Coronavirus (Covid-19)

Legal guides to help UK business

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WRIGHT HASSALL

Contents

Guides for Businesses

What does the knock-on effect of the coronavirus mean for commercial contracts?

Now that the World Health Organisation has declared the outbreak of the coronavirus (COVID-19) a global health emergency, we consider the impact on businesses that may be affected and what companies should be looking at in order to protect their operations.

While China and Italy have to date been the worst hit in terms of number of confirmed cases and deaths, companies importing and exporting goods and services globally are increasingly being impacted by the disruption. We have set out below some of the key areas that businesses should review within their existing contracts when considering the impact of COVID-19 and potentially ways to mitigate exposure, including in particular the impact of force majeure.

What is a "Force Majeure" clause within a commercial contract?

Often set out towards the end of a commercial contract and sometimes wrongly classified as one of the "boilerplate" terms that all commercial contracts should contain and that are drafted as standard without careful consideration, the "force majeure" provision sets out the situation whereby one or more parties to a contract may exclude liability or suspend or terminate the performance of the affected party's obligations when certain circumstances arise beyond the affected party's reasonable control. Often, these clauses are invoked by one party to a contract say, for example, where there has been a fire at a warehouse. However, COVID-19 has the potential to impact businesses at all stages of the supply chain, regardless of whether there is an import or export of goods or services between countries, either in respect of those parties now considering the need to rely on it or those who may be on the receiving end of force majeure being raised as a defence.

Background under English law

There is no common law right under English law to absolve a party's liability where there is an event outside their (reasonable) control. If parties to a commercial agreement wish to benefit from this type of protection, then an express contractual provision is required.

How is "force majeure" defined?

There is no recognised definition of the concept under English law. Simply removing or delaying a party's obligations under a contract by reference to "force majeure" would be difficult to stand up in court. Whilst parties may understand the premise of it, it very much depends on the contractual drafting of the clause to determine how it operates and the way upon which it might be relied.

These clauses can be as specific or as general as the parties agree. We are often involved in drafting a range of options where the clause could be relied upon, such as, where there has been a fire, flood, epidemic etc. However, these clauses can simply often be drafted by reference to any events beyond the reasonable control of the affected party. Where negotiating parties are

companies, the courts will deem them to be able to negotiate effectively and therefore, absent manifest error, will tend to follow the exact wording of these clauses without consideration as to whether the parties did in fact turn their minds to the precise drafting of the relevant clauses.

What would be the result of reliance on force majeure?

Again, this very much depends on the specific contractual language. For example:

1. it could excuse non-performance of all obligations under a contract;
2. it may be drafted in favour of one party only, i.e. only that party can seek the benefit of it;
3. it could adjust the terms to the extent necessary such that the contract can be performed; or
4. it could (automatically or otherwise) terminate the contract between the parties.

Another option – "frustration" of the contract?

Under English law, a contract may be discharged on the ground of "frustration" where, after a contract has been formed, an event occurs which renders any further performance impossible, illegal, or radically different from what was contemplated at the commencement of the contract. This means that even where a contract does not include a force majeure clause, it might be possible to argue that the outbreak of COVID-19 has frustrated the contract. The principle has developed in the English courts over the years, although it is generally accepted that a frustration event:

1. occurs after a contract has been formed;
2. is not due to the fault of either party;
3. is so fundamental as to be regarded as striking at the root of the contract and is beyond what was contemplated by the parties at the commencement of the contract; and
4. renders further performance of the contract impossible, illegal or makes it radically different from that contemplated originally by the parties.

Whilst some jurisdictions do not distinguish between frustration and force majeure, English law does. The main differences are:

1. the test the courts employ is generally stricter in relation to frustration, such that something occurs after the formation of the contract which renders it physically or commercially impossible to fulfil the contract; and
2. discharging the contract (i.e. the contract falls away altogether) may not be the only outcome where a party seeks to rely on a force majeure provision (this will depend on the scope of the provision – it could for example allow for suspension until the force majeure event passes); whereas if a contract has been frustrated, it is automatically discharged and the parties are excused from their future obligations.

If there is no force majeure clause within an agreement (or, indeed, even where there is) and performance is becoming increasingly difficult, the parties should have an open discussion in

relation to this at the earliest opportunity, certainly before asserting that the contract has been frustrated, notwithstanding any WHO or government announcement/measures in place. Where an assertion of frustration or force majeure is found to be incorrect, this may amount to a breach (or anticipatory) breach of contract, which can entitle the other party to damages and potentially even being entitled to terminate the contract.

Will insurance cover this?

Clearly, as COVID-19 is a new virus, there will be no express existing insurance that specifically names the virus to cover companies and the performance of their existing contractual obligations. Similar considerations have arisen in recent years, not least in relation to the impact of the eruption of the Icelandic volcano in 2010.

The most common source of available coverage for many businesses may be business interruption insurance (which is often an extension of a property damage policy. However, it is often the case that for a policy to respond to a business interruption claim, some form of insured event giving rise to damage (or fear of damage) is required – as an example, policies for hospitality providers at a sporting event which is cancelled for high winds are more likely to respond if (say) the event is cancelled after a marquee is blown down.

Businesses may also have specific cancellation insurance in place which may or may not be dependent upon damage, and some policies will have civil authority cover, which would cover a situation where there is an order from a government authority that interferes with normal business operations.

As can be seen from the above, the devil is often in the detail in respect of insurance policies, and different insurance companies will use different wording across their policies. As such, businesses should consider the policies they currently have in place to determine whether there is likely to be any applicable cover that could assist should the need arise, and then identify and follow specific policy procedures if seeking to claim, to reduce the risk so far as possible of invalidating any claim.

What should companies do now to prepare and protect themselves best?

In light of the daily developments in respect of COVID-19 and the increasing impact and awareness across the country and beyond, companies should consider if and the extent to which any of their contracts might be affected by COVID-19, including their own terms and conditions, and whether and to what extent force majeure clauses are included within their agreements. With the current uncertainty shown in the markets, and some companies already starting to declare force majeure in response to the difficulties they face, payment provisions should also be reviewed, to determine whether earlier payment might be an option where typically longer costs exposure is not in normal circumstances considered an issue.

Often, “force majeure” discussions arise where there is an incident that affects one party to the contract. In this current situation, both parties may be affected to a certain extent, particularly if the Government or the WHO makes certain statements and/or recommendations that could

affect trade and dealings between businesses, in order to seek to stem the progression of the virus.

Whilst some businesses might seek to exploit the outbreak of COVID-19 to extract themselves from unfavourable contracts, the majority of companies who have entered into agreements are likely to want to seek to "complete" the agreements for their anticipated mutual benefit. Early contract consideration and discussions between parties is recommended, as often, there might be alternative solutions that could be put in place contractually and logistically, even if in just the short term and/or particular to any direct impact of COVID-19, to enable the same or substantially the same obligations to be performed with as little deviation to the original agreement as possible. If nothing else, taking a commercial view and working with the other party to mitigate the effect of COVID-19 could actually improve a relationship and embed it for the long term.

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Coronavirus: the economic implications for businesses

A Guide for Directors

The outbreak of the Coronavirus has caused a serious and evolving health crisis which will continue to present significant challenges to our everyday lives. Furthermore, the implications for many businesses are likely to be profound. Coronavirus will have a growing impact on the economy and businesses are going to face pressure with the breakdown of supply chains, cash flow issues, labour shortages and disruption to manufacturing.

The Government announced a £350bn bailout to help businesses (in addition to the £12 billion worth of assistance announced in the budget). However, this is an evolving situation and only time will tell whether this will be sufficient to prevent many businesses tipping into insolvency.

Directors are under a duty to act in the best interests of the company and its shareholders. Once a director forms the view that the company is insolvent, on a cash flow and/or balance sheet basis, his/her duty is to act primarily in the interests of the company's creditors. If there is no reasonable prospect of avoiding an insolvent liquidation or insolvent administration, a director's obligation is to manage the affairs of the company with a view to minimising the potential losses to creditors. As the uncertainty of the impact on the economy continues, we advise directors to:

- Maintain accurate and up-to-date company financial records and consider the potential impact on creditors of the decisions they take.
- Continually monitor and review the financial state of the company. Directors should review the company's balance sheet and cash flow position and also consider the need to increase the frequency of management accounting and internal financial reporting.
- Consider ways to reduce expenditure, if necessary.
- Hold frequent board meetings convened specifically for the purpose of reviewing the company's financial position and keep proper minutes of those meetings, noting any decisions made and the reasons for them. Any contingency plans that are implemented and/or steps taken to mitigate the effects of Coronavirus should be carefully documented so that it is clear how and why those decisions were taken.
- Continually monitor market developments and set up alerts in order to keep appraised of such developments.
- Take professional advice aimed at reviewing whether an insolvency process is inevitable or whether there is some way of resolving or mitigating the company's financial difficulties.

Please speak to either Caroline Benfield or Elizabeth Taylor (details below) who can advise and guide you through what may be an extremely challenging time for you and your business.

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Coronavirus (COVID-19) and immigration: double trouble for employers

On the day that the Government unveiled its long-expected revised Immigration Bill to re-balance the immigration system and end Free Movement for EEA nationals from 2021, it faced another priority: escalating the response to COVID-19.

As the Immigration Minister and Chief Medical Adviser both took to the stage, businesses wanted to know how to manage an unfortunate combination of two unwelcome disruptions.

Professor Whitty has been setting out the medical response on virtually a daily basis, and we will also be hearing more in the weeks and months ahead from Minister for Future Borders and Immigration, Kevin Foster, presenting the bill in place of the embattled Home Secretary.

Whereas it is possible to apply employment law principles quickly to the problem of absence and infection management for employees, dealing with immigration applications before any significant legislation is in place, and as travel advice changes by the day, is potentially much more difficult.

As international employers, Governments and airlines impose travel bans or suspend flights, situations can rapidly become fraught and complex.

At Wright Hassall we have already seen the first suspected coronavirus cases in migrants whose applications we are advising on.

Key points are:

- Migrants who travelled on business and whose statuses must be renewed in the UK may be unable to return for the time being due to travel restrictions, with the risk of forced expiry, loss of accrued entitlements to indefinite leave and of access to the UK and their jobs.
- Businesses are beginning to implement travel restrictions and bans and are suspending planned global relocations even though skills are required in the UK for business continuity.

The Government announced at the end of February that most people in the UK whose immigration status is affected by the outbreak will get an automatic extension of their visa until 31 March 2020 where there is an 'exceptional circumstance'. That date may be extended further.

A dedicated helpline has been set up for those migrants affected which employers should ensure they engage with: the helpline can only speak to the visa holder or applicant, so a third-party employer must have the visa holder's permission to do so.

The first formal guidance was issued in relation to Chinese nationals and absences by Tier 2,4 & 5 migrants due to COVID-19:

This was last updated on 27 February 2020, so we expect the principle to be translated to other jurisdictions soon. The Government stated:
"The Home Office recognises the current situation is exceptional and will not take any compliance action against students or employees who are unable to attend their studies/work due to the coronavirus outbreak, or against sponsors which authorise absences and continue to sponsor students or employees despite absences for this reason."

The current Government stance is that if anyone entering the UK has travelled from an affected area, they should stay indoors and avoid contact with other people. The advice and guidance is updated daily. The current guidance expires on 31 March and the Home Office is aiming to have new guidance in place by then, although it warns this is difficult in a fast-moving situation and may not be possible.

As the global situation worsens, we expect further declarations by the UK government on travel to and from affected areas and how it will manage the impact on immigration.

Our immigration team has extensive experience in managing crises and finding practical solutions where possible. We are staying fully abreast of developments and can speak with any clients concerned about managing the immigration impacts of COVID-19.

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Coronavirus self-isolation: what employers need to know

It is important that individuals with symptoms that may be due to coronavirus and their household members stay at home. Those with symptoms should remain at home for 7 days after the onset of their symptoms.

If you are the first person in your household to have coronavirus symptoms, you must stay at home for 7 days. All other household members who remain well must stay at home and not leave the house for 14 days. The 14-day period begins when the first person in the house became ill. If another member of the household becomes ill, they must stay at home for 7 days regardless of where they are in the 14-day period.

Self-isolation

On 23 March the Government ordered everyone to stay at home. However, key workers may find themselves in the position of having to self-isolate. If so, what is the legal position for employers on allowing their employees to self-isolate?

If the employee is not entitled to company sick pay, they will be entitled to statutory sick pay which is now available from day one when self-isolating, instead of day four. If the employee continues to refuse to come into work, the employer would be entitled to take disciplinary action. However, in the first instance, an employer should consider the advice from ACAS:

- asking employees who have work laptops or mobile phones to take them home so that they can work there;
- arranging paperwork tasks that can be done at home for employees who do not work on computers; and
- making sure employees have a way to communicate with their employer and work colleagues.

Employees Refusing to Work

In addition to employees who are in quarantine or isolation, employees may be worried that they may catch the virus. It is, therefore, a vicious cycle if you allow the potentially unwell employees to attend work. If employees refuse to come into work as they are concerned that they might catch coronavirus, it is important that the employer listens to these concerns and potentially offers flexible working (such as homeworking).

Precautions

If the employer hasn't already done so, they may wish to send around email guidance on encouraging employees to be extra-vigilant. If the employer does have the capacity to, it is advised that it may be worth designating an 'isolation room' for employees who feel unwell and may feel the need to call a doctor for advice. This will ensure that other employees are less likely to refuse to work if the employer is taking measures to reduce the virus spreading.

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Coronavirus and insurance

Many businesses will have insurance to pay losses when their business is interrupted by an unforeseen event. This extends in some cases to illness and we set out below some areas for businesses to consider as they grapple with the current unprecedented challenge of coronavirus.

Business interruption insurance (BI)

This cover might be a free-standing policy or it might be a particular section included in your general business insurance. You will need to check your policy schedule to see whether that section is operative.

Whilst every policy is different, a typical BI cover will insure lost profit flowing from actual damage to business premises. The more normal claims would be for lost profit whilst a business closes for repairs after physical damage caused by fire or flood. The BI cover tides the business over until it is back in operation and is usually time limited, perhaps for 12 months.

But some policies also have cover for losses caused by specified illnesses. If, for example, your business has to close as a result of an illness such as coronavirus then you should check your cover to see whether you have BI and what the terms of that cover are.

It is obviously unlikely that the cover will refer to coronavirus or COVID-19 itself, but coronavirus became a notifiable disease on 3 March 2020 in England and Wales and if you have cover for 'notifiable diseases' then losses from that date might be covered.

Cancellation insurance

Another type of cover that might become relevant is cancellation cover. Some businesses that organise events have this cover, more usually to insure against cancellations due to extreme weather. These policies sometimes exclude losses caused by government intervention, in which case there may be no cover for coronavirus losses, but much will depend on the policy wording and the date of cancellation.

Credit insurance

Trade credit cover is also an area to consider. If payments are not made but the debtor relies on 'force majeure' (events beyond their control) to avoid payment, the cover may not respond but it is again worth checking the terms of your cover.

Liability insurances

In the longer-term liability cover may also become relevant if claims are made by employees or customers where businesses are said to have failed to protect them from the risks of coronavirus.

Every policy is different and if your business has suffered loss arising out of the pandemic then we recommend urgently reviewing all policies and notifying claims, even as a precaution, soonest. Late notification could give insurers a reason to decline a valid claim.

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The effect of Coronavirus on UK landlords

The World Health Organisation has recognised Coronavirus (COVID-19) as a pandemic which is causing the UK real estate market to take a hit. We have considered the practical implications that commercial landlords may face as a result of the outbreak and what they should be doing to protect their position including landlord's obligations, temporary closure of commercial buildings and tenant's requirement to continue paying rent.

Can I require my tenant to temporarily vacate the property on government advice?

To date, the government has not recommended closure of the workplace even where a member of staff or member of the public with confirmed COVID-19 has recently been at the property. Public Health England will instead contact the business affected to discuss the circumstances and provide advice. It is likely they will advise on how to best clean communal areas and isolation of any other persons who have potentially been in contact with the infected person.

If the advice of the government changes, most commercial leases will include a clause requiring the tenant to comply with all legislation, notices or orders made by a competent authority. The tenant would therefore be in direct breach of that provision if they fail to comply with any directives published by the government or Public Health England.

Who pays the cost for additional services?

Undertaking additional cleaning services to prevent the spread of COVID-19 will understandably come at a cost. Landlords should check the service charge provisions within their lease as they are most likely to say that the costs can be recovered from the tenant under the landlord's obligation of good estate management or where the additional services have been undertaken under statute.

Temporary closure of business – does my tenant still have to pay rent?

In the majority of commercial leases there will be a rent suspension provision to cover the tenant in circumstances where the property has suffered physical loss or damage by an insured risk (i.e. fire, flood, storm, escape of water). It is very unlikely that the lease will contain a provision to allow tenants to suspend rent in any other circumstances such as a worldwide health pandemic. Landlords should check the terms of their lease to determine in what situations a suspension of rent provision would be triggered.

In some parts of Asia, which have been more severely affected by the virus, landlords who have been forced to close restaurant and retail businesses have offered rental rebates of between 30-50% to assist their tenants in seeing out the COVID-19 outbreak. This would of course need to be offered as a gesture of goodwill and whilst there has been no requirement for these businesses to close in the UK, the public has been advised to refrain from all social activity which will has already hugely impacted on the retail and hospitality sector. Whilst landlords are under no obligation to renegotiate the terms of the lease at the request of the tenant, landlords should consider the implications of bringing a lease to an end when it is unlikely that they will be able to find a new tenant in the current climate.

Temporary closure of business – can my tenant bring their lease to an end?

If you are required by the UK government to close your premises your tenant may consider bringing their lease to an end under the law of frustration or by a force majeure clause. A force majeure clause in a commercial contract will seek to excuse one or both parties from performing the contract where certain events occur that are outside of the parties' control.

Force majeure clauses in commercial property leases are uncommon however, landlords should check the terms of their lease and if it does contain a force majeure provision, further information on the enforceability of said clauses has been considered by Pete Maguire and can be found here.

The law of frustration applies where a contract has been entered into and an unexpected incident occurs outside of the control of both contractual parties making it impossible for the contract to be performed as originally agreed. Whether a Lease can be frustrated has been the topic of discussion in the House of Lords on numerous occasions. Whilst it has been held that there are some very limited circumstances where a lease could be frustrated, to date, there is no reported case law where a lease has actually been frustrated. As a result, we find it very unlikely that a tenant will be able to successfully argue their lease has been frustrated as a result of a temporary closure of their building.

Ongoing considerations for landlords:

- Landlords should seek advice on their lease provisions so that they can take any necessary steps to protect their position;
- Landlords should regularly check updates issued by the World Health Organisation, UK Government and Public Health England;
- For all new leases, consider asking your solicitor to include provisions for future pandemics;
- Undertake more thorough cleaning to assist in containing the virus; and
- Consider flexible working arrangements and where possible, allow employees to work from home on a temporary basis.

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Coronavirus and tech supply chains: dealing with strains and broken links in the chain

There are 34 individual components in an iPhone, and all of them need to be produced somewhere. Once each element is produced, they need to be combined to create the finished product. Anyone in the business of advanced tech supply chains will be well aware of the logistical headaches this can cause. However, managing these types of supply chains in a pandemic is something else entirely.

Each tech company will have their own way of managing disputes, and each individual supply contract will be probably be on differing terms all the way up and down the chain. Despite this, there are a number of overarching practical and legal considerations that you should bear in mind when making risk-based decisions.

Practical issues

First off, you should consider what contracts might cause you problems. Consider whether one of your suppliers breaching their agreements with you will impact your obligations in other areas. You need to understand what your responsibilities are and the requisite timelines for each.

You should also consider geography as a first point of call, if you have not already done detailed analysis around this. You may already have done all this, but, if possible, it would be beneficial to confirm where each of your suppliers receives their key goods from. This may be achieved by making contact with each of your suppliers and establishing the position before reviewing your detailed contingency planning. Geographic issues may well have a knock-on effect, impacting the time it takes your suppliers to get their goods to you. It may also cause you to then breach your contracts with others.

Supply chains are heavily dependent upon compliance with regulations around the world. Obviously, then, being able to keep up traceability of each component will be key in most industries. The aerospace sector is one example where industry testing is a fundamental necessity. Muddying traceability by recklessly seeking alternative suppliers without engaging in the proper process could actually be more damaging than waiting out the existing delays.

At present, there is no consensus about how long or whether Covid-19 can survive on surfaces. You should consider whether it is appropriate for you to hold your goods in quarantine to avoid increasing the risks to the parties you are contracting with.

Lastly, GCHQ has issued a public statement through the National Cyber Security Centre, https://www.ncsc.gov.uk/news/cyber-experts-step-criminals-exploit-coronavirus, about the increased ferocity of cyber attacks in the wake of the Covid-19 pandemic. Consequently, it would be wise to review the security of your systems to ensure that they are sufficiently resilient in light of this current trend.

A range of examples of contingency planning include:

- Organising business interruption insurance as an absolute first priority;
- Obtaining alternative sources of goods to enable you to carry on operating;
- Considering the safety of your staff and any implications of your workforce having to work from home;
- Communicating to your suppliers about any change in your policies;
- Consider which elements of the chain can be sped up by utilising technology and online means; and
- Seeking legal advice in respect of any contracts which you may have to breach as a result of the Covid-19 pandemic.

Legal issues

The practical issues set out above need to be offset against the legal considerations. Generally, you should look at:

- How much flexibility you have within each of your contracts with other parties;
- The size of operations, including the scale of each order and whether this is likely to increase or decrease in the circumstances – for example if you supply technology for remote working technology you may suddenly be met with an overwhelming demand;
- Your ability to make these types of predictions and what impact they will have is contingent on the provisions in your contracts.
- Your rights to cancel, terminate, suspend, vary, take control of subcontracts, break exclusivity provisions and demand information as required.

In addition to the above generic points, you may also want to examine the below in further detail:

Variation provisions

Changing obligations is an important consideration for tech companies. Many companies will respond to the Covid-19 pandemic differently, and hence it is impossible to truly predict the impact it will have on your contractual relationships. Whatever happens, flexibility and agility will be key.

Seeking advice in a timely manner will give you the time that you need to make proper action plans. It is important to make sure that you have evidence about agreements between the parties. The drafting of these pieces of communication should be undertaken with care: you need to avoid inadvertently waiving your rights or varying the contract.

Force majeure

Many contracts include a force majeure clause. This is often colloquially referred to as an "Act of God" clause. It is dubbed this because it caters for events such as:

- Natural disasters including hurricanes, earthquakes, tsunamis and volcano eruptions;
- Wars;
- Industrial action; and
- Subcontractor or third-party failure to supply.

The above are just a few examples of events that could be included. In practice, the drafting of force majeure clauses may vary greatly. If it is engaged, a force majeure clause is hugely significant because it can release a party (or both parties) from their obligations under the relevant contract. The impact of this is that you may be able to shrug off unhelpful contracts during this difficult time, but the same may also happen to you. However, each clause will need careful legal analysis to establish whether a pandemic would be covered by the wording. If it is not and you attempt to terminate on that basis anyway, there may be severe legal consequences.

Frustration, wrongful termination and wilful default

In contract law, there has long been a doctrine called "frustration". Frustration is a way of returning both parties to the position that they were in before the performance or partial performance of their respective obligations under the contract. It is worth noting that this can only be used in very specific circumstances. By way of example, the leading case in this area of law concerns a venue burning down. To come under this doctrine, the services or goods need to cease to exist. It is not enough to say that you cannot supply goods because they are stuck at your warehouse and you are unable to engage a delivery firm. The legal hurdle is extremely challenging to meet.

Most contracts will include express termination provisions. If these are tackled in the wrong way, you may well face a dispute. Similarly, if you simply do not supply your goods or do not pay your suppliers, then you may be in wilful default.

Regulatory issues

As mentioned above, it is likely that regulatory issues will be at the front of your mind when considering supply chain transparency. It may be wise to consider whether any re-testing of products is necessary if you do elect to change suppliers.

Conclusions

There are a range of legal options and practical issues to consider when address Covid-19 related supply chain issues. A thorough analysis of both can help to determine whether a legal or negotiated solution will be best.

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Coronavirus under the contractual microscope – some potential cures for contract problems

Q. I am no longer able to perform my obligations under an existing contract. Can I rely on the Covid-19 outbreak to get out of the contract?

A: From an English law perspective, the starting principle is that contractual obligations are absolute, meaning parties are required to perform their obligations and can be liable for breach if they fail to do so. There are, however, three key exceptions to this rule:

1. Force Majeure Clause: Some contracts include a 'force majeure' clause which excuses the performance of obligations under the contract if an event happens which is beyond the parties' contemplation or control.
2. Material Adverse Change Clause: Some contracts include a 'material adverse change' clause which may, depending on the wording and interpretation, entitle a party to avoid its performance obligations.

3. Frustration: Where there is no force majeure clause, the law provides potential relief in the form of 'frustration'. This discharges a party from its obligations if there is a change in circumstances which makes it physically or commercially impossible to perform the contract or would render performance radically different. This is a high bar and of narrow application. Whether this applied would need to be considered on a case-by-case basis.

Q. Is Covid-19 covered by the force majeure clause in my contract?

A: Force majeure clauses differ so there are various factors to consider on a case-by-case basis, such as:

- Is Coronavirus covered by the clause?
- If so, are there elements of conditionality associated with the clause applying and are they present?
- What notice requirements apply? These would need to be complied with to the extent that you wish to rely on the clause.
- What is the effect of establishing force majeure?
  - Is it an extension of time?
  - Is it a termination right immediately or after a period of time?
  - Who bears the costs?

It is advisable to seek legal advice on the interpretation of your force majeure clause before taking any action so that you can fully understand the potential risks and the commercial and financial impact on your business.

Q. What should I do if a party is seeking to avoid performance of their obligations under the contract?

A: There will be circumstances in which the Coronavirus excuse a party from performance of their obligations; however, this will largely depend upon the wording of the contract.

It is important that you review the terms of your contract, particularly any force majeure or material adverse changes clause, to be sure of each party's rights under the contract. Seek legal advice on their interpretation and the consequences that may follow and consider whether you need to inform your insurers. It is important that you are clear on your legal position before engaging with the other party.

Q. My supplier is asking to change its contractual obligations because of the impact of Covid-Should I agree?

A: This is a commercial question for you, but when communicating about the potential impact of the Coronavirus on your respective performance obligations, make sure that you are:

- clear and fully informed of your legal obligations and rights under the contract;
- no waiver or variation of the terms of the contract is inadvertently agreed
- the communications are in writing and are clear as to the intended scope and legal consequences
- proposed variations which you do not agree to are rejected expressly in writing

Seeking legal advice on the content of your communications before sending them is sensible to ensure that your intentions are clear and can be later relied on if necessary.

Q. I am concerned that, due to staffing shortages, I will not be able to fulfil my obligations under the contract. What should I do?

A: Carefully review the terms of your contract to see whether there are any clauses which can be relied on to absolve you from performance or protect you against potential breach. Where problems with performance are anticipated, it is wise to seek to negotiate a variation to the contract quickly and before the default occurs so has to avoid being in breach, which could otherwise have financial and reputational consequences.

Q. I have a dispute with a customer based outside England and Wales. Which laws will apply to the contract?

A: Most contracts will have a 'choice of law' which sets out which laws will govern the dispute and a 'jurisdiction' clause which identifies the legal system which should determine the dispute. In the absence of such a clause, a careful legal analysis will need to be carried out to ascertain which jurisdiction is likely to apply, to balance the commercial considerations of location where more than one jurisdiction may apply, and to negotiate agreement with the other parties involved

Q. Am I covered under my business insurance for losses related to the covid-19 outbreak?

A: Cover will depend entirely upon the wording and interpretation of the insurance contract. Disputes often arise over the scope of definitions, interpretation of clauses, whether or not events were 'pre-existing' prior to inception of the policy, what exclusions have been placed on cover, what loss is covered, and when the outbreak became a notifiable event and whether notice periods have been complied with.

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How Covid-19 might affect charities and not-for-profits, and what you can do.

Charities, like everyone else, may find themselves struggling to adapt to the fast-moving situation created by Covid-19, however it's incredibly important to ensure these organisations are in a position to provide their services and support in the current climate. We've put together this brief guide to ensure charities and not for profits know what they can do to pandemic-proof themselves:

Filing

Charities have an obligation to ensure they make their annual filings on time, and keep the Charity Commission updated as to their circumstances, especially if these are likely to change drastically in the imminent future, and last week this position was reiterated after it said that charities severely affected by the coronavirus outbreak might need to file serious incident reports

Clearly, in the current environment, it's difficult for anyone to make such a judgement call and the Commission found itself coming under fire for its lack of guidance. The Commission has since changed its position, saying that it will consider granting an extension to any charity that is struggling to file its annual return because of the coronavirus pandemic.

The Commission said in a statement on 17 March that it wanted charities to be reassured its approach to regulation would be "as flexible and supportive as possible" and that "charities can feel confident that we will, where possible, act in a pragmatic way by taking account of the wider public interest during this unprecedented period."

If you are due to file your charity's annual return imminently but are or feel unable to do so, you can request a filing extension. The Commission has confirmed that requests for filing extensions would be made on a case-by-case basis.

Funding

With the Chancellor's announcement on Friday of a £330 billion injection for the British economy being silent on the position for charities and not for profits, many may have been left wondering how they will survive the pandemic, or whether they can meet obligation they might have to funders.

The National Lottery Community Fund has today said it will be flexible with grant recipients if they are adversely affected by the coronavirus pandemic. The Chief Executive of the Fund said the fund wanted to support charities and community organisations as much as possible at a difficult time and that they would look to accommodate changes to activities and timelines because of the outbreak and consider any requests for support if organisations experienced financial pressures as a result of the situation.

This will come as welcome news to many charities supported by the National Lottery, but many more are set to face funding difficulties, as social distancing comes into effect and fundraising

event including the London Marathon are postponed or cancelled. However, a group of 130 charitable grant makers have led the way in reassuring charities that they support that funding would not be withdrawn during the current crisis and that they would also be flexible on how funding is used.

If you're concerned about how your organisation will fare financially, we would recommend getting in touch with your donors, funders or grant makers and putting in place a contingency plan. You should also carefully review any insurance policies you have in place to ensure you're utilising them properly.

Moving Forwards

Advice to charities as to how to manage to evolving situation is, as with all current advice, changing rapidly, however all charities should be taking steps to drawn up plans to deal with the possible effects of the coronavirus outbreak on their workforce and service offering. Ultimately a charity must always function for the public benefit, and charities should ensure they are able to adapt to meet the changing environment.

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Coronavirus: the impact on the construction industry

In these uncertain times, we are aware that parties operating within the construction industry at all levels need reassurance on how to manage the problems they are likely to face in the near future. The most common contracts are the JCT suite and the NEC3 suites, so we have set out below some initial thoughts and guidance to help those of you operating these contracts. We have referred to 'employer' and 'contractor' generically as those terms apply in any part of the supply chain.

Safety and Security

The safety and security of personnel, as well as the site itself, are of paramount importance. Employers have an ongoing duty of care to employees to assess the working environment and take appropriate measures, which may include a mixture of virtual meetings and physical site inspections (where critical to do so and while the UK is not legally locked down). That dovetails with health and safety on site. According to CDM regulations, the principal contractor is responsible for managing the site, but clients must ensure that resource is in place and information provided. While the building contract is live, the site is usually insured and controlled by the main contractor, so a skeleton staff may be required to preserve the safety and security for workers and the general public alike.

Taking specific measures against the spread of the infection will be important not only in relation to safety of individuals but could be crucial to the productivity and viability of sites, particularly where projects are close to practical completion. Making sure that anyone with symptoms is either isolated from or removed from the site will help to prevent the virus spreading to other workers and site-based staff. Limiting travel of people between sites will also help to ensure that some sites remain viable even if others have to close. Hygiene facilities including soap/handwash and hand drying should be readily available and the importance of following good hand hygiene should be reiterated regularly on 'toolbox talks' and site posters/information boards. Consider risks such as shared tools and canteen equipment and ensure cleaning regimes are appropriate.

Can you fall back on legal rights?

It is worth remembering that there is no general legal right to cancel a contract once it is signed and effective unless there is an express contractual right to do so or one of the common law grounds such as frustration of contract applies. For the purposes of this article, frustration will be hard to argue because it is a much higher threshold than simply suffering financial hardship to deliver their project. However, all the circumstances must be reviewed in the context of any particular project.

JCT position

The JCT suite refers to force majeure which is undefined by the JCT authors, relying on the general understanding of the meaning of force majeure as an 'act of God' or other unusual and unforeseeable event out of everyone's control. JCT will treat this as a cost neutral event so an extension of time is available, but the contractor has to cover its own costs of such an event.

However, if the project is suspended for force majeure for two, continuous months, the contractor can serve notice to terminate and pass an incomplete site back to the employer. THE JCT also acknowledges that materials must be used "as far as procurable". Depending upon what happens next for the industry, other grounds to consider may be civil commotion, change in law, employer impediment, and employer instructions to postpone work. However, the JCT is very clear that the contractor must use best endeavours to prevent delay and mitigate the situation so, although the full effect of Coronavirus is not yet known, it would be reasonable to ask a contractor what steps they have taken to resource and complete the job using alternative provision.

It is also worth remembering that a substantial change in conditions would entitle extra time and money for a contractor so, if instructions were given to restrict site access or limit working hours, or work in a different order, or other change of condition of work, then this is a Change for the purposes of the JCT, creating a claim for time and money which must be assessed in the normal way.

Financial hardship

The contractual (or statutory) payment mechanism continues to apply so the Construction Act requirements for an adequate payment mechanism is unaffected. Payers still need to issue notices at the right time and payees should continue to apply for payment. Ensure that the notices will be issued, and responded to, by a number of contacts in case the usual individuals administering the contracts are ill or otherwise unavailable. If there is any possibility of insolvency (which we all hope can be avoided but must be recognised as a possibility) then, prior to the start of the contract, the JCT does provide options for performance bonds and parent company guarantees. Parties can also consider altering the payment schedule by mutual consent to vary the contract.

NEC3/4

The NEC3/4 contracts deal with time and money collectively through compensation events. Relevant points to consider include instructions to change Works Information, change in law (if the optional clause is selected), instructions to stop - or not to start - work, failure to reply to communications (if staff are isolating and unavailable) or the NEC3/4 equivalent of force majeure, which is *'an event which stops the Contractor from completing the works, which neither party could prevent and which an experienced Contractor had judged was such a small risk to be unreasonable to allow for it'*. Again, the legal principles of mitigation apply so the claim for compensation events must be tested in the normal way and, in the NEC3/4 suite, there is an additional complication of claiming the compensation event within the required period of time or the claim is barred. Whether parties would agree to waive this may depend on the circumstances but, in the current climate, parties are already likely to be aware of the circumstances already and therefore the clock would be ticking.

Overall, we know what a difficult time this is for all businesses. Our Construction team is here to help all parties within the construction industry so that everyone has the right information and tools available to consider their own particular circumstances for their project and their business. We would be happy to give you more detail on any of these issues so please do not

hesitate to contact us. As always, the particular circumstances and terms of the contract should be assessed on an individual basis.

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Coronavirus: some practical points for the construction industry

The impact of a lack of materials or labour

Materials coming from China are likely to be in limited supply given the two or so months of limited to zero production from some plants but, as the virus spreads through Europe, the impact will become more wide-reaching, particularly as borders start to close and distribution networks become more critical for food and supplies. In addition, the transport industry faces its own challenges.

Labour shortages could result from high absence levels, whether those who fall ill with the virus or who self-isolate on government advice. As things stand in mid-March 2020, a family member showing symptoms will stop a perfectly healthy and otherwise willing labourer from attending site for 14 days. This is already affecting some industries and on some sites.

A breach of contract may arise where contracts cannot progress as planned, due to lack of materials or labour, meaning the contractor may not be able to complete the works by the agreed date. The risk of obtaining materials and labour typically rests with the party supplying the relevant work.

It is necessary to identify whether each specific contract provides for any entitlement to additional time in the circumstances, if so then there will be no breach of contract.

A 'force majeure' clause in your contract, such as in forms of the JCT suite of contracts, might help and might specify the remedies. It might entitle you to more time, and even additional money in some cases. If the government imposes specific statutory measures which prevent labour and/or materials from going to site, this would also allow an extension of time on many standard forms of contract.

The best approach is to know what your contract says, understand it, and ensure that the right notices are in place in the right timescales – communication will be key over the next few months.

Site-specific issues

If a contractor or sub-contractor is refused entry to a site without a government policy that supports such a refusal, this would be likely to be an act of prevention by the employer or sub-contractor, and likely to lead to an entitlement to more time to complete the works - and probably more money too - to cover loss and expense suffered during the period. If the refusal of access is prolonged, it may be possible to terminate the contract lawfully.

However, if the reason for lack of access is that the party carrying out the works is not complying with site, or wider health and safety considerations (showing symptoms which means they should self-isolate or not complying with hand-wash requirements etc), responsibility for the inability to attend site is likely to rest with them.

If a site is to be closed down due to health concerns or due to government policy, notice should be given to allow the safe and timely collection of materials and equipment. It would be wise, in the event of a national 'lockdown'/quarantine in late March 2020 (given that other countries further along the infection 'curve' do appear to all be following this model), to remove from site what can be easily and safely removed and to make arrangements, if at all possible, for payment for materials as soon as they arrive on site rather than when they are fixed.

Entitlement to interim / stage payments

These should not be directly affected by the virus. Stage payments will still become due when the stages are reached and interim periodic payments should still fall due in accordance with the contract. If no work is progressing then there is unlikely to be anything due (although extended preliminaries and potentially loss and expense could be claimed in some instances), but the first application for payment following any site closure is still likely to contain a sum that could become payable so the usual notices should still be administered by both parties to the contract. It might be wise to include new additional individuals in the distribution of such notices in case their colleagues who normally administer the process are unwell or otherwise unavailable.

Practical site issues

Make sure your workforce, and all of those for you have site responsibility, know what is expected of them from a hygiene perspective and know how to recognise the symptoms meaning that they should self-isolate. Construction sites are sources for rapid transmission of the virus. Ensure that there are plentiful stocks of soap/handwash at cleaning stations and that personnel are regularly and properly washing hands. Make sure that this message is communicated in all relevant languages and reinforced in 'toolbox talks'. We have been specifically asked about face masks but there is no specific requirement in force at the time of writing about these and the World Health Organisation only says they should be used if you are caring from someone suspected of having the virus.

Resource levels

Given the current situation, you may need to consider laying-off your workforce, reducing their hours or even making redundancies. Laying off employees means that the company will provide the employees with no work and no pay for a period of time. Short-time working is where the company can reduce the hours of their employees, and pro-rata their salary accordingly.

In these circumstances, the first thing that you should consider is whether you are contractually entitled to lay-off your staff or place them on short-time working as different rules apply. If you are not contractually entitled to lay-off then this can still be achieved, but we strongly recommend you seek legal advice before commencing this process. Our Employment law team will be happy to assist you with any queries you may have. If you have agency staff or direct sub-contractors, the terms of those contracts will have to be considered too.

What help will there be available for Sole Traders / SME's and large regional/national contractors?

The government has announced a £350bn package but the details are still to follow. Whilst it sounds as though the government will step in and support businesses that have been affected, the mechanisms and timescales are not yet known. Good financial hygiene must be followed to claim money, chase debts and minimise liabilities in the meantime. Some initial help may be available in relation to tax liabilities and if your income is affected, it would be worth speaking with HMRC about their 'Time To Pay' facility, which now appears to have a designated coronavirus helpline.

You should also speak with your insurance broker to establish if you have business interruption cover in place that could respond in the circumstances.

New contracts

Given current uncertainties, it will be difficult, at this stage, to argue that disruption caused by the coronavirus is unforeseeable, so force majeure (if indeed it is provided for in your contracts) will not assist. You need to have frank, realistic and sensible discussions about risks relating to time and money which could yet be amplified by further developments with the virus. Once you agree where those risks sit, make sure they are properly recorded in the terms of your contract.

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Coronavirus: residential landlords – latest government guidance

On Wednesday 18 March, the government announced measures in an attempt to provide some reassurance for both residential landlords and tenants. We are not sure how reassured either landlords or tenants will be.

Mortgage commitments

For many landlords, their rental income is vital to meet mortgage commitments. The government has recognised this and landlords who have buy-to-let mortgages, where the ability of their tenant to pay rent has been affected by any aspect of the coronavirus pandemic, will be able to take advantage of the three-month mortgage payment holiday, already available to home owners in difficulty.

It is not yet clear what evidence will be needed. It is likely that it will be left to lenders to set the criteria. If landlords are already seeing missed rental payments, it would be prudent to ask their tenant to confirm in writing what their circumstances are, i.e. laid off, made redundant or simply receiving statutory sick pay. Landlords should give lenders a few days grace before making contact to discuss this relief. Lenders are already struggling to manage enquiries from those who are owner occupiers.

A mortgage holiday is simply a break from paying the mortgage and landlords will have to make up the missing payments at some point. Lenders are likely to be happy enter into a payment plan to repay the arrears over a reasonable period and it is worth landlords knowing that the remaining term of the mortgage is considered by the court to be a reasonable period for repayment of mortgage arrears.

Rent arrears

Tenants have not been afforded any sort of break from paying rent. What the government has said is that no tenant who cannot pay their rent due to the coronavirus will be forced out of their home. Whilst the tenant is unable to pay, rent arrears are going to accrue. The government has said that, at the end of the three-month period, landlords and tenants will be expected to work together to establish an affordable repayment plan, taking into account a tenant's individual circumstances.

Possession Proceedings

New legislation is being rushed through to provide further protection for tenants. The immediate implications are:

- No new possession claims will be issued at courts for the next three months (at least). It is not clear if this will apply to possession claims based on rent arrears only, or whether it will extend to claims brought pursuant to S21 of the Housing Act 1988, which is the 'no fault' repossession route where a landlord might simply want their property back, rent arrears or no rent arrears.
- The Pre-Action Protocol currently in place for social landlords (requiring them to take certain steps before proceedings can be issued) is going to be revised to include

protection for tenants who have accrued rent arrears due to the coronavirus pandemic. Again, until we see the new legislation and the revised protocol, we will not know whether the protocol requirements will extend to the use of S21 Notices, but it seems likely that it will.

- There was no mention of proceedings that may already have been issued but it seems likely that the Court will be seeking to protect tenants as much as possible and so expect Judges to exercise more discretion than usual.

- Given that the government was already looking at ways to shake up housing legislation and potentially remove S21 entirely, it is possible that this emergency legislation will remain in perpetuity.

More generally, there has been no mention of the impact of non-payment of mortgages on individual's credit ratings. Currently, missing a mortgage payment will be reflected in someone's credit score. However, the Building Societies Association (BSA) has reported that *'firms will make efforts to ensure that forbearance offered under these circumstances* (i.e. payment holidays) *will not result in an adverse impact on the customer's credit score.'* Clearly this forbearance will depend on mortgagees speaking to their lenders and keeping lines of communication open. However, the situation will remain unclear for some time and we will continue to monitor it.

As soon as the new legislation has been released, we will be able to advise you on any particular circumstances. Meanwhile, if you are unsure about anything, or if you are a managing agent that has a query, please get in touch with Mary Rouse.

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Coronavirus: financial support for business

The Chancellor has announced a raft of measures to support business large and small through the coronavirus outbreak. Undoubtedly the government will monitor the impact of its support package closely and we anticipate that more changes will filter through as it starts to take effect.

The Coronavirus Business Interruption Loan Scheme (CBILS)

Most of the money available is to be put to market in the form of loans rather than grants. Large companies can raise finance in the money market by selling CP (Commercial Paper) to Bank of England. Small businesses can receive grants as well as up to 80% Loan Guarantees for loans up to £5m.

Over 40 lenders will be making loans available for smaller businesses (which includes businesses with turnover into the tens of millions). The scheme, which will work in a similar way to the Enterprise Finance Guarantee scheme of recent years, is now up and running as follows:

- The bank / lender will make the loan to the business;
- The government guarantee will underwrite a proportion of that lending (thought to be 80%);
- The government is making the guarantee to the lender rather than the business borrowing the money;
- The decision-making process on granting the loan will be delegated to the lending banks/institutions.
- The borrower will retain the primary obligation to repay the facility supported by the guarantee;
- The first twelve months' interest on any loans made under the scheme will be payable by the government and not the borrower;
- Some business are excluded from the scheme under state aid rules.

You can find details of CIBLS on the British Business Bank's website which is being regularly updated as more detail emerges.

Other help available

Beyond the loan scheme, details of other new and / or extended measures are being announced almost daily. To date, the Chancellor has set out a package of measures to support public services, people and businesses including:

- 12-month business rates holiday for all retail, hospitality and leisure businesses in England;
- Small business grant funding of £10,000 for all business in receipt of small business rate relief or rural rate relief;
- Grant funding of £25,000 for retail, hospitality and leisure businesses with property with a rateable value between £15,000 and £51,000;
- The HMRC Time to Pay Scheme.

Support for businesses that pay business rates

The government is introducing a business rates holiday for retail, hospitality and leisure businesses in England, for the 2020 / 2021 tax year. Businesses that received the retail discount in the 2019 / 2020 tax year will be rebilled by their local authority as soon as possible.

A £25,000 grant will be available for retail, hospitality and leisure businesses operating from smaller premises, with a rateable value (RV) between £15,000 and £51,000. RV is intended to reflect the open market rental of a business property. Bills are issued now and paid in 10 instalments, similar to community charge. Any enquiries on eligibility for, or provision of, the reliefs should be directed to the relevant local authority.

Support for businesses that pay little or no business rates

The government will provide additional funding for local authorities in the form of a one-off grant of £10,000 to support small businesses eligible for small business rate relief (SBRR), or rural rate relief, to help meet their ongoing business costs. Eligible businesses will be contacted by their local authority; they do not need to apply.

Support for businesses paying tax

All businesses and self-employed people in financial distress, and with outstanding tax liabilities, may be eligible to receive support with their tax affairs through HMRC's Time to Pay service. These arrangements are agreed on a case-by-case basis and are tailored to individual circumstances and liabilities. If you are concerned about being able to pay your tax because of the impact of the coronavirus pandemic, call HMRC's dedicated helpline on 0800 0159 559.

The banks tell us they remain open for business and your usual bank should be your first port of call to discuss any concerns you have about managing your finances. However, our banking team is in daily touch with lenders and is on hand to review what you may have signed up to in the past and help you through any next steps. Please feel free to contact either Lucie Byron or Myles Bennett.

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Coronavirus: furloughed workers and what it means for business

The Coronavirus Job Retention Scheme is designed to help businesses avoid having to lay off staff in the face of the unprecedented disruption caused by COVID-19. All businesses with a PAYE scheme in place on 28 February 2020, regardless of size or sector, will be able to benefit from the scheme with the government reimbursing employers up to 80% of their employees' wages, to a maximum of £2,500 per month, plus employer's NICs and auto-enrolment pension contributions. Employees on agency contracts and flexible or zero hours contracts can also benefit from the scheme. In addition, the scheme also covers employees who were made redundant since 28 February 2020, if they are rehired by their employer.

Furloughed workers: what does that mean?

Businesses have to 'designate affected employees as furloughed workers and notify your employees of this change'. However, employers still have to heed employment law which means that, having designated those employees whose jobs were at risk, they will need to agree with those employees that they will be 'furloughed'. Given the extraordinary situation prevailing at the moment, and given the alternative to being furloughed, it is likely that most employees will agree to the terms. For those workers who do not agree, they will either have to take unpaid leave for an indeterminate period or employers are likely to have to go down the redundancy route. It should be noted that furloughed workers are designated by the employer – an employee cannot 'self-designate'.

Eligibility

Employees hired on or after 1 March 2020 are excluded from the scheme, presumably to stop people 'gaming' the system by hiring family members after the scheme was announced and then furloughing them. However, those businesses that have made people redundant since 28 February 2020, can re-employ them and then furlough them. To qualify for payment under the Job Retention Scheme, an employee must be furloughed for a minimum of three weeks in order to prevent employers putting staff on a furlough 'rota' i.e. one week on furlough, one week off.

Who can be furloughed?

Normal employment law still applies so employers must not discriminate when deciding who to furlough. Employees returning to work after a period of sickness absence, or self-isolation, can be furloughed, however they cannot be furloughed while on sickness absence or in self-isolation. Furlough will only take effect when this period comes to an end. Employees who are "shielding" however, will be eligible to be furloughed. Employees on maternity leave can be furloughed if they agree to return to work early or change to shared parental leave; alternatively, they will remain on Statutory Maternity Pay where this is applicable and will not be furloughed until their return.

When agreeing changes and moving to furlough status, it is important to remember that normal employment law processes apply. Employers must be careful not to discriminate against any employees when deciding who to furlough.

Furloughed workers remain employed but must not work

Assuming the designated employee has agreed to be furloughed, they cannot undertake any work for their employer at all. If the employee continues to work, even reduced hours, they are not eligible for the scheme. The good news for furloughed staff is that they can volunteer or undertake training providing neither activity generates income for their employer. Whether or not people can take advantage of this while confined to their house is, of course, another matter altogether.

How it will work

While furloughed, the government will pay related employment costs including pension contributions and NICs in addition to wages. All furloughed workers will remain employed by their employer for the duration of the scheme. Employers can make up the missing 20% of their employees' salaries but there is no legal obligation for employers to top up the salary to 100%. However, any contractual clauses regarding withholding pay and deductions should be taken into account when this decision is being made. For those employees who are furloughed, their employment status will change but their employment record remains continuous.

Employers need to give HMRC a list of furloughed employees. Employers pay their workers as usual via PAYE, and then apply for funding, every three weeks (not weekly) to cover 80% of their wages (up to £2,500 of gross pay). You will receive a grant from HMRC to cover the lower of 80% of an employee's regular wage or £2,500 per month, plus the associated employer NICs and minimum automatic enrolment employer pension contributions on that subsidised wage. Fees, commission and bonuses should not be included.

For workers whose pay varies, the 80% is based on the higher of:

- the earnings in the same pay period in the previous year; or
- the average earnings in the previous 12 months (or less, if they've worked for less).

If employees paid the minimum wage are furloughed, the fact that 80% of their earnings will bring their wages below the NMW does not contravene the legislation as people are only entitled to the NMW if they are working. They can, however, claim the NMW if undertaking training.

The HMRC system through which payments can be made should be up and running by the end of April. The scheme is expected to run for three months, subject to review.

We will update this guide as and when we receive new guidance. In the meantime, if you need any advice on this, or any other employment-related matter, please contact our Employment Law team.

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Coronavirus: available public money for the construction industry

The construction industry has a number of vocal supporters but, nonetheless, we must keep pushing government to do more. Liquidity and cashflow have never been more important. The Retention Bill was a victim of the recent general elections, the identity of the Minister with construction in their portfolio has changed several times, and the Fair Payment Charter was guidance and best practice but not law. However, in this time of national emergency, the Cabinet Office has been considering how to use the power of the public purse to keep the industry moving forward. As a result, the first two Procurement Policy Notes in 2020 ("PPN") have been issued which will hopefully allow money to move down through the supply chain.

PPN1/20 – place orders more quickly

The Note is designed to encourage all contracting authorities (central government, councils, 'blue light', schools, housing associations) to speed up the process and place orders to secure future projects. If you are a main contractor you can encourage your client contacts, whose projects fall above the current financial threshold, that options are available which still comply with procurement rules:

- Direct awards due to extreme urgency caused by unforeseeable events and it is impossible to comply with the normal rules.
- Direct awards due to absence of competition in a specialist technical area.
- Increased use of pre-approved frameworks.
- Accelerated procedures.
- Extending the contract up to permitted financial maximum expenditure
- Sharing resource between public authorities while still applying the value-for-money test in the circumstances

PPN2/20 – payment to supplier to ensure service continuity

If you are a contractor, or a subcontractor, mid-job, push up the line to make sure that payment is being processed. All contracting authorities should:

- Inform suppliers that they will be paid as normal, even with service interruptions, up to the end of June.
- Temporarily adjust payment mechanisms to use shorter interim payment periods, forward ordering, pre-payment and payment on order not delivery.
- KPIs should be judged against three months or more
- Interim invoices are paid and balanced later providing the contractor agrees to work on an open book basis.

Although these PPNS are guidance, they do indicate recommended best practice which allows the payer more flexibility and will allow the payee to exert some pressure. Please contact our Construction team for more details on payment in construction contracts.

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Coronavirus: protecting your business reputation

Whilst most businesses are understandably husbanding every penny and looking to cut costs to survive the coronavirus crisis, you must be strategic about your survival tactics. If not, you may find that your actions mean that you have no business left after the crisis has abated.

While it is to be hoped that most businesses will heed advice to seek emergency funding offered by the Government, there are those whose actions are in danger of damaging their reputation among their employees and their customers to the extent that, even if they do survive, people will not readily wish to do business with them.

Britannia behaving badly

Many people will remember the fuel crisis under Tony Blair's Government. The garages that sought to profit from the situation quickly found out that, once the fuel suppliers returned to normal, no one would entertain buying from them ever again.

Unfortunately, there are businesses falling into the same trap. Circulating initially on social media and then on conventional media, was a shocking letter from Britannia Hotels. Although the hotel chain was understandably under pressure, it had not only written an insensitive letter to its Aviemore employees dismissing them from their jobs with immediate effect; but also ordered them out of their accommodation immediately. For a business that relies upon reputation and goodwill, it was an extraordinary act of callousness to fire and evict all its staff onto the street on the same day with no notice.

Their error was further compounded by a statement blaming that old chestnut, the traditional 'administrative error'. Regardless of the truth of the matter, that sort of passive response will always fail to undo damage caused.

Don't take advantage of the situation

Before the advent of social media, and a greater willingness on the part of consumers to call out bad behaviour by businesses, companies might have been able to get away with actions and / or explanations like that proffered by Britannia. These days, any business behaving badly is likely to face irreparable damage in the longer term, even if they survive the initial backlash.

Businesses that are currently thriving can also find themselves on the wrong side of public opinion if they are tempted to take advantage of the situation, as some petrol stations did in 2000. With photographs of packs of four toilet rolls being sold for £15 a time circulating on the internet, businesses need to recognise that "market forces" have their limit – consumers are not fools. Their profiteering behaviour will be remembered and they will be punished for putting profits before people.

Don't be tempted to trade your reputation for short-term gain

Therefore, we would encourage all businesses to think about their reputation while weighing up what will be extraordinarily difficult financial decisions. Yes, you do need to ensure the survival

of your business beyond coronavirus but at what cost? Beware of trading your reputation for short-term gain.

Acting impulsively to deal with the coronavirus crisis can have unintended consequences: a knee-jerk reaction made by directors acting under immense pressure can lead to the business losing its reputation, carefully nurtured over years, in seconds. Along with all the other aspects of keeping your business afloat during this crisis is your business's reputation. You will need to rely on that heavily when you emerge on the other side.

Businesses that cherish their reputations during this critical period by acts of kindness and by having a considerate approach to their customers and employees alike, will have a much brighter future. Think carefully about how you manage your business through the next few months and take a measured, thoughtful approach towards the difficult decisions you are likely to face; by doing so, you will protect the business and its future.

For more advice please see our Reputation Management Guide and do not hesitate to call our team of reputation management experts for advice.

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Coronavirus: Preserving your business and protecting the nation

The food supply chain

Restaurants are closed for everything except take away services. Supermarkets are struggling to supply staples, but the nation still needs feeding. Most workers will be eating at home rather than in and around the workplace for some time to come. The recipe for feeding the nation has changed with immediate effect, by government order.

Whether you are a beneficiary of this change or a victim, there are opportunities to act for the good of your business and the people of this country.

You probably have contingency plans that you have put into effect. These plans will obviously differ depending on whether or not you are still permitted to open for business.

Open for business

If you are open for business, contingency plans will include:

- Ensuring the safety of your staff and any implications for your workforce, who will be key workers;
- Reducing the range of certain foods sold and focusing on the essential items;
- Sourcing fresh food from suppliers whose customers are no longer allowed to open;
- Increasing frequency of deliveries with existing suppliers and logistics companies;
- Seeking to use spare capacity from suppliers and hauliers no longer required for the restaurant trade;
- Seeking to use spare capacity from logistics companies and suppliers outside the food sector, in so far as their transport and other systems are suitable, or can be made suitable for use;
- Communicating to your suppliers and customers about the change in your policies; and
- Seeking legal advice in respect of any contracts which you may have to breach as a result of the Covid-19 pandemic.

Not open for business, at the present

If you are not open, they will include:

- Considering your staffing, making use of the Government's wage guarantee for staff who would otherwise be laid off and optimising your position for after the prohibition on opening is lifted;
- Considering rent, rates and other fixed overheads and how to minimise, defer or otherwise deal with these;
- Working with your customers or suppliers to mitigate the sudden stoppage of supply by identifying alternative purchasers for the foods;
- Communicating any change in your policies to your suppliers and customers; and
- Seeking legal advice in respect of any contracts which you may have to breach as a result of the Covid-19 pandemic.

Legal issues

As well as practical issues, there are related, legal considerations. Generally, you should look at:

- How much flexibility you have within each of your contracts with other parties;
- The requirement to mitigate any losses, by taking steps to avoid or minimise them;
- Your rights to cancel, terminate, suspend, vary, take control of subcontracts, break exclusivity provisions and demand information as required.

In addition to the above generic points, you may also want to examine the below in further detail.

Variation provisions

Changing obligations is an important consideration for the food chain. Many companies will respond to the Covid-19 pandemic differently, and hence it is impossible to truly predict the impact it will have on your contractual relationships. Whatever happens, flexibility and agility will be key.

Seeking advice in a timely manner will give you the time that you need to make proper action plans. It is important to make sure that you have evidence about agreements between the parties. The drafting of these pieces of communication should be undertaken with care: you need to avoid inadvertently waiving your rights or varying the contract.

Force majeure

Many contracts include a force majeure clause. This is often colloquially referred to as an "Act of God" clause. It is dubbed this because it caters for events such as:

- Natural disasters including hurricanes, earthquakes, tsunamis and volcano eruptions;
- Wars; and
- Industrial action.

These are just a few examples of events that could be included. In practice, the drafting of force majeure clauses may vary greatly. If it is engaged, a force majeure clause is hugely significant because it can release a party (or both parties) from their obligations under the relevant contract. The impact of this is that you may be able to get out of unhelpful contracts during this difficult time, but the same may also happen to you. However, each clause will need careful legal analysis to establish whether a pandemic would be covered by the wording. If it is not, and you attempt to terminate on that basis anyway, there may be severe legal consequences.

Frustration,

In contract law, there has long been a doctrine called "frustration". Frustration discharges parties from their obligations under the contract. It is worth noting that this can only be used in very specific circumstances. By way of example, the leading case in this area of law concerns a venue burning down. To come under this doctrine, the services or goods need to cease to exist. It is not

enough to say that you cannot supply goods because they are stuck at your warehouse and you are unable to engage a delivery firm. The legal hurdle is extremely challenging to meet.

Most contracts will include express termination provisions. If these are tackled in the wrong way, you may well face a dispute. Similarly, if you simply do not supply your goods or do not pay your suppliers, then you may be in wilful default.

Illegality

Contracts can also be declared void if they are illegal. This includes where, although there is no law prohibiting activities that have to be performed under the contract, the activities are against public policy. This is a complex area of law, and it is most likely that, if the contract was illegal, the force majeure clause will apply, if there is one, or the contract will have been frustrated.

Conclusions

Now is the time for cooperation, not confrontation. There are a range of legal options and practical issues to consider when addressing Covid-19 related supply chain issues. A thorough analysis of both can help to determine and implement the most appropriate solution.

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Coronavirus: the impact on recovering debts

As the negative impact on the global economy from the coronavirus pandemic is revealed as far more damaging than initially anticipated by commentators at the beginning of the outbreak in China, businesses face important questions about how they can recover debts in these exceptional times.

Debt recovery services remain in place

As a firm we continue to offer our debt recovery services to our clients in spite of the widespread disruption to workplaces nationwide. While we are witnessing an increased number of courts adopting telephone conferencing for hearings, at the time of writing, the court system (and, importantly, the courts' online claim issuing systems) is functioning. Although it is important to judge how you carry out your debt recovery activities (see below) it is also important that you bear in mind that, even during these challenging times, the court system remains open for you to issue proceedings to recover the money that your business is due. Of course, the coronavirus pandemic is a rapidly evolving situation and this may be subject to change but, as a firm, our priority is to stay abreast of developments and we will issue updates accordingly.

Should I be collecting my debts at the moment?

Clearly, many businesses across a number of sectors, particularly tourism and leisure, have seen their incomes fall dramatically within a matter of days. In response, the Government has sought to intervene in the economy at a level unprecedented in the UK's history in an attempt to limit the impact of the pandemic on businesses. Notwithstanding the Government's intervention, it is inevitable that a number of businesses may struggle to recover. Therefore, although many businesses may genuinely struggle to repay debts for the foreseeable future, it is important that your business takes the necessary steps to protect its interests now, rather than later.

Your business may have been seeking recovery of debts informally for some time before coronavirus intervened, and you may be aware that the company, or individual, owing you money has sufficient assets to satisfy your debt. Whilst caution has to be exercised when commencing legal proceedings, key stakeholders within businesses need to ensure they are in the best position possible to recover their money once the economy has stabilised and should not be deterred from acting now to ensure their business is protected. Recovering monies due now will give you the best possible chance to weather this storm.

Importantly, businesses should bear in mind that the legal process can provide them with the opportunity to obtain forms of security (such as charging orders) that can boost their chances of recovery if debtors are liquidated in the future. Equally, if your business considers that its debtors are genuinely unable to repay their debts at the moment and, for instance, cannot honour previously agreed repayment plans, it is vital that you have the appropriate legal documentation in place to ensure that any forbearance your business offers its debtors during this stage, or any other alternative arrangement, is supported. Getting this sort of thing right now while there is a lot of uncertainty will undoubtedly prevent expensive and time-consuming litigation in the future.

Your clients may be seeking to rely on a force majeure clause to evade contractually agreed payments. Please see our advice on the topic of force majeure on the section of our website dedicated to coronavirus-related issues. Whilst coronavirus undoubtedly presents businesses with a set of unique challenges, debtors are not able to rely on a force majeure clause as a matter of right, and it is important that you seek legal advice when confronted with this challenge to your debt recovery efforts.

How we can help

Our debt recovery team will be fully operational during this difficult period and on standby to help our clients. Please contact either Phil Wilding, Gemma Baker or Kalpesh Patel to discuss any specific concerns or questions you have regarding our debt recovery processes.

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Coronavirus: commercial tenants protected from eviction

The Government has announced extra protection for businesses by placing a temporary restriction on landlords' ability to enforce re-entry or forfeiture for non-payment for at least three months so that those who cannot pay their rent because of cashflow difficulties related to the coronavirus will be protected from eviction.

The measures contained within Section 82 of the Coronavirus Act 2020 (the Act) (passed on 25 March 2020) will mean no business will be forced out of their premises if they miss a payment in the next three months. The key points are:

Protection from eviction

Following the Government's recent announcement, landlords will not be able to forfeit a commercial tenant's lease for non-payment of rent for the next three months. In most standard leases the right to forfeiture does not arise until a certain period of time has elapsed (lease dependent but usually between 7 and 21 days). Rent payable on 25 March, which remains unpaid after the relevant period under the lease, a landlord will not be able to forfeit. This also appears to extend to any other rent payment pattern such that any rent if unpaid, whenever it fell due, will be caught.

Who will be protected and how long will the moratorium last?

The measures apply to all business tenancies in England, Wales and Northern Ireland and will last until 30 June 2020 (Section 82(12)(b) of the Act), with an option for the Government to extend if needed. It should be noted that the measures only suspend a landlord's right to forfeit for the period of three months (ending 30 June 2020); it does not extinguish a tenant's liability to pay rent under the lease. Unless the current deadline of 30 June 2020 is extended, a landlord's right to forfeit will again arise on 1 July 2020.

Which payments are caught by the moratorium?

The measures apply to any sums a tenant is liable to pay under the lease (Section 82(12) of the Act). Depending on the terms of the lease, this could include service charges, insurance rents, landlord's costs and interest in addition to the basic or principal annual rent.

Are landlords' other rights and remedies affected?

Other rights and remedies available to landlords do not appear to be affected by the moratorium, enabling landlords to pursue other options for non-payment of rent or other breaches of tenant covenants: exercising CRAR (Commercial Rent Arrears Recovery), suing for rent arrears, insolvency proceedings, including forfeiture for other tenant breaches but in these circumstances, service of a Section 146 notice pursuant to the Law of Property Act 1925 would be required.

Waiver by landlords

Pursuant to section 82(2) of the Act, no conduct by or on behalf of the landlord during the three months moratorium will be regarded as waiving the right to forfeit for non-payment of rent, other than giving an express waiver in writing.

Court proceedings

The Act also makes provision in relation to ongoing court proceedings, ensuring that the courts do not grant orders for possession prior to expiry of the moratorium period.

Opposition by landlord to application for new business tenancy

One of the grounds on which a landlord can oppose the grant of a new tenancy is based on '*persistent delay in paying rent which has become due*' (Section 30(1)(b) of the Landlord and Tenant Act 1954). Section 82(11) of the Act provides that any failure to pay rent during the period of the moratorium (whether rent due before or in that period) is to be disregarded for the purposes of determining whether the ground is established.

These measures will provide welcome reassurance to businesses struggling with cashflow and ensure no commercial tenant is evicted for non-payment of rent over the next three months. This will inevitably have significant ramifications for landlords and therefore it is imperative that parties maintain an open line of dialogue and support ongoing conversations about voluntary arrangements where possible, a stance supported by the Government, which will continue to monitor the impact on commercial landlords.

Please do not hesitate to contact any member of our property litigation team for help.

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Coronavirus: the impact on commercial rents

Advice for landlords

Unsurprisingly we are hearing from landlords, following the March quarter date, of requests from tenants for rental holidays in the light of a reduction in business caused by the coronavirus pandemic. UK shopping centre owner, Intu, which owns centres nationwide including Birmingham's Merry Hill, The Mall in Bristol and Newcastle's Eldon Square, has said it had only received 29% of the rents it was due in the second quarter - down from 77% last year.

Forfeiture moratorium

The Government has now announced extra protection for business tenants by placing a temporary restriction on commercial landlords' ability to enforce re-entry or forfeiture for non-payment for at least three months, so that those who cannot pay their rent because of cashflow difficulties related to coronavirus will be protected from eviction. These measures are contained within Section 82 of the Coronavirus Act 2020 ("the Act") (passed on 25 March 2020) and will mean no business tenant will be forced out of its premises if it misses a rent or other lease payment in the next three months.

In any event most landlords, in the current, uncertain market, would not wish to bring their tenants' leases to an end by re-entry or forfeiture, regardless of the Act.

Pursuant to Section 82(2) of the Act, no conduct by or on behalf of the landlord during the three-month moratorium will be regarded as waiving the right to forfeit for non-payment of rent, other than an express waiver in writing. The landlord's actions will therefore not prejudice it from exercising a right to forfeit in the future, when the moratorium is over.

Other rights and remedies available to landlords do not appear to be affected by the moratorium, enabling landlords to pursue other options for non-payment of rent or other breaches of tenant covenants. The moratorium does not extinguish a tenant's rental or other liabilities under the lease for the three-month period. It is open to landlords, then, to agree a temporary payment holiday for the current quarter with the tenant, safe in the knowledge that the missed payments will remain due.

What other rights and remedies are available?

Debt recovery proceedings

The landlord can issue court proceedings for non-payment of rent as a simple breach of contract claim. If the claim is for less than £10,000 then the landlord will only be entitled to reclaim a fixed amount of legal costs and interest but, above £10,000, the landlord will be entitled to reclaim reasonable legal costs and interest.

Rent deposit

A landlord may be able to draw down on a rent deposit if one was entered into when the lease was granted. The ability to draw down will depend on the terms of the deed, which may impose certain limitations, but the landlord is likely to be in a position to withdraw funds in the event of tenant default
(i.e. non-payment of rent) and require the tenant to top up the deposit following withdrawal.

Commercial Arrears Rent Recovery (CRAR)

CRAR may only be used in respect of principal rent, so cannot be used to recover other sums due under the lease such as service charges and insurance rent. CRAR permits the landlord to instruct an enforcement agent to take control of a tenant's goods and sell them to cover the debt. The process is quite complex and necessitates the landlord serving notices on the tenant.

Insolvency

A more drastic approach by the landlord might be to serve a statutory demand for non-payment of rent after which, if it remains unpaid for a period of 21 days, the landlord can issue winding up proceedings. The tenant can apply for an injunction to restrain the presentation of a winding-up petition. Due to the urgent nature of such application this can be an extremely expensive application to make. The landlord also has the option of bypassing service of the statutory demand and proceeding straight to winding-up proceedings.

Side letter as a "lever"

If a tenant has personal concessions in a side letter, it is possible – if the side letter is worded accordingly - that these may be capable of being withdrawn if the tenant is in breach of the lease, such as if it is in rent arrears.

Social distancing will be likely to prejudice the efficacy of the above remedies, apart from the rent deposit and side letter lever.

Practical options

The coronavirus outbreak, inevitably, has significant ramifications for landlords and their income streams. Landlords' rights and remedies in respect of unpaid rent – apart from the forfeiture moratorium – are preserved and we would therefore encourage, where possible, an open line of dialogue with tenants in difficulty - to preserve commercial relationships and reputations.

For further advice, please read our guide 'The effect of coronavirus on UK landlords' or contact any member of our property litigation team for help.

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Coronavirus: business interruption insurance update

If you purchased business interruption cover (BI), you might have insurance to pay losses while you cannot trade. You will need to have one or two of the most common BI extension clauses and cover will depend very much on the wording of that clause. Insurers will not be expecting to cover losses due to a pandemic but, if the wording is not drafted carefully enough, they may find they are liable to indemnify. There are also questions being asked by government which might encourage insurers in a certain direction. We explain below.

BI cover

Standard BI covers a business for loss of income during periods when they cannot carry out business as usual due to physical damage: typically damage to the premises caused by a storm, fire or flooding. The insurance might compensate the business for any increased running costs and/or shortfall in profits for a set period and financial limit.

Some policies have extensions that might apply to Coronavirus losses, for which additional premium will have been paid. There are two main clauses likely to respond.

BI as a result of specific illnesses

Most extensions cover specific diseases, listed in the cover. These are diseases that are well known and understood. Covid-19 will not be named though and this is likely to lead insurers to deny claims. Insureds will feel aggrieved by that when they specifically bought cover for this type of circumstance. The argument will be that the clause was intended to cover disease closure and the clause could not have named a disease that did not exist.

Some disease extensions are more general and do not specify certain diseases. In these cases, business interruption cover for Covid-19 is more likely to apply. Usually Covid-19 must have been present at the premises or within a short radius. This is because business interruption is supposed to cover the short period while premises are shut down for a deep clean. Insurers will not have been expecting to pay for a long term shut down due to a global pandemic, but each clause is different and you should check your wording.

Given the limitations on these clauses, due to Covid-19 being new and the need for illness on the premises, the government is asking questions of insurers (see below).

BI for non-damage denial of access

Another relevant extension is cover for losses as a result of people not being able to access the business due to a specific circumstance such as the police cordoning off an area because of terrorism, fire, or the risk of a collapsing building. The clause might cover inability to trade due to a government restriction – this is exactly what has happened now with schools, bars, restaurants and similar venues being directed by the government to close. These clauses might cover loss, again depending on the wording.

Unoccupied premises; do you need to notify your insurer?

Another issue arising out of businesses being temporarily closed is the need to let your insurer know if the insured premises are unoccupied.

There may be a clause in your property insurance that requires the premises to be occupied. The Association of British Insurers (ABI) has suggested that insurers will be more flexible over the requirements around these types of clause under current circumstances, but you should consult your broker/insurer if you are in any doubt. The premises will still need to be insured against risks such as fire, theft and vandalism and all sensible risk management precautions need to be taken and policy conditions complied with.

The FCA's view

The FCA has reacted to Coronavirus by focusing on the operational resilience of financial services providers, making sure they continue to function, service customers and treat them fairly.

They have also provided some guidance to insurance companies on policies but as yet nothing specific has been said regarding BI. They have warned of the particular need to treat customers fairly when renewing and making mid-term adjustments, notably to exclude Covid-19 from travel policies or medical insurance. One area that they will need to monitor is the solvency of insurance companies amid some concern that travel claims and cancellation losses could test even the largest insurers at a time when their invested assets have fallen in value so sharply.

Government response on BI

The government has asked the insurance industry certain questions. Mel Stride, the Chair of the Treasury Select Committee, wrote to the ABI on 25 March asking for data and information on the industry's response to Coronavirus.

Alongside requests relating to cancellations and amendments to insurance coverage, and of particular interest to BI cover, he asked:

- Can you provide an estimate of the amount of money, in aggregate, your firms expect to pay out for business disruption in the face of the coronavirus?
- Can you provide details of the approach that your members are taking regarding the provision of cover for the costs to business relating to Covid-19 and where there may be some flexibility shown in respect of this element of potential cover?

The answers to these questions will be of very great interest to businesses. If a business has cover for BI but the list of illnesses does not include Covid-19, will the government (via the FCA) try to enforce a policy interpretation rule that even if Covid-19 was not listed, it was implied?

Where are we?

For some businesses, the BI extension might be worded to enable recovery of losses due to Coronavirus closure. For others, particularly where Covid-19 is not included in a specific list, cover may well be denied.

Insurers will say they do not cover pandemics and do not charge premiums commensurate with that exposure. They might also say that it is for government to bail out businesses, for example, by the furlough scheme because this pandemic is so widespread and unexpected that it falls outside what private insurance ought, as a matter of policy, to cover.
Insureds will say that they were paying extra premium to extend cover to deal with precisely this sort of risk. Just because the disease was not known, that should not exclude them from cover. Equally the government may want to try and claw back some of the employee costs it is otherwise covering via the insurance industry.

We are monitoring developments with interest.

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