Coronavirus
A guide for your business

Osborne Clarke

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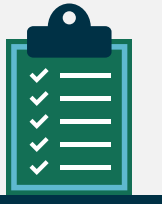

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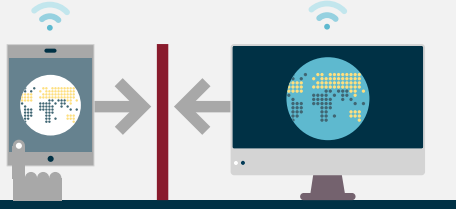

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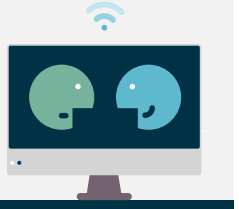

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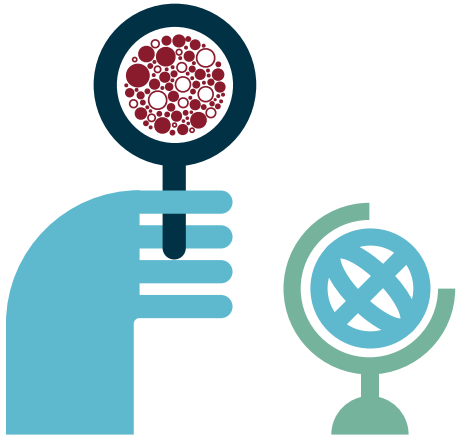

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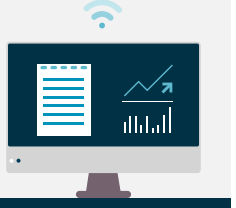

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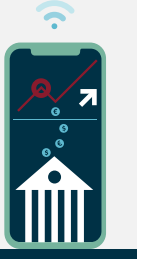

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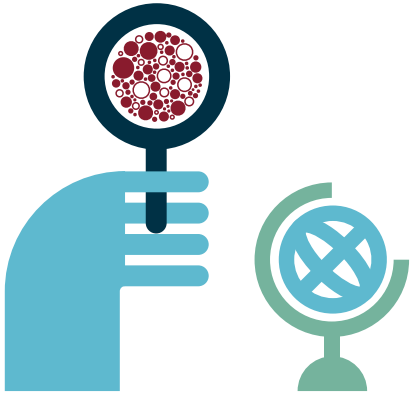
Introduction

COVID-19 – and the measures governments have implemented to slow the spread of the virus – represent an unprecedented challenge for business globally. Disruption to trading, workforces, and supply chains present a range of legal challenges for businesses, while governments are looking to support businesses through packages of financial stimuli, tax breaks and regulatory reforms.

This guide draws on a range of insights that have been published by Osborne Clarke's specialist teams across the jurisdictions in which we operate.



Workforces and workplaces

You may well be reading this while working from home. Workers in many countries have been either required or encouraged to work from home. Having the right technologies is critical to supporting the workforce working remotely function efficiently and securely.

Where workers are continuing to come into work, employers will need to consider workplace health and safety issues, including reporting obligations to authorities and relevant third parties (remaining compliant with data protection regulation).

It will be important to ensure that you have clear policies and lines of communication, which are flexible enough to adapt to rapidly changing circumstances. And if business needs require changes in conditions, hiring of temporary staff or reducing staffing levels, care must be taken given the variations between jurisdictions depending on local employment laws, the existence of any Works Council or other collective forum or agreement governing employment terms, as well as employees' individual terms and conditions of employment.

Supply chains and contractual performance

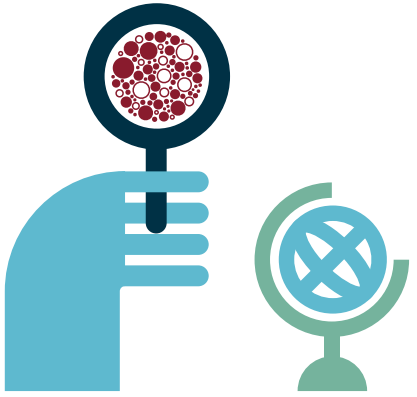
COVID-19 is preventing businesses from fulfilling commercial activities either as a direct effect of government-ordered lock-downs; as a result of disruption in the workforce or supply chain; or because the contract has become uneconomic to perform.

A common question is whether this will be provided for as a force majeure event. The answer to this, and the contractual effect if this is the case, will depend on the governing law of the contract and the wording of any contractual force majeure clause.

Protecting your position

In the face of adversity, many businesses are looking to cooperate and preserve relationships, before raising a dispute. But where the stake are high, disputes will inevitably arise.

When it comes to both new and pre-existing disputes, businesses need to mindful of potential pitfalls relating to limitation periods and formalities for serving notices and legal proceedings. Court closures will also impact on upcoming hearings and court filings.



Deal activity

While the immediate focus for many is the effect on operational activities, businesses involved in or considering corporate activity are having to consider what this means for them.

For those in the early stages of a deal, there is evidence that marketing is being put on hold until buyer appetite returns to more usual level, not least given restrictions on the ability to meet face-to-face. For transactions that are currently being negotiated, we are seeing discussions around risk allocation. These include the drafting of coronavirus specific indemnities, representations and warranties or price adjustment mechanisms such as earn outs.

State aid

From the UK government's announcement of a £330 billion loan package to Emmanuel Macron's insistence that "no business, whatever its size, will face the risk of bankruptcy", states are making interventions unprecedented in peace time.

In the EU and the UK, this means navigating the EU state aid regime, which is intended to prohibit any advantage granted selectively to certain undertakings by the state or through state resources. To ensure they can take full advantage of the support being offered, businesses need to be able to navigate the national measures and how they interact with the state aid regime.

Helping you weather the storm

Please contact one of our experts in your local jurisdiction to discuss how we can help your business to navigate the unique challenges that COVID-19 presents.

International employers: five considerations amid the Covid-19 emergency

Employers faced with coping with the coronavirus (Covid 19) outbreak need to put in place measures to protect, as far as possible, workers, customers and suppliers visiting premises and to try to maintain business continuity.

The situation is more complex for employers operating across jurisdictions with the need to understand and comply with local government guidance and a number of domestic laws.

Amid the rapid spread of Covid 19 across Europe and Italy in lock-down, it is imperative that employers keep up to speed and take legal advice at the relevant time. Some jurisdictions are implementing emergency legislation to address specific issues raised by the Covid 19 outbreak. As the social and economic impact of the public health emergency deepens, we offer five important considerations for businesses.

1. Put together a designated team operating on a domestic level but with an international overview

A designated team in the business, focusing on coronavirus planning that is accountable for actions, will help employers stay on track in a fast-developing situation. If you have expertise in the business on health and safety and business continuity, a representative from each in the group will be very useful. Input from HR, IT and Facilities Management teams will be needed as a minimum. Depending on your industry, other specialists may also be required. While focus will inevitably be driven by the needs in a particular location, it will be important that the team has an international watch. There should be an understand of why different approaches in different jurisdictions are needed, while looking for consistencies where possible.

Directors or other individuals holding statutory or regulatory responsibilities will also need to be alert to their specific duties and obligations to the business in dealing with the issues arising from Covid 19 and carefully document the decisions made.

2. Keep on top of the latest guidance relevant for each jurisdiction as the situation rapidly evolves

There is a wealth of guidance available from the World Health Organisation (WHO), local governments and other domestic organisations of which you will need to remain on top. This guidance should be reflected in the relevant workplace policies and procedures and an effective communication strategy across the domestic and international workforce implemented. Differing government guidance on travel and requirements to self-isolate is an area where particular thought will need to be given to how that translates across a global workforce. Our local experts will be able to point you to the resources in your jurisdiction to keep you up to date.

3. Put in place good practice steps in each physical work location to reduce the risk of exposure.

Coronavirus as an illness that could make employees – or others with whom the business interacts – sick – is likely to be a material risk for many employers and requires consideration. This will be in terms of how it can be eliminated or controlled in the workplace under relevant domestic health and safety laws. HO and local government guidance that affects employers in general, as well as those in specific sectors, should be followed as a minimum.

Generally, there are a number of good practice and now well-publicised steps that all employers should take, regardless of location. Employers should:

- carry out a risk assessment of the impact of coronavirus in each workplace;
- ensure high levels of hygiene. Encourage staff to wash hands with hot water and soap and provide hand sanitisers and tissues. Consider whether protective face masks would assist those working in vulnerable situations;
- have readily available best practice steps for where an individual becomes unwell in the workplace;
- ensure contact numbers and emergency contact details are up to date; and
- be alert to any vulnerable workers, for example, pregnant employees or those with underlying health conditions which make them more vulnerable to the virus. Are there any adjustments needed or changes that should be made to their working practices?

Consider the differing roles of those carrying out duties in your workplace. Cleaners and other contractors will have a key role to play. Speak to them about not only advance provision but also the day-to-day need (and keeping them safe). If you have caterers or those working with food, they will need enhanced procedures to deal with any sign of sickness. Reception staff will also be more vulnerable because of contact with people. All these services also play a key role in reinforcing corporate messages to the workforce and helping you keep things running smoothly.

4. Introduce clear and transparent policies to ensure consistency in managing certain scenarios; build in sufficient flexibility to reflect the real time circumstances

Clear and transparent policies on how different scenarios in each location will be managed should be put in place. Again, care must be taken given the variations between jurisdictions depending on local employment laws, the existence of any Works Council or other collective forum or agreement governing employment terms; together with the actual duties an employee is undertaking and their own individual rights under their terms and conditions of employment.

For employers, key questions to tackle include:

Travel: What guidelines should be put in place on business and personal travel?

Health checks: Is it permissible to undertake at work health checks or require employees to undertake medical examinations on request? Can employees be required to confirm if they are “at risk”?

Pay: What must an employee who is required to self-isolate following local government advice be paid?

Homeworking: What rights do you have to require home-working? If an employee cannot home-work what is their position if they are unable to come into work? Stress test your IT systems.

Caring for others: What rights does an individual have to take leave to care for a dependant?

Policies: How are managers kept updated on the current situation and the relevant employer guidelines and policies? Do they understand them and know who to ask assistance from?

Refusal to comply: Can an employee refuse to attend work or undertake any business travel?

Reporting obligations: Are there any reporting obligations to government or other local bodies? Will there be a requirement to close premises for health and safety reasons? What is the position in respect of employees when this occurs?

Reducing financial loss: What steps are available to you to mitigate financial loss? What is the legal position in relation to any contracts? Are any losses covered by insurance?

Closure of the workplace: What is the legal and procedural position in respect of your employees on a temporary or permanent closure of the workplace?

Any policies introduced must be applied consistently and fairly. Particular care must be taken to ensure that any policies or procedures introduced do not inadvertently discriminate against any individuals. Likewise, steps should also be taken to ensure that no member of staff or any customers or suppliers are treated differently because of their nationality, race or ethnicity. Staff should be reminded that jokes and banter could be unlawful harassment.

It will be important to also consider any specific individual circumstances. Is an employee working any certain immigration requirements? Does the employee have an underlying health condition making them particularly vulnerable if they are exposed to the virus? We will be happy to advise further on these issues.

5. Have a strategy for the potential impact of coronavirus on your ability to meet client demands.

With the coronavirus taking hold, employers must consider how they will deal with any longer term impact on their business:

- What is the impact on any commercial contracts? Is there any insurance coverage for some of the losses that may arise from Covid 19, including employment losses.
- Will they need to meet business demands with reduced staff; if so, will individual employment contracts or commercial contracts with clients need to be mutually changed? Can temporary staff be brought in?
- Will an employer find itself in a position where reduced business demands or withdrawal of contracts with suppliers etc. require a reduction in employees, temporarily or permanently.

While it is hoped that these scenarios do not arise, it is important that you have a handle now on the options available, any specific procedural requirements and the time-frames involved, as well as the potential financial repercussions. Indeed, there are a number of options to consider in reducing costs before make any more permanent decisions are made. Any proposals to make redundancies in the wake of coronavirus will require consideration to be taken of the specific legal obligations associated with this in the relevant jurisdiction, including any collective consultation obligations which may be triggered and individual employment rights. You will also need to factor in employee relations and reputational issues, particularly at a time when many individuals will be feeling particularly vulnerable.

Our lawyers across our jurisdictions are keeping up to date on the latest guidance and advice on Covid 19 issues and the impact this has on the workplace. Please contact your usual Osborne Clarke contact for further advice on managing the impact of coronavirus on a global basis or one of our **specialist lawyers**.

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Will coronavirus be a *force majeure* event? It depends on your governing law

Where coronavirus causes business disruption, from fulfilment of deliveries to cancellation of events, a common question is whether commercial parties can rely on *force majeure* clauses in their contracts.

The position will depend in part on the governing law of the contract, as the concept and effect of *force majeure* varies significantly even across European jurisdictions.

What triggers a *force majeure* clause?

Many legal systems have specific legislative definitions of *force majeure*, which apply whether or not the contract contains a *force majeure* clause. In the Netherlands, for example the concept is set out in the Dutch Civil Code, which provides that the party relying on *force majeure* must show that its failure to perform cannot be attributed to it, by showing that the failure is neither its fault nor for its account pursuant to the law, a legal act or the relevant standards.

In Germany, the term is codified, but not in one particular section of the civil code, as it is in the Netherlands (and France, amongst other places). Instead, as Felix Hilgert explains, *force majeure* appears in a number of different pieces of legislation, and its precise meaning depends on the legislative context.

A consequence of having *force majeure* codified in a civil code is that the relevant government can, through legislation, deem an event to constitute *force majeure*, as the Chinese government has done in response to COVID-19 – issuing *force majeure* certificates.

English law differs from these civil law jurisdictions. In English law, *force majeure* is not defined, either in statute or under case law. And the concept of *force majeure* will not be implied into a contract, meaning that the parties can only rely on this concept if it is expressly covered in the contract. Whether a particular clause is triggered will depend entirely on the words that the parties have used – particularly the non-exhaustive list of events that are often included in a *force majeure* clause.

And even in jurisdictions that do have a statutory definition, the contractual wording may still be important. As Sophie den Held explains, *"In the Netherlands, parties to an agreement may contractually limit or extend the circumstances giving rise to force majeure and, therefore, parties often include a force majeure clause specifying events that will constitute force majeure. In general, the interpretation of such a contractual term depends on the wording of the contract as a whole and the meaning the parties could reasonably attribute to its terms."*

What's the effect of triggering *force majeure*?

The same *force majeure* event, under the same law, could give rise to quite different effects in different contracts. In France, for example, the courts will look at the purpose of the contract and the practical effect of the event:

- If it is temporarily impossible to perform, performance may be suspended for the duration of the *force majeure* event.
- If there is a permanent impossibility to perform, the agreement may be retroactively cancelled, meaning that the parties are put back into the position they were in before signature (including refunds of sums paid in consideration of services that were not performed or products that were not delivered).
- If it is impossible to perform in the future, the agreement may be terminated without giving rise to liability for any of the parties.
- If there is a partial impossibility to perform, the scope of the agreement may be reduced accordingly.

In Germany, if it becomes objectively impossible to perform an agreement, the party owing performance is excused, but as a consequence cannot claim counter-performance from the other party. But the excused party may be liable for damages if it is responsible for the event that rendered the performance impossible or commercially unfeasible.

If your contract is subject to English law, then it's up to you to specify the contractual effects. Common consequences of a *force majeure* event include:

- suspension of contractual obligations;
- non-liability;
- extensions of time to fulfil obligations;
- renegotiation of terms;
- obligation to mitigate losses; and
- the right to terminate the contract.

But to benefit from those effects, recent case law suggests that the party looking to be excused must have been ready and willing to perform the contract, if it had not been for the *force majeure* event.

What if you can foresee the event?

It is difficult to predict the scale, length and effect of the COVID-19 pandemic in any given country or sector; but the fact of an outbreak could hardly be said to be unforeseen. So is disruption resulting from coronavirus capable of triggering a *force majeure* clause in a contract that is yet to be entered into?

The concept of foreseeability is a fundamental part of the definition of *force majeure* under French law. An event will not be considered *force majeure* if it could reasonably be foreseen when the contract was entered into (nor if it could have been avoided by appropriate measures).

English courts have not taken the same approach, and if the contract is silent on whether the event needs to be unforeseen, a court will be reluctant to impose that qualification.

Nevertheless, with coronavirus at the centre of the world's attention, if there is a real risk that a contract might not be capable of being performed as a result of the virus, the most straightforward option would be to expressly name it in the *force majeure* clause. Express wording to this effect may override the general position in jurisdictions that have a civil code (as in France), and also forces the parties to think about what the remedy should be if the clause is triggered. Would the party unable to perform want the contract only to be suspended, or would both sides prefer to be able to walk away and consider alternative options?

And what if the contract is not rendered impossible to perform, but merely uneconomic or different in scope? The German Civil Code envisages such a scenario, and allows either party to seek reasonable adjustments or, if those adjustments are not possible, to terminate or rescind the agreement. French law carries a similar right to renegotiate in these circumstances, although parties are able to waive that right when entering into the contract.

There is no such implied right under an English contract. A right to renegotiate would need to be specifically drafted in the contract, and even then, the English courts are reluctant to hold parties to an "agreement to agree" dependent on a future event. The commercial realities may allow scope to re-negotiate aspects of a contract if the situation changes, but the recommended course is to build in triggers that would allow you to suspend or terminate the contract.

Practical tips

- Review the wording of *force majeure* clauses, paying particular attention to the list of non-exhaustive events which is often included, and the consequences of triggering a *force majeure*.
- If a long list of *force majeure* events is included, it is likely to be helpful (where you are seeking to rely on the clause) if pertinent wording is included such as "pandemic", "epidemic", "outbreak", "crisis" or "governmental action".
- Watch out for wording in new contracts that requires that the event of *force majeure* is "unforeseeable".
- Contact counterparties of contracts which may be affected and discuss a possible renegotiation, or postponement of obligations, as appropriate.

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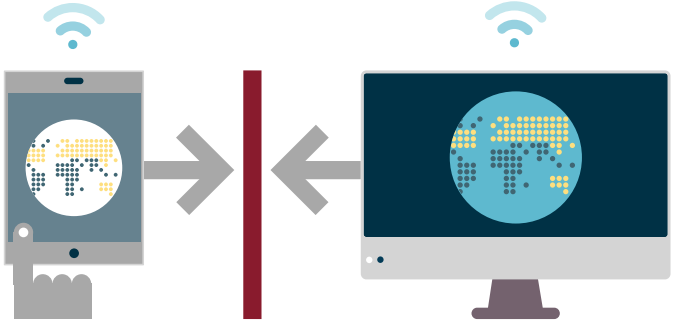

Coronavirus – Preserving your legal position in adversity

As businesses across Europe adapt to the major disruption to their commercial activities resulting from the global pandemic, attention will inevitably turn to their commercial arrangements. This process will likely give rise to new disputes as well as affecting on-going disputes.

Not the bargain the parties entered into

Over the coming weeks and months, contractual obligations will fail to be performed for a number of different reasons. The legal effects will differ depending on the reason, whether or not the parties have explicitly foreseen and allocated that type of risk in their contract and what national law is applicable to their contract.

Force majeure provisions are common in contracts today in both common and civil law jurisdictions. Even in their absence, some civil law jurisdictions give the parties some ability to suspend, terminate or renegotiate agreements in circumstances that might apply in the current pandemic. For example, **Federico Banti** explains that in Italy:

– A party that is impeded or unable to perform its contractual duties – for instance, due to restrictions imposed by the government – may be completely excused and the parties discharged from future performance of the contract, with either party able to terminate the contract.

– If it has become only partially or temporarily impossible for one party to perform their obligations, that party is able to adjust its obligation or request termination.

– If the change of circumstances renders the continued performance of the contract unfair, or its obligations excessively onerous, the party can terminate the contract early, or the other party may offer to renegotiate in order to preserve the contract.

– If a party breaks off negotiations in bad faith following a change in circumstances, they may be found liable for the future losses of the other party.

Similar principles apply in Spain, notes **Rafael Montejo**, where the courts have in previous situations accepted a reduction of the price or similar measures when the situation had become unbalanced to one of the contracting parties. However, wrongful termination of a contract can result in an order to perform or to pay compensation for damages and loss of profit.

Under German law, too, performance may be excused if it has become impossible, but this can be difficult to demonstrate. As **Alexander Kirschstein** highlights, a party may also request adaption of a contract provided it can show that there has been a material unforeseen event and that the risk has been neither explicitly nor impliedly allocated, but this too is a high burden. It is likely that much will turn on whether the cause of the "impossibility" in any particular situation is the pandemic itself or a specific governmental measure and. In the latter case, it will also depend on the precise manner in which the measure has been implemented and perhaps also whether there is any policy or jurisprudence on how the burden of that decision should be borne.

In the UK, by contrast, the courts will not imply into a contract any such rights to renegotiate or terminate due to a contract becoming uneconomic or difficult to perform. Parties may look to common law concepts of frustration, or even illegality if performance would be contrary to legally binding government restrictions. Otherwise, it would depend entirely on the terms of the contract, including a contractual *force majeure* (if there is one), change in law, or termination clause.

Common to all legal systems is the danger for a party that seeks to rely on a right to terminate a contract getting it wrong, as this could give the other party grounds for a claim for damages and loss of profit.

Starting a claim

Those who may wish to terminate a contract or bring a claim should ensure they observe legal and contractual limitation periods, notice requirements and formalities for filing or serving court documents.

Legal limitations tend to be measured in years (six years being the standard limitation period for contractual claims under English law), but this can be considerably shorter for certain types of claims. Claims for breach of EU procurement rules, for example, need to be brought within 30 days of having the requisite knowledge needed to bring a claim. There may also be contractual limitation periods, as is often the case for breach of warranty claims under corporate transaction agreements. And businesses should also be mindful of older claims that might be nearing the end of their limitation period, cautions **Greg Fullelove**. This may necessitate issuing a 'protective' claim to avoid losing the right to bring a claim altogether.

Where a claim needs to be brought, or documents served, governments are taking action to ensure that this is not impacted by disruption to courts. In England and Wales, claims can be filed and documents filed electronically in the Business and Property Courts, the deemed date of which does not depend on action being taken by court staff to accept that action. Germany, too, has quite recently introduced electronic filing. The current situation is likely to give much greater impetus to its adoption by the profession as a whole. If things were to deteriorate to the extent that court business ceases completely for an unforeseeable period of time, there is provision in the code of civil procedure that could arguably impact also on the question of time limits.

In Spain, the government through a Royal Decree dated 16 March 2020 initiated a full lockdown, which included a suspension of all legal proceedings for 15 days (subject to any extensions). During this time, it is not possible to initiate any new claims.

Italy has similarly imposed a temporary stay of proceedings, from 9 March to 15 April (again subject to certain exceptions). Interestingly though, there is no bar to issuing new claims in Italy.

Service

It is not just filing at court that may be disrupted. Documents may need to be served on other parties, by certain deadlines and possibly by prescribed means. This can be as much (or more) of an issue for those receiving documents than those serving them. If service is required to be effected by post, but offices are closed or the relevant people working from home, how will you ensure that you receive notice of the document in good time to meet any deadlines for response?

It may be possible to serve proceedings by email, with Italy and England Wales being two jurisdictions where this is possible, although in the latter case this requires parties to indicate that they are willing to accept service by email. **Adrian Lifely** explains that where at one time organisations may have been reluctant to accept service by email, considering physical delivery to be the "safer" option, with more people working from home, it may be sensible to make it clear that you accept service by email (and seek the same confirmation from opponents).

Arbitration institutions are reacting too, notes **Robert Hunter**. For instance, on 17 March the ICC, whose Rules formally require the initial Request for Arbitration to be submitted in paper form, announced that Requests – along with all other communications with the Secretariat – should be filed by email, and provided a dedicated email address for the filing of applications for emergency arbitrator proceedings. It also postponed or cancelled all hearings scheduled to take place at its Hearing Centre in Paris until 13 April.

Video hearings

The realities of complex, cross-border disputes are that it can be difficult to secure attendance at court hearings from individuals that may need to give evidence. Most jurisdictions allow witnesses to give evidence and be cross-examined via video.

Nevertheless, this remains very much the exception, rather than the norm, and the possibility of holding an entire heading remotely is a very different prospect. Aside from the desirability for advocates to address the court in person, ensuring that all parties are able to participate – in a way that enables proceedings to be controlled and conducted in the way that would happen physically – would present considerable technical challenges.

The UK government is set to publish an emergency bill soon, and ministers are proposing to allow some hearings in criminal courts, to take place remotely via telephone or video link. For civil cases, it is likely that hearings will be postponed, as is the case in Spain under the general stay of proceedings.

In Italy, although proceedings have been stayed, the courts have not been shut altogether, and the government has passed legislation enabling hearings to take place via videoconferencing. This is likely to be reserved for situations where urgent action is needed.

In Germany the supervision of the courts, public prosecutors' offices and other judicial institutions is the responsibility of each of the individual states ("Länder") and not of the Federal Ministry of Justice. It is therefore possible that the Länder will regulate specific measures differently although in recent days it is apparent that the states have been working together at the level of more general public health measures to establish common principles. The Federal Ministry of Justice has however announced that it is planning a new regulation extending the permissible length of interruptions in criminal proceedings where trials cannot be conducted due to infection control measures.

As an illustration on 17 March on estate (the Ministry of Justice in North Rhine-Westphalia) issued the following decree relating to court business until further notice:

– Hearings should only be held if it would be intolerable to postpone them: this is likely to be more relevant to criminal cases than to civil proceedings. The courts themselves will decide on this question as a judicial question on a case-by-case basis.

– The level of service in all courts and public prosecutors' offices is reduced to what is absolutely necessary.

– Public traffic in public buildings of the judiciary is to be reduced as far as possible and applications/requests are to be made in writing wherever possible.

– Access to court buildings for the purpose of attending public hearings remains permitted according to the principle of publicity. However, persons who show symptoms of corona disease or who have had personal contact with a corona infected person within the last 14 days or who have been in a corona risk area within the last 14 days are excluded.

The Higher Regional Court in Berlin, too, issued similar measures on 17 March, to apply from 18 March until 17 April, unless and until the case of a complete shutdown. It has confirmed that 2 of its 22 civil courts will remain in full service to secure urgent preliminary rulings such as preliminary injunctions.

Remain vigilant

At the moment, the emphasis will often, rightly, be on working proactively with commercial partners to be understanding and preserve relationships, but following some simple practical tips will help to ensure you preserve your legal position until the situation becomes clearer:

– If you are unable to perform contractual duties in light of the current situation, check your contract and local law to establish any rights to suspend, terminate or renegotiate terms.

– If you may need to bring a claim, check legal limitation periods and formalities for filing and serving documents.

– Don't forget contractual limitation periods (which may be significantly shorter than those under statute) and requirements for delivery of notices.

– Check whether it is possible and (if required) that the other party is willing to accept service by email; consider making it clear (including in footers to correspondence) that you are willing to accept service by email.

– Check with courts the impact on any upcoming hearings; there may be a knock-on effect to those even far in the future, which could have an effect on the litigation timetable leading up to trial.

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Corporate transactions: the impact of COVID-19 internationally

With coronavirus now officially categorised by the World Health Organization as a pandemic, businesses will be renewing their focus on the immediate and practical steps that they need to take at an operational level.

For those engaged in a corporate transaction – perhaps an acquisition, a disposal or an investment round – there will be particular considerations. These might include questions about the impact on the market or how parties to corporate transactions approach coronavirus risks.

For those in the early stages of a deal, there is evidence that marketing is being put on hold until buyer appetite returns to more usual levels. Travel restrictions have already had an impact on marketing. Sellers at the marketing phase of a transaction often value face-to-face meetings with potential buyers to enable them to clearly communicate investment opportunities and build relationships with potential counterparties. The recently announced US travel ban on foreign nationals who have been to any of the 26 European countries in the Schengen Area in the previous 14 days (which includes France, Germany, Spain and Italy, but excludes the UK and Ireland) will no doubt have a significant impact on US and European marketing.

For transactions that are currently being negotiated, we are seeing discussions around risk allocation. These include the drafting of coronavirus specific indemnities, representations and warranties or price adjustment mechanisms such as earn outs which mean that the price paid will be adjusted if the target's profits are affected post-completion. For businesses with particular exposure to coronavirus impacts – such as travel and leisure – we have seen buyers and sellers choose to delay or defer transactions, given the present uncertainty.

We are also seeing adjustments to deal terms to protect cash flow, such as part of the consideration moving to loan notes. Additional funds are also being put in by investors for working capital post-completion.

For transactions currently between exchange and completion, parties are scrutinising termination rights (including material adverse change (MAC) clauses) to see if they may be invoked. UK-style MAC clauses are likely to exclude the impact of macroeconomic events (such as coronavirus) which affect the market generally – and we have seen coronavirus specifically excluded as a MAC event to put the matter beyond doubt – but this is a live topic of conversation in other jurisdictions such as Italy which currently has greater restrictions in place.

Restrictions on travel have also had an impact on deal processes with more meetings by video-conference or telephone and delegation powers put in place to negotiate and close deals. This is most pronounced in Italy where travel is allowed for business reasons but strongly discouraged. Physical meetings need to be specifically authorised and carried out with precautions in place.

More broadly, general economic uncertainty tends to have a chilling effect on the market. We expect transaction volumes – at least in the short term – to reduce. Equally, the difficulties of marketing may affect the deal pipeline going forward.

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State aid – How can governments support businesses in the midst of the coronavirus crisis?

As the coronavirus causes significant economic losses for companies and for the citizens across the Union, affected businesses are asking whether the State aid rules allow EU Member States to provide support.

What is "State aid"?

The concept of State aid includes any advantage granted selectively to certain undertakings by the State or through State resources. This can include, for example: grants, subsidies, loans on favourable terms, State guarantee or tax benefits.

Although State aid is generally prohibited, there are a number of exceptions that allow governments to assist companies facing difficulties as a result of the coronavirus crisis. These rules also apply to the United Kingdom during the transition period for leaving the EU (currently scheduled to end on 31 December 2020).

What can governments do?

The main exceptions available to national governments to support businesses are as follows:

– Governments are able to implement **general measures** (for example tax reliefs) that apply equally and do not make any distinction between companies. Such measures are likely to fall outside the scope of State aid rules, because they do not selectively benefit certain groups of undertakings.

– Aid granted to undertakings that are not in financial difficulty may benefit from:

- the **General Block Exemption Regulation**, which permits aid associated with certain policy objectives, such as regional development and aid to support SMES, provided criteria are met; or

- the **'de minimis' Regulation**, which permits aid of up to €200,000 to a single undertaking in any 3-year rolling period.

– Member States can adopt aid measures to compensate the damage caused by **exceptional occurrences**. On 13 March, the European Commission **announced** that it considers that the emergency brought by the coronavirus, which is an extraordinary and unforeseeable event having an economic impact, qualifies as such an exceptional occurrence. As one of the first examples of this exception being used, the Commission approved, within 24 hours of receiving the notification by the Danish Government, an aid scheme for Denmark amounting to €12 million (DKK 91 million). The aim of this aid scheme is to compensate organisers for the damages suffered for cancellation of events as a result of the coronavirus. The Commission considered that this aid scheme will contribute to addressing the economic damage suffered and that it is proportionate to the results envisaged.

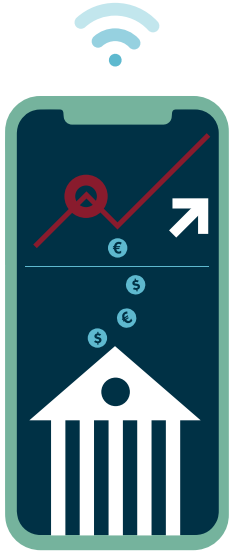
– The Commission has stated that Italy, as the Member State which has been thus far most affected by the corona crisis, can provide aid to remedy a **serious disturbance of its economy**. The Commission takes a restrictive interpretation of what can be considered a "serious disturbance in the economy", which underlines the seriousness of the emergency facing the country.

– Companies with liquidity shortage might qualify to receive **rescue and restructuring aid**. Industries such as aviation, tourism, hospitality or financial services may seek this type of support in the coming weeks. The Commission has already indicated it will be flexible in applying the 'one time last time principle' – which normally precludes companies from receiving rescue and restructuring aid more than once in ten years.

It is not the first time that the Commission has used these measures to safeguard the European economy. It took a similar approach during the 2008 financial crisis, issuing specific communications on the application of State aid rules to measures taken in relation to both the financial sector and the other parts of the economy.

The Commission is also preparing a legal framework based on the exception of aid to remedy a "serious disturbance in the economy".

Furthermore, the Commission has set up a specific coronavirus response team helping coordination between Member States and providing assistance. This team can be reached by telephone at: +32 2 296 52 00 and by e-mail at: **COMP-COVID@ec.europa.eu**.



What can companies do?

The EU State aid rules provide for various exceptions enabling national governments to support business affected by the coronavirus emergency. In order to make effective use of these exceptions, it is crucial for both governments and beneficiaries to take account of the parameters set by the State aid rules at an early stage of the process. Experience shows that aid can often be obtained with full legal certainty, if the measures are designed in the correct way and potential State aid issues are recognised and addressed quickly. It is therefore important to get State aid experts on board as soon as a request for aid is being considered.

Our lawyers across our jurisdictions are keeping up to date on the latest guidance and advice on coronavirus issues and the impact this has on the market. Please contact your usual Osborne Clarke contact for further advice on managing the impact of coronavirus on a global basis or one of our specialist lawyers listed below.

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