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COVID-19: Commercial Leasing in South Australia: Another Round of Changes!

The South Australian Government has made further changes to the COVID-19 Emergency Response Act 2020 ("Act") and also introduced new regulations - the COVID-19 Emergency Response (Commercial Leases No 2) Regulations 2020 ("New Regulations").

The New Regulations have particular importance to commercial leasing and operate to implement certain principles set out in the National Cabinet Mandatory Code of Conduct for Commercial Leasing ("Code") in South Australia.

How did we get here?

Before analysing the changes to the Act and the New Regulations, it is worth considering the sequences of events that led to these further changes.

On 6 April 2020, the Code was released by the National Cabinet. For a summary please refer to our previous article "COVID-19: What Landlords and Tenants Need to Know".

On 9 April 2020, the South Australian Government introduced the Act and on 16 April 2020, the COVID-19 Emergency Response (Commercial Leases) Regulations 2020 ("Initial Regulations"). For a summary please refer to our previous article "COVID-19: The South Australian Response to the Commercial Leasing Code of Conduct".

Changes to the Act and the Regulations

On 15 May 2020, the Act was amended when the COVID-19 Emergency Response (Further Measures) Amendment Bill 2020 ("Bill") was assented to. On the same day the New Regulations came into force and the Initial Regulations ceased to apply.

Section 7 of the Act previously contained substantive provisions setting out the specific rights and obligations of lessors and lessees under a commercial lease during the COVID-19 pandemic. This section has been amended and now contains broad provisions for regulations to be created to deal with these rights and obligations. The New Regulations contain the substantive provisions that were previously contained in the Act.

We suspect this "switch" was made so that if further changes are needed as the status of the COVID-19 pandemic evolves, they can be swiftly implemented by way of new regulations via Ministerial consent, rather than the more elaborate parliamentary process required to amend the Act.

Section 7 of the Act and the New Regulations apply from 30 March and end on 30 September 2020 ("Prescribed Period").

The New Regulations

In addition to replicating the substantive provisions that were previously contained in the Act, the New Regulations also implement additional principles set out in the Code. Further details regarding these changes are set out below.

Good Faith Negotiations

The New Regulations require all parties to a commercial lease to make a genuine attempt at negotiating in good faith the rent payable and other terms to apply to their commercial lease during the Prescribed Period.

Whilst "good faith" is not defined in the Act or the New Regulations, we consider that what is required is for the parties to exercise their rights for legitimate purposes and to conduct themselves honestly. To negotiate in good faith lessees should, if requested by their lessor, provide BAS statements, turnover sales and information relating to their JobKeeper payments and business insurance. The Small Business Commissioner ("SBC") has produced a "guidance note" that confirms this.

Have regard to...

In negotiating in good faith, the parties must "have regard to" the economic impacts of COVID-19 on all parties to the lease and the provisions of the Act, the New Regulations and the Code.

In our view the requirement to "have regard to" should be considered in a broad context.

We do not consider that it places a prescriptive requirement on the parties to comply with the Code in its entirety. That is, we do not consider this requires rent relief to be granted to a lessee strictly proportionate to the lessee's reduction in turnover, rather it requires the parties to consider the principles set out in the Code when negotiating in good faith. Lessors should however note that if the matter proceeds to Court (refer below), the Court must have regard to a lessee's reduction in turnover during the Prescribed Period.

Lessor's financial position

The New Regulations require the parties to consider whether the lessor is suffering financially from the effects of COVID-19 when conducting negotiations. This requirement is not set out in the Code and we consider this to be especially relevant for smaller lessors who may be receiving minimum or no support from their financier and who may have entered into a commercial lease with a larger "corporate" lessee.

Affected Lessees

Under the New Regulations, a lessee is an affected lessee if they can establish that they are suffering financial hardship as a result of the COVID-19 pandemic and if their turnover in the relevant year (e.g. FY18/19) was less than $50 million.

The definition of "affected lessees" is important as lessors are prohibited from taking prescribed action against an affected lessee on grounds of a breach of the lease during the Prescribed Period (refer below).

Turnover threshold

The introduction of the turnover threshold is noteworthy as the Act and the Initial Regulations did not include this limitation. Previously, all lessees suffering financial hardship as a result of the COVID-19 pandemic were afforded protection. Lessors are no longer prohibited from taking enforcement action against a tenant with a turnover of $50 million or more.

Whilst there is no definition of turnover, the New Regulations confirm that turnover includes turnover that is derived from Internet sales. It remains to be seen how broadly this will be interpreted. Questions arise as to whether it will include all Internet sales or only sales dispatched from or collected from the premises (i.e. via click and collect).

Deemed financial hardship

If a lessee is eligible for or receiving JobKeeper payments they will be deemed to be suffering financial hardship. As the effects of the COVID-19 pandemic evolve, we recommend that lessors continue to request information from lessees on a regular basis (fortnightly or at least monthly) to verify ongoing eligibility and receipt of JobKeeper payments.

Prescribed Action

Lessors are still prohibited from taking prescribed action against an affected lessee on grounds of a breach of the lease during the Prescribed Period (e.g. evicting lessees, re-entry, distraint of goods, recovery of a security bond, requiring performance under a personal guarantee or terminating the lease).

The wording in Regulation 7(1) of the New Regulations is in essence the same as the wording that was previously set out in clause 7(3) of the Act. Our view remains that there is uncertainty as to whether lessors can take prescribed action against an affected lessee for breaches of the lease that occurred before the Prescribed Period, for example, in relation to arrears that were incurred before 30 March 2020. Accordingly we recommend that specific legal advice is sought in relation to the particular lease before any prescribed action is taken.

Enforcing Breaches of Re-negotiated Terms

The New Regulations have clarified that a lessor can only enforce a failure to pay reduced rent during the Prescribed Period if it has been agreed following mediation with the SBC or pursuant to a Court determination. A reduction in rent agreed to by the parties during good faith negotiations cannot otherwise be enforced during the Prescribed Period.

We consider this to be problematic for lessors. Lessors may look to negotiate on the basis that the parties enter into a new lease (and surrender the existing lease) should the parties be able to reach agreement on revised terms. This would enable the lessor to enforce the terms of the new lease (refer below).

New vs Existing Leases

The New Regulations apply to existing commercial leases during the Prescribed Period and to any extension/renewal of an existing lease if it is on the same or substantially similar terms as the existing lease.

The phrase "substantially similar terms" is not defined in the Act or the New Regulations. This may cause confusion or disputes to arise because if an existing lease is renewed but the terms are not substantially similar to the terms of the existing lease, then the New Regulations will not apply. This will enable the lessor to enforce the terms of the renewed lease.

The New Regulations also do not apply to new leases entered into after 30 March 2020.

Mediation & Court

The New Regulations provide a mechanism for the resolution of disputes.

Mediation

A lessor, an affected lessee or a lessee claiming to be an affected lessee can apply to the SBC for mediation of a "relevant dispute". This is defined in an extremely broad manner.

If mediation successfully resolves the issues between the parties, usually a legally binding settlement agreement would be drawn up and executed by the parties.

If mediation is unsuccessful, then the SBC must issue the parties with a certificate. The certificate will confirm the mediation has failed or was not reasonable or a party refused to participate in the mediation / did not participate in good faith ("Certificate").

Whilst there is no prohibition on a party taking Court action after receiving a Certificate, in circumstances where the party did not participate in the mediation or did not participate in good faith, we expect that such conduct would not be looked upon favourably by the Court.

Court proceedings

A party may only issue proceedings in the Magistrates Court for a determination of the relevant dispute if the party has been issued with a Certificate. Any lessee that is not or is not claiming to be an affected lessee cannot pursue Court proceedings or mediation pursuant to the New Regulations.

The Court may make wide ranging orders including:

- Deferred rent - the maximum period the Court can prescribe for payment of deferred rent is 24 months after the date the Court makes its determination. This is distinct from the Code, which prescribes a minimum period of 24 months. Whilst this timeframe is only applicable in relation to an order made by the Court, it may assist lessors in negotiating rent relief with affected lessees.

- Rental waivers - if the Court determines that rent relief is warranted, the Court must order that at least 50% of the rent relief is a rent waiver. Therefore, although there is no prescriptive obligation under the Act or the New Regulations for lessors to give rent relief, if the dispute goes to Court, the lessor may be at risk of a more onerous rent relief arrangement than if they had resolved the matter with the lessee direct.

Need Assistance?

If you have any specific queries in relation to the Regulations or the Code, please do not hesitate to contact a member of our Property Team - contact us:

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COVID-19: LEGAL AND PRACTICAL CONSIDERATIONS FOR COMMERCIAL LANDLORDS AND TENANTS

Written by: **Doug Kerner**

Many commercial tenants suffering financial distress related to COVID-19 are unable to make their monthly rent payments. Commercial landlords are seeing a wide variety of requests from their tenants, including rent deferment, rent abatement, lease renegotiation, and outright lease termination. Some tenants already have simply abandoned their space and turned over the keys.

But before either side takes drastic action, such as terminating a lease, abandoning the premises, or initiating litigation, landlords and tenants should openly discuss the issues. If each side understands the other's needs, there may be a way to salvage the tenancy and preserve the landlord-tenant relationship. Here are the top things commercial landlords and tenants suffering financial impacts related to COVID-19 should consider:

- **What Does the Lease Say?** Whether it is a commercially produced form lease or a custom drafted document, the analysis of options for both landlords and tenants should always start with the actual language of the lease. Lease terms vary widely, and a thorough review of the agreement is the first step.
- **Is There a Quick and Easy Solution?** Often, the tenant just needs a little time. A simple short-term deferral of rent may be enough. Deals can be structured to allow the tenant to make up the deferred rent by the end of the calendar year, or by a certain date in the next calendar year. Some landlords have agreed to allow tenants to pay 50% of their rent for up to 90 days or have agreed to defer 100% of base rent while the tenants continue to pay all their triple net expenses. For more complex situations, the parties will need to be a bit more resourceful. Landlords might seek additional security, such as personal guarantees, in exchange for concessions.
- **Can the Tenant Sublet the Space?** Where a simple deferral of rent is not enough, tenants will want to consider whether the lease allows them to assign or sublet the space (it usually does, with the landlord's consent), and whether they should seek a subtenant to take over some or all of the premises. This may be difficult in the current market. And while a sublease might help alleviate

- **Can the Tenant Abate Rent?** Tenants also will want to see if the lease allows rent abatement, and under what circumstances. Often abatement is permitted only where there has been physical damage to the premises, or a hazardous substance condition has arisen. Leases do not typically allow rent abatement for financial distress caused by an unforeseen viral pandemic.
- **What About Force Majeure?** Much has been written about force majeure lately. Creative arguments notwithstanding, most force majeure clauses are not helpful. They often do not specifically reference pandemics as a justification for delaying performance, and even if some useful language exists, it may not apply to the payment of rent. Tenants similarly might seek refuge in California Civil Code section 1511, the statutory force majeure provision. But here again, applicability in a pandemic is far from clear. Much will turn on the specific facts and circumstances of the lease in question.
- **Are There Other Legal Defenses to Ease Rent Payments?** Tenants also should investigate the legal doctrines of impossibility and commercial frustration. In California, commercial frustration is interpreted more liberally than in other states, so tenants will want to explore that issue thoroughly with their legal counsel. Under some circumstances, it may give tenants some basis for temporary relief.
- **Does the Landlord Have Other Recourse?** Landlords should determine if they can access the tenant's security deposit to offset rent. Landlords also should check to see if any personal guarantees were executed with the lease. Even if the tenant has defenses under the lease for the payment of rent, the landlord might have personal recourse against one or more individuals that can provide significant leverage in any negotiations with the tenant.
- **Should the Parties Modify the Lease?** The parties generally should at least attempt to modify their lease terms. If a tenant claims it is unable to meet its rent obligations due to financial impacts related to COVID-19, it should be prepared to demonstrate those impacts to the landlord. And the landlord should insist on some evidence substantiating the impacts to the tenant. In many cases, the landlord is probably better off trying to modify the lease because the landlord's hands are somewhat tied. With courts closed, or functioning in only a limited capacity, there is little opportunity, at

resumes, landlords may experience significant delays in their matters as courts struggle with the backlog of cases. Uncompromising landlords also may find an unsympathetic judiciary, and juries may not look kindly on them if they have not tried to resolve the issues with their tenants (many leases contain jury trial waivers, but such waivers on not enforceable in California). Tenants, too, need to realize that landlords might be in a difficult financial situation and have little flexibility to deal with them on rent. Landlords must pay bills too. Many landlords have substantial debt obligations and may not able to work with their lender to defer loan payments. They rely on rental income and without it might be at risk of defaulting on their loans and losing their property to foreclosure. If the parties can reach agreement, an amendment to the lease, even a simple 30-day abatement of rent, should be in writing. Each party should consult legal counsel to ensure the modifications are properly documented to avoid any future disputes.

- **Can the Tenant Be Evicted for Failing to Pay Rent?** In short, yes, but probably not right away. In addition to court closures, which hampers eviction proceedings, many local jurisdictions, such as the City of San Diego, have adopted emergency ordinances that prohibit evictions of commercial tenants due to an inability to pay rent because of COVID-19. Tenants who can show a substantial business loss related to COVID-19 may be able to defer rent for a short period and be relieved of the threat of immediate eviction. Even though these ordinances may soon expire, they might also be extended while the economy gradually reopens. For example, the City of San Diego's eviction ordinance was recently extended to June 30, 2020. It is also important for tenants to note that these programs typically provide only for a deferral of rent, not an abatement, or forgiveness of rent. Ultimately, the tenant will have to pay all unpaid rent or face eviction once the moratorium is lifted. In the meantime, a new bill, **SB 939** (Wiener), is working its way through the California legislature. As currently drafted, the bill would prohibit landlords from terminating a commercial tenancy or seeking to evict a tenant of commercial property during the pendency of the state of emergency proclaimed by the Governor on March 4, 2020, related to COVID-19. Any such eviction would be deemed void and any harassment or retaliation against a tenant would be punishable by $2,000 fine. This bill is, not surprisingly,

- **Should the Tenant Walk Away?** This is a big decision, but some tenants have no choice. The COVID-19 pandemic has already destroyed their business and they must dissolve or file bankruptcy. For tenants likely to survive, in addition to exposure to monetary damages, there are future credit implications to consider before abandoning the premises. This should be an option of last resort, and one taken only after careful consideration and consultation with legal counsel.
- **What Can the Landlord Do if the Tenant Walks?** If a tenant threatens to hand over the keys and stop paying rent, the landlord should consider its options and determine what legal remedies are available. While the landlord has a duty to mitigate its damages and will try to lease the premises to another tenant as soon as possible, in this market, that may be tough. Until the landlord finds a new tenant, the prior tenant will probably be liable for unpaid rent (and other costs, such as attorney's fees) until a new tenant is found. If the landlord pursues legal action and obtains an award of damages, the tenant could be liable for all unpaid rent that would have been earned until the time of the award, and for the balance of the lease term, less only any amount of rental loss that the *tenant* proves could have been reasonably avoided. This could be a substantial sum, but the landlord will need to evaluate whether any judgment against the tenant will ultimately be collectible. If the tenant has little or no assets, legal action may not be worthwhile.

These are difficult and unprecedented times. Many of the claims made and arguments offered by both landlords and tenants have not been tested in court and likely will not be tested for quite some time. In the meantime, landlords and tenants should take a hard look at their relationship and try to preserve it, if possible. Other options may not serve either party well in the long run.

The attorneys at Higgs Fletcher & Mack are here to help both tenants and landlords adjust their leases while they navigate the COVID-19 pandemic. Please contact us for further guidance.

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Covid-19: Impact of force majeure in Indian commercial contracts

Authors: Preetam D'Souza and Ranjit Mahishi

1. Force Majeure – meaning

The term 'force majeure' translates literally from French as *superior force. It is also generally defined in the Merriam Webster dictionary as '*an event or effect that cannot be reasonably anticipated or controlled'. The reference to "force majeure" is meant to describe events beyond the reasonable control of contracting parties and could include uncontrollable events (such as war, labour stoppages, or extreme weather) that are not the fault of any party and that make it difficult or impossible to carry out normal business.

A provision of force majeure in a contract is intended to absolve a party or waive its obligations absolutely or suspend it temporarily for reasons which cannot be construed to be a breach of contract by the defaulting party.

2. Section 56 and 32

In India, the law on force majeure is embodied under sections 32 and 56 of the Indian Contract Act, 1872 ("**Contract Act**"). Section 32 of the Contract Act provides that '*contingent contracts to do or not to do anything if an uncertain future event happens, cannot be enforced by law unless and until that event has happened. If the event becomes impossible, such contracts become void.'* Section 56 of the Contract Act enshrines the 'doctrine of impossibility', which provides that '*a contract to do an act which, after the contract is made, becomes impossible or unlawful or, by reason of some event which the promisor could not prevent, becomes void when the act becomes impossible or unlawful.'*

Under the aforesaid provisions, contracting parties can plead impossibility of performance and consequently frustration of a contract on account of a particular event, unforeseen previously and beyond the control of the parties.

3. Contract

Commercial contracts almost always include a *force majeure* clause. The circumstances in which the provision may be invoked are generally limited to common events which may be construed to be 'Acts of God' and are usually not negotiated vigorously, except for specific situations such as 'strikes, lock outs, shortage of material, etc.', which are the parties anticipate are likely to occur and have a direct bearing on the performance of the contract.

In certain instances, the provision may be triggered by an 'Act of God' and may not specifically enumerate the specific situations, such as the current pandemic. Most commercial contracts nevertheless include certain catch-all provisions having language such as – 'any other cause whatsoever beyond the control of the respective party'.

4. Section 56 of the Contract Act.

Doctrine of frustration - Impossibility

Prior to the Common Law decision in *Taylor vs. Caldwell*, (1861-73) All ER Rep 24, the law in England was extremely rigid. A contract had to be performed, notwithstanding the fact that it had become impossible of performance, owing to some unforeseen event, after it was made, which was not the fault of either of the parties to the contract. This rigidity of the common law in which the absolute sanctity of contract was upheld was loosened somewhat by the decision in *Taylor vs. Caldwell* in which it was held that if some unforeseen event occurs during the performance of a contract which makes it impossible of performance, in the sense that the fundamental basis of the contract goes, it need not be further performed, as insisting upon such performance would be unjust.

The law on the 'doctrine of frustration' has been laid down in India by the Supreme Court in the seminal decision of *Satyabrata Ghose v. Mugneeram Bangur & Co*. [1954 SCR 310]. The word "impossible" has not been used in the section [Section 56 of the Contract Act] in the sense of a physical or literal impossibility. The performance of an act may not be literally impossible, but it may be impracticable and useless from the point of view of the object and purpose of the parties. If an untoward event or change of circumstance totally upsets the very foundation upon which the parties entered their agreement, it can be said that the promisor finds it impossible to do the act which he had promised to do. It was further held that where the court finds that the contract itself either impliedly or expressly contains a term, according to which performance would stand discharged under certain circumstances, the dissolution of the contract would take place under the terms of the contract itself and such cases would be dealt with under section 32 of the Contract Act. If, however, frustration is to take place *de hors* the contract, it will be governed by Section 56 of the Contract Act.

In *M/s Alopi Parshad & Sons Ltd. v. Union of India* [1960 (2) SCR 793], the Supreme Court, after setting out section 56 of the Contract Act, held that the statute does not enable a party to a contract to ignore the express covenants thereof and to claim payment of consideration, for performance of the contract at rates different from the stipulated rates, on a vague plea of equity. Parties to an executable contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate, for example, a wholly abnormal rise or fall in prices which is an unexpected obstacle to execution. This does not in itself get rid of the bargain they have made. It is only when a consideration of the terms of the contract, in the light of the circumstances existing when it was made, showed that they never agreed to be bound in a fundamentally different situation which had unexpectedly emerged, that the contract ceases to bind. It was further held that the performance of a contract is never discharged merely because it may become onerous to one of the parties.

Similarly, in *Naihati Jute Mills Ltd. v. Hyaliram Jagannath* [1968 (1) SCR 821], the Supreme Court went into the English law on frustration in some detail and then cited the celebrated judgment of *Satyabrata Ghose v. Mugneeram Bangur & Co*. Ultimately, the Court concluded that a contract is not frustrated merely because the circumstances in which it was made are altered. The Courts have no general power to absolve a party from the performance of its part of the contract merely because its performance has become onerous on account of an unforeseen turn of events.

It has also been held that applying the doctrine of frustration must always be within narrow limits. In an instructive English judgment namely, *Tsakiroglou & Co. Ltd. v. Noblee Thorl GmbH* [1961 (2) All ER 179], despite the closure of the Suez canal and despite the fact that the customary route for shipping the goods was only through the Suez canal, it was held that the contract of sale of groundnuts in that case was not frustrated, even though it would have to be performed by an alternative mode of performance which was much more expensive, namely, that the ship would now have to go around

the Cape of Good Hope, which is three times the distance from Hamburg to Port Sudan. The freight for such journey was also double. Despite this, the House of Lords held that even though the contract had become more onerous to perform, it was not fundamentally altered. Where performance is otherwise possible, it is clear that a mere rise in freight price would not allow one of the parties to say that the contract was discharged by impossibility of performance.

Non application if contract provides for force majeure which applies

As has been held in particular, in the Satyabrata Ghose case, when a contract contains a force majeure clause which on construction by the court is held attracted to the facts of the case, Section 56 of the Contract Act can have no application.

The Supreme Court in its latest judgment in *Energy Watchdog vs. Central Electricity Regulatory Commission and Others* [(2017) 14 SCC 80] dated April 11, 2017 laid down the guidelines with respect to applicability of sections 32 and 56 of Contract Act to a contract. In the said judgment, the Supreme Court also made references to previous landmark judgments of the Supreme Court of India and also drew references from common law judgments and held that in so far as it is relatable to an express or implied clause in a contract, it is governed by Chapter III dealing with contingent contracts and more particularly, Section 32 thereof. In so far as a force majeure event occurs *de hors* the contract, it is dealt with by a rule of positive law under Section 56 of the Contract Act.

5. Covid – 19 – Force Majeure event.

Contract –application.

Force majeure clauses in commercial contracts generally set forth limited circumstances under which a party may terminate or be excused of performance without liability due to the occurrence of an unforeseen event.

If the definition of *force majeure* specifically includes an 'epidemic', 'pandemic', 'disease outbreak', or even 'public health crisis', the current situation relating to COVID-19 may fit within that clause. The provision may also still include a reference to government action as a *force majeure* event, including 'acts, orders, regulations, or laws of any government', or 'government order or regulation'.

Where such clauses are present, regulations and executive orders regulating, among other things, the size of gatherings or mandating the closure of certain establishments issued by the local government or the authorities, may qualify as *force majeure* events.

If the contract does not have specific language detailing the specific force majeure scenarios mentioned above, but has general catch all language referring to events outside the control of the performing party, the courts generally interpret *force majeure* clauses narrowly and typically do not interpret a general catch-all provision to cover specific circumstances, which upon analysis may be construed to be beyond the agreed scope of the contract agreed between the parties. In such an event, if litigated, a party may have to prove that the clause, when drafted, was intended to cover a similar situation (a public health crisis as opposed to a natural disaster).

If the *force majeure* clause covers only 'Acts of God', the current pandemic may be outside its scope, as apart from triggering the applicability of Section 56 of the Contract Act and consequently impossibility of performance as above, the party claiming waiver of obligations under the provision will need to substantiate the intent of the parties to assume inclusion of the pandemic as an 'Act of God'. It is however important to note that assessing applicability and enforceability of such clauses by the

relevant court will be dependent on a highly fact-specific analysis.

Finance and renewal energy ministry orders on force majeure.

The Ministry of Finance recently issued an office memorandum dated February 19, 2020 ("**OM**") which states that the force majeure clause can be invoked in Government contracts under the Manual for Procurement of Goods, 2017 if there is a "*disruption in supply chain due to spread of corona virus in China or any other country*". The OM further states that is should be considered as a case of "*natural calamity*".

Pursuant to the aforesaid memorandum, the Ministry of New & Renewable Energy issued an Office Memorandum dated March 20, 2020 which directed all renewable energy implementing agencies of the Ministry of New & Renewable Energy (MNRE) to treat delay on account of disruption of the supply chains due to spread of coronavirus in China or any other country, as force majeure.

In case of a litigation, where the contractual provisions are not specific or have general language, such as 'events beyond the control of the performing party', the above mentioned Government memorandums may help in supporting the interpretation that the situation amounts to a force majeure event. Further, it could be covered under 'natural calamity' (as stated in OM) if the clause does not use the words 'epidemic' or 'pandemic'.

6. Standard of performance.

Contract – termination, suspension of obligations

The consequence of a force majeure event under a contract may vary. Certain commercial contracts may require an 'impossible' standard for termination of the contract where a party may be allowed to terminate the contract only if the obligations are impossible to be performed. In certain other cases, the provisions may allow for the parties to suspend certain obligations during the pendency of the situation or allow for suspension in case of situations where although the performance may be possible, it may nevertheless be impractical or commercially non feasible.

7. Government orders.

Where the contracting party seeks to rely on orders of a regulatory authority or legislations issued in order to regulate the movement of persons or conduct of business on account of the pandemic, it will be necessary for the contracting party to review the restrictions carefully to confirm that the same tantamount to the standards of performance as set out in the contract or under law (as applicable). For eg., where the relevant order provides for a prohibition of all commercial activities, but allows for certain business to procure passes for its employees to travel to their work places, it may be argued that the contract is not frustrated on account of the allowance; or that the non performing party is not restrained from fulfilling its obligations on account of events beyond its control.

Although the specific language in the contract may not set out an 'impossible' standard for invocation, the courts nevertheless are known to read into the said Government orders and restraints relied upon by the party take a narrow view of such circumstances to determine the parties claim for waiver of obligations under the contract.

8. **Notice.**

In addition to the rights accruing to the non performing party under the contract, specific attention will

also need to be paid to the timing and manner in which the notice will need to be issued under the contract.

Most commercial contracts allow for issuance of a written notice by registered post, courier and/or email. In the event the parties have not agreed to multiple modes for issuance of the notice and the prevailing circumstance make it almost impossible for the notice to be issued by modes agreed to in the contract (such as post or by courier), the non performing party will need to consider a mode, whereupon, a notice issued and receipt thereof may be legally and validly substantiated in case of enforcement.

The non performing party will also need to consider the timing for the issuance of the notice in line with the requirements of the contract. Most commercial contracts provide for the period of suspension or right to terminate to be triggered upon issuance/receipt of the notice. Even where the contract does not specifically provide for such a trigger, it is advisable for the party seeking waiver or suspension of obligations to issue the notice at the earliest upon becoming aware of the event or upon realization of its inability to perform its obligation under the contract.

Conclusion –

The concept of ‘one size fits all’ would be anathema in the invocation of the force majeure provision under Indian law or under the relevant contract. The local practices, usage, orders by the statutory bodies, the specific language of the contract, facts in relation to the pandemic affecting the parties, etc have a bearing on the analysis of applicability and enforceability of the provisions of the contract.

NOVEL CORONAVIRUS (COVID-19) AND ITS LEGAL IMPLICATIONS ON THE BUSINESSES IN THE UAE

With the spread of COVID-19 and its classification by the World Health Organisation as a pandemic, businesses in the UAE and other countries in the world face significant social and economic impact. The markets are weakening, corporate transactions delayed or aborted, concerns over commercial viability of contracts, workplace operations and reduced mobility of people and goods are contributing to disruption of businesses globally.

As we continue to monitor the legal implications of COVID-19, we have received several inquiries from our clients regarding its potential implications on their business and their compliance obligations especially in view of the measures implemented by the UAE authorities to control the spread of COVID-19.

In this newsletter, we identify some of the key legal issues that could be relevant to your business to help you understand and prepare for the significant challenges that COVID-19 or similar situations pose:

Force majeure clauses

COVID-19 could constitute a force majeure event depending on the verbiage and scope of the force majeure clauses, if any, in the concerned contracts and applicable legal provisions in the UAE law and court interpretation. The contracts would have to be analysed vis-à-vis the conduct of parties and applicability of the legal landscape to assess and advise on the implications of COVID-19.

Illustratively, we are working with some of our clients to assist with restructuring their debt repayments, dealing with supply delays and handling payments under pre existing real estate contracts.

Breach of contracts

There may be instances where the businesses breach contracts, including leases which may be due to the inability or unwillingness to perform the contract due to the outbreak of the COVID-19.

In order to determine the implications of COVID-19, we can evaluate the rights and obligations and advise on potential risks as well as an assessment of suspension or deferment of obligations and initiate or defend appropriate legal proceedings.

Challenges within M&A Transactions

As the impact of COVID-19 pandemic and its consequences continue to evolve, it has emphasised the need for businesses to re-evaluate their current and contemplated M&A and other transactions. The assessment of material adverse change provisions, termination rights, impact on warranties and indemnities, have assumed importance.

Employment Relationships

The COVID-19 outbreak has once again put in focus the management of employment relationships including the health and safety of employees, sick leave entitlements, employment restructurings including termination, reduction in pay and working hours, etc. It is henceforth, the need of the hour to examine the effects of COVID-19 vis-à-vis the UAE Labour Law and guidelines issued by the UAE authorities to prevent the breaches by businesses while keeping in view that it may not be possible to contract out the provisions of the UAE Labour Law unless specified otherwise.

Insurance coverage and claims

The business losses due to the outbreak of COVID-19 may in certain situations give rise to an insurance claim. In view of this, businesses are advised to evaluate the impact of COVID-19 on their potential insurance claims and the scope of their existing insurance coverage by undertaking a review of the policy terms and conditions including evaluating the merits of a potential insurance claim, rights and obligations of the parties etc.

Laws, regulations, & policies

With the implementation of measures in response to the COVID-19 outbreak, the UAE authorities have been implementing noteworthy measures to control its spread. Among others, these measures include the preventive guidelines by the UAE Ministry of Health and Prevention, restrictions or temporary suspension of businesses, restrictions of travel and transportation, distance learning, economic stimulus by the Central Bank of UAE and the Federal Government, relief packages announced by certain banks in the UAE, etc. It is therefore imperative for the businesses to stay abreast of the changes in the laws and regulations.

Kochhar & Co. Inc

Kochhar Dubai is the first full-service law firm from the Indian sub-continent to have been issued a license by the Dubai Legal Affairs Department to practice local law in the UAE.

The Firm offers a wide range of legal services specializing in all core areas of law providing strategic commercial legal advice to foreign and domestic corporations with diverse business interests in the UAE.

To speak to us in relation to the impact of COVID-19 on your business and to undertake a legal risk assessment and mitigation plan, please feel free to contact us.

DISCLAIMER

The contents of this document do not constitute legal advice and is being issued for purposes of information only and no action should be taken in reliance of this without first obtaining our formal legal advice.

The Covid-19 Crisis – Returning to Work Briefing

9 June 2020

CharlesRussell Speechlys

Contents

The Covid-19 Crisis – Returning to Work

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As the Government continues to ease some lockdown restrictions and people return to work, there are both short term challenges for businesses with continued social distancing requirements as well as long term changes to the way we work. Effectively managing these issues is likely to require a combination of following up-to-date government guidance as it now evolves, amending relevant working policies and, in some instances, contractual variations. We highlight below some of the key short and longer term issues we see arising over the coming months.

Short Term Challenges

Returning to work and social distancing

- **Health and safety***:* These issues will underpin all return to work strategies. As well as keeping a close watch on government guidance, employers remain bound by the existing framework of health and safety legislation in the UK. Maintaining employee confidence will be key. Risk assessments should help address concerns as to whether open plan offices provide sufficient protection, what is considered a safe capacity for the workplace and how to ensure social distancing in shared spaces such as staircases, corridors, canteens and production/manufacturing areas. Many employers are already working on a staggered or rotational basis by splitting the workforce into teams that alternate between working from home and attending the workplace when necessary. This not only creates more space for social distancing but limits interactions between distinct teams, reducing the risk of a large number of the workforce taking sick leave simultaneously and therefore supporting business continuity (although this will only work where low risk travel options are available).

- **Workplaces:** Businesses will need to ensure they are monitoring the changing government guidance in relation to physical premises and assessing how social distancing can be implemented in their workplaces. The Department for Business, Energy and Industrial Strategy has so far published sector-specific guides to cover a range of different types of working and how to make these workplaces Covid-secure. This includes five main steps to working safely. Employers should carry out Covid-19 risk assessments in line with Health and Safety Executive guidance, in consultation with workers or trade unions. Employers should take all reasonable steps to help employees work from home, by ensuring they have the right equipment and discussing home working arrangements. In the workplace, 2m social distancing should be maintained where possible with the use of signage, floor tape, arranging one-way systems through the workplace and avoiding the sharing of workstations where possible. Where workers cannot be kept 2m apart, the risk of transmission should be minimised by using screens or barriers, avoiding face-to-face working, staggering arrival and departure times and reducing the number of people each employee has contact with by using fixed or rotating teams. Steps may also be taken to prevent staff and third parties displaying symptoms from entering the workplace. For example requiring the signing of declarations in relation to recent health, interaction with confirmed cases or travel to high-risk locations.

- **Technology:** This should be used to promote remote working and limit face-to-face interactions as far as possible in line with government advice to work from home if possible. Businesses should continue to embed the use of Teams/Webex/Zoom as a viable alternative to meetings in person and promote a consistent experience for staff working from home and in the workplace. This may include further training of staff to make the most of the full functionality available and the extension of helpline services and support available. Businesses should take care that all mediums used to communicate or share information while working remotely are secure and comply with regulatory requirements where relevant to their industry.

- **Commuting:** Ongoing restrictions in relation to travel are likely to continue in some form as lockdown is eased. Public transport poses particular risks to staff considered vulnerable due to their age or underlying health conditions. Businesses may consider ways to reduce risks such as offering flexible working to avoid peak travel times and encouraging staff to

only attend the workplace for work that cannot be done from home, for example for certain core days of the week. Face coverings will be compulsory on public transport in England from 15 June. Employers may wish to discourage car sharing, which may require the provision of further space for car parking to allow employees to travel to work separately where possible.

- **Vulnerable workers:** Staff considered vulnerable due to their age or underlying health conditions will need additional consideration by employers in line with their duty of care and duty to make reasonable adjustments for workers falling within the definition of disability. Vulnerable workers should be prioritised for working from home, either in their current role or in an alternative role, where possible to optimise the workforce as a whole. At present, workers at significant risk from coronavirus who have been told to shield by the government should not be required to come to work. If they are unable to work from home, these workers can be furloughed under the Coronavirus Job Retention Scheme.

- **Holiday:** Employers should continue to encourage workers to take annual leave throughout the year to promote rest and good physical and mental health. For businesses that are particularly busy during the pandemic, new laws allows staff to roll over up to four weeks' annual leave into the next two holiday years if they are unable to take it this holiday year. Employers may also wish to avoid too much annual leave being accrued if this will cause work shortages if taken later in the year. Employers have the right to require staff to take, or not take, leave on certain dates, subject to notice requirements and terms of the relevant employment contract. Due to current travel and social restrictions, staff may seek to cancel pre booked leave but employers do not have to agree to this. Following the government's introduction of a 14-day quarantine period for people travelling to the UK from abroad from 8 June, employers should pre-empt requests from staff to work from home or take unpaid leave on return from foreign holidays, and decide if and how this may be facilitated.

Staff Policy Changes

- **Furlough:** Before the government launched the Coronavirus Job Retention Scheme, employers were unlikely to have policies in relation to furloughing staff. Policies should deal with issues such as minimum periods of furlough, the requirement that staff do not work or generate revenue for

their employer while furloughed, as well as arrangements for ending a period of furlough such as notice requirements. The government has recently announced changes to the Scheme, including new flexibility to bring furloughed staff back to work on a part time basis from 1 July, whilst allowing employers to claim under the scheme for hours not worked. Additionally, the scheme will taper from 1 August. This will initially require employers to contribute to the costs of national insurance and pension contributions of furloughed workers. From 1 September, employers will also be required to pay 10% of furloughed workers' wages, increasing to 20% from 1 October. The cap of £2,500 per month for each worker's wages will remain the same. The scheme is due to close on 31 October. Furlough policies should therefore be updated by employers wishing to utilise these changes, in tandem with contractual variations where required for amendments such as any changes to pay. A furlough policy should reflect that workers told to shield who cannot work from home qualify for furlough and should not currently be asked to return to the workplace. See our guidance document to furloughing staff for further information.

- **Sickness absence:** changes to statutory sick pay and guidance in relation to self-isolation or shielding may require changes to existing sick leave policies. Statutory sick pay is now payable from the first day of absence if related to Covid-19, rather than from day four. This includes instances in which a worker is self-isolating because they, or someone in their household, has coronavirus symptoms or if the worker is at high risk of severe illness and has been told to shield. The requirement in sickness absence policies for evidence of illness should also be updated to reflect the difficulty in obtaining a note from a GP due to changes in the way the NHS operates, and increased reliance on notifications to self-isolate.

- **Social distancing:** Businesses are unlikely to have pre-existing social distancing policies, so these should be introduced in line with up-to-date government advice and communicated to staff effectively. They should cover issues specific to the employer's relevant sector and the individual challenges faced by the business but may generally include regulation in relation to vulnerable workers, break times and areas, staggered arrival and departure times, commuting and PPE. Social distancing may also be facilitated by phased or rotated return to work policies, to reduce the overall risk of

Covid-19 cases in the workplace, as well as the likelihood of the virus spreading between discreet teams. This should form part of wider steps to improve workplace safety where appropriate such as the provision of hand sanitiser, face masks, tissues and the dissemination of information for example, in relation to regular hand washing, symptoms and self-isolation. This will also need to be extended to ensure there are clear protocols when dealing with third parties visiting the premises, for example seeing visitors by appointment only.

- **Travel:** Travel policies will need to be updated to reflect issues with travelling to higher risk locations, requirements to quarantine for 14 days on arrival in the UK from abroad from 8 June and/or to help save costs during a time of financial pressure by reducing travel expenses wherever possible. Quarantine requirements remain the subject of political debate and challenge and may change, for example through the introduction of 'international travel corridors' for arrivals into the UK from countries with low infection rates and robust healthcare systems. Some workers are already exempt, for example freight and haulage workers, medics and carers providing essential healthcare, UK residents who usually travel abroad at least once a week for work and seasonal agricultural workers, if they self-isolate where they are working. Travel policies must reflect up-to-date government guidance, including in relation to commuting, and therefore may require frequent updates.

- **Disciplinary and grievance procedures:** Existing procedures relating to disciplinary and grievance processes are unlikely to consider factors such as social distancing, home working or furloughed staff. Historically, these procedures rely on face-to-face meetings, which may no longer be feasible before workplaces open. Employees retain the right to raise a grievance while working from home or on furlough and employers must consider how they can carry out a fair grievance procedure safely. Grievance procedures should therefore account for current health and safety guidance, the wellbeing of employees involved, whether the matter can be dealt with fairly remotely and an employees' right to be accompanied in key meetings. This may involve conducting the process virtually where technology allows, or postponing an investigation until meetings can be held in person in line with social distancing guidelines. If a worker wishes to make a claim to an employment tribunal, the usual

legal time limits apply despite the Covid-19 pandemic, even if grievance or disciplinary procedures are postponed.

- **Data and cyber security:** Data and cyber security policies will need updating in relation to increased levels of remote working and the related changes in working practices, such as the use of personal devices while working from home and third party access management. This should form part of ongoing disaster recovery protocols, cyber risk management and business continuity planning. Employers should also be aware of the way that changes in working practices may affect the collection, storage and movement of sensitive data. This may include client data or confidential information being taken offsite by remote workers or third parties, which may have security and GDPR implications. Businesses may also find themselves collecting more data in relation to employees for example temperature checks, Covid-19 tests and records in relation to health, which will be considered sensitive data and therefore must be obtained and processed in line with GDPR requirements. Employers must also liaise where necessary with the Government's 'track and tracers' in relation to employees and visitors identified under the contact tracing programme.

- **Home working:** The increased reliance upon working from home is likely to be longer term and therefore may call for more detailed remote working policies where previously not required. Such policies should cover issues such as hours of work, employee supervision, conduct, the use of video conferencing software, effective communication patterns and the provision of technical or other equipment for employees. A home working policy should be drafted with the purpose of building trust with employees, as well as meeting employer's legal obligations in relation to health and safety risk assessments and the reporting of any issues or accidents. As many workplaces reopen at lower capacity, policies should also deal with flexible working and the combination of working from home where possible, whilst only attending the workplace when necessary.

- **Mental health and wellbeing:** The impact upon workers of social distancing, self-isolation and more limited access to health services must not be underestimated by employers. Remote working may make it more difficult for managers and occupational health specialists to spot potential concerns in relation to the mental health and wellbeing of particular workers. Wellbeing policies may include the establishment of

support networks, easily accessible staff helplines, regular communications on the importance of wellbeing and upskilling managers on how to identify and address any stress related issues.

- **Learning and development:** Professional development must not fall by the wayside during the immediate period of adjustment and longer term way of working. There is likely to be a continued shift away from face-to-face or classroom-based learning and policies should be adjusted accordingly. However, the growing availability of remote and flexible training can deliver distance learning at a lower costs and is more easily managed around workloads. Workers furloughed under the government's Coronavirus Job Retention Scheme can undertake training as long as none of their activities generate revenue for the business. A period of furlough should therefore be considered an opportunity to upskill workers at an efficient time and training opportunities offered can be tailored towards changes expected when staff return to work. Offering training to both furloughed staff and those that remain at work is an effective way of maintaining workforce motivation and focussing upon the future of the business.

The Longer Term Challenges

For many businesses, once the Coronavirus Job Retention Scheme ends on 31 October, there will be difficult decisions to be made. Work levels for most are unlikely to increase to early 2020 levels for many months, if not longer. There are a range of options for businesses to consider:

- **The future of flexible working:** In some industries where home working has not been common, recent months may show how the barriers to home working can be overcome. Whilst clearly the lockdown period has been exceptional, the ability to have remote 'face-to-face' meetings, and manage work effectively will, for some, change the way they want to work going forward. Employers faced with increased requests for flexible working may find them more difficult to resist in many cases. As discussed above, the period of lockdown has highlighted some areas that would need to be addressed in terms of long term home working. For example, ensuring greater flexibility over the hours/times of day staff can work as well as adequate training and supervision for more junior team members. Regular face-to-face meetings through video conferencing will help but flexible hours may also necessitate the restriction of meetings

to a reduced period of core hours in a day. Strong leadership will help to build up a good team rapport, address worker isolation issues and ensure effective communication channels are open between team members as well as with clients and customers. All these issues will need thought and planning to ensure the business achieves the best from its workforce.

- **Reduction in work:** If this is likely to be a short term issue, some alternatives to redundancies may be viable. For example staff could be asked to agree to short term variations such as reduced hours, deferred pay (provided pay does not reduce below national minimum wage levels), secondments or a period of unpaid leave. In the absence of a contractual right to do this, employers should seek agreement from staff. Flexibility in the Coronavirus Job Retention Scheme from 1 July will enable workers to return to work on a part time basis, while employers can continue to access government contributions for wages for hours not worked. As the scheme tapers until 31 October, the government hopes that by asking employers to gradually increase contributions that jobs will be retained in the longer term, with greater flexibility, and therefore avoiding redundancies.

- **Permanent contractual changes:** This could be considered to help plan for similar issues in the future, such as another period of enforced lock down. For example to include a contractual right to lay off staff (where there is a temporary shortage of work), furlough staff or put them on short-time working. Depending on the number of employees involved there may be a need to collectively consult to effect any such contractual changes. We may also see the greater use of the powers under the Working Time Regulations which can be incorporated into contracts to allow employers to decide when holidays will need to be taken and provide less flexibility more generally for holiday requests at the busy times of the year for the relevant sector.

- **Redundancies:** As the crisis has been so severe for many, the financial problems many businesses are facing are likely to be more long term and so redundancies in many sectors, will be unavoidable. Employees with more than two years' service are entitled not to be unfairly dismissed and whilst "redundancy" is a potentially fair reason for dismissal, it is also important that the process be carried out fairly to avoid and defend claims for unfair dismissal. There are additional requirements to collectively consult if the employer proposes to dismiss 20 or more employees by reason of redundancy in

a 90 day period. This applies where the 20 or more employees work in one ‘establishment’ - a defined term that needs careful legal advice before employers proceed. This additional duty to consult collectively may not be triggered if the total number of redundant staff exceed 20 overall but are spread across several establishments in separate groups of less than 20.

- **Restructuring:** Just as it is critical to now be constantly considering the financial forecasting to meet the costs of the business, we are advocating workforce forecasting to consider what size, shape and skills are needed to drive revenues. It may be that employers do not find a long term reduction in their worker requirements but there is an important change in the nature of work required to meet their business needs. This may not require a reduction in worker numbers or the roles but rather a refocus of the workforce, mapping employees into evolving jobs that use their skills in different ways and upskilling staff to adjust to these changes. This can help to reduce the cost of redundancy payments, retain talent and foster loyalty in the workforce. Again, legal advice is sensible when planning any redundancy or restructure of the business to ensure that the prescriptive requirements of consultation and consent to any new contract changes are met.

- **Talent Retention:** During a period of change, targeted recruitment, talent retention and succession planning must not fall by the wayside. Increased levels of remote working will require changes to performance management and the way that work effort is measured / reported. Where possible, this should be driven by output which promotes flexibility but with a focus on measurable results. Businesses may consider moving away from traditional face-to-face only meetings as part of annual appraisal processes towards the greater use of data analytics to inform staff performance. Communicating opportunities to staff for professional development and progression will become increasingly important where such opportunities may be less visible or tangible while working from home. Encouraging meaningful career conversations at an appropriate frequency will help to motivate the workforce, improve productivity and reduce flight risks.

- **Remuneration:** Increased financial pressure as a result of the pandemic may drive businesses to approach remuneration more creatively, for example to promote cash flow if profits are affected. In the short term this may involve deferring bonuses or linking them to overall company performance in the usual way. Businesses may however choose to offer a broader

range of incentives in the future, linked to their brand or sector. For example, more special offers for products or events; an aligning with other businesses from different sectors who share their values and appreciate the joint brand recognition. The overall reward packages will be most effective when tailored to the workforce and offering greater flexibility. For example, providing staff choice to purchase additional leave, take sabbaticals, as well as greater choice of bespoke health and other benefits packages that best suit the individual and their current needs. There may therefore be a move away from reliance on the discretionary bonus schemes to a more honed approach to the individual's motivation to be compensated in a particular way with an emphasis for the employer to promote longer term reward plans rather than short term cash gains, alongside these more bespoke benefit/reward packages.

- **Care Responsibilities:** School closures and increased help required by the elderly and vulnerable during the pandemic has highlighted the importance of individual caregiving responsibilities during a period of unprecedented pressures on public health services. This could have a longer term impact upon the significance of family-based policies such flexible working in relation to the hours and mobility needs for staff that may have to be recognised with more adaptable working policies particularly around times of work and location.
- **Corporate Social Responsibility:** The reality of social distancing and increased remote working may cause some businesses to shift away from centrally-managed volunteering and fundraising efforts that rely on single large events or staff being in one physical location. The coronavirus pandemic has highlighted the importance of charitable endeavours within local communities, specifically in relation to local healthcare services and vulnerable people. This is likely to have continued relevance for staff working from home and therefore spending more time in their local communities. CSR may therefore have a greater impact on staff engagement and company reputation if it reflects this shift.
- **Reputation:** The UK Government has spoken openly about the importance of businesses doing what they can to protect workers and jobs in these unprecedented times. Employers are under pressure from communities and workers to act responsibly and share the burden of the impacts of coronavirus on society as a whole. Although larger scale redundancies will prove inevitable for a number of sectors, the onus remains on businesses to think in the longer term and

use technology and the resources at their disposal to minimise the negative impacts on workers. It is an opportunity to promote loyalty, increase retention rates and help make workers brand ambassadors for their businesses at a time when there is still so much uncertainty around Brexit and the impact on obtaining the necessary talent. In many instances, the changes required will require a commitment to innovation and more lateral solutions around areas such as alternative ways of working and reward, which can still minimise the exposure to costs in these tough financial times but maximise productivity to allow the business to then not just survive, but thrive.

Conclusion

Key issues to consider as restrictions continue to ease:

- Health and safety provisions and government guidance will underpin the workplace strategy.
- Make the workplace Covid-secure – consider issues such as social distancing and hygiene.
- Risk assessments – follow up to date guidance from the Health and Safety Executive for your industry and consult with staff to address their concerns.
- Travel – continue to promote home working where possible, consider ways to reduce commuting risks or the need for business travel and abide by quarantine requirements.
- Employee mental health – provide support and guidance for employees and OHS specialists to help with staff issues relating to stress and mental health.
- Reduce contact at work – provide more automated entrances and consider the rotation of office-based staff.
- Technology - look to improve remote contact and access. Ensure webex/ zoom/ Teams work for your business.
- Staff policy changes – ensure staff are adapting to the new working model and that their wellbeing is a priority.
- Furloughed staff – consider how to utilise the flexible scheme from July onwards, the impact of tapering and the long term aim of avoiding redundancies.
- Data security – ensure policies and procedures on data protection and cyber security are updated to account for changes to home working, engagement with the Government's 'track and tracers' and a possible spike in Data Subject Access Requests.

- Contractual changes – longer term contractual changes may be helpful to prepare for a further lockdown period either in the short or longer term.

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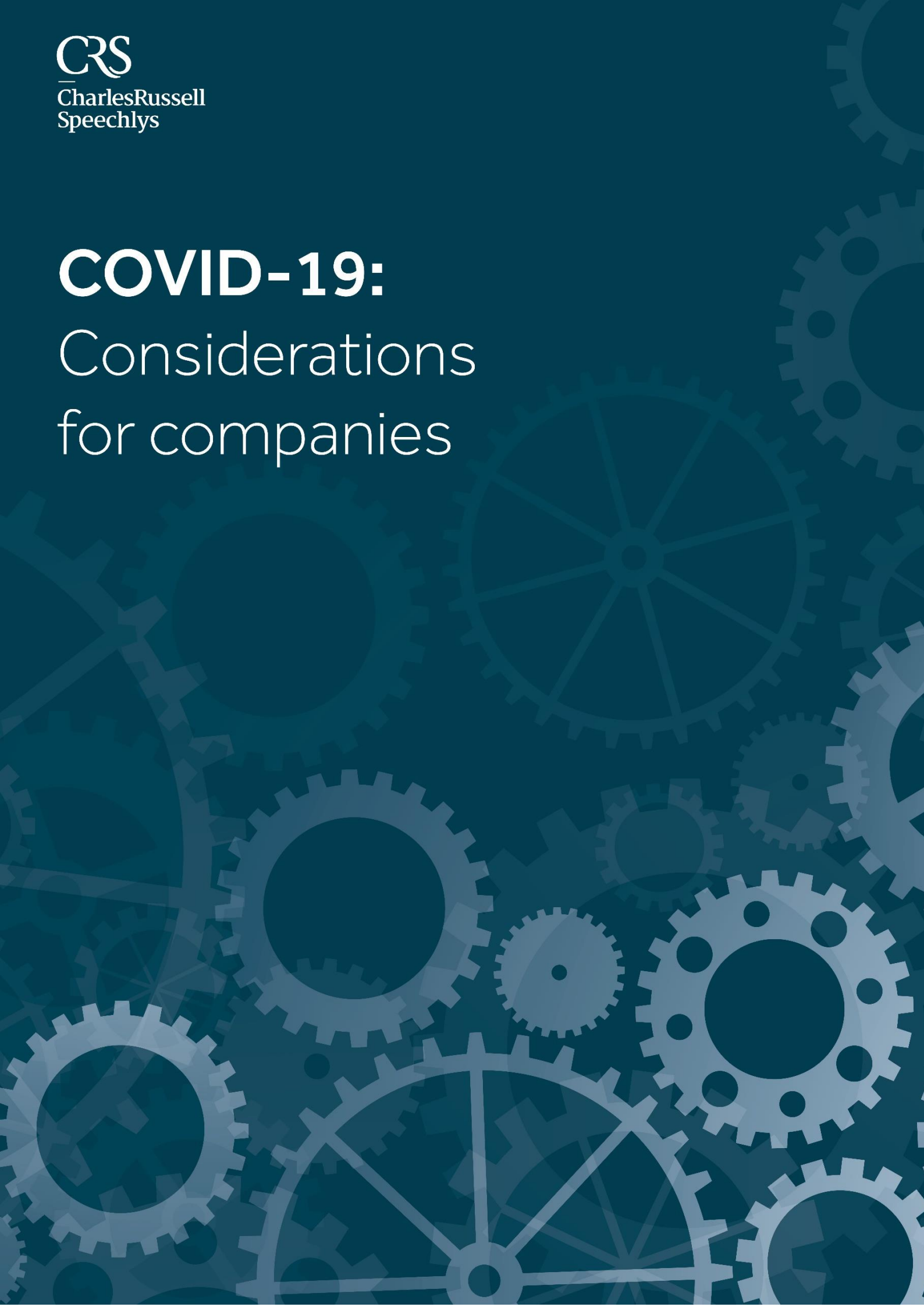
COVID-19:
Considerations for companies



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The COVID-19 pandemic is causing disruption to businesses of all sizes across the UK.

With an uncertain economic outlook, reviewing how a company can deal with and adapt to the evolving business environment is critical. Understanding the legal rights and responsibilities of the company, and its directors, is also a vital part of this task.

In this toolkit we have set out some of the key issues for companies and directors, focusing on supporting employees, protecting company finances and commercial relationships and dealing with real estate issues.

Please note that the information contained in this toolkit is correct as of 28/04/20. It has been prepared as a general guide only and does not constitute advice on any specific matter.

Our team has been working with clients on a broad range of issues relating to the COVID-19 pandemic. For more information on how we can help please get in touch with the listed key contacts or your usual contact at Charles Russell Speechlys.

Running the company

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Effective company management is crucial in these unprecedented circumstances.

We have set out below some considerations to aid effective decision-making and company management:

1. **Appointing alternate directors to ensure a functioning board** – this contingency measure is advisable in case a director becomes unavailable to attend a board meeting or act as a director. By appointing the alternate director ahead of time, the alternate director will have the approval and support of the full board and meetings will remain quorate.

   Appointments need to be consistent with the provisions of the company's articles of association and D&O insurance policies. Shareholders can approve a change to the articles of association to increase flexibility for the board and both original and alternate directors should be aware of their responsibilities as directors and of the related personal liabilities.

2. **Holding regular meetings and documenting decisions –** decisions taken now may be subject to greater scrutiny in future. It is important that directors continue to observe and demonstrate their duties to the company, and to creditors, when applicable).

   Regular, minuted board meetings should be held, focusing on factors such as the state of the business, company and group liquidity and future funding considerations. The commercial rationale for decisions should be documented and professional financial or legal advice sought to clarify any "grey areas" to demonstrate the directors' awareness of their obligations.

   Companies may wish to amend their articles of association to permit hybrid AGMs (part physical, part-virtual), showing stakeholders how the process will be run, and how they can participate in any meetings.

3. **Raising debt or equity finance** – Directors should review the provisions of the company's articles of association to check that access to debt finance would not be limited, for example by borrowings in excess of a certain amount needing shareholder approval. Directors should also consider the logistics of raising equity finance, whether they have current general authorities to allot shares and dis-apply statutory pre-emption rights and any restrictions in the company's articles of association including bespoke pre-emption rights. Debt finance may, for example, only be available contingent on a company simultaneously raising equity finance.

4. **Reviewing shareholder agreements** – a business may be subject to constraints under shareholder agreements that require the consent of certain specific shareholders (for example, granting security over the business). It is advisable to consider whether some such restrictions should or could be waived temporarily to enable companies to take action more quickly, whether various actions can be pre-approved by the specific shareholders as a form of contingency planning, and/or if the specific shareholders should grant powers of attorney as a contingency measure. Any variations should be documented to protect both directors and shareholders.

5. **Using IT software to execute documents** – electronic platforms can enable two directors to execute deeds in different locations, removing the need for a director to sign in the physical presence of a witness. Where a document (excluding a will) needs to be executed with a witness, the witness must be a third party with no interest in the matter and not a party to the same agreement. Additionally, we would not recommend a family member acts as a witness. If this seems to be the only option, please discuss this with us so we can consider the risks before a family member witnesses a document. We can also help with electronic signing logistics, if needed.

6. **Reviewing the company structure** – we recommend reviewing the company's structure and the relationships with subsidiaries. This may include documenting intra-group loans between subsidiaries to ensure that any debts can be identified if a borrower gets into financial difficulty. It may also mean considering whether the group has satisfactory levels of management information across the group, whether the subsidiaries are run by directors in whom the parent company (and ultimate shareholders) have confidence and that internal controls are adequate.

7. **Companies House filings**[1] – there is currently no general relief from meeting Companies House filing deadlines which are required by law, and directors will need to plan ahead to meet their deadlines. All same day services have been suspended until further notice and we anticipate a delay in the processing times for paper forms. Online filing is still available and forms filed electronically can be processed and available on the register within hours. Companies which are not already registered for the Companies House web-filing service should consider doing so in advance of any filing deadlines to allow time for receipt of log-in details to be received at the Company's registered office. We expect the options for filing documents at Companies House to be developed in due course.

[1] https://www.frc.org.uk/getattachmenst/51dec8c7-7820-402b-b3a1-222db7220157/AGM-QA-Final-Version-Apr-2020.pdf.

8. **Maintain regular contact with auditors and financial advisers** – continuous dialogue with auditors and financial advisers will help maintain access to good financial data, which can potentially be shared with providers of capital. Additionally, directors, in consultation with their advisers, need to consider the basis for the preparation of their accounts. Directors should be prepared for analysis and discussion with their auditors around the "going concern" assumption and potential for a "material uncertainty" qualification to the assumption in the company's accounts.

9. **Delaying publication of company accounts** – Directors are obliged to file company accounts on time and failure to deliver is an offence with a range of potential consequences. Given potential logistical challenges in conducting audits in the current environment, directors and auditors should discuss whether meeting the filing deadline is achievable. If the filing deadline is not achievable and certain conditions apply, in advance of the filing deadline the directors should make an application to Companies House to obtain a three-month extension for filing the company's accounts.

10. **Changes in UK Insolvency Law to protect businesses and directors** – a temporary suspension of section 214 Insolvency Act 1986 in relation to "wrongful trading" has been introduced. Previously if the directors allowed a company to trade after the point at which they know, or ought to know, that the company has no reasonable prospect of returning to solvent trading, then they could be held personally liable.

    This is a welcome development but we would strongly advise against any substantive change in approach by boards of directors as the detail of the new measures is still to be seen. The duty to act in the best interests of the company's creditors remains, as does potential personal liability for any breach of that or any other fiduciary duty. Potential for disqualification as a director is also unaffected. In the circumstances and irrespective of whether the law on wrongful trading has been suspended, boards of directors should constantly keep the question as to the company's future viability under consideration. We appreciate that is extremely difficult given the uncertainty that every business is facing but this highlights the need for regular board meetings and the need to carefully minute decisions throughout the process.

11. **Tax: making payments** – companies in the retail, hospitality and leisure sector will benefit from 100% relief from business rates for 2020 – 2021. These rates will not become payable in the future.

    In addition, UK registered companies with VAT payments due between 20 March 2020 and 30 June 2020 can defer the payment until a later date without being penalised by penalties nor interest for doing so. Any deferred payment must be paid on or before 31 March 2021. No application is

required to benefit from this deferral but it the responsibility of companies to cancel any direct debts. In addition, businesses must continue to submit VAT returns as normal.

The March 2020 Budget expanded existing “Time to Pay” arrangements, which is intended to assist businesses with cash flow difficulties to defer tax liabilities for a period of time. Arrangements will be agreed on a case-by-case basis. There is a specific helpline to call for any businesses interested in making use of this facility.

Further information:
Covid-19 pushes the government to gift time, lend money and provide clarity

Supporting employees

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For many companies an immediate concern is how to support employees and access the Government schemes available to help with staff costs.

We have summarised the recently announced Coronavirus Job Retention Scheme and other measures:

Coronavirus Job Retention Scheme[2]

The Chancellor announced on 20 March that the Coronavirus Job Retention Scheme (the **Scheme**) would be introduced to help support business and protect jobs during the COVID-19 pandemic. The Government and HMRC have produced guidance notes, which have been updated several times (together the **Guidance**), as well as a Treasury Direction (the **Direction**). The Guidance states that the Scheme is designed to help employers whose operations have been "severely affected" by coronavirus to retain their employees and protect the UK economy, but recognises that different businesses will face different impacts from COVID-19. This has been an evolving Scheme and some uncertainty remains, but crucially for business the government on-line portal for making claims opened on 20 April.

To try and prevent fraud, the Guidance makes clear that payments made on claims based on dishonest, or inaccurate information or found to be fraudulent will have to be repaid in full and HMRC retain the right to audit claims at a later date.

Key points

- The Scheme is open to all UK employers (including charities, recruitment agencies and public authorities) which had created and started a PAYE payroll scheme on or before 19 March 2020 and have a UK bank account.
- The Scheme offers temporary contributions to the wages of workers payable by employers "severely affected" by the COVID-19 pandemic. It will operate for at least 4 months from 1 March 2020, but may be extended.
- To be considered furloughed, the employees must not be working *at all* for the organisation, or any linked organisation, but will remain 'on the books'. This means they must not provide services or generate revenue for or on behalf of the employer (or any connected organisation).

[2] https://www.gov.uk/guidance/check-if-you-could-be-covered-by-the-coronavirus-job-retention-scheme
https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme
https://www.gov.uk/guidance/work-out-80-of-your-employees-wages-to-claim-through-the-coronavirus-job-retention-scheme
https://www.gov.uk/government/publications/coronavirus-job-retention-scheme-step-by-step-guide-for-employers

- To be eligible employers must write to their employees confirming that they have been furloughed and keep a record of this communication for 5 years. While the Direction makes clear that the employer and employee must *agree in writing* that the employee will cease all work in relation to their employment, this was subsequently departed from in the guidance. The Direction provision that the employee's agreement must be in writing may cause issues for employers who have already furloughed employees relying on implied, or deemed consent to the changes. The Guidance which was updated shortly after the Direction was issued appears to contradict the Direction. The Guidance is more helpful and permits the employee's agreement to be in line with employment law (e.g. it may be deemed or implied without express consent in certain circumstances).
- To avoid constructive unfair and wrongful dismissal, employers must consider how to implement the contractual changes.
- The minimum length of time an employee can be furloughed for is 3 weeks. Furlough leave can be rotated and employees can be furloughed multiple times, provided always for a minimum of 3 weeks.
- Furloughed employees retain the same employment rights as non-furloughed employees, including in respect of unfair dismissal, discrimination, redundancy payments and statutory payments such as statutory sick pay and maternity rights and other parental rights.
- HMRC will pay 80% of a furloughed worker's gross monthly wages directly to employers by way of a grant subject to a cap of £2,500 per month. Employers can top up the grant but have no obligation to do so (although they must validly vary the employees' contracts if they do not top up the pay).
- When the Scheme ends, the employer will need to assess at that point whether to bring the employee back to work or, depending on the circumstances, make them redundant. Grants cannot be used to subsidise redundancy payments.
- HMRC states that it retains the right to retrospectively audit all aspects of any claim.

Further information:
Coronavirus Job Retention Scheme Briefing for Employers

Other employment considerations

1. **Changes to Statutory Sick Pay (SSP)** – SSP now covers employees who are not ill but have been advised to self-isolate and those who are shielding. SSP is payable from day 1 instead of day 4 for affected individuals and online isolation notes will be available from the NHS 111 helpline as well as doctors. The government will refund companies with less than 250 employees for the cost of up to two weeks per eligible employee who has been off work because of COVID-19.

2. **Gender pay gap reporting** – this has been suspended in view of COVID-19 and the Equalities and Human Rights Commission is not intending to take enforcement action effectively meaning there was no requirement to report by 4 April 2020.

3. **IR35 –** the changes to off-payroll working in the private sector have been delayed for 12 months to April 2021 due to the uncertainty for businesses surrounding the COVID-19 pandemic.

4. **Employees working from home** – employers should make sure that health and safety policies, data protection and confidentiality are considered when staff are working from home.

Financial planning

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Sudden alterations to a company's cash flow and revenue predictions may have a rapid impact on its balance sheet, liquidity and financial projections.

Companies have a variety of options to deal with the financial impact of the coronavirus outbreak but action will need to be taken quickly to enable the company to remain on a financial sure footing for the weeks and months ahead.

Liquidity and cash flow

Liquidity and cash flow are likely to be the first issues to be contemplated. Borrowers may wish to consider whether they can draw remaining available commitments (perhaps through revolving credit facilities or overdrafts) early to the extent they can under the existing documentation.

Other potential short-term solutions (which will require amendment of the finance documents) may be discussed with lenders. These include:

- Deferral of interest payments for a fixed period of time.
- A switch to PIK interest if there are sufficient term loan commitments available to be drawn.
- Accrual of interest payments.
- Deferral of scheduled amortisations of loans.
- Holidays from certain mandatory prepayments.
- Amendments to equity cure provisions (if there are projected financial covenant issues or to change the way in which equity injected into the business is to be used).

Changes to the business to reposition it may also require lender consent and any failure to fulfil undertakings in key contracts are likely to cause an Event of Default under finance documents, and will need to be raised and discussed with lenders in order that solutions can be found.

It is very important for companies to fully review their financing arrangements and agreements to identify what, if any, disclosures they will need to make to their lenders.

Accessing Government funding schemes

In addition to all VAT payments being deferred for 3 months from 20 March 2020 to 30 June 2020 the Government has also announced funding schemes that companies may apply for:

COVID Corporate Financing Facility Scheme (CCFF)[3]

The scheme is open to firms that can demonstrate they were in sound financial health prior to the pandemic. This means companies that had a short or long-term rating of investment grade, as at 1 March 2020, or equivalent.

The Bank of England will purchase commercially issued paper by eligible companies subject to individual issuer limits, including an issuer's credit rating. The facility will operate for at least 12 months.

Eligible companies will be UK incorporated companies, including those with foreign-incorporated parents and with a genuine business in the UK; companies with significant employment in the UK; and firms with their headquarters in the UK. The scheme will also consider whether the company generates significant revenues in the UK, serves a large number of customers in the UK or has a number of operating sites in the UK.

Coronavirus Business Interruption Loan Scheme (CBILS)[4]

This scheme provides facilities of up to £5 million for smaller businesses across the UK who are experiencing lost or deferred revenues, leading to disruptions to their cash flow. CBILS supports a wide range of business finance products, including term loans, overdrafts, invoice finance and asset finance facilities.

CBILS guarantees facilities up to a maximum of £5 million available on repayment terms up to six years for term loans and asset finance. For overdrafts and invoice finance facilities, terms will be up to three years. The scheme provides the lender with a Government-backed guarantee against the outstanding facility balance.

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[3] https://www.bankofengland.co.uk/news/2020/march/the-covid-corporate-financing-facility

[4] https://www.british-business-bank.co.uk/wp-content/uploads/2020/03/British-Business-Bank-CBILS-FAQs-for-SMEs-v11-270320.pdf

Future Fund[5]

On 20 April the Treasury announced a £250m fund to support high growth companies who may not be eligible for funding under other Government schemes.

The Future Fund will be delivered in partnership with the British Business Bank and will be open for applications in May 2020. Investments will vary between £125,000 and £5 million.

Headline terms have been published by the Government but questions on the practical application of the scheme will need answering.

The main eligibility conditions include:

- The business must be an unlisted UK registered company with a substantive economic presence in the UK;
- The business must have raised at least £250,000 in equity investment from private third party investors in the last 5 years; and
- The business is able to attract match funding from third party investors and institutions – so the Government contribution shall comprise no more than 50% of the total funding.

If the business is part of a corporate group, only the ultimate parent company is eligible to receive the funding.

Further information:
The Future Fund – good news for growth companies?

Bounce Back Loan scheme

This scheme, which will launch on 4 May 2020 and will be delivered through accredited lenders, will help SMEs to borrow between £2,000 and £50,000. The government will guarantee 100% of the loan with a term up to 6 years. There won't be any fees, repayments or interest due for the first 12 months. The government will work with lenders to agree a low rate of interest for the remaining period of the loan.

Businesses cannot claim if they are already making a claim under the CBILS scheme although a CBILS loan can be transferred to the Bounce Bank Loan scheme. To be eligible claimants need to be:

- based in the UK;
- negatively affected by coronavirus; and
- not an 'undertaking in difficulty' on 31 December 2019.

[5] https://www.gov.uk/guidance/future-fund

Small Business Grant Fund and Retail, Hospitality and Leisure Grant Fund[6]

Under these two funds eligible businesses will be entitled to payments and cash grants of at least £10,000. The schemes will be delivered by Local Authorities – if you are eligible, your Local Authority will be in touch with you to arrange payment.

6 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/878082/small-business-grant-and-retail-leisure-hospitality-grant-guidance-for-businesses-v2.pdf

Insolvency of customers and suppliers

Companies should be careful about the level of credit extended to customers and clients and may also want to review the basis upon which goods are supplied to customers including, specifically, the strength of retention of title clauses (or the insertion of such clauses if they do not already exist). This will improve a company's position in the event a customer enters into difficulties or an insolvency process.

Signs of insolvency are all too often ignored. By way of example, these can include:

1. a sudden change in employees or management structure of a customer or supplier;
2. suppliers seeking more credit terms; or
3. erratic payments or partial payments of debts.

Companies should regularly check the payment profile of customers and act quickly where possible. Various public sources can provide further information on a company's financial position including the London Gazette (which publishes all public notices relating to corporate and personal insolvency in England and Wales) and Companies House (for accounting and directorship information as well as registration of new security).

Protecting commercial relationships

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The commercial contracts that companies have in place with suppliers, customers and service providers form the backbone of a business. Some companies may struggle to meet their contractual obligations and different scenarios need to be planned for.

Can these contracts be terminated or suspended?

Companies should not assume that contractual agreements entered into before the pandemic was declared will automatically terminate or be capable of suspension because of the prohibitions and restrictions currently in place.

There is no implied *force majeure* clause in English law. The effect of this is that if the contract does not contain a force majeure clause then the parties will be unable to rely on force majeure as an incident, despite the indisputable impact of COVID-19.

Assuming there is a force majeure clause, the scope is very important, for instance does it include; a pandemic, an epidemic, a global health emergency or circumstances where there is a Government restriction or prohibition? One of the above is key and very likely to apply to the circumstances caused by COVID-19.

However, the consequences of the force majeure clause will depend on how it is drafted - just because it is less profitable (or indeed unprofitable) or more difficult to perform the contract, this will not necessarily release the parties from their obligations.

If there is no force majeure clause, a party may seek to rely on the doctrine of *frustration* but the test is a strict one. The party would have to show that the consequences of COVID-19 as supervening event indisputably prevents the parties from performing their obligations under the contract.

What is the process to terminate a contract?

Companies should check the termination provisions of their commercial contracts carefully. Simply because performance seems at the very least not commercially viable and, at worst, impossible this will not result in automatic termination. For instance, a force majeure clause should contain a specific procedure for the parties to follow, and may not permit a party to rely on the clause unless that procedure has been followed. This is likely to include provisions around delivering a notice to terminate.

Whether seeking to rely on force majeure or another right to terminate, when any notice of termination is served, the reason for termination must be clear and correct. Furthermore, the mechanism by which the notice is served must comply with the contract. If either the reason for termination or the service of the notice are incorrect, there is a risk of the notice being invalid. The effect of this is that the party seeking to terminate could face an expensive claim for damages for breach of the contract. Such a claim could and should be avoided with careful analysis of the terms agreed and how to extricate the parties in the most commercial way possible.

Managing Data Protection Law when responding to COVID-19

As businesses introduce strategies to manage the outbreak of COVID-19 and begin implementing business continuity plans, they should not forget their ongoing obligations under the applicable data protection legislation.

Businesses continue to provide employees with information on how best to prevent the spread of COVID-19 and reminding them to stay at home where possible or to take on-board additional measures to protect themselves such as properly washing their hands or wearing certain equipment. However, as the number of COVID-19 cases increases, businesses are implementing containment policies that include asking employees to share and report their location (including where personnel may have to travel to and from work) as well as providing health information on request. Location data constitutes personal data under data protection law and health information is 'sensitive personal data', which requires additional consideration.

Considerations should include the legal basis for processing data (i.e. legitimate interest, consent), whether processes are in place to protect personal data gathered and whether personal data is 'truly anonymous', meaning the individual is no longer indirectly or directly identifiable.

There are exemptions under data protection law for personal data processed where required by law, to protect the public (subject to defined categories) and in relation to health (under limited circumstances). Companies may consider undertaking a Data Protection Impact Assessment to assess the risk of processing personal data with any changes the company is implementing.

Insurance reviews

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The UK insurance industry accepts that it faces a liability to pay out on COVID-19 claims for the following classes of business: event cancellation, other contingency risks, entertainment risks, sports risks and travel insurance.

Most prudent insurers will have posted reserves for these anticipated losses but they are relatively modest and will not impair insurers' balance sheets. Financial Lines insurers are also anticipating some exposure in relation to D&O liability where derivative claims may be brought alleging mismanagement by management in the wake of the pandemic. Again any exposures are not likely to impair balance sheets.

What concerns property and casualty insurers is the avalanche of business interruption claims made the SME sector. There is simply not enough money in the insurance sector to meet these claims if they were held to be covered under Business Interruption policies. Insurers are relying upon two defences to defeat such business interruption claims. First, they point to a term in the insurance policy which requires that property has to be damaged in order to trigger business interruption cover. If that is not applicable, then insurers rely upon virus and communicable disease exclusions.

The difficulty for many SME businesses is that although many business interruption policies do grant cover for communicable disease under a "Public Authority" clause, insurers argue that the current Government enforced lock-down does not meet the specific criteria laid down in that clause. There is likely to be litigation in relation to this issue and, even though on a pure contractual interpretation insurers have the better argument, it is an issue which will ultimately have to be resolved by the Supreme Court.

The U.S. has taken a different route and draft legislation is being proposed in New York and New Jersey retrospectively changing the law so that insurers have to pay out on business interruption claims even where they have the benefit of the property damage trigger defence and the communicable disease exclusion. The UK traditionally does not enact retrospective legislation and it is unlikely that it will follow the American route. However, there is a groundswell of public opinion which rightly or wrongly believes that some insurers are not honouring the spirit of their insurance contracts. Insurers are keen to try to repair the damage to their public reputation. As a consequence now may be a good time to bring valid claims against insurers in all classes of business as they will be keen to include them in statistics to demonstrate to their governing body and to the Government that they are doing their bit in this crisis and are paying claims.

Managing real estate matters

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The disruption caused by COVID-19 may impact a company's revenue and cash flow, which in turn may affect their ability to meet rent payments due and other real estate costs. There are also health and safety and insurance considerations.

We have set out some answers to initial questions that companies may have below:

1. **Can a lease be terminated by frustration as a result of COVID-19 or if there is a 'force majeure' clause?**

   Both scenarios seems unlikely. The majority of leases contain alienation provisions that cover a tenant being involuntarily unable to access a premises. Similarly, unless there is express wording in a lease then a claim of force majeure or for rent suspension is arguably not a foreseeable event.

   Alternatively, if a landlord or tenant wishes to consider termination of its lease as a result of COVID-19, it should review whether there is a break clause in the lease which can be operated or if the tenant is in breach, whether the landlord can forfeit the lease.

2. **What action can landlords take if tenants cannot afford to pay rents due to business interruption as a result of COVID-19?**

   With regard to non-payment of rent, the Government has announced that landlords in England and Wales will be prevented from terminating certain business tenancies by forfeiture for non-payment of rent from 25 March 2020 until 30 June 2020 (this date may be extended). Business Tenancies protected under the Landlord and Tenant Act 1954 ("LTA 1954") are affected and the Government also intends the measures to apply to leases where the protection of the LTA 1954 has been excluded.

   Further information:
   A stay on business tenancy terminations

3. **Is there any Government advice available on the impact of COVID-19 on premises?**

   There are a number of specific health and safety obligations on landlords relating to legionella risks and gas safety. However, dealing with COVID-19 is different in that it is not linked directly to a building. Public Health England has guidance for employers and businesses generally, which is likely to be applicable to most landlords. The Government has also published "Guidance

for landlords and tenants" which includes advice on accessing properties and health and safety obligations in the context of Coronavirus restrictions.

4. What actions can tenants take if they are struggling to pay rent?

A tenant can seek to open a dialogue with its landlord to discuss a rent concession such as a rent reduction or a change to the frequency of rent payments. Tenants should also check relevant insurance policies which they hold for business interruption to ascertain what cover they have.

In addition, if premises are to be left unoccupied for a period of time, tenants of any premises should consider their insurance policies as to whether or not they are obliged to notify insurers of the closure of premises or their absence from them.

Tiefenbacher
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Legal Impacts of COVID-19

March 2020

Essential Regulations of the Act on Mitigating the Consequences of COVID-19 Pandemic in Civil Law, Corporate Law and Insolvency Law

In order to slow down the massive increase in SARS CoV-2 virus infections ("COVID-19 Pandemic"), in March 2020 German authorities ordered the closure of a large number of recreational, cultural, and childcare facilities, restaurants and retail stores, banned all public events, in some cases ordered quarantine. To mitigate and to compensate for the effects of the measures, the Federal Cabinet has submitted a draft of the **Act on Mitigating the Consequences of COVID-19** (COVID-19 Act), which is expected to be resolved by the Parliament shortly. In particular, changes are planned in the areas of civil law, company law and insolvency law.

1. Civil Law

Small enterprises and consumers will be granted a temporary right to refuse payment or fulfilment of other obligations under essential long-term contracts concluded before March 8, 2020, if the payment (or other fulfilment) compromised a reasonable livelihood for the consumer. Small enterprises are businesses with up to 9 employees and an annual turnover of up to two million euros. The purpose of this regulation is to prevent debtors from getting into default and claims for damages arising out of that. According to the explanatory memorandum to the Act, the right to refuse payment or performance shall not only apply to the primary obligations of consumers or small businesses, but also to secondary claims (e. g. for damages or repayment) arising out of these. Default shall even be temporarily suspended upon exercise of this right to refuse performance if it had already occurred previously.

Rental and lease agreements shall not be considered essential long-term obligations in this context. However, in these cases the landlord's right to terminate the contract extraordinarily for late payment of rent payments for April to June 2020 is revoked, if the tenant can substantiate that there is a connection between his delay in payment and the COVID-19 Pandemic. With regard to employment contracts, consumers shall not be able to refuse performance.

Furthermore, under consumer loan agreements claims of the lender for repayment, interest and redemption that become due between April 01, 2020 and June 30, 2020 are deferred for three months from the respective due date if the debtor has lost income due to the COVID-19 Pandemic and the payment would compromise a reasonable livelihood. The law also authorizes the Federal Government to include small and medium-sized enterprises in this regulation in addition to consumers by statutory order if this seems reasonable. As a result, the lender may not terminate the agreement extraordinarily for delay in payment or a significant deterioration in the financial circumstances of the debtor. These provisions shall not apply if, taking into account all circumstances of the individual case, the

deferral and the exclusion of the right of termination cannot reasonably be expected of the lender. For the period after June 30, 2020, the parties shall find an amicable solution. Otherwise, the term of the agreement will be extended by three months.

2. Corporate Law

In order to enable companies to pass necessary resolutions despite the prohibition of meetings and thus to remain capable of acting, substantial temporary facilitations for the holding of general meetings and shareholders' meetings are being resolved, such as a statutory authorization to hold meetings online. Companies in the legal form of a limited liability company ("*GmbH*") are able to pass shareholder resolutions in text form or by written vote in the course of 2020 without the consent of all shareholders. For certain forms of associations, in particular the condominium owners' association (*"Wohnungseigentümergemeinschaft"*), it was stipulated that the statutory bodies will initially continue to exist when their term of office expires and no meeting could yet be held to decide on the new appointment.

3. Insolvency Law

Under insolvency law, the possibility of creditors and in particular the manager's obligation to file for insolvency will be suspended in order to keep companies alive despite the loss of turnover and in order to enable refinancing them without being exposed to liability risks and rights of contestation under insolvency law (*"Anfechtungsansprüche*"). The obligation to file for insolvency and the payment prohibitions under insolvency law will be suspended until September 30, 2020. This does not apply, though, if the insolvency is not caused by the consequences of the COVID-19 Pandemic or if there is no prospect of eliminating an existing insolvency anyway. However, if the debtor was not insolvent on December 31, 2019, it is assumed that the insolvency is based on the effects of the COVID-19 Pandemic and that there are prospects of eliminating an existing insolvency. If managing directors make payments during this period in the ordinary course of business, their liability to repay these is waived.

Besides, the draft of the Act contains regulations to secure loans and repayments for these loans until September 2023, in case insolvency proceedings are nevertheless opened at a later date; in particular, instalment payments and securities for these loans cannot be reclaimed by way of contestation under insolvency law. This is intended to enable and promote the restructuring and refinancing of insolvent companies through new loans – from banks, shareholders and contractual partners.

Please do not hesitate to contact us should you have any questions in relation to the new legislation and any other questions that may arise due to the current threat from the COVID-19 Pandemic!

Stay well and safe!

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