possibility of termination due to rent arrears

The Government has enacted a new law to mitigate the consequences of the Covid-19 pandemic. Under the new law lease agreements may not be terminated on the grounds that tenants are unable to pay the rent in whole or in part during the period from 01 April 2020 to 30 June 2020 as a result of the impact of the corona-pandemic if these rent arrears are paid until the end of June 2022. The reason for a termination due to

arrears of rent from the months April, May and June 2020 is therefore precluded until June 2022. The law applies equally to residential as well as commercial leases.

However, the suspension is limited to rent and does not include VAT owed on such rent nor any advances of additional cost (*Nebenkosten*). Landlords do not get any relief on the VAT side. In particular, as the payment may only be withheld for a certain amount of time, landlords cannot argue with any adjustment in value (*Wertberichtigung*) of the lease claim. And fiscal authorities do not grant any relief on payment obligations in the ongoing business operation. They rather grant long periods for past due amounts.

What applies in the case of insolvency of the tenant?

Since insolvencies are only postponed until 30 September 2020, the question arises which effect the insolvency of the tenant has on the lease agreement.

If the tenant has filed for insolvency, the landlord is not entitled to terminate the lease agreement. At the same time, the insolvency administrator (*Insolvenzverwalter*) has a special right of termination with a 3-month notice period.

However, the rent claims are so-called privileged claims, so that the insolvency administrator has to pay the rents from the insolvency mass prior to other claims. Nevertheless, rents that have been paid before the insolvency application has been filed, can be contested, if the landlord was already aware of the tenant's inability to pay at that time. As a rule of thumb, it is assumed that the landlord was aware of the situation if the tenant is in arrears with 3 months' rent.

There are opportunities for landlords to protect themselves against a contest of insolvency (*Insolvenzanfechtung*). One option in this regard is the so called cash transaction (*Bargeschäft*). A cash transaction is a payment for which a counter-performance is made immediately (up to 30 days after due date). Such a payment is incontestable. This also applies to rental payments, provided that these are not paid later than 30 days after the due date. A landlord is therefore well advised to enter into a deferral agreement that meets the requirements for a cash transaction. In particular, a deferral agreement should include a provision that any current payments are set off against the most recent debt.

May and should landlords conclude deferral agreements with tenants?

However, it must be carefully examined in advance for each individual case whether a corresponding deferral agreement may and should be concluded, and if so, how the respective content should be agreed. This depends, among other things, on the asset class and the legal structure of the respective entity of the landlord and the tenant as well as the respective provisions in the lease agreement. If the landlord is for example a public fund, the provision of Section 26 paragraph 1 German Capital Investment Code (*Kapitalanlagegesetzbuch*) must be observed, according to which a capital management company must act in the sole interest of its investors. Asset managers are therefore advised to strongly act according to agreed business plans or seek the consent of their investors to avoid any risk of being in breach with that obligation.

Content of a deferral agreement

If the landlord has decided to offer the tenant a deferral, it is necessary to include some specific provisions in the deferral agreement. In particular, clear time frames and the concrete amount of the instalments must be regulated. Besides, a provision with regard to the interests should be considered. In any case, it should be determined, that the respective payments are set off primarily on the most recent debt and only subordinately on the deferred rent in order to meet the requirements of the cash transaction (*Bargeschäft*).

Furthermore, it is possible to incorporate the obligation of the tenant to use state aid and subsidies. The government has recently launched various programs to support tenants in financial distress.

State aid and subsidies

Microenterprises and self-employed persons can apply for non-repayable state subsidies, for example. The application is made online. Since the approval is the responsibility of the federal states, there are differences in the application process and competencies. The homepage of the Federal Ministry of Finance (*Bundesfinanzministerium*) provides an overview of the competent authorities and offices. Furthermore, the tenants application for a loan from its house bank may also be considered. The government has set up a special program for this purpose. The state development bank (*Förderbank*) KfW covers up to 90 percent of the risk. This is also an option for large companies. It is possible to obtain up to one billion Euro. Further information can be found on the KfW website. In addition, the requirements for the approval of short-time work compensation (*Kurzarbeitergeld*) have been eased. Applications can be made via the homepage of the Federal Employment Agency (*Bundesagentur für Arbeit*). For regional funding programmes, a keyword search on the page of the funding database (*Förderdatenbank*) is worthwhile.

Immediate things to do

- Due to the current dynamics in tenancy law and the expected enactment of new laws and regulations to protect tenants from insolvency, the current state of legislation must be taken into account before any legal action is taken.
- If it is likely that a tenant will not be able to pay the rent, it is advisable in any case for the parties to discuss this matter in an early stage. Amicable solutions (e.g. deferral agreements or payment by instalments) can prevent the tenant from becoming insolvent.
- Due to the risks for the landlord associated with insolvency, it is advisable to act now rather than wait for the tenant to become insolvent. However, it should be carefully considered whether an agreement on the payment of rent may and should be made. In any case, certain content requirements should be observed (clear time frames, concrete instalment amounts, any payments are to be set off against the most recent debt).
- If a consensual solution has been reached between the parties, it is crucial to ensure that the fixation complies with the written form. This is because according to Section 550 German Civil Code (BGB), agreements that do not comply with the written form requirement can give grounds for a right of ordinary termination.
- If applicable, the strategy should also be coordinated with financing banks in order to avoid possible conflicts/violations with the loan agreement.
- It should be assessed whether the tenant may be entitled to state aid and subsidies that enable him/her to pay rent.
- Landlords can also use existing rent securities (deposit etc.) for satisfaction and require the tenant to refill these securities. It is open whether the breach of such obligation entitles the landlord to terminate the agreement. However, this result is probably socio-politically undesired, as it contradicts the intention of the legislator to relieve tenants in the corona-crisis.

5. CONSTRUCTION CONTRACTING (GERMANY)

Measures put in place by the German government, as well as some of Germany's neighbouring countries' governments, in response to the Covid-19 pandemic are causing considerable disruptions to the construction industry. All German federal states have implemented regulations providing for 'social distancing' and even prohibiting the carrying out of certain business activities. Bavaria, Germany's second most populated federal state, implemented some of the most stringent restrictions and only allows the carrying out of 'essential' businesses; such 'essential' businesses, at present, including the construction sector[4].

Government measures do not at this stage altogether prevent the operation of construction sites. However, significant uncertainties remain. The next few months will be particularly challenging for employers and contractors alike, as they seek to adapt to the Covid-19 measures whilst having to comply with their contractual obligations.

In a first step key issues that are likely to arise in Germany would include the following:

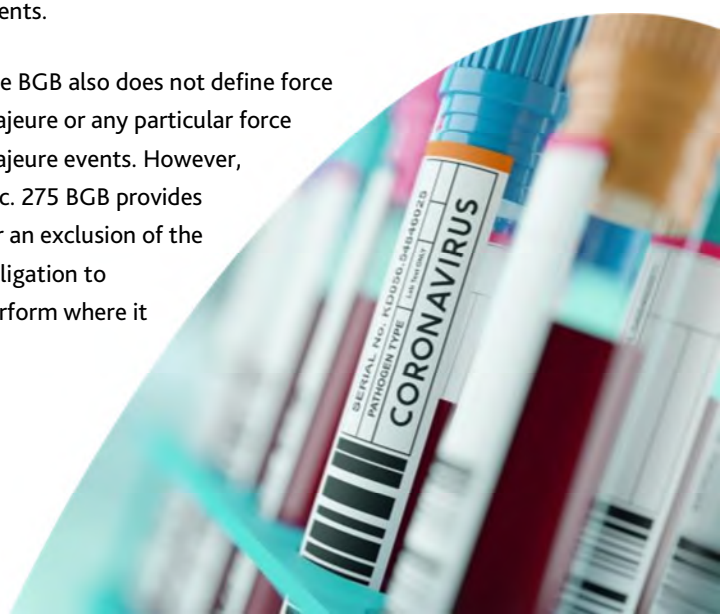
- absence of personnel(also on account of border closures);
- unavailability of materials because of disruption to supply chains;
- delays in complying with contractual obligations on the part of employers – for instance delayed construction permits due to the respective authorities requiring significantly more time, milestone payments due to cash flow issues, or lack of timely responses to claims under the contract;
- delayed performance on the part of contractors, esp. failure to comply with contractual completion times;
- the prospect of the federal government or state governments going one step further and ordering the suspension of works on site; and
- the possibility that any suspension of works may continue for a prolonged period and trigger termination rights.

Force majeure under German law

The availability of claims under construction contracts will be dependent upon the individual contract. Where a contract contains a force majeure clause the respective content will, thus, be key; provided, however, the force majeure clause is not in the nature of 'general business terms' (*Allgemeine Geschäfsbedingungen*) or, where it is, survives the 'fairness test' (*Inhaltskontrolle*) in accordance with Sec. 305 et seq. of the German Civil Code (*Bürgerliches Gesetzbuch – BGB*), failing which it will be void. Contractors need to be aware that unless a force majeure provision in their contract explicitly refers to pandemics, Covid-19 will not automatically qualify as a force majeure event.

The most widely used set of 'general business terms' relating to the execution of construction works in Germany is the VOB/B (*Vergabe- und Vertragsordnung für Bauleistungen/ Teil B: Allgemeine Vertragsbedingungen für die Ausführung von Bauleistungen*). The VOB/B refers to force majeure (*höhere Gewalt*) in Sec. 6 and Sec. 7 VOB/B, but does not set out a definition of force majeure or any particular force majeure events.

The BGB also does not define force majeure or any particular force majeure events. However, Sec. 275 BGB provides for an exclusion of the obligation to perform where it



[4]See https://www.stmwi.bayern.de/presse/pressemeldungen/pressemeldung/pm/43321/; only available in German.

is impossible for the obligor, and for anyone else, to perform (*Unmöglichkeit*).

For any event to qualify for that purpose it is required that–

- the event is beyond the control of a party;
- the event could not have been reasonably foreseen at the time of entering into the contract;
- the effects of the event cannot be avoided through adequate measures; and
- the event prevents a party from performing its obligations under the contract.

Although Covid-19 has been declared as a pandemic and may be considered as an unforeseeable event beyond the control of the parties it does not necessarily, *per se*, prevent a party from performing its obligations under the contract. However, the consequences arising from Covid-19 – such as lockdowns, curfews, border closures or other restrictive measures – may indeed prevent a party from performing its obligations which needs to be assessed on a case by case basis.

Thus, parties cannot merely rely on Covid-19 to excuse non-performance or delays, but must demonstrate a causal link between the Covid-19 measures and how they prevented performance of the contractual obligations. In relation to contractor delays this in particular means that the respective contractor will still have to comply with the requirements established by German courts to demonstrate an entitlement to extension of time, in particular by way of a concrete construction process description (*konkrete bauablaufbezogene Darstellung*).

Other relevant German statutory law provisions

- A party may also seek to rely on the concept of 'hardship' under Sec. 313 (1) BGB, which would allow for an adjustment of contractual terms or even its termination, provided the following two conditions are fulfilled:
  - the claiming party must prove that there has been a change of circumstances – in this case, the Covid-19 outbreak – which was unforeseeable at the time of entering into the contract; and
  - •the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change.

In practice, meeting these two conditions is rather burdensome and the concept of hardship will only apply in exceptionally dire circumstances.

Immediate things to do

- Check that applicable health & safety rules are up to date and implemented on the construction site.
- Issue certificates to employees or other personnel working on the construction site stating that their presence is required.
- Consider where your project is in terms of life-cycle (for example is it at the start or close to completion?) What personnel and plans are in place to maintain continuity? Such matters will influence the approach that will be taken in contract negotiations.
- Review and understand the contracts terms. Does the contract allocate the risk of force majeure and other events and circumstances that may arise from Covid-19? What relief is available in relation to specific issues and what areas are not clear and require discussions/negotiation between the parties to resolve?
- Consider strategies to communicate with project parties to ensure contractual provisions are complied with and positions are preserved.
- Identify and observe possible termination rights – e.g. based on Sec. 6 (7) VOB/B. Distinguish suspension from a mere 'slow down'.
- Prepare and send notices, in particular is relation to hindrances, as soon as possible to ensure compliance with the underlying contract and to ensure claims are not compromised by procedural barriers such as time-bars.
- Keep records – collate evidence, and ensure that records are being kept to evidence force majeure and specific issues encountered with. Do they reflect the costs incurred in maintaining the construction site, such as for idle equipment and staff, and what cannot be delivered as a result of disruption? Ensure that the records reflect which specific activities on the construction site where hindered on each day due to Covid-19 measures.
- Consider whether the parties can find a joint way forward or need to amend the existing contract to ensure that the project can successfully achieve completion.

6. LITIGATION AND COURTS (GERMANY)

The continuing spread of coronavirus (Covid-19) is gradually affecting the German judicial system. However, its current impact seems to be less grave than in other areas. The judicial system continues to operate, including its commercial litigation branch. The main restrictions and changes concern conduction of hearings and handling of time limits. A particular challenge for litigants is that there is no coherent approach throughout Germany. The measures, thus, vary from court to court and sometimes even from judge to judge.

In Germany, courts of the first and second instance are supervised by the Ministry of Justice of the respective federal state ("*Bundesland*") and only the federal courts by the Federal Ministry of Justice. Thus, there is no common regulation or approach in response to Covid-19 applicable to all courts. In addition, the individual judges are independent in how they conduct their proceedings. Hence, there are no mandatory instructions from the ministries or the respective court, but only guidelines. This allows each judge to apply such measures as he or she deems appropriate for each individual case. The downside is, however, that the measures vary from court to court and sometimes even from judge to judge.

Ongoing litigation proceedings

Ongoing litigation proceedings are being continued. There is no automatic stay due to a standstill of the judiciary or the like and it is not expected that the courts are going to be officially shut down any time soon.

However, several federal ministries of justice have ordered courts to limit their operation of justice that requires the presence of court employees to the very necessary business. Only the staff required to maintain the functional capability of the judicial system are present. Therefore, urgent and essential court services are guaranteed.

Communication from counsel to courts is not impeded. Submissions can still be made by regular mail, facsimile and, most importantly, electronically. However, due to the limited staff present at courts, a decelerated processing of the files must be expected.

Hearings

The decision on whether an oral hearing will take place as scheduled is made by the judge in charge of the case. The guidelines recommend that hearings are limited to the necessary minimum. An important aspect is the principle that hearings are public. Therefore the oral hearings that are taking place have to be open for public, but the courts are required to ensure that precautionary measures are taken to protect all involved, e.g. the by reducing the number of seats for spectators.

German procedural law provides for several measures if a hearing is called off. The court may either postpone the hearing, or conduct the hearing by means of a video conference or without an oral hearing in written proceedings.

Currently, many hearings are cancelled and postponed to a later date or without setting a new date. New hearings are either not being scheduled or are being set for summer at the earliest. Some judges postpone *ex officio*, most only upon request of one or both parties. Very few judges did not postpone hearings so far. Due to the current developments, however, this will probably no longer be sustainable.

Even the highest German courts have postponed oral hearings and renderings of judgements.

German procedural law allows for a hearing to be conducted by means of a video conference but, until now, the use of this technology in German court proceedings was a rare exception. The current situation, however, prompted the courts to be more open to conducting hearings by means of video conferencing, provided the court has the appropriate facilities; telephone conferences do not suffice. Also, during remote hearings via video conferencing the judges have to be in court in order to comply with the principle of public hearings. Meanwhile, judges started contacting counsel and parties proactively asking whether the hearings could be conducted via video. Even though the taking of evidence may also be conducted by means of a video conference, we do not expect that many courts will now turn to remote witness examination.

A number of proceedings are now being transferred to so-called written proceedings. This, however, requires both parties' prior consent. An oral hearing will not take place in these proceedings. The court will set both parties a deadline until which written submissions may be submitted. The court will render a judgment thereafter based on these submissions. While these proceedings ensure that a judgment will be handed down more quickly, it does not give the parties the opportunity to discuss the case with the court, as it usually takes place in oral hearings.

Time limits

German procedural law provides for several statutory time limits that cannot be extended by the court (e.g. to file a notice of defence or to file an appeal). These time limits run despite the current Covid-19 disruptions. To the extent statutory time limits may be extended or are set by the court, the exact timing is in the discretion of the judge in charge of the case. The decision on a request for extension of time limits is also made by the competent judge in his or her discretion.

The guidelines recommend that time limits are set and extended very generously. So far, the courts seem to follow this recommendation.

New litigation proceedings

The operation of the courts is guaranteed and new litigation proceedings can be commenced. This is decisive especially as time limits, including limitation periods, are by law not suspended.

However, due to the limited court employees present in court it must be expected that claims and files are not being processed and served upon or forwarded to the other parties within the usual time frame.

Urgent matters

Despite the reducing of judicial operation urgent matters are still being dealt with. Some courts have established special telephone hotlines for urgent cases. All courts and ministries of justice emphasize that in any event the courts will continue to be able to deal with urgent matters.

Enforcement

Due to the current Covid-19 situation, there may be delays in delivery and service also when it comes to the enforcement of judgements and rulings. A debtor might also be able to raise the delay caused by Covid-19 disruptions as an (interim) defence.

Conclusion and outlook

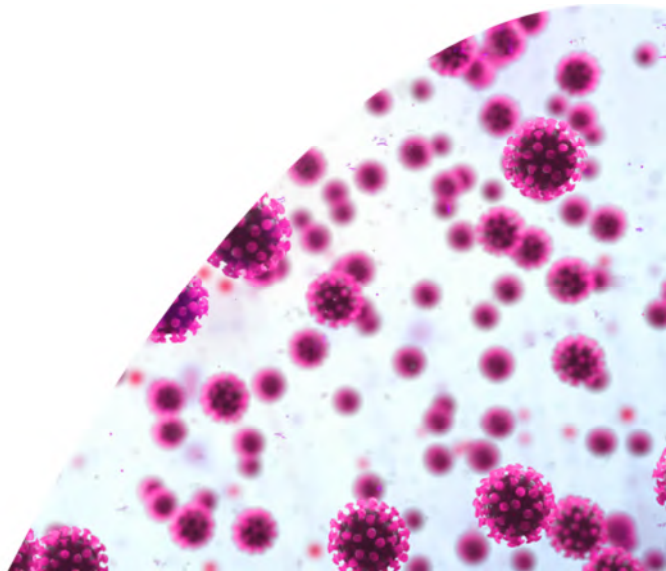
As a consequence of Covid-19, the German court system is facing an unprecedented limitation of the operation of justice. Parties to commercial litigation proceedings must expect that the resolution of their dispute is likely going to be delayed.

Most courts are limiting the presence of court employees to the very necessary. The majority of oral hearings that are not urgent are postponed; the access to most if not all court buildings is limited and precautionary measures are being taken. A delayed processing of files and forwarding of submissions must be expected. However, the judicial system continues to operate as far as necessary and urgent and essential court services are guaranteed.

Where possible, judges and meanwhile even service employees are asked to work from home. A large number of remote workplaces have now been set up and partly been created. Possibly, this crisis leads to a faster adaptation of the courts to using electronic files, electronic mail and more updated ways of operating. This, however, remains to be seen.

Immediate things to do

- Ensure that incoming mail is checked (service of documents is still being carried out)
- Keep an eye on upcoming court deadlines as the gathering of facts and preparation of briefs could take more time than usual
- Ensure the availability of knowledge carriers
- Record witness statements in writing if possible
- Check the applicable statutes of limitation for potential claims keeping in mind that processing and preparation of filing could take more time that usual
- Verify whether a settlement of an ongoing or potential dispute is economically more favourable given the likely delay in the proceedings



7. STATE AID (GERMANY)

The German Federal Government has adopted a package of measures to help companies cope with the coronavirus crisis. A central component of the relief programme is the extension of the existing support programmes of the KfW (Kreditanstalt für Wiederaufbau) and the improvement of the guarantee programmes of the guarantee banks. The European Union has also taken comprehensive measures to reduce the economic impact of the corona pandemic.

Measures at national level

First, the liquidity of companies is improved by tax measures. To this end, the deferral of tax payments will be made easier and advance payments can be reduced more easily. Enforcement and late payment surcharges are waived in connection with the corona effects.

Then, the liquidity of companies is protected by new measures that are unlimited in volume. To this end, the existing programs for liquidity support will be expanded and made available to more companies. This concerns the loans KfW Entrepreneur Loan, ERP Start-Up Loan – Universal, KfW Loan for Growth and KfW Special Programme. Besides the KfW programmes, the German federal states offer various loan programmes via their state development banks for smaller and midsize companies.

In addition, the guarantee schemes of the guarantee banks and the federal government's large guarantee programme were adapted.

Measures at European level

On 19 March 2020, the European Commission adopted a Temporary Framework (*Temporary Framework for State aid measures to support the economy in the current Covid-19 outbreak*) extending the possibilities for companies to receive aid from Member States. This framework will apply until the end of 2020.

The Temporary Framework provides for five types of aid:

- **Direct grants, selective tax advantages and advance payments**: Member States will be able to set up schemes to grant up to EUR 800,000 to a company to address its urgent liquidity needs.
- **State guarantees for loans taken by companies from banks**: Member States will be able to provide State guarantees to ensure banks keep providing loans to the customers who need them.
- **Subsidized public loans to companies**: Member States will be able to grant loans with favourable interest rates to companies. These loans can help businesses cover immediate working capital and investment needs.
- **Safeguards for banks that channel State aid to the real economy**: Some Member States plan to build on banks' existing lending capacities, and use them as a channel for support to businesses – in particular to small and medium-sized companies. The Framework makes clear that such aid is considered as direct aid to the banks' customers, not to the banks themselves, and gives guidance on how to ensure minimal distortion of competition between banks.
- **Short-term export credit insurance**: The Framework introduces additional flexibility on how to demonstrate that certain countries are not-marketable risks, thereby enabling short-term export credit insurance to be provided by the State where needed.

Grants under existing frameworks are not affected by the Temporary Framework and can continue to be spent. This also applies to aid that is in principle allowed under the exemption Regulation No 651/2014. In addition, Member States may notify support programmes to the European Commission under

the existing framework for rescue and restructuring aid (Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (2014/C 249/01).

Currently: draft legislation of the German Federal Government

The German Bundestag will soon pass a law to mitigate the consequences of the Covid-19 pandemic in civil, insolvency and criminal proceedings. In the Introductory Act to the German Civil Code, special provisions are introduced for a limited period of time in Article 240, which allow debtors who cannot fulfil their contractual obligations because of the Covid-19 pandemic to refuse or discontinue performance for the time being, without any adverse legal consequences for them.

However, due to their contractual obligation to cooperate pursuant to sec. 242 of the German Civil Code, the companies may be required to first take advantage of state aid (as described above).

Immediate things to do

- First of all, it must be examined which government measures/programmes my company can take advantage of to improve liquidity.
- If my company invokes the new right to refuse performance, the contractual arrangements must first be examined to determine whether state aid should first be claimed (obligation of protection).

8. INSOLVENCY (GERMANY)

While the German Federal Government and the State Governments have announced multi billion Euro support packages for businesses of all sizes, and, in fact, only two days after the announcement are already paying out funds for immediate assistance, it is widely believed that some of the money and instruments will arrive too late to help avoid insolvencies.

Obligation to file for bankruptcy

Therefore, the German government is planning to suspend the statutory obligation to file for bankruptcy until 30 September 2020 for all insolvencies which are caused by the Covid-19 crisis. An amendment of the relevant laws regarding the obligation to file for insolvency in Germany will be published by the Federal Ministry of Justice and Consumer Protection (*BMJV*). If necessary, the validity of the new provision can be extended until 31 March 2021.

Currently, directors of insolvent companies have an obligation to file for bankruptcy without undue delay. Filing for bankruptcy may be deferred for a maximum period of three weeks, in the event that there is merit in implementing measures to avert the company's illiquidity or overindebtedness. Failure to comply with this obligation bear the risk of criminal charges as well as the likelihood to be exposed to personal liability regarding damages which creditors incur as a result of the delay.

The new provisions will enable directors to refrain from filing for bankruptcy. For the suspension of the insolvency filing deadline to apply, it is required that the reason for the insolvency is based on the effects of the corona pandemic and that there are prospects of restructuring through public aid or financing and restructuring negotiations.

Proving a 'Covid 19-caused insolvency' could turn out to be extremely difficult. A number of German industrial sectors are already under extreme pressure due to disruptive developments in technology and business models (e.g. automotive industry). If the planned statutory revisions do not provide for a clear definition or statutory presumption, they will not be effective. In any case, it is to be expected that uncertainties will arise. Distressed businesses should pay particular attention to the timely documentation of the specific circumstances of their insolvency.

The Government's proposal, however, may not be enough.

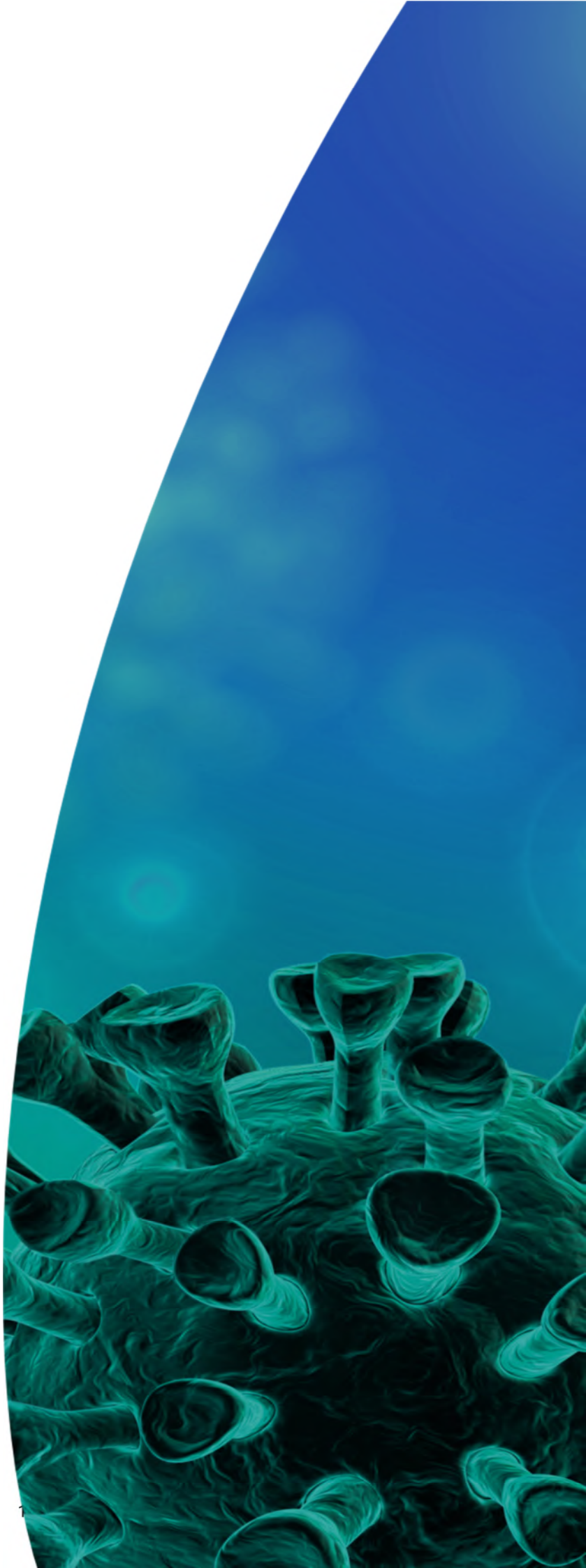
Risk of a claw-back

Companies which maintain business relationships with companies at risk of insolvency now need special protection as well. Insolvency administrators are entitled to render transactions, payments and other factual or legal acts, regardless whether they are based on a lawful contract, void and are entitled to claw-back funds and assets (*Anfechtung*) in order to distribute the funds among the creditors of the insolvent business. This is subject to various requirements and deadlines, but in the light of the interpretation of claw-back laws by German courts, the risk is substantial.

Therefore, companies which maintain business relationships with companies at risk of insolvency need to take special care now that the obligation to file for insolvency may be suspended. As it is likely that considerable numbers of insolvencies are going to be postponed, anyone receiving payments from a business which is threatened by insolvency potentially faces the risk of a claw-back later on, if and when those businesses have to go into insolvency procedures.

Immediate things to do

- Businesses dealing with distressed business partners will need to take available precautions in order to avoid claw-backs by insolvency administrators, e.g. supplying goods only against direct payment.
- If your business is distressed, check daily your financial situation and forecasts, particularly the business's liquidity and its liquidity plan, daily in order compliance with the obligation to file for insolvency.
- If you believe that the financial distress is caused by the Covid-19 crisis, then
    - seek all immediately available financial help from the government,
    - document the details of the causes for financial distress, e.g. a customer cancelling orders or not being able to pay due invoices and giving the Covid-19 crisis as a reason, and
    - monitor whether the planned changes of insolvency law actually come into effect.



9. CORPORATE LAW (GERMANY)

A new law addresses challenges German corporations face due to the far-reaching limitations of physical contact.

Shareholders' meetings

As a general rule, shareholders' meetings in Germany require the shareholders' physical presence. The prohibition of meetings of more than two individuals which now has been introduced confines most of us to our homes, making physical shareholders' meeting practically impossible.

In the past stock corporations (*Aktiengesellschaften, AG*) and SEs (*Societas Europaea*) could allow shareholders to join shareholders' meetings online only if the articles so provided, and only if the shareholders still had the opportunity to physically attend the meeting. Obviously this is not a way to overcome the latest limitations of physical contact.

The German Bundestag thus enacted a new law which for the first time allows stock corporations to hold completely virtual shareholders' meetings. In addition, the board in case of a physical meeting may allow online participation and voting, even if this is not explicitly provided for in the corporation's articles. The entire meeting must be broadcasted online. Shareholders must be able to vote, raise questions and record objections to resolutions electronically. Shareholders have an extensive right to ask questions in a shareholders' meeting which must be answered by the board. The new law significantly limits this right for shareholders' meetings held online. It gives the board discretion which questions to answer. The board's decision which questions to answer may be challenged only if the board intentionally abused its discretion. As in the past a problem has been the challenging of resolutions because of alleged technical shortfalls of an online meeting, under the new law any challengers must prove that the corporation has intentionally caused technical limitations.

The statutory notice period for convening shareholders' meetings is reduced from 30 to 21 days. For a German AG (not for a SE, where European law sets a period of six months) the period in which a shareholder meeting is to be held is extended from eight months to twelve months after the end of a fiscal year. The management board is empowered to pay an advance dividend, even if there is no corresponding provision in the articles.

Limited liability companies (*Gesellschaften mit beschränkter Haftung, GmbH*) in the past could adopt circular resolutions or meet online or use other means of communication, if this was either provided for in the articles of association, or if all shareholders consented. The new law allows circular resolutions in text form even if not all shareholders consent.

Corporate Restructurings

Corporate Restructurings require shareholder resolutions and must be registered with the commercial register. The filings to the commercial register must contain companies' accounts not older than eight months. As companies often for efficiency reasons want to use the last annual accounts and in Germany fiscal years typically correspond to the calendar year, filings in many cases need to be made until August. As at least in 2020 it often will be difficult to hold shareholders' meetings before the end of August, the new law allows to file accounts for periods ending up to twelve months earlier. This way corporations effectively can postpone corporate restructurings until the end of 2020 without having to set up new accounts.

Period of Validity

The new rules will remain in effect until the end of 2020, but may be extended by one year by the ministry of justice, should this become necessary.

Immediate things to do

- Examine whether it will be feasible to hold shareholder meetings without physical presence according to the new legislation.
- If a shareholder meeting already has been scheduled, examine whether the meeting should be postponed, or cancelled and rescheduled as a virtual meeting.

10. INSURANCE OBLIGATIONS (GERMANY)

German businesses should check their insurance policy wordings carefully to find out if they are protected against Coronavirus related disruption.

On 1 February 2020, the German Federal Ministry of Health has designated Coronavirus, officially Covid-19, as a 'notifiable disease' within the meaning of German Law on Prevention and Control of Infectious Diseases (Infektionsschutzgesetz, IfSG). On 11 March the virus was declared by the WHO as a 'pandemic', a term used to describe an infectious disease which has spread globally. This change in law now requires the report of all cases of Covid-19 to the German Public Health Department and can be a critical distinction in interpreting insurance contracts.

If, as a consequence of the Covid-19 pandemic businesses are closed down either because they are prohibited from doing business or because the supply chain is interrupted or simply because they have to protect their employees, businesses may look for cover in particular under their business interruption policies. However, most business interruption policies typically only cover damages resulting form fire, theft, storm and other natural risks. There are exceptions, though, most frequently in the restaurant and hotel sector or the food industry.

However, whether losses caused by Coronavirus are covered will depend on the specific terms of each policy. There is no consistent industry-wide approach to how policies deal with pandemic illness. Some policies either exclude infectious diseases explicitly, whilst others are conditional upon a public body declaring that the outbreak amounts to a pandemic or is a 'notifiable disease'. For businesses, it is important that they review

Businesses should liaise with their brokers or insurance providers in order to get clarity on whether their policies would cover Coronavirus-related losses and in what circumstances. Products likely to be affected by Coronavirus, such as travel insurance policies, often contain clauses concerning force majeure.

Claims arising from Coronavirus have the potential to be complex in nature, so ensuring advice is sought based on the current status of the disease, and how policies respond to it, will be important in enabling businesses to understand what coverage they may have.

In addition, it is worth noting that many insurance providers offering business interruption cover have already stopped accepting new applications for insurance, since the spread of the Coronavirus and the consequences resulting thereof cannot yet be estimated. Those insurance providers who have not yet stopped accepting new applications will likely exclude the Coronavirus as a benefit trigger. It can be expected that other insurance providers and insurance policies will follow.

Immediate things to do

- Monitor closely the classification of the virus by the Government and international agencies such as the World Health Organisation (WHO)
- Liaise closely with insurers and brokers to understand the cover that the business has in place and where this might be applicable to broader business decision making around event cancellation or staff movements.
- Bear in mind claims relating to Coronavirus are likely to be complex and businesses should seek advice in how to respond and in respect of any claims.

11. COMPETITION LAW – MERGER CONTROL, COOPERATION (GERMANY)

Merger Control

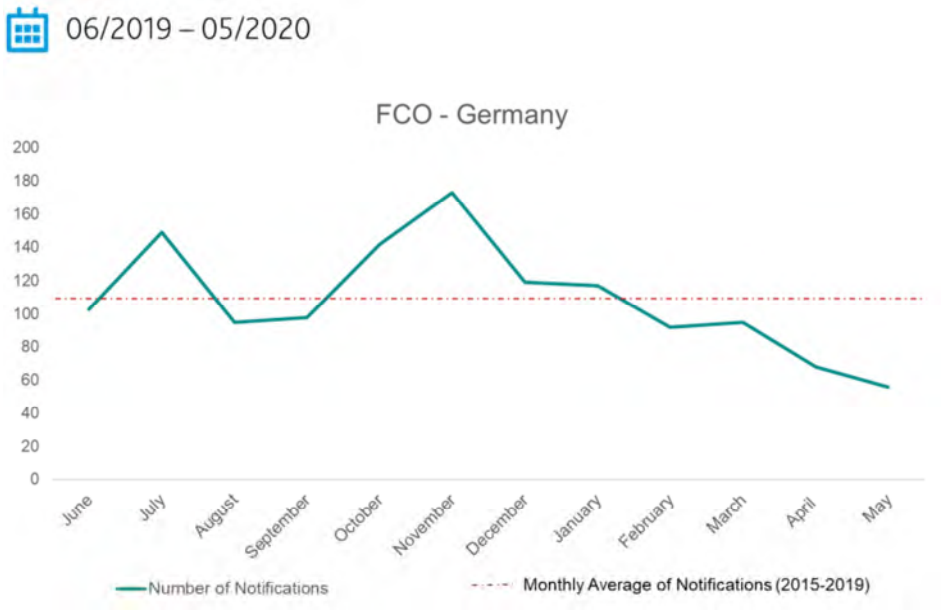
Merger approvals may be delayed because of capacity issues caused by coronavirus. This should be considered while drafting share and purchase agreements and timetables for a deal.

Merging companies urged to delay filings

Many national competition authorities have called on companies to postpone the notification of planned mergers and to submit notifications only in exceptional cases, and preferably in digital form. The Federal Cartel Office (FCO) explicitly requests companies "to consider in each individual case whether, in view of the challenging circumstances, a project has to be submitted to the Bundeskartellamt right away or whether it could possibly also be submitted at a later date."

Such requests are mainly due to the difficulties competition authorities are already facing when carrying out market tests in complex cases, i.e. the questioning of customers, competitors and suppliers, and thus may lack a sufficient evidentiary basis for a robust and court-proof decision.

The number of transactions notified during the current crisis are well below the average of notifications filed on average per month in the past five years:



(Based on public information available at www.bundeskartellamt.de)

National authorities adjust review periods

Various national competition authorities have reacted early to such crisis-related challenges, e.g. by postponing the start of the deadline for current notifications.

In Germany, the review period is only triggered when a notification is complete and formally accepted by the authority. Incompleteness may, however, only become apparent during the ongoing proceedings and the review period only starts to run if the parties meet the demands and the filing is formally accepted by the FCO. Thus, in theory the FCO has a procedural tool to delay 'starting the clock' for merger review if companies do not voluntarily refrain from filings and the authority's capacity is no longer guaranteed.

Temporarily, the FCO can also rely on extended review periods due to a new law that entered into force on May 29, 2020. The law with the purpose of mitigating the consequences of the Covid-19 pandemic in competition law extends the currently applicable deadlines exclusively for transactions notified in the period from 1 March 2020 to 31 May 2020 as follows:

	Total review period starting with complete notification	
	Regular	**Temporarily**
Phase 1	up to one month	up to **two months**
Phase 2	up to four months	up to **six months**

Clearance in Phase 1 is granted in unproblematic transactions. If a further review is necessary, the FCO initiates an in-depth investigation (Phase 2).

As the explanatory note to the law sets out, the FCO is currently not able to carry out necessary investigations within the given time limits: Market participants are not responding to requests or are responding with a delay. However, given that the authority itself currently does not suffer from capacity restraints, the revised deadlines are supposed to be a *maximum* review period and will only be fully exploited if necessary. This also means that simple merger cases in Phase 1 can still be cleared within the usual period. Indeed, the FCO has cleared mergers notified in April within an average of 19 days; in a few rare cases, clearance was obtained at the end of the regular reviewing period.

Consultation with FCO

Even if companies have compelling reasons why a notification cannot be delayed in the current circumstances, the authority should be informed accordingly in advance. This would be advisable if only to clarify to what extent the entire transaction timetable will be affected by the merger control proceedings.

Impact on M&A transactions

Contractual Clauses

Contractual clauses relating to the merger control procedure should anticipate the scope for considerable delays in individual jurisdictions and that even authorities that have not yet changed their deadline regime, such as Germany, will likely make maximum use of their existing deadlines in order to be able to examine the notified transactions properly. This may include contractual clauses in sale purchase agreements such as the so-called long stop date. With respect to so-called best-efforts clauses stipulating that both parties must make every reasonable effort to obtain antitrust approval, it is important not to set an inflexible or unrealistically short deadline within which the parties have to bring a project to notification.

Standstill obligation

German merger control law applies without restrictions during the coronavirus pandemic. This encompasses the so-called standstill obligation, prohibiting parties from carrying out a notifiable merger without the FCO's green light. A closing, even in parts, before the merger clearance is obtained ("gun-jumping"), would not only result in fines but also in the invalidity of the transaction contracts. As seen in a recent Portuguese merger case, payment of a gun-jumping fine in instalments might be possible if a one-off payment of the fine would jeopardise the company's ability to function.

Exemption from the standstill obligation

It is likely that the crisis will lead to further corporate insolvencies and that even at present companies are acquiring companies in crisis. The FCO may in exceptional circumstances grant an exemption from the standstill obligation in order to prevent serious threats to the viability of one of the companies involved or to third parties. This approach aims to prevent the collapse of a crisis-stricken company, particularly in the case of reorganisation mergers.

In the past, it has been more pragmatic in practice to rely on speedy merger clearance in unproblematic cases to avert possible failure of a business instead of additionally applying for exemption from the standstill obligation. Due to an authority's workload or changes to procedural deadlines, a simplified merger clearance decision may not be realistic in the medium term either. Depending on the circumstances, parties may need to assess whether they are able to apply for an exemption from the standstill rule.

Immediate things to do:

- If contemplating a merger in near future, whether under the German or EU regimes, always consider seeking legal advice, and engage proactively with the FCO or the Commission.
- Check whether statutory deadlines still apply for merger filings with the competent authority or whether they are adjusted to cope with restricted capacities as in Germany.
- It will be vital to clearly communicate whether Covid-19-related disruption is likely to affect the business' ability to respond to information requests or otherwise engage with the assessment process.
- Examine whether the transaction may qualify for an exemption from the standstill obligation or a failing firm scenario may be applicable (e.g. if due to the pandemic a business cannot remain financially viable absent the transaction).
- Ensure continued compliance with the standstill obligation prohibiting the closing of a merger before approval is granted in order to avoid a fine.
- Review contractual provisions (e.g. long stop date, best efforts) and anticipate the scope for possible delays in individual jurisdictions.

Cooperation between competitors

If competitors need to collaborate in the wake of Covid-19, they have to conduct a thorough self-assessment in order to mitigate the (fining) risks stemming from antitrust infringements.

Competition law remains applicable and allows for certain business cooperation

In order to overcome the negative impact of Covid-19 on businesses and supply security, competitors may join their forces with respect to production, distribution and service networks to facilitate uninterrupted production and distribution of essential goods. Notwithstanding the challenges of the current crisis, competition law remains fully applicable and prohibits agreements, arrangements and concerted business practices that appreciably prevent, restrict or distort competition. Under antitrust rules, an agreement may be individually exempted on the grounds that its beneficial effects outweigh the potential harm resulting from restrictions of competition.

While the EU Commission provides informal guidance for cooperation related to essential scarce products and – in exceptional cases – issues comfort letters under its "Temporary Framework", the president of the German Federal Cartel Office emphasised that existing antitrust laws are sufficiently flexible, and if there are good reasons for a necessary cooperation between companies, the authority does support such cooperation. The Federal Minister of Economics also affirmed that the ministry will reach out to the competition authority to find a solution if the food industry and grocery retailers intend to collaborate to ensure the supply of food to citizens in the wake of Covid-19.

Indeed, competitor collaborations are recognized as, and frequently are, pro-competitive and efficiency-enhancing activities that serve important public policy objectives. Such collaboration, however well intentioned, can sometimes also violate antitrust laws.

No relaxation of antitrust enforcement

Despite the flexible approach, the FCO has signalled that companies should also be aware of the limits that antitrust law places on their activities. The authority – as well as the Commission – remains vigilant and resolute if companies exploit the current crisis, e.g. to raise prices to the detriment of consumers. In this vein, the FCO is currently monitoring the behaviour of an online marketplace very closely following an increased number of complaints from distributors. According to press reports, the enforcer is examining the company's dealings with supply bottlenecks and which deliveries are given preferential or subordinate treatment.

Self-assessment and consultation with FCO

As a rule, companies will need to conduct a self-assessment exercise to ensure that the envisaged cooperation does not infringe antitrust laws or, if applicable, exemption criteria are satisfied. However, the FCO can be approached for specific guidance during the Covid-19 crisis to help facilitate the self-assessment of cooperation partners and has already dealt with various consultations related to potential cooperation such as joint production avoiding bottlenecks and loss of suppliers, warehousing and redistribution of goods.

Managing risks during phase of collaboration

It is of upmost importance that companies which need to collaborate with their competitors refrain from fixing prices, restricting output or allocating markets and customers between them.

The exchange of certain sensitive information between competitors (also in cross-industry discussions) may also infringe competition law. Confidential price information is the most obvious example of information that should not be exchanged between competitors,

while the exchange of, e.g., customer lists, output volume and business plans, could also have an impact on competition. Companies must be careful not to over-share commercially sensitive information with their competitors and thereby foster transparency on market conditions. The exchange has to be limited to what is appropriate and necessary related to the intended purpose, e.g. aggregated supply figures to understand delivery needs.

If this is respected, a cooperation initiative of competitors may be justified under the current competition law framework, provided specific conditions are fulfilled. This includes, e.g., collaboration in the field of R&D under the EU R&D Block Exemption Regulation, and purchasing alliances or production agreements as provided in the Horizontal Guidelines. Even in such cases, the information exchange has to be limited as indicated above.

In addition, the European Competition Network comprising national competition authorities of all EU Member States, like the FCO, has published a joint statement with some general guidance related to cooperation in order to ensure the supply and fair distribution of scarce products to all consumers.

Immediate things to do:

- Review existing supply and distribution arrangements to identify potential supply chain weakness that may require cooperation.
- Remember: antitrust rules remain applicable and the current crisis cannot be used as a justification for anti-competitive conduct.
- Seek legal advice in order to assess whether the envisaged cooperation with a (close) competitor is compliant with competition law and whether all necessary safeguards are put in place.
- The exchange of information during collaboration has to be approached with due caution and documents/information exchanged have to be supervised and limited to what is appropriate and necessary.
- The same applies for lobbying activities through trade associations or sector bodies.

12. DATA PROTECTION COMPLIANCE (GERMANY)

Following the outbreak of the Coronavirus, businesses have been implementing extraordinary measures to safeguard employees, customers and others against the threat that is being posed by the virus.

Although the current focus is set on health and economic related efforts, individual privacy rights and data protection rules have still to be complied with. Accordingly, data protection considerations should be included in organisations' actions even in the current exceptional situation. Insofar, EU data protection laws (and notably, the EU General Data Protection Regulation ("GDPR")) as well as national data protection laws have to be observed.

The following overview will provide you with some of the most relevant issues in connection with the current Covid-19 situation from a data protection law perspective.

Data protection compliance in general

Also in times of Covid-19, there is no specific relief regarding the fulfilment of general data protection obligations. However, if a business has operational issues which are triggered by the current Covid-19 situation, this may be a justification for not being able to comply with certain deadlines (for example, deadlines to fulfil data subject rights). However, German data protection authorities ("DPAs") announced that they will assess on a case-by-case basis whether the extension of deadlines is acceptable. The same may apply with regard to the 72 hours notification obligation in the context of data breaches. Insofar, DPAs have emphasized that even if it might be justified to prolong the deadline, this does not release a company from closing any security gaps.

Note: *Germany is a federation of 16 states which are not just provinces but states with their own original sovereign rights and legislative responsibilities. Every state has its own DPA which is responsible for supervising the public sector at state level as well as the majority of the private sector with the exception of telecommunications and postal services companies. Those companies are monitored by the federal government which has assigned that task to the Federal Data Protection Commissioner. Apart from that, the Federal Data Protection Commissioner monitors obedience to data protection laws and regulations by federal authorities and other public bodies under federal government control.*

The German Federal Data Protection Act 2018 ("BDSG")

Every processing of personal data and/or special categories of personal data requires an appropriate legal justification. In addition to the legal justifications set forth by the GDPR, certain processing activities can also be based on provisions set out in the BDSG; in particular:

- Data processing for employment-related purposes: According to Sec. 26 para. 1 BDSG, personal data of employees may be processed for employment-related purposes where necessary for entering into, carrying out or terminating the employment contract. Also the processing of special categories of personal data for employment-related purposes shall be permitted if it is necessary to exercise rights or comply with legal obligations derived from labour law, social security and social protection law, and there is no reason to believe that the (potential) employee has an overriding legitimate interest in not processing the data (cf. Sec. 26 para. 3 BDSG); and

- data processing of special categories of personal data in general: the processing of special categories of personal data shall – inter alia – be permitted by public and private bodies if such processing is necessary for reasons of public interest in the area of public health, such as protecting against serious cross-border threats to health (cf. Sec. 22 para. 1 No. 1 c) BDSG).

Covid-19 related communication and health data

According to Art. 4 No. 15 GDPR, personal data is considered 'health data' if it relates to the physical or mental health of a natural person, including the provision of health care services, which reveal information about his or her health status. Health data is a so-called 'special category of personal data'. This means that the data is subject to higher protection; particularly the hurdles for legal justification of processing of such data are even higher (cf. Art. 9 GDPR in this regard).

Information collected on employees or visitors to assess the risk of a Covid-19 contagion are considered health data if they contain information on symptoms, a positive test or the classification of the respective person as a 'contact person' (with the consequence of reasonable suspicion of infection). On the other hand, the information that a person does not have any symptoms or has not had contact to infected people does not already constitute health data.

For example in the context of a questionnaire, it is not clear from the beginning, whether the provided answers will be considered health data. Accordingly, any such collection and/or processing should be covered by one of the legal justifications listed under Art. 9 para. 2 GDPR/ Sec. 26 para. 3 BDSG.

Data protection in the workplace

In light of the above, please find below a rough guideline on certain workplace related measures taken by businesses and their legal admissibility from a data protection point of view.

- Collection of information about an employee who is infected with the Coronavirus: Please note that – also in times of Corona – an employer is generally not entitled to ask/request information on the reason of an employee's sick leave. Something else may apply if an employee has been tested positive (or, as will be more and more relevant in the future, is deemed to be positive under the guidance of the relevant health authorities). In such cases, the employee may even be obliged to inform the employer accordingly.

  Due to the current pandemic and in order to comply with welfare obligations, employers may therefore collect and process information on infections. Besides, businesses may – without being required to seek consent – be allowed to ask employees or visitors whether they (i) are infected with the Coronavirus themselves, (ii) have been in contact with a person tested positive or (iii) have just visited an area designated by the Robert Koch Institute as a risk area. Businesses are, however, not allowed to generally ask with whom the respective person has had contact or which countries he or she has visited. Alternatively, employees may be requested to proactively inform the employer if they meet one of the above mentioned criteria.

- Communication with employees: As health data is so-called 'special category of personal data', employers must – for example – ensure, at least in principle, that an employer-wide communication does not contain such data. For example, it would be permissible and, under certain circumstances, also useful from a welfare point of view, to inform employees that there is a confirmed case of coronavirus within the workforce. However, the name of the specific person should only be mentioned within a narrow circle if this is necessary and proportionate for the traceability of infection chains and the further protection of other employees. Instead, it could make sense to ask the employee to provide a list of potentially relevant contacts (for example, colleagues and visitors with whom the employee has had face-to-face contact for at least 15 minutes and/or where the recommended safety distance has not been observed).

- Collection of employees' private contact details, particularly mobile phone numbers: The collection of private contact details may be relevant for businesses in the current situation in order to provide them with necessary information on short notice. The collection and processing of such data, however, requires the employees' consent. Employers who seek to rely on consent should consider the fact that, in an employment context, consent is often deemed to be invalid due to the imbalance of power between the employer making the request and the employee, who may feel compelled to provide the information. This, however, would probably not be the case if the employee – by providing consent – seeks to gain a time advantage in the event that the business shares relevant information on short notice

Immediate things to do:

- Closely monitor guidance issued by the European Data Protection Board as well as national DPAs. In this context, please also note that DPAs are generally ready to help in case of questions relating to processing – particularly in the current situation.
- Implement procedures and policies to reduce the risk of infection at work (e.g. by providing remote working options and implementing clear procedures on self-isolation in case of infection); issue good practice hygiene recommendations etc. Insofar, please also see the 'SARS-CoV-2 Occupational Safety and Health Standard (SARS-CoV-2-Arbeitsschutzstandard)' issued by the German Federal Ministry of Labour and Social Affairs.
- Implement procedures, discouraging employees from coming to work if they have travelled to risk areas, have symptoms or have come into contact with an infected person.
- Ensure that personal data and/or special categories of personal data which are collected in the realms of Covid-19 must not be processed for any other purposes (unless there is a separate justification for such use) and there must be technical and organisational measures in place to ensure this.

13. MANAGING DATA PROTECTION IN THE HOME OFFICE (GERMANY)

Coronavirus has made significant changes to the way we work and do our businesses. Many organisations have switched their workforce to home offices to slow down the spread of COVID-19. However, organisations still have to comply with data protection obligations and ensure technical and organisational measures to keep personal information secure, despite the increased additional risks caused by the sudden volume of remote working. Especially for organizations with no solid remote work procedures in place, this will mean increased vulnerability of personal data.

Mastering data protection compliance during these hard times requires use of appropriate technology and good organisational measures. Organisations should focus on the compliant behaviour of their employees, freed from the restrictive policies of company networks, which constitutes an additional source of risk.

Although achieving data protection compliance with respect to remote working on short notice is a great challenge, this challenge brings along an equally great opportunity to establish sustainable concepts instead of short-term survival kits.

DATA PROTECTION FOR REMOTE WORKING

KEY PRINCIPLES

Risk minimization: Remote working enhances risks for personal data. In case of sensitive data, (such as employee or social data, special categories of data pursuant to Art. 9(1) GDPR, etc.), the processing in course of remote working is only justifiable, if the organisation takes appropriate technical and organisational measures (TOMs) and establishes the mechanisms of control over the processing of personal data by employees who work remotely. It shall be considered in each individual case, whether the risks of remote working can be appropriately reduced. Sensitive personal data shall only be processed remotely, if the level of unavoidable residual risk does not preclude such processing.

Media-consistent processing: Fully automated media-consistent processing should be preferential. This means that internal text communication, allocation of tasks, handling of personal data and transmission of work results should take place automatically via IT facilities. Unnecessary processing of physical documents in home office and their transport should be avoided, if possible.

Use of secured network connection: Use of a secure VPN connection is a fundamental requirement. Remote access to systems should normally be through multi-factor identification rather than use of a single password.

Minimum requirements for the device: Organisations should establish minimum requirements for devices used by their employees for remote working, especially if a private device will be used. German Federal Commissioner for Data Protection (BfDI) recommends using equipment which was approved by German Federal Officer for Information Security (BSI) to be used by federal administration for remote working.

Minimum TOMs: In case of remote working, BfDI recommends organisations to implement following minimum TOMs (Art. 32 GDPR): remote access to sensitive personal data shall only be allowed to authorized personnel using two-factor authentication; use of VPN connection; encryption of data, including storage encryption on the device; blocking of the USB access and other similar connections; no connection of printers; no private use of the IT equipment provided by the employer for professional use; regular trainings and information for employees to ensure data security and data protection while working remotely (e.g. regarding handling mobile working devices or privacy-friendly behaviour during video conferencing).

Control over TOMs implementation: The organisation should regularly control whether its employees actually implement technical and organisational measures while working remotely. For these purposes, the BSI recommends using Mobile Device Management.

What to do first

- In light of data protection, thoroughly evaluate, whether the work can be conducted by an employee from the home office. Please note that COVID-19 may add leverage to balancing of interests in favour of organisations; however, only temporarily. If the danger caused by the pandemic constitutes the decisive argument, the situation should be regularly monitored and re-evaluated.
- Comprehensively allocate responsibilities for the handling of personal data, if necessary, by means of an additional contract. Clearly communicate the responsibilities.
- Conduct an employee briefing or training, raising awareness with regard to the risks borne by remote working and implemented countermeasures. Regularly control the implementation of these measures.
- Check your equipment, devices, software, tools and procedures: they should meet the state-of-the art security standard for remote working.
- Give suitable priority to the support of remote access solutions and ensure adequate support in case of problems. This would prevent employees from trying to fix the problem themselves and would fasten the detection of an incident, should there be any.
- Define clear procedures to follow in case of a security incident.

Use of private devices

In general, the BfDI does not recommend using private hard- and software for remote working on day-to-day basis. However, given an enormous number of devices urgently required for home offices, many businesses are now permitting their employees to work remotely on their own devices. Many of these employees have never worked remotely before the lockdowns.

The organisations are now urgently required to consider and elaborate concepts of using private devices by their employees. This challenge may be taken as an opportunity for establishing a sustainable Bring Your Own Device (BYOD) Policy, which could settle the remote working practices in the organisation in a long term perspective as well.

Such policy should address:

- minimum standard requirements to a device and to its operating system and software (e.g. requirements for timely updates, fully updated anti-virus system, up-to-date security software, etc.).
- measures for raising employees' awareness for associated risks (e.g. risks caused by not updating the operating system, firewall, or antivirus; or by downloading of unverified apps) as well as rules to be followed;
- secure methods of accessing the organisation's network and systems while working remotely;
- remote data storage and access from a BYOD as well as back up procedures. Please note that the use of public

cloud storage is not recommended due to increased security risks;

- restrictions on using local document copies on BOYD due to increased risk of violations of data protection laws (e.g. difficulties in keeping track of copies of personal data or in answering to data subjects requests, doubts with regard to erasure of personal data) and other possible countermeasures;
- provisions that deal with loss, theft or failure of the employee's device;
- exit provisions, i.e. measures how to deal with BYOD when users will be leaving their job.

Remote working und security policies

Nevertheless, many businesses already have a range of remote working related policies (Remote Working Policy, BYOD policy, IT Acceptable Use and Security policies, Data Breach or Incident Response Procedures, etc.) in place; however, these policies are often not taken seriously or have not been used often by a majority of staff members.

In light of current situation, the existing policies should be reviewed with regard to the increased volume of remote working caused by pandemic. However, it is also advisable to take the opportunity and completely revise these policies in order to maintain sustainable, fit-for-purpose and up-to-date remote working concept.

Remote communication tools

While choosing communication tools, the organisation should consider types and categories of processed personal data as well as level of the associated risk. The more sensible is the processed data and the higher is the risk, the stronger technical and organisational measures should be considered. While choosing remote communication tools, consider the following aspects:

- Is the organisation intending to use an online service (SaaS) or an on premise solution (installed on an own server and in own network)? An on premise solution gives the organisation full control over data; however, its implementation is a much longer process which needs more resources, comprehensive risk evaluation and a respective concept, paying special attention to privacy by design. Nevertheless, in some cases it is worth considering such solutions with regard to a long-term perspective.
- Whereas an on premise solution seems to be more preferable from a data protection perspective, online services, in turn, allow immediate implementation with fewer efforts and can be used as interim solutions for crisis times. In principle, the use of online tools is not criticized. However, the organisations should choose such tools diligently (choose a solution based on a risk assessment, set forth TOMS and keep records to demonstrate compliance).
- Is the registration of all users required or should there be a possibility to provide guest access? An account could be strictly required, for example, if the user needs to have access to shared files or administrative functions.
- Does the provider of the communications tool use analytics or intend to finance its free or low-price offer by means of commercial use of end users' personal data, e.g. such as metadata? Utilisation of such tools for professional use raises considerable data protection concerns.
- Is the server located in a country which provides for a lower level of data protection than in the EU? It is recommended to ask your provider about exact data flows. Additional security measures and safeguards may be necessary.
- Will the tool be used during the pandemic and lockdown only, or shall the use be continued even after the return to a normal business operation? This may influence the balancing of legitimate interests of the controller against rights and freedoms of the data subject. After normalisation of the situation, the results of such balancing test may deviate.

- Avoid choosing common messengers for professional communication.

Handling paper files in home office

Use of paper records in home office should be reduced to a minimum necessary. The main challenge here is to control data flows and adequate handling of personal data by employees. In such case, the organisations should maintain logs of what files have been taken home and by whom. If the files contain special categories of personal data, e.g. health data, additional measures for ensuring security and confidentiality of these data are required. BfDI also recommends avoiding copying / printing out documents at home. In the latter case it is almost impossible to reliably track the created hard copies.

CHAPTER 5 – SPAIN

CONTENTS

1. CONTRACTS AND SUPPLY CHAIN (SPAIN)

GENERAL CONSIDERATIONS ON FORCE MAJEURE AND *REBUS SIC STANTIBUS*

Force majeure as a cause for exemption from contractual liability

Under Spanish legislation, the parties are obliged to comply with the provisions assumed by virtue of the contract (art. 1.091 of the Civil Code – "**CC**") and the will of the parties (by the principle *pacta sunt servanda*) obliges them not only to comply with what has been agreed, but also with all the consequences that are in accordance with good faith, usage and the law (art. 1.258 CC), with the debtor having to assume liability in the event of non-compliance.

In cases where compliance is impossible or there is an unexpected change in the circumstances, the law requires the parties to make every effort to overcome this situation and to comply with the agreement, for example by extending deadlines or by alternative compliance. If compliance is not possible, based on the principle of good faith, the law provides for several exceptions that make the obligation to perform and the debtor's liability more flexible: Force Majeure and the so-called *rebus sic stantibus* clause.

Article 1.105 CC includes the involuntary causes of noncompliance with contracts: force majeure and fortuitous cases, when it establishes that "*Apart from the cases expressly mentioned in the law, and those in which the obligation is so stated, no one shall be liable for events that could not have been foreseen, or which, if foreseen, were unavoidable*".

According to Article 1.105 CC and the doctrine and case law that develop it, the requirements for activating the Force Majeure clause are:

- That the event is unforeseeable, because it exceeds the normal course of life or the circle of activity of the debtor.
- It is an event, which, although foreseen, is unavoidable and insurmountable, in such a way as to make it impossible to fulfil an obligation previously entered into or to prevent the occurrence of an obligation, which may arise.
- The burden of proof is on the party claiming force majeure.
- The decisive factor must be external and independent of the party alleging it, and the circumstances that must be assumed and foreseen by the contracting party on whom the contract depends must not be considered external.
- Absence of fault on the part of the party alleging force majeure
- Force majeure does not excuse the exercise of **due diligence** required to overcome the difficulties encountered. In this respect, even if force majeure is declared, the parties have a duty to mitigate the damage.
- In order for the obligation to be extinguished, the event constituting force majeure must occur prior to the time when the debtor is in default.
- Force majeure only occurs when **the party has exhausted all means at its disposal to fulfil the agreed obligations**.
- Existence of a causal relationship between the event and the result.
- Force majeure is not considered to exist when the event of the damage is due to a breach of relevant duties of foreseeability.

The Government Royal Decree 463/2020 of 14 March 2020, declaring the state of alarm for the management of the health crisis situation caused by Covid-19 ("**RD 463/2020**") states, *"in order to deal with this serious and exceptional situation, it is essential to declare the state of alarm"*. It may be interpreted that we are faced with an extraordinary situation of Force Majeure, given that the legal effects detrimental to the rights and obligations of the parties were totally unforeseeable and unavoidable at the time the contract was signed, unless Force Majeure had been expressly regulated in the contract (which is not usual), in which case the contractual clauses will apply.

For example, tenants operating in the tourist accommodation sector could argue more strongly for the applicability of Orden SND/257/2020, de 19 de marzo, declaring the suspension of

the opening to the public of tourist accommodation establishments in relation to Article 1.184 CC – *'The debtor shall also be released from the obligations to do so where performance is legally or physically impossible'*). The closure of the accommodation meets a specific legal requirement.

We understand that the interested party must demonstrate, so that the effects of Covid-19 as an event of Force Majeure exempt from liability in a possible legal claim of the lessor, that (i) the event of Force Majeure occurred in the course of the performance of the contract (and therefore the contract was concluded earlier); (ii) the measures decreed to contain the pandemic outbreak were the determining cause of the breach; (iii) it has carried out mitigation measures to limit the damage or loss to the creditor, providing timely notice and proof; and, (iv) due to the unpredictability and unavoidability of the events, it has not become more difficult or costly, but has become impossible to perform the obligation.

The restrictive application of the rebus sic stantibus clause

The *rebus sic stantibus* clause has been developed by case law as a rule that allows one of the parties to the contract to exonerate itself or at least reduce the negative impact of the contractual risk not examined at the time of the signature of the contract, produced as a result of unforeseeable and extraordinary changes in circumstances and that cause an imbalance in the obligations originally provided for in the contract.

Case law shows that the courts have been extremely restrictive in the application of this clause. The following conditions have to be met (in general terms): (i) extraordinary alteration of circumstances at the time of performance of the contract in relation to those prevailing at the time of its signature; (ii) exorbitant disproportion between the parties' obligations, with a breach of contractual equilibrium; (iii) that all this occurs for unforeseeable reasons; and (iv) that there is no other means of remedying the damage.

For example, in the case of leases, the assessment of this *rebus sic stantibus* clause should lead to a reduction in rent, but not to exemption from payment of rent through suspension of the lease. In principle, it does not seem fair or equitable to burden only one of the contracting parties with the risks of an extraordinary situation.

The differences between Force Majeure and *rebus sic stantibus* – two different scenarios

The main difference between Force Majeure and *rebus sic stantibus* clause is that, while Force Majeure makes it impossible to perform the contract, the *rebus sic stantibus* clause applies in the event of a change in circumstances which does not prevent the contract from being performed, even if the economic equilibrium of the services is broken. The party concerned could therefore apply this clause to contracts which can still be objectively performed and where Force Majeure cannot therefore be invoked, provided that the continued performance of the contract may be unfair to one of the parties.

This main (but not unique) difference implies the need to differentiate between two scenarios: (i) that generated by the declaration of a state of alarm which has imposed a series of measures aimed at limiting circulation and restricting trade by law; and (ii) the continuation of the Coronavirus outbreak, which will lead to a drastic drop in revenue. This will undoubtedly generate an economic and financial crisis of a dimension that is currently impossible to predict.

While point (i) above may imply the applicability of Force Majeure as the situation of economic precariousness and decline in activity is due to regulations with the rank of Law promulgated by the Government, point (ii) may imply the application of the *rebus sic stantibus* clause if the Coronavirus stage lasts for a reasonably long period. In the latter case, an interested party (i.e. lessee) could impose modifications on the lease, such as rent reductions and/or deferred payments, based on a substantial, unforeseeable and unavoidable change in the current conditions compared to those existing at the time of the conclusion of the lease.

Immediate things to do:

(A) General considerations

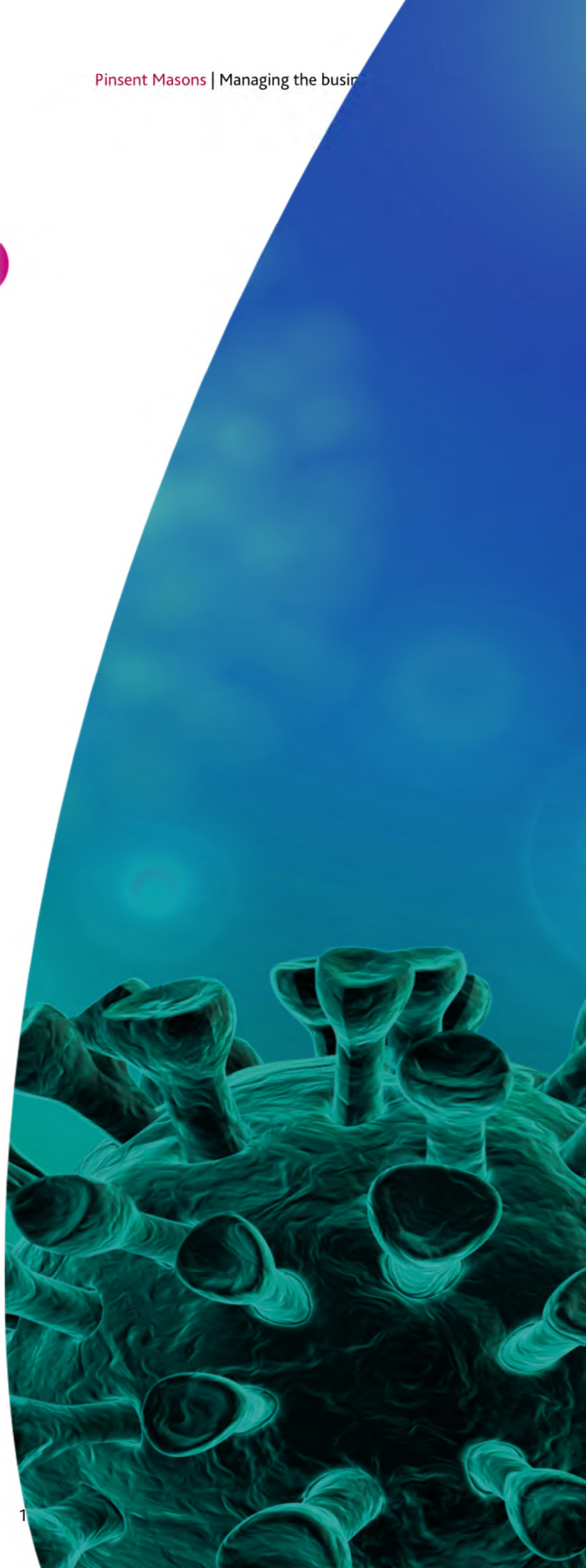
- The legal situation regarding compliance with the rights and obligations generated by the confinement decreed by RD 463/2020 as a result of the spread of the Coronavirus is unprecedented.
- Faced with this new scenario of confusion and uncertainty, there is no automatic, unambiguous response. First, each contract must be subject to a specific regime of liability in the event of failure to comply with obligations due to force majeure. Secondly, it must be taken into account that some premises will be forced to close down, but others may continue to operate, with severe restrictions because they are not covered by the prohibitions imposed.
- There is no need to respond hastily or conclusively; we do not yet know how long this situation will continue and what measures will continue to be taken.
- The applicability of force majeure or the rebus sic stantibus clause to a contract requires a specific analysis of the case and peculiarities of each case with the utmost caution – we should avoid automatic responses.
- An approach between the parties, which can lead to a consensual agreement, is always advisable. In the event that the situation becomes judicial, it is likely that the courts will follow this equitable line of balancing the mutual benefits.

(B) During the situation and validity of the state of alarm – Force Majeure

- The pandemic is clearly an unforeseeable and unavoidable event; however, in order for Force Majeure to exonerate liability, the interested party must demonstrate that he has taken the necessary mitigation measures to reduce the harmful consequences.
- An interested party who does not claim to be unable to comply with its obligations and seeks to use Force Majeure has the burden of proving that (i) objectively he could not fulfil the obligation (physical or legal, objective, absolute and lasting impossibility to fulfil the contractual performance); and, (ii) the existence of a causal relationship between the breach and the unforeseeable event.
- This impossibility of compliance must be permanent, and therefore excludes temporary impossibility, which only has suspensive effects. Similarly, impossibility cannot be claimed when it is possible to comply with it by rationally modifying the content of the service so that it is appropriate to the purpose being pursued. In short, the interested party must demonstrate that he has tried to comply with the agreed payments by all possible means, through equivalent compliance, extension of deadlines, alternative means, etc.
- The law provides for some exceptions to the general regime of exemption from liability for failure to comply with obligations due to Force Majeure. Among other things, the debtor must not be in default, in which case he shall bear the consequences of an event of Force Majeure until such payment is delivered (Article 1096 CC).
- It is strongly recommended that the parties state its arguments in writing in relation to the impossibility of performing his obligations due to the outbreak of the Covid-19. These communications play an essential role in demonstrating compliance with good contractual faith, transparency, diligence and even in demonstrating (in a possible subsequent judicial process) the intention to reach an agreement.

(C) Once the situation and the state of alarm is over – Rebus sic stantibus clause

- In this case, it will be necessary to examine whether certain measures restricting or impeding the activity persist in order to assess whether the situation of Force Majeure persists
- Once the unforeseeable and unavoidable event (the epidemic) has ceased and the cause of Force Majeure has therefore disappeared, reciprocal services should be complied with under the agreed terms.
- However, for certain businesses, it is foreseeable that the economic equilibrium of the contract may be affected and that the modification or even termination of the contract may be requested if the other requirements for the application of the rebus sic stantibus doctrine.
- In our opinion, Covid-19 crisis is a circumstance that the parties could not foresee at the time of the signature of the contract, although compliance with this requirement of unpredictability is not sufficient in itself to constitute the basis for the application of the rebus sic stantibus clause on a general or automatic basis
- In any case, we recommend caution and patience in the face of events that may occur and must be carefully analysed on a case-by-case basis and try to reach an out-of-court solution through which to balance the damage to each contracting party.



2. EMPLOYMENT AND IMMIGRATION (SPAIN)

The Spanish Government has implemented a series of measures related to employment to cope with the pandemic related to Covid-19.

Employment from home

If technically and reasonably possible, employers should organise tools and alternative mechanisms to develop work from home, provided that the effort of adaptation is not unproportioned. From March 30th this is compulsory for those workers in non-essential businesses (e.g. food and beverage, pharmacy, financial services, etc.). Working from home will be recommended during the following two months as of the end of the state of alert.

Right of adapt the working schedule

Such employees (i.e. those with children whose schools have been closed) may adapt their working conditions and reduce working hours under specific circumstances due to Covid-19. Note that the employee is entitled to specify the adaptation of the working hours.

Special reduction in working hours: Those employees who, due to guardianship reasons, have a child under the age of twelve or a disabled person that does not perform a paid activity, will be entitled to a reduction in working hours of up to 100%. The employee's salary will be reduced in proportion to the reduction in working hours. The employee must notify the Company 24 hours in advance.

Suspension of employment contracts ("ERTE")

Considering the suspension of activities and the lockdown caused by Covid-19, temporary suspension of employment contracts had been made more flexible. These measures affect both to suspension triggered by force majeure event and those caused by economic, technical, organizational and production-related grounds arising from Covid-19 and it seeks to facilitate these measures over others that may have a greater impact on employment.

The Royal Decree-Law issued on18 March 2020 specifies what are considered force majeure causes (i.e. business impossibility derived from the measures adopted by the government, lack of supplies that seriously prevents the development of the Company's activity and infection of any of the employees or if any of them are in quarantine) –the implementation procedure will last up to 5 days.

Force Majeure - Application procedure

The Company must submit an application request to the competent Labour Authority. The Company must also inform the employees of the suspension request made to the Authority, and provide a copy of the request and accompanying documents to the workers' representative, if any.

The Labour and Social Security Inspectorate may issue a report within a maximum period of five days, if the Labour Authority considers it appropriate (its request is not mandatory).

The Labour Authority must issue a resolution within five days.

Economical, technical or organisational grounds - procedure

If Companies cannot justify these measures based on force majeure causes, they must implement the process based on economical, technical, organisational and productive causes (implementation period has been reduced but it is longer than that based on force majeure) –the implementation procedure will last up to two weeks.

This procedure requires a previous negotiation period with the employee's representatives. In the event that there are no employees' representatives, the consultation period will be

carried out by the most representative unions in the sector in which the Company operates.

If it is not possible to constitute the previous representative commission, consultation will be carried out with up of three employees of the Company democratically elected. In this case, the procedure established in article 41.4 of the Spanish Employment Act will apply.

In any case, the representative commission must be constituted within a maximum period of five days. The consultation period with the workers representatives or the representative commission aforementioned shall not exceed the maximum period of seven days. The report of the Labour and Social Security Inspection, whose request will be optional for the Labour Authority, will be issued within a maximum period of seven days.

Social Security measures:

In the case of suspension of employment contracts or reduction of working hours due to force majeure, the Social Security will exempt those companies who have less than 50 employees from the payment of the Company's contributions. For those companies that have 50 or more employees, the Social Security will exonerate 75% of the Company's contributions to the Social Security during this period.

Such exemptions are conditional upon the Company maintaining employment levels in the 6 months following the re-activation of normal activity.

Employees who will be entitled to the unemployment benefit, even though they lack the required minimum period of unemployment.

Sick employees

Sick leave due to Covid-19 infections or preventive isolation is treated as an occupational accident for the purposes of benefits. This entails an improved public benefit for affected workers, in addition to any supplements that companies may provide under collective labour agreements, company policies or applicable legislation.

Borders and immigration

From 17 March 2020 at 00:00, all Spanish land borders were closed – only Spanish citizens and residents in Spain, cross-border workers and those persons who prove force majeure causes or situations of need will be allowed to cross the borders. This restriction will not affect the transport of goods through land and maritime borders.

3. TAX ISSUES (SPAIN)

In the area of taxation, in development of the general measures implemented with the publication of Royal Decree 463/2020 of 14 March, which declared the state of alarm throughout the national territory, a series of implementing rules have been issued with the main objective of making access for SMEs and the self-employed more flexible to measures for deferring payment of tax debts and regulating the operation of the tax deadlines affected as a result of the state of alarm.

Transitional financial support measures for SMEs and the self-employed: Royal Decree Law 7/2020 of 12 March, adopting urgent measures to respond to the economic impact of Covid-19

The requirements for deferment of the tax debt corresponding to all those declarations-settlements and self-assessments whose deadline for presentation and payment is from 13 March to 30 May 2020, both inclusive, are made more flexible:

- Express request is required
- A six-month deferral, interest-free during the first three months
- No guarantees are required when the amount of the debt is less than 30,000 euros.
- The debtor's volume of operations may not exceed 6,010,121.04 euros in 2019
- Certain tax debts, which would normally not be within the scope of deferral, may also be deferred:

(i) account withholdings and payments;
(ii) those derived from taxes that must be legally charged (for example, Value Added Tax);
(iii) Corporate income tax payments by instalments

Measures in relation to the suspension of tax deadlines: Article 33 of Royal Decree Law 8/2020 on urgent extraordinary measures to deal with the economic and social impact of Covid-19

- The calculation of the duration of the procedures processed by the Tax Administration is suspended from 18 March 2020 until 30 April 2020.
- The calculation of expiration periods and prescription periods of Article 66 of the General Tax Law is suspended from 18 March 2020 until 30 April 2020.
- Extension until 30 April 2020 of certain periods opened prior to 18 March 2020 and which were not completed at that date:

(i) The deadlines for payment of the tax debt in the voluntary and executive period and the deadlines for the deferred and instalment agreements granted.
(ii) The terms related to the development of the auctions and awarding of goods and
(iii) The deadlines for responding to requests, seizure orders, requests for information, and for making submissions.

- Extension until 20 May 2020 or, if later, until the date granted by the general rule, of the deadlines starting on 18 March 2020 in the same cases as the previous paragraph.
- There is no need to enforce guarantees on real estate from 18 March to 30 April 2020.
- The period for lodging economic-administrative appeals or claims begins on 1 May 2020, or from the date determined by the general rule if the notification of the act to be appealed against was made after 30 April 2020.
- The rule does not require the filing of any application for the extension of time limits. The extension shall apply by default, without prejudice to the possibility of the person concerned voluntarily deciding not to exhaust the time limits.
- The deadlines for filing and submitting self assessments and the deadlines for filing information returns are not affected

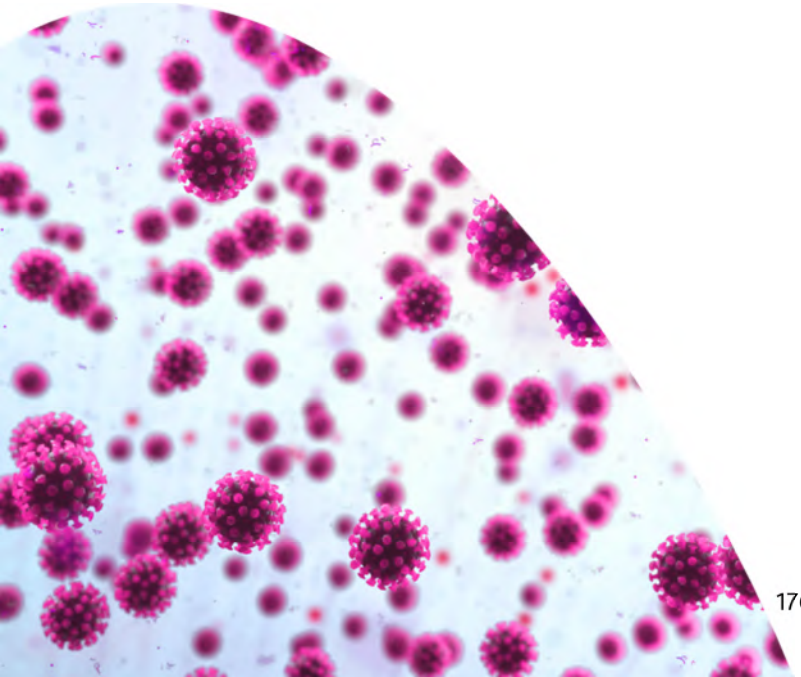
by the suspension of deadlines, without prejudice to the provision of Royal Decree-Law 14/2020 of 14 April, on the extension until 20 May 2020 the deadlines for the submission and payment of tax returns and self-assessments of State taxes which expire as of the entry into force of this Royal Decree-Law, for those liable for a volume of transactions not exceeding 600,000 euros in 2019.

Royal Decree-Law 11/2020 of 31 March, which adopts additional urgent measures in the social and economic field to deal with Covid 19, includes new urgent and complementary measures to those adopted previously, as of 1 April.

- Deferral of customs debts for SMEs and self-employed workers. Deferral of the customs and tax debt payment corresponding to customs declarations presented from 2 March 2020 until 30 May 2020, inclusive, will be granted provided that the applications presented until that date are for an amount less than 30,000 euros and the amount of the debt to be deferred is greater than 100 euros.
- Application of the measures to suspend the deadlines for tax debts of the Autonomous Communities and Local Entities
- Extension of the deadlines for lodging appeals for replacement and economic-administrative claims, will be calculated from the working day following the date on which the alarm condition ends.
- Non-computation of the term to execute resolutions of the economic-administrative courts from 14 March to 30 April, and suspension of the expiration and prescription terms from 14 March to 30 April.

Royal Decree-Law 15/2020 on urgent complementary measures to support the economy and employment.

- In relation to Value Added Tax:
  - A tax rate of zero is established until July 31, 2020 for certain healthcare material intended for public, non-profit organisations and hospital centres.
  - The tax rate applicable to e-books, newspapers and digital magazines is reduced to 4 percent.
- In relation to Corporate Tax:
  - For the financial year 2020, taxpayers whose volume of operations has not exceeded 600,000 euros are allowed to exercise until 20 May the option to make payments in instalments based on the current year's profit on the part of the tax base of the first 3 months for the May return.
  - For taxpayers who have not been able to exercise the option and net turnover does not exceed EUR 6,000,000, the option can be exercised within the deadline for the instalment payment to be submitted on 20 October 2020. This measure does not apply to tax groups.
- In relation to Personal Income Tax: under the objective estimate scheme, it is possible to determine net income by the direct estimate method and the mandatory three-year link for waiving the objective estimate method is eliminated, so that taxpayers can reapply the method in 2021.



4. EVENT STAGING (SPAIN)

In view of the health crisis caused by the situation of the coronavirus Covid-19 in Spain and in order to try to stop its advance, the Government has been approving certain measures, limiting - but not suspending - many fundamental rights of citizens.

It should be noted that these measures are in line with the principles of proportionality and necessity. The main measure agreed upon, which in turn contains a long list of measures, was the approval of Royal Decree 463/2020, of 14 March, declaring the state of alarm for the management of the health crisis situation caused by Covid-19 ("**RDL 463/2020**"). The RDL 463/2020 would initially be in force for a period of fifteen years. However, on 27 March 2020 the Congress of Deputies approved the extension of this for another fifteen days, until 00:00h on April 12th. Again, on 11 April 2020 a new extension was approved until 00:00h on 26 April.

As we were saying, the approval of RDL 463/2020 has meant a series of extraordinary obligations for citizens, sometimes limiting their fundamental rights as set out in the Spanish Constitution of 1978. The main measures adopted are set out below:

The Government will be the competent authority

The Government will be the competent for the purposes of the state of alarm. This is without prejudice to the authorities delegated in their respective areas of responsibility: (i) the Minister of Defence, (ii) the Minister for Home Affairs, (iii) the Minister of Transport and Mobility and (iv) the Minister of Health.

Limitation to the freedom of movement of persons.

Persons may only move - either on foot or in their vehicles - on public roads for the following activities:

- Acquisition of food, pharmaceutical products and basic necessities.
- Assistance to health centres, services and establishments.
- Travel to the workplace to carry out their work, professional or business activities.
- Return to the place of habitual residence.
- Assistance and care for the elderly, minors, dependents, disabled persons or particularly vulnerable persons.
- Travel to financial and insurance entities.
- Due to force majeure or a situation of need.
- Any other activity of a similar nature to be carried out individually, unless accompanied by disabled persons or for another justified reason.

These were the initial limitations adopted. However, as we said, these measures have been strengthened.

Restrictions in the employment field

The possibility of attending jobs -on behalf of others- for activities not considered essential has been suspended -a list of activities considered essential has been published: as financial services undertakings, including banking, insurance and investment services, for the provision of services which are indispensable; telecommunications and audiovisual companies and essential computer services, among others whose very nature can be understood as essential-. Along these lines, Royal Decree-Law 10/2020 of 29 March has been approved, regulating recoverable paid leave for employees - self-employed workers or those not providing essential services are not included - in order to reduce population mobility in the context of the fight against Covid-19. This regulation establishes the activities considered essential - in its Annex - in addition to the obligation, given that it is not permitted to go to work, for employers to grant paid leave between 30 March

and 9 April, inclusive. This obligation ended last 9 April 2020 returning the employees to work on Monday 13th April 2020, but with the same limitations established by RD 463/2020 and in general under the same conditions as those laid down prior to the introduction of the paid leave.

Likewise, companies have been granted the possibility of taking advantage of temporary suspension of contracts through the Temporary Employment Regulation Record ("**ERTE**"), and workers who have not paid the minimum legal contribution may be paid. On the other hand, the causes for dismissal have been very limited, prohibiting - in the vast majority of cases - and increasing the number of days for calculating the compensation that may be due (Royal Decree-Law 9/2020, of 27 March, which adopts complementary measures, in the field of employment, to alleviate the effects of the Covid-19).

It also provides that self-employed persons who have reduced income may receive benefits for lack of activity.

Temporary requirements and mandatory personal benefits

The authorities may agree - ex officio or at the request of the Autonomous Communities - to the practice of requisitions of material considered essential for the fight against the health crisis. In this regard, requisitions of masks, respirators and medical equipment in general have already been seen. Once again, these measures respond to the critical situation experienced. They shall at all times respect the principles of proportionality and necessity, as well as the suitability of the goods requisitioned.

Containment measures in the field of education and training

Classroom teaching activities have been suspended in all centres and at all stages, cycles, grades, courses and levels of education. In view of this situation, educational services are being provided online or by telematics means. Among other issues, this fact has had a great detrimental effect on the preparation and convocation of the university entrance exams, postponing their initial date and requiring a modification of their content given the lack of exposure of the required subjects.

Containment measures in the field of commercial activity, cultural facilities, recreational establishments and activities, hotel and restaurant activities and additional others

In general terms, commercial premises and establishments have been closed. Likewise, the opening to the public of museums, libraries, monuments, as well as those where public shows and sports and leisure activities are carried out, has been suspended. The same obligation applies to hotel and restaurant activities. Naturally, the suspension of festivals, parades and popular celebrations has also been included.

However, this obligation does not apply to pharmacies, petrol stations, food shops, doctors, opticians and similar services. The service of restaurants that exclusively provide home delivery services is also maintained. Excluded as well of this obligation, the opening of certain hotels and hostels included in the list set out in Order TMA/277/2020 of 23 March, declaring certain tourist accommodation to be essential services and adopting additional provisions, is also excluded.

Measures in the field of transport

Public transport has been reduced by 50%. Regarding the movement of goods, the authorities guarantee the movement of these throughout the national territory - it is one of the activities considered essential and therefore not suspended.

A temporary restriction has been applied to those "non-essential trips from other countries", for thirty days, a measure that will not be applied, in principle, to EU residents or diplomatic personnel (Order INT/270/2020, of 21 March, establishing criteria for the application of a temporary restriction on non-essential trips from third countries to the European Union and associated Schengen countries for reasons of public order and public health on the occasion of the health crisis caused by the Covid-19).

Extension of the functions of the armed forces

The role and participation of the Army in the implementation and monitoring of many of these measures is strengthened. This includes the transfer of patients, by air and land, to sanitary centres with available health resources. Logistical support is also implemented by the Army for the transportation of medical material from abroad. Assistance functions are also foreseen for elderly people in the distribution of pharmaceutical products and food, thus preventing them from leaving their homes.

Measures to ensure the supply of goods and services necessary for the protection of public health

The Minister of Health may:

- Issue the necessary orders to ensure the supply of the market and the operation of the services of the production centres affected by the shortage of products necessary for the protection of public health.
- Intervene in and temporarily occupy industries, factories, workshops, farms or premises of any kind, including privately owned health centres, services and establishments, as well as those operating in the pharmaceutical sector.
- Carry out temporary requisitions of all types of goods and impose mandatory personal benefits in those cases where it is necessary for the adequate protection of public health, in the context of this health crisis.

The national manufacture of health products and materials has also been strengthened, with a strategic reserve of this type of product for future complications that may arise.

On 14 April 2020 was approved the Order SND/344/2020 establishing exceptional measures to strengthen the National Health System and contain the health crisis caused by COVID-19. Among the measures adopted by this Order, the autonomous communities shall have at their disposal the privately owned clinical diagnostic health centres, services and establishments located in their autonomous community that are not providing services in the National Health System, as well as their personnel.

We should also remember that the management of private health care centres has become the responsibility of the public sector.

Other measures

The following measures have recently been established through the approval of Royal Decree Law 11/2020, of 31 March, which introduces additional urgent measures in the labour and economic fields to deal with Covid-19:

- Social measures aimed at families and vulnerable groups, moratoriums on rental and mortgage debts for people affected by the economic consequences of Covid-19, bans on evictions and measures of a similar nature.
- In relation to the energy sector, guarantees have been approved for the supply of electricity, oil products, natural gas and water.
- Regarding the support measures for the self-employed, moratoriums on social security contributions and deferrals of payment of social security debts have been approved.

In addition to the measures described above, more measures are being approved on a weekly basis in order to somehow contain this health crisis by alleviating its effects and trying to reduce its impact on families and the Spanish economy in general.

5. FINANCIAL MEASURES (SPAIN)

Royal Decree-Law 8/2020, on March 17th, on Urgent Extraordinary Measures to deal with the Economic and Social Impact of Covid-19.

The granting of a credit supplement amounting to 300,000,000 euros, allocated through the corresponding transfers to the Autonomous Communities, Ceuta and Melilla for the "Protection of the family and attention to child poverty. Basic social service benefits", i.e. to finance basic social service benefits intended exclusively to deal with extraordinary situations arising from the Covid-19.

Exceptionally, and for a period of one month from the date of entry into force of the regulation or until the last day of the month in which the alarm state ends, measures are provided so that self-employed workers or freelances and whose activities are suspended, or otherwise when their turnover in the month prior to that in which the benefit is requested is reduced by at least 75 per cent in relation to the average turnover for the previous six-month period, are entitled to an extraordinary benefit due to the termination of activity, the amount of which is determined by applying 70 per cent to the regulatory base.

The approval of a line for the coverage on behalf of the State of the financing granted by financial institutions to companies and freelances

In short, it provides guarantees for financing granted by credit institutions, financial credit establishments, electronic money institutions and payment institutions to companies and freelances to meet their needs arising, among others, from the management and payment of invoices, working capital requirements, maturities of financial or tax obligations or other liquidity requirements and salary payments.

This line of guarantees has a maximum amount of 100,000 million euros. Its conditions have been specified in the Agreement of the Cabinet of Ministers of 24 March 2020.

A first tranche of this line of guarantees for freelances and companies has been approved for the time being, for an amount of up to 20,000 million euros. 50% of this is for the freelances and SMEs only. Its management is also entrusted to the Official Credit Institute (*ICO*)

To apply for these guarantees:

- You must be affected by the economic effects of Covid-19;
- neither be in default by 31 December 2019 nor in bankruptcy proceedings by 17 March 2020.

The guarantees are retroactive and can be requested for transactions formalized after the entry into force of Royal Decree-Law 8/2020, which took place on 18 March.

The endorsement guarantees:

- 80% of new loans and renewals of transactions requested by the freelances and SMEs;
- for the rest of the companies, the guarantee will cover 70% of the new loan granted and 60% of the renewals.

Its term is that of the loan granted, with a maximum term of five years and its cost, between 20 and 120 basic points, will be assumed by the financial institutions.

They can be requested until 30 September 2020, in the financial entities with which the ICO collaborates. We understand that the ICO is now defining this operation.

The net borrowing limit for the ICO in the State Budget Law is increased by 10,000 million euros, in order to provide additional liquidity to companies, especially SMEs and freelances

The ICO has a recognised annual debt limit. At its expense is financed within the international capital markets and this financing is used to fund the well-known ICO lines that are defined and designed each year and made available to credit institutions so that they can grant loans to companies and individuals funded not by the credit institution that grants them but with ICO money.

By increasing this debt limit, the ICO is better able to provide more liquidity to credit institutions. However, this Royal Decree-Law already states that the ICO must adopt the necessary measures, through its decision-making bodies (the Council), to define these lines. We understand that the ICO is now defining the lines of mediation and will have to keep an eye on this definition to see the conditions of the lines and whether it is possible to apply for the loans from the banks.

The creation of a line of insurance coverage of up to 2,000 million euros charged to the Internationalisation Risk Reserve Fund, with a duration of 6 months, aimed at the working capital loans of exporting SMEs that are internationalised or in the process of internationalisation; the coverage being granted by CESCE.

Royal Decree-Law 6/2020, on March 10th, adopting certain urgent measures in the economic field and for the protection of public health

Amends Law 1/2013, on May 14th, on measures to strengthen the protection of mortgage debtors, debt restructuring and social renting.

This Law 1/2013 which was approved by the previous Government during the crisis, attempted to suspend and prevent the launching/evictions of people in particularly vulnerable situations.

What the Royal Decree-Law 6/2020 does is to extend the moratorium on these evictions until May 2024. This is a moratorium because we are talking about launches/evictions that are already judicially decreed because in the judicial or extrajudicial process of foreclosure the creditor, or a third party, has already been awarded with the main residence of these people but, due to Law 1/2013 and the period now extended until 2024, this award could not materialize or be carried out. This prevents the eviction of vulnerable persons.

In Law 1/2013, vulnerable people were:

- those belonging to large families;
- to single-parent families with dependent children or those with a minor;
- families in which one of the members has a recognised degree of disability equal to or greater than 33 per cent, a dependency situation or an illness that makes him/her unfit for work;
- families where the mortgagor is unemployed;
- families in which one or more persons live together with the holder of the mortgage or his/her spouse by blood relationship up to the third degree of consanguinity or affinity, and who are in a personal situation of disability, dependency or serious illness that makes them unfit for work;
- families where there is a victim of gender-based violence;
- to debtors over 60 years old.

The Royal Decree-Law 6/2020 extends the group in case 2 because it now includes single-parent families even if they have only one dependent child (there is no need for several).

It also increases the maximum income limit of the family unit that serves as a reference for considering vulnerability, which is calculated with the IPREM (the Public Indicator of Income with Multiple Effects) depending on the number of children and whether it is a single-parent family.

Now it is required:

- 0.15 times the IPREM for single-parent families;
- 0.10 times the IPREM for all other families.

Royal Decree-Law 8/2020, on March 17th, on extraordinary urgent measures to deal with the economic and social impact of Covid-19

This contemplates a moratorium on the payment of mortgage instalments by particularly vulnerable groups.

It should be borne in mind that Royal Decree-Law 6/2012, on March 9th, on urgent measures to protect mortgage debtors without resources, already provided for a Code of Good Practice to which financial institutions could adhere and which

allowed debtors at the exclusion threshold to restructure their mortgage loans.

What Royal Decree-Law 8/2020 does is to provide for measures of moratorium on the payment of mortgage loan instalments for mortgage debtors in a situation of vulnerability who, as a result of Covid-19, are unable to meet this payment.

These must be debtors in a situation of economic vulnerability, that is to say:

1) The mortgagor becomes unemployed or, if he/she is an entrepreneur or professional, suffers a substantial loss of income or a substantial fall in sales (this is understood to be the case where the fall is at least 40%)

2) The total income of the members of the household does not exceed, in the month preceding the application for the moratorium:

   i. In general, the limit of three times the IPREM.

   ii. This limit will be increased by 0.1 times the IPREM for each dependent child in the family unit. The increase applicable per dependent child will be 0.15 times the IPREM for each child in the case of a single-parent family unit.

   iii. This limit shall be increased by 0.1 times the IPREM for each person over 65 years old in the family unit.

   iv. In the event that any of the members of the family unit has a declared disability of more than 33 percent, a situation of dependency or illness that makes him/her unfit for work, the limit shall be four times the IPREM.

   v. In the event that the mortgagor is a person with cerebral palsy, mental illness, or intellectual disability, with a recognised degree of disability equal to or greater than 33 per cent, or a person with physical or sensory disability, with a recognised degree of disability equal to or greater than 65 per cent, as well as in cases of serious illness that incapacitates the person or his/her carer, to carry out a work activity, the limit shall be five times the IPREM.

3) That the mortgage fee, plus basic expenses and supplies, is greater than or equal to 35 percent of the net income received by all members of the family unit.

4) As a result of the health emergency, the family unit has suffered a significant alteration in its economic circumstances in terms of the effort required to access housing, when the effort represented by the mortgage burden on the family income has been multiplied by at least 1.3.

During the moratorium that is requested and granted, the creditor entity may not demand the payment of the mortgage instalment, nor of any of the concepts that make it up (amortization of the capital or payment of interest), either in full or as a percentage. Nor will interest be accrued.

6. PUBLIC PROCUREMENT (SPAIN)

The Spanish Government is implementing measures in public procurement to prevent Covid-19 and the measures adopted by the Administration from damaging the employment and business viability of contractors during this exceptional situation.

On 18 March 2020, Royal Decree-Law 8/2020 of 17 March on extraordinary urgent measures to deal with the economic and social impact of Covid-19 ("**RDL 8/2020**") came into force, introducing a series of measures in different areas of business activity.

In this context, RDL 8/2020 aims to mitigate the uncertainty regarding the actions in the field of public contracting adopted by the different contracting entities as a result of the declaration of the state of alarm provided for in Royal Decree 463/2020 of 14 March, which declares the state of alarm for the management of the health crisis situation caused by Covid-19 ("**RD 463/2020**"), since the current regulations do not respond to this exceptional situation.

In general terms, RDL 8/2020 includes certain measures such as the suspension, extension of deadlines or the economic rebalancing of concessions whose execution becomes impossible due to the situation created by Covid-19 or the measures adopted by the Administration to mitigate it in this new scenario.

On 2 April 2020, Royal Decree-Law 11/2020 of 31 March came into force introduce additional urgent measures in the social and the economic field to deal with Covid-19. Some new measures has been enacted as: (i) the possibility of suspending cleaning and security contracts executed in public facilities which have been closed, or (ii) the salary costs set out in Article 34 RDL 8/2020 include those relating to social security costs, among others.

Main implications of RDL 8/2020 in public procurement

Article 34 of RDL 8/2020 introduces a series of modifications that are applicable to public contracts in force on 18 March 2020 and that have been awarded in accordance with the provisions of (i) Law 9/2017, of 8 November, on Public Sector Contracts, which transposes into Spanish law the Directives of the European Parliament and Council 2014/23/EU and 2014/24/EU, of 26 February 2014 ("**LCSP**") and (ii) Royal Decree-Law 3/2020 of 4 February on urgent measures incorporating into Spanish law various European Union directives in the field of public procurement in certain sectors ("**RDL 3/2020**") or such other regulations as may be applicable from time to time

The main modifications and measures introduced by RDL 8/2020 are the following:

Service and supply contracts for the provision of successive services

- These contracts are suspended when their execution becomes impossible as a result of the Covid-19 or the measures adopted by the State, the Autonomous Communities or the municipalities. This suspension will be effective from the moment that the factual situation that prevents their provision arises and until such time as the provision can be resumed. It may be resumed when the contracting authority notifies the end of the suspension. This suspension regime requires the request of the contractor and the contracting authority must give its opinion within 5 calendar days. If this period expires without an express decision being notified, the request must be deemed to have been rejected.
- The suspension of these contracts does not imply a cause for termination.

- The suspension of the contracts implies the obligation to pay the contractor the damages and losses actually suffered during the period of suspension - upon request and proof of their existence. The contractor will be compensated in the following cases:
  - Salary expenses paid by the contractor to the personnel during the period of suspension as of 14 March 2020 (social security costs included).
  - Expenses for maintenance of the definitive guarantee relating to the period of suspension.
  - Expenditure on rent or maintenance costs of machinery, installations and equipment relating to the period of suspension of the contract and assigned to the execution of the contract and provided that it is demonstrated that these means could not be used for other purposes during this period.
  - Costs of insurance policies provided for in the specifications and linked to the object of the contract and in force at the time of suspension of the contract.
- The procedure for requesting compensation is as follows:
  - The contractor must present his request to the contracting authority, stating (i) the reasons why the execution of the contract was impossible; (ii) the staff, machinery, installations and equipment assigned to the execution of the contract and (iii) the reasons why it was impossible to use the means assigned to the execution of the contract in another contract.
  - The contracting entity must resolve the request within 5 calendar days. After this period has elapsed without notification of the express termination, it must be understood that it has been rejected.
- It is expected that, after the expiry of a contract, the new contract guaranteeing the continuity of the service will not have been formalized as a result of the paralysis of the contracting procedures derived from RD 463/2020, this type of contract may be extended until the execution of a new contract begins for a maximum period of 9 months.

Service and supply contracts for non-sequential performance

- These contracts were in force when RDL 8/2020 came into force and have not lost their purpose as a result of the de facto situation created by Covid-19.
- If the contractor is late in meeting the deadlines set out in the contract as a result of the Covid-19 or the measures adopted by the State, the Autonomous Communities or the local administration, an extension of the execution period is authorised without the imposition of penalties or the termination of the contract. To this end:
- The contractor must request the extension, ensuring compliance with the commitments made within the additional period granted. This period must be at least equal to the time lost for the justified reason, unless the contractor requests a shorter one.
- For the extension of this period, the contractor will be entitled to the payment of the additional salary expenses incurred as a result of the time lost due to the Covid-19 up to a maximum of 10% of the initial contract price.

Works contracts

- These are contracts in force when RDL 8/2020 comes into force and which are expected to be completed between 14 March 2020 - the initial date of the state of alarm - and during the period in which they are in force, and as a result of Covid-19 or the measures adopted by the State, the Autonomous Communities or the local Administration, the delivery of the work cannot take place. These contracts must not have requested their purpose as a result of the declaration of the state of alarm.
- The contractor may request the suspension of the contract as soon as the situation that prevents its delivery arises and until such time as the delivery can be resumed. It will be understood that it can be resumed when the contracting authority so notifies it.

- Once the suspension or extension of the period has been agreed, the contractor may request compensation for the concepts set out in section regarding the service and supply contracts for the provision of successive services.
- In this case, the procedure for requesting compensation and damages requires a formal request from the main contractor with accreditation that the following conditions have been met:
  - That the main contractor, subcontractors, suppliers and providers are up to date with payment of their labour and social obligations as of 14 March 2020.
  - That the main contractor is up to date with payments to subcontractors and suppliers under the terms of articles 216 and 217 of the LCSP.
- An extension of the final delivery date is foreseen as long as the contractor expressly requests it and commits to its compliance within this period.

Works contracts

- These are works and service concessions in force at the time RDL 8/2020 came into force.
- The concessionaire's right to restore the economic balance of the contract is recognised by extending the initial duration of the concession to a maximum of 15% or by modifying the clauses on economic content. The recognition of this right will be conditioned to the contracting authority's assessment of the impossibility of executing the contract due to the situation caused by the Covid-19 or the measures adopted by the State, the Autonomous Communities or the Local Administration.
- The economic rebalancing is configured as a right when the execution of the concession is impossible (and not when the service continues). In this case, the concessionaire will be compensated for the loss of income and increase in costs incurred (possible additional salary expenses). The procedure for this rebalancing is the request by the concessionaire with proof of the situation and the reality of these costs.

Contracts excluded from the application of RDL 8/2020

- The measures provided for in RDL 8/2020 do not apply to the following contracts:
- Contracts for health, pharmaceutical or other services or supplies, the object of which is linked to the health crisis caused by Covid-19.
- Contracts for security, cleaning or computer system maintenance services.
- It is allowed to suspend totally or partially the cleaning and security contracts when the public buildings or facilities where they are executed are closed making the performance of the public contract impossible. This suspension shall be granted *ex officio* or at the request of the contractor.
- Service or supply contracts necessary to ensure the mobility and security of transport infrastructures and services.
- Contracts awarded by public entities that are listed on official markets and do not obtain income from the General State Budget.

7. LITIGATION AND COURTS (SPAIN)

The containment measures have led to a significant slow-down of the Spanish courts. However, matters considered urgent will generally be dealt with normally.

We will analyse the consequences of the of RD 463/2020 and other complementary or implemented regulations that affect legal actions before the courts that are in progress or were intended to be initiated, as well as the exceptions expressly provided for.

Suspension of deadlines, terms and procedural hearings - DA 2nd RD 463/2020

Despite the provisions of the second paragraph of Article 134 of Law 1/2000 of 7 January on Civil Procedure ("LEC"), which provides for the non-extendibility of procedural deadlines, the General Council of the Spanish Judiciary (**'CGPJ'**) issued an Official Communication on 18 March 2020, publishing the extraordinary measures it had been forced to adopt with regard to procedural deadlines and lawsuits, in order to protect the members and staff of judicial bodies.

These measures, which are set out in the Second Additional Provision of RD 463/2020, are designed to suspend procedural deadlines and prohibit the submission of written documents and communications before the courts and tribunals, limiting access only to those documents that relate to proceedings that have been declared urgent and cannot be postponed by court order[5]. In these cases, it will be possible to make use of the platform enabled by the Ministry of Justice LexNET or the equivalent telematics systems.

These suspension measures are aimed at (i) legal proceedings whose initiations were foreseen during this period of time; (ii) those that were in the ordinary course of the lawsuit; and (iii) those whose deadlines apply for the presentation of requests for tender, the latter being adopted pursuant to the provisions of Article 43.1 of Royal Decree 8/2020, of 17 March, on urgent extraordinary measures to deal with the economic and social impact of the Covid-19.

In this regard, it is important to bear in mind that legal proceedings are understood to be all those actions that take place within a judicial procedure, essentially of an oral nature, at the instigation of the court or on the initiative of the parties involved, including hearings, statements and interrogations, among others. Therefore, it seems to be a unanimous criterion that this suspension is extended to hearings and face-to-face acts before the courts and tribunals despite the silence of the CGPJ.

As an exception to this operational suspension, the following may be considered urgent, necessary and unpostponable legal proceedings, inter alia, those relating to measures for the protection of minors, protection orders and any precautionary measures in the area of violence against women and minors, any legal action in cases involving prisoners or detainees, or urgent actions relating to prison surveillance.

The Second Additional Provision of RD 463/2020 brought about a total disruption of the judicial activity. On 13 April 2020, the Secretary of State for Justice issued a Resolution by virtue of which a series of measures were introduced in order to progressively reactivate the service of justice. In particular, the submission of written documents and communications before the courts and tribunals was lifted, and a minimum level of staffing has resumed their physical work.

[5] This classification includes measures for the protection of minors, protection orders and any precautionary measures in the area of violence against women and minors, any action in cases involving prisoners or detainees or urgent prison surveillance actions, among others.

Consequently, it is currently possible to file claims as well as written documents or communications before the courts and tribunals, although the suspension of procedural deadlines and hearings remains in force.

Suspension of limitation and prescription periods – DA 4th RD 463/2020

The Fourth Additional Provision of RD 463/2020 provides for the suspension of the limitation and expiration periods of any lawsuits and rights during the state of alarm, and therefore provides for the lifting of such suspension with the expiration of the state of alarm or its corresponding extensions.

Consequently, those operators who may be awaiting

the possible prescription or expiration of any legal action to which they are entitled (e.g. contractual or non-contractual liability, compensation for damages, etc.) are not obliged to send letters or communications aimed at their interruption. Nevertheless, the sending of these communications (by letter, *burofax*, e-mail, etc.) would be in any case advisable in order to avoid a follow-up of the possible extensions of RD 463/2020, an exhaustive control on the calculation of the deadlines after the lifting of these measures and, in short, to ensure the possibility of exercising their rights.

Exceptions to the suspension measure of deadlines and legal proceedings

By way of exception to the measures set out above, the CGPJ has provided for the dispensation of minimum services to ensure the continuation of certain lawsuits.

By way of example, we can highlight (i) any legal action which, if not taken, could cause irreparable harm; (ii) the adoption of precautionary measures or other actions that cannot be postponed, such as the measures for the protection of minors set out in Article 158 of the CC; or, (iii) in general, proceedings in which there is an alleged violation of fundamental rights and which are urgent and preferential (i.e. those whose postponement would prevent or make very burdensome the judicial protection sought).

In the light of the above, we can conclude that (i) the terms are suspended and the time limits set by procedural laws are interrupted, mainly with regard to the civil jurisdictional order; (ii) the calculation of these time limits will be resumed when RD 463/2020 or the extensions adopted lose their validity; (iii) it is possible to file written documents or communications before the courts by telematics means through LexNET or similar, and (iv) a minimum level of staffing has resumed their work in order to reactivate the judicial activity.

Preparation of the Spanish service of public justice towards the end of the state of alarm

On Wednesday 29 April 2020, the Official State Gazette published Royal Decree Law 16/2020, of 28 April, on procedural and organisational measures to deal with COVID-19 in the field of the Administration of Justice ("RDL 16/2020"). The aim of the procedural and organisational measures approved and entering into force on 30 April 2020 is primarily: (i) to prepare for the reactivation of the functioning of the courts and tribunals, (ii) to ensure a speedy exit given the accumulation of procedures suspended due to the declaration of the state of alarm and (iii) to prepare with sufficient means the Administration of Justice in view of the increase in litigation that will arise as a result of the extraordinary measures adopted in the context of COVID-19.

The first measure regulated in Article 1 of RDL 16/2020 is the exceptional and partial authorisation of judicial proceedings in the month of August. From 11 to 31 August 2020, all legal proceedings will be open. Saturdays, Sundays and public holidays are exempted, except for those legal proceedings for which these days are already working.

As of the conclusion of the state of alarm, RDL 16/2020 provides that the terms and deadlines suspended by the state of alarm are recalculated from their start, i.e. no account is taken of the time that has elapsed before the state of alarm is declared. The first day of the count (dies a quo) will be the next working day after the day on which the suspension of the corresponding procedure ceases to have effect. Despite the fact that RD16/2020 does not specify this, in principle, they will be restarted on the working day following the cessation of the state of alarm, unless otherwise stipulated in any additional extensions to it.

The time limits for lodging appeals against judgments and decisions that terminate the proceedings and that have been notified during the state of alarm or within 20 days following the lifting of the suspension of the deferred procedural time limits are extended by a period equal to that provided for their submission.

In addition, RDL 16/2020 has regulated a series of organisational and technological measures to be implemented in the Justice Administration such as the holding of hearings by telematics means, which will be applied during the state of alarm and up to three months after its completion.

These measures must be interpreted in accordance with the provisions of the decision of 25 April 2020 of the Standing Committee of the CGPJ, which maintains the suspension of non-essential legal proceedings. This suspension was previously agreed on 14 March 2020 and the last authorised extension on the state of alarm will end on 10 May 2020.

8. INSOLVENCY (SPAIN)

On 18 March 2020, the Royal Decree-Law 8/2020, of 17 March, on extraordinary urgent measures to address the economic and social impact of Covid-19 ("**RDL 8/2020**") entered into force.

This law has introduced relevant measures in several sectors of the business activity, and they shall remain in force for a period of one month (i.e. until 18 April 2020), although this period may be extended by the Spanish government.

In general terms, RD 8/2020 grants the debtor, in this period of sudden and unforeseeable crisis, an additional shield of protection to prevent creditors from forcing insolvency proceedings while extending the deadline for submitting the insolvency proceedings to those who had submitted the 5 *bis* before the declaration of the alert state. In short, a ball of oxygen to help alleviate the business crisis and avoid as far as possible a flood of bankruptcy applications when the state of alert ends. RD 8/2020 was followed by the introduction of new measures related to insolvency aimed mainly at continuing with this alleviation of the debtor's critical situation, expediting insolvency proceedings and incentivizing the debtor's financing.

Suspension of the duty to file for insolvency

SIA requires the debtor (either an individual or a corporation) to file for insolvency within two months following the date on which the debtor is aware or should have been aware of its insolvency. The Insolvency RDL 16/2020 has suspended this obligation until 31 December 2020.Act defines what is considered as a state of insolvency.

Moreover, SIA enables creditors to apply for their debtor's insolvency by providing the court with sufficient evidence of both the enforceability of its claim against the debtor and the debtor's indebtedness situation. RDL 16/2020 states that the judges shall not admit any bankruptcy applications filed by the creditors since the declaration of the state of alarm. Finally, applications filed by the debtor shall be deemed preferential from those filed by the creditors.

Suspension of the duty to file for insolvency after the pre-insolvency process

Article 5 *bis* of the SIA contemplates an exception to the previously explained legal period to file for insolvency. Any debtor shall be entitled to communicate to the court its intention to either reach a refinancing agreement with its financial creditors or obtain the necessary adhesions to a composition agreement. This mechanism is referred to as the pre-insolvency process.

The filing of this notice leads to the suspension of the legal period to apply for insolvency. If an agreement is not reached within three months from the filing of the notice before the judge, the debtor has not reached an agreement validated by the court or has not obtained the necessary adhesions to the composition agreement, the debtor shall apply for insolvency within the following month.

By virtue of the suspension of the duty to apply for insolvency until 31 December 2020 provided under RDL 16/2020, the elapsing of said three-month period shall not lead to the debtor's obligation to file for insolvency.

Liquidity guarantee measures to sustain economic activity

RDL 8/2020 provides for the approval of a line of guarantees on behalf of the State for companies and self-employed of up to EUR 100 billion, covering both the renewal of loans and new financing by credit institutions and similar entities to meet their needs. Among others, those arising from the management of invoices, working capital requirements or other liquidity needs, including those arising from the maturity of financial or tax obligations, to facilitate the maintenance of employment and mitigate the economic effects of Covid-19.

This RDL 8/2020 increases the Official Credit Institute's (Instituto de Crédito Oficial) net borrowing capacity by EUR 10 billion, to immediately provide additional liquidity to companies, especially SMEs and the self-employed, through the existing ICO financing lines, among other measures.

In view of the difficulties that the exceptional situation generated by Covid-19 may entail for taxpayers in order to comply with certain tax obligations, RDL 8/2020 provides for the relaxation of deadlines for which the provisions on the suspension of administrative deadlines have been taken into account. However, with a time horizon in favour of the obligor that may exceed the initial validity of the alert state.

Temporary modulations of certain rules governing the insolvency proceeding

As mentioned before, RDL 16/2020 has introduced a set of measures related to insolvency which vary from the ordinary legal regime regulated under LC. Please find below the most relevant rules contained in RDL 16/2020:

- Losses corresponding to 2020 financial year shall not be taken into account for the possible concurrence of a cause for dissolution of the company under Article 365.1.e) of the Spanish Corporate Act.
- The ordinary legal regime shall be applied to the debtor who has communicated its intentions to negotiate (Article 5bis LC) before 30 September 2020
- The debtor can apply for the modification of: (i) the multilateral agreement, the (ii) extrajudicial settlement agreement, during the year following the declaration of the state of alarm.
- The debtor can issue a new communication of the start of negotiations with creditors before the judge even if a year has not elapsed since the last communication occurred (Article 10.2 RD 16/2020).

Conclusions

- Failure to apply for insolvency under the terms of the SIA shall lead to very relevant consequences, such as liability for the corporation's directors and the suspension of this duty enables companies to avoid said consequences which is why the Spanish Government has suspended the duty to apply for insolvency until 31 December 2020.
- RDL 8/2020 also aims at protecting corporations' liquidity through: (i) the approval of a line of guarantees borne by the State for companies and the self-employed of up to EUR 100 billion; and, (ii) the expansion of the net indebtedness capacity of the Official Credit Institute by EUR 10 billion, to immediately provide additional liquidity to enterprises, especially SMEs and the self-employed, through existing funding ICO (*Instituto de Crédito Oficial*) lines.
- The measures (explained above) grant businesses additional time and tools to recover financially or negotiate with is creditors while avoiding the consequences of becoming involved in insolvency proceedings in Spain. However, the periods of suspension granted by the Spanish Government may be insufficient for some companies to attain financial recovery.

9. CORPORATE LAW (SPAIN)

The following is a summary of the measures provided for commercial companies in Chapter V of *Royal Decree Law 8/2020, of 17 March, on extraordinary urgent measures to deal with the economic and social impact of Covid-19*, as amended by the Royal Decree-Law 11/2020, of 31 March, on urgent complementary measures to deal with the economic and social impact of Covid-19. They provide, *inter alia*, a series of extraordinary measures applicable to the functioning of the governing bodies of:

- legal entities governed by private law; and
- listed companies.

These measures will remain in force up until one month after the end of the state of alarm.

Extraordinary Measures Applicable to Legal Persons Governed by Private Law

Meetings and adoption of resolutions by the governing bodies of companies during the state of alarm and even if their Articles of Association do not provide for it:

- **Meetings may be held by videoconference or conference call.**
- **Resolutions may be adopted by means of a written vote and without having to hold a face-to-face meeting whenever** the Chairman decides and must be adopted when requested by at least two of the members of the board.

In both cases, the meeting will be deemed to have been held in the registered office of the company.

During the state of alarm and even if the Articles of Association do not provide for it, **general shareholders meetings** may be **held by videoconference or conference call.**

Drawing up, audit and approval of **annual accounts**:

- **Drawing up**: The obligation to draw up the annual accounts within the first three months following the end of the financial year is suspended until the end of the state of alarm, resuming again for another three months from such date.
- **Audit**: If, before or during the state of alarm, the governing body had already drawn up the accounts for the previous financial year, the period for the obligatory verification of said accounts shall be extended by two months from the end of the state of alarm.
- **Approval**: The ordinary general meeting to approve the accounts for the previous financial year must be held within the three months from the end of the period for drawing up the annual accounts.

The proposed allocation of results included in the annual accounts may be amended without the need to draw up again the annual accounts, provided it is duly justified by the administration body and the auditor confirms that such change has no impact on its report.

Notarial deed of the general shareholders meeting: the notary may use remote, real-time means of communication that adequately guarantees the fulfilment of the notarial function.

Suspension of the right of separation: even if there is a legal or statutory cause, shareholders may not exercise the right of separation until the state of alarm has ended.

Dissolution and liquidation:

- If, before or during the validity of that state of alarm, there is a legal or statutory cause for the dissolution of a company, the legal period for calling the general meeting of shareholders to adopt the relevant resolutions is suspended until the end of the state of alarm.

- If the legal or statutory cause for dissolution has occurred during the state of alarm period, the administrators will not be liable for the corporate debts incurred during that period.

Extraordinary Measures Applicable to Listed Companies.

The following measures will apply during 2020 to companies with securities traded on a regulated market in the European Union:

- Obligation to publish and submit the annual financial report to the CNMV and the audit report of its annual accounts: this may be done up to six months after the end of the financial year.
- General shareholders meeting:
    - The ordinary general meeting of shareholders may be held within the first ten months of the financial year.
    - Despite not being included in a company's Articles of Association, the board of directors may provide in the notice of the general meeting: (i) attendance by telematic means and remote voting; and (ii) the holding of the meeting anywhere in Spain.

CHAPTER 6 – UNITED ARAB EMIRATES

CONTENTS

1. CONTRACTS AND SUPPLY CHAIN (UNITED ARAB EMIRATES)

The coronavirus is impacting all stages of contract supply chains, from material resources to manpower and product delivery. One step companies can take now to mitigate their exposure is to examine their contracts for provisions that may deal with the current circumstances, consider any provisions applied by the governing law and adhere to those provisions. Clauses dealing with force majeure should be identified and analysed in light of the governing law.

Force Majeure

Businesses operating in the United Arab Emirates (UAE) must pay careful attention to the wording of their contracts and refresh their knowledge of the law before they seek to rely on a 'force majeure' clause in response to the Covid-19 pandemic.

Force majeure is a reference to an external event, outside of the parties' control, which parties cite as a reason to withhold performance of their contractual obligations. In commercial contracts, the consequences of force majeure events are often dealt with by force majeure clauses.

Three major jurisdictions in the UAE under which companies may be operating are the onshore UAE, the Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Market (ADGM). Within those jurisdictions, there is no unified approach, so contracting parties should pay close attention to the terms of their contracts, the governing law and any mandatory state interventions which may cut across these factors.

Force majeure under UAE law

There is no specific definition of force majeure under UAE law. The UAE Civil Code (Federal Law No. 8 of 1985) does, however, include several provisions addressing the concept of force majeure and its consequences. The law also differentiates force majeure from events which render the performance of the contract simply onerous.

Generally speaking, a force majeure clause will be interpreted in the same way as any other clause: the wording will be given its plain and simple meaning and, if that is not possible, the intention of the parties when drafting the clause will be looked to. Any contractual notice provisions should also be applied strictly and followed.

Whilst the starting point will be a review of any force majeure provisions contained in the contract between the parties, certain provisions of the UAE Civil Code will be relevant to the interpretation of contractual force majeure provisions and, in the absence of appropriate contractual provisions, will govern the effect of force majeure on the relationship between the parties.

Is performance impossible?

Article 273(1) of the UAE Civil Code says, in part: "if force majeure supervenes which makes the performance of the contract impossible, the corresponding obligation shall cease, and the contract shall be automatically cancelled". So, where performance is rendered wholly impossible, the contract will no longer need to be performed and is treated as cancelled - meaning that the parties will be returned to their pre-contractual positions and damages potentially awarded to achieve this. However, in respect of continuous contracts - as opposed to instant contracts - the part of the contract that was already performed prior to the force majeure event should remain enforceable. Where the force majeure event renders only part of an obligation impossible to perform, Article 273(2) allows only that part of the contract to be extinguished. The remainder of the contract remains enforceable.

Whilst a force majeure event can be a cause for termination, it can also be a defence to liability. In this respect, Article 287 of the UAE Civil Code says: "If a person proves that the loss arose out of an extraneous cause in which he played no part such as a natural disaster, unavoidable accident, force majeure, act of a third party, or act of the person suffering loss, he shall not be bound to make it good in the absence of a legal provision or agreement to the contrary".

Similarly, and in relation to rights in general, Article 472 of the UAE Civil Code deals with impossibility, although it does not expressly refer to force majeure. It says: "The right shall expire if the obligor proves that the performance of it has become impossible for him for an extraneous cause in which he played no part".

Effect in practice?

There is no definition of a force majeure event under UAE law, although judgments have provided guidance on the application of the above provisions of the UAE Civil Code. Generally speaking, the courts have interpreted force majeure restrictively and will analyse each case on its own facts. A force majeure event must have been unforeseeable and unavoidable. The courts will therefore consider whether the event was unforeseeable when the contract was formed and whether the event was truly out of the non-performing party's control and whether that party can be said to have reasonably assumed the commercial risk for the event under the terms of the contract. The same approach is anticipated for parties raising Covid-19, and specific events arising out of the virus, as a force majeure event. One size will not fit all and each case will be assessed on its facts.

That said, parties should remember that UAE law imposes a duty to perform contracts in good faith and, although there is no express duty to mitigate, UAE courts will expect parties to refrain from compounding their losses. Therefore, every step should be taken in this respect, including providing timely notice to the other party of the nature of the event and an explanation as to why performance is now impossible as well as acting quickly and reasonably to reduce a party's own losses.

Force majeure under DIFC law

The DIFC free zone has its own dedicated contract law - the DIFC Contract Law (DIFC Law No. 6/2004). Whilst the terms of the contract agreed by the parties will always be the starting point, if the consequences of non-performance due to a frustrating event are not clearly agreed, then Article 82 of the DIFC Contract Law fills the resulting lacuna and must be taken account alongside any force majeure provision in the contract.

Excusing non-performance

Article 82(1) of the DIFC Contact Law provides: "Except with respect to a mere obligation to pay, non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences".

Putting aside a simple debt obligation, which will be unaffected under this provision, this means that a party may be excused from performance if:

- non-performance was caused by the event;
- the event was beyond the party's control;
- the party could not reasonably have assumed the risk of it at the time of entering into the contract; and
- the party could not have reasonably avoided or overcome the event or its consequences.

Effect in practice?

The main question to consider here is: was the failure to perform because of Covid-19, or were there other intervening events which broke the chain of causation?

Take the example of a delivery company, short-staffed due to employees self-isolating. A failure to deliver occurs after one driver suffers a collision on the road. The collision is not related to the pandemic but, if the company had more drivers on the

road, a surrogate driver could have been deployed to complete the delivery.

A number of questions are relevant to whether Article 82(1) applies:

- was the failure to deliver caused by the effects of the pandemic?
- is it reasonable for the company to assume the risk of non-delivery where it is short-staffed due to the pandemic and a car accident occurs?
- is it reasonable for the company to hire temporary workers at an additional cost while others self-isolate in order to mitigate the risk of such events?

This is a basic example, but it illustrates the complex questions as to reasonableness, mitigation and causation that will arise in all manner of commercial contexts.

How long will it last?

Article 82(2) of the DIFC Contract Law provides that non-performance is excused "for such period as is reasonable, having regard to the effect of the impediment on performance of the contract".

Three questions arise here:

- is the virus the impediment, or is the impediment the specific consequences arising from the virus? In our view, it is the latter - but this is open to debate;
- if the impediment is the virus itself, at what point does it 'end'? Is it when the risk of infection drops below a certain level, or when the infection curve is 'flattened'? If the impediment is the specific consequences of the virus, duration might be easier to measure – but it is a point that warrants careful consideration;
- how will the effect of the impediment on performance be measured, and at what point is the effect reduced so that performance is expected again?

The more specifically a party can identify and frame an impediment, the better placed it will be. If a party can pinpoint a particular 'lockdown' measure that has impeded performance, explain as precisely as possible how and why performance has been impeded and justify the expected duration, it is more likely to have the sympathetic ear of the other party and, ultimately, a court or tribunal.

Notifying the other side

Article 82(3) of the DIFC Contract Law provides that a party must give notice to the other party of the impediment and its effect on the party's ability to perform. If notice is not received "within a reasonable time after the party who fails to perform knew or ought to have known of the impediment" then the non-performing party is liable for damages resulting from the non-receipt of notice.

When giving notice, in addition to complying with any notice provisions in the contract, we advise clearly specifying:

- the impediment;
- why performance is not possible as a consequence of that impediment; and
- for how long the impediment is expected to continue.

This provision is particularly important for parties entering into new contracts. They will be treated as knowing about the pandemic and its consequences, and to have allocated the risk of the pandemic within their contract, unless expressly stated otherwise.

Exit is open

Lastly, parties should remember that termination of the contract is still an available option.

Article 82(4) of the DIFC Contract Law is clear that nothing in Article 82 prevents a party from exercising a right to terminate the contract, withhold performance or request interest on money due. It is clear that force majeure events do not excuse the obligation to pay debts.

Force majeure under ADGM law

The position in the Abu Dhabi Global Market (ADGM) free zone follows the English common law. Under English law, force majeure is a creature of contract and not of the general common law. The ordinary principles of contractual interpretation apply, albeit the English courts traditionally interpret force majeure clauses restrictively. The party relying on the clause must prove its scope and application to the facts. The first step is to carefully review the words in the clause, paying attention to any express carve outs and notification requirements.

As under DIFC law, and subject to the specific wording of the clause, the English common law requires that to prove a force majeure event a party must establish that:

- the event was beyond its control;
- the risk of non-performance was not allocated by the contract; and
- that reasonable steps could not have been taken to avoid the consequences of the event.

In the absence of a force majeure clause, the parties must rely on the English law doctrine of frustration to relieve them from the consequences of their non-performance. In short, a contract may be frustrated where an extraneous factor outside the parties' control renders performance of the contract radically different from what was agreed, and the risk of that occurring is not allocated by the parties' contract. The contract is treated as terminated, but without retrospective effect.

For more on the position of force majeure under English law, see the Supply Contracts section under the United Kingdom Chapter above.

Effect in practice?

Parties should be familiar with the wording of their contracts and comply with any notice requirements strictly. The courts are generally loath to allow commercial parties to get out of contracts they have freely entered into. Force majeure clauses are interpreted restrictively, and it is a very high hurdle to prove that a contract has been frustrated. Parties should therefore seek to cooperate in this difficult climate, working together on devising reasonable steps to mitigate the adverse effects caused by the pandemic while still delivering performance, even if in a different way.

Parties also remain free to vary their contract by agreement in order to adapt to the current situation.

Immediate things to do

- Despite the legal differences, there are a number of questions that every business should be raising right now no matter the stage of contractual performance:
- is performance of the contract impeded?
- is the contract now impossible to perform, or is it merely more difficult?
- does the contract include an explicit force majeure provision (which need not be labelled 'force majeure') and, if so, is the impediment caught by that provision?
- does the contract require notice of a force majeure event to be given and has notice been given accordingly?
- how is the impediment measured, how long will it last and when can it reasonably be said to have ended?
- is there any indication in the terms of the contract that one party has assumed the risk of not being able to perform in the current circumstances?
- is the impediment due to an event under one party's control? Could one party reasonably have mitigated or avoided the consequences of non-performance altogether?
- the impediment be dealt with by cooperative means, including expressly varying the contract to accommodate the change?
- whether or not the contract contains a force majeure clause, what is the governing law of the contract and what does that law say about force majeure or similar doctrines?
- Where a business is entering into a new contract, how does it intend to allocate the risk of non-performance caused by the pandemic

2. EMPLOYMENT (UNITED ARAB EMIRATES)

Authorities in the UAE have published new guidance and legislation to support private sector employers against the unprecedented backdrop of the Covid-19 pandemic. In particular, the Ministry of Human Resources and Emiratisation (MoHRE) has issued two resolutions to support businesses dealing with the challenges of remote working and to allow the restructuring of the contractual relationship with employees.

Remote working

Many private sector employers have been applying more flexible working arrangements for their staff wherever possible in recent weeks to support employees and ensure business continuity during the crisis.

The MoHRE issued a resolution to give businesses added guidance and confidence in terms of the measures they can implement across their UAE workforces. Ministerial Resolution No. 281 of 2020 (Resolution 281) regulates remote working in the private sector to assist businesses during the coronavirus crisis.

A schedule attached to Resolution 281 sets out a policy for employers and employees who are working remotely, to ensure that both parties are benefitting from the working arrangements. Although the policy is non-binding, it sets out a number of "obligations" for employers and employees to ensure effective home working.

Employees should "perform tasks according to specified timeframes" and "maintain confidentiality of information, documents and papers", among other commitments. Employers should "provide the technical equipment necessary for the employee to perform their work" and "facilitate remote workers' communication with their colleagues, management and leadership".

The policy provides a useful benchmark for companies as they grapple with the new norm of remote working.

Redundancies and restructuring employment contracts

Ministerial resolution No. 279 of 2020 (Resolution 279) allows private sector businesses affected by the precautionary measures taken to prevent the spread of Covid-19 to restructure the contractual relationship with their employees.

Most significantly, Resolution 279 introduces the concept of 'redundancy' into the UAE Labour Law for the first time. Where an employer has identified a surplus of non-UAE national staff whose employment will be terminated, Resolution 279 requires the employer to:

- continue to provide the former employee with all of their entitlements with the exception of basic salary - including housing, transport and other allowances and private medical insurance - until such time that the employee secures alternative employment or leaves the UAE; and
- register the individual onto the MoHRE's 'Virtual Labour Market' so that they can take up work for another organisation. This is particularly helpful for sectors experiencing an increase in business operations given the current suspension of foreign recruitment. A new employer can then lawfully hire the employee by choosing one of the following work permit options: transfer of work permit, temporary work permit or part time work permit.

Resolution 279 does not go so far as to expressly define redundancy termination - arising in connection with Covid-19 or otherwise - as an automatically 'valid' reason to dismiss an employee under the UAE Labour Law. However, it is likely that the courts will be more sympathetic to employers who can

prove that redundancy terminations were the only viable option for the business.

Resolution 279 also seeks to support employers reshuffling their business structures by gradually adopting the following:

- implementing a remote work system;
- granting employees paid leave;
- granting employees unpaid leave;
- temporarily reducing salaries; and
- permanently reducing salaries.

Requiring employees to take a period of paid leave is not new and employers have always been able to unilaterally set an employee's holiday dates under article 76 of the UAE Labour Law. However, employee consent is necessary before a period of unpaid leave can be imposed on employees.

A temporary or permanent reduction to salary will amount to a change of a key term of the employment contract. Advance written consent must be obtained from the employee in the usual way, or else the employer risks a claim.

Article 5 of the Resolution states that businesses seeking to temporarily reduce employee salary must sign an annex to the employment contract, in the form provided by MoHRE. The validity of the temporary arrangement will be as mutually agreed in the terms or for as long as the Resolution remains valid, whichever is sooner. The annex recording the salary reduction can be renewed by mutual agreement of the parties. Employers must retain an original of the annex so that it can be shared with the MoHRE if and when requested.

A permanent reduction in salary will require the employer to go one step further and first obtain the MoHRE's approval by applying for a change to the registered employment contract. Employers wishing to introduce a permanent reduction to salary should consider how the employees' post-employment gratuity will be calculated - specifically, if the gratuity accrued to the 'changeover date' will be ring-fenced at the original rate of basic salary, or if the entire gratuity value will be calculated with reference to the reduced rate of basic salary at time of eventual employment termination.

Employers in the 'onshore' jurisdiction to which Resolution 279 applies will not be exempt from compliance with the Wages Protection System (WPS). However, Resolution 279 gives MoHRE the power to relax the WPS rules for employers as they try to work through their options in these unprecedented times.

Misinformation

The UAE has very strict defamation and media laws and criminal liability may result from the circulation of misleading information via the internet and social media. In addition, on 31 March 2020, Cabinet issued Resolution No. 24 of 2020 Concerning the Publication and Exchange of Health Information about Communicable Diseases and Epidemics was issued, which imposes a fine of AED 20,000 on any person who circulates or publishes misinformation about Covid-19 or any information about Covid-19 that is not from an approved government source. The fine may be doubled in the case of repetition.

As the UAE has a predominately expat workforce, many employees are following news reports in both the UAE and their home countries with interest, often via reports shared on social media. It is easy for rumours and misinformation to spread quickly, therefore employers should advise all employees to follow official government announcements and to avoid sharing rumours without verifying statements from official sources. Employers should remind employees of such laws and consider updating and recirculating their internet use and social media policies to reflect this.

Data protection and privacy

Far-reaching privacy laws are in place in the UAE. Any employee medical records should therefore be dealt with strictly confidentially and only shared with relevant personnel on a 'need to know' basis. Best practice is to obtain advance written consent from the employee before the details of any

medical test or report are shared, even where there is a provision in the employment contract confirming how personal data will be processed within the organisation.

Back to work requirements

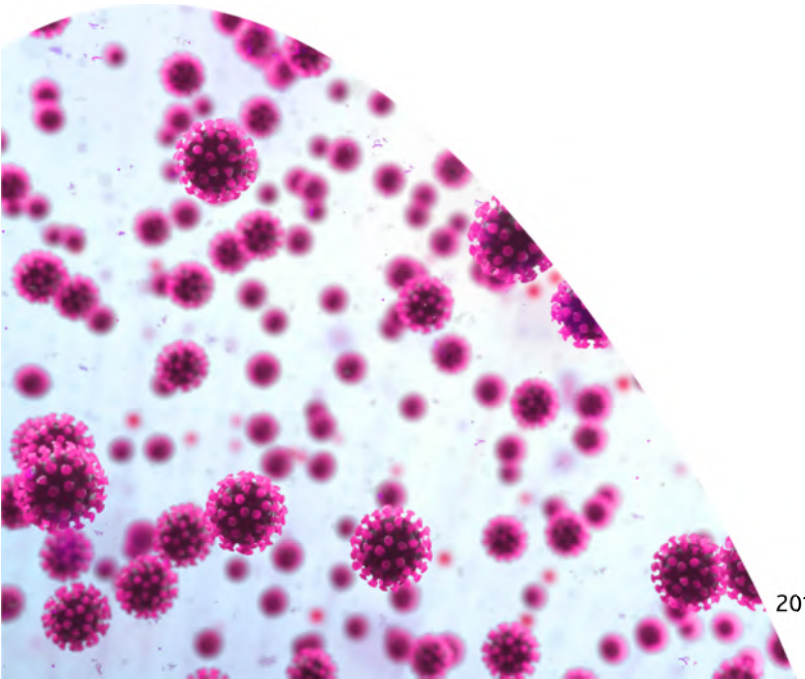
The Dubai Economy has recently published some requirements for businesses going back to work. It includes specific requirements for the wholesale and retail trade, transport and logistics, social welfare, construction and manufacturing sectors as well as general requirements for office buildings and precautions to be taken during Ramadan.

Businesses should check their individual requirements issued by their Emirate and/or free zone in order to ensure that they comply. Requirements may include:

- temperature screening all people entering the business premises;
- complying with occupancy ceilings (e.g. 70% of employees to work from home);
- limit the number of people in a room and maintain 2m distance from each other;
- 24 hour office sanitisation and installation of hand sanitisers; and
- provide an isolation room for suspected cases.

Immediate things to do

- Ensure employees remote working have the technical equipment necessary to do the work.
- Check the back to work requirements issued by your Emirate and/or free zone and ensure that you have the resources to comply.
- Consider working patterns which reduce the risk of infection - e.g. creating two cohorts with half of the department working from home and half in the office each day in order to balance operations with practical measures.
- Communicate clearly with the workforce on any updated working procedures or timings for moving back to workplace.
- Brief line managers and HR staff on company policy – using an FAQ guidance sheet. Ensure there is a consistent message to all employees on process and company policy.
- Remind employees of the laws of defamation and consider updating and recirculating the company internet use and social media policy.
- Ensure employees' medical information is kept confidential and in compliance with any relevant privacy and data protection laws.
- Keep clear records and audit trails of all actions and decisions that can later be used as evidence of compliance with the relevant laws.
- If changes to employment contracts are required on a temporary or permanent basis, seek legal advice to ensure that proper procedures are followed in order to avoid liability.



3. CONSTRUCTION CONTRACTING (UNITED ARAB EMIRATES)

The UAE government has put in place a number of measures to curb the spread of coronavirus. People, supply chains and financing arrangements are all impacted, but there are actions that businesses can take to address the challenges they are facing.

Relevant government measures

The UAE government has, amongst other steps, issued the following precautionary measures to limit the transmission of the virus and manage its impact:

- temporarily suspended the issuance of all types of labour permits from 19 March 2020, save for intra-corporate transfer permits and employment permits for Expo 2020;
- suspended entry, for a limited period of time, to all residents who are currently outside the country;
- suspended the entry of all valid visa holders, who are currently out of the country, for a renewable period (although this is now beginning to be relaxed for some residents with special approval to return);
- directed that 70% of the workforce of the private sector are to work from home, for a renewable period of time, with the exception of certain sectors including infrastructure projects. Those projects include energy companies (including oil companies, oil refineries, power plants, gas stations, and the sale and distribution of fuel) and building and construction sites, contracting and construction firms, and engineering consultants;
- Introduced a sterilisation programme and curfew from 26 March 2020, save for urgent/emergency travel, but the implementation has varied from Emirate to Emirate. Most Emirates observe an evening curfew, recently adjusted to 10pm to 6am to coincide with the start of Ramadan. In Dubai, a 24 hour curfew was in place from 4 April 2020 to 23 April 2020 but was reduced to an evening curfew of 10pm to 6am from 24 April 2020. The construction sector is exempt from the curfew.
- Put in place a strict system of penalties for violation of any precautionary and preventative measures, instructions and duties issued by the Ministry of Health and Prevention, the Ministry of Interior and the National Emergencies, Crisis and Disaster Management Authority in relation to maintaining health and safety to prevent the risk of spreading COVID-19.
- Announced that all visas, entry permits and Emirates ID cards expiring from 1 March 2020 will remain valid until the end of 2020. The 'expired' residence permit itself will remain valid until the end of 2020.
- In Dubai, the Municipality issued guidelines to help operators of labour accommodation and transport to take preventative steps. These include precautionary measures to be followed within labour accommodation and on buses.
- Introduced a resolution encouraging private sector employers to consider ways to reduce their non-national employee staffing costs other then terminating employees, including, with the employee's written agreement, remote working, paid leave, unpaid leave, temporary salary reduction, and permanent salary reduction. In the event of redundancy, employees should be shared on the Ministry's Virtual Labour Market System to help find alternative employment and, until alternative employment is found or the employee leaves the UAE, the employer remains liable for the employee's minimum entitlements, excluding salary, such as medical insurance and housing allowance (see Resolution 279, discussed in **Employment** above).

Potential implications for the UAE construction sector

The people factor

With the temporary suspension of the issuance of new labour permits, save for intra-corporate transfers and employment permits for Expo 2020, together with the recent imposition of restrictions on flights and cross board travel, it is very likely that the UAE construction industry will face short to medium term issues in respect of recruiting labour and moving or transferring employees for both on- and off-site roles.

The shutdown of schools across the nation coupled with working from home guidelines will also have an impact, at least in the short term, on companies' off-site employees, and may lead to reductions in productivity whilst companies quickly look to improve off-site software capabilities to enable remote working.

In light of the impact that the virus is having on individual mobility, the allocation and shifting of labour resources and potential staffing shortages, the supply chain and in particular contractors, subcontractors and contract administrators may also be faced with disruption and delays on supervision and signing off of works.

Employers will also have to be mindful of the government directions to private employers that alternatives to redundancies should be considered and, even if redundancies are necessary, employers remain liable for the employee's minimum entitlements until alternative employment is found or the employee leaves the UAE.

Immediate things to do

Personnel

- Stay up to date with the UAE government's most recent announcements in respect of the issuance of new work permits, and travel restrictions.
- Conduct a risk assessment on health and safety and put in place relevant measures to ensure the health and safety of employees in line with UAE government guidance.
- Communicate clearly with the workforce on any updated absence procedures, including notifying absence by email or telephone call and consider a requirement to notify coronavirus related absences to a central inbox in order to track centrally the potential workforce impact, and in order to comply with UAE infection reporting obligations.
- Consider if any steps are required in order to facilitate home working, such as issuing laptops and enhancing network capacity for increased home working.
- Consider working arrangements on construction sites and whether the company can implement patterns which reduce the risk of infection. Such patterns may include staggered working shifts to ensure round the clock progression of the works with more limited human-to-human contact.
- Ensure accurate records are kept in respect of any employees on visas that may need an extension due to travel restrictions; and
- Keep clear records and audit trails of all actions and decisions that can later be used as evidence of compliance with the relevant UAE government requirements

Immediate things to do

Facilities – health and safety obligations

- Provide additional buses to transport workers from their accommodation to construction sites, noting that the UAE government has stated that buses must not exceed 25% capacity in an effort to maintain a safe distance between workers;
- Carry out a risk assessment to ensure that people working in or visiting the building/site are not exposed to risks to their health;
- Put in place practical measures to support those on site such as:
  - ensuring hand washing facilities are available, regularly stocked with anti-bacterial soap and checked regularly;
  - provide additional hand sanitiser stations as appropriate;
  - include signage advising of hand washing protocols and reminding those on site to wash hands in line with UAE government guidance;
  - add signage advice on coughing and the use of tissues – 'catch it, kill it, bin it' – and provide closed bins for disposal of tissues;
  - ensure gloves and helmets are personal to employees so are used by one individual only and cleaned between uses; and
  - ensure that, where possible, social distancing can be maintained;
- Consider whether any additional screening or protocols are required for visitors to site; and
- Where appropriate, consider restricting access to premises to essential personnel only.

The supply chain

Whilst many borders around the world have been closed to passenger travel, they largely remain open to goods. There is some positive news coming out of China, indicating that the Chinese economy is cautiously beginning to resume operations. Chinese government containment and quarantine measures are slowly being lifted, and production of construction materials is likely to resume sooner rather than later. A similar approach appears to be commencing in some European countries, whist the U.K. and U.S. remain heavily affected and restricted. This means that sourcing materials in jurisdictions most heavily restricted will be more difficult and companies may have to source materials elsewhere, leading to potentially higher material costs and a slower progression of works.

Immediate things to do

Contracts and supply chain

- Businesses should be reviewing the terms in all of their existing construction and supply contracts:
- What is the governing law of the contracts entered into by the business, and which contracts have force majeure provisions that may be relied on?
- Where is the exposure and risk? Diarise any backstop termination rights identified in contracts to ensure the risk can be managed.
- Prepare template force majeure notices which can be populated quickly if there is a need to respond to a changing situation rapidly.
- Map supply chains through to customers and use this to plan and implement a supply chain strategy in order to guard against disruption to the business and stop early warning signs of challenges.
- Take steps to mitigate exposure, such as dual sourcing, stock piling or obtaining goods from another source.
- Consider whether any specific provisions dealing with Covid-19 – a coronavirus clause – may be required in new agreements that are being entered into by the business.
- Provide training to accounts and contract management teams to ensure that they do not inadvertently waive contractual rights or create binding variations through actions to respond.
- Legal teams should also consider whether there will be any issues caused with signatory availability, for example if the workforce is remote working, and whether any workarounds need to be put in place to address this.
- Consider putting in place processes for electronic signatures and identify where the business has contracts that will not be capable of being executed by an electronic signature.

Immediate things to do

Insurance Obligations

- Monitor the classification of the virus by the UAE government and international agencies such as the World Health Organisation.
- Liaise closely with insurers and brokers to understand the cover that the business has in place and where this might be applicable to broader business decision making around activity cancellation or staff movements.
- Bear in mind claims relating to Covid-19 are likely to be complex and businesses should seek advice promptly

Project financing

In the current period of uncertainty, it is likely that the sector will also face uneasiness from lenders. They may not be willing to finance large scale construction projects, and projects which are tied to the oil and gas sector will be under particularly intense scrutiny in light of the recent fall in oil prices. Disruptions to the supply chain and the labour market will increase the risk of delay and default, and financers are likely to take more-cautious risk assessments before agreeing to finance projects.

Managing the business impact of Covid-19

The implications of the virus are wide-ranging, however, there are numerous measures that businesses in the construction industry can implement to mitigate some of those implications, and more effectively manage the impact on their businesses.

As a general remark, and whilst the situation continues to develop, a close eye should be kept on further UAE government guidance and measures that may be introduced in order to contain or reduce the spread of the virus. Businesses will need to monitor these carefully so that the overall impact can be factored into the business planning and response.

There are other actions businesses within the UAE construction sector may want to consider in order to formulate a robust response to the situation and these are captured in the **Immediate things to do** sections above.

4. GULF TAX (UNITED ARAB EMIRATES)

The Gulf Cooperation Council (GCC) States have taken a number of rapid and significant actions at a government and banking level in order to support people and businesses which are suffering financially from the impact of the Covid-19 pandemic.

Each State has invested in a significant financial stimulus package, including various exemptions, deferrals and subsidies designed to support businesses and individuals to keep afloat, mitigate the impact and attempt to emerge out the other end of the crisis on semi-solid ground.

Overview of Fiscal Stimulus Packages

Have financial stimulus packages been implemented in the GCC in order to support the region with managing the financial impact of the Covid19 crisis?

As of early April 2020, we understand the Financial Stimulus packages implemented across the GCC States by local Government and Central Banks to be as follows:

- UAE's combined stimulus package as at 5 April 2020, following a number of top-ups by the Central Bank, Free Zone Authorities, etc. is approx. AED 256 billion (US$70bn)
- Similarly, KSA topped up its stimulus package on 20 March 2020 to a combined package of SAR 120bn ($32bn).
- Bahrain implemented a stimulus package of BHD 4.3bn (US $11.4bn) on 17 March 2020.
- Qatar implemented a stimulus package of QAR 85bn (US $23.35bn) on 16 March 2020, made up of QAR 75bn for the private sector and an additional QAR 10bn boost into the capital markets in the Qatar Stock Exchange.
- Oman announced its banking only stimulus package of OMR 8bn (US$20.8bn) on 18 March 2020.
- Kuwait's stimulus package delivered wholly through the Central Bank as of 2 April 2020 equates to a KWD 5bn ($16BN) increase in additional lending for local banks. The state has also announced a KWD 500 million (US$1.6bn) increase to the 2020-21 ministries and government budget.

How will individuals and businesses practically see the impact of these financial stimulus packages?

Within each stimulus package, GCC states have introduced a variety of exemptions, deferrals and subsidies in order to provide practical support to people and businesses across the region. While some are common across a number of GCC States, some are very specific to a State or Free Zone Area.

The most common of these include:

- Banking reliefs – delayed repayments on loans, reduction or mitigation of loan and other banking and transaction fees, and an increase in the availability of credit facilities;
- Water and utility reliefs – reductions, deferral and exemptions for deposits and bills, together with some specific subsidies;
- Real estate reliefs – reduction, deferral or exemption of land lease tariffs, registration fees, municipality charges, rents, etc.;
- Transportation reliefs – reduction, deferral or exemption for traffic tariffs, vehicle registration fees, ship mooring fees etc.;
- Employment and labour reliefs – reduction, deferral or exemption of work permit fees and other labour charges, together with additional availability to extend the period covered by certain visa categories, etc.;
- Hotel and other tourism reliefs – reduction, deferral or exemption of tourism levies and other municipality fees on hotel stays, event permits and other fees;
- Customs duty reliefs – reduction, deferral or exemption of bank guarantee obligations, the actual customs duty liabilities and fees for the processing of customs documentation, etc.;
- Other tax reliefs – postponement of certain VAT, excise tax and income tax compliance and payments, including expat levy, for a period of three months (KSA and Oman only), special period of tax error disclosure without the application of penalties (KSA only);

- Government fees & charges - generally there are a huge number of governmental fees, levies and other charges being exempted;
- A government commitment to ensure prompt and timely payment of fees to government bodies within 15 days (UAE only); and
- A government commitment to contribute to private sector salaries (Bahrain only).

These initiatives will last for an initial fixed period of either three months or six months, depending on the initiative and the State. Some are specific to particular categories of individuals or businesses which are at a higher risk of the negative financial impacts of Covid-19 such as small businesses; private sector; retail; tourism and transportation businesses; etc.

How can individuals and businesses avail of such reliefs?

All individuals and businesses in the GCC region should be identifying which:

1. States are most relevant to them,
2. Sectors they work or trade in, and
3. Reliefs set out above may be available to them.

Once they have identified the reliefs that they may be able to avail of, it is important that individuals and businesses seek the support of professional advisers and / or the government bodies responsible for implementing the relevant stimulus reliefs in order to identify:

1. Criteria to be met in order to avail of the relief, and
2. The process and associated timing that must be followed in order to activate the relief.

As most of the stimulus reliefs have been introduced on an urgent basis in order to support the region on a short-term basis during this critical time, applications for relief will also have tight deadlines which should be identified and adhered to strictly.

The situation should also be monitored frequently so that businesses can take advantage of any further reliefs that may be implemented in the coming weeks.

Covid 19 Tax Planning and Mitigation

Aside from the tax reliefs introduced at a State level by the local governments / tax authorities, some strategic and prompt tax planning and impact mitigation by tax managers and finance directors will also be a smart investment of time for a business in operational 'survival mode'.

B1 - VAT refunds from tax authorities (UAE, KSA and Bahrain)

Many businesses across the GCC region have allowed VAT refunds to build up on their account with the tax authorities, on the basis that they could deduct these from future VAT liabilities and possibly to avoid the burden of potentially triggering a tax audit from the tax authorities.

The tax authorities across the region have continued to promote the claiming of tax refunds. For example, the KSA tax authority has advertised on its website that all VAT refunds should be paid within a 30 business day window. In addition, most government bodies across the region will be under more strict instructions to release payments to businesses as promptly as possible in order to relieve financial pressures caused by the pandemic.

Although businesses should be prepared in the event of queries or an official audit being triggered, now may be as good a time as any to submit VAT refund requests to the relevant tax authorities in order to improve cash flow into the business.

B2 - VAT Bad Debt Relief (UAE and Bahrain)

VAT Bad Debt Relief is available where a business registered for VAT purposes in the GCC has charged VAT to a customer, reported such VAT on its periodic VAT returns and settled any outstanding liabilities, but remains unpaid in part or in full by the customer.

This relief allows the supplier to claim the amount of VAT associated with unpaid amounts from customers as a credit in the current period, in order to reduce its VAT liability for that period. If the customer subsequently pays, the supplier would again adjust its VAT liability to the authorities in its periodic VAT return in the period that the payment is received.

This relief is likely to become more relevant to businesses during the pandemic, as payments from customers may be

delayed more than usual and the delays may continue into the coming weeks and months. If applicable, and claimed, Bad Debt Relief would free up cash flow within the business by reducing any VAT due in the current period.

Of course, in the event of non-payment to vendors, similar bad debt relief may be triggered requiring the business to adjust VAT previously deducted on purchases, increasing the current period VAT liability.

These positive and negative adjustments should be planned and managed in an effective way by the business for optimal cash flow.

This may also become relevant in the KSA after the three month VAT return and liability deferment initiative has ceased.

B3 - VAT on commercial contracts (UAE, KSA and Bahrain)

No doubt a number of challenges and disputes are being faced across the region in respect of long-term and high value contracts. These challenges may bring with them reductions to originally agreed pricing, suspension of payment due dates, claims for penalties for breach of contract where one party can no longer deliver, and other changes that may impact the overall VAT liability and timing of liabilities for these contracts.

Issues which may arise include:

- Returned deposits – if a deposit paid at the start of a contract was a 'payment on account' for a future supply of taxable goods or services, then any agreed refund of this deposit due to the commercial circumstances of Covid-19 would result in the reversal of the associated VAT previously invoiced and reported by means of a tax credit note by the supplier. This credit note will reduce the supplier's VAT liability to the tax authorities in the current period. Note, however, that not all deposits are liable to VAT;

- Reduced consideration – similar to the return of a payment on account deposit, any agreed reduction in the overall consideration for a supply under a commercial contract which is liable to VAT may trigger a current period tax credit note, which would reduce the current period VAT liability of the supplier;

- Continuous supplies – with any long-term contracts for the continuous supply of services subject to a periodic payments schedule, any suspension or postponement of payments as a result of Covid-19 should also suspend or postpone the VAT liability as long as the issuance of the associated tax invoice is scheduled to align with the new payment plan. However, in the UAE, a tax point must trigger after each 12-month period at a minimum. Therefore, businesses should ensure that a tax invoice is issued and the associated VAT is remitted to the tax authority within 14 days of the end of the first 12 months of the contract in order to avoid the risk of penalties;

- Penalties – penalties, damages or similar charges for breach of contract may become due on certain commercial contracts. Generally, a penalty resulting solely from non-delivery under the contract would not be liable for VAT. However, each payment should always be assessed in terms of why it is being paid and what for, to ensure that it could not be viewed as being a payment for a supply - for example, the toleration of a situation in return for a payment could be viewed as a supply of services. If a third party seeks to charge VAT on these types of charges, it is important to ensure that the amounts are correctly liable to VAT, as any incorrectly charged VAT will not be reclaimable from the tax authorities.

B4 - Employment taxes (Bahrain)

The impact of any government contribution to private sector salaries should also be considered from a social security perspective and any ambiguity on treatment clarified. This will ensure that costs are mitigated for both employer and employee as much as possible, as well as mitigating any risk of penalties for non-compliance.

B5 - Corporate restructuring (all GCC)

Corporate groups across the GCC region may wish to reconsider their corporate structure in response to economic constraints caused by Covid-19. This exercise could include scaling back on certain divisions, merging businesses within fewer legal entities or even liquidating certain entities.

It will be important to consider the tax impacts of any mergers or liquidations as part of this process, together with the correct

timing for these actions in order to optimise the tax position or mitigate costs. See our Out-Law Guide: VAT and corporate structuring in GCC countries

Some initial considerations might include:

- tax impact of share sales, business transfers and liquidations;
- retention or loss of carry forward provisions for tax losses, or refunds to net against future profits or liabilities;
- continued or new use of group tax provisions allowing one entity's tax losses and refunds to be netted against another entity's tax profits or liabilities;
- triggering capital asset gains, losses or scheme adjustments;
- timing of any tax deregistration – for example, to not compromise the carry forward of losses and refunds but to meet required deregistration timelines in order to avoid penalty.

Immediate things to do

- Implement an internal process for identifying and monitoring financial and tax reliefs in the Gulf region;
- Implement a tight turnaround time for identifying the criteria and process for availing of any Gulf reliefs applicable for your business;
- Undertake an internal tax planning & mitigation exercise to identify any other practical ways to increase cash flow or mitigate cost, through effective tax management; and
- Manage any potential tax non-compliance, de-registration, etc. in an effective and proactive way internally and with the tax authorities, in order to mitigate the risk of any penalties.

CHAPTER 7 – QATAR

CONTENTS

1. CONSTRUCTION CONTRACTING (QATAR)

The Qatar government has taken measures to curb the spread of coronavirus, Covid-19, and some of these will have an impact on the construction industry which is already dealing with a sudden and unexpected oil price war.

The measures affect people, supply chains and financing arrangements, but companies can take action to address the challenges they face.

The Qatari government has taken the following steps to limit the transmission of the virus:

- suspended entry for a limited period of time to all residents who are currently outside the country;
- shut down schools;
- shut down the Metro;
- introduced changes to bus services for travel between labour camps and sites;
- suspended the entry of all valid visa holders, who are currently out of the country for a renewable period of two weeks effective from 18 March 2020 until further notice, with the exception of receiving any Qatari citizens coming from anywhere in the world;
- directed that anyone entering Qatar must self-isolate for 14 days;
- directed that 80% of the work force of the private sector are to work from home from 1 April 2020, with certain exceptions;
- directed that the working hours of employees and workers in the public and private sector who are still required to attend their workplace are reduced to 6 hours per day from 07.00 - 13.00, although some projects considered to be in the national interests have been exempted from this restriction;
- locked down an entire area of the Industrial Area where staff, labourers and materials for construction sites are located;
- mandated the closing down of canteens in labour camps;
- shut down certain sites in their entirety.

These measures have implications for the Qatari construction sector.

The people factor

The restrictions on flights into Qatar from countries such as India and the Philippines will have an impact on projects at mobilisation stage. Recruiting and moving employees from on and off site roles will become more challenging and short to medium term issues can be anticipated.

The closing of schools across the nation coupled with working from home guidelines will also impact, at least in the short term, companies' off-site employees, and may lead to reductions in productivity while companies put in place software capable of enabling remote working.

There is likely to be disruption to individual mobility as a result of the reduction in buses and the operation of fewer services, and restrictions on number of passengers, as well as the shutting of the metro services completely. Travel to and from construction sites, labour camps and HQ is disrupted and employers are facing demands for alternative travel arrangements to be put in place for employees.

In cases where employees are based in the Industrial Area and are locked down, they are being paid salaries while not working, causing imbalance to the project's finances.

In labour camps and on construction sites the obligation to provide food has been affected by the prohibition on dining in site canteens. The provision of food to employees by alternative, more expensive, means is an increased cost to employees.

The supply chain

Though there are severe travel restrictions for people this is not the case for cargo and freight transfer via sea and air, though delays have been reported due to staffing issues.

As the situation in China improves Chinese government containment and quarantine measures are being lifted and the production of materials and good from China, which Qatari contractors often depend on, will become available again soon.

As the Covid-19 epicentre shifts from China to mainland Europe and the US, the Qatar construction industry is likely to face shortages of materials from there. Contractors in Qatar are particularly reliant on suppliers and manufacturers in Europe for mechanical, electrical and plumbing products and the European impact may lead contractors to find alternative suppliers. This may affect the price of the goods themselves and raises questions about cancellation of purchase orders and the termination of existing contracts.

The delay and disruption 'up the line' will also naturally feature in claims for extensions of time and associated cost. Whether those claims are rooted in the contract or Qatari Civil Code depends on the wording of the contract and the remedies available contractually. Contractors may well be better, financially, to rely on the Civil Code provisions such as Article 171 (2) for compensation rather than a force majeure provisions which gives time but not money.

Project financing

Given the current uncertainty it is anticipated that contractors will face challenges obtaining financing from lenders unwilling to commit to supporting infrastructure projects.

Because of the drop in the oil price, projects relating to the production of gas will face particular scrutiny from banks, which may be forecasting budget deficits and subsequent large scale de-scoping of capital state funded infrastructure and energy projects, as happened when the oil price dropped in 2014.

The slow momentum the public private partnership procurement model was gathering in Qatar may well be accelerated now, with Covid-19 as a catalyst for change. Lenders involved in funding those deals will of course be cautious about committing to such long-term projects until some degree of economic stability returns.

Disruptions to the supply chain and labour market increase the risk associated with complex infrastructure and energy projects, and the likelihood of delay and default. In such circumstances project finance is likely to be limited and banks will be carefully assessing the contractor making the request, the government's reaction to the Covid-19 pandemic to date and their own balance sheets, before committing.

How contractors can manage the business impact of Covid-19

There are steps contractors can take to manage the impact of the virus. To do this a team should be designated as a Covid-19 task force responsible for monitoring Qatar government guidance and communicating the measures being introduced every day to senior commercial directors. See **Immediate things to do** for further guidance.

Immediate things to do

Project directors, managers, lawyers and contract managers should review the terms of existing contracts both 'up the line' with employers and main contractors and 'down the line' with subcontractors, suppliers and manufacturers. For each contract, ask:

- does it have a force majeure provision?
- does the force majeure provision require performance to be 'impossible' or not?
- do the Covid-19 implications fit into the scenarios described in the force majeure provision?
- is notice required to be served and when?
- does it give the contractor time and money or just time?
- does the contract have a 'change in law' provision?
- when is the 'suspension' provision triggered?
- when is the 'termination' provision triggered, and is notice and a court order required?

Other measures to take include:

- Prepare templates: usually contractors adopt a standard form template for subcontracts, suppliers and purchases. If a business adopts a single contractual response to the Covid-19 outbreak, it may be possible to prepare a template letter for use by everyone. This will save time and ensure consistency.
- Produce a supply chain map: this should identify each supplier, where they are located, what they are producing and when it is due to arrive on site. This can be used to identify and anticipate blockages in the chain, review the relevant contract and plan alternative solutions.
- Mitigate exposure: contractually there is usually either an express or an implied obligation to mitigate the impact of delays to progress. Options for dual sourcing, stockpiling and obtaining goods and materials from alternative sources should all be considered.
- Draft Covid-19 into new contracts: any new contracts should contain specific provisions dealing with issues anticipated as a result of Covid-19 related measures.
- Train: contract managers and procurement teams should be given training to ensure contractual rights and remedies are not inadvertently waived and variations introduced by employers are priced, or at least notified, accurately in light of recent government directives.
- Signatory availability: those authorised to sign contracts may not be able to do so in person. Consider whether other workarounds are available including e-signature options.
- Keep records: never has tracking the impact of a compensable event been more critical. Cash recovery from claims will become a key priority at every level of the supply chain. Ensure records are kept and insist the same from subcontractors.

The impact on people

There are actions companies can take to manage and reduce the impact of coronavirus on people.

Companies should stay up to date with the Qatar government's most recent announcements about the issuance of new work permits, and travel restrictions.

They should conduct a health and safety risk assessment and put in place measures to ensure the health and safety of employees in line with Qatar government guidance.

Employees should be provided with clear, unambiguous policy changes and procedures.

Absence procedures should be reviewed. It may be preferable to permit notification of, and requests for periods of absence to be made by, email or phone. Coronavirus-related absence may be notified to a central inbox to track workforce impact and comply with reporting obligations.

Consider what steps should be taken to enable staff to work from home, such as issuing laptops, installing software, amending network capacity.

Hundreds of employees could be affected on any one project. Tracking each employee's personal situation including their visa status and extensions that may be needed due to travel restrictions, for example, will help monitor the impact.

Clear records and an audit trail of each action and decision taken can later be used as evidence of compliance and mitigation.

Immediate things to do

- Monitor government announcements dealing with work permits and travel restrictions.
- Conduct a heath and safety risk assessment and put measures in place to comply with government guidance.
- Assess feasibility of working from home arrangements and put clear policies and procedures in place.
- Maintain records of all actions and decisions taken.

Health and safety

It is likely that additional buses will be needed to transport workers from their accommodation and labour camps to construction sites given the Qatar government directive limiting capacity to 50% or less. Identify alternative private transportation options and record the cost to later include in a claim for compensation if one is made.

Employees' health and safety is paramount and a risk assessment should be conducted on every construction site and within every office building to ensure the working environment does not expose employees or visitors to infection.

Introduce measures to keep people safe, taking World Health Organisation advice into account. Examples of those measures are summarised in **Immediate things to do**.

Insurance

All insurance policies should be reviewed, particularly 'business interruption' type policies, and notification obligations complied with. Contractors All Risk policies sometimes cover business interruption but it depends on the individual policy. Also, the insuring clause in the relevant policy will typically include a large number of significant exclusions. Accordingly, the cover that is provided by CAR policies can vary considerably and the individual wording must be checked carefully to determine what is (and is not) covered by a particular policy.

The classification of the virus by the Qatar government and international agencies such as WHO can influence the availability of insurance and should be monitored.

Companies should discuss existing cover with insurers and brokers and seek to understand where this might be applicable to broader business decision-making around activity cancellation or staff movements.

Many businesses will have claims relating to Covid-19 and insurers will be inundated. Notification obligations under the policy and procedures the policy requires the insured to follow should be implemented as a priority.

Immediate things to do

- Provide hand washing facilities, regularly restocking anti-bacterial soap and checking and cleaning the associated facilities;
- Provide additional hand sanitiser stations around the working environment;
- Communicate the hand washing protocols and other WHO advice through signage;
- Provide gloves and masks to employees regularly;
- Encourage social distancing;
- Consider screening visitors, such as with temperature checks; and
- Consider restricting access to essential personnel only.

CHAPTER 8 – KINGDOM OF SAUDI ARABIA

CONTENTS

1. CONSTRUCTION CONTRACTS (KINGDOM OF SAUDI ARABIA)

Construction companies operating in Saudi Arabia should review the 'force majeure' provisions in their contracts to understand whether they can be acted on in light of the impact of coronavirus.

The concept of 'force majeure' is not defined in Saudi law, but the principles of Shariah law, which have overarching effect in the country, do provide a basis for force majeure events to be recognised and triggered in contracts. While the Saudi courts have applied the concept of force majeure strictly, the Saudi government has taken some steps to clarify the circumstances in which force majeure clauses might be triggered.

The impact of Covid-19 on construction projects in Saudi Arabia

The spread of Covid-19 is impacting the construction markets in the Middle East and globally. The extent of the impact is difficult to assess and differs from project to project and depends on the length and extent of measures implemented by governments in the region in response to Covid-19.

The government of Saudi Arabia has taken a number of measures to curtail the spread of Covid-19 since it was declared as a pandemic by the World Health Organisation on 11 March 2020. These measures include suspending office working; implementing curfews from 7pm to 6am nationwide and 24 hour curfews in Riyadh, Jeddah, Mecca, Madinah and a number of other cities; and suspending international and domestic flights and inter-urban bus, taxi and train services. These measures will have varying levels of impact on a project, depending on the stage of the construction project in question, whether in the development, construction or operation phases.

Claims for force majeure

Regardless of the stage of the project, the delay and disruption and the unexpected nature of the outbreak may entitle contractors and developers to claim for relief under force majeure and 'change in law' provisions of their contract. In the pre-contractual stage, contractors and developers may have to rely on civil law concepts of 'impossibility' or other rights under the law.

The concept of force majeure originally derives from the French civil law system and it is a general legal concept where courts may declare that a particular event such as a pandemic is a force majeure event, thereby relieving parties of their contractual obligations or event resulting termination of the contract if it becomes impossible to perform. Similar concepts exist in the civil law system prevalent in the Middle East. In contrast, under English law, force majeure is a creature of contract and not of the general common law. It is therefore important that the contract deals with force majeure events.

The purpose of a force majeure clause is to allocate risk for future circumstances and events which are beyond the reasonable control of the parties and which are likely to have an impact on the performance of contractual obligations. Whether a particular clause will relieve a party will depend on the precise wording of the clause. In the case of the Covid-19 pandemic, trigger words such 'epidemic', 'pandemic' or 'plague' would be helpful. Relief is usually in the form of extensions of time, increased costs, suspension of obligations or ultimately termination of a contract.

Saudi law

Saudi law is governed by the principles of Shariah law. Unlike most of the countries in the Middle East, Shariah has been adopted by Saudi Arabia in an uncodified form. This, and the lack of judicial precedent, has resulted in uncertainty in the scope and content of the country's laws.

While Shariah forms the basis of the legal system, Saudi Arabia has introduced several secular codes, such as the Companies Law and Investment Regulations. In practice, with commercial

contracts, it is often enacted, or codified, legislation which will be the principal source of reference in terms of interpretation, but all such laws are ultimately subject to, and may not conflict with, the Shariah.

Shariah forms a background for judicial interpretation of the relevant documents and facts, with an emphasis on being fair and equitable to the parties involved, and applying good faith in commercial dealings.

Legal concepts similar to force majeure

Although there is no codification of the concept of 'force majeure', similar concepts can be understood from the Sharia principles – parties to a contract are legally bound to honour their terms unless otherwise excused. Such a legitimate excuse can include:

- Calamity (Ja'eha جائحة)which are general, external and unavoidable damage-causing circumstances over which contracting parties have no control.
- Valid excuse (Uthur عذر) which is the inability to perform the contract without incurring damages that are not otherwise contemplated under the contract.

Saudi law usually requires that the relevant event is:

- outside the control of the parties and unforeseeable;
- general in application;
- unavoidable, or its damages are unavoidable; and
- causing the performance of the contract to be impossible.

Force majeure clauses do not provide relief if the relevant party has negligently failed to perform its obligations under the contract prior to the occurrence of the force majeure event, or where the contracting parties are not affected by the force majeure event.

Under Saudi law, "force majeure" can be claimed irrespective of the parties' contractual position. The Saudi courts will only recognise force majeure events where the circumstances render performance of contractual obligations impossible and no other contractual remedies or relief is available. The courts will consider if force majeure is defined in the contract and that such definition does not contradict with Sharia principles. The burden of proof is on the party seeking the relief and the threshold is generally high. Such cases are examined on a case-by-case basis and the outcome is uncertain, particularly without the benefit of a binding doctrine of precedent to which one might otherwise refer.

Saudi courts are likely to consider factors such as the duration of the event and the terms of the contract when determining whether a force majeure event has occurred or not. Therefore, claims citing force majeure where a contract has merely become too expensive to perform or is no longer profitable would be unlikely to be granted relief by the Saudi courts as such financial losses may well be considered a part of doing business. Accordingly, any claim in connection with the Covid-19 pandemic seeking to be excused from performance under a contract will still need to demonstrate that the performance of such contract has been negatively and directed impacted by Covid-19 in order to be successful

Helpfully, in response to Covid-19 the Saudi government has issued certain directives and amendments to existing regulations which indicate that Covid-19 is considered as an extraordinary event or force majeure event entitling relief for employees and to ease certain procurement processes under the Procurement Law. The relief includes permitting parties to terminate the contract by agreement in the event of impossibility to carry out the work due to force majeure such as the Covid-19 pandemic.

Further initiatives to ease the burden of the Covid-19 pandemic for the private sector have also been announced by the Saudi government, including the deferral of tax reporting and payment obligations, pay protection for employees, suspension of fines, and delay of payment of government and municipality fees.

The impact of Covid-19 on construction projects is not easy to predict and will vary from project to project. However, during these uncertain and challenging times, contractors and developers should start by reviewing the force majeure provisions in their contracts to better understand their contractual position.

Immediate things to do

- Review your contracts to assess your rights, taking into consideration the governing law as this will effect contractual interpretation and the existence of rights under the law;
- Proactively administer the terms of your contract, for example ensure that relevant notices are provided in accordance with the terms of your contract;
- Proactively discuss the situation with your counterpart and provide regular updates to relevant stakeholders;
- Review your subcontracts and supply chain arrangements to assess your rights and obligations under those contracts as a result of Covid-19. Consider if you are likely to be exposed to any termination of supplier or subcontracts and also diarise any rights of termination you may have;
- Keep contemporaneous records of all communications and notices with your counterparts and records of all mitigation action and any impact on time and costs as a result of the Covid-19 pandemic and government action response; and
- Consider what mitigation strategies can be put in place, such as identifying affected suppliers, consider if alternative materials/suppliers/labour are available – consideration should be given also to lead times– and how any delay or shortages will be managed – for example by acceleration, or commencing early works. Be careful that your actions are not a breach of your existing contractual arrangements

Pinsent Masons Coronavirus Team

We have developed a cross-discipline and cross-jurisdiction team to support our clients in responding to the impact of the Coronavirus on their business. We are well placed to support your business in:

- carrying out scenario planning and putting in place your business strategy to consider the Coronavirus impact on how you might deal with this in your business operations – providing pragmatic and practical advise;
- support your engagement with your workforce dealing with sickness reporting, self-isolation, business travel and immigration requirements
- reviewing your contractual arrangements in place with customers and suppliers to help assess exposure and identify where relief could be sought or claimed;
- advising on standard form construction contracts, notification requirements and formal processes that will need to be complied with;
- considering the health and safety obligations you need to comply with in respect of your employees and visitors to your premises;
- advising on financial disclosure requirements that should be made in your year end reporting;
- reviewing your insurance coverage to ensure that you operate in line with this and do not invalidate any insurances through business actions taken in responding the virus.

You can contact any of our team below or email coronavirusenquiries@pinsentmasons.com for further guidance.

We have developed a cross-discipline and **cross-jurisdiction team to support our clients in responding to the impact of the Coronavirus** on their business.

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