

COVID-19: Considerations for businesses and directors



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Introduction

The effects of COVID-19 will be felt by all businesses regardless of size and regardless of sector. In these difficult and uncertain times what could stakeholders and directors be doing to recognise, manage and where possible mitigate this impact? This briefing is not intended to provide concrete steps, but rather offer guidance as to what businesses and business owners should consider undertaking.

Global Outlook

The COVID-19 pandemic is being felt worldwide with economists predicting that the world economy could return to 2009 levels of growth which makes for harsh reading. We have already seen Flybe become the first business victim of the impact of COVID-19 and it is unlikely that it will be the last. However, as with other risks currently facing businesses right now, such as the steep decline in oil prices and Brexit, these must form an important part of management's thinking and appropriate risk mitigation strategies should be adopted and implemented.

Immediate business impact – what could businesses be doing?

COVID-19 has caused disruptions to international supply chains, which will impact manufacturing and productivity, which will cause cash flow issues and which could result in forced cuts to a businesses' workforce and capital investments.

The longer the uncertainty or duration of current measures lasts, the higher risk of businesses entering into the realm of insolvency becomes. At this time, businesses ought to be considering some or all of the following:

- Is the business able to meet its existing contractual obligations? Do any existing contracts have the ability to be terminated?
- Does the business have a business continuity plan in place? When was this last reviewed?

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- Is the business in breach of any of its financial covenants with any lender? Can the business meet its existing debt arrangements?
- Does the business have any litigation exposure and if so should advice be sought and if appropriate Professional Indemnity Insurers put on notice?
- Are business decisions being clearly and carefully documented to ensure there is an adequate paper trail of why a particular course of action was reached?

When considering the above, businesses should consider undertaking some or all of the following tasks:

- Review the terms of contracts already in place – have any or could any events of default or insolvency events be about to occur; are there any force majeure clauses which could now be in operation?
- Communicating with business partners and customers of these contracts; most contracting parties are likely to be adversely affected by the current situation one way or another, as such one would hope that they would be accommodating in an attempt to minimise their own disruption.
- Ensuring all new contracts grant the business the flexibility it needs in times of restricted liquidity or economic uncertainty.
- Review the business's balance sheet and cash flow position with financial and legal advisors to identify whether there are any concerns about the business's solvency and if adopt and implement strategies to combat it.

When is it already too late for a business?

It can be difficult to determine the precise moment when a business is insolvent (particularly without the benefit of hindsight). If a business is on the cusp of insolvency or has already entered into an insolvent situation, business directors must ensure that they continue to comply with their duties (both statutory and common law fiduciary), namely to ensure they switch their mind-set such that they act with a view to the best interests of creditors (i.e. to minimise the loss to the company's creditors) rather than running the business with the best interests of shareholders in mind.

COVID-19: Considerations for businesses and directors cont.

At the time of writing this article there has not been any relaxation of this requirement by the Government of Jersey, although it is interesting to note that Australia the United Kingdom have recently done this and there is some expectation that Jersey will do likewise. Whether or not there is a relaxation or a temporary moratorium upon director liability for wrongful trading, business owners must ensure that the business decisions taken here and now will stand up to scrutiny. A confirmation that directors will not be personally liable if they continue to trade reasonably during this crisis will of course be significant relief to businesses and provide greater freedom to act in this fast moving and challenging environment.

This briefing is only intended to give a summary of the subject matter. It does not constitute legal advice. If you would like legal advice or further information, please contact us using the details below.

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