

WELCOME TO THE JULY 2020 EDITION OF

Upload

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Welcome to the latest edition of Upload, bringing you the latest news and insights into the many developments taking hold in technology.



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In December I wrote that the pace of technological advancement remains blisteringly fast. The events of the last three months have guaranteed that all of us, in our personal and business lives, have adapted faster than ever. Our teams are seeing clients react to the challenges of the coronavirus through increased digitalisation of processes and work flows, moving products and services to on-line delivery models and developing new ways (and tools) to engage employees and stakeholders. There is little likelihood of going back to the methods of what feels like another age.

In this edition we welcome two new members of our team – Andrew Priest and Melanie Harvey. Both are senior lawyers, bring huge experience and skill to Birketts and will be key members developing our Technology practice even further. Georgina Perrott comments on the latest ICO best practice guidance for data protection-compliant AI and Andrew Priest shares thoughts on the key issues in negotiating the early stages of collaboration agreements. David Coupe and colleagues, based in our London office, remind us of the challenges meeting your contractual obligations in a COVID-19 world and Kitty Rosser interviews Pathfindr, an award winning Industrial IoT solutions provider.

I hope you find there is plenty here to keep your interest between your Zoom meetings! As always, please let us have any feedback and do contact any of our team with any specific issues you'd like to explore further.

FIND OUT ABOUT OUR AWARDS

Birketts was crowned “[Commercial Property Team of the Year](#)” and [rewarded for “Excellence in Client Service”](#) for the second year running at this year’s Cambridgeshire and District Law Society (CDLS) awards.

Birketts was shortlisted for the title of [Inspirational Business](#) at the East Anglian Air Ambulance Inspiration Awards 2020.

Birketts was shortlisted for ‘[Best Trainer – National/Large Regional Firm](#)’ at the 17th annual LawCareers. Net Training and Recruitment Awards.

Birketts’ Senior Conveyancing Executive Kelvin Cooper has been nominated as a finalist for the title of [Best Conveyancing Paralegal at the National Paralegal Awards](#) for the second year running.

Birketts has been named [Law Firm of the Year](#) at the Modern Law Awards 2020.

Birketts was shortlisted for [Best Community Programme](#) at the eighteenth annual Management Excellence Awards.





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Andrew has significant expertise ... in the ICT, cleantech and life sciences sectors, specialising in technology and business process outsourcing, technology transfer and licensing, and telecoms projects

Introducing... Andrew Priest and Melanie Harvey

Birketts was delighted to welcome two new arrivals to the Technology Team in June.

Andrew Priest - Partner

Andrew is a commercial lawyer with over thirty years' legal experience advising a range of private and public sector clients across commercial law firms in Cambridge, London, Edinburgh, Glasgow and Brussels. With an MBA from Manchester Business School, Andrew is well-placed to offer advice on commercial and technology related arrangements, projects and deals of all descriptions.

Andrew has significant expertise and experience in the ICT, cleantech and life sciences sectors, specialising in technology and business process outsourcing, technology transfer and licensing, and telecoms projects, both nationally and internationally. As an intellectual property specialist he drafts and negotiates agreements for the commercial exploitation of patents and trade marks, and also advises on a wide range of data protection issues, from GDPR compliance and policies to data security and international data transfers.

Adrian Seagers, Partner and Head of Corporate Services commented: *“As knowledge based industries continue to grow, a wide variety of legal issues concerning intellectual property, and technology development, protection and exploitation, become increasingly important. Birketts is excited to further expand our offering in this exciting area, and I have no doubt that Andrew's appointment will prove to be a significant step towards this goal.”*

Commenting on his appointment, Andrew said: *“I am delighted to be joining such a well-respected law firm with its focus set firmly on the future. I am particularly looking forward to fresh challenges within a dynamic and innovative commercial environment as well as supporting the growth of Birketts' technology sector offering.”*

Melanie Harvey - Legal Director

With over twenty years' experience as a chartered trade mark lawyer, Melanie specialises in trade mark and design protection and enforcement, as well as dispute resolution, brand registration, IP strategy and IP litigation.

Before joining Birketts, Melanie was a Copenacre indentured apprentice with the Ministry of Defence working on engineering projects with the armed forces and NATO. It was whilst working on collaborative engineering projects that Melanie became interested in the ownership of rights.

Over the course of her career, Melanie has provided clients with strategic advice on developing IP portfolios, as well as offering legal advice regarding IP-related contractual matters. She is skilled in the negotiation, drafting and review of contracts, including license, co-operation and co-existence agreements.

Melanie has a great deal of experience in both contentious and non-contentious matters and has advised a wide range of clients, both in the UK and internationally, including start-ups, small businesses and international corporations.

She is accredited to appear before the European Union Intellectual Property Office (EUIPO) in both trademark and design matters. She has audience rights before the UK's dedicated IP court and the Intellectual Property Enterprise Court (IPEC) and is a member of several key IP Professional bodies including CITMA, ECTA, INTA and AIPPI.

Having previously chaired the Europe and Central Asia subcommittee of the International Trademark Association's (INTA) Non-Traditional Marks Committee, Melanie remains active within INTA, working with their Trademark Office and Practices Committee to provide up-to-date practice knowledge.

James Austin, Partner, said of Melanie's appointment *"We are delighted to have a brand identity protection specialist like Melanie join the team. This vitally important aspect of commercial law is often overlooked yet it plays a key role in the success of any business and Melanie's broad experience in this area will be a huge asset to the team and to Birketts as a whole. I feel confident that Melanie's depth of knowledge, extensive skillset and expertise will see her fit very well in to the firm."*

Melanie said of her appointment *"I am very excited to join a firm like Birketts with an impressive reputation for high quality client service as well as a forward thinking outlook. I feel that my extensive experience across a range of practices, will strengthen the team's offering and I look forward to supporting new clients and facing fresh new challenges."*

Although she will be based at in the Norwich office Melanie will support colleagues across all offices: Cambridge, Chelmsford, Ipswich and London.

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Data protection guidance for AI systems

The Information Commissioner's Office (ICO) recently published its draft 'Guidance on the AI Auditing Framework.'

The term AI is used to refer to technologies that mimic human thought, both purely software-based systems like voice assistants, search engines and image analysis software and hardware devices such as autonomous cars and internet of things applications.

The ICO is concerned about the volume of personal data used by some AI systems and the ability of AI to intrude into private life and effect human behaviour. It has previously identified certain characteristics of AI which raise data protection concerns including the use of algorithms for undetermined purposes, the opacity of processing by AI and a tendency to collect all available data. Whilst it is not legally-binding, the draft guidance provides what the ICO considers best practice for data protection-compliant AI, with practical advice on how to identify risks posed by AI to individuals and how best to mitigate such risks. It is aimed at both organisations that build their own AI systems and those which use AI developed by third parties and focuses on the challenges posed by AI in the following four areas of data protection.

Accountability and governance

Under the accountability principle organisations are responsible for demonstrating compliance of any AI system with data protection. Interestingly, the ICO recognises that, depending on their design and deployment, AI systems are likely to require making 'trade-offs' between privacy and other competing rights and interests. For example, using additional personal data in a data set to improve the statistical accuracy of an AI system will enhance compliance with the fairness principle but it will also increase the privacy risk. The guidance recommends ways to assess trade-offs. Such assessments should be included in compliance documentation. It acknowledges that a 'zero tolerance' approach to risks to individuals' rights is unrealistic and that instead, organisations should ensure that such risks are identified and mitigated.

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Lawful and fair processing

The guidance highlights the importance of identifying an appropriate lawful basis for each processing operation. This can be challenging in an AI-context. It can be difficult, for example, to obtain valid consent for more complicated processing operations where the processing of data may evolve without human intervention. The guidance discusses when different conditions, including consent and legitimate interests, may be appropriate for AI systems.

For AI systems which infer data about individuals, statistical inaccuracy and bias are key risk areas in relation to the fairness principle. The guidance clarifies that a system doesn't need to be 100% accurate but the greater its accuracy the more likely it is to be compliant. The ICO stresses the importance of ensuring that data used to train and test AI systems is balanced and the guidance includes techniques to manage imbalanced or biased data. As AI systems sometimes become less accurate over time, the ICO recommends that an AI system's performance be monitored for any inaccuracy or discrimination. In addition, to ensure fairness, where an AI system is used to produce a statistically informed guess about an individual (for example that they are a parent) records must indicate that such data is a guess to avoid it being misinterpreted as factual.

Security and data minimisation

The complexity of AI systems, reliance on third party code and/or relationships with suppliers, the need to integrate different IP components and the use of large data sets can exacerbate security risks. This complexity can also make it harder to identify and manage such security risks. The guidance describes risks that apply particularly to AI, such as model inversion attacks, and security measures to consider implementing.

Under the data minimisation principle only the minimum amount of personal data to fulfil the purpose should be processed. This can appear difficult to comply with for AI systems requiring large amounts of data. The guidance explores different approaches to develop functional AI systems that only process the data required and stresses the need for the input of those responsible for risk management at the design and build stages of AI systems.

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Under the data minimisation principle only the minimum amount of personal data to fulfil the purpose should be processed.

Individuals' rights

Personal data is often managed in unusual ways in relation to the development and deployment of AI systems. This can make it more challenging to know when and how individual rights apply to such data. The ICO provides guidance on this and on the implementation of effective mechanisms to enable individuals to exercise their rights. The guidance also covers fully automated decision making and the safeguards that need to be in place.

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The guidance is still in draft form but it provides a useful indication of the ICO's current approach to AI systems ...



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The guidance is still in draft form but it provides a useful indication of the ICO's current approach to AI systems and what it expects of organisations which are developing and/or using AI systems in order to comply with data protection legislation. Ahead of the publication of the final guidance, organisations using AI may wish to use this draft version to review existing practices to check they align with the ICO's current thinking. The guidance recommends that both technology specialists developing AI systems and those with a compliance focus be involved in achieving data protection compliance so when conducting any review, an organisation should seek input from both of these parties.

Collaboration and product development – a match made in heaven?

There comes a time in life when, for most of us, our thoughts turn to looking for a partner. Someone with whom we can share our life, laugh and cry, discuss our innermost thoughts and plan for the future. Many technology companies will at some stage have similar thoughts.

Maybe not a partner for life, but a partner who will help to take them to the next level, who will bring additional expertise (and often money!) to the table. But whether it is life or business, you want to ensure that it is a match made in heaven. If it isn't, you may have to deal with the consequences!

As a technology company you may be approached by a potential partner or you may make the initial move. However the introduction comes about, it is often a good idea to conclude a 'heads of terms' and a non-disclosure agreement. The NDA will allow you to discuss ideas, plans and trade secrets whilst deciding whether and how to proceed with the relationship. The heads of terms will set out the main commitments that each of the parties will be making and how they envisage the relationship developing. These commitments (apart from confidentiality) should not be legally binding so that both parties can go their separate ways if need be and with minimal disruption.

But don't get too tied down on the details in the heads of terms. Those details will come in the more complex and legally binding collaboration agreement (or whatever name the parties choose to give it). Don't be tempted to rush into the relationship until this agreement has been concluded or to proceed solely on the basis of the heads of terms. A good deal of management time will be needed to negotiate and conclude the details in the collaboration agreement.

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The NDA will allow you to discuss ideas, plans and trade secrets whilst deciding whether and how to proceed with the relationship.



More often than not the plan will form an integral part of the main agreement, so make sure that not only is it detailed but it also contains contingencies and dependencies.

In any collaboration it is important to work out what each of the parties will be bringing into the relationship, whether that is initially or at some point in the future. It could be people and expertise, know-how and intellectual property, equipment and materials, or financial capital. Ideally there should be a balance between what is being contributed, and the risks and rewards associated with the agreement should reflect the respective contributions.

Fail to plan, plan to fail. It may sound obvious but it pays dividends to spend the time developing a robust plan for what the collaboration is intending to achieve. This is particularly important where product development is concerned. More often than not the plan will form an integral part of the main agreement, so make sure that not only is it detailed but it also contains contingencies and dependencies. No one knows at the outset just how things will turn out, but a decent plan should ensure that both parties are 'singing from the same hymn sheet'. Quite often milestones in the plan are linked to additional financial contributions and other contractual obligations.

A product development arrangement will almost certainly involve the creation of intellectual property rights, often referred to as foreground IP. If both parties are likely to create foreground IP then it is important to define these rights and who will own them. Cross-licensing of the IP rights may also be necessary. Sometimes there are joint IP rights where some IP is created jointly by both parties. The agreement needs to spell out how any joint IP rights may be used and exploited, and the extent to which consent is required from the other party. IP rights can be quite complex but it pays to deal with the issues at the outset rather than have to argue over IP rights in the future.



Consideration also needs to be given to when the relationship might end, in what circumstances and what the consequences should be.

At the start of any relationship no one really wants to focus too much on what might go wrong. As lawyers though that is one of our roles, to ask the tricky 'what if' questions and to ensure that the provisions in the agreement reflect the risks involved. Issues around risk and liability require a good understanding of the relevant technology or products that are being developed, and as technology lawyers we are better placed to advise on these issues and offer pragmatic solutions if we are first involved in the deal in its early rather than later stages.

Consideration also needs to be given to when the relationship might end, in what circumstances and what the consequences should be. Of course it is hoped at the outset that the relationship will be a successful one (and in the context of a commercial agreement that can be measured against agreed criteria) but no one has a crystal ball and can predict what might happen, despite the best intentions of both parties. Again, it is worth spending the time to think about this before the agreement is signed or risk leaving 'open' issues to be argued over in the months or years to come.

So if you are a technology company looking for a collaboration partner or thinking about whether a potential partner would be a suitable match, if it can't be a match made in heaven it could be a successful arrangement of convenience. That's ok, isn't it?



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In the spotlight – an interview with Pathfinder

Pathfindr provides award-winning Industrial IoT solutions for indoor and outdoor asset tracking and monitoring. Since the country went into lockdown, the company has rapidly developed and launched a new product to help people maintain safe personal distancing.

Founder and CTO, Ben Sturgess, and Managing Director, Matt Isherwood, discuss their products, dealing with the media and managing a new product launch during a pandemic.

Matt, can you tell us about your Safe Distancing Assistant and how it might help a business to operate during the pandemic?

Matt: Each SDA continuously scans for other units in the area and measures the distance between them every half a second. When any of the devices come within two metres, an audible or vibrating alert goes off and will continue until the users increase the distance between them to above two metres.

We all have personal experience of knowing how difficult it is to remain aware of the distance around us at all times; it's tricky in places such as a supermarket. When people are concentrating in the workplace, they need all the help they can get to maintain a safe distance, so our device is designed to do just that. If we can help businesses to demonstrate they are doing everything they can to create safe and healthy working environments, then they can remain operational and, importantly, minimise the risk of virus transmission.

Ben, does the new product use your existing technology or did it require a lot of new development? How were you able to launch it so quickly?

Ben: The SDA uses our existing accurate Ultra Wide Band distancing solution that we use in our indoor and outdoor asset tracking product, but it's a new hardware and software design optimised for this use case. This new product had to be designed, prototyped, tested and prepared for large scale production, all in a few weeks. How did we do it so quickly? An amazingly talented and dedicated team, combined with gallons of coffee and very little sleep!

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If we can help businesses to demonstrate they are doing everything they can to create safe and healthy working environments, then they can remain operational and, importantly, minimise the risk of virus transmission.

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... we pride ourselves not only on our core asset tracking product but also our ability to adapt and tailor custom IoT solutions for our client's individual business challenges.

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From a business perspective, the pandemic means it's almost impossible to confidently create a sales forecast for the remainder of the year.

Matt, we first heard about the Safe Distancing Assistant on Sky News – how did that come about and what has the impact of the media coverage been for you?

Matt: We're fortunate to be part of a larger group of companies, and one of them is a B2B PR specialist called Speed Communications. Speed help us with media contacts and they arranged for Sky News to visit our Norwich office to see how we developed the SDA. That evening they wrote a short piece for the Sky News website and overnight we had a huge spike in enquiries and orders! The SDA was subsequently picked up by other media across Europe and USA. I was even interviewed for the breakfast show on Fox TV Orlando. A very surreal but enjoyable experience!

Ben, we understand that this isn't your first experience of dealing with the media – is it true that the business started when you worked on the BBC's Secret Life of Cats program? How have you managed to adapt your technology to take you from tracking cats, to aerospace applications and now to social distancing?

Ben: We actually started in retail indoor navigation for supermarkets, then *Cats*, then jet engines! So yes it certainly has been a very interesting journey, with a huge amount of product evolution over the last three years. At each turn we have been passionate about providing innovative and best in class technology solutions, we pride ourselves not only on our core asset tracking product but also our ability to adapt and tailor custom IoT solutions for our client's individual business challenges.

Matt, you have managed to not only keep the business going lockdown but to develop and launch a new product. What are the biggest challenges the pandemic has thrown at you and how have you managed them?

Matt: Thankfully, we didn't experience too many headaches setting up remote working and operations for the team. Developing a new product at such speed will always be challenging, but doing so during lockdown made the supply chain of components incredibly difficult to manage. From a business perspective, the pandemic means it's almost impossible to confidently create a sales forecast for the remainder of the year. We just can't predict the full impact of COVID-19 on the market. Our products help businesses to be more efficient and save money – which will be important to many – but will they have the budget to invest in new technology?

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The issue with bluetooth based distancing is that it's based on the signal strength to determine distance.

Final question. Ben, have you been following the development of the Test and Trace app? What are your thoughts?

Ben: When we first started the project we looked at bluetooth based social distancing, but after extensive testing in the first week we quickly discounted it. The issue with bluetooth based distancing is that it's based on the signal strength to determine distance. This makes it very unreliable for short range accurate distancing as there are so many variables in play including the environment, where you carry your phone, and hundreds of different phone antenna designs. The fact that the best engineers in the world at Apple and Google can't find a reliable solution says a lot. I wish Mr Hancock would had messaged me in March, I could have saved him £12m!

Thanks go to Ben and Matt for taking the time out of their hectic schedule to share their thoughts and experience with us. More information about the Safe Distancing Assistant can be found on Pathfinder's [website](#).

Birketts launches online training solution

Developed with the assistance of Learning and Development professionals who routinely purchase online training modules, Birketts' expert Employment Team has created an up to date, legally robust and easy to access equality, diversity and inclusion e-learning course, perfect for promoting inclusivity and encouraging teamwork in the workplace.

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Birketts' state of the art e-learning training package has been designed to provide practical guidance, with material presented in a range of different ways, suitable for all learning styles.

Birketts' Equality, Diversity and Inclusion e-learning course offers a comprehensive overview of the key topics delegates need to understand in order to promote a positive workplace culture. Our modular-based approach covers all the topics that you would expect to hear about in a face-to-face training session, including the Equality Act 2010, protected characteristics and unconscious bias. Birketts' state of the art e-learning training package has been designed to provide practical guidance, with material presented in a range of different ways, suitable for all learning styles.



Delegates' knowledge is regularly tested through the use of interactive quizzes, enabling the outcome of the learning to be easily measured and quantified.

Training can be provided in a number of ways – either as a Birketts' hosted platform which delegates can reach via a secure log-in page, or as a SCORM file that can be provided for an organisation's existing learning management system. Offering a mix of presentations, slides, videos, animations, discussion groups, quizzes and case studies, Birketts' Equality, Diversity and Inclusion course enables delegates to access all the learning material in one go, or to complete the session at their own pace.

Birketts' secure and sophisticated e-learning package is xAPI compatible, allowing users to benefit from advanced reporting capabilities that will track a delegate's activity and identify any further learning needs as necessary.

Delegates' knowledge is regularly tested through the use of interactive quizzes, enabling the outcome of the learning to be easily measured and quantified.

Louise Lillingstone, Senior HR Business Partner - Talent from BUUK Infrastructure commented: *"Packed with enjoyable and interactive break-out tasks, Birketts' sophisticated equality, diversity and inclusion e-learning package supplied our delegates with contemporary, legally rigorous guidance which we could feel confident. With comprehensive coverage of a wide range of topics including protected characteristics, the different types of discrimination and how they can arise in the workplace as well as a look at unconscious bias, this course delivered everything and more we would expect from an online training solution. Featuring a mix of learning styles such as slides, videos, discussion points, quizzes and case studies, we felt this course was suitable for all abilities. The quiz at the end enabled us to gauge whether the knowledge was embedded and provided a mixture of binary questions and case studies so the delegates could exercise their judgment over a range of realistic scenarios that could crop up in the workplace."*

To find out more details about the course, please contact [Sam Greenhalgh](#), [Abigail Powell](#), [Sonya O'Reilly](#) or [Katie Harris-Wright](#).

DEAL FOCUS

Birketts advised [The Milbank Group on the acquisition of pioneering plant bio stimulant business](#) Orion Future Technology Ltd.

Birketts advised the director of leading agricultural research and training company [Crop Management Information Ltd on its transfer of undertakings](#) to cutting edge farming company Beeswax Dyson Farming Limited.

Birketts advised the owners of leading order and warehouse management solutions business, [Mintsoft Limited, on its sale to prominent software provider](#), The Access Group.

Birketts has assisted Mike Montgomery, the founder of renowned British games developer, [The Bitmap Brothers, in the sale of its entire portfolio](#) to independent game studio, Rebellion Developments.

Want to be the first to know about our deals? Follow us on Twitter [@Birkettsllp](#).



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Fulfilling contractual obligations during a global pandemic

The coronavirus (COVID-19) has undoubtedly shaken the business world. Whilst some companies may be thriving right now, many are struggling to navigate their way through this crisis and the virus is having an impact on all types of businesses and affecting them from every angle.

A particular area of concern for companies is contract fulfilment. Unfortunately, the impact of COVID-19 for many companies will mean that they are simply unable to meet some of their contractual obligations.

Before doing anything else, companies should consider getting in touch with their counterparties to discuss any contractual obligations that are going to be difficult to fulfil during this time. It may be able to come to a mutual agreement on varying the contract where necessary.

If it is not possible to come to an agreement, the next step will be to look at the relevant contractual terms to determine whether there are any options for cancelling the contract. If your contract includes a 'force majeure' clause, this may be an option since these clauses typically relieve the party seeking to rely on them from what would otherwise amount to a breach of contract.

What is Force Majeure?

Force majeure is a common clause inserted into commercial contracts allowing for the party claiming relief to be free of their contractual obligations without damages arising in circumstances where an extraordinary situation has arisen outside of the parties' reasonable control. The extraordinary event must either prevent, hinder or delay the company from performing their obligations under a contract. Such events would typically include Acts of God (i.e. hurricane, earthquake etc), war, crime or plagues etc.

The burden of proof will fall on the party seeking to rely on the clause to show that the force majeure event is the cause of it being unable to fulfil its contractual obligation and not something else.

Is COVID-19 covered by your force majeure clause?

The wording of the clause may explicitly include a "pandemic" or "epidemic" as one of the extraordinary events or it may include various other extraordinary events that are not connected to COVID-19. If the contract does not explicitly mention COVID-19/coronavirus or a global pandemic, it will simply be a matter of interpretation for the business seeking to claim force majeure relief as to whether the clause provides relief in the current circumstances.

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If the contract does not explicitly mention COVID-19/coronavirus or a global pandemic, it will simply be a matter of interpretation for the business seeking to claim force majeure relief.

Government actions during this pandemic, albeit a result of COVID-19, are considered independently of the virus and are therefore a different event for the purposes of force majeure. The government measures that are now in place have majorly disrupted the way businesses operate (working from home, closing businesses not considered "essential" and travel restrictions) so contracts should also be reviewed to see whether government actions or requirements are listed as a force majeure event if viruses/pandemics are not.

Before terminating a contract in reliance on a force majeure clause, the claiming party must satisfy itself that the event falls within its scope. Should a contract be terminated, only for the courts to reject the claim further down the line and conclude that they do not interpret the clause to include COVID-19, the contracting party may be found to be in repudiatory breach of the contract.

It is perfectly possible that there will be another pandemic in the future. Going forward, those drafting legal documents will need to pay very close attention to the precise wording of force majeure clauses. In order to avoid the inevitable disputes that our legal system will soon be faced with, articulation is even more critical and stipulating determinative bodies (World Health Organisation, UK Government etc), specific events and timescales will assist with clarification in interpreting these clauses in the future.

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Where a contract is frustrated, the contract will be terminated instantly discharging the parties from all obligations.

If force majeure is not available, are there any other options?

If there is no force majeure clause in your contract, it may be possible to rely upon the common law doctrine of frustration instead. The doctrine of frustration will be implied into the contract (unlike force majeure). Frustration arises if an unforeseen event takes place after the contract has been entered into rendering the contractual obligations impossible to perform or radically different so as to remove the contract of its commercial purpose. Where a contract is frustrated, the contract will be terminated instantly discharging the parties from all obligations.

The essential element of frustration makes it incredibly difficult to claim successfully since the claiming party will need to demonstrate that the unforeseen event renders performing the contractual obligations "radically different" from what was originally contemplated.

Duty to mitigate

The cancellation of commercial contracts will have a knock-on effect through many contractual and supply chains. Whether you are seeking to cancel a contract, or you are the counterparty to a contract which has been breached or legitimately cancelled in reliance on force majeure or otherwise, it is quite possible that a degree of loss will be suffered.

If you believe that your contractual counterparty has acted in breach of its obligations, then it will be necessary to review the terms of your contract to determine whether you might have a claim for damages.

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In all circumstances, you will be required to ensure that you have mitigated your loss of the effects of the force majeure event or the breach.

In all circumstances, you will be required to ensure that you have mitigated your loss of the effects of the force majeure event or the breach. It will be important to be able to demonstrate that this has been done and so clear and succinct written records of decisions taken and correspondence regarding the impact of events that take place should be maintained.

This will also be important from an insurance perspective as the extent to which a party has sought to mitigate its loss will have an impact on the ability and extent to which it is able to make a recovery under any applicable insurance policy.

What other protection do you have?

Some organisations will have insurance protection in place which covers loss suffered as a result of COVID-19. For example, we have recently seen many events cancelled as a result of the pandemic, and cover for loss arising out of such cancellations may be available. Likewise, some policies may be wide enough to provide cover for business interruption in these circumstances. This will of course depend on the scope of cover and the precise wording of the applicable policy since the language of such policies will vary and whether or not a policy will respond will depend very much on the application of that language to the specific facts.

If you think you might have a valid insurance claim, you should speak to your broker to ensure that the claim is notified in accordance with the policy requirements.

Summary

1. Parties to a contract should discuss their contractual obligations and whether they would be willing to vary the contract in light of COVID-19;
2. Contracts should be checked for a force majeure clause and more specifically, one that covers “pandemics”, “epidemics” or other event which is relevant in the circumstances;



Contracts should not be terminated until it is known that the force majeure clause covers COVID-19...

3. If not, government actions might be included in the force majeure clause which may provide an alternative route means to terminate a contract;
4. Contracts should not be terminated until it is known that the force majeure clause covers COVID-19;
5. If force majeure is not possible, the doctrine of frustration could be explored instead;
6. Mitigating any loss is essential and companies should keep a record of steps taken in support of any claim or insurance claim if available; and
7. Companies will need to review other protections available and ensure that they are familiar with the terms of any relevant insurance policy. If you are unsure, you should speak to your broker.