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Kernel

The Scotland Food and Drink Bulletin

Summer 2020

Kernel

Welcome to the latest issue of Kernel, our Scotland food and drink bulletin. In Kernel, we examine current legal issues affecting the Scottish food and drink industry and provide bite-size articles on key developments.

In this issue, we consider the following:

— Workforce issues in the COVID-19: a new normal?

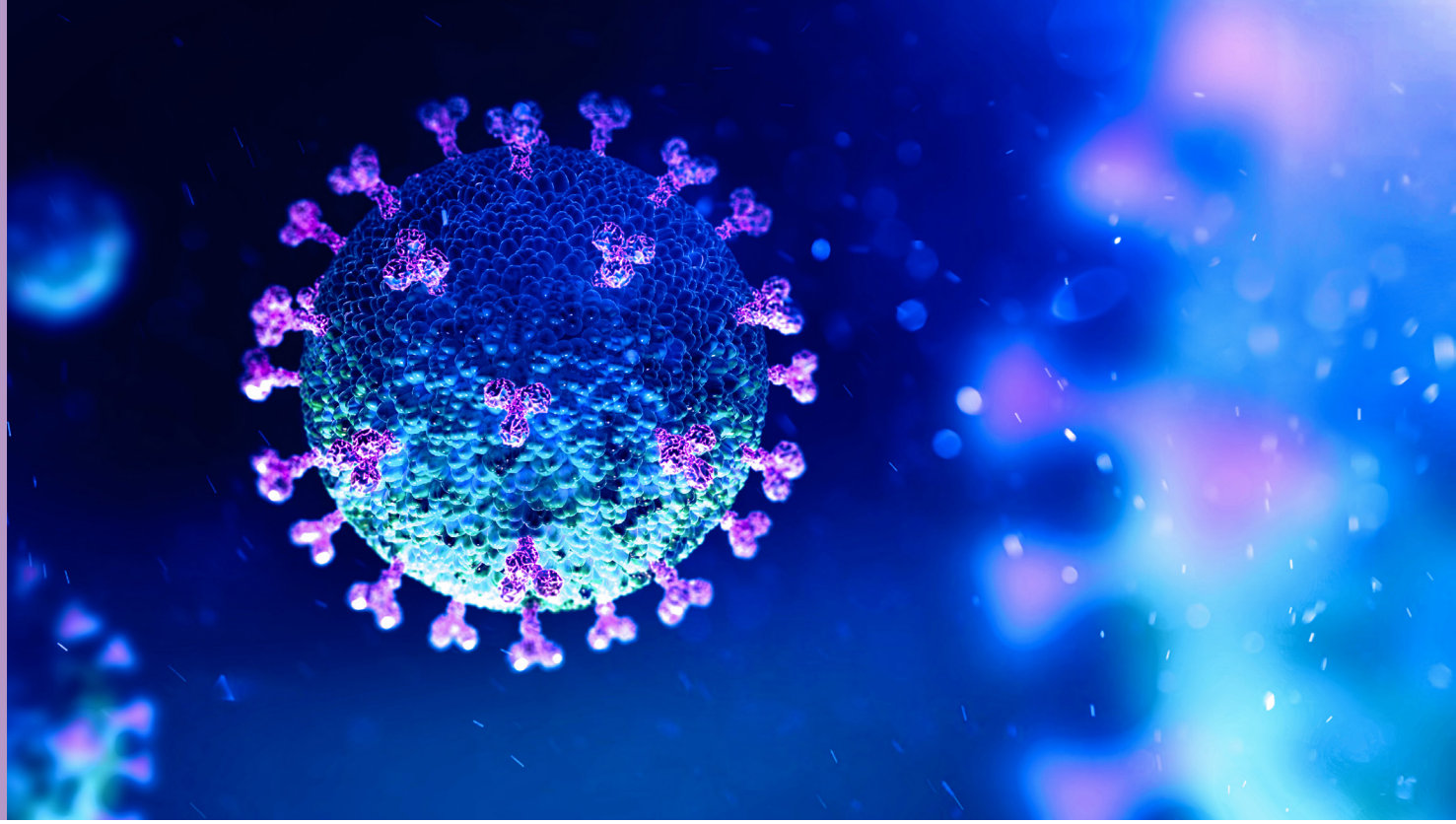
— Borders kombucha brewer basking in 'elixir of life'

— Impact of COVID-19 on CBD food businesses

— Power in the collective – why greater industry collaboration could assist food and drink brand protection

— Play nicely and be kind? Contracts in the time of Covid-19

If you would like to discuss any of the articles in this edition of Kernel or wish to provide any feedback, please contact Alison McCartney at **alison.mccartney@cms-cmno.com**



Workforce issues in the COVID-19: a new normal?

What a year 2020 has been so far. Back in January few of us could have imagined how every part of life would be turned upside down in such a short space of time. The uncertainty and potential impact of Brexit topped the list of worries of most employers at the start of the year. If only we had known what was to come…

The sudden nature of the lockdown imposed on 23 March brought many businesses to a halt. Suddenly, employees were prohibited by law from travelling to work and undertaking their duties. Employers were left in an extremely difficult position, but found solace in the coronavirus job retention scheme, which has come to be known as the "furlough" scheme. This unprecedented scheme allowed employers to claim 80% of the wages of employees who were required to take a temporary leave of absence due to the impact of the coronavirus crisis. To get a sense of the scale and cost of the scheme, as of 31 May 2020, 8.7 million employees had been furloughed and £17.5 billion had been claimed. The food and drink sector, and especially the hospitality arm of the sector, has been particularly hit and the scheme has been a welcome lifeline for businesses in that space, although plans to wind down the scheme have now been announced.

Now that we have been through the initial shock of the lockdown and things are starting to ease off, the question is how food and drink businesses can adapt their workforce to meet the challenges (and opportunities) in the months to come. How can employers adapt to the "new normal"? Together with making use of the furlough scheme described above, we have extracted a few key themes for businesses to keep in mind.

Flexibility

Forecasting demand is crucial for any business. This is a particularly difficult exercise given the uncertainty around how fast we will unlock, and how quickly the public demand for hospitality and leisure will build back up again. The furlough scheme was initially in binary terms – an employee who was furloughed was not permitted to undertake any work for the employer for the duration of the claim period. An employee was essentially either furloughed, or at work.

In order to address this, the government has included a level of flexibility from in the scheme 1 July 2020 that will allow for part time working whilst making claims for hours when the employee is not at work. From 1 July 2020, employees are allowed, for example, to work 60% of their usual hours and a claim can be submitted for a proportion of the pay for the balance of the time which the employee will spend on furlough.

Employers are required to document this arrangement in an agreement and record the hours worked for the purposes of making a claim. It is hoped that this flexibility will support businesses in a phased re-opening so that costs are balanced against a level of demand that may initially be fairly low.

Safety

Public confidence is likely to be key in securing the demand necessary to support food and drink businesses. Putting appropriate safety procedures in place, and training staff on those procedures, will be an important part of creating a safe and positive environment that is so central to the hospitality arm of the sector.

The public facing nature of the sector means that employees might perceive themselves as being at greater than average risk of contracting coronavirus at work. In response, large restaurant chains such as Wahaca have announced plans to introduce an app platform for orders, PPE for staff and new stringent recommendations in relation to hygiene. We expect other employers to follow in this direction, partly for consumer confidence reasons but also from an employee risk management perspective. All employers are required by law to provide a safe place of work and are required to comply with certain health and safety standards and employees who have a legitimate health and safety concern are entitled to decline to perform their duties and are protected against dismissal as a result.

As we unlock it is likely that new measures such as strict social distancing, limits on capacity, the provision of PPE and stringent hygiene routines will be the norm for most workplaces, particularly in the food and drink sector. Employers should keep up to date on requirements and recommendations from government and engage with their workforces to ensure an understanding of the assistance available to employees to ensure that they are safe at work, together with the expectations of them to support a safe environment for both colleagues and customers.

Engagement & Forward Planning

The pace of unlocking is a source of significant uncertainty. Different parts of the UK are unlocking at different speeds and we have seen an apparent acceleration of the unlocking process in England recently. In order to adapt to the pace of change, it may be necessary to call upon parts of the workforce at short notice. In the event of a resurgence of COVID-19 and the reintroduction of lockdown measures employers will need to respond quickly in terms of taking advantage of any available assistance including further claims under the furlough scheme and making use of any available reliefs. It is worth bearing in mind that the furlough scheme is due to be wound up in October, with the employer being liable for employer pension and national insurance contributions from August,

We therefore recommend having workforce plans in place to deal with both an acceleration of the unlocking process and the impact of a second lockdown. Where employee representative bodies are in place we recommend engaging with them in relation to these plans so that forward planning can be taken forward taking into account the interests of all stakeholders. Engaging with employee representative bodies with the forward planning process is likely to assist in fostering positive employee relations which could assist in the difficult process of collective redundancy consultations, to the extent that redundancies are required in the economic aftermath of the crisis.

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Borders kombucha brewer basking in ‘elixir of life’

A Borders-based couple is building a thriving business on the back of the growing consumer demand for ‘grown-up,’ non-sugary non-alcoholic drinks.

Husband and wife team, Geraint Roberts and Jo Easingwood Roberts, launched Left Field Kombucha in 2016 becoming the first to brew kombucha tea in Scotland. After diversifying their product offering and expanding UK distribution, the company is about to enter Europe.

Known as the ‘elixir of life,’ kombucha is an ancient form of fermented tea with origins from the Far East. As part of a solution containing sugar and water, the tea undergoes a natural biological process to convert the sugars into beneficial organic compounds producing a vibrant and healthy non-alcoholic beverage. Little wonder it’s become extremely popular in the US over recent years and is now gaining traction with European consumers.

Born in Wales, Geraint is the brewer behind Left Field Kombucha. He trained as a brewer at Sharp’s in Cornwall but then later changed careers to become a management accountant. When he met Jo she had a successful career as a charities consultant. After working down south for a number of years the couple returned to settle in Jo’s hometown of Eyemouth. While expecting their second child, they developed an interest in alternative non-alcoholic drinks and within months they launched the business, initially producing draft kombucha from a home-based brewery.

“We took a pioneering approach,” says Jo. “Tea is the star attraction within our product and we developed different flavours to suit individual tastes, without adding flavours or spices which is unusual in kombucha. We create a natural and healthy product which provides a great alternative to alcohol. Soft drinks are never an ideal

match for food whereas kombucha offers a really grown up alternative and it is ideal with so many dishes, for example, our Darjeeling kombucha with curry."

The draft product was initially sold at outdoor markets and to a number of bespoke bars. Geraint and Jo soon began to produce bottled kombucha while increasing their brand presence across the UK. Left Field Kombucha now produces four different flavours. Among their growing number of industry accolades for their products was the recent win at the Scotsman Food and Drink Awards, proudly supported by CMS, where they took honours in the Most Innovative New Product category.

In Scotland their kombucha can now be found in premier establishments such as Glasgow's Ubiquitous Chip; the Scottish Café on the Mound; Ondine and David Bann's restaurant in Edinburgh; and, more locally, at the Rialto Café on Eyemouth's High Street. The also sell across the UK direct to consumer.

Along with Geraint and Jo, the company has so far taken on two additional employees: one focused on sales and the other in brewery operational support. They currently work with two distributors in Scotland and another covering the rest of the UK.

Left Field Kombucha entered the European market for DC2 (direct to consumer) and beyond in mid 2020 with initial agreements being finalised to supply draft product with outlets in in Amsterdam and Prague. "Our focus is on sustainable, organic growth," says Jo. "That is based on finding the right partnerships that fit with our product."

As a Scottish-based quality food and drink producer the Roberts' are also keen to represent 'Scotland the Brand.' The business is already linked to the Scotland Starts Here campaign, aimed at boosting tourism in the Scottish Borders. As the first kombucha brewery in Scotland, they have ambitions to open a visitor experience within the Eyemouth brewery they built. "Eyemouth has a rich history as a tea smuggling port," says Jo. "We want to link into this and be part of an experiential offering."

This community approach to building a successful business is as inspiring and refreshing as their award-winning product which the Roberts' aim to promote to a growing international marketplace.

Impact of COVID-19 on CBD food businesses

The coronavirus ("**COVID-19**") pandemic has driven online consumer shopping in the wellbeing sector in a bid to find products that will protect against, and help manage the symptoms of, COVID-19. Food products that claim benefits such as increased auto-immunity and stress relief have seen huge spikes in sales. This is good news for food business operators ("**FBOs**") including those in the cannabidiol ("**CBD**") arena.

CBD products are increasingly used by consumers seeking alternatives to modern pharmaceuticals to treat a range of ailments, such as: anxiety, chronic pain, inflammation, sleep problems and depression. The three main CBD products within the European ("**EU**") market are ingestibles, topicals and vaping, with food products and oils accounting for the majority of sales. There are already a wide variety of CBD food products available, including confectionery, bakery products and drinks.

No delay to UK novel foods deadline for CBD products

Nevertheless, the UK Food Standards Authority ("**FSA**") recently confirmed in a meeting with the Association for the Cannabinoid Industry that despite the impact of COVID-19, there will be no delay to the deadline for FBOs to submit novel foods applications for CBD products.

In January 2019, CBD was added to the EU Novel Foods Catalogue, meaning all food products containing CBD require pre-market authorisation to be placed on the EU market. Enforcement of the Novel Food guidelines for CBD has not been consistent across the EU, with Spain and Austria removing all CBD products from the shelves, but Germany and the UK still allowing the products to be sold.

In response to the inconsistent treatment of CBD products in the EU, the FSA set the industry a deadline of 31 March 2021 to submit valid novel food applications for products already on the market. Businesses can continue to sell their existing CBD products during this time provided they are not incorrectly labelled or unsafe to eat and do not contain substances that fall under Misuse of Drugs legislation (i.e. THC). After this deadline, only products which have submitted a valid application will be allowed to remain on the market.[1]

The decision by the FSA not to delay the deadline may be influenced by increased concerns around the risks that come from an expanding, but to some extent unregulated, industry. Recent studies of the CBD sector have identified inaccuracies with product ingredients and in some cases, the prohibited psychoactive compound THC has been found within products, highlighting the need to establish recognised levels of quality control. Growing public concern around safety and efficacy can therefore be addressed through the novel foods process.

Food Standards Scotland ("**FSS**") has not set a similar deadline but states that it "*is working with local authorities and other partners to keep the safety of CBD food products currently on the market under review, and to ensure that products stating they contain this ingredient do so. Currently there are no CBD extract products authorised as novel foods and those products currently on the market are in contravention of the novel food regulations. It is important, therefore, that you take immediate action to gain authorisation as a novel food in relation to any CBD extract products you sell, or plan to sell in the future. Otherwise, you should seek assurances from your suppliers/manufacturers that they have done so*".[2]

1 This applies in England, Wales and Northern Ireland only. Novel food regulation in Scotland is covered by Food Standards Scotland.
2 https://www.foodstandards.gov.scot/business-and-industry/safety-and-regulation/novel-foods-regulation/cannabidiol-cbd

Where does this leave CBD food products?

By giving CBD manufacturers over a year to submit a novel foods application for products already on the market, the FSA are providing a path to compliance, whilst still allowing consumers to continue to purchase products in the interim. However, businesses may want to consider preparing novel food applications now, with the aim of submitting applications this autumn, to ensure that the FSA considers them to be valid.

At the end of April 2020, it was reported that Mile High Labs submitted an EU novel foods dossier to the European Food Safety Authority ("**EFSA**") for its CBD isolate. The business hopes that compliance will help move CBD further into the FCMG mainstream. It will be interesting to see how many others have made the same choice – and indeed how long it will take for the applications to be assessed.

Neither the FSA nor EFSA have indicated how COVID-19 will impact on time frames for processing any novel food applications. Before the pandemic, the process would be well over a year and it seems likely that applications will now take longer to process – although for the UK market, this may prove a key opportunity for the FSA to take a different approach when it becomes responsible for novel food applications at the end of the Brexit transition period.

For FBOs grappling with these choices, the dilemma remains whether to invest the time and expense now to prepare and submit an application to both EFSA and the FSA (for the UK market) but face potential rejection, or to wait (however long) and see how the front runners fare - at the risk of being left behind.

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Power in the collective – why greater industry collaboration could assist food and drink brand protection

As businesses look to move to the recover from the devastating effects of the recent pandemic, protection of their brand is something that should be high up on the agenda. For many food and drink brands, their name, logo and identity are a major part of what makes them successful. But what about situations where it is not so much an individual brand as a type of food or drink that is under threat of being misrepresented?

For example, when is Sourdough bread not Sourdough bread? When is Scottish Gin not Scottish Gin? And when is Scotch Whisky not Scotch Whisky? Unfortunately for some, only the third question is presently capable of being answered. The reason for the apparent lack of clarity as to what truly constitutes Sourdough bread or Scottish Gin is due to the lack of statutory or legal definition for either product.

In contrast, Scotch Whisky is protected by the Scotch Whisky Regulations 2009. Only Whisky which conforms to the exact requirements set out in those regulations can be called "Scotch Whisky". Any product which does not meet that specification cannot be classed as "Scotch Whisky". Manufacturers of such products are liable to action by the Scotch Whisky Association ("**SWA**"), the trade organisation that represents the Scotch Whisky industry if they try to label it as such. The SWA do a tremendous job worldwide in policing the relevant regulations and as such the integrity of the "Scotch Whisky" brand is preserved and protected on a global scale.

However, unlike the Scotch Whisky industry where the objectives and statutory definitions are all agreed, other industries are not similarly aligned. Late last year, a collection of Bakery trade bodies presented the Department for Environment, Food and Rural Affairs ("**DEFRA**") with a proposed 'UK Baking Industry Code of Practice for the Labelling of Sourdough Bread and Rolls'. The collective group wanted to "clarify the term and prevent misinformation when it is applied to products in the UK bakery market". However, others within the industry, were not so keen on such an approach and the Real Bread Campaign (a group set up by the charity Sustain) said: "We believe that the industrial loaf fabricators' proposed code undermines the integrity of the word sourdough with muddled meanings that would make things more, not less, confusing for shoppers."

Similarly, there have been issues surrounding "Scottish Gin". There is no doubt the Scottish Gin industry has been booming for last few years. It has been reported that around 70% of the UK's gin comes from Scotland. Such is the success of the Scottish Gin market that many gin manufacturers want their products to be associated with Scotland and to take advantage of the tremendous reputation that Scottish Gin enjoys. However, the lack of

statutory definition has allowed a number of distilleries and manufacturers with some loose connection with Scotland to label their products as "Scottish Gin".

So how can Scottish Gin and Sourdough Bread manufacturers benefit from similar protection to that enjoyed by the Scotch Whisky Industry? The answer is not straightforward.

Effectively, both the Gin and the Sourdough manufacturers would need to set up their own singular trade organisations, similar to the SWA whose aims and objectives would be to protect the integrity of their relevant industries. Once those bodies were set up, they would then require to consider how their products could be protected

It is unlikely that Scottish Gin and/or Sourdough Bread would be given a statutory definition. Clearly persuading the Government to pass legislation is not straightforward and there must be significant doubts that (despite the growth and strength in each industry) either has enough power to persuade the Government to implement the relevant laws at the present time.

A singular registered trade mark for either "Sourdough" or "Scottish Gin" will not be the answer either, as both industries are a collective of various manufacturers none of which would want the trade mark to be owned by one singular company.

One option open to both industries (and other industries who are in similar positions) is to explore Collective or Certification trade marks. Collective marks distinguish the goods and services of a group of companies or members of an association from those of competitors. Collective marks can be used to build consumer confidence in the products or services offered under the collective mark. Often they are used to identify products which share a certain characteristic. Collective marks can only be used by members of the relevant trade or member association that owns the collective mark. In contrast Certification marks can be used by any legal or natural person so long as the goods the mark is being applied to fits within the certain specifications, which are normally set out in accompanying regulations to the mark.

Essentially however, both Collective or Certification marks would provide certain protections to safeguard the Sourdough and Scottish Gin industries. A significant issue which would likely have to be overcome would be which body or organisation would own the relevant collective or certification mark. If/when the marks were registered, there would then need to be further resource in policing them to ensure they are not being misused.

It is clear however, that protecting types of goods such as "Sourdough" or "Scottish Gin" is not straightforward and requires collaboration across the various industries. There have been numerous stories of businesses banding together to try and help each other recover at a time of significant financial uncertainty for the benefit of the "greater good". If progress is to be made, competing companies may just realise their collective power far outweighs the sum of the individual organisations.

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Play nicely and be kind? Contracts in the time of Covid-19

Businesses in almost every sector are facing challenges brought about by the unprecedented operational climate in light of the Covid-19 pandemic: those acutely affected include those operating within the food & drink sector.

Operators across the sector are having to consider whether and how to meet their contractual obligations and respond to any short-comings in the performance of others. Against this backdrop, the UK Government published guidance seeking to persuade parties to act reasonably, fairly and proportionately, in order to adopt a new approach to disputes that avoids, where possible, commencing legal proceedings. However, whilst it is certainly well-intentioned, does such guidance actually help parties avoid disputes?

The pandemic appears to have had an immediate impact on the number of new disputes filed before the courts both north and south of the border. That can, in part, be explained by businesses having more pressing immediate issues to contend with, restrictions of the progression of civil business by the courts during the pandemic and the practical limitations of a lockdown. An increase in litigation is usually seen after a crisis rather than in the depths of it. It is, therefore, too early to tell what appetite there will be for COVID-19 contractual issues to be 'worked-out' through the courts.

However, contract law exists to provide certainty, protect parties, and hold others to their contractual bargains. Often, the terms of a contract reflect a carefully negotiated allocation of risk. An unfortunate consequence of the pandemic is that a risk to which little regard was likely to be had at the point the contract was negotiated, may now be having a profound effect on either or both parties. The law, and the right to recourse to courts, however, exists to allow access to justice and to "keep the wheels of commerce running smoothly". In some cases early recourse may be necessary to secure ongoing performance, stave off insolvency and, potentially, avoid redundancies. If a contractual right exists, it will usually be responsible for a party to enforce it, often for wider reasons than the performance of the contract itself.

Whilst it is generally a good thing to avoid disputes where possible, that is not always possible. In the light of the new guidance, parties seeking to avoid contractual obligations may now reach for additional arguments to position themselves pre-litigation.

The Government Guidance

On 7 May 2020, the Cabinet Office published guidance on '*responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid-19 emergency*' ("Guidance"). The Guidance is stated not to be legally binding and does not apply in the devolved administrations (Scotland, Wales and Northern Ireland).

The stated purpose of the Guidance is to ensure that businesses that are parties to contracts engage in "*responsible and fair behaviour*". The Guidance lays emphasis on such behaviour particularly in "*dealing with potential disputes*". In that regard it includes a list of 15 points in relation to which responsible and fair behaviour is "strongly encouraged". Those points cover almost every issue that can be foreseen to arise in the operation of a contract, including:

— relief for impaired performance and exercising remedies in that regard;

— extensions of time;

— payment;

— damages (including liquidated damages clauses);

— events of default and termination rights;

— giving notices and contractual variations;

— dispute resolution procedures (including court proceedings), mediation or other ADR or fast-track dispute resolution; and

— enforcing judgments.

It is apparent from the wording and tenor of the Guidance that the UK Government expects parties to take a measured and proportionate response to potential contractual disputes during this time. That approach is in many respects well-founded. In practical terms, most businesses are likely to adopt such an approach without Government guidance since maintaining contractual relations is likely to be in a party's long-term interest before rushing to act on a short-term default. It will now be prudent for businesses to consider the Guidance as part of their decision making. However, parties should also bear in mind that the status of the Guidance is made clear at various points as being "*guidance and recommendations*", "*guidance only*" or "*non-statutory guidance*". The Guidance also makes clear that such responsible and fair behaviour applies to contracts "*where there has been a material impact from Covid-19*".

While the Guidance has no legal effect, parties should also bear in mind that counterparties themselves may have very good reasons to require performance under a contract, and it should not be assumed that they will take a more generous approach to failings in the performance of contractual obligations in their interest.

Corporate Insolvency and Governance Bill

In a clearer step, legislation was introduced in Parliament on 20 May 2020, in an attempt to prevent struggling companies being forced to enter into an insolvency process because of problems caused by COVID-19. That legislation is currently in the form of the Corporate Insolvency and Governance Bill ("Bill") and was debated by MPs at the start of June.

The Bill is far reaching in scope. A 20-day moratorium (similar to that currently available to companies being placed in administration) is being made available to almost all companies that are insolvent or likely to become insolvent. Current wrongful trading provisions, which impose personal liability on directors, will also be suspended. Restrictions will also be placed on the use of winding up petitions and statutory demands.

Comment

Much of the world around us has changed in light of the Covid-19 pandemic: this includes how contracting parties adjust their behaviour.

The British Institute of International and Comparative Law (BIICL) has published a Concept Note calling for an urgent debate on the "*necessary contribution of the law to safeguard commercial activity… and ameliorate the adverse effects of a plethora of defaults*", noting that some jurisdictions have taken steps on a statutory footing to create 'breathing space' in commercial contract disputes. For instance, Singapore has enacted legislation providing companies with breathing space where they are unable to fulfil their contractual obligations owing to the pandemic. In their second Concept Note, the BIICL also urged commercial parties to consider further use of negotiated solutions and alternative dispute resolution (ADR) mechanisms, such as mediation.

It remains to be seen whether we will see a more concerted effort in Scotland to push parties towards mediation; while 2020 may always be remembered for the impact of Covid-19, it was intended to be Scotland's Year of Mediation.

What to think about before escalating your dispute

Whilst the Guidance is not binding, it does merit consideration. Regardless of the Guidance, prudent parties may wish to consider the following factors before embarking on litigation:

- Does the contract give you discretion in relation to one or more matters? If so, is there a risk that the exercise of discretion is arbitrary, capricious or irrational?
- Does your contract contain a requirement to act in good faith?
- Can alternative steps can be used in the first instance in order to de-escalate a potential contractual dispute: for example, have the parties considered ADR options rather than litigation?
- Does the short-term requirement outweigh the potential long-term effect of the litigation on the contractual relationship and the party's standing and reputation in its market sector(s)?
- Before taking any step, consider its potential reputational impact in light of the increased scrutiny being applied on the conduct of businesses at this time. The Guidance also emphasises this, requiring responsible and fair behaviour particularly in relation to contracts that are required to support the response to the pandemic.

Whilst we are a long way from understanding the full impact of the Covid-19 pandemic on disputes, the early signs are that there is already an increased appetite, or possibly need, for clients to escalate disputes. It will be interesting to see whether parties elect to play nicely and be kind or adopt a more traditional approach to disputes.

About our team

Colin Hutton has over 25 years' experience in dispute avoidance and resolution. He is dual qualified and advises on both English and Scots law matters, including litigations, arbitrations and mediations. Colin specialises in the project management of the dispute resolution process. He is a keen advocate of alternative dispute resolution and regularly uses mediation to effectively resolve disputes.

Emma Boffey specialises in commercial dispute resolution. She is a qualified solicitor in both Scotland and England & Wales. Emma is recognised as a 'Rising Star' by the Legal 500 2020 and is also ranked by Chambers & Partners. In 2019, Emma was named 'Junior Solicitor of the Year' at the Herald Law Awards.

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