



CORPORATE AND COMMERCIAL

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# COVID-19: What Companies Need to Know to Reduce Insolvency Risk

by **Jill Callanan, Clare Dowling**

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Covid-19 is top of the agenda for businesses globally — and for good reason.

It has now been classified as a worldwide pandemic and numbers of those affected are on the rise each day. It has already had some devastating effects on the markets and now with some countries being on complete lockdown, issues such as survival of businesses and trading while potentially becoming insolvent need to be seriously considered by companies and their directors.

This article sets out some points for companies to consider so as to ensure that their business is fully prepared for what may be coming down the tracks in terms of wider ramifications of Covid-19. It is by no means clear what the impact of Covid-19 will be and how long into the future the ramifications of this pandemic will resonate, so it is essential that all businesses consider how to best protect and minimise the effects of Covid-19.

## 1. Review key contracts:

At this stage, it would be wise to review key contracts in place whether the company is the entity supplying the service/goods or receiving the service/goods. Depending on a company's current predicament, it would be useful to then form a view on how the terms will or will not assist it.

## 2. Does the event fall within the meaning of a force majeure event?

A force majeure clause in a contract allows a party to terminate that contract where an event has occurred that is outside of that party's control. A force majeure clause typically does not cover events that could have reasonably been avoided or overcome by the party seeking to claim relief. This means that the non-affected party may insist that the affected party should have implemented business continuity or serious incident planning appropriate to its circumstances. With Covid-19, this may include the affected party following government recommendations.

## 3. Performance of contractual obligations/Frustration of contracts:

If the contract does not contain a force majeure event, a party could still claim that they are entitled to terminate the contract as it has been frustrated. However, it can be difficult to succeed with a claim for frustration on the basis of an ability to pay under the contract.

## 4. Insurance cover:

A company may have insurance cover for some of the losses that may arise from Covid-19. The types of coverage that may be available include business interruption, employee compensation, public liability. It would be prudent for companies at an early stage to conduct an analysis of their insurance policy so as to ascertain what coverage may be available. Consideration also ought to be given to specific notification requirements.

## 5. Duties of directors and senior managers and trading difficulties:

Directors have a number of statutory duties under company law to include acting in good faith and in the best interests of the company and to act honestly and responsibly in relation to the affairs of the company. Directors need to also bear in mind that there is a risk of personal exposure for directors should they cause the company to continue to trade in a reckless or fraudulent manner whilst the business is considered to be insolvent. In the course of the coming weeks, difficult judgment calls and particular course of actions involving, for example, the ability to perform contractual commitments and repay debts as they fall due, will arise and all decision making should be very clear and well documented.

## 6. Consider insolvency risks:

In the event a company is finding itself in a situation where insolvency risks are becoming apparent it should consider the following matters:

- consider finding alternative suppliers,
- tightening credit terms including retention of title clauses until payment has been made
- renewing efforts to collect any payment arrears
- the impact of other companies in the group entering into insolvency, in particular access to vital assets (IP, IT, Employees, etc)?
- ability to meet payment obligations as they fall due and any steps a company may need to take to manage its cash.

## 7. Examinership option

If a company is getting to the stage whereby it is trading while insolvent though still has a prospect of survival, examinership would be an option to be considered. It affords a business breathing space from its creditors for a period of up to 100 days and thereafter, the opportunity to emerge from the brink of liquidation to becoming a viable business again.

### In Conclusion

Covid-19 is a fast-evolving situation and the impact of it is not yet fully known. As is apparent from early information, it is clear that its effects will be far-reaching and may have a negative impact on the sales and profit levels of many companies over the coming weeks and months particularly industries reliant on the international supply chain.

All organisations should conduct an early-stage risk analysis of the issues identified above and ensure that they have a plan in place to minimise the potential operational and financial implications of Covid-19.

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For further advice please contact [Jill Callanan](#) or [Clare Dowling](#).

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