



Marriott Harrison

Covid-19 update

8 April 2020

MH COVID-19 UPDATE

Wednesday, 8 April 2020

The Covid-19 pandemic is creating unprecedented challenges for businesses across the world. We are working alongside our clients to provide updates on the issues you are facing as the situation unfolds. Below is a summary of the key developments – including UK Government response measures – from the following MH practice areas:

1. **Banking & Restructuring (pages 3-5)**
2. **Commercial (page 6)**
3. **Corporate (page 7-8)**
4. **Employment (page 9)**
5. **Property (page 10)**

The effect of Covid-19 on the business community and the legal and regulatory response to it is changing daily.

The content of this update is accurate as at the date of publication but may be superseded.

If you are unsure as to the latest position on any particular issue, please follow up-to-date governmental advice and feel free to contact a member of the Marriott Harrison team (see details on page 11).

Our Managing Partner has the following message for our clients:

“As the Covid-19 outbreak continues to evolve, I want to reassure you that our priority is to continue to provide quality service and advice to our clients while protecting the health and wellbeing of our staff and those with whom we work.

We have been following and will continue to follow the advice from the relevant government and health authorities and have successfully implemented a number of business continuity initiatives. In particular, our IT infrastructure enables our lawyers and support teams to work remotely. All our meetings will take place virtually rather than in person until further notice. In all other respects we are currently operating with minimal impairment to our service so please contact us as you normally would.

Thank you for your continued support.

We wish you, our friends, the very best through this challenging time.”



HUGH GARDNER
**MANAGING
PARTNER**

hugh.gardner@marriottharrison.co.uk
DDI: +44 (0)207 209 2042
M: +44 7767 477674

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I. Banking & Restructuring

Loan Schemes

On 3 April 2020, the Government announced a new Coronavirus Large Business Interruption Loan Scheme (CLBILS), in addition to the CBILS and the CCFF announced last month, to ensure more firms are able to benefit from government-backed support during this difficult time:

Changes were announced to **the Coronavirus Business Interruption Loan Scheme (CBILS): for companies with a turnover of up to £45m.** To further maximise the support available:

- The CBILS is being extended to ensure that all viable small businesses affected by COVID-19, and not just those unable to secure regular commercial financing, will now be eligible should they need finance to keep operating during this difficult time.
- Lenders are now banned from requesting personal guarantees for loans under £250,000. For loans over £250,000, personal guarantees will be limited to just 20% of any amount outstanding on the CBILS lending after any other recoveries from business assets. This will also apply to finance already offered under the scheme.
- The Government will continue to cover the first 12 months of interest and fees.

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I. Banking & Restructuring (cont)

Administration

Administration in the UK, either as a standalone process or in combination with other processes, acts as an essential tool to assist in the rescue of viable businesses.

Given the uncertainty businesses are facing in the context of the current pandemic, the flexibility of this process could be used to stabilise, protect, restructure and save otherwise viable companies that are struggling with the unavoidable effects of COVID-19 on businesses across the country and the world.

Administration as a debtor-in-possession procedure

The most notable and pragmatic use of administration in the current climate is as a debtor-in-possession procedure, using a document known as a consent protocol ("**Consent Protocol**"). Under *paragraph 64 of Schedule B1 to the Insolvency Act 1986*, administrators have a broad power to give consent to the continuing day-to-day management of the company by the existing directors under the administrators' supervision.

This giving of consent, and any associated conditions, will be governed by a Consent Protocol, which will provide a framework to allow the directors, who know the business, to play a central role in stabilising and rescuing the company with the assistance of the administrators. This procedure not only helps to keep administrative costs down, but does not require creditor approval or an application to the court.

This regime is intended to create long-term solutions to a hopefully short-term problem, with the primary objective of rescuing the company as a going concern.

If it proves to be possible to stabilise and preserve the company until the COVID-19 crisis has ended, it is anticipated that the administration can be supplemented by either a consensual arrangement, a CVA or Scheme of Arrangement in order to reach a compromise with creditors, reduce and/or extend the company's liabilities and secure the company's long-term viability.

Other uses of administration

- Administration and payment of creditors – administration can provide a flexible environment in which to make essential payments and to pause other payments in order to stabilise and protect the business and provide much-needed liquidity while a long-term plan is considered.
- Administration and new money – administration also offers a more flexible mechanism for getting money into the company. Administrators have the power to raise or borrow new money, and any debt or liability arising out of a contract which the admin enters into achieves a priority ranking over most of the company's existing liabilities.
- Administration and restructuring – to afford the company some breathing space to allow it to be stabilised during these extraordinary circumstances, as noted above the CVA and scheme or arrangement could be used in conjunction with administration for this purpose.
- Administration and Government measures – administrators may be able to take advantage of some of the financial measures announced by the Government, for example furloughing employees to preserve the value in the business and taking advantage of governmental grants. Coupled with the breathing space afforded to a company in administration, these measures could provide additional support and help stabilise businesses.

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I. Banking & Restructuring (cont)

The Temporary Insolvency Practice Direction 2020 (TIPD)

The Temporary Insolvency Practice Direction 2020 (TIPD) came into force on the evening of 3 April 2020 to assist court users during the current COVID-19 pandemic. It supplements the *Practice Direction – Insolvency Proceedings July 2018*, applies to all insolvency proceedings in the Business and Property Courts subject to certain variations outside London and will remain in force until 1 October 2020 unless amended or revoked in the meantime. The key points to be taken from the TIPD are as follows:

Filing a notice of intention to appoint an administrator (NoI) and a notice of appointment of an administrator (NoA)

- Subject to the below exceptions, where a **company, director or qualifying charge holder** uses CE-file to file an NoA, or where a **company or director** uses CE-file to file an NoI, the notice will be treated as delivered to court on the date and time recorded in a filing submission email. This is to reduce any uncertainty as to timing.
- If a filing submission email attaching an NoI or NoA filing made by a **company or director by CE-file** is sent outside the time period of 10am to 4pm on any day that the courts are open for business, the notice shall be treated as delivered to the court at 10am on the day that courts are next open for business. This is to ensure certainty regarding, firstly, the timing of an appointment following the filing of an NoA and, secondly, the commencement of the ten-day period in *paragraph 28(2) of Schedule B1 to the Insolvency Act 1986* following the filing of an NoI, which will be the date on which the courts are next open for business.

- All notices filed by CE-file will be reviewed by the court, as and when practicable, in accordance with *paragraph 5.3 of PD510*. The validity and time at which the appointment of an administrator is effective shall, however, not be affected by reason only of any delay in acceptance of the notice.
- Users are reminded that the procedure in *Rule 3.20-3.22 of the Insolvency (England and Wales) Rules 2016* in respect of **qualifying charge holders** still applies, and Electronic Working may not be used to file an NoA under *paragraph 14 of Schedule B1 to the Insolvency Act 1986*.

Remote hearings – insolvency hearings will generally continue to be conducted remotely.

Pending petitions and applications – pending petitions and applications (except for winding up and bankruptcy petitions) listed for hearing before 21 April 2020 will be adjourned and relisted, with further relisting envisaged. Special provision is made for urgent matters.

Winding up and bankruptcy petitions – these will continue to be heard in batches by remote hearings.

Urgent hearings – where one of the parties considers that a matter that has been adjourned is urgent, they may apply to have it re-listed.

Statutory declarations – provision is made for statutory declarations to be made by video conference.

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2. Commercial

Variation of Contracts

The global pandemic is putting pressure on businesses and their ability to satisfy their contractual obligations. While some businesses may be able to continue performing their contractual obligations during the Covid-19 crisis, others will see their industry disrupted and will find themselves unable to do so.

To get around the difficulty or inability to perform their contractual obligations, some businesses might be tempted to terminate a commercial contract or to invoke force majeure clauses so they do not have to perform their obligations where it is difficult or impossible to do so (please see [here](#) for our Covid-19 update published on 1 April 2020 for more information on force majeure clauses).

However, often the best approach is to discuss the issues under the contract with the other party, renegotiate parts of the contract and agree appropriate variations. Such negotiations should be conducted on a 'without prejudice' basis.

Varying a contract is useful for business continuity and preserving commercial relationships.

When negotiating variations to a contract, the parties should consider the following key points:

1. **Binding variations:** for the variations to be valid and legally binding, the parties must comply with any contract variation requirements under the original contract, such as for variations to be in writing and signed by each party to the original contract. Some contracts will have more detailed 'change of control' clauses which must be strictly followed.
2. **Knock-on effect:** the variations to the contract could have a knock-on effect on other provisions of the contract, other contracts related to it or to the overall project. Where there is such an effect, the variations will need to be reflected elsewhere in the supply chain or in other relevant contracts. For example, where a party has entered into a loan agreement to borrow funds for a specific commercial contract, the variations to the contract might need to be reflected in the underlying loan agreement.
3. **Avoid 'agreements to agree':** the parties may be tempted to acknowledge that variations to the contractual obligations are required but leave the details for later. However, an 'agreement to agree' is not legally binding so the parties must, as far as possible, agree all the details to the variation up front.
4. **Third party rights:** where third parties have rights under the original contract, their consent may be needed to validly amend its terms. The parties must check the third-party rights clause carefully.
5. **Sign as a deed:** contract variations usually need to be signed as deeds to be valid and legally binding (please see our Covid-19 update [here](#) for more information on how to sign a deed during the quarantine period).
6. **Time limit:** the parties should agree whether the variations will be in any way limited so that they only apply for a limited period, or whether they will stay in effect even after the crisis ends.

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3. Corporate

What are the UK government's plans for start-ups?

The European Commission has approved a temporary relaxation of EU state aid rules in the form of a £50 billion “umbrella” scheme to support UK businesses affected by the Covid-19 outbreak. The scheme was approved under the state aid Temporary Framework, which allows member states to offer a limited amount of aid on a short-term basis to businesses facing cash flow problems. While the UK has now left the EU, it continues to adhere to EU rules during a transition period which will last until at least the end of 2020.

The measure allows UK authorities at all levels, including central government, devolved government and local authorities, to provide aid to businesses in the form of grants, equity injections, tax advantages, loans and support for coronavirus-related projects. It is aimed at SMEs as well as large corporates.

However, the measure is not start-up specific, and many early stage companies are effectively blocked from accessing such schemes as they are not yet profitable. In addition, aid can only be granted to businesses that were not in financial difficulty at the end of 2019. This has prompted key players in the tech sector to argue that the UK needs to go further in supporting start-ups, many of which are not yet profitable, rely on market-sensitive angel investors and seed and venture funds for liquidity and could collapse in the face of the Covid-19 pandemic.

Various leading industry bodies have lobbied the government for a so-called £300 million ‘runway’ fund, which would provide convertible loan notes to early-stage businesses with the aim of supporting at least nine more months of operations at which point the peak of the pandemic and its immediate economic damage would hopefully have passed. The loans would then convert into equity in the next funding round. France has already launched such a fund and we understand the UK government is in advanced stages of forming a proposal to implement a similar scheme here.

The debate raises an interesting question about the role of government and whether it should be using public money to, effectively, become a venture capital investor. And why should emerging companies, predominately in the tech sector, be favoured with a specific programme when many other small businesses are also suffering? That said, we hear anecdotally that investors are focusing on their current portfolios and have little appetite to make new investments in this climate. A runway fund might be the only way to save an industry in which the UK is a global leader and, in the process, could provide a much-needed boost to entrepreneurs, employment and tax revenue.

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3. Corporate (cont)

Temporarily revised stamp duty processes

HMRC has announced temporary changes to its guidance on stamping stock transfer forms and paying stamp duty due to measures put in place to stop the spread of Covid-19.

Stock transfer forms and other transfer instruments should now be sent by email to **stampdutymailbox@hmrc.gov.uk** rather than posted. HMRC will accept e-signatures on forms or instruments while this measure is in place.

Rather than the stock transfer being stamped, HMRC will issue a letter confirming that stamp duty has been paid. If a Companies House filing then needs to be made that would usually require evidence of payment of stamp duty (for example, in relation to a buyback of shares), a copy of the HMRC confirmation letter must be submitted to Companies House in place of the stamped stock transfer form.

Payments of stamp duty must also be made electronically and, once payment has been made, details of the transaction must be sent to HMRC by email rather than by post. Payments by cheque will not be banked until the temporary measures end.

If you have already made submissions by post recently, you should consider resubmission using the appropriate electronic channels as set out above in order to avoid further delays in completing the stamping process.

The usual penalties for not paying stamp duty on time remain in place.

The Marriott Harrison Corporate team have welcomed these changes and our experience so far is that the new process is user friendly and more efficient than the traditional method of posting transfer instruments to HMRC.

HMRC has stated that this guidance will be updated when the measures end. It remains to be seen whether electronic submission of stock transfer forms will be made permanent, but we would certainly support such a move.

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4. Employment

Key employment measures

Our full, regularly updated employment coronavirus briefing was last issued on 7 April 2020 and is available [here](#).

The briefing is accurate as at the date of publication, but please note that the situation is changing daily.

The 7 April 2020 briefing reflects new government guidance about how the Job Retention Scheme will work.

The key updates are that:

- employees can be furloughed more than once each, subject to the three week minimum. This means that an employer could rotate which employees are furloughed;
- directors (including non-executives) can be furloughed where it is in the company's interests to do so and there is an exception to the 'no work' rule so that they can comply with their statutory duties, such as filing accounts;
- employers must be registered for PAYE online in order to submit claims for reimbursement (although specific details of how and where to claim are not yet available);
- employees can be furloughed from more than one job and can potentially claim up to the £2,500 limit for each job if furloughed by both (if they have more than one job); and
- employees can get a new job whilst furloughed (if their employer allows them to) and any sums they earn from the new job won't reduce their furlough pay.

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6. Property

This note looks at some of the themes and questions we have seen in the last week.

Rent Payment

A commercial lease will not allow the Tenant to set off or withhold rent and its rent suspension clause is most unlikely to come into play because there is no damage to the Property. On the face of it therefore Tenants are obliged to continue paying rent. Anecdotally we have heard that 70% of office Tenants have paid some of the rents that fell due on 25 March. It seems clear that the vast majority of (paying) Tenants have moved to monthly payments and that there are many ongoing discussions relating to deferred rent, rent frees or reduced rent. Different Landlords have different approaches, factors include sector, the size of the Landlord, whether the Landlord has a mortgage and the turnover of the Tenant.

Service Charge

Landlords will budget their Service Charge and collect on account payments quarterly. Many Landlords are expecting the Service Charge to be paid in full. Logically over the year it is likely to fall as the running costs of the building are likely to be lower than budgeted.

Can a Landlord lawfully close their building/ block the Tenant's access cards?

For a non-food retail shop in a shopping centre or located within a larger shop then the answer to this is almost certainly yes.

But we are aware of at least two office providers who have done this. We are advising on whether this is a breach of the Landlord's covenants which then allows the Tenant to either end the lease or to be relieved from paying rent. Watch this space.

Insurance

A tiny handful of Landlord's insurance policies may provide some loss of rent cover. We are helping one client make a claim in respect of retail and restaurant units.

Business Rates

There is some debate as to whether offices that are not currently occupied because of the lockdown qualify for empty business rates. The general view, at present, is that because all personal files, effects, etc remain in the office and that as soon as the lockdown is lifted the office could be reoccupied such a claim would not succeed. Nonetheless, it seems pretty certain that someone will try and we are aware of serious lobbying on this point.

Leases going forward

One point being discussed now is how might new leases deal with a future lockdown? Might they provide for rent suspension/termination? It is very difficult to decide what the correct answer is as everyone affected is "innocent". Will insurers be prepared to underwrite the risk? If so – at what cost and subject to what exclusions? Many Landlords are our pension companies, others have mortgages they have to pay but should it be just the Tenant who bears all the risk? Again, watch this space.

Conclusion

If you have any comments or questions, please do contact us (see details on page 11).

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The Marriott Harrison Covid-19 Team



ANDREW ROSS
**PARTNER -
CORPORATE**

andrew.ross@marriottharrison.co.uk
DDI: +44 (0) 207 209 2033
M: +44 7711 154563



BRETT ISRAEL
**PARTNER -
BANKING &
RESTRUCTURING**

brett.israel@marriottharrison.co.uk
DDI: +44 (0)207 209 2007
M: +44 7713 620573



CHRIS MOONEY
**PARTNER -
COMMERCIAL**

chris.mooney@marriottharrison.co.uk
DDI: +44 (0)207 209 2030
M: +44 7973 931531



TAMAR HALEVY
**PARTNER -
DISPUTE
RESOLUTION**

tamar.halevy@marriottharrison.co.uk
DDI: +44 (0)207 209 2048
M: +44 7900 198742



BOB MECRATE-
BUTCHER
**PARTNER -
EMPLOYMENT**

bob.mecrate-butcher@marriottharrison.co.uk
DDI: +44 (0)207 209 2017
M: +44 7471 953174



MARK LAVERS
**PARTNER -
PROPERTY**

mark.lavers@marriottharrison.co.uk
DDI: +44 (0)207 209 2013
M: +44 7803 969035