GIBSON DUNN

April 8, 2020

COVID-19 UK BULLETIN - APRIL 8, 2020

To Our Clients and Friends:

This bulletin provides a summary and compendium of English law legal developments during the current COVID-19 pandemic in the following key areas:

Links to various English law alerts prepared by Gibson Dunn during this period are also included in the relevant sections.

As always, for additional information, please feel free to contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's **Coronavirus (COVID-19) Response Team**, or the co-leads of the UK COVID-19 Taskforce:

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1. COMPETITION AND CONSUMERS

The European Commission (EC) and UK Competition and Markets Authority (CMA) are continuing to conduct their business, subject to practical adjustments to allow for social distancing (e.g. staff are

working from home; all meetings and hearings are being conducted via videoconference or telephone, etc.). However, the authorities are having to balance their limited resources with the need to address additional priorities, such as expedited reviews of state aid, competitor collaborations and coronavirus related overcharging and/or misleading claims practices. Specific guidance and carve-outs to address particular challenges raised by the crisis have also been issued. The key developments are mentioned below.

Merger control

Not quite business as usual:

- The European Commission has issued a statement "encouraging" companies to delay new merger notifications until further notice, where possible. It has indicated that there will be delays in the pre-notification process as it prioritizes transactions that have been formally filed. It has also reportedly stopped the clock in several Phase II cases.

- The CMA has stated that it will continue to monitor case timetables and that extensions will be made to statutory timetables, as permitted, where necessary. It is also, however, reallocating resources to help ensure that the "most urgent" and the "most critical" work can be done on time. Reportedly, some companies subject to anticipated (rather than already closed) mergers have been asked to hold off on formally filing notifications.

- Some other competition authorities are adopting more drastic approaches e.g. suspending applicable deadlines or operations.

What does this mean for deals? Clearance timetables will be less predictable than usual. Authorities will likely make use of powers to extend statutory timetables / "stop the clock" in active cases, where required. Parties may face challenges getting "on the clock" in cases not yet filed. Parties engaged in negotiating future deals must be mindful of the impact on the meeting of long stop dates. Parties who have already signed deals should revisit the likely meeting of any long stop dates with counsel. It will be important to monitor closely the differing approaches of authorities in jurisdictions relevant to any transaction.

Antitrust

- Guidance on competitor collaboration: subsequent to the Gibson Dunn client briefing on 24 March 2020, further guidance has been issued by the CMA which suggests that temporary, necessary competitor co-operation will be permitted in certain circumstances to address critical issues arising as a result of the COVID-19 crisis. This does not, however, fully relax the competition rules (even in relation to the distribution of essential scarce products and/or services

to consumers or key workers). Companies will need to tread carefully and should seek advice if they intend to engage in conduct that would normally risk breaching competition laws.

- Exploitative practices/collusion: Several competition authorities have voiced concern over excessive pricing practices (e.g. with respect to face masks and hand sanitising gel) and refusals to supply in the context of the crisis. Statements have been made that authorities will actively monitor market developments to detect companies taking advantage of the current situation to break competition rules. The CMA has established a COVID-19 Taskforce to "tackle negative impacts within its remit of the COVID-19 pandemic". The Taskforce will identify harmful sales and pricing practices as they emerge and take enforcement action as needed.**What does this mean for clients?** Companies will continue to be scrutinised for compliance with competition laws throughout the crisis. Companies facing issues with supply or distribution or considering co-operating with competitors should consult with counsel.

Consumer protection

- The CMA COVID-19 TaskForce's remit, established to tackle negative impacts of the COVID-19 pandemic, will extend to issues under consumer laws in addition to competition laws. The task force will also advise the Government on policy and legislative measures.

- In public statements on its COVID-19 response, the CMA has stated that it is monitoring reports of changes to sales and pricing practices.

- The CMA issued an open letter to drug-makers and food and drink companies warning them against capitalising on the crisis by charging unjustifiably high prices for essential goods or by making misleading claims about efficacy. It also encouraged engagement if wholesalers or suppliers significantly increase prices.

- The CMA has also launched an online service "Report a business behaving unfairly during the Coronavirus (COVID-19) outbreak" for the reporting of unfair prices (charged to businesses or consumers), businesses making misleading claims about products or services, problems with cancellation, refunds or exchange of products or other unfair behaviour.

- The CMA has not ruled out seeking emergency powers from the Government if it considers this necessary to address negative impacts on consumers (e.g. to directly regulate prices). It has been reported that legislation is being considered by the Government to tackle profiteering.

What does this mean for clients? Companies should be mindful of the need to continue to comply with competition and consumer laws e.g. avoiding misleading or false claims about the efficacy of protective equipment.

State aid

EU State aid rules apply in the UK during the Brexit transition period which expires on 31 December 2020. On 19 March 2020, the European Commission (Commission) adopted a Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak. Under the Temporary Framework, the Commission can authorise member states and the UK to adopt aid schemes in the form of tax advantages or direct grants, State guarantees or loans on an expedited basis (within 24-48 hours). On 25 March 2020, the Commission approved two UK aid schemes. The guarantees scheme covers 80% of loan facilities for SMEs with a turnover of up to £45 million to cover their working and investment capital needs and will be implemented through the British Business Bank. Under the direct grants scheme, SMEs are eligible for up to £734,000 support in the form of a direct grant. The schemes will be in place until 30 September 2020, and can be extended by the UK until 31 December 2020.

On 3 April 2020, the Commission extended the Temporary Framework to provide for an additional five types of aid measures, including support for coronavirus related research and development, for the construction and upscaling of testing facilities, and for the production of products relevant to tackle the coronavirus outbreak as well as tax payment and social security contribution deferrals and wage subsidies for companies in sectors and regions that have suffered most from the coronavirus outbreak.

In addition, the 3 April 2020 amendment to the Temporary Framework enables member states and the UK to provide €800,000 in the form of loan, loan guarantee or equity to companies in need. The €800,000 can be combined with the de-minimis aid of up to €200,000.

In addition to the Temporary Framework, which provides for the possibility of adopting aid schemes, the UK can grant State aid under the existing (non-COVID-19) State aid rules, which permit member states and the UK, under certain conditions, to: (i) provide rescue aid without first notifying the Commission; and (ii) provide State aid to make good the damage caused by natural disasters or exceptional occurrences. On 12 March 2020, the Commission declared that COVID-19 is an exceptional occurrence. Whether larger companies that cannot benefit from the COVID-19 aid schemes, both because of their size and their funding needs, can receive Government support will need to be assessed on a case-by-case basis.

For further details, see our recent briefing here.

2. CORPORATE GOVERNANCE (INCLUDING ACCOUNTS, DISCLOSURE AND REPORTING OBLIGATIONS)

Extension to file annual accounts at Companies House

UK companies are able to apply for a three-month extension to file their annual accounts at Companies House. Although an application is necessary, companies citing COVID-19 as an issue preventing them from filing on time will be automatically and immediately granted the extension. However, companies that have already extended their filing deadline, or shortened their accounting reference period, may not

be eligible. Over 10,000 businesses have already successfully applied for the extension. Guidance on how to apply is available here.

Company annual general meetings (AGMs)

Guidance on how to conduct AGMs of UK companies during the COVID-19 pandemic has been published by The Chartered Governance Institute (ICSA). It recommends that companies satisfy the quorum requirement (usually two shareholders) via designated director or employee shareholders and that any other shareholder seeking to attend the meeting in person be refused entry. Further information is available here.

In due course, companies may be allowed to postpone AGMs or hold them online. See Business Secretary Alok Sharma MP's announcement on 30 March 2020 for further information. Details as to how these proposals are to be implemented are still to emerge.

Data collected by ISS Corporate Solutions (ISS) shows major disruption to the timing and format of AGMs in a number of jurisdictions as the COVID-19 pandemic extends into the traditional AGM season for many markets in the northern hemisphere. As of 31 March 2020, approximately 557 meetings had been postponed or cancelled globally because of COVID-19, which is more than double the total number of meetings postponed or cancelled for the full 2019 calendar year (which stood at 286). In addition, an increasing number of meetings (around 560) were held online or by proxy. Further information is available here.

Financial reporting obligations

London listed companies

On 26 March 2020, the Financial Conduct Authority (FCA), Financial Reporting Council (FRC) and Prudential Regulation Authority (PRA) published a joint statement which introduced a series of measures to ensure information flow to investors and support the continued functioning of the UK's capital markets during the COVID-19 pandemic. The measures include:

- A statement by the FCA allowing listed companies an extra two months to publish their audited annual financial reports. This is a policy of forbearance by the FCA as opposed to a rule change. The FCA has said that when the disruption abates, it will consider how best to end the policy. Further information is available here and here.

- Guidance from the FRC for companies preparing financial statements in the current uncertain environment. The guidance covers corporate governance (ensuring management information is available; maintaining risk management and internal control systems; and considering the approach to dividends and capital maintenance) and corporate reporting (strategic reports and

viability statements; going concern statements and material uncertainties; significant judgements and estimation uncertainty; and events after the reporting date). The FRC's Financial Reporting Lab has sought feedback from investors on the disclosures that they would like to see and has produced a helpful document which is available here.The FRC guidance is complemented by guidance from the PRA regarding the approach that should be taken by banks, building societies and PRA-designated investment firms in assessing expected loss provisions under IFRS9. This includes guidance to lenders on how they should respond to covenant breaches by borrowers related to coronavirus.

- Guidance from the FRC for audit firms where engagements are affected by COVID-19.

The FCA requested on 21 March 2020 that listed companies delay the announcement of their preliminary statement of annual results by at least two weeks, to alleviate unnecessary pressure on companies and the audit profession. The FCA has subsequently confirmed that this moratorium could end on 5 April 2020. Further information is available here.

AIM companies

AIM companies may apply for a three month extension to the reporting deadline for the publication of their annual audited accounts. This extension will be available for AIM companies with financial year ends between 30 September 2019 to 30 June 2020. The request for extension must be made to AIM Regulation by the nominated adviser, prior to the AIM company's current reporting deadline under the AIM Rules for Companies (AIM Rules). The London Stock Exchange (LSE) will keep under review the operation of the AIM Rules and in particular, the requirements for reporting of half yearly reports under AIM Rule 18.

Disclosure obligations

The FCA has provided commentary for issuers and market participants in light of the COVID-19 pandemic in its most recent Primary Markets Bulletin (No.27). Amongst other matters, the Primary Markets Bulletin states that listed issuers should continue to comply with their obligations under MAR and the FCA rules. The FCA has stated that it 'appreciate[s] there may be slight delays [in issuers meeting their disclosure obligations on a timely basis] as new processes are put in place'. However, we consider that the FCA would expect any such processes to now be in place.

In addition, the Primary Markets Bulletin discusses the following:

- **The importance of transaction notifications** - Persons discharging managerial responsibilities (PDMRs) and 'persons (who are) closely associated' will continue to be expected to meet their notification requirements under MAR on time.

- **Delays in corporate reporting** - If an issuer does not believe it is able to meet its continuing obligations it should take appropriate advice and contact the FCA to discuss. Issuers should also engage with their auditors, who should contact the FRC, as appropriate.

- **Corporate transactions and admissions** - The FCA will continue reviewing documentation for corporate transactions in line with the established principles set out on its website.

Pre-Emption Group (PEG) statement on share issues during the COVID-19 crisis

In order to help London listed companies raise equity capital in the current circumstances caused by the COVID-19 pandemic, the PEG has published a statement which recommends that investors, on a case-by-case basis, consider supporting issuances by companies of up to 20 per cent of their issued share capital on a temporary basis, rather than the 5 per cent for general corporate purposes, with an additional 5 per cent for specified acquisitions or investments, as set out in the Statement of Principles. The Statement of Principles already permits companies to request a specific disapplication of pre-emptive rights outside of the normal thresholds, and this process should continue to be respected. If this additional flexibility is being sought:

- the particular circumstances of the company should be fully explained, including how they are supporting their stakeholders;

- proper consultation with a representative sample of the company's major shareholders should be undertaken;

- as far as possible, the issue should be made on a soft pre-emptive basis; and

- company management should be involved in the allocation process.

In addition to the disclosures expected in a company's next annual report and accounts, as outlined in the PEG's Appendix of Best Practice in Engagement and Disclosure, any companies issuing up to 20 per cent of their capital would be expected to disclose alongside the issuance, information about the consultation undertaken prior to the issuance and the efforts made to respect pre-emptive rights, given the time available. Existing share awards should not be normalised to negate the dilutive effect of the extended issuance and the directors of the company will be held accountable for their decisions at the next AGM.

The proposals are to remain in place until 30 September 2020. The PEG will reconvene before then to assess how companies and investors have responded to the additional flexibility. For the avoidance of doubt, this statement does not signify an intention by the PEG to consider an extension beyond the 5+5 per cent threshold applicable in normal circumstances.

Short selling restrictions

The FCA has decided not to impose bans on short selling in the UK at this time. The FCA will continue to closely monitor market activity in the UK, including short selling activity, but currently considers UK markets to be operating in an orderly fashion and has found no evidence that short selling has been the cause of recent market falls.

Austria, Belgium, Greece, Spain, Italy and France have all introduced short selling bans, which the FCA has followed where relevant (i.e. where relevant shares are also traded in the UK). For further information, see FCA's statement on UK markets.

ESMA has required net short position holders to report positions of 0.1% and above. This change to short selling reporting will apply in the UK. Further information is available here and here.

Approach taken by the European Securities and Markets Authority (ESMA)

According to ESMA's recommended actions on COVID-19, issuers should:

- disclose as soon as possible any relevant significant information concerning the impacts of COVID-19 on their fundamentals, prospects or financial situation in accordance with their transparency obligations under MAR; and

- provide transparency on the actual and potential impacts of COVID-19 to the extent possible based on both a qualitative and quantitative assessment of their business activities, financial situation and economic performance in their 2019 year-end financial report if this has not yet been finalised or otherwise in their interim financial reporting disclosure.

In relation to financial reporting deadlines, ESMA has issued a public statement in which it asked National Competent Authorities (NCAs) not to prioritise supervisory actions against issuers who fail to meet certain financial reporting deadlines under the Transparency Directive (TD), for a period of (i) two months following the TD deadline, in relation to annual financial reports and (ii) one month following the TD deadline, in relation to half-yearly financial reports, provided in each case that the period of reporting referred to in such reports ended on or after 31 December 2019 but before 1 April 2020.

Where issuers reasonably anticipate that publication of their financial reports will be delayed beyond the deadline set out in national laws transposing the TD, such issuers are expected to inform their NCA of this and inform the market of the delay, the reasons for such delay and, to the extent possible, the estimated publication date.

ESMA's statement to NCAs can be found here and ESMA's recommended actions can be found here.

Gender pay gap reporting

Enforcement of the gender pay gap reporting deadlines has been suspended for this reporting year (2019/20). The decision, issued by the Government Equalities Office and the Equality and Human Rights Commission on 24 March 2020, means there will be no expectation on employers to report their data. Further information can be found here.

Postponement of auditor tenders and audit partner rotation

In the joint statement by the FCA, FRC and PRA, companies are encouraged to consider delaying planned tenders for new auditors, even when mandatory rotation is due. The FRC has a power in law to extend certain mandates. The joint statement also notes that where there are good reasons, for example to maintain audit quality in current circumstances, key audit partner rotation can be extended to no more than seven years (from five years). The joint statement notes that this needs to be agreed with the audit committee and does not need to be cleared with or approved by the FRC.

COVID-19 guidance for Companies House customers

Companies House has issued guidance to assist customers with accessing its services during the COVID-19 outbreak. Key highlights are as follows:

- **Office closures and paper filings** - All Companies House offices are currently closed to the public and all same day services have been suspended as have document ordering services for older documents not shown on the filing history of Companies House Direct.

Offices in Belfast, Cardiff and Edinburgh will continue to accept paper documents, but there are likely to be significant delays in processing paper documents. The London office is not accepting paper documents and any paper documents normally sent to London should be diverted to Cardiff.

- **Online filings** - Given the delays in processing paper documents due to COVID-19, Companies House is encouraging its customers to use its online services (WebFiling) to the extent possible. If you are not registered for online services, you may file paper documents or register for the online services. A majority of documents can be filed electronically using the online services (a full list can view viewed here). There are certain documents that can only be filed in paper form (for example, special resolutions of a company and full audited accounts cannot be filed online). For the small number of filings that do not currently have an online service, Companies House is urgently working on a service to allow customers to upload such documents and make a payment where necessary. Further details in relation to this are awaited.

- **Registering with WebFiling** - Any business not already registered with WebFiling should note that as part of the registration process an online access code will need to be mailed to the

registered service address of such business. The code is required to complete the online on-boarding process. Businesses should therefore consider if they will be able to retrieve this from their registered office before signing up to WebFiling.

ICSA guidance on good practice for virtual board and committee meetings during the COVID-19 crisis

ICSA/The Chartered Governance Institute has published guidance to assist companies in conducting virtual board and committee meetings during the COVID-19 pandemic. Key points are as follows:

- **Initial Considerations** - Companies should consider the platform to be used for the meeting and should check their articles of association for provisions on telephone or video conferencing. Companies should also consider what equipment/IT support is required to facilitate the meeting.
- **Meeting structure**- Virtual meetings should be structured more simply than face to face meetings and should recognise the constraints of technology. It is recommended that minutes should be taken as usual rather than recording board or committee meetings.
- **Accessing the meeting** - Clear instructions on accessing the meeting system are essential and should be provided in good time before the meeting as not all participants will be familiar with the meeting system technology.
- **Conduct of the meeting** - The chair of the meeting will need additional techniques to run the meeting in an orderly manner whilst also allowing for adequate debate. Appendix 1 to the guidance includes notes for the chair to assist with the smooth running of the meeting. Appendix 4 contains suggested ground rules for virtual meetings that should be circulated to participants in advance of the meeting.
- **After the meeting** - Feedback should be obtained after the meeting so that any issues or required updates to the ground rules can be addressed before the next meeting.

Temporary changes to the LSE Dividend Procedure Timetable

London listed companies may defer the payment of dividends by up to 30 business days, but no more than 60 business days after the dividend record date, following temporary changes made to the Dividend Procedure Timetable by the LSE on 25 March 2020. After the deferral period has expired the dividend must be paid or cancelled. Any such deferral or cancellation must be notified to the LSE's Stock Situations Team without delay. A copy of the amended timetable is available here.

Consideration also needs to be given to any company law implications of deferring or cancelling dividends.

Extension of deadline to publish annual accounts for AQSE Growth Market companies

Aquis Stock Exchange (AQSE) has temporarily extended, by one month, the date by which companies admitted to the AQSE Growth Market must publish their annual audited accounts in order to take account of the disruption caused by the COVID-19 outbreak. AQSE may consider extending this period further if it considers it to be beneficial to companies. Further information is available here.

Charity Commission guidance to assist charities during the COVID-19 crisis

The Charity Commission has issued guidance to help with the running of charities during the COVID-19 pandemic. Key highlights are as follows:

- **Virtual meetings** - Charities should check their governing documents for any provisions allowing virtual or telephone facilities and should follow the provisions therein. Where there is no such provision in a charity's governing document, the decision to hold a telephone/virtual meeting should be recorded.

- **Cancellation or postponement of meetings** - Charity trustees may, if necessary, and subject to complying with the charity's governing documents cancel or postpone AGMs or other important meetings. A record of this decision should be made to demonstrate good governance of the charity.

- **Financial reporting** - Wherever possible, charities should endeavour to deliver their annual reports to the Charity Commission on time. Where the outbreak of COVID-19 impacts on the completion of annual returns and accounts, charities with an imminent filing date should email the Charity Commission (filingextension@charitycommission.gov.uk).

- **Statement of Recommended Practice (SORP) Guidance** - The Charities SORP Committee has published guidance for trustees and preparers of charity accounts looking at the potential impact of the control measures to contain COVID-19 on financial reporting by charities. The guidance considers the implications for the trustees' annual report, going concern and the alternative basis to going concern when preparing accounts under the SORP.

- **Assisting with the impact of COVID-19** - Charities may assist with the impact of COVID-19 if permitted to do so by the objects clause in their governing documents. Objects that already include the relief of poverty, the relief of need, hardship or distress, the relief of the elderly, the advancement of education, the advancement in life of young people or the advancement of health are given as examples of objects that may permit a charity to provide support, as are those with general charitable purposes. However, in considering what can be done, charities must be aware of any restrictions set out in the objects, such as to benefit a specific local area or class of beneficiaries.

Alternatively, charities may seek to amend their objects to enable support to be provided. Any proposed changes should be reasonable, consistent with what the charity does, and not undermine the existing objects. Where its consent is required to amendments, the Charity Commission will prioritise any request that is urgent due to COVID-19. However, the regulator advises charity trustees to "consider carefully" whether other charities may be better placed to respond, and the wider and longer-term impacts of changing a charity's objects, including on existing beneficiaries.

3. CYBERSECURITY AND DATA PROTECTION

Cybersecurity
The Government's guidance for employees to work from home where possible presents new cybersecurity challenges which must be managed.

Further, cyber criminals are taking advantage of fears of the coronavirus and sending 'phishing' emails which encourage recipients to click links leading them to websites triggering the download of malware on to their computers or steal their passwords.

Possible legal issues arising from security breaches are as follows:

- data protection and other regulatory risk arising from loss of personal data in respect of cyber-related incidents;
- privacy claims brought by data subjects;
- enforcement action, including the imposition of significant fines; and
- commercial disputes with customers and/or third-party service providers in respect of liability for cyber-related incidents.

Home working challenges:

- Good cybersecurity is essential.
- What employers should be doing:
    - setting up clear reporting procedure to follow in the case of a security incident;
    - setting up new accounts and accesses – ensure strong passwords are used, and where possible implement two- factor authentication;
    - controlling access to corporate systems – Virtual Private Networks (VPN) allow remote users to securely access an organisation's IT resources. They work by creating an encrypted network connection that authenticates the user and device, and also encrypts

data in transit. Even if employees are accustomed to using VPN, a business should ensure its VPN is able to cope with increased usage – additional licenses, capacity or bandwidth may be required if there is usually a limited number of remote users; and

- engaging security experts to perform escalating penetration tests to determine vulnerabilities within its IT infrastructure and prevent their exploitation by hackers.

- What employees should be doing:
  - backing-up regularly, as in a worst-case scenario an individual could fall foul of ransomware; and
  - ensuring there is an up-to-date anti-virus system in place and data security software.

'Phishing' scams often prey on real world concerns, and in present times may claim to have a cure for coronavirus or request a donation.

It is recommended that work and leisure activities are not mixed on the same device.

It is advisable for employers to share procedures for initial steps if an employee does click on a 'phishing' scam, including as follows:

- open any antivirus software and run a full scam, following any instructions given;
- if an employee has been tricked into providing a password, they should immediately change all passwords;
- contact the employer's IT department to let them know about the "phishing" email and that they have followed this link; and
- if an employee has lost money, they should report it to Action Fraud, at www.actionfraud.police.uk.

Data Protection

Enforcement - The Information Commissioner's Office (ICO) has confirmed it will not take regulatory action against organisations that do not meet their usual standard on data protection practices or take longer to respond to information rights requests during the coronavirus pandemic, and has established a "Data protection and coronavirus information hub". Notwithstanding the ICO's recognition of the demands of the crisis, GDPR reporting/notification requirements remain in place, and are likely to be enforced assiduously. Meanwhile the European Data Protection Board (EDPB)reminds us that even now the data controller and processor must ensure the protection of personal data and stresses the applicability of national law, but notes the emergency may legitimise proportionate and time-limited restrictions of freedoms.

Symptomatic workers - The ICO has said it is reasonable for employers to ask people to tell them if they are experiencing COVID-19 symptoms and staff should be informed of these, but individuals probably do not need to be named and no more information than is necessary should be provided.

Data sharing between healthcare organisations - Data controllers in certain healthcare organisations have been asked to share information to support efforts against COVID-19. The GDPR continues to apply and organisations must remain compliant; however, those organisations that have been notified may share patients' data provided it is limited to COVID-19 purposes and they keep appropriate records of all data processed. The data sharing power will expire on 30 September 2020, unless extended. Further information is available here.

Mobile phone data - The ICO and EDPB have said the use of mobile phone location data to track the spread of COVID-19 will remain outside the scope of the GDPR, provided it is properly anonymised, aggregated and deleted as soon as the COVID-19 emergency comes to an end.

For further information on these areas, please see Gibson Dunn's alert of 20 March 2020.

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4. DISPUTES

Operation of the Courts

The pandemic is impacting litigation and other court proceedings, marked by an increased use of remote hearings, adjournment of cases considered unsuitable for remote hearing, and general court closures. The work of courts and tribunals has been consolidated into fewer buildings, with a network of "priority courts" (magistrates, county, and family courts) remaining open across the country. Jury trials that are underway in County Courts will continue, provided that appropriate measures can be put in place to protect the parties, but there are to be no new jury trials.

The change in the courts' working practices is facilitated by the emergency Coronavirus Act 2020, passed on 25 March 2020, which aims to ensure that the courts can continue to function without the need for participants to attend in person, and to reduce delays to the administration of justice. To that end, it contains provisions (Sections 53 to 57 and Schedules 23 to 27) enabling greater use of technology to hear (particularly criminal) cases remotely (see a summary in the Coronavirus Bill Impact Assessment). There is already flexibility in the Civil Procedure Rules (CPR) and Family Court rules to hear cases remotely.

Relatedly, much guidance has been issued by the Judiciary and Her Majesty's Courts and Tribunal Service (HMCTS) (see Gov.uk and Courts and Tribunals Judiciary websites), including:

- The Lord Chief Justice explained the position regarding civil and family matters on 23 March 2020: hearings requiring the physical presence of parties and their representatives and others

should only take place if a remote hearing is not possible and if suitable arrangements can be made to ensure the safety of all concerned.

- The Judiciary of England and Wales has issued a Protocol Regarding Remote Hearings, providing basic guidance on the conduct of remote hearings in the County Court, High Court, and Civil Division of the Court of Appeal, in view of the objective to undertake as many hearings as possible remotely, so as to minimise the risk of transmission of COVID-19.

- HMCTS is issuing daily updates on developments involving the Courts and the Civil Procedure Rules Committee has confirmed further CPR updates at short notice are likely to be published.

The following temporary CPR practice directions have also been introduced:

- Practice Direction 51Y, on Video or Audio Hearings During Coronavirus Pandemic, came into force on 25 March 2020. It provides that where the media is able to access proceedings remotely, they will be public proceedings, and that remote hearings being held in private must be either audio or video recorded.

- Practice Direction 51Z, on Stay of Possession Proceedings – Coronavirus, came into force on 27 March 2020. It provides for the stay of proceedings for possession brought under CPR Part 55 and all proceedings seeking to enforce an order for possession by warrant or writ, for a period of 90 days during the COVID-19 pandemic.

- Practice Direction 51ZA, on Extension of Time Limits and Clarification of PD51Y – Coronavirus, came into force on 2 April 2020. It extends the period of extension that parties may agree without formally notifying the court from 28 days to 56 days. An extension of more than 56 days needs to be agreed by the court, which is required to take the impact of the COVID-19 pandemic into account when considering applications for extensions of time, compliance with directions of the Court, adjournment of hearings, and relief from sanctions. It also stipulates that the Court will take into account the impact of COVID-19 when considering applications for the extension of time for compliance with directions, the adjournment of hearings, and applications for relief from sanctions.

Civil Courts – County Courts

Per HMCTS guidance issued last week, the County Courts are prioritising, as "Priority 1 – work that must be done", freezing orders, injunctions, any cases with a real time element, any applications for cases listed in the next three weeks, any applications where there is a substantial hearing listed in the next month, all multi-track hearings where the parties agree it is urgent, as well as appeals in all these cases. The same guidance also lists "Priority 2 – work that could be done", which includes applications for summary judgment for a specified sum and applications for security for costs.

Civil Courts – The High Court

The High Court is operating pursuant to a "Contingency Plan for Maintaining Urgent Court Hearings", which explains that "urgent business" will be given priority, but clarifies that the High Court will seek to address non-urgent business ("business as usual") as far as possible during this period, subject to specific guidance issued by the different Divisions and Courts. The Contingency Plan defines "urgent business" as "business that would warrant an out of hours application in any of the courts covered by this plan", leaving this to the discretion of the relevant duty judge. At any one time during the working week, at least one judge from each of the Queen's Bench Division, the Administrative Court, the Commercial Court, the Technology and Construction Court, the Court of Protection, the Family Division and the Chancery Division will be available to deal remotely with the business of that jurisdiction, including urgent business.

The Rolls Building Cause list illustrates that hearings are now proceeding "Remotely via Skype" or "Remotely via telephone conference", and that the media and members of the public can contact the Court for access. Recently, the various changes enabled Mr Justice Teare to conduct a hearing via Zoom, in the dispute between the Republic of Kazakhstan and its national bank and BNY Mellon and others, which was also streamed on YouTube.

Notably, winding-up and bankruptcy petitions scheduled for hearings are, in most cases, being adjourned to June 2020, on the basis that such petitions cannot be conducted remotely and because in-person hearings cannot be safely conducted.

It is possible to use CE-File to file applications and new claims (or email the respective registries) in the usual manner, although the Law Society has explained that it is working with HMCTS to further streamline procedures. There may be a delay in processing routine filings and non-urgent claims may not progress for some time. Note that filing deadlines in the High Court have not been affected, however PD 51ZA may result in parties agreeing to a longer extensions.

Civil Courts – Court of Appeal

The Court of Appeal (Civil Division) is conducting urgent work only (applications and hearings), with all hearings being held remotely.

The RCJ Civil Appeals Office has issued separate guidance explaining that it will only deal with urgent applications, i.e. "applications where it is essential in the interests of justice that there be a substantive decision within the next 7 days". Non-urgent applications can still be lodged and will be dealt with as soon as the office increases its capacity to manage new non-urgent work.

The Supreme Court

The Supreme Court building and Registries of both the Supreme Court and Judicial Committee of the Privy Council (JCPC) are both temporarily closed. The Registries closed on Friday 20 March and are not due to re-open until Monday 20 April, although this date is subject to ongoing review. In the interim, if there are deadlines for filing documents in either the Supreme Court or JCPC that expire on a business day, these will be extended automatically until 20 April. This does not mean that documents due on or after 20 April, however, will have their deadlines automatically extended. Any hearings during this time will be conducted via video conference and streamed live as usual.

Implications for arbitration proceedings

COVID-19 is likewise impacting arbitration hearings, though it should be noted from the outset that many of the main arbitral institutions, such as the ICC and LCIA, remain fully operational (see the ICC's recent press release here; and the LCIA's recent press release here).

Over recent weeks we have seen the postponement of a number of hearings scheduled during the likely affected period. Some institutions have specifically ordered the postponement of hearings: for example, the ICC International Court of Arbitration, has postponed or cancelled all hearings scheduled to take place at the ICC Hearing Centre in Paris until 13 April 2020. Of course, the length of the affected period is currently unknown and in many cases it may preferable, given the inevitable costs of delay and difficulties of rescheduling, for the parties to agree for upcoming hearings to be held remotely.

In that regard, we note that under all of the main arbitral institutional rules, a tribunal has the power to order a hearing to proceed - see, for example, the ICC 2017 Rules, Article 22(2) ("the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate"), and the LCIA 2014 Rules, Article 14.4(ii) ("Tribunal's general duties [include]…a duty to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense…") - and counsel and parties will be expected to cooperate.

Many arbitral tribunals have in any case embraced the use of hearing room technology over recent years, including the taking of evidence via video link and having fully electronic hearing bundles. There are a number of useful video-conferencing protocols already in existence, which parties and tribunals can refer to (including the 2018 Seoul Protocol and 2019 Hague Conference Draft Guide to Good Practice on the Use of Video-Links Under the Evidence Convention). Indeed, in response to COVID-19, arbitral institutions have taken the opportunity to remind members and parties of their online dispute resolution facilities. ICSID, for example, has issued a Brief Guide to Online Hearings. SIAC has likewise issued a press release suggesting the use of certain virtual ADR services.

Filing deadlines are inevitably also being affected by the pandemic, due to the logistical challenges presented by parties and their counsel working remotely, and we are seeing a number of deadlines being pushed back by several weeks. Helpfully, institutions such as ICSID and the LCIA, permit filings to be made entirely online.

5. EMPLOYMENT

Coronavirus is already having an unprecedented effect on employers and their workforces. Employers have been told to allow their employees to work from home where possible. Further, the Chancellor has introduced a number of unprecedented package of measures to support businesses and employers coping with the economic shock of coronavirus, including the Coronavirus Job Retention Scheme. As we know, the pandemic is continually changing and the Government and Acas advice for employers is being updated as the situation develops. Employers should keep track of this guidance and that of the World Health Organisation. Gibson Dunn has produced a series of client alerts focusing on initial UK employment law changes: 17 March 2020, 20 March 2020, 27 March 2020.

6. ENERGY

The energy industry is currently grappling with the impact of three concurrent crises: a crash in the oil price (and continued high volatility, with the market awaiting the outcome of the deferred OPEC+ meeting on 9 April 2020), a record low in gas prices and the global COVID-19 pandemic. This creates additional complexity in responding to each crisis and poses an unprecedented challenge to the sector as a whole. A few of the COVID-19-driven key areas/trends relevant to the sector which we are seeing are below.

Definition of critical sectors / key workers

The energy supply chain falls within the Utilities, Communication and Financial Services "critical industry" sector as set out in the UK's COVID-19 guidelines, and the Government has throughout emphasised to industry that it views the energy sector as a whole as vital. However, being categorised as a "critical industry" does not automatically mean that all employees of companies within the sector have "key worker" status and are exempt from travel and work restrictions. The onus is on each company to use its discretion in preparing its list of key workers and to be able to justify such classifications.

To seek to formalise these designations, various industry organisations as well as individual companies have prepared travel authorisation templates that can be printed on company letterhead to allow daily travel access for "key workers" in critical industries.

Supply chain issues

There are disruption issues across the energy supply chain (as there are for all industries), including bottlenecks and cash flow problems. Maintaining security of supply in the UK is key to ensuring a

resilient supply chain on the other side of COVID-19, and various solutions are being sought throughout the sector. In some cases this includes collaborating and sharing equipment and personnel, which would usually raise potential anti-trust concerns which companies should consider carefully before entering into any such arrangements. For a summary of the CMA's current views, please see 1. Competition and Consumers above.

The economic health of the energy industry is a key concern, especially given the extensive cost-cutting measures already enacted after the oil price crash of 2014-2015, the sustainability of which was already in question. Some industry observers have noted that only as little as 14% of the cost reductions achieved between 2015-2017 may be sustainable going forward.

There is also an increase in force majeure claims under contracts at various points in the supply chain. See our guidance on COVID-19 impacts on LNG and other commodities contracts here, together with our 4-step force majeure checklist for English law and New York law.

Stranded middle ground for SMEs

The energy industry also has a large number of "stranded middle" businesses which had not been previously eligible for the COVID-19 relief packages put forward by the Government, whether for small businesses with a revenue of less than £45 million (Coronavirus Business Interruption Loan Scheme (CBILS)) or for larger investment grade companies (COVID-19 Corporate Financing Facility (CCFF)), and are at substantial economic risk. The Government has now taken welcome strides in expanding the relief available to such businesses through the introduction on 3 April 2020 of the Coronavirus Large Business Interruption Loan Scheme (CLBILS) for businesses with turnover of between £45 million and £500 million.

Where business interruption schemes are available, there is a concern that in practice banks are asking business owners to provide personal guarantees, thereby undermining the intent of the support offered. The most recent update to CBILS (announced 3 April 2020) seeks to address this - for further details please see 7. Finance below.

Harmonisation between England and Scotland

The Government has acknowledged to industry that in the response to the COVID-19 crisis to date there has been a lack of consistency between the English and Scottish Governments, for example in the approach to construction work (with the English Government striving to ensure construction work continues, whereas the Scottish Government has sought to stop work but confirmed that it may continue for essential projects) The national Governments are working to align their positions but for the time being there is some concern as to the effects of such differences in application.

Energy transition

The longer term impacts of the current crises are yet to fully reveal themselves, but the Government for its part has taken pains to emphasise that it remains committed to net-zero 2050 and that the oil and gas industry is a key stakeholder in delivering the transition. The sector is awaiting the publication of the Government's delayed energy white paper which is expected to contain a more detailed pathway to net-zero 2050. Some observers have asserted that the dramatic cuts in emissions caused by the global quarantine measures may spur additional momentum for the climate transition, especially in conjunction with low oil prices making renewables competitive in terms of rates of return if the low oil price environment is sustained. While this may be true for proven renewables projects, there is also a risk of a move away from investment in more capital intensive and unproven technologies.

Regulatory flexibility

In line with other regulators during the COVID-19 crisis, the UK's Oil and Gas Authority (OGA) has indicated it will show flexibility on a case by case basis where circumstances have affected operator and owner timelines. This includes with respect to the UK's ongoing 32nd offshore licensing round, as well as in respect of potential licence extensions. The OGA's Maximising Economic Recovery (MER) Strategy Consultation is also proceeding, but with a view to ensuring companies have adequate time to respond given current circumstances. The Health and Safety Executive has put a short pause (currently two weeks, though this is under review) on offshore oil and gas inspection activities to allow duty holders time to overcome various immediate pressures and challenges. However, major hazard oversight continues as usual.

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7. FINANCE

Financial statements

In England, private companies ordinarily have nine months from their balance sheet dates to finalise and file audited accounts with Companies House. However, on 25 March 2020, Companies House announced the ability for companies to take advantage of a three-month extension for the filing of their audited financial statements. On 26 March 2020, the FCA also announced temporary relief for publicly listed companies facing the challenges of financial reporting during the COVID-19 crisis by providing an additional two months over and above the normal four month period to publish their audited financial statements. See 2. Corporate Governance above for more details.

Covenants in financing agreements typically require audited financial statements to be provided in a shorter timeframe than that prescribed by law, and therefore it may be necessary for companies to engage with lenders to seek to extend the timeframes in which audited financial statements are to be provided to ensure no defaults arise.

Auditors are also typically requiring more time to finalise their audit of the financial year 2018/9: this allows companies sufficient time to provide additional disclosure relating to the impact COVID-19 of their operations and performance in line with IFRS.

We think it is unlikely that auditors will qualify their going concern opinions with respect to accounts for 2018/2019 (given the COVID-19 outbreak hit Europe in 2020) but companies should be prepared to engage with auditors on emphasis of matter provisos. This is an important issue for companies with financing given an audit qualification is typically an express default under financing documents.

Liquidity

There is enormous need for liquidity in the market - companies are looking for ways to ensure available committed and uncommitted facilities can be tapped when required and also ways to facilitate the injection of equity capital into the operating groups to provide liquidity where required. The need for liquidity has also involved companies seeking to take advantage of permitted indebtedness buckets for local working capital financing, trade financing and other potential means of borrowing within the terms of their credit agreements.

There is also increasing covenant pressure (for those borrowers with financial maintenance covenants) and incurrence covenant-driven pressure on operational flexibility and we would expect to see an increase in borrower-requests for postponement of testing, covenant resets , amendments and in some cases deferral of interest and other payments.

Additional liquidity may be available under the Coronavirus Business Interruption Scheme. This temporary scheme supports small and medium-sized businesses with an annual turnover of up to £45 million with access to £5 million of finance in the form of term loans, overdrafts, invoice finance and asset finance facilities for up to six years. The Scheme has also been extended to enable banks to make loans of up to £25 million to firms with an annual turnover of between £45 million and £500 million. The scheme will be delivered through commercial lenders (including all major UK-operating banks), backed by the Government-owned British Business Bank. As part of the scheme, the Government will provide lenders with a guarantee of 80% on each loan (subject to a per-lender cap on claims). The Government will also make a business interruption payment to cover the first 12 months of interest payments and any lender-levied fees.

If a lender can offer finance on normal commercial terms without making use of the Scheme, it will do so. Security is not required to secure lending below £250,000. For any borrowing above £250,000, it is open to lenders to ask for security including personal guarantees from directors and security over their assets in support of such guarantees, however, there is a prohibition on taking security over a director's primary residential property. Taking into consideration the Government's guarantee, any personal guarantees for borrowing in excess of £250,000 are capped at 20% of the outstanding value of the loan. The full rules of the Scheme (including eligibility and the application process) are available on the British Business Bank website. Any such financing would need to be permitted under the terms of

the relevant company's finance documents, or where the lenders permit such additional debt, security and guarantees (if any) to be incurred.

8. FINANCIAL SERVICES REGULATORY

Financial services regulatory client alerts

- The UK Financial Conduct Authority's expectations under the Senior Managers and Certification Regime
- ESMA Suggests Regulatory Forbearance in Relation to Best Execution Reporting Deadlines
- UK Financial Conduct Authority's Short Selling Notification Thresholds Amended

Financial Conduct Authority

The FCA has published a statement on the impact of COVID-19 on the SM&CR, setting out its expectations of solo-regulated firms. It covers senior management responsibilities, statements of responsibilities and significant changes to senior manager responsibilities, temporary arrangements for senior management functions, furloughed staff and reallocating prescribed responsibilities (here).

Prudential Regulation Authority / Bank of England

- The PRA and FCA have jointly published a statement on the impact of COVID-19 on the Senior Managers and Certification Regime, setting out their expectations of dual-regulated firms. Firms are reminded of the "12-week" rule, which allows individuals to perform senior management functions without approval for a temporary period. They also state that they do not expect firms to designate a single senior manager to be responsible for all aspects of their response to COVID-19 (here).
- The PRA has published a statement on amendments made to regulatory reporting and Pillar 3 disclosure requirements as a result of COVID-19. The statement provides for delays to certain reporting requirements under the Capital Requirements Regulation and the Bank Recovery and Resolution Directive. Delays are also permitted for certain "PRA-owned regulatory" reports (here).
- The PRA has published a Dear CEO letter to UK insurers asking them to pay close attention to the need to protect policyholders and maintain safety and soundness when considering any distributions to shareholders or making decisions on variable remuneration (here).

- The Bank of England and the PRA have published a joint statement welcoming the delay in implementation of the final Basel III standards by one year, to 1 January 2023. The delay is intended to provide operational capacity for banks and supervisors to respond to the immediate financial stability priorities from the impact of COVID-19 (here).

- The PRA has published a statement on deposit takers' approach to dividend payments, share buybacks and cash bonuses in response to COVID-19. In particular, the PRA expects banks not to pay any cash bonuses to senior staff, including all material risk takers (here).

9. FORCE MAJEURE

We have prepared a 4-Step Checklist & Flowchart to assist with the analysis of force majeure clauses under English law. Read more here.

10. GOVERNMENT SUPPORT SCHEMES

On 3 April 2020, the Government announced changes to the Coronavirus Business Interruption Loans Scheme (CBILS), on which we previously prepared a client alert. CBILS has been extended with the aim of benefitting both smaller businesses and larger enterprises that were previously unable to access the scheme. Under the revised scheme:

- businesses with revenues of £45 million or less can access up to £5 million in loans. The primary change for these businesses is the ban on lenders requiring any personal guarantees or security from borrowers for loans of up to £250,000; and

- larger businesses with revenues of between £45 million and £500 million can also now access the CBILS with loans of up to £25 million available. The CBILS was previously unavailable to businesses with revenue in excess of £45 million.

  The Government has also confirmed that it will guarantee up to 80% of the outstanding amount of each loan issued under the CBILS (subject to a per-lender cap on claims). The loans under the CBILS continue to be issued by commercial lenders on commercial terms. Further details on the expansion of the CBILS are expected to be released later this month.

See our recent client alert for more information.

11. INSOLVENCY

Wrongful trading

In response to the unprecedented stress that the COVID-19 pandemic has placed on businesses (in the UK and elsewhere), the Government announced on 28 March 2020 that the "wrongful trading" provisions of the UK Insolvency Act 1986 would be suspended with retroactive effect from 1 March 2020, initially for three months. Further details of the suspension will become known once the legislation to implement the change is introduced to Parliament (which the Government has said that it will do at the earliest opportunity). The suspension of wrongful trading liability follows on the heels of similar steps taken in Germany and Australia.

Separately, the Financial Reporting Council (FRC) has published guidance for companies on various issues, including going concern statements and material uncertainties in the current environment.

Wrongful trading is a creditor protection mechanism contained in the UK Insolvency Act 1986, pursuant to which an administrator or liquidator can seek to render a director personally liable for some or all of a company's losses if the director knew or ought to have concluded that there was no reasonable prospect of the company avoiding an insolvent administration or liquidation and where that director failed to take every step with a view to minimising potential losses to creditors. A finding of wrongful trading can also result in the director being disqualified from acting as a director of English companies for up to 15 years. Fear of potential wrongful trading liability is one of the key drivers for directors to file for administration or liquidation in relation to a company and, given the current unpredictable market conditions, has been at the very front of directors' minds. The Government's suspension of wrongful trading has provided significant comfort to directors who face the difficult decision (on a day-to-day basis as the trading picture in the UK evolves) whether to brace and persevere until trading conditions improve or file for administration or liquidation. The suspension of wrongful trading does not, however, avoid the need for directors to continue to comply with their duty to promote the success of the company, to act in good faith in the best interests of the company or other duties or obligations. Directors need be aware that in the UK, acting in the best interests of the company (when that company is in the zone of insolvency) is equated to acting in the best interests of the company's creditors rather than (or opposed to) the interests of its shareholders. The Government also noted that existing laws for fraudulent trading (i.e. trading with intent to defraud creditors, or for any fraudulent purpose) and the threat of director disqualification, will continue to act as an effective deterrent against director misconduct.

The Government also stated its intention to implement a previously announced (August 2018) programme of insolvency and restructuring reforms, including the creation of a short-term breathing space moratorium for financially distressed companies to facilitate restructuring, UK-style company-led plan of reorganisation process (which will be something of a hybrid between a US Chapter 11 proceeding and a UK Scheme of Arrangement with a supporting moratorium), which will bind creditors to that plan, and a restriction on the effectiveness of so called ipso facto contract clauses (i.e. where a contract terminates by reason of actual or anticipated insolvency) for certain key contracts to permit a restructuring plan to be formulated and implemented. The Government has stated that the intended

reforms will include key safeguards for creditors and suppliers to ensure that are paid while a solution is sought.

12. INTERNATIONAL TRADE AGREEMENTS (PRIVATE AND PUBLIC)

The COVID-19 pandemic has already had a catastrophic impact on international markets, with far reaching impacts on international trade that will be felt for years to come. In the short term, government authorities responsible for the regulation of global trade have been hobbled by the rapidly spreading pandemic and its resulting restrictions on their ability to work. Nevertheless, several early initiatives may serve as a harbinger of things to come, as regulators around the globe act to mitigate the impact of the pandemic on global supply chains and national security. See Gibson Dunn's client alert for further information on the first visible impacts on and changes to global export controls, tariffs, foreign direct investment regulations, and sanctions and respective enforcement.

13. LOCKDOWN AND PUBLIC LAW ISSUES

Health Protection (Coronavirus) Regulations 2020

The Health Protection (Coronavirus) Regulations 2020 came into place on 10 February 2020 and allowed the detention and isolation of individuals in circumstances where a public health official has reasonable grounds to suspect that an individual is, or may be, infected with coronavirus. The regulations are very wide reaching and notably give the Secretary of State (or any other public health official) the power to impose on anyone they have reasonable grounds to believe is infected with the virus, or on anyone arriving from an infected country, "any other restriction or requirement which [they consider] necessary for the purposes of removing or reducing the risk".

Coronavirus Act 2020

The Coronavirus Act 2020 was enacted on 25 March 2020 and gave the Government emergency powers to address the public health crisis caused by coronavirus. Among numerous other provisions, it gives the Government the power to restrict or prohibit public gatherings, suspend public transport, order businesses to close and temporarily detain individuals suspected of being infected by the virus.

Health Protection (Coronavirus, Restrictions) (England) Regulations 2020

On 26 March 2020, the Government enacted the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 which repealed the Health Protection (Coronavirus, Business Closure) (England)

Regulations 2020, imposed a national lockdown and mandated the closure of most businesses except those deemed to be essential. The restrictions also prevent any person from leaving their homes without a reasonable excuse such as to obtain basic necessities, take exercise, seek medical assistance, provide care to a vulnerable person, or travel to work but only where necessary and prevent public gatherings of more than two people, with a small number of exceptions. Breach of the regulations by businesses and individuals is a criminal offence punishable by a fine. The restrictions are subject to review every 21 days, with the first review taking place on 15 April 2020.

UK police warned against "overreach" of lockdown powers

In recent news, police have been warned to make their use of emergency powers to enforce social distancing laws consistent and not overreach their new powers. Former Supreme Court justice, Lord Sumption has also warned that excessive measures risked turning Britain into a "police state". The College of Policing has drawn up guidance for police on use of the new powers, stressing "policing by consent" and recommending that only after encouraging voluntary compliance; explaining the risks; and encouraging the individual to comply, will use of the new enforcement powers be appropriate, such as issuing a £60 penalty notice or using prohibition notices to prevent public gatherings.

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14. M&A AND PRIVATE EQUITY

Since the onset of COVID-19 and the global lock-down, we have continued to execute a range of transactions (both public and private M&A, joint ventures investments and commercial arrangements) of a cross-border and domestic nature.

This is a checklist of some of the issues that we have experienced in executing transactions and which clients should be mindful of when undertaking, negotiating or executing transactions in this new challenging landscape.

Exclusivity agreements

Transactions may take a longer period to consummate including for reasons of regulatory or closures and/or delays, the need for third party-debt financing or third party approvals/consents in circumstances where these cannot be secured with the "usual" levels of expediency or simply due to the practical issues arising in executing transactions (undertaking due diligence and negotiating transaction documents) on an entirely remote basis.

Accordingly, when negotiating exclusivity provisions (initial periods, rolling periods, long stop dates or similar), be mindful of what a reasonable time frame(s) is taking into account the factors listed above

and consider building in a healthier cushion into exclusivity periods and/or including specific mechanics to extend by reason of such delays.

Due diligence

Most if not all businesses have been impacted in some way by COVID-19. Many of these businesses have had to put in place new operations and emergency measures to address the ever-changing landscape in which they operate. Some of these key operational and strategic decisions may have been undertaken with necessary haste and in some cases at the expense of the standards of governance, oversight, MI, systems and controls that would prevail in business-as-usual environment.

Whilst in many areas, regulators and other agencies have relaxed certain rule requirements and are applying forbearance and a change to their enforcement strategy, buy-side diligence should include a specific review of COVID-19 related arrangements and new policies with a view to identifying weaknesses and areas of risk both in relation to legal and regulatory compliance and new operational structures which have been put in place.

Warranty & Indemnity (W&I) insurance

W&I insurance can typically serve as a useful tool for both buyers, in terms of enhancing or supplementing contractual protections, and for sellers, in terms of reducing contingent liabilities and related benefits.

In response to the pandemic, we are seeing changes to the W&I market. Specifically, insurers are currently proposing certain exclusions from coverage with respect to COVID-19 risk and are requiring buyers to conduct focused diligence regarding the impact of COVID-19 on the target's business. See here for some of the parallel development in the representation and warranty insurance market for US M&A transactions.

Shareholder consent

Does the transaction require buyer or seller shareholder consent at a special shareholders' or general meeting?

If so, be mindful of the technical and practical requirements in ensuring (or reviewing) the arrangements that are put in place to secure a validly convened shareholders' meeting. If a virtual shareholder meeting is proposed, note that not all jurisdictions permit such meetings.

See 2. Corporate Governance above on guidance published by ICSA/The Governance Institute on holding annual general meetings (AGMs) and UK proposals (yet to be published) on "online" or virtual meetings.

See also below on possible delays arising in connection with the approval of shareholder circulars.

Transactional documents requiring regulatory review or pre-vetting

Does your transaction require the publication of a shareholder circular, prospectus or other transactional document requiring review by the relevant listing authority or financial services regulator?

In the UK, at the present time, the FCA has stated that they will continue reviewing documentation for corporate transactions in line with their established principles. See here for current turn-around times for review of circulars and prospectuses. The FCA have also said that if any issuers are involved in urgent transactions, they should consult with their sponsor or adviser in the first instance.

On cross-border transactions, try to obtain guidance early in the transaction as to the approach being taken by the relevant regulators. Some agencies have all but shut save for the most urgent of cases (e.g. involving distressed or other similar transaction situations) whilst others are continuing to review transactions albeit on a prioritised basis and/or on longer time frames.

Court approved transactions

In the UK, the courts are currently continuing to deal with schemes of arrangement, including reductions of capital and cross-border mergers albeit remotely via skype or by telephone conference.

For some jurisdictions however, in the light of closures of many courts, capacity constraints on remote hearings and case prioritisation (e.g. official guidance that non-urgent cases will not be heard), it is possible that there may be delays in securing dates for relevant procedural or final hearings (e.g. directions hearing and/or a sanctions hearing in the case of schemes of arrangement). Some courts may require a certificate of urgency and/or evidence to be submitted to support the urgency of the transaction.

Further, in such transactions which are conditional upon the relevant shareholder approvals being secured, the courts may apply greater scrutiny to the manner in which the shareholder meetings were convened, the forum in which they were held and turn-out. Companies should consider granting greater than usual latitude and/or discretion to the chairman of the meeting (within the terms of any governing documents) to allow for flexibility to address changing circumstances.

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15. REAL ESTATE

Commercial outlook

Several quarterly and monthly open-ended property funds, including funds at Blackrock, Schroders, Legal & General and Royal London, have locked up their funds, a dramatic move which echoes many funds' reactions following market dislocation after the Brexit announcement in summer 2016. The FCA and the Bank of England were already cooperating to develop protective measures for investors, before the COVID-19 crisis began impacting the economy. Gerald Eve, a specialist real estate advisor, has commented that Property Total Returns, Morgan Stanley Capital International's (MSCI) standard composite measure of investment performance, will drop to -4.3% for 2020 as a result of the current crisis. However, they expect the damage to be short-lived with a resurgence of demand bringing Returns up to 7.6% in 2021. Gerald Eve also suggested that, given the logistical difficulties of completing deals, and the financial pressures on funds, they expect only far-advanced transactions to continue to close with other transactions abandoned or paused. It was revealed in the press recently that Columbia Threadneedle, a global asset manager, has withdrawn from its £510 million agreement to buy Manchester Airport Group's Victoria portfolio, despite having exchanged, apparently relying on a MAC clause in their acquisition contract.

Government action

Although the Prime Minister had said that the Government was due to review the lockdown after Easter, with new confirmed cases continuing to rise daily it is unlikely that the lockdown will be loosened at their review. The Ministry for Housing, Communities and Local Government (MHCLG) has issued responses to questions posed by the Property Litigation Association on section 82 of the Coronavirus Act 2020 (Act) which introduced protection for businesses from forfeiture as a result of non-payment of rent. The answers clarify that rent includes all sums payable under the lease and that the policy aims to cover all commercial leases, whether short, contracted out or excluded. A number of retail tenants have made headlines by refusing to pay their rent following the 25 March quarter date. The Government advice has not changed since a moratorium on forfeiture for non-payment of rent having had been introduced. Crucially, no suspension of the obligation to pay rent was introduced by the Act or by the answers provided by MHCLG so rent remains payable. Institutional landlords up and down the country have seen a dramatic fall in rents received on the 25th March quarter day (with some hotel owners receiving next to nothing and retail/shopping centre owners averaging less than a third). This will make for difficult discussions with their lenders over deferral of debt service obligations under their secured financings.

16. UK TAX

Our client alert on tax measures in respect of the COVID-19 is available here. Updates to our client alert published on 27 March 2020 are as follows:

HMRC approach to UK company residence and permanent establishments in response to COVID-19

HMRC has confirmed that it does not consider that:

- a company will necessarily become resident in the UK because a few board meetings are held here or because some decisions are taken in the UK over a short period of time.
- a non-resident company will automatically have a taxable presence by way of permanent establishment after a short period of time. Similarly, whilst the habitual conclusion of contracts in the UK would usually create a taxable presence in the UK, it is a matter of fact and degree as to whether that habitual condition is met.
- HMRC's guidance is available here and here.
- HMRC's recent pronouncements do not address all aspects of the UK tax system that may be impacted by COVID-19 (in particular, CFC and transfer pricing matters) and further HMRC guidance in other areas (in particular the impact on employment taxation) is anticipated in the light of recent OECD recommendations.

Residence for individuals

HMRC has published new guidance on whether days spent in the UK can be disregarded due to exceptional circumstances for the purposes of determining an individual's tax residence. The guidance can be found here.

Tax treatment of the Coronavirus Job Retention Grant

Payments received by a business under the scheme are made to offset deductible revenue costs. Payments must, therefore, be included as income in the business's calculation of its taxable profits for Income Tax and Corporation Tax purposes, in accordance with normal principles. Businesses can deduct employment costs as normal when calculating taxable profits for Income Tax and Corporation Tax purposes.

Income tax and NICs for furloughed employees

The Government has clarified that:

◦ while on furlough, the employee's wage will be subject to usual income tax, employee national insurance contributions and automatic pension contributions from the employee (unless the employee has stopped saving into their pension). Employer national insurance contributions and the minimum automatic enrolment employer pension contributions will be paid by the Government under the Coronavirus Job Retention Scheme.

◦ the reference salary for the purposes of the Coronavirus Job Retention Scheme should not include the cost of non-monetary benefits provided to employees (including taxable benefits in kind) nor benefits provided through salary sacrifice schemes (including pension contributions). Where an employer elects to provide such benefits to furloughed employees, that should be done outside of, and in addition to the wages that must be paid under the terms of, the Coronavirus Job Retention Scheme.

Business rates relief

The business rate holiday has been extended to nurseries.

Extend accounts filing deadline

Companies affected by COVID-19, whose filing deadline has not yet passed, can apply for an automatic and immediate three month extension to file their accounts. If companies do not apply for an extension and their accounts are filed late, an automatic penalty will be imposed. The Government has advised that the registrar has limited discretion not to collect a penalty and any appeal will be considered under the usual appeal policies. More information is available here.

No import duty and VAT for certain medical supplies, equipment and protective garments

Importers of certain medical supplies, equipment and protective garments will pay no import duty and VAT where goods are imported either (i) for distribution free of charge to those affected by, at risk from or involved in combating the COVID-19 outbreak or (ii) made available free of charge to those affected by, at risk from or involved in combating the COVID-19 outbreak (while remaining the property of the organisations importing them). A full list of eligible goods is available here.

Apprenticeship levy

The Government has confirmed that there are currently no plans to make any changes to apprenticeship levy arrangements or to pause the collection of the apprenticeship levy because of the COVID-19 disruption. Employers continue to have 24 months in which to spend their levy funds before these expire. Further details are available here.