



COVID-19 RESPONSE

In partnership with **ARTHUR COX**

Covid-19: Directors duties and your legal responsibilities

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Who We Are



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What we will cover

- Covid-19 and directors' duties under the Companies Act 2006;
- Insolvency reforms;
- Covid-19 and contract management;
- Managing essential and statutory business activities, such as board meetings;
- Executing legal documents and social distancing.

Directors' Duties Overview

- The Companies Act 2006 codifies certain duties of a director. During the Covid-19 pandemic directors should be particularly mindful of their duty to:
 - S172 promote the success of the company; and
 - S174 exercise reasonable care, skill and diligence.

Duty to Promote the Success of the Company

- Section 172 of the Companies Act 2006 imposes a duty on directors to promote the success of the company for the benefit of its members as a whole and generally requires a director to:
 - consider the consequences of their decisions in the long term;
 - consider the effect of decisions on business relationships such as with suppliers, customers and employees
 - seek to achieve a balance between the need to ensure the survival and long-term success of the company
- If a company is insolvent or at risk of becoming insolvent then this duty is modified so that a director must act in the best interests of the company's creditors.

The Duty To Exercise Reasonable Care, Skill And Diligence

- Section 174 of the Companies Act 2006 states that a director must exercise the same care, skill and diligence that would routinely be exercised by a reasonably diligent person with:
 - the general knowledge, skill and expertise that may reasonably be expected of a person carrying out the same functions as the director in relation to the company; and
 - the general knowledge, skill and expertise that the director actually possesses.

Potential Liabilities for Directors

- Personal Liability - Article 176 the Insolvency (Northern Ireland) Order 1989 states that an action can be brought by a liquidator or creditor against a director of a company guilty of a breach of duty.
- Director Disqualification – a court may make a disqualification order against a director for a minimum period of disqualification of two years and for a maximum of fifteen years

Prudent mitigating steps for directors

- Hold regular board meetings to discuss the financial and trading position of the company and keep detailed minutes of same.
- Monitor and manage creditor pressure pro-actively.
- Engage with lenders and other key-stakeholders such as key customers, suppliers and shareholders.
- Check contracts for Force Majeure clauses.
- Check insurance policies.
- Seek and act on appropriate professional advice, including legal financial and others appropriate to the business.

Insolvency Reforms

Insolvency Reforms

- Changes to insolvency laws were announced by the UK government on 28 March 2020. Key highlights include:
- Temporary suspension of current Wrongful Trading provisions
- A moratorium for companies giving them breathing space from creditors enforcing their debts for a period of time whilst they seeks a rescue or restructure;
- Protection of supplies to prevent enforcement of certain insolvency related contractual termination clauses; and
- A new restructuring plan, binding dissenting classes of creditors to that plan.

Covid-19 and Contract Management

Force Majeure

- Force majeure is a term in a contract used to describe an event that is beyond the control of the parties, and which prevents them from fulfilling their contractual obligations.
- Does your contract contain force majeure provisions?
- Is the force majeure provision triggered by the impact of coronavirus?
- What are the consequences of force majeure?
 - An extension of time to comply with contractual obligations
 - Compensation for additional costs
 - Suspension of performance
 - A duty to renegotiate performance
 - Termination

Other Contractual Implications

- The Doctrine of Frustration
 - Has it become impossible to fulfil the contract?
 - High threshold
- Contractual provisions
 - Are there alternative clauses to force majeure that allow for additional time?
 - Is there a requirement to give an advance warning of anything that might impact on your performance under the contract?
- Contracts not yet entered into
 - Force majeure and Doctrine of Frustration are unlikely to be available.
 - COVID-19 is now a foreseeable event and the contract needs to expressly deal with its implications.

Managing Essential and Statutory Business Activity

General meetings and AGMs

- COVID-19 outbreak raises immediate legal and practical issues for companies who are due to hold their annual general meetings in the weeks and months ahead.
- The Chartered Governance Institute (CGI) has issued guidance to include:
 - Adapting the basis on which the AGM is held
 - Delaying convening the AGM
 - Postponing the AGM
 - Adjourning the AGM
 - Conducting a hybrid AGM

Board Meetings

- The Stay at Home Measures limit the ability of directors to hold board meetings in a physical form.
- There are no provisions in the Companies Act 2006 regulating board meetings, instead the procedure for calling and conducting board meetings is usually set out in the articles.
- Constitutional documents should be checked to see whether board meetings can be held by telephone or video conference.
- The key consideration is whether the meeting is quorate and effective.

Board Meetings: COVID-19 Guidance

- The choice of the right communication channel is vital
- Virtual meetings need to be well structured and avoid unnecessary complexity
- Ensure all necessary preparations for the meeting are in place
- The chair will need additional techniques to run an orderly meeting
- Ground rules for participants should be circulated to all those joining the meeting
- Clear instructions on accessing the meeting system or app are essential
- Good boardroom practices are even more necessary than for face-to-face meetings

Annual Reports and Accounts

- The Department for Business, Energy & Industrial Strategy (BEIS) and Companies House have announced that, in order to avoid penalties for late filing of accounts as a result of the coronavirus outbreak, businesses will be able to apply for a three-month extension to file from 25 March 2020.
- The Financial Conduct Authority (FCA), the European Securities and Markets Authority (ESMA) and the London Stock Exchange have also published statements relaxing some of the deadlines for listed companies and AIM companies to publish their financial reports.

Stamp Duty

- HMRC has announced that it has introduced a temporary electronic service to replace the usual Stamp Duty process.
- Stamp duty must now be paid electronically (cheques will not be processed) and the taxpayer must then email details of the transaction to HMRC, including an electronic copy of the document that would otherwise have been stamped.
- HMRC has stated that it will accept electronic signatures while these measures are in place. HMRC will send a confirmation letter by email.

COVID-19: Execution of Documents

Remote Execution Overview

- There are a range of legal considerations with the execution of documents in light of the COVID-19 pandemic.
- The following slides set out key considerations, such as:
 - Ensuring the person executing has the authority to execute
 - The remote execution of simple contracts
 - The remote execution of deeds
 - How documents can be witnessed remotely
 - Documents requiring the affixing of the common seal
 - Guidance for remote execution

Authority to Execute

- A contract may be held unenforceable if the person executing it does not have the relevant authority.
- Authority is not the same as capacity to enter into a contract.
- An authorised signatory may be required for the execution.
- Consider if there is an existing power of attorney in place that would permit an attorney to execute in the absence of an authorised signatory.
- Check constitutional documents to confirm the relevant authority for execution.

Execution of Simple Contracts

- With staff working from home, authorised signatories of the parties may not be able to be physically present to sign the same physical document.
- Documents can be executed in counterpart virtually or through electronic signatures.
- Care should be taken with transactions involving overseas parties. Different legal considerations may apply to execution by parties based overseas.

Execution of Deeds

- Deeds require compliance with specific formalities to be validly executed.
- Deeds executed by an individual must be witnessed. A witness should be physically present in the same location as the signatory and observe their signature.
- Mercury Case may assist

Documents ‘Under Seal’

- A company can execute a deed ‘under seal’ by affixing its common seal as authorised by the board of directors.
- Unless the company’s constitution provides otherwise, any document to which the common seal is affixed must be signed by a director and countersigned by the company secretary, a second director or another person appointed by the directors for that purpose.
- The company constitution documents should be checked to confirm the requirements.
- There is no electronic means for affixing a seal, however, companies can grant a power of attorney to one or more individuals to execute documents on its behalf.

Questions