

COVID-19 - impact on businesses in the UK

March 2020

While priority measures for coronavirus (COVID-19) are understandably focused on the threat to life and health, with governments around the world implementing quarantine and social distancing procedures, local and international trade and business has been and will continue to be affected in different and, often extreme, ways.

We offer some perspectives from across our corporate and commercial practice areas about the wider impact for businesses, areas of potential exposure and what steps organisations should now be taking.

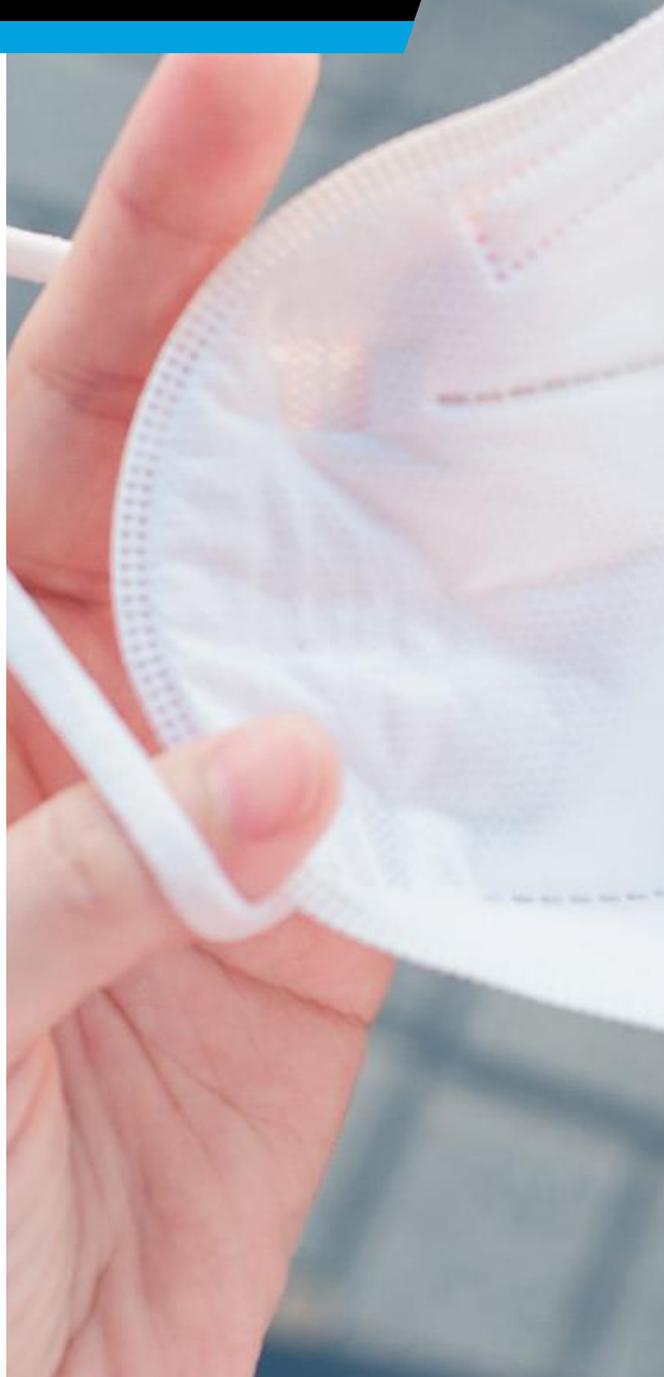
Commercial disputes

What we are witnessing is how local trading can lead to world chaos, with supply chains failing, billions being wiped off the stock markets and companies collapsing. But as businesses struggle with trading, they also struggle with managing their disputes. And as if the existing workload was not enough, there are likely to be many more disputes on the horizon as a result of the COVID-19 disruption.

The practical impact upon arbitration

Thankfully, arbitration is one of the most flexible forms of dispute resolution that may be well equipped to assist, although it will still need to be managed carefully.

For the most part, arbitrations can proceed without in-person contact, as many tasks are document only and for others they can proceed via telephone, video-link or online. The situations where in-person contact may be necessary predominantly relate to



hearings and it is the final hearing that may prove most difficult, since it is very often an in-person hearing involving multiple participants. To ease the burden, tribunals and parties may consider agreeing an alternative seat or place of an arbitration (although a change in seat does impact the procedural law of the arbitration and must be considered carefully).

One should also be mindful of the situation where the parties, their counsel and/or the tribunal contract the virus. In most cases, there will be little impact as the disease appears to be relatively short-lived and most successfully recover from it. Of greater concern, however, is where a tribunal member dies from the disease. Ad hoc and institutional rules generally cater for this outcome, so guidance must be taken from the applicable law/institutional rules on how to deal with this.

Contact: Katherine Proctor

The importance of the small print: force majeure clauses

A force majeure clause is designed to alter the parties' contractual obligations or to avoid a breach of contract by excusing the party seeking to rely on it from performing its contractual obligations, following the occurrence of an exceptional event or circumstance beyond the party's control.

The majority of contracts will likely contain such a clause but how effective they are in excusing non-performance will be dependent on the precise wording in each case and the particular set of circumstances. If the clause states that a triggering event must prevent performance then that event must have made the performance legally or physically impossible. Mere difficulty in fulfilling the contractual obligations, or extra expense arising as a result of that event, is not sufficient, unless expressly stated to be so. Should a force majeure clause be successful the impact could be to suspend the obligation, extend the time for performance or provide the right to terminate the contract.

Contacts: Reuben Berg, Jacqueline Curran, Alison Loveday, Ian Mendelsohn, Carlyn Weale, Yaseen Altaf and Jade Booth

The social aspect of business

Last week, the majority of businesses were asked to stop trading face-to-face and to practice social distancing. As a result, many businesses, owners and

staff have been concerned about the future viability of the business and their income streams.

There will inevitably be an impact on the profitability of many businesses for the months to come. However retaining goodwill and keeping motivated will encourage customers to head straight through the doors once they reopen. It may also lead to businesses being able to provide more creative ways to interact in the future.

In the face of this crisis, the businesses who think the most innovatively and adapt well are likely to flourish, or at least be maintained, whilst doing their bit to help the community, which will pay dividends looking forward to the future.

Contacts: Alison Loveday and Carlyn Weale

Duties of directors

The government has announced unprecedented measures to assist certain businesses at this time, which include support with time to pay arrangements for tax, business rates holidays for some retail, hospitality and leisure businesses, and business interruption loans for SMEs. In addition, the Bank of England has announced a new lending facility to provide a quick and cost effective way to raise working capital through the purchase of short-term debt for "strong" businesses.

In certain circumstances, the merits of a business adopting some of these measures will be clear. Directors of companies are, however, reminded of their duties to act in the interests of the company, as they could be held personally liable for any loss to the company as a result of the breach of such a duty, or in the event that a director knew, or ought to have known, that a company could not avoid insolvency.

Directors will therefore need to ensure they have up-to-date knowledge of the financial predicament of the company, and to review factors which may affect turnover and profit, for example, supply chain issues, reduced demand, or problems with logistics. Directors should also consider holding regular meetings to review the management accounts.

Contacts: Dino Paganuzzi, Darren Bradshaw and Laura Smith

Employment

What more could the UK Government be doing to support employers in the short term?

The coronavirus pandemic has presented a challenge to employers that is unprecedented in modern times. The UK Government has already announced a number of highly-welcomed initiatives to help employers cope with the employment law implications of the pandemic, but we suggest further steps that we would urge the government to consider in order to help employers at this challenging time

Further clarification of the Job Retention Scheme

The 'Coronavirus Job Retention Scheme' will allow employers to designate 'furloughed' employees who might otherwise have been unpaid or made redundant as a consequence of the crisis, and recover a proportion of their wage costs from the state up to a maximum limit.

The scheme is welcomed but, whilst helpful guidance was published on 26 March 2020, employers would welcome further clarification, in particular as to what other, if any, conditions or evidential requirements may apply in order to qualify for reimbursement under the scheme.

The automatic stay of proceedings in new Employment Tribunal claims

The Employment Tribunal (ET) system has already helpfully given directions confirming that all in-person ET hearings scheduled to start on or before 26 June 2020 shall be converted to telephone case management appointments. However, no action has been taken as regards the treatment of newly issued claims.

At present, an ET claim must be responded to within 28 days of receipt of the notification of the claim. Whilst employers may apply for additional time, such applications are not guaranteed to be granted, may incur time and cost, and may not be responded to in time. We therefore propose the government should act to provide that no action shall be required by employers to defend new claims until after the immediate crisis has passed.

Relaxation of collective redundancy consultation rules

Collective redundancy consultation rules require that, where 20 or more redundancies are proposed at one establishment within a period of 90 days or less, there must be a minimum of 30 (or in some cases 45) days between opening redundancy

consultation and effecting any redundancies, but subject to a 'special circumstances' defence applying.

Many employers are having to urgently grapple with the prospect of making coronavirus-related redundancies but are uncertain as to whether or not the current situation is sufficient to amount to 'special circumstances'. If an employer is found to have unlawfully deviated from the normal rules, the employer may face liability for a 'protective award' of up to 90 days' gross pay per affected employee, a potentially very significant sum.

Whilst it is hoped the Coronavirus Job Retention Scheme will reduce the need for redundancies, we propose there should be further legislation to declare that redundancies initiated by reason of the impact of the coronavirus emergency shall amount to special circumstances. This would not absolve employers from the need to consult, but would allow them some much-needed flexibility.

What lessons can employers already start to learn from the coronavirus pandemic?

Hindsight is a wonderful thing.

Unexpected and unique challenges have arisen as to how to effectively and lawfully deal with a workforce where there has been a sudden, mass decline in work and/or significant restrictions on employees' availability to work or their work location. Quite understandably, employers' standard employment contracts and procedures may not provide the flexibility and powers needed to respond.

Here we consider some particular measures that employers might start to look towards in the longer term once the immediate crisis has passed, so as to help guard against future pandemic issues:

Amending contracts of employment to include lay-off provision

Over the years, contractual lay-off clauses have largely fallen out of favour but it may now be prudent to reintroduce them as a matter of course so that they may be called upon in a future similar crisis.

Amending contracts of employment to provide for emergency business protections

More broadly, employers may wish to consider making contractual provision to allow them to impose a number of other employment measures in the event of a similar emergency that impacts upon a large proportion of the workforce. These might

include provisions as to notice period reduction, enhanced work location flexibility, enhanced flexibility on duties, and restrictions on normal sick pay and holiday entitlements.

Developing contingency plans

Employers may wish to now devise detailed contingency plans as to how to respond to the employment challenges of a pandemic in future, learning from the lessons emerging from the coronavirus situation

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Real estate and construction

Businesses feeling the relief from business rate freezes

On 17 March 2020, the Chancellor announced a wide-ranging expansion to the business rate discount set out in the Spring Budget 2020. The expansion takes the form of a tax holiday without any restrictions, whereby starting from 1 April 2020, any business in the retail, hospitality or leisure sectors will pay 0% of business rates for 12 months. Most importantly, this new measure will apply to these businesses irrespective of their properties' rateable value, ensuring that all businesses within these industries have the same government support to manage and survive the COVID-19 crisis.

The business rates holiday will provide welcome relief to businesses in this unprecedented climate where outgoings are currently outweighing income and will assist with cash flow at a time when it is needed the most.

Contacts: Alison Loveday, Angela Bhaseen and Bibiana Lachkovicova

Property managers take note

In the coming weeks and months, we will see how this dire situation will develop and whether any further government support, controls or intervention will ensue. In the meantime property managers need to be vigilant to ensure that they continue to monitor key dates extremely closely.

Where a tenant intends to exercise a lease break, the terms of service of the exercise notice and the conditions applicable to the break need to be carefully considered. Many contracts preclude service by email, leases being no exception, and whilst for the time being the postal service in the UK

continues to operate, in anticipation that things could change it would be prudent, if you are contemplating exercising a break clause, to serve the notice without delay.

Many break clauses will have conditions attached often requiring tenants to provide vacant possession. If restrictions prevent you from removing tenant's furniture and other items, or a general shutdown precludes your appointed contractors from carrying out reinstatement works to comply with a vacant possession condition, you risk being obliged to carry on paying rent and other outgoings on premises that are surplus to requirements.

If there is a danger you will be in this position you may wish to approach your landlord with a view to agreeing a postponement of the break date. Depending on the exact circumstances, you may need to compensate the landlord but in these extraordinary times responsible landlords and tenants trying to do the right thing by each other are more than likely to reach a sensible compromise.

Contacts: Jeremy Palmer and Simon Dawes

Construction - a time for collaboration?

These are unprecedented times for the construction industry and whilst traditionally adversarial, this is a new situation and one that calls for a new, collaborative, approach.

From a contractual perspective, parties will usually be concerned about three things when it comes to COVID-19 - additional time, additional cost, and suspension/termination but whether parties can claim any of these will depend wholly on the contract terms.

- Contracts entered into before the outbreak - COVID-19 is likely to constitute a force majeure event (subject to the contract terms).
- Contracts entered into after the outbreak - COVID-19 is foreseeable. Care must therefore be taken to ensure the effects of COVID-19 are discussed, agreed and recorded expressly in the contract.

The contract is only the starting point and we believe that collaboration will be key in overcoming COVID-19 and so wherever possible, parties should engage with each other at an early stage, and maintain an open and positive approach to problem-solving. Contracts do not have to be inflexible.

Contacts: Helen Johnson and Helen Birchall

Considerations if sites close

For the time being construction projects may continue, however, it is easy to foresee a more stringent lock-down being put into place, under which construction projects cannot continue. There is also a risk of employers stopping individual projects due to their own stance on COVID-19.

If site closures become an enforced reality, all involved parties will need to ensure the site is left safe and secure, and to protect their own contractual positions and we recommend the following:

- Organise staff to work from home if possible, or organise other off-site work.
- Make sites safe and secure to be left for the foreseeable future.
- Postpone deliveries or ensure safe storage of the items after delivery.
- Check the notice provisions in contracts and insurance policies and serve notices where necessary.
- Keep records of information that might become useful. It may also be useful to request similar levels of information from sub-contractors.
- If appropriate, agree formal amendments to contracts.
- If you don't have a contract in place, utilise the time off-site to draft and agree a contract which explicitly deals with COVID-19 and associated issues.

Contacts: Helen Johnson, Helen Birchall and Tegan Johnson

Transactions and advisory

Interruption loan scheme - assistance for SMEs

One of the key measures introduced is the Coronavirus Business Interruption Loan Scheme (CBILS), which is designed to help SMEs experiencing financial difficulty. The CBILS can provide loan facilities of up to £5 million for small businesses facing serious impact on revenue and cash flow. The finance products available include term loans, overdrafts, invoice finance and asset finance.

The CBILS guarantee is for the benefit of the lender and not the business and is of 80% of the total amount of the debt. Borrowers will remain 100% liable for the debt and so will be ultimately responsible for repayments and therefore any shortfall in the government's guarantee will be a

concern. Businesses may also be reluctant to take on further debt when the longer term impact of the current crisis on the economy is not yet known.

While all efforts to provide relief to SMEs in this difficult period are to be welcomed, there are some potential drawbacks to the scheme. Applications are through the lenders' usual application channels and therefore the process could be time consuming during a period where businesses are facing urgent need for cash resource. Traditional lenders' systems may not be digitally nimble enough to be up to the task in hand, particularly at a time when staff are home based or where there is reliance on call centres, leading to the possibility of delay in accessing and receiving the financing.

So, while the creation of the CIBLS at short notice is positive news, it may not provide the short term fix that some SMEs urgently require and so they may need to look closely at the other supportive measures announced by the government, such as rates holidays, grant funding or deferring of VAT payments to ease their immediate financial pressures.

Contact: Jacqueline Curran

Impact on loan agreements

We have seen government measures provide relief for property owners in respect of mortgage payments. However, while individual banks may adopt policies to support their borrowers through these difficult times, there is no official guidance as to what steps might be taken to assist businesses struggling to make payments under their financing arrangements, nor as to how lenders' rights under loan agreements will be affected in light of the ongoing public health crisis.

We have identified a number of areas where rights and obligations under financing documents might be affected:

- **Interest rates** - on 19 March 2020 a further emergency rate cut was announced reducing the interest rate to an unprecedented low of 0.1%.
- **Non-payment** - borrowers whose businesses are affected will need to proceed with caution as non-payment is a default and any attempt to obtain additional financing is likely to be subject to restrictions on incurring additional debt.
- **Covenants** - depending on when the next test dates are due to fall, these might not be the most urgent priority for borrowers. There may also be cure measures built in which can be utilised.

- **Material Adverse Change** - if included in the loan this is likely to give the lender enhanced rights and remedies. In some cases, it might allow a lender to stop making advances or demand early repayment.

Borrowers will need to review the terms of the loan agreement to assess whether they are likely to be in breach and whether they have an obligation to notify the lender of that. Lenders will no doubt face requests for additional financing and/or a relaxation of covenants, and will need to consider whether waivers of breaches or short term forbearance of repayments may be appropriate. Early communication is recommended so that the parties can aim to mitigate the effects of the crisis on financing arrangements.

Contacts: Andrew Robinson

And finally

The COVID-19 class action against the People's Republic of China

COVID-19 has resulted in a number of unexpected outcomes and has already spurred a litany of lawsuits, from Freedom of Information suits to claims against cruise line companies. Add to this growing list a claim against the Chinese Government.

On 13 March, a group of small business owners in Florida filed a class-action lawsuit in the US District Court against the People's Republic of China (PRC) and its various provincial government agencies and ministries for allegedly failing to contain the spread of COVID-19. The claimants collectively allege that PRC failed to report the outbreak of COVID-19 as quickly as they could have. The claimants further allege the PRC deliberately underreported cases of COVID-19 and failed to contain the outbreak despite their knowledge of its severity.

Time will tell whether PRC will choose to respond to what is certainly an ambitious claim but in the highly unlikely event that a successful judgment against PRC is obtained, it would also be interesting to see how the claimants will contend with the hurdle of enforcement to realise the significant damages sought.

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Further information

To find out more about our services and expertise, and key contacts, go to:
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